

Research Paper

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NATO and the Frameworks of Nuclear Non-proliferation and Disarmament

Challenges for the 10th NPT Review Conference



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Summary

- The 10th five-yearly Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (the NPT) was due to take place in April–May 2020, but has been postponed because of the COVID-19 pandemic.
- In force since 1970 and with 191 states parties, the NPT is hailed as the cornerstone of a rules-based international arms control and non-proliferation regime, and an essential basis for the pursuit of nuclear disarmament. But successive review conferences have been riven by disagreement between the five nuclear weapon states and many non-nuclear weapon states over the appropriate way to implement the treaty's nuclear disarmament pillar.
- Although the number of nuclear weapons committed to NATO defence has been reduced by over 90 per cent since the depths of the Cold War, NATO nuclear weapon states, and their allies that depend on the doctrine of extended nuclear deterrence for their own defence, favour continued retention of the remaining nuclear weapons until the international security situation is conducive to further progress on nuclear disarmament.
- The test of a constructive NPT Review Conference will be the extent to which broad engagement can be achieved on how and where to find common ground on practical ways forward for nuclear disarmament during the next five-year review cycle. In this regard, NATO allies are likely to promote the US-led Creating an Environment for Nuclear Disarmament (CEND) process, and other new initiatives with which NATO members are associated.
- Though not likely to be in force by the time of the forthcoming Review Conference, the recent negotiation of the Treaty on the Prohibition of Nuclear Weapons (TPNW) also brings a new dimension to the debate on how best to implement the NPT's nuclear disarmament pillar. The challenge for the Review Conference will be to acknowledge that papering over the differences inherent in the competing perspectives on, and approaches to, nuclear disarmament is not a desirable way of marking the first half-century of the NPT. Nor, more importantly, will it help pave the way to a calmer global security environment in which the risks of both nuclear proliferation and use of nuclear weapons are reduced and ultimately eliminated.

1. Introduction

We strive for a world free of nuclear weapons because we know these weapons pose a unique and potentially existential threat to our planet. We know any use of nuclear weapons would be a humanitarian catastrophe.

UN Secretary-General António Guterres, 2019¹

The next five-yearly review of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (the Non-Proliferation Treaty – NPT), originally scheduled for April–May 2020, has been postponed because of the COVID-19 pandemic.² The Review Conference, when circumstances allow it to take place, will be the first since the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW) in July 2017. A number of NPT states parties, among them the nuclear weapon states and most members of the North Atlantic Treaty Organization (NATO), with the exception of the Netherlands,³ chose not to participate in the UN conference that adopted the TPNW, rejecting or casting doubt on its likely efficacy as an ‘effective measure’ for nuclear disarmament in terms of the NPT.⁴

Although the TPNW has not yet entered into force,⁵ it will nonetheless loom large over the next NPT Review Conference. This is because the TPNW has served to underline various pressure points in the NPT that, although not new, have not previously been quite so clear cut. While NPT parties are sometimes described as the nuclear ‘haves’⁶ and ‘have nots’,⁷ a sizeable number of the latter are militarily aligned to and are protected by the nuclear weapons of the former under a so-called ‘nuclear umbrella’.⁸

¹ Guterres, A. (2019), ‘Remarks at Commemoration of the International Day for the Total Elimination of Nuclear Weapons’, 26 September 2019, <https://www.un.org/sg/en/content/sg/speeches/2019-09-26/commemoration-of-int-day-for-elimination-of-nuclear-weapons-remarks> (accessed 29 Oct. 2019).

² The 10th NPT Review Conference was due to take place from 27 April to 22 May 2020, but has been postponed in light of the COVID-19 pandemic. As of May 2020 it had not been possible to confirm the new dates for the Review Conference: in late April the President-designate of the 2020 NPT Review Conference, Gustavo Zlaugvinen, announced his intention to seek – on the eventual resumption of activities at UN headquarters, if the COVID-19 situation allows it and if no alternative dates can be confirmed – a formal decision from states parties to hold the Review Conference from 4–29 January 2021. For further details, see UNODA (2020), Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), <https://www.un.org/en/conferences/npt2020> (accessed 11 May 2020).

³ The Netherlands was the only NATO member state to participate in the negotiations leading to the adoption of the TPNW. The Netherlands voted against the adoption of the Treaty. See also the North Atlantic Council’s Statement on the TPNW: NATO (2017), ‘North Atlantic Council Statement on the Treaty on the Prohibition of Nuclear Weapons’, 20 September 2017, https://www.nato.int/cps/en/natohq/news_146954.htm (accessed 4 Mar. 2020).

⁴ Article VI of the NPT stipulates that parties will ‘pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament’.

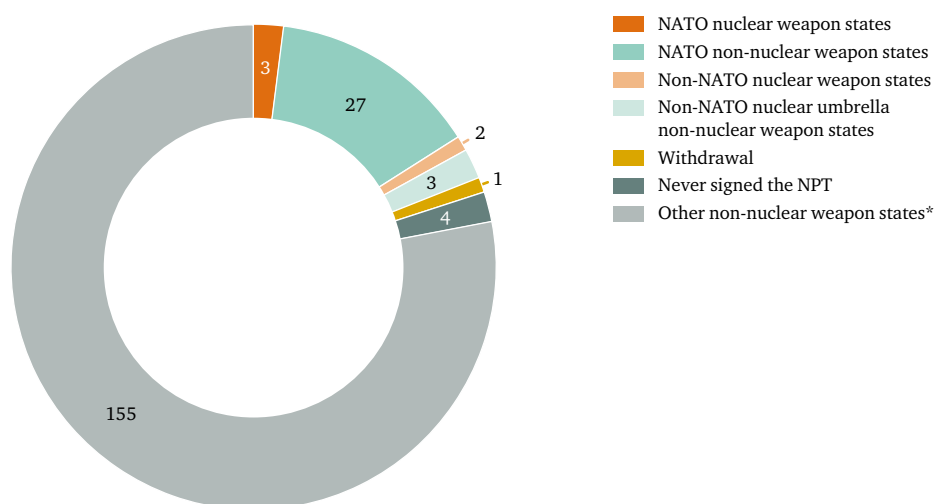
⁵ Article 15 of the TPNW stipulates that 50 instruments of ratification, acceptance, approval or accession are required for the treaty to enter into force. As of May 2020, 37 states had deposited such instruments.

⁶ Numbering five states (the People’s Republic of China, France, Russia, the UK and the US), commonly referred to as nuclear weapon states. States outside the NPT that possess or are believed to possess nuclear weapons – sometimes differentiated from the NPT nuclear weapon states by the term nuclear-armed states – are the DPRK (which announced its withdrawal from the NPT in 2003), India, Pakistan and Israel.

⁷ 185 non-nuclear weapon states.

⁸ Of NATO’s Partnership for Peace (PfP) programme, Austria has signed and ratified the TPNW, and Ireland has signed but not yet ratified. PfP countries may choose individual partnership activities on which to cooperate with NATO outside the nuclear realm. For instance, Ireland partners with NATO as part of its PfP membership in areas including the protection of civilians, as well as the protection of children in armed conflict. See Department of Foreign Affairs and Trade, ‘Ireland in the Partnership for Peace Programme’, <https://www.dfa.ie/partnership-for-peace/ireland-in-the-partnership-for-peace-programme/> (accessed 4 Mar. 2020).

Figure 1. Status of the Treaty on the Non-Proliferation of Nuclear Weapons



* Including two UN non-member states/permanent observers, the Holy See and the State of Palestine.

Perspectives of members of such alliances on the one hand, and proponents of the TPNW on the other, are contrasted in this paper. Perceptions of what underpins strategic stability are, in effect, competing with what some see as the humanitarian imperative for the elimination of nuclear arms.⁹ In any event, strong tribalism¹⁰ associated with these viewpoints has wreaked mistrust and misunderstanding in nuclear disarmament forums. The upcoming NPT Review Conference needs to lay the basic groundwork for identifying and recognizing the sources of this situation, and chart a course for addressing them in the next review cycle.

⁹ Afina, Y., Borrie, J., Caughley, T., Ritchie, N., Wan, W. (2017), *Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban: The New Treaty: Taking Stock*, UNIDIR, p. 10, <https://www.unidir.org/sites/default/files/publication/pdfs/-en-687.pdf> (accessed 7 Oct. 2019). As noted by one observer, the implicit prohibition in the TPNW would force ‘umbrella states to pick a side on an issue that they would have preferred stayed under the radar’. See Harries, M. (2017), ‘The ban treaty and the future of US extended nuclear deterrence arrangements’, in Shetty, S. and Raynova, D. (eds) (2017), *Global Perspectives on the Nuclear Ban Treaty: Global Security Special Report*, European Leadership Network, <https://europeanleadershipnetwork.org/wp-content/uploads/2017/12/ELN-Global-Perspectives-on-the-Nuclear-Ban-Treaty-December-2017.pdf> (accessed 11 Oct 2019).

¹⁰ For a discussion on tribalism in the context of the nuclear arms race, see Thompson, J. A. (1988), ‘Tribalism and the arms race trap’, *Medicine and War*, 4(1), pp. 37–47, doi: 10.1080/07488008808408785 (accessed 29 Oct. 2019).

2. Background

NPT: Nuclear disarmament versus non-proliferation

Disagreement between the five nuclear weapon states parties to the NPT and many non-nuclear weapon states over the commitment by the nuclear weapon states to the nuclear disarmament pillar¹¹ of the treaty has long plagued NPT review cycles, and indeed helped precipitate the TPNW. This chronic divide in the NPT on the emphasis afforded to non-proliferation over nuclear disarmament will be placed in particularly stark relief during the upcoming review. This is because March 2020 marked 50 years since the NPT entered into force and 25 years since its indefinite extension, milestones that are not inconsequential for a treaty that is an essential bulwark against the spread of nuclear weapons and is thus fundamental to global security. Under the NPT, almost all of the international community of states legally bound themselves never to acquire nuclear weapons. They undertook that obligation in the expectation that existing nuclear arsenals would in due course be eliminated (hence the original intention that the treaty would have a duration of 25 years). In the half-century of the treaty's existence, considerable reductions have indeed been made, but these have plateaued in recent years.¹²

NATO and nuclear weapons

Nuclear weapons form part of the arsenals of five states within the NPT, and three outside (India, Pakistan and North Korea). One non-NPT state – Israel – may also possess a nuclear weapon capability but does not officially confirm this.¹³ As already noted, all other countries renounced the acquisition of nuclear weapons by becoming party to the NPT. Many of this latter group, however, have formed military alliances with nuclear weapon states. One such alliance is NATO,¹⁴ three members of which possess nuclear weapons.¹⁵ NATO was established in 1949 under the North Atlantic (or Washington) Treaty. It functions as a transatlantic security and defence community, consisting of 30 European and North American countries that have committed themselves to advancing their individual and collective security.

¹¹ The NPT's three pillars also include peaceful uses of nuclear technology and, for our current purposes, non-proliferation. In the aftermath of the launch by US President George W Bush of the Proliferation Security Initiative (PSI) in May 2003 during the Iraq War, a number of non-nuclear weapon states questioned the emphasis being placed on non-proliferation in NPT meetings at the expense of the nuclear disarmament pillar.

¹² The maximum global inventory of nuclear weapons of various kinds reached almost 70,000 at the height of the Cold War in 1986. As of January 2019, the total global inventory of nuclear weapons was estimated at 13,865. See SIPRI (2019), *SIPRI Yearbook 2019: Armaments, Disarmament and International Security*, Oxford: Oxford University Press; and Fedchenko, V. (2016), 'Is there hope for nuclear disarmament?', SIPRI WritePeace blog, 26 September 2016, <https://www.sipri.org/commentary/blog/2016/there-hope-nuclear-disarmament> (accessed 17 Oct. 2019).

¹³ India, Israel and Pakistan have not joined the NPT, while North Korea withdrew from it in 2003. China, France, Russia, the UK and the US are the other five states possessing nuclear weapons; all are NPT parties.

¹⁴ North Atlantic Treaty Organization (NATO) (2019), 'Member countries', https://www.nato.int/cps/en/natohq/topics_52044.htm (accessed 11 Oct. 2019).

¹⁵ France, the UK and the US. These states were estimated by SIPRI to have approximately 300, 200 and 6,185 nuclear arms respectively as of January 2019. Of the three, only the UK and the US make any parts of their nuclear force available to NATO, and only the US specifically earmarks nuclear weapons to NATO. See SIPRI (2019), *SIPRI Yearbook 2019*.

As a legal matter, NATO Allies are bound by the UN Charter, since all NATO members also belong to the UN. Indeed, Article 7 of the North Atlantic Treaty stipulates that the UN Security Council retains ‘primary responsibility’ in matters of international peace and security, and that the North Atlantic Treaty does not affect its member states’ existing rights and obligations under the UN Charter.¹⁶ Neither the UN Charter nor the North Atlantic Treaty makes specific reference to nuclear weapons.

The members of NATO are also governed by non-legally binding but politically influential policy documents such as the 2010 NATO Strategic Concept.¹⁷ Under this concept, NATO aims to ‘create the conditions for a world without nuclear weapons’. This objective is linked to NATO’s commitment to seek ‘a safer world’, and to the goals of the NPT.¹⁸ Notably in this respect, NATO states that there has been a more than 90 per cent reduction in the number of nuclear weapons committed to NATO defence since the height of the Cold War (i.e. since the early 1980s).¹⁹ It is also clear that NATO allies view the NPT as a ‘cornerstone’ of global nuclear non-proliferation efforts, and an essential basis for the pursuit of nuclear disarmament.²⁰

NATO states that there has been a more than 90 per cent reduction in the number of nuclear weapons committed to NATO defence since the height of the Cold War.

Nonetheless, the 2010 Strategic Concept states that NATO is committed to remaining ‘a nuclear alliance’²¹ for as long as nuclear weapons exist, but that it will do so at the ‘lowest possible level’.²² The Strategic Concept notes that the ‘circumstances in which any use of nuclear weapons might have to be contemplated are extremely remote’. It also takes the view that ‘an appropriate mix of nuclear and conventional capabilities’ should remain the basis of NATO’s approach to deterrence.²³ NATO sees nuclear weapons, however, as ‘the supreme guarantee of the security of the Allies’.²⁴

Although just three of NATO’s members possess nuclear weapons, the Alliance seeks to ensure the ‘broadest possible participation of Allies in collective defence planning on nuclear roles, in peacetime basing of nuclear forces, and in command, control and consultation arrangements’.²⁵ In this sense, the 27 NATO member states that have renounced the option to acquire nuclear weapons under the NPT actively participate in consultations and exercises involving nuclear weapons, and otherwise prepare for and facilitate the potential use of nuclear arms by the Alliance.²⁶ Moreover, all members of NATO,

¹⁶ Article 7, 1949 North Atlantic Treaty.

¹⁷ NATO (2010), *Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf (accessed 11 Oct. 2019); NATO (2018), ‘Strategic Concepts’, https://www.nato.int/cps/en/natohq/topics_56626.htm (accessed 1 Oct. 2019).

¹⁸ NATO (2010), *Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, para. 26.

¹⁹ NATO (2019), ‘Arms control, disarmament and non-proliferation in NATO’, https://www.nato.int/cps/en/natohq/topics_48895.htm (accessed 11 Oct. 2019).

²⁰ For example, see the Netherlands’ Statement to the United Nations General Assembly First Committee, 6 October 2017, <https://undocs.org/A/C.1/72/PV.6> (accessed 11 Oct. 2019).

²¹ According to some experts, NATO states’ individual nuclear policy evolved into an Alliance policy over time, and NATO ‘never described itself as a nuclear alliance prior to 2010’. See, Egeland K. (2019), ‘Spreading the Burden: How NATO Became a ‘Nuclear’ Alliance’, *Diplomacy & Statecraft*, 31(1), pp. 143–167, doi: 10.1080/09592296.2020.1721086 (accessed 31 Mar. 2020).

²² NATO (2010), *Active Engagement Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization*, para. 26.

²³ *Ibid.*, para. 14.

²⁴ *Ibid.*, para. 18.

²⁵ *Ibid.*, para. 19.

²⁶ Eide, S.-I. L. (2014), *A Ban on Nuclear Weapons: What’s In It for NATO?*, International Law and Policy Institute, <http://nwp.ilpi.org/wp-content/uploads/2015/03/PP05-14-NATO-and-a-BAN.pdf> (accessed 11 Oct. 2019).

with one exception, attend meetings of the Nuclear Planning Group (NPG), where members formulate the Alliance's policy on nuclear posture, irrespective of whether they possess nuclear weapons.²⁷ The exception is France, which has chosen to remain outside the NPG in pursuit of its own national nuclear strategy.

Notably, too, five NATO states (Belgium, Germany, Italy, the Netherlands and Turkey²⁸) currently host forward-deployed nuclear weapons in Europe on behalf of the US (in some cases maintaining aircraft to ensure that US nuclear weapons stationed in Europe can be used by Allied forces if deemed necessary).²⁹ While NATO neither confirms nor denies the number or exact location of these weapons, it has been estimated that the US deploys somewhere between 150 and 240 air-delivered nuclear weapons at six air force bases in the five host countries.³⁰ Although sometimes called into question, the compatibility between these hosting arrangements and the NPT has been defended on the basis that these arrangements were well known at the time the treaty was negotiated.³¹ Because of space constraints, this aspect will not be addressed in this paper.

²⁷ NATO (2019), 'Nuclear Planning Group (NPG)', http://www.nato.int/cps/en/SID-24A1E2F6-99731ECC/natolive/topics_50069.htm (accessed 11 Oct. 2019).

²⁸ The US has withdrawn nuclear weapons once held in Greece and the UK, and from one base in Germany. See Panda, A. (2019), 'Why Are U.S. Nuclear Bombs Still in Turkey?', *New Republic*, 15 October 2019, <https://newrepublic.com/article/155381/us-nuclear-bombs-still-turkey> (accessed 28 Nov. 2019).

²⁹ The 2018 US Nuclear Posture Review, under the Trump administration, asserts that modernizing dual-capable fighter bombers 'will maintain the strength of NATO's deterrence posture and maintain our ability to forward deploy nuclear weapons'. See US Department of Defense (2018), *Nuclear Posture Review*, <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF> (accessed 11 Oct. 2019).

³⁰ See Joyner, D. (2017), 'The Treaty on the Prohibition of Nuclear Weapons', EJIL: Talk! Blog of the *European Journal of International Law*, 26 July 2017, <https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/> (accessed 11 Oct. 2019).

³¹ See for example Kotch, J. B. (1967), 'NATO Nuclear Arrangements in the Aftermath of MLF: Perspectives on a Continuing Dilemma', *Air University Review*, 18(3), pp. 78–87, cited in Alberque, W. (2017), *The NPT and the Origins of NATO's Nuclear Sharing Arrangements*, IFRI, https://www.ifri.org/sites/default/files/atoms/files/alberque_npt_origins_nato_nuclear_2017.pdf (accessed 17 Oct. 2019).

3. NATO and the NPT

Two aspects related to the possession of and reliance on nuclear weapons have come to the fore in the current NPT review cycle. The first arises in connection with the serious state of international security, while the second, involving the doctrine of deterrence, has been brought into close scrutiny by the emergence of the TPNW. They are examined here under these propositions:

1. **Global security environment:** To what extent does the current global security environment constitute a valid justification for retaining nuclear weapons (in current numbers as well as modernizing them)?
2. **Extended deterrence:** On what premise do those non-nuclear weapon states that are members of nuclear alliances base their reliance on a class of weapon of mass destruction that they renounced when they joined the NPT?

Global security environment

While all nuclear and non-nuclear states parties to the NPT share legal obligations and a mutual commitment to non-proliferation, they have long contested the weight of attention that should be placed on implementation of the nuclear disarmament obligation. This dynamic – a feature of the review conferences – is currently reflected in the stance of nuclear weapon states and their allies³² that today's tense international environment is not conducive to further progress on nuclear disarmament. For instance, a 2017 NATO communiqué emphasized:

... progress on arms control and disarmament must take into account the prevailing international security environment. We regret that the conditions for achieving disarmament are not favourable today.³³

With North Korea and, to a lesser extent, Iran in mind, proponents of this view often maintain that the focus should instead be on actual or suspected instances of nuclear proliferation.³⁴

Prevention of nuclear weapon proliferation is a matter of universal interest. In the NPT context, however, two related matters arise. Does actual or suspected proliferation justify the continued retention of existing nuclear arsenals of NPT parties until global security is somehow restored and reductions are resumed? And until that point is reached (as determined by whom and how?), can non-nuclear weapon parties to the NPT legitimately shelter under the nuclear umbrella

³² See for example UK Mission to UN in New York and UK Mission to the WTO, UN and Other International Organisations (Geneva) (2018), 'P5 Joint Statement on the Treaty on the Non-Proliferation of Nuclear Weapons', 24 October 2018, <https://www.gov.uk/government/news/p5-joint-statement-on-the-treaty-on-the-non-proliferation-of-nuclear-weapons> (accessed 22 Oct. 2019).

³³ NATO (2017), 'North Atlantic Council Statement on the Treaty on the Prohibition of Nuclear Weapons'.

³⁴ See for example the US statement to the United Nations General Assembly First Committee, 3 October 2017, <https://undocs.org/A/C.1/72/PV.3> (accessed 11 Oct. 2019).

or ‘extended deterrence’ provided by their military allies? For many non-nuclear weapon states, however, there is a *prior* question. Do existing nuclear arsenals undermine³⁵ rather than enhance global security – another perennial point of contention in NPT review conferences?

In other words, the likelihood that most non-nuclear weapon states would accept that global security equilibrium is essential for nuclear disarmament is low. Equally, it is unlikely that nuclear weapon states would accept that the pursuit of nuclear disarmament leads to ameliorating the security environment. NPT parties need to acknowledge that this divergence, far from reducing existing tensions in the NPT process, is in reality exacerbating international tensions.

The significance of the global security environment to the implementation of the NPT stems from several provisions of the treaty. The first of these is the penultimate paragraph of the preamble, which records the ‘desire’ of the negotiators to:

... further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.³⁶

The second provision of relevance is Article VI, a binding obligation to ‘pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control’.³⁷

Traditionally, a treaty’s preamble is not cast in binding legal terms. Rather, it reflects the purposes and considerations that motivated the parties to conclude the treaty. Its main use is to provide an interpretative tool when a specific legal obligation comes under scrutiny – in this instance, Article VI.³⁸ The preamble reflects the expectation of the negotiators that an easing of tension and a building of trust would progressively facilitate the halting of production, the liquidation of stockpiles and the elimination of nuclear weapons from national arsenals. The key word here is ‘facilitate’. The cessation of manufacture, destruction of stockpiles and elimination of nuclear weapons and their means of delivery is not made conditional on the state of global security. Rather, it is perceived that this process will be easier in a climate of trust and reduced tension. As the preamble also envisages,

³⁵ The New Agenda Coalition goes as far as to assert that ‘nuclear weapons ultimately constitute a security risk for all states, including nuclear weapon states, and that nuclear disarmament is as much a security imperative as it is a humanitarian one’: See Working paper submitted by Brazil on behalf of the New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa) (2019), ‘Taking forward nuclear disarmament’, 26 April 2019, Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2020/PC.II/WP.13, para. 14, <https://undocs.org/pdf?symbol=en/NPT/CONF.2020/PC.III/WP.35> (accessed 11 Oct. 2019).

³⁶ Preamble, NPT.

³⁷ Article VI, NPT.

³⁸ The preambles may be considered as part of the elements contributing to the interpretation of treaties in accordance to articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

such a process would serve the declared intention of the parties of achieving ‘at the earliest possible date the cessation of the nuclear arms race’ and the undertaking of ‘effective measures in the direction of nuclear disarmament’.³⁹

The preamble to the NPT reflects the expectation of the negotiators that an easing of tension and a building of trust would progressively facilitate the halting of production, the liquidation of stockpiles and the elimination of nuclear weapons from national arsenals. The key word here is ‘facilitate’.

Reference must also be made to the phrase that is common to both the NPT preamble and Article VI: the concept of a future treaty on ‘general and complete disarmament under strict and effective international control’.⁴⁰ This ambition has been on the UN General Assembly’s agenda since 1959,⁴¹ and was declared by consensus at the General Assembly’s first Special Session on Disarmament, in 1978, to be the UN’s ‘ultimate goal’⁴² in this field.⁴³ The notion of general and complete disarmament recognizes that nuclear disarmament ‘will not occur or be sustainable in isolation of other considerations of international peace and security, including the status of conventional force holdings’, and that it will proceed only under strict and effective control – i.e. with international verification and safeguards.⁴⁴

General and complete disarmament can be likened to the comprehensive approach pursued by UN Secretary-General António Guterres’ Disarmament Agenda,⁴⁵ which ‘associates disarmament and arms control as vital to the future of international peace and security and frames the relationship between disarmament and security as mutually reinforcing and interdependent’.⁴⁶ In the case of the NPT, as just explained, security is not a prerequisite for disarmament but facilitates it. It is in this sense that NATO’s recognition of the need to create the conditions for a world without nuclear weapons should be seen.

Indeed, among NATO members, the need for shaping a constructive discussion on global security in the context of nuclear disarmament has already been recognized in a substantive manner by the US. In 2018, US Assistant Secretary (of State) Dr Chris Ford initiated a working group – Creating

³⁹ Preamble, NPT.

⁴⁰ Ibid; see also Article VI, NPT.

⁴¹ United Nations General Assembly (1959), Resolution 1378 (XIV), ‘General and complete disarmament’, 20 November 1959, [https://undocs.org/en/A/RES/1378\(XIV\)](https://undocs.org/en/A/RES/1378(XIV)) (accessed 11 Oct. 2019).

⁴² Note also the telling use of ‘ultimate objective’ in step 11 of the 13 practical steps accepted by consensus at the NPT Review Conference in 2000 (and deliberately separated from step 6 – the unequivocal undertaking by the nuclear weapon states to accomplish the total elimination of their nuclear arsenals): this phrase reflects the fundamental desire of NPT states parties to achieve general and complete disarmament as an ‘ultimate objective’ (thus implying a process beforehand), instead of seeing general and complete disarmament as a pre-requisite, *sine qua non* condition to nuclear disarmament.

⁴³ United Nations General Assembly (1978), A/S-10/2, ‘Final Document of the Tenth Special Session of the General Assembly’, paras. 109 and 111, 28 June 1978, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/A-S10-4.pdf> (accessed 22 Oct. 2019).

⁴⁴ Rydell, R. (2016), ‘Creating disarmament synergies: The general and complete disarmament multiplier’ in United Nations Office for Disarmament Affairs (2016), UNODA Occasional Papers No. 28, Rethinking General and Complete Disarmament in the Twenty-first Century, New York: United Nations Office for Disarmament Affairs, <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/publications/occasionalpapers/en/op28.pdf> (accessed 22 Oct. 2019).

⁴⁵ United Nations Office for Disarmament Affairs (2018), *Securing Our Common Future, An Agenda for Disarmament*, New York: United Nations Office for Disarmament Affairs, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2018/06/sg-disarmament-agenda-pubs-page.pdf#view=Fit> (accessed 29 Oct. 2019).

⁴⁶ See Rydell, R. (2019), ‘The Guterres Disarmament Agenda’, *Arms Control Today*, January/February 2019, <https://www.armscontrol.org/act/2019-01/features/guterres-disarmament-agenda> (accessed 29 Oct. 2019).

an Environment for Nuclear Disarmament (CEND) – on ways to make the security environment more conducive to further progress towards nuclear disarmament.⁴⁷ The inaugural meeting of the working group, attended by 42 states at the invitation of the US, was held in Washington in July 2019. Nuclear-armed states from within and outside the NPT, and non-nuclear weapon states including some NATO allies and representatives of states supporting the TPNW, participated.

Three subgroups were formed, with each one discussing these three topics:

1. Measures to modify the security environment to reduce incentives for states to retain, acquire, or increase their holdings of nuclear weapons;
2. Institutions and processes nuclear weapon states and non-nuclear weapon states can put in place to bolster non-proliferation efforts and build confidence in nuclear disarmament; and
3. Interim measures to reduce the likelihood of war among states that possess nuclear weapons.

The first meeting of the CEND working group took place in a constructive atmosphere, prompting the idea of expanding the number of country and civil society participants.⁴⁸ The US, however, in its original invitation did encourage invitees to consult others in their region to identify local or other security conditions affecting disarmament prospects. Leaving aside the prospects for expanding CEND participation, its establishment represents at least a willingness to provide a forum for constructive dialogue. A further, slightly smaller, meeting was held in London in November 2019. A third meeting was anticipated for early 2020, but, like the Review Conference, has been postponed because of COVID-19.⁴⁹ As in the NPT Review Conference, it is up to states as to how they fashion such tools for progress.

Extended nuclear deterrence

The doctrine of nuclear deterrence is employed by nuclear weapon states as a means of dissuading an adversary from attacking them or, via ‘extended deterrence’, their alliance partners, out of fear of retaliatory strikes using nuclear weapons.⁵⁰ Deterring aggression is a long-standing tenet of human survival – one that has been given new meaning in the nuclear age. This is because the inherent threat of use of nuclear weapons in retaliation for an act of aggression relies on inducing ‘caution in others by threats of pain’, the failure of which would result in catastrophic consequences.⁵¹

⁴⁷ Working paper submitted by the United States of America (2019), ‘Operationalizing the Creating an Environment for Nuclear Disarmament (CEND) Initiative’, 26 April 2019, Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT/CONF.2020/PC.III/WP.43, <https://undocs.org/pdf?symbol=en/NPT/CONF.2020/PC.III/WP.43> (accessed 11 Oct. 2019).

⁴⁸ For commentary on CEND’s work, see Potter, W. C. (2019), ‘Taking the Pulse at the Inaugural Meeting of the CEND Initiative’, *Middlebury Institute of International Studies at Monterey*, 15 July 2019, <https://www.nonproliferation.org/taking-the-pulse-at-the-inaugural-meeting-of-the-cend-initiative/> (accessed 11 Oct. 2019). See further points: Burford, L., Meier, O., Ritchie, N. (2019), ‘Sidetrack or kickstart? How to respond to the US proposal on nuclear disarmament’, *Bulletin of the Atomic Scientists*, April 19, 2019, <https://thebulletin.org/2019/04/sidetrack-or-kickstart-how-to-respond-to-the-us-proposal-on-nuclear-disarmament/> (accessed 11 Oct. 2019).

⁴⁹ U.S. Department of State, Bureau of International Security and Nonproliferation (2019), ‘Creating an Environment for Nuclear Disarmament Working Group Meets in Wilton Park’, Press Release, 27 November 2019, <https://www.state.gov/creating-an-environment-for-nuclear-disarmament-working-group-meets-in-wilton-park/> (accessed 11 Dec. 2019).

⁵⁰ For a definition of ‘extended deterrence’, see Anderson, J. V., Larsen, J. A., Holdorf, P. M. (2013), *Extended Deterrence and Allied Assurance: Key Concepts and Current Challenges for U.S. Policy*, INSS Occasional Paper, US Air Force Institute for National Security Studies, USAF Academy, Colorado, <https://www.usafa.edu/app/uploads/OCP69.pdf> (accessed 29 Oct. 2019).

⁵¹ Borrie, J. (2020), ‘Human Rationality in Nuclear Deterrence’, in Unal, B., Afina, Y. and Lewis, P. (eds) (2020), *Perspectives on Nuclear Deterrence in the 21st Century*, Research Paper, London: Royal Institute of International Affairs, p. 8, <https://www.chathamhouse.org/sites/default/files/2020-04-20-nuclear-deterrence-unal-et-al.pdf> (accessed 19 May 2020).

Indeed, the deep concern about the ‘catastrophic humanitarian consequences of any use of nuclear weapons’ that was shared by all NPT states parties in the agreed outcome to the 2010 Review Conference recalls the stark wording in the preamble to the NPT: ‘the devastation that would be visited upon all mankind by a nuclear war’.⁵² Given the immensity of the consequences of nuclear war, the risk of failing to avert such a calamity evokes the Cold War label ‘mutually assured destruction’, or MAD – an acronym not coined in jest.⁵³

The dependence of some non-nuclear weapon states on nuclear alliances is in fact often seen by those non-nuclear weapon states that are without such alliances or binding assurances for their own security as inconsistent with the spirit of the NPT’s non-proliferation pillar, as well as with the nuclear disarmament one. That is, as long as nuclear weapons are claimed to provide security for some states, others may want to acquire them for their own security. Another angle, as noted by former Canadian ambassador Paul Meyer, is that the ‘dissenting minority’ of non-nuclear weapon states are in effect obliged, as nuclear alliance states:

... to affirm that nuclear weapons have security benefits, which sits uneasily with traditional support for nuclear disarmament under the NPT including the 2000 NPT Review Conference’s “unequivocal undertaking by the nuclear weapon states to accomplish the total elimination of their nuclear arsenals.”⁵⁴

For nuclear weapon states, however, and for their military allies, reliance on nuclear arms to deter attacks on any of them carries an unshakeable logic despite – indeed because of – the high stakes involved. Nuclear weapons are seen as having helped avert major, region-wide conflicts for over 70 years.⁵⁵ It is the existence of nuclear weapons, by this logic, that prevents any humanitarian catastrophe. That is not to say that these states relish the prospect of any use of nuclear weapons.⁵⁶ Indeed, they claim principled leadership in their strenuous efforts taken during the life of the NPT to date to discourage, curtail, prevent or obviate proliferation by other states. In this regard, it is generally accepted that the fact that the number of countries in possession of a nuclear arsenal remains in single figures is a major success of international vigilance and of the treaty itself. Commenting in 2017 on the ‘profound link between non-proliferation and extended nuclear deterrence’, former NATO deputy secretary-general Rose Gottemoeller asserted that the US nuclear umbrella had in essence made the NPT possible:⁵⁷ ‘It gave U.S. allies and partners in Europe and Asia the confidence to put aside their own nuclear weapons research and to become non-nuclear

⁵² Preamble, NPT.

⁵³ Jervis, R. (2009), ‘The Dustbin of History: Mutual Assured Destruction’, *Foreign Policy*, 9 November 2009, <https://foreignpolicy.com/2009/11/09/the-dustbin-of-history-mutual-assured-destruction/> (accessed 16 Oct. 2019).

⁵⁴ Meyer, P. (2018), *Folding the Umbrella: Nuclear Allies, the NPT and the Ban Treaty*, Policy Brief No. 58, Asia Pacific Leadership Network for Nuclear Non-Proliferation and Disarmament, Toda Peace Institute, <http://www.isodarco.it/courses/kyrenia19/doc/policy-Brief-No%2058-Folding-the-Umbrella.pdf> (accessed 11 Oct. 2019).

⁵⁵ Tannenwald, N. (1999), ‘The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use’, *International Organization*, 53(1), pp. 433–468, <https://www.jstor.org/stable/2601286?seq=1> (accessed 6 Jan. 2020).

⁵⁶ For example, the 2018 Brussels Summit Declaration stipulates that while the ‘fundamental purpose of NATO’s nuclear capability is to preserve peace, prevent coercion, and deter aggression’, the ‘circumstances in which NATO might have to use nuclear weapons are extremely remote’. This demonstrates that while nuclear weapons remain at the heart of the Alliance’s security, NATO perceives the use of nuclear weapons as highly exceptional. See NATO (2018), ‘Brussels Summit Declaration’, https://www.nato.int/cps/en/natohq/official_texts_156624.htm (accessed 16 Oct. 2019).

⁵⁷ NATO (2016), ‘Remarks by NATO Deputy Secretary General Rose Gottemoeller during a panel discussion on Perspectives for a World Free from Nuclear Weapons at Vatican City’, https://www.nato.int/cps/en/natohq/opinions_148789.htm?selectedLocale=en (accessed 11 Oct. 2019). For a discussion on the TPNW and nuclear umbrella arrangements, see Human Rights Program at Harvard Law School (2018), *Nuclear Umbrella Arrangements and the Treaty on the Prohibition of Nuclear Weapons*, International Human Rights Clinic, Harvard Law School, http://hrp.law.harvard.edu/wp-content/uploads/2018/06/Nuclear_Umbrella_Arrangements_Treaty_Prohibition.pdf (accessed 24 Oct. 2019).

weapon states under the NPT.⁵⁸ This should, however, be considered alongside other factors that may have dissuaded those states from developing their own nuclear weapons programme, including the transfer of knowledge for peaceful uses of nuclear energy.⁵⁹

The dependence of some non-nuclear weapon states on nuclear alliances is in fact often seen by those non-nuclear weapon states that are without such alliances or binding assurances for their own security as inconsistent with the spirit of the NPT's non-proliferation pillar, as well as with the nuclear disarmament one.

The doctrine of *nuclear* deterrence, nonetheless, is the source of constant tension among NPT states parties. The need to deter conflict as much as possible is not contentious. What is at issue, in the view of many non-nuclear weapon states, is the threat of use of nuclear weapons to deter aggression. Deployment of such destructive and inherently indiscriminate armaments is regarded by those states as incompatible with international humanitarian law. Failure of the doctrine of nuclear deterrence, as already noted, could entail a humanitarian tragedy of regional, if not, global consequence, with disproportionate civilian casualties.

NATO: extended deterrence and threat of use

Any legal discussion of nuclear deterrence invites consideration of the use or threat of use of nuclear weapons. In the case of an explicit threat of use, the 1996 advisory opinion of the International Court of Justice (ICJ) on the *Legality of the Threat or Use of Nuclear Weapons*⁶⁰ held that it was unlawful to issue threats that would be illegal if carried out in practice. But the court declined to address the matter of whether the use of nuclear weapons would be unlawful when the 'survival' of the state using nuclear weapons was in jeopardy – that is, as an act of self-defence.

On the one hand, this could be interpreted as suggesting that, as far as an alliance is concerned, the threat or use of nuclear weapons would not be permissible if carried out on behalf of another state, as the survival of the user would presumably not be in jeopardy.⁶¹ On the other, the practice of extended nuclear deterrence could be seen as constituting part of the inherent right of states to undertake collective self-defence, enshrined in Article 51 of the UN Charter.⁶² The practice

⁵⁸ Ibid.

⁵⁹ Benoît Pelopidas explored whether extended deterrence could be either a sufficient or a necessary condition for non-proliferation, and argues that it has been neither. See Pelopidas, B. (2015), 'A Bet Portrayed as a Certainty: Reassessing the Added Deterrent Value of Nuclear Weapons', in Shultz, G. P. and Goodby, J. E. (eds) (2015), *The War That Must Never Be Fought: Dilemmas of Nuclear Deterrence*, Stanford, CA: Hoover Institution Press.

⁶⁰ International Court of Justice (1996), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Reports of Judgments, Advisory Opinions and Orders, 8 July 1996, <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed 29 Oct. 2019).

⁶¹ Egeland, K. (2019), 'Arms, Influence and the Treaty on the Prohibition of Nuclear Weapons', *Survival*, 61(3), p. 67, doi: 10.1080/00396338.2019.1614786 (accessed 29 Oct. 2019); see also: Hayashi, N. (2014), 'Legality Under *Jus ad Bellum* of the Threat of Use of Nuclear Weapons' in Nystuen, G., Casey-Maslen, S. and Bersagel, A. G. (eds) (2014), *Nuclear Weapons under International Law*, Cambridge: Cambridge University Press.

⁶² The term 'collective self-defence' is often interpreted as 'the well-established UN Charter right to States to defend *other States*.' See Pothelet, E. (2018), 'U.S. Military's "Collective Self-Defense" of Non-State Partner Forces: What Does International Law Say?', *Just Security*, 26 October 2018, <https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/> (accessed 12 Mar. 2020).

of collective self-defence may potentially be lawful *only* if it respects certain conditions.⁶³ In the same advisory opinion, the ICJ established that the legality of a threat to use force (thus, by extension, the policy of deterrence) is contingent on the legality of the envisaged use of force.⁶⁴ In other words, the particular use of force envisaged must not be ‘directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality’.⁶⁵ Whether the practice of extended deterrence in a given situation is lawful would therefore depend on whether the envisaged use would be lawful under international law, even if the protected state has requested such protection.

Moreover, the ICJ noted that ‘a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law’.⁶⁶ Such use of nuclear weapons would need to respect the customary rules of distinction (between combatants and civilians, and between military objectives and civilian objects), proportionality, and precautions (that such attack would spare civilians and civilian objects). The question of whether use of nuclear weapons would inherently violate *jus in bello* (international humanitarian law, or the law of armed conflict) is beyond the scope of this paper.⁶⁷

To anticipate briefly the next chapter of this paper, it has been argued for alliance partners, that passive reliance by a non-nuclear weapon state on the nuclear weapons of a state with which it is allied under extended deterrence would not be inconsistent with the TPNW’s prohibition of threatening to use under Article 1.1 (d). Nor would that provision encompass the mere possession of nuclear weapons: nuclear deterrence is not in and of itself an unlawful threat to use nuclear arms.⁶⁸ But this point should not be taken to be founded on, or to extend to, any claim that nuclear deterrence may be considered as a legitimate means of obviating use of those arms. Taken to its logical conclusion, the rationalization that the nuclear deterrence doctrine exists in effect to forestall the detonation (and non-proliferation) of nuclear weapons – i.e. that the use of nuclear weapons, for as long as such weapons exist, is confined to preventive purposes, sits uneasily with the objects and purposes of the NPT as outlined earlier. If this point is a defence of the status quo, it sits uncomfortably with the reality that in today’s fractious world the risks of nuclear warfare appear greater than they have been since the depths of the Cold War.⁶⁹

⁶³ It is a rule of customary international law that the basis of the exercise of the right to self-defence lies on the conditions of (1) necessity, and (2) proportionality, as established by the ICJ in the *Nicaragua v. United States of America* case of 1986: International Court of Justice (1986), *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, Reports of Judgments, Advisory Opinions and Orders, 27 June 1986, <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> (accessed 12 Mar. 2020).

⁶⁴ International Court of Justice (1996), *Legality of the Threat or Use of Nuclear Weapons*, paras 47–48: ‘If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4’ of the UN Charter.

⁶⁵ *Ibid.*, para. 48.

⁶⁶ *Ibid.*, para. 42.

⁶⁷ For an in-depth discussion on the legal consequences of a nuclear detonation under international humanitarian law, see Maresca, L. and Mitchell, E. (2015), ‘The human costs and legal consequences of nuclear weapons under international humanitarian law’, *International Review of the Red Cross*, 97(899), pp. 621–645, https://international-review.icrc.org/sites/default/files/irc97_8.pdf (accessed 17 Mar. 2020).

⁶⁸ Norwegian People’s Aid, *Nuclear Weapons Ban Monitor 2019, TPNW Status and Compliance*, p.47, https://banmonitor.org/files/Nuclear_Weapons_Ban_Monitor_2019.pdf (accessed 28 Nov. 2019).

⁶⁹ Wan, W. (2019), *Nuclear Risk Reduction*, United Nations Institute for Disarmament Research, <https://unidir.org/files/publications/pdfs/nuclear-risk-reduction-a-framework-for-analysis-en-809.pdf> (accessed 28 Nov. 2019).

4. NATO: the NPT and the TPNW

The historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term humanitarian, social, economic and environmental impacts. These effects, whether resulting from a deliberate or accidental detonation, are unlikely to be constrained by national borders: as with climate change, every human being has a stake in the avoidance of nuclear war. Following the deep concern expressed by NPT parties in 2010 about the catastrophic humanitarian consequences of the use of nuclear weapons, a series of Conferences on the Humanitarian Impact of Nuclear Weapons was convened. The first of these took place in Oslo in March 2013, and was attended by all non-nuclear NATO Alliance member states. The three nuclear weapon NATO states boycotted the first and second meetings (the latter held in Nayarit, Mexico, in February 2014), as did China and Russia, although the UK and the US did attend the final one of the series, which took place in Vienna in December 2014.

Tracing the development of and reasons for the opposition that later developed among NATO members towards the impetus for a binding nuclear weapons prohibition as a tangible product of the 'humanitarian initiative'⁷⁰ is not the purpose of this paper: suffice it to say that the only NATO nation that chose to participate in the UN conference that negotiated the TPNW was the Netherlands. When the new treaty was adopted, the Netherlands voted against it, explaining its inability to 'sign up to any instrument that is incompatible with our NATO obligations, that contains inadequate verification provisions or that undermines the Non-Proliferation Treaty'.⁷¹ At the beginning of the negotiations, the Netherlands also made it clear that any prohibition must be compatible with the NATO principles of the Deterrence and Defence Posture Review, including the notion that NATO will remain a nuclear alliance as long as nuclear weapons exist.⁷²

Historically, there have been instances where individual NATO states have adopted independent national positions on nuclear weapons and on treaties relating to them.

Historically, there have been instances where individual NATO states have adopted independent national positions on nuclear weapons and on treaties relating to them. Five members decided not to allow deployment of nuclear weapons on their territory in peacetime (Denmark, Iceland, Lithuania, Norway and Spain), and, as already noted, France chose to remain outside the NPG. Nor in the case of binding international agreements such as the Comprehensive Nuclear-Test-Ban Treaty (CTBT) have NATO members acted in concert; the US, for instance, has not ratified the CTBT, while France and the

⁷⁰ See however Kmentt, A. (2016), 'The development of the international initiative on the humanitarian impact of nuclear weapons and its effect on the nuclear weapons debate', *International Review of the Red Cross*, 97(899), pp. 681–709, doi: 10.1017/S1816383116000059 (accessed 2 Apr. 2020).

⁷¹ The Netherlands (2017), 'Explanation of vote of the Netherlands on text of Nuclear Ban Treaty', 7 July 2017, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/Netherlands-EoV-Nuclear-Ban-Treaty.pdf> (accessed 11 Oct. 2019).

⁷² The Netherlands (2017), 'United Nations Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination: agenda item 8 (b): Statement by The Netherlands', 28 March 2017, <http://statements.unmeetings.org/media2/14683480/netherlands.pdf> (accessed 16 Oct. 2019).

UK have been vocal in championing the entry into force of the treaty. But for the meantime at least, all NATO states are acting in lockstep in opposing the TPNW for the same or similar reasons to those of the Netherlands.

That opposition, discussed below, first needs to be placed in broader context. Paul Meyer has argued that the nuclear-reliant non-nuclear weapon states members of NATO had to contest the stigmatization of nuclear weapons inherent in the notion of a prohibition of those arms ‘as otherwise they would be perceived as supporters of an illegitimate weapon’.⁷³ He notes the dilemma facing that group of states given their traditional stance in support of international law, including international humanitarian law: ‘These factors’, he argues, ‘underscored the inherent ambiguity of [NATO’s] declaratory policy in favour of nuclear weapons abolition.’⁷⁴

In other words, do arguments of the kind put forward by the Netherlands during the negotiation of the TPNW point to a more deep-seated concern about the treaty? And if so, does that concern arise from fear among NATO members that the mere existence of a prohibition treaty – even one from which they have withheld their signature – may help delegitimize nuclear weapons and thus erode the doctrine of nuclear deterrence on which they see their security as dependent?⁷⁵ If, in reality, their criticisms of the TPNW were interpreted as a thinly veiled defence of the nuclear deterrence doctrine, then would that in turn be tantamount to a defence of nuclear weapons? If so, it would be unsurprising during debates at the NPT Review Conference if such a defence were to be challenged as being inconsistent with the NPT, at least in terms of the ‘spirit’ of that treaty.

These questions deliberately oversimplify the situation. They are couched in this manner not to call into question the sincerity of NATO’s ambitions both for strategic stability and a world free of nuclear weapons when conditions allow, but to lay bare a perspective that will need sensitive handling particularly during the forthcoming Review Conference. In this regard, there are a number of angles that warrant attention.

Temporality

NATO members depend on the rationalization that this state of affairs is a temporary one.⁷⁶ This case is justified only for as long as the current tumultuous global security climate lasts. It has not to date proved persuasive, given the fundamental disagreement over whether nuclear weapons are security enhancing or destabilizing. It should be noted, however, that a number of members of NATO⁷⁷ and other nuclear alliances⁷⁸ cooperate in the NPT in a cross-regional group, the Non-Proliferation and Disarmament Initiative (NPDI). The NPDI was formed in 2010 to jointly advance the nuclear disarmament and non-proliferation agendas as mutually reinforcing processes.

⁷³ Meyer, P. (2018), *Folding the Umbrella: Nuclear Allies, the NPT and the Ban Treaty*.

⁷⁴ Ibid. See also Dall, E. (2017), ‘A Balancing Act: NATO States and the Nuclear Ban Treaty’, in Shetty and Raynova (eds) (2017), *Breakthrough or Breakpoint? Global Perspectives on the Nuclear Ban Treaty*.

⁷⁵ See for example Kimball, D. G. (2017), ‘The United States and the Nuclear Ban Treaty’, in Shetty and Raynova (eds) (2017), *Breakthrough or Breakpoint? Global Perspectives on the Nuclear Ban Treaty*.

⁷⁶ During the TPNW negotiations, the Netherlands floated the notion of a ‘temporality clause’: see the Netherlands (2017), ‘Explanation of vote of the Netherlands on text of Nuclear Ban Treaty’.

⁷⁷ Canada, Germany, the Netherlands, Poland and Turkey.

⁷⁸ Australia, Japan and the Philippines.

One of the group's core objectives is to encourage greater transparency surrounding nuclear disarmament efforts, and they have tabled a number of proposals to this and other ends.⁷⁹ Using their influence with nuclear weapon states to engender true momentum for such goals will be essential to assuage sceptics about the commitment to nuclear disarmament of alliance states that are reliant on extended nuclear deterrence at least for the time being.

Sequence, timeframes

Incorporation of timelines for taking steps from transparency measures to weapons reductions has long been resisted by nuclear weapon states; there has long been disagreement, too, over the appropriate sequencing of moving towards the elimination of nuclear weapons. These are chronic sources of tension in the five-yearly review cycles, and the emergence of the TPNW is perhaps emblematic of these failings. While there is widespread recognition that a prohibition treaty is a necessary step in the process of securing a world free of nuclear weapons, for nuclear weapon states and their allies taking such a step now is premature. Ultimately, once the possessors of nuclear weapons have negotiated the destruction of all nuclear arsenals, the purpose of a prohibition will be to prevent the manufacture of new ones. This is not a case of putting the 'nuclear genie' back in the bottle. Rather, it will constitute a renunciation of nuclear weapons by the possessing states comparable to that already made by the non-nuclear weapon states under the NPT – a fundamental obligation that the TPNW reinforces.⁸⁰

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As an aside, the argument that the negotiation of a prohibition instrument was premature represents a lost opportunity: it could have been made at the start of the negotiation process by the proponents of that view had they chosen to participate. But in another sense, Article 4 of the TPNW, on the steps to advance the elimination of nuclear weapons, is a careful and deliberate elaboration by the negotiators of a means – supplemented by judicious decisions of meetings of states parties (Article 8) – to extend the prohibition treaty in a manner that meets this criticism of untimeliness.

⁷⁹ See *inter alia* Preparatory Committee for the Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons 'Proposals by the Non-Proliferation and Disarmament Initiative to enhance transparency for strengthening the review process for the Treaty on the Non-Proliferation of Nuclear Weapons', Working Paper NPT/CONF.2020/PC.III/WP.24; Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (2018), NPT/CONF.2020/PC.II/WP.29, 'Nuclear safeguards standards under the Treaty on the Non-Proliferation of Nuclear Weapons', Working Paper, <https://undocs.org/NPT/CONF.2020/PC.II/WP.29> (accessed 1 Nov. 2019); Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (2018), NPT/CONF.2020/PC.II/WP.36, 'Democratic People's Republic of Korea', Working Paper, <https://undocs.org/NPT/CONF.2020/PC.II/WP.36> (accessed 1 Nov. 2019).

⁸⁰ Regarding reinforcement, see the Swiss report on the TPNW: Federal Department of Foreign Affairs (2018), *Report of the Working Group to analyse the Treaty on the Prohibition of Nuclear Weapons*, https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/2018-bericht-arbeitsgruppe-uno-TPNW_en.pdf (accessed 11 Oct. 2019).

Priorities

The test of a constructive NPT Review Conference will be the extent to which broad engagement can be achieved on how and where to find common ground on practical ways forward for nuclear disarmament during the next review cycle. This is unlikely to be found in denigrating the TPNW (criticisms of which will be addressed briefly below). It may be found in building on the efforts of the CEND working group, if concerns can be allayed that the US is in effect raising the bar on disarmament progress by 'linking it to transformations in the international security landscape far removed from NPT-specified obligations'.⁸¹

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Common ground may also be found through a range of other initiatives in which NATO allies are actively involved, a small sample of which is listed here; reference is also made to initiatives of members of NATO's Partnership for Peace (PfP), and to major non-NATO allies (designated as such by the US government) that have strategic working relationships with the US Armed Forces:

- Canada has long played a leadership role in promoting the negotiation of a Fissile Material Cut-Off Treaty (FMCT) as the next step towards nuclear disarmament. Such a treaty would halt the production of the material that gives nuclear weapons their explosive power, and thus eventually halt the production of those armaments.⁸²
- Germany convened a conference in Berlin in March 2019 entitled Capturing Technology. Rethinking Arms Control, the aim of which was to provide a 'forum to help better understand the challenges posed to global arms control by the military applications of new technologies, and to help discuss solutions in response to these challenges'.⁸³ The meeting's areas of focus included missile control regimes and new technologies, as well as new trends in missile technologies.⁸⁴ At the start of the conference, the foreign ministers of Germany, the Netherlands and Sweden issued a political declaration emphasizing the need for strengthening existing nuclear arms control arrangements 'in a multilateral endeavour to maintain and reinforce the rules-based international order for a new technological age'.⁸⁵
- Norway's current priority is the development of a verification regime that is trusted by nuclear weapon states and non-nuclear weapon states alike as crucial for achieving further reductions in nuclear arsenals. Norway recently chaired a UN-mandated Group of Government Experts on this issue. Verification is also the priority of a number of NATO and other states (including

⁸¹ Meyer, P. (2019) 'Creating an Environment for Nuclear Disarmament: Striding Forward or Stepping Back?', *Arms Control Today*, April 2019, <https://www.armscontrol.org/act/2019-04/features/creating-environment-nuclear-disarmament-striding-forward-stepping-back> (accessed 11 Oct. 2019).

⁸² For background, see Government of Canada (2018), 'Banning fissile material production for nuclear weapons', https://www.international.gc.ca/world-monde/issues_developpement-enjeux_developpement/peace_security-paix_scurite/banning_materials-interdire_materiaux.aspx?lang=eng (accessed 29 Apr. 2020).

⁸³ 2019. Capturing Technology. Rethinking Arms Control (2019), 'About', <https://rethinkingarmscontrol.de/about/> (accessed 10 Dec. 2019).

⁸⁴ SIPRI (2019), 'SIPRI partners with the German Federal Foreign Office for conference on technology and arms control', <https://www.sipri.org/news/2019/sipri-partners-german-federal-foreign-office-conference-technology-and-arms-control> (accessed 20 May 2020).

⁸⁵ Foreign Ministers of the Federal Republic of Germany, the Kingdom of the Netherlands and the Kingdom of Sweden (2019), 'Political Declaration: Conference "2019. Capturing Technology. Rethinking Arms Control"', Berlin, 15 March 2019, <https://www.auswaertiges-amt.de/blob/2199824/798daa3007fd8fc2ddd04db13633353/190315-erkl-konf-rethinking-arms-control-data.pdf> (accessed 20 May 2020).

nuclear weapon states) that are active in the International Partnership for Nuclear Disarmament Verification (IPNDV), identifying challenges associated with nuclear disarmament verification and developing potential procedures and technologies to address those challenges.

- The Stockholm Ministerial Meeting on Nuclear Disarmament and the Non-Proliferation Treaty, convened by the foreign minister of Sweden⁸⁶ in June 2019, expressed the goal that the forthcoming Review Conference should identify stepping stones for the implementation of Article VI of the NPT,⁸⁷ building on commitments made particularly during the Review Conferences of 1995, 2000 and 2010.⁸⁸
- In 2017 the then minister of foreign affairs of Japan⁸⁹ initiated a Group of Eminent Persons for Substantive Advancement of Nuclear Disarmament, which submitted several papers during the current NPT review cycle.⁹⁰

Also indicative of the seriousness of the context in which such initiatives are being undertaken are the April 2019 UN Security Council's debate on the NPT, chaired by German foreign minister Heiko Maas in anticipation of the forthcoming Review Conference,⁹¹ and, also in April 2019, the Statement on Non-Proliferation and Disarmament issued by the G7 under the French presidency.⁹² And at their ninth annual meeting, in London in February 2020, the P5 – China, France, Russia, the UK and the US (i.e. the five permanent members of the UN Security Council; also, as the NPT nuclear weapon states, termed the 'N5') – agreed that their work on nuclear doctrines and strategic risk reduction should continue beyond the 10th NPT Review Conference.⁹³

⁸⁶ Sweden is a NATO PfP member state.

⁸⁷ See working paper submitted by Sweden, NPT/CONF.2020/PC.III/WP.33, 'Unlocking disarmament diplomacy through a "stepping stone" approach'.

⁸⁸ Government Offices of Sweden (2019), 'The Stockholm Ministerial Meeting on Nuclear Disarmament and the Non-Proliferation Treaty', <https://www.government.se/statements/2019/06/the-stockholm-ministerial-meeting-on-nuclear-disarmament-and-the-non-proliferation-treaty/> (accessed 11 Oct. 2019).

⁸⁹ Japan is a major non-NATO ally.

⁹⁰ Ministry of Foreign Affairs of Japan (2019), 'Group of Eminent Persons for Substantive Advancement of Nuclear Disarmament', https://www.mofa.go.jp/dns/ac_d/page25e_000178.html (accessed 11 Oct. 2019).

⁹¹ United Nations (2019), 'New Approach Crucial for Eliminating Atomic Bombs, Speakers Tell Security Council, Warning Dangerous Rhetoric about Nuclear Weapons Use Is Eroding Disarmament Gains', 2 April 2019, <https://www.un.org/press/en/2019/sc13761.doc.htm> (accessed 11 Oct. 2019).

⁹² G7 (2019), '2019 G7 Statement on Non-Proliferation and Disarmament', 6 April 2019, <https://www.elysee.fr/admin/upload/default/0001/05/2ffa826926cd72354b90a05f7de765bfcc9908b6.pdf> (accessed 11 Oct. 2019).

⁹³ See Liddle, A. (2020), 'Disarmament blog: the P5 meet in London', Foreign & Commonwealth Office, 21 February 2020, <https://blogs.fco.gov.uk/aidanliddle/2020/02/21/disarmament-blog-the-p5-meet-in-london/> (accessed 2 Apr. 2020).

5. NATO and the TPNW: Legal Issues

For a NATO member, joining the TPNW would pose considerable political problems for its membership of the Alliance, as it would challenge the political obligations of the latter. Such an act would likely be seen as tantamount, in Matthew Harries' view, to a denuclearization of extended deterrence, entailing reliance only on a conventional umbrella rather than a nuclear one.⁹⁴ Relying on a conventional umbrella may not unite the Allies as does the nuclear umbrella, as nuclear weapons have provided a powerful symbolic value to the Alliance – more so than their actual use. In other words, for the foreseeable future, practical regional political difficulties with the TPNW are likely to trump perceived legal ones.

Even so, legal complications of the TPNW for military alliances, as well as its shortcomings as perceived by its opponents, have been the subject of much discussion and examination⁹⁵ – including by government inquiries such as those of Sweden, Norway, France and Switzerland.⁹⁶ Some of those inquiries have drawn rebuttals, several quite detailed, such as by the Norwegian Academy of International Law. Comments on criticisms of the TPNW will be discussed in four specific respects: the TPNW's relationship with the NPT; safeguards for non-proliferation verification; verification of nuclear disarmament; and military assistance and cooperation.⁹⁷

The TPNW's relationship with the NPT

As no NATO members have signed or ratified the TPNW, its prohibitions and obligations do not in a legal sense apply to them. But there has been particular questioning about the language of Article 18 of the TPNW, and its description of the relationship between the prohibition treaty and other agreements.⁹⁸ The suggestion that Article 18 might enable parties to the TPNW to choose to forgo their obligations under other treaties, including the NPT, does not stand up to close scrutiny. It overlooks existing tenets of international law, including Article 30 of the Vienna Convention on the Law of Treaties, governing successive agreements dealing with the same subject matter, and *pacta*

⁹⁴ Harries, M. (2017), 'The ban treaty and the future of US extended nuclear deterrence arrangements'.

⁹⁵ See for example Hajnoczi, T. (2020), 'The Relationship between the NPT and the TPNW', *Journal for Peace and Nuclear Disarmament*, doi: 10.1080/25751654.2020.1738815 (accessed 2 Apr. 2020).

⁹⁶ For the report of the Swedish inquiry (including an English translation of the executive summary), see Ministry of Foreign Affairs (2019), *Utredning av konsekvenserna av ett svenskt tillträde till konventionen om förbud mot kärnvapen. Inquiry into the consequences of a Swedish accession to the Treaty on the Prohibition of Nuclear Weapons*, https://www.regeringen.se/48f047/contentassets/55e89d0a4d8c4768a0cabf4c3314aab3/rapport_1-e_lundin_webb.pdf. For the Norwegian report, see Ministry of Foreign Affairs (2018), 'Review of the consequences for Norway of ratifying the Treaty on the Prohibition of Nuclear Weapons'. For the Swiss report, see Federal Department of Foreign Affairs (2018), *Report of the Working Group to analyse the Treaty on the Prohibition of Nuclear Weapons*.

⁹⁷ In addition to the criticisms set forth in this paper, critics of the TPNW have also noted the need for greater clarity on the treaty's scope. This aspect is of particular importance in the context of the EU, in light of the European Council Regulation No. 428/2009 (of 5 May 2009, 2017 consolidated version), which provides for the exports, transfers, brokering and transit of dual-use items, including those that can be used for 'assisting in any way the manufacture of nuclear weapons or other nuclear explosive devices'. The interpretation of this provision, binding on all EU member states, may vary from one state to another in the event that EU member states become party to the TPNW (e.g. Austria) once the treaty enters into force, in light of its prohibition of assistance. A lack of clarity may greatly affect the 'harmonious' interpretation of EU law across all member states of the Union. For a discussion on the assistance aspect, see Casey-Maslen, S. (2018), 'The Nuclear Weapons Prohibition Treaty: Interpreting the Ban on Assisting and Encouraging', *Arms Control Today*, October 2018, <https://www.armscontrol.org/act/2018-10/features/nuclear-weapons-prohibition-treaty-interpreting-ban-assisting-encouraging> (accessed 24 Oct. 2019).

⁹⁸ Article 18, TPNW covers the treaty's relationship with other agreements: '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.'

sunt servanda – i.e. every treaty in force is binding on the parties to it. It also overlooks the fact that, as a practical matter, the obligations undertaken by states parties to the TPNW are similar to – and reinforce – the obligations set out in the NPT itself. Criticism directed, for example, at the new treaty’s failure to permit reservations, and at its inclusion of a withdrawal clause, fail to appreciate that these provisions essentially follow the approach adopted by the NPT.⁹⁹

In addition, in its 1996 advisory opinion, the ICJ has established that: ‘A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.’¹⁰⁰ While the advisory opinion does not classify nuclear weapons as unlawful *per se*, one current concern nuclear weapon states may have is the possibility of a prohibition on nuclear weapons becoming customary in international law. Other than conventional treaty law, international legal norms are also composed of customary international law, a body of rules that find their source from the ‘evidence of a general practice accepted as law’,¹⁰¹ and that must be respected by all subjects of international law. The US, the UK and France issued a joint statement immediately following the adoption of the TPNW, rejecting ‘any claim that this treaty reflects or in any way contributes to the development of customary international law’.¹⁰² This move, along with their persistent rejection of the TPNW, can have two implications:

1. Preventing the actual development of a customary international law prohibiting nuclear weapons;¹⁰³ and
2. Treating them as ‘persistent objectors’, which may render a customary prohibition on nuclear weapons inapplicable to these nuclear weapon states.¹⁰⁴

⁹⁹ New Zealand (2017), ‘Nuclear weapons Statement by New Zealand, Delivered by H.E Dell Higgin, Ambassador for Disarmament’, 13 October 2017, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2018/11/statement-by-new-zealand-72-nw.pdf> (accessed 16 Oct. 2019).

¹⁰⁰ International Court of Justice (1996), *Legality of the Threat or Use of Nuclear Weapons*, para. 39.

¹⁰¹ Article 38(1)(b) of the Statute of the International Court of Justice (Annex to the UN Charter) defines an international custom as ‘evidence of a general practice accepted as law’.

¹⁰² Permanent mission on France to the United Nations in New York (2017), ‘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’, 7 July 2017, <https://onu.delegfrance.org/Adoption-of-a-treaty-banning-nuclear-weapons> (accessed 16 Mar. 2020). These states have also indicated individually their objection to any formation of customary law from the beginning. For example, see France, Statement to the United Nations General Assembly 72 First Committee, 14 October 2017, <https://undocs.org/A/C.1/72/PV.16> (accessed 23 Mar. 2020).

¹⁰³ Based on the definition of international customs provided by Article 38(1)(b) of the Statute of the ICJ, a norm requires two elements to obtain the status of ‘customary’ international law: (1) general state practice, and (2) the belief that the norm in question is of customary nature and is binding upon them. With an overwhelming support within the UN General Assembly for the launch of the negotiations leading to the adoption of the TPNW, as well as the growing number of signatory states, the practice of prohibiting nuclear weapons could therefore be argued as constituting a ‘general practice accepted as law’. However, the definition provided by the ICJ Statute requires ‘evidence’ of state practice and acceptance – thus requiring positive actions: in other words, states (in particular those of most relevance to the norm in question, i.e. nuclear weapon states and other nuclear possessors) need to proactively accept this norm. The fact that China, India and Pakistan abstained on the adoption of Resolution 71/258 to mandate the negotiation of the TPNW may be enough to establish that the ‘general’ state practice element is missing for the complete formation of a customary norm. The active objection by the US, the UK and France of this norm as customary adds further evidence that a prohibition of nuclear weapons does not constitute, at present, a customary international law.

¹⁰⁴ In the event of the prohibition of nuclear weapons becoming customary international law, this norm will be applicable and must be enforced by all subjects of international law – with the exception of persistent objectors. These are subjects of international law who have persistently objected, from the formation and development stages of the customary norm in question, against the norm in question. This notion has been set by the ICJ, in its 1951 *Fisheries* (United Kingdom v Norway) case. For a discussion on persistent objectors, see Dumberry, P. (2010), ‘Incoherent and Ineffective: The Concept of Persistent Objector Revisited’, *International and Comparative Law Quarterly*, 59(3), pp. 779–802, doi: 10.1017/S0020589310000308 (accessed 16 Mar. 2020).

Safeguards for non-proliferation verification

Efforts in the TPNW negotiations to promote stronger safeguards (i.e. the IAEA's Additional Protocol¹⁰⁵) unfortunately fell short, just as they have for many years in the NPT. Indeed, it will be a challenge for the NPT Review Conference to achieve something that its predecessors have so far failed to do – to strengthen the NPT by requiring parties to go beyond the Article III baseline obligation of negotiating and concluding comprehensive safeguards agreements with the IAEA. The TPNW does, however, specifically adopt the NPT's current safeguards,¹⁰⁶ and exceeds the NPT by requiring – as a legal obligation under Article 3.1 of the prohibition treaty – that those of its parties with an IAEA Additional Protocol retain that protocol in place as their minimum baseline.¹⁰⁷

Verification of nuclear disarmament

In the TPNW, verification of disarmament efforts is confined, for the time being, to a limited outline. In their paper for the Norwegian Academy of International Law, Gro Nystuen et al. note that negotiating detailed verification provisions without the participation of the nuclear weapon states was 'deemed impractical':¹⁰⁸ the architects of the prohibition treaty consciously deferred the essential aspect of how the elimination of nuclear weapon programmes should be verified, organized and resourced. Those details were left to development at the point at which Article 4 of the TPNW would be invoked on the accession to the prohibition treaty of a nuclear weapon-possessing state, or one that has declared that it has disarmed prior to acceding. TPNW parties are required under paragraph 6 of Article 4 to designate a competent international authority or authorities to 'negotiate and verify the irreversible elimination of nuclear weapon programmes, including the elimination or irreversible conversion of all nuclear weapons-related facilities'.¹⁰⁹

As mentioned earlier, the Netherlands – the sole NATO member present throughout the negotiation of the treaty – based its vote against the adoption of the TPNW on the grounds that the new treaty was 'not verifiable'.¹¹⁰ It is too early to predict the shape of the necessary verification mechanisms under a prohibition regime that has still to convene its first formal meeting of states parties (MSP)¹¹¹ to determine how best to implement the Treaty. But in the meantime, the development of robust mechanisms for the verification of nuclear disarmament in TPNW MSPs, as in NPT review cycles, remains to be tested.

Military assistance and cooperation

Becoming party to the TPNW would not curtail military cooperation among non-nuclear weapon NATO members, their nuclear weapon partners, or NATO's PfP partners, except in one specific respect. Article 1.1 (g) prohibits any stationing, installation or deployment of any nuclear weapons or other

¹⁰⁵ There is an ongoing debate as to whether the safeguards regime in the TPNW has a lower standard of safeguards level than the standard set by the IAEA Additional Protocol, or whether it is actually of a higher standard than for a new state joining the NPT. For more information on the Additional Protocol, see IAEA (1998–2020), 'Additional Protocol', <https://www.iaea.org/topics/additional-protocol> (accessed 20 May 2020).

¹⁰⁶ International Atomic Energy Agency (IAEA) (1971, reprinted 1972), *The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, INF/CIRC/153 (Corrected), Austria: IAEA, <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1972/infcirc153.pdf> (accessed 29 Oct. 2019).

¹⁰⁷ Nystuen, G., Egeland, K., Hugo, T. G. (2018), *The TPNW: Setting the record straight*, Norwegian Academy of International Law, p. 11, <http://intl.no/wp-content/uploads/2018/10/TPNW-Setting-the-record-straight-Oct-2018-WEB.pdf> (accessed 16 Oct. 2019).

¹⁰⁸ *Ibid.*, p. 15.

¹⁰⁹ Article 4, TPNW.

¹¹⁰ The Netherlands (2017), 'Explanation of vote of the Netherlands on text of Nuclear Ban Treaty'.

¹¹¹ Article 8, TPNW.

nuclear explosive devices in each state party's territory or at any place under its jurisdiction or control. This reflects the situation that arises for the five NATO members that currently host US nuclear weapons. But these are matters of national choice, not NATO obligation. For instance, by analogy to other arms control prohibitions, a number of NATO members that possessed weapon systems prohibited by the Anti-Personnel Mine Ban Convention (APMBC) and the Convention on Cluster Munitions (CCM) were able to become party to those conventions once they met the required conditions of the conventions – i.e. destruction of the prohibited weapons within stipulated timelines. They were able to do without compromising their status in NATO *vis-à-vis* NATO non-parties to those agreements. For instance, the CCM allows (in Article 21) for military cooperation and operations to continue with non-party allies despite the risk that CCM parties may, due to their role in such operations, be associated with the use, stockpiling and transfer of cluster munitions. However, there is no equivalent in the TPNW to Article 21 of the CCM.¹¹² Parties to the TPNW could participate in joint military operations with a nuclear weapon state without contravening the treaty, provided there is no nexus between a particular task and an activity prohibited by the TPNW such as the stationing one just mentioned.¹¹³

Observing TPNW meetings, however, could be a positive step. Article 8.5 of the TPNW provides that: 'States not party to this Treaty, as well as the relevant entities of the United Nations system, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organizations, shall be invited to attend the meetings of States Parties and the review conferences as observers.' Switzerland, for one, is aware of this opportunity.¹¹⁴ Participation in treaty meetings by non-parties as observers is not uncommon in international law. For example, Israel observed the NPT Review Conference in 2015: seeking observer status in such circumstances does not create any commitment in terms of signature or ratification by a non-party. But availing itself of the opportunity to monitor directly meetings of states parties implies a state's serious interest in those proceedings.

¹¹² As New Zealand noted pointed in 2017, the possibility of making reservations and of withdrawal follows the NPT's approach. See New Zealand (2017), 'Nuclear Weapons Statement by New Zealand, Delivered by H.E. Dell Higgie, Ambassador for Disarmament'. See also: Harries, M. (2017), 'The ban treaty and the future of US extended nuclear deterrence arrangements'.

¹¹³ Human Rights Program at Harvard Law School (2018), *Nuclear Umbrella Arrangements and the Treaty on the Prohibition of Nuclear Weapons*, p. 5.

¹¹⁴ Federal Department of Foreign Affairs (2018), *Report of the Working Group to analyse the Treaty on the Prohibition of Nuclear Weapons*.

6. Conclusions

Protecting humanity from the catastrophic humanitarian consequences of nuclear weapons requires courage, sustained commitment and concerted action. Today's complex security environment highlights both the challenges and necessity of such action. Nuclear weapons are often presented as promoting security, particularly during times of international instability. But weapons that risk catastrophic and irreversible humanitarian consequences cannot seriously be viewed as protecting civilians or humanity as a whole.

*ICRC President Peter Maurer, 2015*¹¹⁵

In the context of the forthcoming review of the NPT – the cornerstone of the international nuclear non-proliferation regime – the first practical reality that requires acknowledgment by all parties to the treaty is that papering over their differences will serve not only to discount the seriousness of the global security context that is being used as a brake on nuclear disarmament, but to weaken the standing of the NPT itself. As cautioned by Mary Robinson on behalf of The Elders: 'Failure to reenergise negotiations at this juncture could put at risk the near-universal global commitment to non-proliferation and push more countries to seek their own nuclear weapons programmes.'¹¹⁶

Before participants at the Review Conference embark on the routine procedures and detailed aspects of its work, it is to be hoped that they will give careful consideration to three overriding challenges:

1. Bridging widely differing perceptions of what underpins strategic stability – i.e. the spectrum that sees at one end few, if any, non-nuclear weapon states, other than those that rely on extended deterrence, accept that global security equilibrium is an essential condition for nuclear disarmament, and at the other end few, if any, nuclear weapon states or their allies accept that the pursuit of nuclear disarmament helps ameliorate the security environment.
2. With regard to nuclear deterrence, wrestling with the questions: If existing nuclear arsenals are perceived as offering protection to their possessors and those in alliance with them, how can continued reliance on nuclear weapons by nuclear weapon states and their allies serve the cause of non-proliferation consistent with the NPT? What assurances can be provided – and what measures can be agreed – that this state of affairs is not tantamount to justifying the possession of nuclear weapons in perpetuity?
3. Allaying humanitarian concerns, notably how best to recognize and reduce risks related to nuclear weapon detonations (whether accidental or deliberate).

As to issue 1, it is salutary to ask at what point in a deteriorating security environment might non-allied states regard the restraint of their NPT obligations as incompatible with their national security interests. The potentially self-defeating nature of a situation in which nuclear weapon

¹¹⁵ ICRC (2015), 'Nuclear weapons: Ending a threat to humanity', Statement by Peter Maurer, president of the ICRC, to the diplomatic community in Geneva, 18 February 2015, <https://www.icrc.org/en/document/nuclear-weapons-ending-threat-humanity> (accessed 2 Apr. 2020).

¹¹⁶ Robinson, M. (2019), 'The lack of concern and absence of political will risks [sic] nuclear catastrophe', speech delivered at a panel discussion on the future of arms control at the Carnegie Endowment for International Peace in Washington, DC, 26 September 2019, <https://theelders.org/news/lack-concern-and-absence-political-will-risks-nuclear-catastrophe> (accessed 16 Oct. 2019). The Elders are an independent group of global leaders working together for peace, justice and human rights.

states are putting nuclear disarmament efforts on hold, and indeed are pursuing modernization programmes as a response to the tense security climate, needs for the sake of the NPT to be recognized and acknowledged.

As to issue 2, whatever position one takes on the logic of the doctrine of nuclear deterrence, reconciling it with disarmament and non-proliferation obligations under the NPT requires more openness and frankness from nuclear weapon states and their allies. Unless and until the consequences for the NPT of reliance on nuclear deterrence for their security by nuclear weapon states and their allies are articulated in terms of compatibility with the treaty, most non-nuclear weapon states are unlikely to be mollified. Although nuclear proliferation has remained largely in check to date, this may not be conclusively attributable to extended deterrence, but in any event ‘there is reason to doubt whether it will do so indefinitely’.¹¹⁷

Disagreement on whether the TPNW succeeds or fails as an ‘effective measure’ for nuclear disarmament in terms of Article VI of the NPT, or whether or not it is premature, masks deeper problems. These are rooted in concerns that the TPNW erodes international security by undermining the doctrine of nuclear deterrence.¹¹⁸ Until such factors are examined in a dispassionate manner, proponents of the respective points of view on them will continue to talk past one another. Harries makes the point that alliance members that wish to maintain extended deterrence ‘should articulate a clear rationale for why they believe it is necessary’.¹¹⁹

As to issue 3, there is growing recognition of the case that, irrespective of differences in how states perceive nuclear weapons, a closer understanding of the components of risk surrounding the safety and security of nuclear weapons is warranted – with a view to reducing the probability of the detonation of a nuclear weapon.¹²⁰ Given the enormous lethality of nuclear arms and their potential for global disruption, all states share an interest in prevention, as was noted by ICRC President Peter Maurer in 2015.¹²¹ It is this commonality of interest among nuclear weapon states, their allies and all other non-nuclear weapon states that makes this issue a potentially fruitful one for building mutual trust, opening a valuable door for compromise.

These are complex and related matters. The 10th NPT Review Conference will need to lay basic groundwork for identifying and recognizing the sources of such fundamental differences, and chart a course for addressing them during the next review cycle. The question for NPT parties is whether it may be more profitable to confront divergence on this scale by acknowledging that, in and of itself, this state of affairs – this profound stand-off – is doing nothing to reduce existing tensions in the NPT process, let alone cool international tensions.

¹¹⁷ Brewer, E. (2019), ‘Will Nuclear Weapons Make A Comeback? Why the Global Nonproliferation Regime Is Fraying’, *Foreign Affairs*, 23 September, 2019, <https://www.foreignaffairs.com/articles/2019-09-23/will-nuclear-weapons-make-comeback> (accessed 16 Oct. 2019).

¹¹⁸ See Nystuen, G., Egeland, K., Hugo, T. G. (2018), *The TPNW: Setting the record straight*, p. 35: ‘Procedural and textual critique of The TPNW ends up masking the most important political fault line of the debate, namely a profound disagreement over the acceptability of nuclear weapons and the legitimacy of nuclear deterrence.’ See, for example, the United States’ Statement to the United Nations General Assembly First Committee, 12 October 2017, <https://undocs.org/A/C.1/72/PV.12> (accessed 11 Oct. 2019).

¹¹⁹ Harries, M. (2017), ‘The ban treaty and the future of US extended nuclear deterrence arrangements’.

¹²⁰ Borrie, J., Caughley, T., Wan, W. (eds) (2017), *Understanding Nuclear Weapon Risks*, United Nations Institute for Disarmament Research, <https://www.unidir.org/publication/understanding-nuclear-weapon-risks> (accessed 31 Mar. 2020).

¹²¹ Maurer, P. (2015), at a side event hosted by Norway on ‘The humanitarian impact of nuclear weapons: key findings on the consequences and risks of, and the response capabilities regarding nuclear weapons explosions’, 32nd International Conference of the Red Cross and Red Crescent Movement, 8 December 2015, cited in Borrie, J., Caughley, T., Wan, W. (eds) (2017), *Understanding Nuclear Weapon Risks*, pp. 18–19.

Dispelling distrust as to the readiness of nuclear weapon states and their allies to act consistently with the spirit and letter of the NPT is vital for the treaty's future and wellbeing. And this is so irrespective of the existence of the TPNW. As noted by UN High Representative for Disarmament Affairs Izumi Nakamitsu:

The goals the TPNW pursues remain as necessary as ever. A deteriorating international security environment and rising nuclear risks continue to demonstrate the wisdom of the adage that the only guarantee against the use of nuclear weapons is their total elimination.¹²²

Evidently, the NPT states parties need urgently to engage in a frank clearing of the air. The CEND initiative, with its three sub-groups currently working on issues similar to those outlined here, cannot be disregarded if NPT parties are sincere in their wish to forge common understandings. Acknowledging different perspectives, let alone resolving them, will take time. And as observed at the outset, for a significant number of states these are high matters of strategic security. By their very nature, however, the consequences of use of nuclear weapons potentially affect every state's interests. Identifying what is at stake for the NPT if the differences highlighted in this paper are left unaddressed could provide a starting point both for stimulating efforts to shore up the NPT and for addressing strategic security needs in the next review cycle.

Encouragement can be taken from the fact that this is already happening outside the NPT review process. Efforts such as CEND and others noted in this paper have been undertaken for various reasons, but they have in common a tacit realization that seeking to mitigate an overwrought global security climate requires engagement among the protagonists for the health of the NPT. While these parallel initiatives are very much welcome as potential means of redressing global security dysfunctionality, they need to be cast, and measured, in ways that demonstrably strengthen the NPT. The international community's stake in a world free of further detonations of nuclear weapons or their testing demands no less.

NATO members are well placed within and outside NATO (through the NPDI, for instance) to contribute to such efforts by using their alliance relationships to influence nuclear weapon states on the significance of addressing key divergences as outlined in this paper, and sketching out strategies and mechanisms that stand a realistic chance of attracting widespread buy-in among NPT states parties and of helping to reinforce the rule of law.

Specific recommendations as to how NATO Allies might conduct their engagement at the Review Conference are as follows:

- There will be considerable value in upholding the tenets of constructive, good-faith engagement that recognize the range of interests involved, and the need to identify and focus on points that are most likely to foster common ground and reciprocity.
- By extension, efforts should be made to avoid pressing positions that are unlikely either to improve prospects for compromise or for cultivating a negotiating atmosphere conducive to problem-solving; for instance, continuing to voice intra-regional or 'local' antipathies on a multilateral stage, or restating previously aired opposition such as to the TPNW. Conversely, in the latter regard, for example, an openness by non-parties to observing TPNW meetings, as provided for in Article 8.5, could be a positive step.

¹²² United Nations Office for Disarmament Affairs (2018), 'Statement by Ms. Izumi Nakamitsu High Representative for Disarmament Affairs At TPNW Ceremony', 26 September 2018, <https://www.un.org/disarmament/wp-content/uploads/2019/09/HR-statement-TPNW.pdf> (accessed 16 Oct. 2019).

- A carefully calibrated tone in statements made in multilateral meetings can pay dividends. NATO has a part to play in this regard in weighing the manner in which its voice as a highly militarized Western bloc may be seen from non-aligned NPT states. This is relevant to perceptions of NATO's openness to serious dialogue and engagement measured, for instance, in relation to the sincerity of nuclear disarmament ambitions by states that rely on nuclear weapons for their security. An area of promise in this respect is offsetting nuclear with conventional forces.
- A readiness on the part of NATO to engage on issues that some or all of its nuclear weapon states are opposed to, or uncomfortable with, will be seen by other NPT states as a test of the readiness of the bulk of Alliance members to contribute to consensus-building. Pertinent examples here would be a commitment to increasing transparency of nuclear arsenals and to abandoning expansion of those arsenals; and addressing the crucial question of how any use of nuclear weapons can be compatible with the requirements of international humanitarian law.
- Urge the 'N5' (P5) to intensify their work on nuclear doctrines and strategic risk reduction. These are areas that hold promise for constructive dialogue among NPT parties because they are matters of common interest to possessors and non-possessors of nuclear weapons alike. Reducing the potential for misinterpretation of military postures is fundamental to the avoidance of nuclear war.
- A concerted effort will be needed to help shape and harmonize current initiatives by NATO members and partners to become widely accepted vehicles for fostering common ground among NPT states parties. This means strengthening approaches that will serve to build bridges through open and constructive dialogue in which opposing views are aired and reflected representatively in feasible outcomes.
- Beyond reaffirming their commitment to the letter and spirit of all three pillars of the NPT, it would be significant if NATO could put forward for discussion specific ideas on how to implement the NPT in practical, time-bound ways. This could entail identifying various stages, at the end of which progress would be reviewed and, unless there were persuasive reasons to the contrary, work on the next stage would begin. The initial stage would deal with confidence-building activities such as settling on a list of general points of common interest. The next stages would deal with refining and prioritizing these issues. To be useful, such an approach would need to deal with current key and seemingly unsurmountable issues such as entry into force of the CTBT and the negotiation of a Fissile Material Cut-Off Treaty. If these are acid tests for the NPT's future, they must be imaginatively confronted and worked through or around.

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