

TOWARDS THE PROHIBITION OF NUCLEAR ARMS? THE NOBEL PEACE PRIZE AND THE INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS (ICAN)

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ABSTRACT

The proposition that the use of nuclear arms leads to catastrophic consequences is the basis for their deterring effect. Indeed the horror experienced by the victims of the Hiroshima and Nagasaki bombings was tangible proof of this. In 2017, the anti-nuclear NGO ICAN (the International Campaign to Abolish Nuclear Weapons), which has exploited this theme, was rewarded with the receipt of the Nobel Peace Prize, several months after the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW). The benefits of this Treaty for international peace and security are uncertain. However, it could certainly threaten the advancement of nuclear disarmament.

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INTRODUCTION

In 2017, the Nobel Peace Prize¹ was bestowed on the ICAN organization (the International Campaign to Abolish Nuclear Weapons) for its work to further the negotiation and conclusion of the Treaty on the Prohibition of Nuclear Weapons (TPNW), adopted on 7 July 2017 and opened for signature as of 20 September 2017. The Nobel Committee has regularly highlighted the theme of nuclear disarmament and, more specifically, the case for abolition. The selection of ICAN suggests implicit support for the TPNW, whose fragmented history is reflected in the very substance of the Treaty. But this legacy will likely prevent the Treaty from succeeding in the way its supporters hope it will. It was adopted, under the auspices of the UN, by a large number of States, but also met with opposition from those States specifically targeted by the prohibition. This *fausse bonne idée*² is in stark contrast with the aura of authority and respectability of the Nobel Peace Prize.

This research paper considers the history behind the TPNW before examining its possible consequences within the field of nuclear disarmament.

THE NOBEL PRIZE AND THE ABOLITION CAUSE

Once again, the Nobel Peace Prize has highlighted the initiative of a non-governmental organization (NGO) championing the elimination of nuclear weapons. Already in 1985, International Physicians for the Prevention of Nuclear War (IPPNW)³ was honored for its “service to humanity” through the diffusion of information on the catastrophic consequences of nuclear war. In 1995, the NGO Pugwash⁴ and Jozef Rotblat were recognized “for their efforts to diminish the part played by nuclear arms in international politics and, in the longer run, to eliminate such arms.” Still on the theme of abolition, the Nobel Committee, in 2009, created a powerful platform for President Obama’s Prague speech during which he proclaimed his vision of a “world without nuclear weapons.”⁵ The consequences of bestowing the Nobel Peace Prize on NGO abolitionists may be hard to measure (and even harder to anticipate). But the effect of such distinction is incontestable and the accompanying recognition is enduring. In fact, ICAN, launched in 2007 by the NGO IPPNW, would likely never have come into existence had its founder not received the Nobel Peace Prize in 1985.

More broadly, it appears that the Nobel Committee⁶ is regularly interested in disarmament and nuclear non-proliferation.⁷ In addition to those cited, many other Laureates have been spotlighted: in 1962, Linus Carl Pauling, an American chemist and physician, who worked to combat the testing of nuclear weapons; in 1974, the Japanese Prime Minister Eisaku Sato for his renunciation of the nuclear option for Japan (specifically, for the “Three Nonnuclear Principles” of 1967 and Japan’s adhesion to the Non-Proliferation Treaty); in 1975, the physician Andreï Sakharov, notably for his pursuit of nuclear disarmament; in 1982, Alva Myrdal and Alfonso Garcia Robles, two diplomats, for their “central role” in the disarmament negotiations at the UN (Robles, in particular, for the Tlatelolco Treaty, which established the first nuclear weapon-free zone, in Latin America); in 2005, the International Atomic Energy Agency (IAEA) and M. ElBaradei, the director at the time, “for their efforts to prevent nuclear energy from being used for military purposes and to ensure that nuclear energy for peaceful purposes is used in the safest way possible.”

1. ICAN was selected for “its work to draw attention to the catastrophic humanitarian consequences of any use of nuclear weapons and for its ground-breaking efforts to achieve a treaty-based prohibition of such weapons,” according to the Chair of the Nobel Committee Berit Reiss-Andersen during the award ceremony on 6 October 2017 in Oslo.

2. Jean-Baptiste Jeangène Vilmer, “Le traité sur l’interdiction des armes nucléaires : une fausse bonne idée,” presentation during an all-day conference at the Thucydides Center on the topic of France and nuclear arms in the 21st century, 29 September 2017.

3. The NGO IPPNW (International Physicians for the Prevention of Nuclear War), which was founded in 1980 by several American and Soviet doctors, claims to have acquired 200,000 members since the end of the Cold War. It also claims to pursue the prohibition of atmospheric and underground nuclear testing. The IPPNW is considered the principal organization of doctors in civil society’s campaign for a treaty to ban and delegitimize nuclear arms and, ultimately, to eliminate them entirely.

4. Pugwash was created in 1957 by Jozef Rotblat (a Polish physician who worked on the Manhattan Project, 1908-2005) and the philosopher Bertrand Russell (1872-1970) following publication of the Russell-Einstein Manifesto on 9 July 1955. The document drew attention to the dangers associated with nuclear proliferation, specifically nuclear arms’ growing power and yield, and the possibility of a nuclear war leading to the extinction of humanity.

5. Barack Obama, *Speech on Nuclear Weapons*, Prague, Czech Republic, 5 April 2009.

6. The Nobel Committee, which selects the recipient of the Nobel Peace Prize each year, is composed of five members, nominated by the Norwegian Parliament. In 2017, the Committee was composed of Berit Reiss-Andersen, Henrik Syse, Inger-Marie Ytterhorn, Thorbjørn Jagland and Tone Jørstad.

7. This glimpse into the Nobel Committee’s interest in nuclear disarmament does not entirely capture the relationship between the Nobel Prize and nuclear disarmament, particularly in light of other potential nominees proposed to the Nobel Committee. Consider, for example, that one of the promoters of the TPNW, Alyn Ware (the coordinator of the NGO Parliamentarians for Nuclear Non-Proliferation and Disarmament) had proposed the nomination of the President of Kazakhstan N. Nazarbaiev for the Nobel Peace Prize in 2017 for his “incredible efforts for nuclear abolition” (see the website of the Embassy of Kazakhstan in Washington).

The Nobel Prize has similarly recognized the fight against the proliferation of chemical weapons (in 2013, the Prize was awarded to the Organization for the Prohibition of Chemical Weapons)⁸ and the fight for conventional disarmament (in 1997, through the International Campaign to Ban Landmines and Jody Williams who brought the campaign to the public's attention). In these two cases, in particular, and in the fight against nuclear proliferation (the case of the IAEA), in general, the Nobel Prize highlighted concrete actions or, in other words, tangible results.

The Nobel Committee's support of nuclear disarmament reflects both a profound aversion for nuclear arms as well as a belief that there exists an (albeit dubious) causal link between nuclear disarmament and the amelioration of international security. Indirectly, through ICAN, the Nobel Peace Prize drew attention to the recent Treaty on the Prohibition of Nuclear Weapons (TPNW),⁹ which was unusual in that it was adopted without the consent of those States directly concerned. Nuclear-armed States as well as those States that ultimately rely on nuclear arms for their security (States in security alliances with a nuclear dimension, i.e. under the "nuclear umbrella") simply refused to participate in the Treaty negotiations.¹⁰ Since the conclusion of the TPNW, these States have continued to voice their rejection¹¹ of the Treaty and have refused, quite logically, to adhere to the terms of the TPNW. There is not going to be any prohibition imposed on these States. The unprecedented character of this legal document that is now included in the "collection" of United Nations treaties¹² can be better understood by a look back at its creation and progression.

THE FRAGMENTED ORIGINS OF AN UNUSUAL TREATY

The history of the TPNW is unusually complex. There are several explanations for its origins. Partly, it was a product of tensions within the review process of the Non-Proliferation Treaty.¹³ Partly, it was the result of the recent so-called "humanitarian" campaign that has progressively weaved an expansive and dense web around the institutions of the UN where the final treaty negotiations took place.

The right breeding ground and the right climate

Over the years, the NPT review process has clarified the growing dissatisfaction of many non-nuclear States with the existence of two categories of States, each with different rights and obligations.¹⁴ Then, the review process changed to the extent that nuclear disarmament became an object of paramount importance.¹⁵ Several factors contributed to this situation: diverging interpretations as to the degree and nature of the obligation to disarm incumbent on nuclear-armed States;¹⁶ the growing demand for nuclear disarmament by non-nuclear-armed States, who argued that the process was too slow; the interest of certain non-nuclear-armed States to center attention on disarmament rather than non-proliferation; the will of certain nuclear-armed States to assuage the frustration of non-nuclear-armed States, which eventually raised expectations, etc.¹⁷ The situation was thus ripe for an initiative such as the one that led to the adoption of the TPNW, in particular, because of President Obama's Prague speech on nuclear disarmament (April 2009). Despite renewed U.S. interest in nuclear deterrence and a certain realism as demonstrated by the unspoken

8. The Nobel Peace Prize was awarded to the OPCW several days after the United Nations Security Council adopted Resolution 2118 which denounced the use of chemical weapons in Syria and called for the decommissioning of the Syrian chemical arsenal.

9. In French: *le traité sur l'interdiction des armes nucléaires*.

10. The sole exception was the Netherlands, whose government, under pressure from Parliament, decided to participate in treaty negotiations. Japan refused to participate in the negotiations and, during the negotiation conference on 27 March 2017, explained the reasons for its refusal while also reaffirming its commitment to the long-term goal of nuclear disarmament (this speech is available on the conference website).

11. See "Will the Treaty lead to the creation of a norm?" in a later section of this essay.

12. Treaty on the Prohibition of Nuclear Weapons (TPNW), United Nations Treaty Collection, 7 July 2017.

13. The NPT review process is based on review conferences that take place every five years and are overseen by annual preparatory committees (Prepcom). This process, sometimes incorrectly referred to as a "revision" process, is not intended to revise the NPT, but instead to examine the implementation of its terms.

14. In this sense, the TPNW reflects the wish, of certain States, to radically change the nuclear order established by the NPT as well as, more generally, the multilateral system which they perceive as imbalanced.

15. The principal objective of the NPT, as suggested by the name, is the non-proliferation of nuclear arms. However, in view of the other operative provisions of the Treaty, the NPT is said to be founded on three pillars: non-proliferation, the peaceful use of nuclear energy, and disarmament.

16. The ICJ, in its 1996 Opinion of the Legality of the Threat or Use of Nuclear Weapons, determined that there existed an obligation on nuclear-armed States to pursue and conclude negotiations on nuclear disarmament.

17. And perhaps also the idea that non-proliferation is no longer at play within the framework of the NPT, but instead within the larger international arena, the IAEA and the UN Security Council.

affirmation that the US would be the last State to eliminate its nuclear arsenal, the vision of “a world without nuclear weapons” is what stands out in this speech. This vision then influenced the NPT review process and, finally, the NPT review conference of 2010. If American willingness to engage with the issue of nuclear disarmament created an atmosphere favorable enough to allow States to agree on a final document,¹⁸ it also — and above all — signaled, especially to NGOs, a rare window of opportunity to advance the cause of nuclear disarmament. More concretely, the conclusion of the final document of 2010 included a paragraph establishing a link between the use of nuclear arms and possible humanitarian consequences,¹⁹ which constituted an important tool for ICAN and the wider “humanitarian campaign.”

In parallel, there was space reserved for NGOs on the sidelines of the NPT review process as well as directly within these official meetings (one session is devoted to NGOs during each preparatory committee and conference). This has constituted a useful tool for ICAN and the wider “humanitarian” campaign. ICAN settled among a plethora of initiatives and organizations, of which a large number were gathered under the network of Abolition 2000²⁰ (launched in 1995, whose goal was the adoption of a convention on the prohibition and elimination of nuclear weapons). Over the years, these particularly active NGOs learned how to work with those delegations that were favorable to them and/or those whose objectives converged with their own.

The destiny of the model for a convention on nuclear arms — developed notably by an NGO composed of jurists, IALANA (International Association of Lawyers Against Nuclear Arms), in association with the IPPNW — demonstrates the capability and the resources of these NGOs. This convention model was proposed by Costa Rica to the UN through the Secretary General in 1997.²¹ Then, a revised model was submitted to the General Assembly by Costa Rica and Malaysia in 2007. The TPNW was distinctly different from this convention model in that it integrated a plan for the elimination of nuclear arms, detailing different steps as well as a verification process. Nonetheless, the relationship between the two frameworks is undeniable. The work of NGOs on this convention model, while in the margins of official UN institutions, is what created the environment for the TPNW. In parallel, recognition of the role of NGOs in the domain of conventional disarmament and, in particular, the processes of Ottawa (the Anti-Personnel Mine Ban Convention in 1997) and Oslo (the Convention on Cluster Munitions in 2008) certainly encouraged those NGOs active in the domain of nuclear disarmament to launch a similar process. However, the weapons targeted by the Ottawa and Oslo conventions are very different from nuclear weapons in terms of both their nature and function; the strategic and political use of nuclear arms distinguishes them from antipersonnel mines and cluster munitions.²² NGOs ignored this obstacle in order to advance, with the support of many States,²³ an international campaign highlighting the humanitarian consequences of the use of nuclear weapons.

The so-called humanitarian campaign (from Oslo to Oslo)

The moral debate surrounding nuclear weapons is “as ancient” as the weapons themselves²⁴ and the TPNW is a part of this history. The bedrock of the so-called “humanitarian” campaign is the attribution of not only a dangerous, but also an immoral character to nuclear weapons, even a potential negation of humanity.

The campaign is also an event in the chronology of legal challenges to weapons and nuclear deterrence. Note that the IPPNW was initiated by the World Court Project²⁵ in cooperation with the NGOs, International Peace Bureau and IALANA. Four years later, the International Court of Justice (ICJ) published an Advisory Opinion on the legality of nuclear

18. The adoption of a substantial — and not only procedural — final document by consensus is, for most participants (States and NGOs), the criteria with which to assess the success or failure of the review conference.

19. “The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law.” (I, A, v).

20. Abolition 2000 claims to have 2000 member organizations, representing 90 countries.

21. Letter dated 31 October 1997 from the Chargé d'affaires a.i. of the Permanent Mission of Costa Rica to the United Nations addressed to the Secretary-General, A/C.1/52/7, 17 November 1997.

22. As highlighted by Jean-Baptiste Jeangène Vilmer, in a press article published the following day on the decision to award the Nobel Prize to ICAN, never has the politics surrounding the security and defense of any country ever depended on antipersonnel mines.

23. A longtime observer of the debate on disarmament commented, in particular, on the financial implications for Norway, Switzerland and Austria. See William C. Potter, “Disarmament diplomacy and the Nuclear Ban Treaty,” *Survival*, 59:4, 2017, p. 75-108.

24. For a comprehensive history of this debate, see Nicolas Roche, *Pourquoi la dissuasion*, PUF, 2017, p. 490-494.

25. The World Court Project is an international campaign that seeks to refer the nuclear weapons issue to the ICJ.

weapons.²⁶ Moreover, the contentious request to the ICJ introduced by the Marshall Islands on 24 April 2014 is also undoubtedly a part of the humanitarian campaign.²⁷

The first significant appearance of the humanitarian campaign on the international agenda was the conference in Oslo on the humanitarian consequences of nuclear weapons in March 2013. The program of the event²⁸ seemed to reflect a genuine concern for the tangible, medical, social and environmental consequences associated with nuclear arms as well as the anticipated response to their use. In this sense, the discussions were apparently not meant to take an arbitrary political turn. The five nuclear-armed States refused to participate but India and Pakistan were represented in the conference. The conference not only affirmed that the consequences of a nuclear explosion would be impossible to rectify, but also insisted that such an explosion would have consequences for the entire world.

If the Oslo conference laid the groundwork for a nuclear arms ban by providing the rationale for the ban, it did not conclude that a ban was needed. (The conference organized by Mexico in February 2014 did reach such a conclusion.) In that sense, the Nayarit conference constituted, as the president of the conference declared in his final report,²⁹ a point of no return. It was a turning point in that the goal of the prohibition of nuclear arms was no longer implicit, but publicly acknowledged. However, even if this goal was proclaimed in the president's report, it was not necessarily the goal of the majority of conference participants. According to a report posted on the website of the NGO Reaching Critical Will³⁰, the prohibition of nuclear weapons is the way forward for "at least 20 governments participating" – in reality, only 20 out of 127 participants.

At Nayarit, Austria offered to organize the next conference. The perspective of this third conference confirmed that these meetings were indeed part of a process. In December 2014, in Vienna, another step was taken, with fifty-eight governments present.³¹ The Austrian Foreign Minister S. Kurz, while exaggerating the conclusions of the conference, called on States to fill the "legal gap for the prohibition and elimination of nuclear weapons." The "Austrian Pledge" to cooperate with relevant actors in their "efforts to stigmatize, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks" was echoed by the Humanitarian Pledge supported by 107 States during the NPT review conference of 2015.

In parallel with these conferences, the campaign found a way to set markers in the institution most favorable for the promotion of its objective:³² the First Committee of the UN General Assembly (this committee is both dedicated to security and disarmament issues) and the NPT review process. Thus, in 2012, Switzerland submitted a statement on the humanitarian dimension of nuclear disarmament, with the support of 16 States, to the NPT planning committee (Prepcom). Several months later, despite the presentation in parallel of a similar, but more modest, declaration proposed by a smaller group of States (led by Australia),³³ the Swiss-led declaration was presented to the UN General Assembly First Committee of 2013. Then, this "humanitarian" declaration received the support of 155 States during the First Committee of 2014. These initiatives helped lay the groundwork for the preparation and launch of negotiations under the aegis of the United Nations.

26. On this point, see as an example: Marc Perrin de Brichambaut, "Les avis consultatifs rendus par la CIJ le 8 juillet 1996 sur *la licéité de l'utilisation des armes nucléaires par un État dans un conflit armé* (O.M.S.) et sur la licéité de la menace et de l'emploi d'armes nucléaires (A.G.N.U.)," *Annuaire français de droit international*, 42, 1996. p. 315-336. As highlighted by the author, it is difficult to know whose idea it was to request an ICJ Opinion. The NGO IALANA was particularly active in this regard.

27. Contentious requests submitted simultaneously against five nuclear-armed States, as well as North Korea, India, Israel and Pakistan. Accusations by the Marshall Islands against these States for not fulfilling their obligations concerning the cessation of the nuclear arms race and nuclear disarmament.

28. Conference: Humanitarian Impact of Nuclear Weapons. NB: In advance of the conference open to States (though NGOs were permitted to give presentations), ICAN organized a forum for civil society.

29. Juan Manuel Gómez Robledo, Vice Minister for Multilateral Affairs and Human Rights, Mexico, Second Conference on the Humanitarian Impact of Nuclear Weapons, Chair's Summary, *Reaching Critical Will*, 14 February 2014.

30. Report from the Nayarit Conference.

31. While the States of the P3 remained united in their refusal to participate in the humanitarian conferences, the United States and the United Kingdom decided to be represented in the Vienna conference. For information about the efforts of organizers to persuade the U.S. and U.K. to participate in the conference, see William C. Potter, *op. cit.* p. 82.

32. The General Assembly First Committee is more favorable than the Conference on Disarmament (CD). Consider, for example, that all States are represented in the First Committee (while the CD only includes 65 members). In addition, the rules of the General Assembly are more flexible when it comes to the adoption of texts (requires a majority while the CD requires consensus). Finally, the topic of the abolition of nuclear arms frequently appears in the resolutions presented before the First Committee.

33. The States supporting this declaration are essentially those States under the nuclear umbrella, which are members of NATO and/or the European Union: Germany, Belgium, Canada, Spain, Finland, Italy, Japan, Onie, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Sweden and Turkey.

Negotiations accelerated under the auspices of the UN³⁴

The inclusion of these negotiations in the United Nations disarmament process can certainly be traced to the very first resolution adopted by the General Assembly on 24 January 1946, which established a commission tasked with studying the problems raised by the discovery of nuclear energy. This commission was charged with making “specific proposals” for the “elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.”³⁵ However, this is part of a larger history concerning the problem of dual use nuclear technology (i.e. technology that has both civilian and military uses). This history is, more particularly, that of the Non-proliferation Treaty (NPT), than that of the TPNW.

The history of the TPNW negotiations at the UN is recent. The General Assembly First Committee became the principal theater with a first resolution adopted in October 2012 for the constitution of a working group said to be an “open-ended working group” (an OEWG). This OEWG was tasked with developing proposals “to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.”³⁶ This resolution, whose main sponsors were Austria, Mexico and Norway, was adopted without the support of NPT States possessing nuclear weapons and other nuclear-armed States (opposition from the United States, France, the United Kingdom and Russia; abstention from China, India, Israel and Pakistan). The group’s final report mentions the possibility of adopting “a treaty banning nuclear weapons.”³⁷ In this sense, this OEWG constitutes one of the cornerstones of the TPNW’s history.

The second OEWG,³⁸ convened following the General Assembly’s adoption of another resolution on the same topic in 2015,³⁹ was another major event in this chronology, as it finally managed to set a fixed deadline for the launch of treaty negotiations. At the end of the proceedings, without being able to obtain a large majority — with 68 votes in favor, 22 against⁴⁰ and 13 abstentions, the OEWG approved a report. One conclusion of the report was that it was necessary for the General Assembly to convene a conference, in 2017, “to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination.”⁴¹ The way in which the Final Report is written reflects the participants’ disagreement over the conclusion.⁴² Despite the lack of consensus and aside from these divisions, the 2017 deadline was finally fixed.

Several months later, at the General Assembly, the decision to organize this conference was confirmed with the adoption, by 123 votes for, 38 against (and 16 abstentions), of Resolution 71/258 (23 December 2016) entitled “Taking forward multilateral nuclear disarmament negotiations.” The “United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination” was held in two sessions from 27 to 31 March 2017 and from 15 June to 7 July 2017 presided over by Costa Rica. If the negotiations brought together the vast majority of the world’s States, those States possessing nuclear arms were not among the participants. Moreover, among EU Member States, 22 did not participate in the Conference.⁴³ The Netherlands, the only NATO member to have participated, was particularly exposed, given that it was also the only State to vote against the Treaty.⁴⁴ The Treaty was adopted on 7 July 2017 by 122 votes for, 1 abstention (Singapore) and 1 vote against.

34. This research paper does not discuss the active role played for the last several years by different UN bodies promoting nuclear abolition and its inclusion in the international agenda. This finding would require methodical documentation, beyond some observations on the messages passed on the subject between senior officials, the thematic presentation of topics in documents published on the UN website, etc.

35. Resolution 1 (I), para. 5c, United Nations General Assembly, 24 January 1946.

36. Resolution adopted by the General Assembly on 3 December 2012, “Taking forward multilateral nuclear disarmament negotiations,” A/RES/67/56, 4 January 2013.

37. Proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons, A/68/514, 9 October 2013.

38. The group met three times (in February, May and August 2016). No State possessing nuclear arms participated.

39. Resolution adopted by the General Assembly on 7 December 2015, “Taking forward multilateral nuclear disarmament negotiations,” A/RES/70/33, 7 December 2015.

40. Of the 24 States representing the progressive approach (see previous footnote), 19 voted against and 5 abstained (Finland, Japan, the Netherlands, Norway and Portugal).

41. The OEWG Final Report, paragraph 67.

42. The Report mentions that the OEWG makes this recommendation “with the support of a large number of countries” and details this support by regional grouping in a footnote. The format of this footnote emphasizes the existence of a majority in support of the recommendation whereas only “certain States” support an opposing opinion. The footnote clarifies that these include the 24 States of the “progressive approach.” These States are (mostly under the nuclear umbrella): Germany, Australia, Belgium, Bulgaria, Canada, South Korea, Croatia, Spain, Estonia, Finland, Greece, Hungary, Italy, Japan, Latvia, Norway, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey.

43. Austria, Cyprus, Malta, Ireland, the Netherlands and Sweden participated in the conference.

44. The Netherlands had to call for a vote on the Treaty.

While the history of the TPNW is drawn-out, its negotiations moved quickly. The fragmentation and the volatility of support for the “humanitarian” campaign were clear. A clear logic and a relentless will were seemingly guiding the succession of different steps leading to the adoption of the TPNW (with a significant acceleration after 2010). The result is a treaty whose incoherence reflects the artificiality of the process that led to its conclusion.

THE TPNW AND NUCLEAR DISARMAMENT

An inconsistent treaty, without the prospect of implementation

The TPNW,⁴⁵ concluded on 7 July 2017, consists of a long preamble, which totals twenty-four paragraphs in comparison to twelve paragraphs in the preamble of the NPT or ten paragraphs in the case of the Comprehensive Test Ban Treaty (CTBT).⁴⁶ The body includes twenty articles, of which seven lay out the principles of the Treaty; the remaining thirteen are devoted to the Treaty’s functioning (final clauses).

Its main purpose, as announced by its title, is the prohibition of nuclear weapons. This objective took the form of a prohibition against the manufacture, acquisition, possession and stockpiling of nuclear weapons (art. 1a); against the transfer of or control over these arms (art. 1b), and against the receipt of the transfer of or control over these arms (art. 1c). These provisions are the same as the first two articles of the NPT.

The TPNW also includes completely new provisions: prohibition against the use and threatened use of nuclear weapons (art. 1d);⁴⁷ prohibition against the stationing, installation or deployment of nuclear weapons or other nuclear explosive devices within signatories’ territory or at any place within their jurisdiction or control (art. 1g). The prohibition against the use or threatened use of nuclear arms is certainly at the heart of the TPNW for a number of its proponents and signatories who sought to establish an international norm that would delegitimize the strategy of deterrence. Referral to the ICJ was already part of this process but the Opinion rendered by the Court did not allow proponents to achieve their goal (the ICJ had concluded that the threat or use of nuclear weapons was generally unlawful but could not determine whether that would apply to an extreme situation of self-defense in which even the continued existence of the State was in jeopardy). The second new provision concerning the deployment of nuclear weapons was also a central element and a significant difference between the TPNW and the NPT — particularly in the eyes of certain proponents of the TPNW⁴⁸ who sought to delegitimize NATO nuclear-sharing agreements.⁴⁹ As background, five NATO Member States station American nuclear weapons on their soil (without being in control of them). This provision is regularly criticized during the NPT review process by nonnuclear-armed States (in particular the States of the non-aligned movement) and also by Russia⁵⁰ and China.⁵¹

Finally, in addition to these new provisions, there is an article prohibiting State Parties from seeking or receiving assistance from anyone to engage in an activity prohibited by the Treaty (art. 1f). Had the article been written differently, it would only have constituted a strengthening of the ban and a means of implementation. However, as it is written,

45. The text of the Treaty is available on the website.

46. According to Dan Joyner, a contributor to the blog *Arms Control Law*, this length was the result of the conference chairman’s desire to include all elements that NGOs and some states had wished, but which did not have enough support from participants (Dan Joyner, “My Impressions on the Second Draft of the NW Ban Treaty,” *Arms Control Law*, 28 June 2017).

47. The Chemical Weapons Convention also includes a prohibition against the use of such weapons (art. 1b) while the Biological Weapons Convention (BWC) does not include such a prohibition. The 1925 Geneva Protocol provides for a ban on use during wartime.

48. Pugwash reports on its website about a round table organized in the margins of the TPNW conference negotiations on 16 June 2017 with the support of the Permanent Mission of Brazil to the UN.

49. NATO’s nuclear dissuasion is based both on the strategic nuclear forces of nuclear-armed States in the Alliance (France is not part of NATO’s nuclear planning mechanism, but the Alliance recognizes that French nuclear deterrence contributes to the global security of the Alliance) and on American nuclear weapons stationed within the territory of five NATO States (Germany, Belgium, Italy, the Netherlands, Turkey) and those with dual capacity aircraft.

50. See, for example, Russia’s speech on 1 May 2015 at Main Committee 1, calling for the withdrawal of non-strategic nuclear weapons deployed on the territory of third States. This was directly aimed at the NATO nuclear arrangement.

51. See, for example, the working paper (NPT/CONF.2015/WP.36) submitted by China during the 2015 review conference. Among recommendations, the document called for the abolition of the “nuclear umbrella and nuclear sharing policies and practices. Countries that deploy nuclear weapons abroad should withdraw and repatriate all such weapons.” (§15e).

the article could lead to the emergence of new obligations for the TPNW signatories. Indeed, the language⁵² of Article 1f could give way to elaborate interpretations that all States are not necessarily ready to apply.⁵³

Aside from the principles, the Treaty is vague with regard to the means with which to ensure compliance. In the end, the TPNW does not provide for a genuine verification mechanism even though Article 3 is devoted to safeguards and Article 4, named “Towards the total elimination of nuclear weapons,” revisits the issue. The TPNW distinguishes three categories of States that must comply with its obligations (art. 2): those that formerly possessed nuclear weapons; those that currently possess nuclear weapons; and those that station nuclear weapons on their territory. The second category is further subdivided depending on whether the State will or will not have abandoned its program between 7 July 2017 and the date of the Treaty’s entry into force (art. 4, paras 1 and 2). Therefore, Article 3 on the guarantees concerns all States except those of the second category. It is of no use in comparison with the NPT in so far as the TPNW calls for the maintenance of IAEA guarantees that existed at the time of the Treaty’s entry into force. And, for those States that have not yet concluded guarantees, the article calls for an agreement on generalized guarantees (INFCIRC/153).

The TPNW could have fostered a breakthrough in nuclear non-proliferation that would have increased strategic stability and, thereby, the right conditions for its ultimate goal of rendering nuclear weapons unnecessary. To that end, Article 3 should also have referred to the need for an additional protocol (INFCIRC/540), a new standard for IAEA safeguards that have been in place since the late 1990s.⁵⁴ Despite the persistent refusal of some States to submit to the new constraints imposed through this protocol, the latter is now in force in 129 States. Its universalization is a necessity recognized by numerous States (the European Union, Australia, Canada, U.S., Japan, Russia, China, etc.). Therefore, the absence of any mention of the additional protocol in the TPNW represents a negation of the process of verification and/or confirms the lack of interest of the participants in the negotiation for the operationalization of the Treaty. As most critics of the TPNW have pointed out, it is clear that this will not permit material progress towards nuclear disarmament.

Indeed the operationalization of the Treaty has not been a priority for its proponents, who have sought first and foremost to conclude a legally-binding instrument intended to serve as the basis of an international norm prohibiting nuclear weapons. Taking as an example the Chemical and Biological Weapons Convention, they hoped in effect to create a norm from a treaty, in opposition to the proponents of a convention, who would have detailed steps towards the elimination of nuclear arms coupled with a verification process.⁵⁵ The negotiation of such a convention would certainly have been much longer (and perhaps impossible to conclude even in the absence of the States concerned).⁵⁶ For its proponents, the goal of the TPNW had been achieved. It remains to be seen whether the establishment of an international norm can be achieved as well.

Will the Treaty lead to the creation of a norm?

Will the TPNW serve as the foundation of an international norm prohibiting nuclear weapons? As Beatrice Fihn, Executive Director of ICAN, explains, in an article published in January 2017⁵⁷ shortly before the start of the TPNW negotiations at the UN, the rationale behind the initiative is that a treaty creates a norm that affects the behavior of States even that of those States not party to the treaty. It does not appear that ICAN is hoping for the accession of nuclear-armed States (and, without their accession, no obligation can be imposed on them).⁵⁸ ICAN, without even mentioning

52. Each State Party undertakes never to, under any circumstances, “seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty.”

53. The list in Annex 2 of the 2016 Final Report of the OEWG on legal measures, which may be included in an international legal instrument, leads one to imagine a number of possibilities.

54. The proliferation crises of the 1990s demonstrated that the INFCIRC/153 safeguard, while ensuring the absence of the diversion of civilian activities for military purposes, remained insufficient for the development of covert activities.

55. For example, Sweden and Switzerland stressed the necessity of an effective verification system during negotiations and, at the time of the TPNW’s adoption, regretted such a system’s absence in the final text.

56. The divergent views on the form that this legally binding instrument should take have, for some time, slowed the progress of the TPNW’s pre-negotiation. The choice of the negotiating forum also divided the States supporting the humanitarian campaign (some preferred an ad hoc forum modeled on the Ottawa and Oslo processes, while others did not think of negotiating outside of UN institutions).

57. Beatrice Fihn, “The Logic of Banning Nuclear Weapons,” *Survival*, 59:1, 2017, p. 43-50.

58. The Vienna Convention on the Law of Treaties, 1969, Part III, Section 4 codifies this point (a corollary to the principle of *pacta sunt servanda*) that treaties must be respected by their parties (Article 26 of the Convention).

the formation of a customary norm under international law, outlines an international norm and its influence on the behavior of States.

The example of the CTBT given by Finh would require further explanation in order to be convincing because this Treaty, though signed by 183 States, did not prevent nuclear testing by North Korea. The fact that other nuclear-armed States have not held tests since the conclusion of the CTBT is probably not due entirely to the existence of an international standard. Other factors must be taken into account, including the establishment of a powerful surveillance system (already in operation though the CTBT has yet to enter into force). Similarly, the examples illustrating the idea that prohibition against the use of a weapon should lead to its elimination (biological and chemical weapons, antipersonnel mines, cluster bombs) need to be analyzed thoroughly and are not, either way, directly applicable to the case of nuclear weapons. The creation of a norm would imply universal adherence (or at least quasi-universal adherence, as in the case of the NPT) by the international community, including those States specifically targeted by the ban. Three months after the TPNW was opened for signature, the number of signatories remained the same as on the first day. As of February 2018, the number remains at 57, including 5 ratifications (Guyana, Cuba, Mexico, Thailand and the Holy See). The Treaty's entry into force could, therefore, be delayed a few more months (not including the three months of conventional delay).⁵⁹ At this stage, the absence of signatures from the 66 States that voted for the treaty at the negotiating conference may simply result from a juggling of priorities and the sluggishness of administrative procedure. ICAN, which will not leave this matter to chance, is undoubtedly counting on its local branches to ensure the commitment of those States that have yet to sign. The decision to award the Nobel Peace Prize to ICAN will also encourage States to sign. Certain governments, that supported the TPNW and its conclusion in July 2017, have said that they intend to conduct internal reviews to determine their positions on the Treaty. Sweden,⁶⁰ for example, while hailing the conclusion of the Treaty, has indicated that it is examining the text of the TPNW and that, ultimately, it is the Parliament that will decide whether or not to ratify. Switzerland is engaged in a similar process.⁶¹

Moreover, nuclear-armed States have, as a whole, expressed their refusal to join the TPNW through national declarations in several institutions. The majority had already refused to sign the Treaty when it was concluded in July 2017. The First Committee of the 72nd Session of the General Assembly (which began after the TPNW opened for signature) subsequently led several of these States to express their views on the TPNW. Their opposition to the TPNW was very clearly exposed. P5 States have not issued a joint statement, but the United States, France and the United Kingdom have agreed on a statement in P3 format⁶² that they will not join the TPNW, they do not consider themselves bound by the obligations of the Treaty and they reject the idea that a customary norm could emerge from it. These States even specified that they remain persistent objectors to the Treaty (U.S., France, U.K.).

In addition, NATO has issued a joint statement in support of its Member States' refusal to join the Treaty. It cited the ineffectiveness of the Treaty's approach, which will neither limit the size of States' arsenals nor secure international stability, the risk of such treaty fracturing consensus within the international community, the weakening of the NPT and IAEA safeguard system and the inadequacy of the international environment to accommodate such a treaty. Furthermore, NATO called on its "partners," before signing the Treaty, to carefully consider the implications of the TPNW for international peace and security as well as the earlier NPT.⁶³ NATO also issued a statement following the award of the Nobel Peace Prize to ICAN, indicating that it shares ICAN's goal of a world without nuclear weapons, but reiterates its opposition to the TPNW, in particular because of the risk that the Treaty poses to the success of non-proliferation and disarmament.⁶⁴

Despite the opposition of the States concerned and the low number of signatures at this stage, support for the TPNW remains satisfactory, though not sufficient to establish an international norm. What then could be the objectives of and modes of action open to ICAN to pursue its initiative and take advantage of the recognition resulting from its receipt of the Nobel Peace Prize? What might be the consequences for nuclear disarmament?

59. Entry into force is effective 90 days after the submission of the fiftieth instrument of ratification (art. 15).

60. Adriana Haxhimustafa, *Global treaty on the prohibition of nuclear weapons adopted*, 7 July 2017.

61. "Armes nucléaires : Berne attend pour signer," *Tribune de Genève*, 13 September 2017.

62. Statement on the Adoption of a treaty banning nuclear weapons, Permanent representation of France to the Conference on Disarmament in Geneva, 7 July 2017.

63. "North Atlantic Council Statement on the Treaty on the Prohibition of Nuclear Weapons," *North Atlantic Treaty Organization*, Press Release 135, 20 September 2017.

64. David M. Herszenhorn, "NATO chief criticizes treaty pushed by Nobel Peace Prize winner," *Politico*, 10 June 2017.

Risks to the architecture of security

In the short or medium term, the Treaty should eventually enter into force without the least reduction in the number of nuclear weapons in the world. Indeed, the TPNW will not produce any concrete effect. While the CTBT and the proposed Fissile Material Cut-off Treaty (FMCT) are operational, the TPNW is not. The proponents of the TPNW are well aware of this. Few hope to rally support from nuclear-armed States. On the other hand, one objective of the TPNW remains: to force these States to make new commitments to nuclear disarmament and to initiate, what some describe as, a revival of the process of nuclear disarmament. To this end, ICAN and its members intend to rely on civil society and members of national parliaments to exert pressure on their governments, particularly in those States where the population already largely favors nuclear disarmament. Therefore, ICAN will certainly target NATO members whose citizens and parliaments have, in the past, demonstrated opposition to the nuclear deterrence strategy and, more particularly, to the stationing of nuclear weapons on their territory. On this point, some of ICAN's representatives are quite clear. Their goal is to stigmatize nuclear-armed States. The expected benefit is yet unclear. In addition, the project "Do not bank on the bomb" demonstrates that other NGOs are attempting to find different ways of delegitimizing nuclear weapons. This initiative, implemented by the Dutch-based NGO PAX, publishes an index of companies and investments in the field of nuclear weapons in an annual report and denounces financial institutions ("Hall of Shame") investing in the 27 companies identified as involved in the production and maintenance of nuclear weapons. The NGOs supporting this project (ICAN, in particular) encourage individuals to pressure their governments and financial institutions on this issue (see the example of the *Amalgamated bank*),⁶⁵ operating on the observation that companies are sensitive to such pressure and fear the consequences to their reputations. (The NGO PAX states, for example, that the "disinvestment" by even a small number of institutions or States can have an impact on the strategic direction of a company.) The objective of NGOs operating in this sector is not only normative. It is also based on the assumption that following the ban on anti-personnel mines and cluster munitions, the withdrawal of investment in the sector would have led to the end of such weapons production.⁶⁶ These NGOs, who have been pushing for the inclusion of a provision on the financing of nuclear weapons⁶⁷ in the Treaty to no avail, may seek to expand the article on national implementation (art. 5) and encourage an extensive interpretation of Article 1f to require State Parties to the TPNW to take action in this area. Subsequently, these NGOs may hope that, as part of the TPNW review process (art. 8), pressure could be applied across all Member States.

While the ultimate goal of such an approach is undoubtedly the gradual delegitimization of nuclear deterrence, the risk is great. Such an approach risks exacerbating divisions within the international community and generating instability in Europe — instability that is not likely to advance the cause of nuclear disarmament...

The risk of creating division at the international level over the design of the nuclear non-proliferation and disarmament agenda may appear minor when it was in fact serious. The TPNW will not "advance" nuclear disarmament. Indeed it risks exacerbating difficulties that have arisen in multilateral fora in recent years from attempts to conclude and ratify legally binding instruments that would have immediate, practical effects. The Conference on Disarmament, though it has not permitted the adoption of new treaties since the mid-1990s, is nonetheless a forum for dialogue on security issues between member States. (The term "blocking" often used to criticize this forum is not justified.) As J. Goldblat⁶⁸ pointed out several years ago, the disarmament conference is a measure of confidence. Discussions must continue despite contrasting views on the priorities of the disarmament agenda.

The division resulting from the conclusion of the TPNW may make it more difficult to maintain a positive dynamic in this institution. The First Committee of the General Assembly (held in October/November 2017) was where this tension was first expressed. The debate on nuclear weapons has further highlighted the opposition between proponents of the ban and proponents of a "progressive" and concrete approach to nuclear disarmament. The latter group still hopes that the conclusion of the TPNW will finally free up these energies, previously harnessed towards this goal, in order to redirect them towards the rallying of new support. However, it is feared that this divide will persist and indeed worsen, which would affirm its distinctly political dimension. The NPT may suffer the consequences.

65. Susi Snyder, "Amalgamated Bank – a step in the right direction," dontbankonthebomb.com, 21 September 2017.

66. IKV Pax Christi, a member of PAX, was very active in the campaign against investment following the adoption of the Oslo Convention. A *Guardian* article recognizes the effect of the movement: "UK banks and insurers blacklist cluster bomb manufacturers," *The Guardian*, 9 April 2012.

67. See notably PAX's presentations for the second OEWG (available on the website Don't Bank on the Bomb).

68. J. Goldblat is the author of a reference book entitled "Arms control," SAGE Publications, 2002.

Although proponents of the TPNW argue otherwise, this new treaty, especially in its final version,⁶⁹ is an additional blow to the already weakened NPT. Such a blow would probably not displease non-nuclear-armed States who consider the situation created by the NPT to be discriminatory and unfair. For different reasons, States not party to the NPT would also benefit. The next Prepcom (spring 2018) will be a test. TPNW supporters will certainly attend this Prepcom either (at best) to preserve the NPT framework or (at the very least) to convince TPNW critics that this Treaty would do no harm to the NPT (and to try to persuade those States still reluctant to sign the TPNW). An objective for these States will also be to legitimize the TPNW in the final document of the 2020 NPT review conference.⁷⁰

In the meantime, a high-level meeting of the UN Secretary General on issues of nuclear disarmament, scheduled to take place in 2018, should clarify the room for maneuver available to various actors as well as the flexibility of the agenda.

In the longer term, a new referral to the ICJ may be a logical next step in the humanitarian campaign, which may be hoping that the conclusion of the TPNW will bring something new to the table. ICAN does not seem to have won the battle on the playing field of international law as the States concerned have, in reaction to the conclusion of the TPNW, *de facto* raised multiple objections to the creation of an international norm.

CONCLUSION: DAMAGE CONTROL

The TPNW has permitted non-nuclear States to express their profound dissatisfaction with a situation that they perceive as discriminatory, unfair and intolerable — in this sense, one may consider the treaty as a form of “protest diplomacy.”⁷¹ At this stage, perhaps that is the Treaty’s only benefit.

The “good faith” of the negotiators is of little importance now and the existence of this new treaty, inconsistent as it may be, cannot be ignored. The TPNW is reminiscent of the Kellogg-Briand Pact and its “tragic failure,”⁷² as the role of nuclear weapons, far from being diminished, actually seems to be returning to the forefront of the international stage.

Beyond the scope of the press, changes in the arsenals and doctrines of a few nuclear-armed States should cause worry among those who fear nuclear weapons for their catastrophic consequences. Concern may incite these actors to work to eliminate some of the risks that emerge when nuclear weapons no longer serve the purpose of preserving peace, the status quo and strategic stability, but rather support only conquest, blackmail and “aggressive sanctuarization.”⁷³

69. See above (development on the absence of the additional protocol in Article 3 of the TPNW). Article 18 states, “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.”

70. See the analysis of Dan Joyner on the blog Arms control law (“The treaty on the prohibition of nuclear weapons,” 26 July 2017) that anticipates a tense negotiation of the final document, specifically concerning the recognition of the TPNW as an element of the implementation of Article IV of the NPT. (“Many states parties to the TPNW see the new treaty as an implementation of Article VI of the NPT on nuclear disarmament, and will seek to have it acknowledged as such in the Review Conference’s final document. This will be heavily opposed by the nuclear armed states and those under their “umbrella” of nuclear protection. But negotiations on a consensus Review Conference final document are always unpredictable, and if some acknowledgment of the TPNW can be worked into it, that will represent a major political and potentially legal coup for the TPNW parties.”)

71. Interview with Guillaume Devin (Sciences Po Paris), 18 October 2017. The notion of protest diplomacy was developed by Bertrand Badie (*Le diplomate et l’intrus*, Fayard, 2008).

72. Michel Miraillet, “La Dissuasion et le second âge nucléaire,” *Politique étrangère*, Summer 2:2010, p. 373-83. Reference to the Kellogg-Briand Pact was also recently made by B. Tertrais during a seminar on deterrence and resistance, at the National Library of France (BNF), 5 October 2017.

73. Corentin Brustlein, “À l’ombre de la dissuasion : la sanctuarisation agressive”, *Les Grands Dossiers de Diplomatie*, October-November 2013.

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