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UNIDIR

**Negotiation of a Nuclear Weapons
Prohibition Treaty:
Nuts and Bolts of the Ban**

The New Treaty: Taking Stock

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Related UNIDIR publications

J. Borrie, T. Caughley, T. Graff Hugo, M. Løvold, G. Nystuen, and C. Waszink, *A Prohibition on Nuclear Weapons: A Guide to the Issues* (with the International Law and Policy Institute), February 2016.

P. Meyer and N. Ritchie, *The NPT and the Prohibition Negotiation: Scope for Bridge-building*, May 2017.

T. Caughley and G. Mukhatzhanova, *Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban*, June 2017.

Introduction

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is a landmark achievement in multilateral disarmament efforts. Its central tenet is that nuclear weapons are unacceptable in any hands. The Treaty's supporters among States, the Red Cross and Red Crescent Movement, and civil society believe that establishing a clear nuclear weapons prohibition regime will contribute to renewed progress on nuclear arms reductions towards eventual elimination. For their part, the nine nuclear-armed States and most of their allies boycotted the negotiations. Thus there are significant challenges to consider as efforts commence to bring the fledgling regime into force internationally, and for its eventual implementation.

Context

In December 2016, the United Nations General Assembly adopted a resolution on “taking forward multilateral nuclear disarmament negotiations”.¹ The resolution mandated the convening of a United Nations Conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. The Conference met at United Nations headquarters in New York for two 2017 negotiating sessions, from 27 to 31 March, and from 15 June to 7 July. Ambassador Elayne Whyte Gómez of Costa Rica was elected as President for both negotiating sessions.

The Conference was to “make its best endeavours to ensure that the work of the Conference is accomplished by consensus”, according to its provisional rules of procedure.² On the final day however, one delegation (the Netherlands) called for a vote on the treaty text.³ The vote was passed by 122 to 1 against (the Netherlands), with one abstention (Singapore). Thus the Treaty on the Prohibition of Nuclear Weapons⁴ was adopted. The TPNW will be open for signature on 20 September 2017 during the seventy-second session of the General Assembly.

The origins of the TPNW lie in the Final Document of the 2010 Non-Proliferation Treaty (NPT) Review Conference, which noted the deep concern of all States Parties with “the catastrophic humanitarian consequences of any use of nuclear weapons”.⁵ Prompted by this, Norway hosted an international conference in its capital, Oslo, in March 2013 to explore these humanitarian consequences. Further international conferences followed in Nayarit, Mexico (February 2014), and Vienna, Austria (December 2014), which drew further attention to the subject. Widely attended by non-nuclear weapon States, civil society, and

¹ General Assembly, Taking Forward Multilateral Nuclear Disarmament Negotiations, A/RES/71/258, 23 December 2016.

² General Assembly, Provisional Rules of Procedure of the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination, A/CONF.229/2017/L.1, 7 March 2017.

³ General Assembly, Draft Treaty on the Prohibition of Nuclear Weapons, A/CONF.229/2017/L.3/Rev.1, 6 July 2017.

⁴ General Assembly, Treaty on the Prohibition of Nuclear Weapons, A/CONF.229/2017/8, 7 July 2017.

⁵ Final Document Volume I, NPT/CONF.2010/50 (Vol. I), p. 12.

inter-governmental organizations, this sequence of two-day humanitarian conferences was sparsely attended by the nuclear weapon-possessors.⁶

Complementing the three conferences, between 2011 and 2014 a succession of joint statements underlined concern about the risk of serious humanitarian consequences from nuclear weapon use. They also highlighted challenges those weapons pose under international humanitarian law. Notably, a humanitarian joint statement initiative with 34 State signatories in the October 2012 General Assembly First Committee ballooned to 80 at the April–May 2013 NPT preparatory meeting, 125 at the 2013 First Committee six months later, and 155 in October 2014.⁷ Collectively, statements such as these—along with the humanitarian conferences—became generally described as the “humanitarian initiative”.

Descriptions and evidence of the humanitarian hazards posed by the use of nuclear weapons served to sharpen the question of how best to make progress towards nuclear disarmament. The emergence after the Vienna conference of a widely subscribed pledge “to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons and ... to cooperate with all stakeholders to achieve this goal”⁸ was a thinly veiled call for a process towards a legally binding international nuclear weapons prohibition treaty—the clear ambition of a number of civil society groups, notably the International Campaign to Abolish Nuclear Weapons (ICAN). The five NPT nuclear-weapon States and many of their allies opposed the call for negotiations, however, on the basis that in their view it was premature and inappropriate in a global security environment that warrants a more gradual “step-by-step” approach. This would entail, as initial steps, bringing the Comprehensive Nuclear-Test-Ban Treaty (CTBT) into force and negotiating a ban on fissile material production—efforts, that have, however, languished since the 1990s.

This divergence of approach pervaded the failed 2015 NPT Review Conference and the debate in the First Committee in October that year, especially on a resolution to establish an Open-ended Working Group (OEWG) for the purpose of taking nuclear disarmament forward. The OEWG meeting duly took place in 2016 without the participation of the nuclear weapon-possessors. After a vote⁹ it adopted a report recommending that the General Assembly convene “a conference in 2017, open to all States, with the participation and contribution of international organizations and civil society, to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination”.¹⁰ This set the scene for the General Assembly’s decision (noted earlier) to initiate the prohibition

⁶ There are nine possessors: China, France, the Democratic People’s Republic of Korea, India, Israel, Pakistan, the Russian Federation, the United Kingdom, and the United States. India and Pakistan attended all three meetings while the United Kingdom and the United States participated in the Vienna conference.

⁷ See Box 2 in N. Ritchie, “The Humanitarian Initiative in 2015 (ILPI–UNIDIR NPT Review Conference Series no. 1)”, 2015, p. 3, <http://www.unidir.org/files/publications/pdfs/the-humanitarian-initiative-in-2015-en-626.pdf>.

⁸ Note Verbale Dated 25 August 2015 from the Permanent Mission of Austria Addressed to the Secretary-General of the Conference on Disarmament Transmitting Text of the Humanitarian Pledge Supported by 114 Members of the United Nations, CD/2039, 28 August 2015.

⁹ 68 in favour, 22 against, and 19 abstentions. See General Assembly, Taking Forward Multilateral Nuclear Disarmament Negotiations, A/71/371, 1 September 2016, para. 71.

¹⁰ Ibid, para. 67.

negotiations. In March 2017, these commenced with a one-week session that offered an initial airing of views and identification of the potential components of a first treaty draft.

The June–July session

On the strength of views expressed by delegations at the March session and subsequent consultations, in May the President circulated an initial draft treaty text as the basis for the resumption of negotiations on 15 June.¹¹ At the outset of the June–July session she presented each article, provided explanatory remarks, and solicited comments from delegations. While States at times offered proposals and suggested language, the President retained control of the text, citing her preference for an interactive exchange of views rather than a drafting exercise.

The reading of the draft treaty was structured into several clusters, with the most challenging being initially:

- 1) the preamble (stating the object and purpose of the treaty);
- 2) general prohibitions in article 1, particularly issues of threat of use, testing, and transit;
- 3) accession and dismantlement processes outlined in articles 2–5 for nuclear weapon-possessors; and
- 4) victim assistance, environmental rehabilitation, and the question of user responsibility.

On the basis of the ensuing debate and informal consultations, the President circulated a revised preamble on 20 June, then a second draft of the full treaty on 27 June. Noting technical questions on articles 2–5 arising in the course of her consultations, the President indicated that the revised language was left intentionally simple, and would require further work. Article 4 contained the most significant changes, allowing for early joining of the treaty by nuclear weapon-possessors, but under specific conditions.

Overall responses to the President’s 27 June text from delegations were positive, although some concerns on prohibitions and articles 2–5 remained. Negotiations then intensified by means of informal consultations on article 1 (facilitated by the President), articles 2–5 (facilitated by Ireland), articles 6–8 on victim assistance, environmental remediation, and international cooperation (facilitated by Chile), and articles 9–21 on the treaty’s organizational aspects (facilitated by Thailand). On 29 June, the President noted in a negotiation plenary meeting that “extremely significant progress” had been achieved in all working groups. Smaller delegations, however, expressed concerns about ensuring that their views were being represented because the informal consultations were occurring in parallel.

Each of the facilitators then submitted revised texts from their informal consultations. Along with suggestions gathered from her other contacts, the President incorporated these proposals into a third draft she circulated late in the afternoon on 3 July. This was done cognizant of the negotiation’s tight schedule. Time was needed for translation, and for

¹¹ General Assembly, Draft Convention on the Prohibition of Nuclear Weapons, A/CONF.229/2017/CRP.1, 22 May 2017.

delegations to receive feedback and instructions from their capitals. Nevertheless, the desire to conclude and adopt a treaty by the scheduled end of the negotiating round on 7 July was widely expressed. Plenaries in the last days of the Conference allowed States to place their positions on the final text on record. A persistent point of contention was the right of withdrawal from the treaty (at 12-months' notice in the text, revised from three months; others wanted the right removed).

Ultimately, the final text was passed to the translators with only slight grammatical adjustments (a revised third draft). On 7 July 2017, after the adoption of the TPNW, a number of delegations intervened—some States to offer explanations of vote; most to hail the achievement of the treaty.¹²

Next steps after the ban

The negotiation of the TPNW is a significant achievement. It sets forth a broad suite of norms that build upon the NPT, nuclear-weapon-free zones, and “humanitarian disarmament” instruments. These norms have now been codified in a legal instrument under the auspices and authority of the United Nations. Moving forward, the treaty’s supporters face a number of challenges in translating these norms into political effects that are consistent with the treaty.

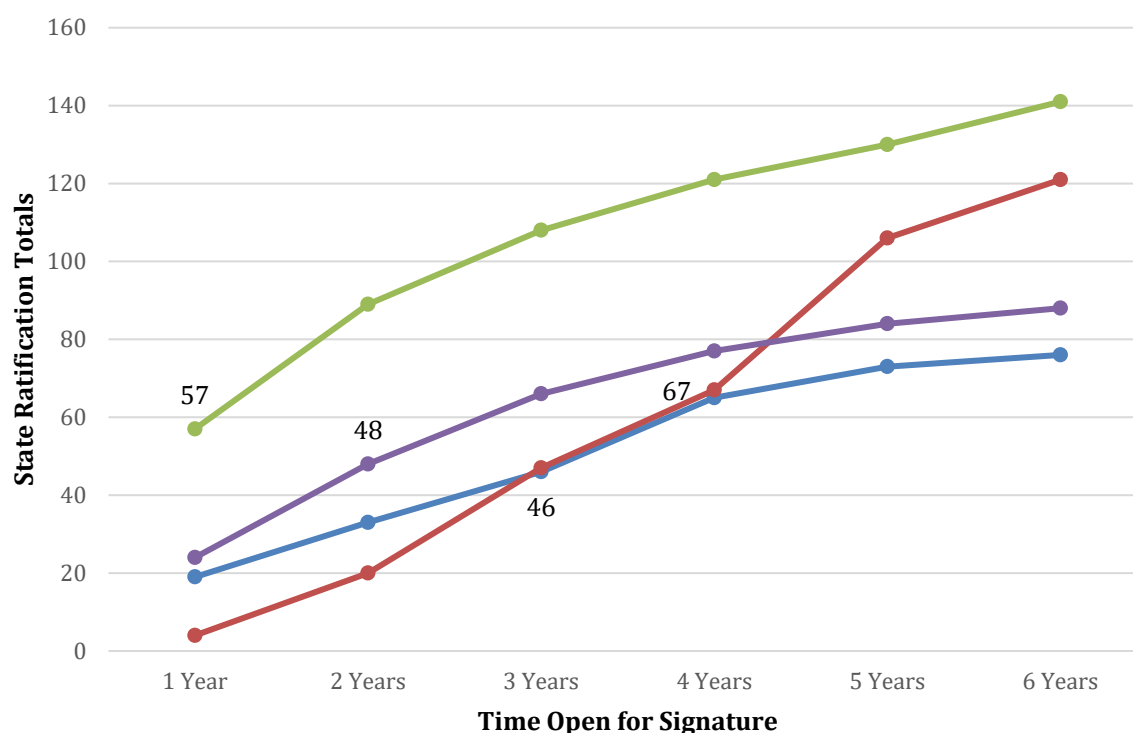
1. Entry into force and the authority of the treaty

As with any legally binding agreement, the normative effect of the TPNW will depend in part on the number of its States Parties. Universalization efforts are thus an important priority. Figure 1 provides comparative information on the rate of entry into force of other disarmament conventions, and on their progress towards the universal adherence of all States in the aftermath of their entry into force.

The legitimacy of the TPNW’s norms and the value of the treaty as an effective measure for nuclear disarmament will need cementing through the translation of the 122 “yes” votes in favour of the treaty into signatories and ratifications up to—and far beyond—the 50 States required for entry into force. Only then will the TPNW begin to take on wider “authority” in global nuclear politics. This will require sustained and mindful attention from the TPNW’s supporters. At the same time, the entry into force processes of other humanitarian-inspired disarmament treaties have indicated that having such specific targets and milestones is helpful to focusing such efforts. Civil society organizations, regional inter-governmental organizations, and sources of established moral authority, such as the United Nations, Red Cross and Red Crescent Movement, and religious institutions, have important roles to play in this process.

¹² See <https://www.un.org/disarmament/ptnw/index.html>.

Figure 1. Towards Entry into Force and Universalization



- Biological Weapons Convention (1972)—22 States for entry into force, including US, UK, and then-USSR
- Chemical Weapons Convention (1993)—65 States for entry into force
- Anti-Personnel Landmines Convention (1997)—40 States for entry into force
- Convention on Cluster Munitions (2008)—30 States for entry into force

Numbers indicate threshold reached for entry into force. The current tallies of States Parties are as follows: Biological Weapons Convention—178, Chemical Weapons Convention—192, Anti-Personnel Landmines Convention—162, Convention on Cluster Munitions—102.

2. Engagement with nuclear-armed and nuclear weapon-dependent States

The TPNW’s normative authority will not automatically affect the behaviour of the “hold-outs” (primarily the nuclear-armed and nuclear weapon-dependent States). Instead, the TPNW’s supporters will need to engage with:

- 1) members of the North Atlantic Treaty Organization (NATO) and other nuclear weapon-dependent States to work through the implications and practicalities of joining the TPNW, in order to encourage and facilitate their accession; and
- 2) nuclear-armed States on interim measures that reduce the risk of use of nuclear weapons and facilitate the re-engagement of these States with nuclear disarmament processes, for example in encouraging them to remove their weapons from alert status, embark on further nuclear arms reductions, and develop disarmament verification practices.

Many of the hold-out States reject the TPNW and the legitimacy of the process by which it was negotiated, evidenced by stringent rebuttal of the treaty by the United States, United

Kingdom, and France.¹³ Yet, it is essential in this process that nuclear-armed States are engaged on an equal basis. Equality is a foundational part of the prohibition treaty's claim to legitimacy and what differentiates it from the NPT. To date, the United States, United Kingdom, France, and NATO have been the targets of most efforts at engagement (and criticism) by supporters of a nuclear ban treaty. However, non-NATO nuclear-armed States also sustain practices of nuclear deterrence and nuclear weapons complexes. These and other ways that States "normalize" nuclear weapons—including through rhetoric—will warrant re-evaluation.

3. Configuring the relationship between the NPT and TPNW

Critics of the TPNW have argued that it undermines the NPT, which sits at the heart of the nuclear non-proliferation and disarmament regime.¹⁴ The NPT's 2015 Review Conference ended without a consensus final document (ostensibly over Middle East-related issues). Failure to agree on a final document in 2020 will likely be seen widely as a serious breakdown of the NPT regime.

What matters next is how both the TPNW's supporters and detractors engage with the current NPT review cycle and the next NPT Review Conference in 2020. States that support and join the TPNW will have choices to make in how they interpret the relationship between the TPNW and the NPT. Those understandings will affect their statements, actions, and negotiating strategies in 2020. This is important, as a key claim that some States supportive of a nuclear ban treaty have made is that it will strengthen the NPT.

Of course, many of the non-nuclear armed States have expressed deep frustration at what they see as nuclear weapon States' failure to move to implement their NPT article VI obligations. Some TPNW supporters might see the new treaty as an authoritative manifestation of disillusionment with the NPT and as a potential alternative to it. They might interpret the achievement of the TPNW as legitimizing the politics of division within the NPT and disengagement from its processes, though not necessarily to the point of formal withdrawal. Nuclear-armed and nuclear weapon-dependent States, however, will likely frame the TPNW as a cause of division in the NPT rather than a symptom of long-standing frustrations with it.¹⁵

¹³ United States Mission to the United Nations, "Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom and France Following the Adoption of a Treaty Banning Nuclear Weapons", New York, 7 July 2017.

¹⁴ See G. Perkovich, "The Nuclear Ban Treaty: What Would Follow?", Carnegie Endowment for International Peace, 31 May 2017, <http://carnegieendowment.org/2017/05/31/nuclear-ban-treaty-what-would-follow-pub-70136>; A. Mount and R. Nephew, "A Nuclear Weapons Ban Should First Do No Harm to the NPT", Bulletin of the Atomic Scientists, 7 March 2017, <http://thebulletin.org/nuclear-weapons-ban-should-first-do-no-harm-npt10599>; and P. Izewicz, "The Nuclear Ban Treaty and its Possible Ramifications", IISS Voices, 1 November 2016, <http://www.iiss.org/en/iiss-voices/blogsections/iiss-voices-2016-9143/november-27c6/the-nuclear-ban-treaty-and-its-possible-ramifications-36fc>. For a comprehensive response, see K. Egeland, T. Graff Hugo, M. Løvold, and G. Nystuen, "A Ban on Nuclear Weapons and the NPT: Ambiguity, Polarization and the Fear of Mass Withdrawal", International Law and Policy Institute, March 2017.

¹⁵ See P. Meyer and N. Ritchie, "The NPT and the Prohibition Negotiation: Scope for Bridge-building", UNIDIR, 2017, <http://unidir.org/files/publications/pdfs/the-npt-and-the-prohibition-negotiation-en-682.pdf>.

Alternatively, TPNW supporter States might engage fully with the NPT and nuclear-armed and nuclear weapon-dependent States to further develop implementation of its provisions on peaceful uses of nuclear energy, non-proliferation, and nuclear disarmament including, but not limited to, accession to the TPNW. How the TPNW's supporters choose to engage with the NPT over the current review cycle will set the long-term framing of the relationship between the TPNW and the NPT. A very strong case can be made that TPNW supporters should remain fully engaged with the NPT, not least to strengthen and implement its provisions in articles I–VI.

4. The TPNW and IAEA safeguards

TPNW supporters should consider the relationship between the TPNW's safeguards requirements and state-of-the-art safeguards practices and legal instruments.¹⁶ The TPNW requires States that have yet to negotiate a comprehensive safeguards agreement (CSA)¹⁷ with the International Atomic Energy Agency (IAEA) to do so, and for all other States to maintain at a minimum their IAEA safeguards obligations in force at the time of the TPNW's entry into force without prejudice to any future additional safeguards instruments they might adopt. For some States this will mean a CSA and IAEA Additional Protocol (AP) agreement; for others just a CSA.

A number of States and many experts wanted the AP to be a specific requirement for States Parties to the prohibition treaty.¹⁸ The consensus in the 2010 NPT Review Conference final document was that the combination of a CSA and AP was “the enhanced verification standard” and that all States that have not yet done so should be encouraged to negotiate an AP with the IAEA.¹⁹ The TPNW has been criticized for allegedly undermining progress on safeguards by limiting the basic requirement to the 1972 CSA standard. Irrespective of the validity of such criticism, a strong case can be made that States Parties to the TPNW should reiterate the NPT position agreed in 2010 and encourage those without an AP to bring one into force as soon as possible.

5. The scope of victim assistance, environmental remediation, and international cooperation and assistance

Articles 6(1) and 6(2) of the TPNW place the primary responsibility for victim assistance and environmental remediation on affected States, though States Parties will need to elaborate the form of support to their own populations and territory. Concern had been raised during the TPNW negotiations that these provisions needed to reflect norms established in other humanitarian disarmament instruments. States will need to make decisions on the extent

¹⁶ J. Wofsthal, “Second Time is NOT a Charm for the Nuclear Ban Treaty”, Arms Control Wonk, 29 June 2017, <http://www.armscontrolwonk.com/archive/1203455/second-time-is-not-a-charm-for-the-nuclear-ban-treaty/>.

¹⁷ See INFCIRC/153 (corrected).

¹⁸ J. Borrie et al., “A Prohibition of Nuclear Weapons: A Guide to the Issues”, ILPI–UNIDIR, February 2016, p. 37, <http://unidir.org/files/publications/pdfs/a-prohibition-on-nuclear-weapons-a-guide-to-the-issues-en-647.pdf>; T. Caughley and G. Mukhatzhanova “Negotiations of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban”, UNIDIR, 2017, <http://www.unidir.org/files/publications/pdfs/nuts-and-bolts-en-684.pdf>.

¹⁹ See Final Document Volume I, NPT/CONF.2010/50 (Vol. I), p. 4.

to which they formalize victim assistance and environmental remediation obligations in line with existing treaties.²⁰

Decisions on the form of support also pertain to the provisions on international cooperation and assistance. Articles 7(3) and (4) of the TPNW stipulate that each State Party will provide technical, material, and financial assistance to States Parties affected by nuclear weapons use or testing and assistance for the victims, if they are in a position to do so.²¹ Article 7(6) specifies a responsibility for State Parties that have used or tested nuclear weapons or other nuclear explosive devices to provide adequate assistance to affected States for victim assistance and environmental remediation. Further elaboration of the language used in the TPNW will be required as States Parties move to implement international cooperation and assistance obligations.

6. The scope of the prohibition against “assisting, encouraging, or inducing”

This article 1 prohibition is particularly pertinent for NATO members and other States operating alongside nuclear-armed States in joint military missions with interoperable forces. A maximal interpretation of the TPNW’s prohibitions to “assist, encourage, and induce” could include all military activities with NATO as an explicitly nuclear-armed alliance committed to nuclear deterrence and the possible use of nuclear weapons. The inclusion of “threaten to use” in article 1(d) could be seen as prohibiting an extended nuclear deterrence relationship between a non-nuclear-armed State Party to the TPNW and a nuclear-armed State outside the treaty. Such an interpretation would present non-nuclear-armed NATO States with the choice of acceding to the TPNW or retaining existing military cooperation agreements and practices with nuclear-armed States outside the treaty.²²

Alternatively, the reference to “assist” in the TPNW could be interpreted minimally as prohibiting only those specific activities that deliberately enable the threat or use of nuclear weapons. This would allow non-nuclear-armed NATO members to maintain existing military cooperation agreements and practices with nuclear-armed States that remain outside the treaty, subject to specific changes relating to nuclear weapons. Which political and military activities might fall under a more minimal interpretation is open to question. However, NATO members have a range of views and practices on nuclear weapon-related activities to which the alliance has adapted.²³ Accession to the TPNW by one or more of its members could signal a phase of further adaptation rather than a binary either/or choice, noting that the North Atlantic Treaty itself says nothing about nuclear weapons.

Three issues in this regard were subject to widespread discussion during the negotiations on which no general agreement was reached: military preparations for use, transit, and financing. Some States might decide to explicitly recognize these prohibitions in national ratification legislation and advocate for others to do the same rather than assuming (or

²⁰ See Working Paper submitted by Pace University, A/CONF.229/2017/NGO/WP.36, 13 June 2017.

²¹ See Working Paper submitted by Article 36, A/CONF.229/2017/NGO/WP.10, 27 March 2017.

²² J. Borrie et al., “A Prohibition of Nuclear Weapons: A Guide to the Issues”, ILPI/UNIDIR, February 2016, p. 37, <http://unidir.org/files/publications/pdfs/a-prohibition-on-nuclear-weapons-a-guide-to-the-issues-en-647.pdf>.

²³ See T. Sauer, “How will NATO’s Non-Nuclear Members Handle the UN’s Ban on Nuclear Weapons?”, *Bulletin of the Atomic Scientists* 73(3), 2017, pp. 177–181.

denying) their inclusion under the general prohibition against assisting, encouraging, or inducing prohibited activities.

Concluding remarks

The TPNW's adoption represents a significant milestone in efforts to delegitimize nuclear weapons. Such is the central role that nuclear weapons play in international security politics that, until now, prohibition at the global level was not in prospect, despite well-established treaty regimes banning other weapons of mass destruction. Born of humanitarian concern and frustration with slow progress of nuclear disarmament, the TPNW fills an important "legal gap" in the view of its advocates, illuminating and augmenting the obligations of article VI of the NPT. Now that the gap is filled, the test for the regime it embodies will be how it affects the behaviour of those States that rely on nuclear weapons for their security, with a view to encouraging them to transition towards a nuclear-weapon-free world.

The pace of progress towards entry into force is an important initial barometer for the TPNW, and one that will be the focus now for TPNW supporters. Yet it is not too early for supporter States to commence implementation groundwork. Article 8 invests Meetings of States Parties with decisions on matters of implementation after entry into force, and some matters, like the issues outlined above, will need careful reflection. Further, as this paper has explained, engagement with those States for which joining the TPNW is an unlikely prospect for now will be vital. Its character will have implications not just for the TPNW but for the broader nuclear weapons control regime, including the NPT, and any future steps leading to the verifiable elimination of nuclear weapons.

Abbreviations

AP	Additional Protocol
CSA	comprehensive safeguards agreement
CTBT	Comprehensive Nuclear-Test-Ban Treaty
IAEA	International Atomic Energy Agency
ICAN	International Campaign to Abolish Nuclear Weapons
NATO	North Atlantic Treaty Organization
NPT	Nuclear Non-Proliferation Treaty
OEWG	Open-ended Working Group
TPNW	Treaty on the Prohibition of Nuclear Weapons

Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban

The New Treaty: Taking Stock

In July 2017, 122 States adopted the Treaty on the Prohibition of Nuclear Weapons. This paper briefly traces the context and course of its negotiation. It comments on the key features of the treaty, on its relationship with other treaties, and on next steps towards nuclear disarmament.

This paper is the third in a series of UNIDIR briefs on the “nuts and bolts of a ban”. Funded by the Governments of Ireland and Sweden and building upon the 2016 ILPI/UNIDIR Guide to the Issues, the papers aim to constitute a practical resource for practitioners involved in the negotiating the nuclear ban treaty, as well as those now seeking to bring it into force.