

NUCLEAR BAN TREATY: CAN IT UNRAVEL THE GLOBAL NON-PROLIFERATION REGIME?

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Abstract

The Treaty on Prohibition of Nuclear Weapons (TPNWs) was negotiated with the primary purpose of creating a new international norm that could bring pressure upon all the nuclear possessor states to work towards nuclear disarmament. Instead, the TPNW may have led to more divisions between the nuclear weapon states (NWS) and the non-nuclear weapon states (NNWS) that could affect the outcome of the 2020 NPT (Nuclear Non-proliferation Treaty) Review Conference. Parallel initiatives with conflicting obligations, spearheaded by the non-governmental organizations (NGOs) and negotiated amongst the NNWS mainly, without taking into consideration security interests of all states, are likely to reduce the incentive for the nuclear possessor states (both NPT and the non-NPT states) to remain constructively engaged with the non-proliferation regime, thus making the goal of nuclear disarmament more elusive.

Keywords: *TPNWs, Nuclear Disarmament, NNWS, NPT, NWS, Non-proliferation Regime*

Introduction

The Treaty on Prohibition of Nuclear Weapons (TPNW) or the nuclear ban treaty is the first ever legally binding international instrument that aims to delegitimize the use, as well as the possession, of nuclear weapons (NWs). Once entered into force, the TPNW is expected to establish a new international norm that could bring additional pressure upon the nuclear weapon states (NWSs) to show seriousness towards their nuclear disarmament obligations. The opponents of the TPNW do not share this optimism. According to them, the treaty may help rekindle the nuclear disarmament debate, but due to

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its inherent conflict with the Nuclear Nonproliferation Treaty (NPT), it is likely to create more fissures amongst the international community besides complicating the existing non-proliferation regime.

Notwithstanding the noble intent behind the new initiative and considerable support from the international community, none of the NPT and non-NPT nuclear possessor states, including those with nuclear umbrella, appears keen to join the TPNW. Without the participation of these major stakeholders, the TPNW is likely to remain an arrangement negotiated *by* the non-nuclear weapon states (NNWS), *amongst* the NNWS, and *for* the NNWS.

This paper aims to provide the genesis of the humanitarian-based NGOs-led approach which eventually gained traction at the United Nations (UN) and led to the conclusion of TPNW. This paper also highlights inconsistencies in some of the treaty articles, besides providing a summary of perspectives from the NPT and the non-NPT NWS. Finally, the likely implications of the TPNW on the existing NPT based non-proliferation regime have been discussed, along with recommendations that could help preserve the sanctity of the global non-proliferation regime.

Genesis of the TPNW

NGOs' Approach to Delegitimize NWS

In Jan 2007, four senior former US officials – George Schultz, William Perry, Henry Kissinger and Sam Nunn co-authored an op-ed building a case for a world free of nuclear weapons. It was followed by another article in Jan 2008 by these four former Cold War hawks, generating excitement amongst the civil society that may have also influenced President Obama's disarmament agenda of committing to a world free of nuclear weapons. With the United States providing the much-needed leadership, several new initiatives were launched across the world to achieve the goal of global nuclear zero. The *International Campaign to Abolish Nuclear Weapons* (ICAN) - a loose coalition of several civil society organizations working in more than 100 countries, was one of the several entities that played an important role in launching the Humanitarian Impact Movement (HIM), which eventually formed the basis for negotiating a new treaty to ban nuclear weapons. For its efforts in materializing a new disarmament treaty, the ICAN was also awarded the Nobel Peace prize of 2017.

ICAN's role was crucial in building support for the nuclear ban treaty at the three HIM conferences that were held at Oslo (Norway, 2013); Nayarit (Mexico, 2014); and at Vienna (Austria, 2014). These events were attended by a large number of states and were helpful in building global support towards the TPNW. The US and UK participated in the Vienna conference but opted to stay away from the subsequent process. Amongst the other nuclear possessor states, Pakistan and India

did participate in all the three HIM conferences, signalling support for global nuclear disarmament, but were not part of the treaty negotiations.

Institutional Approach to Ban Nuclear Weapons

In nuclear disarmament debates, the humanitarian issue was initially discussed informally but surfaced for the first time in the 2010 NPT RevCon outcome document that “expressed deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons.”¹ It became the basis for the subsequent debate held at the NPT PrepComs, as well as the UN First Committee meetings. In 2012, Norway, Mexico, and Austria sponsored a UN General Assembly Resolution 67/56 titled “Taking Forward Multilateral Disarmament Negotiations,” which was supported by a large number of countries while the four major NWS (US, UK, Russia and France) voted against it. China, along with the three non-NPT nuclear weapon states (India, Pakistan and Israel) abstained, while North Korea voted in favour of the Resolution.

In 2015, Mexico, with the help of like-minded countries, sponsored another resolution that called for establishing an “open-ended working group to negotiate with a view to reaching agreement on concrete and effective legal measures to achieve nuclear disarmament, in particular, new legal provisions and norms to attain and maintain a world without nuclear weapons.”² Owing to overwhelming support, the UN General Assembly decided to convene an open-ended working group (OEWG) in 2016 that consisted of members from various international organizations and civil society to recommend the next steps. None of the nine nuclear possessor states participated in the OEWG discussions, which possibly made it convenient for the NNWS to conclude that negotiating a nuclear ban treaty without indulging in technical issues would be relatively easy and a more realistic option than negotiating a convention to ban nuclear weapons. Based on the recommendations of the OEWG, the UN adopted a resolution with overwhelming majority to convene a conference in 2017 for negotiating a legally binding treaty to prohibit nuclear weapons.

Amongst the nuclear possessor states, the US, UK, France, Russia and Israel voted against this resolution, while China along with Pakistan and India abstained. Interestingly, states like Norway that were leading the HIM movement but also benefitting from the US nuclear umbrella

¹ 2010 NPT RevCon Outcome Document, (*Reaching Critical Will*: May, 28, 2010) <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/documents/MCI-WP1.pdf>, <http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com15/resolutions/L13.pdf>.

opposed the UN resolution for negotiating a nuclear ban treaty.

The New Norm of Norms Creation

Both the NGOs' approach combined with the UN efforts helped build a momentum towards the conclusion of the TPNW. The members of the civil society behind the nuclear ban treaty are of the view that by highlighting the humanitarian consequences of the use of nuclear weapons they would be able to garner sufficient public support and build pressure on governments. By stigmatizing the possession of nuclear weapons and strengthening the norm of its non-use, the proponents of the TPNW believe that they could challenge the NWS on moral and ethical grounds leading to a 'norm cascading'³ effect and making it difficult for the nuclear weapon states to defy international consensus against nuclear weapons.

These *norm entrepreneurs* however have failed to explain why NWSs would relent under public pressure, if they had been able to successfully withstand similar pressures in the past by refusing to give up nuclear weapons as part of their NPT related obligations. The new approach may not necessarily have significant impact on the powerful NWSs but could bring negative spotlight on the relatively smaller nuclear states, who may eventually find it useful to align themselves with the NWS and oppose the calls for nuclear disarmament, thus strengthening the camp of 'haves' and creating further divisions within the 'have-nots.'

In demonstrating insensitivity to the security dilemma being faced by at least a few of the nuclear possessor states, the supporters of the ban treaty believe that they can push for nuclear disarmament on the pattern of anti-personnel mine treaty, Chemical Weapons Convention (CWC) and the Biological and Toxin Weapons Convention (BTWC). There, however, lies one fundamental difference between nuclear weapons and the rest of the weapons of mass destruction. BTWC and CWC, negotiated in 1972 and 1993, were follow-ups of an agreement on the 'Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare',⁴ commonly known as the Geneva Protocol of 1925. There existed a global norm on the non-use of chemical and biological weapons and since the major powers were already in possession of nuclear weapons with more destructive power, therefore, this made it relatively easy to negotiate treaties banning chemical or biological weapons. In the case of the nuclear ban treaty, the process

³ Lawrence Freedman, "Disarmament and other Nuclear Norms," *The Washington Quarterly* 36:2, May 3, 2013, 95.
<https://www.tandfonline.com/doi/abs/10.1080/0163660X.2013.791085>.

⁴ "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare", United Nations Office for Disarmament (UNODA), <http://disarmament.un.org/treaties/t/1925>.

seems to have been reversed with an unrealistic expectation that it would evolve into a new norm acceptable to all states.

Emphasizing that the western democracies would have more acceptability for a treaty that could establish new norms leading towards nuclear disarmament also remains debatable. Over 69 percent of the world population from 37 countries has opposed the TPNW, and out of these 37 countries 89percent enjoy nuclear umbrella or have security alliances with the US. Apparently, the majority of the 147 states that support the ban treaty consist of only 39 percent of the world population,⁵ and out of these only 4 percent have nuclear umbrella.⁶ This according to George Perkovich could be due to inherent conflict between the international state system, where democracy within state collides with democracy amongst states due to disproportionate power and influence of the few over the majority.⁷

Perkovich also points out an interesting aspect of the influence of democratic norms on national military decision-making. According to him, the evolving public debate on humanitarian consequences of the use of nuclear weapons may constrain some of the western democracies from using or threatening the use of nuclear weapons, while the less democratic states may not be inhibited from the use of nuclear weapons as they are less susceptible to public scrutiny.⁸ This differentiation could also be because none of the western countries face an existential threat that would justify the use or threat of use of nuclear weapons. If these countries faced a serious threat to their national security, it is unlikely that democratic norms would be a major restraining factor for their national leadership. Moreover, if domestic pressure was indeed a defining factor in statecraft, especially amongst the leading proliferators, nuclear disarmament would not have been a major problem confronted by the international community.

The Treaty on the Prohibition of Nuclear Weapons (TPNW)

TPNW was opened for signatures on September 20, 2017 and will enter into force once 50 countries have ratified it. After almost one year of

⁵ Paul Schulte, in Shatabhisha Shetty and Denitsa Raynova, (eds.), "Breakthrough or Breakpoint? Global Perspectives on the Nuclear Ban Treaty," European Leadership Network (ELN) Global Security Report. 20.

⁶ Jennifer Knox, "Haves, have-nots, and need-nots: The nuclear ban exposes the hidden fault line," *Bulletin of Atomic Scientists*. July 3, 2017, <https://thebulletin.org/haves-have-nots-and-need-nots-nuclear-ban-exposes-hidden-fault-lines10879>.

⁷ George Perkovich, "The Nuclear Ban Treaty: What Would Follow?" CEIP, May, 2017, 15.

⁸ Ibid., 10.

its existence, so far only 69 nations have signed it, and only 19 have ratified it.⁹

The ban treaty, in its preambular part subsumes the key principles of the NPT and recognizes its importance as the central tenet of the global non-proliferation and disarmament regime. TPNW also endorses the importance of CTBT and its verification mechanism and acknowledges the right of all states to have access to peaceful uses of nuclear technology (NPT Article IV). Some of the main articles of the TPNW and their implications for the nuclear possessor states as well as those having extended nuclear assurances are briefly discussed in the subsequent paragraphs.

Banning of NWs

Article 1 of the TPNW bans possession and development of all nuclear weapons, which according to the proponents of the ban treaty would help fill the legal gap towards nuclear disarmament.¹⁰ In fact, there was no such gap. The reasons for varied interpretation of NPT's Article VI are political, along with a lack of will on the part of most nuclear states to give up their nuclear status. If at all there was an issue of interpretation, it was adequately addressed in ICJ's Advisory Opinion of 1996, which stated:

There exists an obligation [upon NPT NWS] to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament in all its aspects under strict and effective international control.¹¹

Notwithstanding this unambiguous advisory opinion, the NPT NWSs remain reluctant to work towards nuclear disarmament. It is not clear how the TPNW would be able to bring further clarity on the matter that could otherwise help nuclear disarmament efforts. Instead, the argument offered by the proponents of the TPNW would further reinforce the NWSs' position that there existed inherent ambiguity in NPT's Article VI that needs to be addressed before moving towards nuclear disarmament.

⁹ "Signature/ratification status of the Treaty on the Prohibition of Nuclear Weapons," International Campaign to Abolish Nuclear Weapons, <http://www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>

¹⁰ Tariq Rauf, "Fiftieth Anniversary of the Non-Proliferation Treaty: Preparing for a Successful Outcome", *APLN & CNND Policy Brief No. 48*, November, 2017,8.

¹¹ International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion," July 8, 1996, <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

Delegitimizing Deterrence

The Nuclear Ban Treaty delegitimizes the use or the threat of use of nuclear weapons or other explosive devices, directly or indirectly, thus rendering the entire edifice of nuclear deterrence obsolete. States committing to the new treaty would be held accountable if they ever use or threaten to use nuclear weapons against their adversary, or in support of their allies. This, however, appears gratuitous, since the use or the threat of use of nuclear weapons would only arise if states are in possession of nuclear weapons, and those in possession of these weapons would otherwise not be part of the TPNW.

Rendering nuclear deterrence illegal would also have implications for the NATO countries who have been the principal beneficiaries of the US extended deterrence. The US would no longer be able to place its NWs on the territories of its allies or make port calls to the countries that choose to become a party to the TPNW. It is for this reason that none of the NATO members have agreed to join the new treaty. The Netherlands was the only exception that supported initial discussions but eventually decided not to vote in favour of the UN resolution that led to the start of TPNW negotiations.

The TPNW does de-legitimize deterrence, but the ICJ's 1996 Advisory Opinion in its findings had stated that "it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." In view of the present state of international law, the ICJ observed that "[I]t cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self defense, in which its very survival would be at stake."¹²

More recently, some scholars have also argued that the use of nuclear weapons could also be criminalized by seeking an amendment in the statute of International Criminal Court (ICC).¹³ Such an amendment, if agreed unanimously and with the inclusion of major powers may criminalize the 'use' but not necessarily the 'possession' of nuclear weapons. Most states would still want to retain nuclear weapons for the purpose of deterrence, so as to cater to unforeseen threats in the distant future.

¹² Ibid.

¹³ Zia Mian, "After the Nuclear Weapons Ban Treaty: A New Disarmament Politics," *Bulletin of Atomic Scientists*, July 7, 2017, <http://thebulletin.org/after-nuclear-weapons-ban-treaty-new-disarmament-politics10932>.

National Declarations

Article 2 of the ban treaty obligates a state party to submit declarations within 30 days of the treaty's entry into force that it has eliminated its nuclear weapons program, while also submitting information whether it owned, possessed or controlled nuclear weapons in the past. Once the treaty materializes, it could bind all NATO states that were either in possession of their nuclear weapons or were stationing the weapons of other countries on their territories, to share relevant information that should also be verifiable, but with no designated entity to do this work. In the absence of a credible verification mechanism, the declarations submitted by state parties could be misleading, as was the case for CWC implementation where at least one of the state parties (India) ratified the CWC in 1996 as a non-possessor, but later declared to be in possession of 1,044 metric tonnes of sulphur mustard stockpiles.¹⁴

The proponents of the TPNW acknowledge these limitations in the TPNW and argue that technical issues could be handled at a later stage; but it would also be unrealistic to expect that the nuclear possessor states would commit to an abstract treaty with uncertain contours.

Universalizing Comprehensive Safeguards

Article 3 of the TPNW carries obligations for all non-nuclear weapon states to conclude and bring into force comprehensive safeguards agreement (INFCIRC/153) that would remain in perpetuity. Since the treaty does not differentiate between the NWSs and NNWSs, therefore all NPT and non-NPT NWSs would have to give up their voluntary offer or facility-specific agreements with the IAEA and instead accept comprehensive safeguards arrangements. The TPNW text does not include the precondition of Additional Protocol (AP), which may be due to the reason that the treaty was negotiated amongst the NNWSs and these states would not want to bring unnecessary obligations upon themselves while knowing the fact that nuclear possessor states are likely to remain outside the treaty.

Reporting Progress

Article 4 of the Nuclear Ban Treaty obligates nuclear possessor states to provide a time-bound roadmap for dismantling and elimination of their nuclear program to a competent authority, which has not been identified. While the IAEA could be a potential contender with requisite technical expertise, but it does not have the mandate to venture into the realm of nuclear weapon programs and neither has the resources to verify

¹⁴ Fact Sheet, *Arms Control Association*, <https://www.armscontrol.org/factsheets/india-profile#chem>.

nuclear programs of all nuclear possessor states. Without effective verification mechanism that must take into consideration national sensitivities, it would be difficult to convince most of the nuclear possessor states to accept a legally binding treaty that in the end may not lead to its intended objective of complete and global nuclear disarmament.

Strengthening Domestic Controls

Article 5 of the treaty obligates state parties to strengthen their domestic legal systems and penalize all such actions that are considered illegal. The 2004 UNSC Resolution 1540 passed under Chapter VII of the UN Charter contains similar provisions and the TPNW could be intended to further reinforce this commitment. Nevertheless, as was the case with the UNSCR 1540, the TPNW cannot be viewed as providing legitimacy to various counter-proliferation initiatives, like the Proliferation Security Initiative (PSI), the Container Security Initiative (CSI) or the Global Initiative to Combat Nuclear Terrorism (GICNT).

Conflict with the NPT

The proponents of TPNW claim that it is not a parallel treaty but compliments the existing NPT. In essence, the TPNW overrides all previous disarmament treaties and may have weakened the existing NPT based non-proliferation regime. For instance, Article 18 of the TPNW states that “[It] shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party....”¹⁵ As per the NPT, there exist different sets of obligations for the NWSs and the NNWS, but the TPNW does not recognize such differentiation thus making it difficult for any of the NPT NWSs to join the new treaty without giving up their nuclear weapons.

TPNW and the Nuclear Possessor States

Since the TPNW does not differentiate between the NWSs or the NNWSs; therefore, for the purpose of ban treaty all states that possess nuclear weapons would be considered as the NWS, which also include India, Pakistan, Israel and North Korea. As the TPNW is based on a premise that it would help increase awareness about the humanitarian consequences of the use of nuclear weapons amongst the general public level, it would therefore be useful to review national positions of all the nuclear weapons states and the potential public support for the new initiative.

¹⁵ Text of the TPNW, <https://www.un.org/disarmament/wp-content/uploads/2017/10/tpnw-info-kit-v2.pdf>.

The European Leadership Network's (ELN) report, "Breakthrough or Breakpoint? Global Perspectives on the Nuclear Ban Treaty,"¹⁶ provides interesting insight into the thinking of NPT recognized nuclear possessor states, which is briefly summarized in the subsequent paragraphs along with the national positions of the non-NPT nuclear possessor states towards the ban treaty.

The United States: The US has opposed the new treaty for political and technical reasons. A legally binding TPNW would make it difficult for the US to deploy its nuclear arsenal on the territories of its allies. And in the absence of security assurances, it would be difficult to maintain the sanctity of the NATO alliance structure that is already under stress due to various ongoing political developments. TPNW is also seen as an unnecessary distraction by the United States since it could bring increased focus on the ongoing modernization of its nuclear arsenal as part of the new National Security Strategy.¹⁷ The ban treaty enjoys limited support in the civil society and most consider it a distraction from the existing disarmament efforts that could unnecessarily complicate the NPT review process.

Russia: Russia's opposition towards the TPNW has been more restrained. Like other NWSs, it supports gradual disarmament but also considers nuclear deterrence essential for the stability of international security environment. Russia believes that sudden elimination of nuclear weapons would increase the chances of volatility, and if nuclear disarmament has to be pursued, it would require inclusive approaches involving all nuclear possessor states through an integrated approach catering for the conventional as well as nuclear balance. Unlike the US or other western countries, there seems to be negligible support at the public level for the new treaty. Instead, a large majority of the public consider nuclear weapons as a necessary evil to maintain deterrence and counter threats from the US led Western security alliance.

UK and France: Both the European nuclear weapon states, who are often faced with the challenge of justifying their nuclear deterrents in the absence of existential threats to their national security have opposed the TPNW. Unlike some other European countries, the general public in these two countries remains relatively less vocal about the humanitarian impact of the use of nuclear weapons. It is therefore unlikely that the TPNW would be able to generate enough momentum from within these

¹⁶ Shatabhisha Shetty and Denitsa Raynova, (eds.), *Breakthrough or Breakpoint? Global Perspectives on the Nuclear Ban Treaty*, Global Security Special Report, European Leadership Network, December 2017.

¹⁷ *National Security Strategy of the United States*, December 2017, 30. <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

two nuclear states that could force their national leadership to give up their nuclear weapons and join the ban treaty.

China: China is the only country amongst the five NPT NWSs that provides unconditional 'No First Use' (NFU) commitment, which could be seen in line with the principles of the ban treaty. While China is unlikely to join the TPNW, it continues to maintain a cautious approach and has not demonstrated any visible hostility towards the new treaty. Due to the absence of any meaningful debate on the humanitarian consequences of nuclear weapons at the public level, it is unlikely that the TPNW would emerge as an important national issue which could force the leadership to unilaterally give up nuclear weapons.

India: It is one of the two declared nuclear weapon states that never signed the NPT and has also opposed the nuclear ban treaty. India participated in the 2013 open-ended working group (OEWG) on nuclear disarmament but decided to stay out of the 2016 OEWG that eventually led to the TPNW negotiations. India's opposition on the TPNW is in line with its traditional approach towards other international arms control and disarmament treaties. In the past, it supported and participated in the negotiations on NPT and CTBT but eventually refused to sign any of the two treaties by terming these as 'nuclear apartheid' and detrimental to its national security interests.

While the initial discussions were being held at the third HIM meeting at Vienna, India's representative stated that instead of focussing on the possession of nuclear weapons, "there is a need to strengthen the international norm of nearly seventy years of non-use of nuclear weapons."¹⁸ This concern emanates from the possibility of a nuclear use by its principal adversary Pakistan in response to India's limited conventional war Cold Start doctrine.

India has been a staunch supporter of nuclear disarmament in the past and had also offered a comprehensive plan towards nuclear disarmament in 1988;¹⁹ however, once the TPNW was formally negotiated, India stated that it cannot be bound by any of the obligations that may arise from it. And to avoid being held accountable for its past public support towards nuclear disarmament, India made it clear that this "Treaty in no way constitutes or contributes to the development of any

¹⁸ Statement by Indian Representative at Vienna, Conference on the "Humanitarian Impact of Nuclear Weapons," December 8-9, 2014. https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Ab_ruestung/HINW14/Statements/HINW14_Statement_India.pdf

¹⁹ "Rajiv Gandhi Action Plan on Nuke Disarmament Relevant after 30 Years," *National Herald*, June 10, 2018, <https://www.nationalheraldindia.com/opinion/rajiv-gandhi-plan-on-nuclear-disarmament-is-more-relevant-even-after-30-years>.

customary international law.”²⁰

A large majority of the civil society members in India view nuclear weapons as a tool to enhance international standing. Since these are seen as political weapons, there seems to be little or no concern on the humanitarian consequences of the use of nuclear weapons. It is therefore unlikely that the TPNW would be able to generate sufficient interest amongst the civil society groups or encourage the general public to force the Indian government towards nuclear disarmament.

Pakistan: Pakistan’s approach towards global arms control and disarmament related treaties is shaped by its regional security concerns emanating mainly from the existential threat it faces from its principal adversary. This was also evident in the Pakistani response at the third HIM meeting held at Vienna that highlighted its security compulsions and the need to address the underlying causes of insecurity.²¹ Although Pakistan has traditionally remained supportive of global nuclear disarmament but has refused to offer unilateral concessions and give up its nuclear weapons. Therefore, once the TPNW was finally negotiated, Pakistan maintained that: “[It] does not consider itself bound by any of the obligations enshrined in this Treaty,” and that “this Treaty neither forms a part of, nor contributes to the development of customary international law in any manner.”²²

Israel: Israel is one of the three states that never signed the NPT and is believed to be in possession of a sizeable nuclear arsenal. Unlike the other two non-NPT nuclear states (India and Pakistan), Israel continues to maintain ambiguity about its nuclear status and has not formally declared itself as a nuclear weapon state. Israel is one of the earlier signatories of the CTBT but has linked its ratification with the regional security environment and at an appropriate time.²³

Israel voted against the 2016 resolution that gave the mandate to negotiate TPNW and did not participate in the treaty negotiations, as it could bring additional problems for Israel in the form of renewed calls for declaring Middle East as a zone free of nuclear weapons at the next NPT RevCons. Israel’s continued refusal to provide more transparency regarding its nuclear program, and the fact that its regional rival Iran

²⁰ Statement by India’s Ministry of External Affairs spokesperson, July 18, 2017, <http://www.mea.gov.in>.

²¹ Statement by Pakistan. https://www.bmeia.gov.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Statements/HINW14_Statement_Pakistan.pdf

²² Press release by Ministry of Foreign Affairs, August 7, 2017, <http://www.mofa.gov.pk>.

²³ “Working On The “When” Of Israel’s Ratification,” CTBTO, <https://www.ctbto.org/press-centre/highlights/2016/working-on-the-when-of-israels-ratification/>

voted in favour of the 2016 resolution and also actively participated in the treaty negotiations, could bring additional pressure on Israel. At the domestic level, there seems to be no major support by the civil society that could otherwise pressurize the government and change Israel's position towards the TPNW.

North Korea: North Korea left the NPT in 2003 and declared itself as a nuclear weapons state in 2006. It supported the 2016 UN resolution to negotiate the TPNW but did not participate in its negotiations. Without firm security assurances and complete de-nuclearization of the Korean Peninsula, it is not likely to join the TPNW or revert back to the NPT. The June 12, 2018 US-DPRK joint statement issued after the leadership-level summit was significant from the North Korean perspective, since it offered US security guarantees in return for a commitment by North Korea to work towards "complete de-nuclearization of the Korean Peninsula,"²⁴ which could also mean that the US will not be permitted to place its nuclear weapons in the region, besides North Korea promising to give up its nuclear weapons. This interpretation nevertheless, is likely to be contested by the US as well as South Korea and Japan, who have their separate definition of regional de-nuclearization.

For North Korea, humanitarian consequences of nuclear weapons seem to be of little concern and may not have any meaningful impact on the civil society. North Korea seems to be the least affected state from the HIM, especially taking into consideration the fact that Japan, which has been the leading proponent of nuclear disarmament and the most affected state having faced humanitarian disaster itself, also remains opposed to the TPNW.

TPNW and its Implications for the Non-Proliferation Regime

The nuclear ban treaty carries an ambitious agenda that is likely to create further dissent amongst the 'norm-compliant' states since these are being asked to accept overlapping obligations, while the 'norm-defiant' states are likely to remain outside the new treaty. The supporters of the TPNW, in their eagerness to negotiate a new legally binding disarmament instrument with little or no consideration for the existing initiatives, may have in fact weakened the existing non-proliferation regime, which could

²⁴ "Joint Statement of President Donald J. Trump of the United States of America and Chairman Kim Jong Un of the Democratic People's Republic of Korea at the Singapore Summit," White House, June 12, 2018, <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/>.

possibly lead to “the end of current disarmament efforts.”²⁵ Following is an analysis of how the various components of the global non-proliferation and disarmament regime may be affected:

Non-Proliferation Treaty

The Non-Proliferation Treaty (NPT) based global nonproliferation regime continues to remain under stress because of the issues of non-compliance by some of the treaty members and its lack of universality. The TPNW may have added to these challenges, thus making it difficult to reconcile the growing void between the NWSs and the NNWSs and could also undermine the NPT review process.²⁶ TPNW may provide an “additional justification for the NWSs not working towards their disarmament commitments by arguing for the need to reconcile different set of obligations under the NPT and the TPNW before moving further on nuclear disarmament.

The proponents of the TPNW, nevertheless, remain optimistic and are of the view that the ban treaty would supplement the existing international treaties and arrangements, which may not necessarily be true since there exists inherent conflict between the NPT and the TPNW. The former clearly defines the NWS and the NNWS (Article IX) with a different set of non-proliferation and disarmament obligations, while the TPNW has removed this distinction thus making it unrealistic for the nuclear possessor states to become a party to the new treaty without completely giving up their nuclear weapons.

Comprehensive Nuclear-Test-Ban Treaty

The text of the nuclear ban treaty recognizes the importance of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and its verification mechanism as the core element of the nuclear disarmament and non-proliferation regime, but beyond this reference and that too in the preambular section of the treaty text, no effort has been made to benefit from CTBT’s extensive verification infrastructure that could otherwise have been useful for the treaty implementation. There is also a possibility that some of CTBT’s Annex II states²⁷ could contest the need to sign/ ratify the CTBT in the presence of a new treaty that comprehensively deals with all aspects, including the ban on its use, the production and possession of

²⁵ Jeffrey Lewis, “An Award for the Collapse of Disarmament,” *Foreign Policy*, October 9, 2017, <http://foreignpolicy.com/2017/10/09/an-award-for-the-collapse-of-nuclear-disarmament/amp/>

²⁶ Rauf, APLN & CNND Policy Brief, 8.

²⁷ These are eight Annex II states without their ratification CTBT cannot enter into force. These include, US, China, Egypt, North Korea, Israel, Iran, India and Pakistan.

nuclear weapons etc., thus making the issue of nuclear testing irrelevant.

Fissile Material Cut-off Treaty

Under the TPNW, state parties would have to give up their nuclear weapons program and submit declarations that they do not own, possess or control nuclear weapons and materials used for nuclear weapons. States joining the TPNW would be accepting obligations to provide credible assurances regarding the non-diversion of declared nuclear material from peaceful nuclear activities and the absence of undeclared nuclear material or activities in the state. If the new treaty could be universalized, it would preclude the possibility of fissile material production by the state parties and the need to engage in technically and politically difficult FMCT negotiations.

The Way Forward

The humanitarian appeal of nuclear ban treaty may help the civil society to launch follow-up initiatives but, without the participation of nuclear possessor states who remain principal stakeholders, it would be unrealistic to assume that nuclear disarmament could be seriously pursued. Instead of erecting new structures which would lead to further dissent within the global non-proliferation regime, it would be more useful to develop a consensus on the NPT based non-proliferation regime by addressing its existing shortcomings. Following are a few suggestions as to the way forward:

Resetting Priorities

International focus over the last several years seems to have drifted from non-proliferation and nuclear disarmament towards strengthening of nuclear security and export controls. These issues are important and do supplement the broader non-proliferation goals but may also put additional burden on states to meet their international obligations by diverting resources and energy from the disarmament and non-proliferation related issues. Resetting of priorities could bring back the focus on the NPT related obligations that enjoy near universal consensus rather than making concerted efforts to build a new consensus for a nuclear ban treaty.

Universalize the NPT Based Non-Proliferation Regime

NPT may have several weaknesses but has been successful in limiting the number of nuclear weapon states and preventing much feared *nuclear cascading* effect. Amongst its major shortcomings is NPT's failure to integrate the three 'original' non-NPT signatories that have nuclear weapons. Unless India, Pakistan and Israel are brought into mainstream

non-proliferation regime through a realistic and tangible *quid pro quo*, the goal of a universal non-proliferation regime cannot be achieved. A universal NPT will reduce the incentive for countries intending to build latent nuclear capabilities and break away from their non-proliferation obligations, thus precluding the need for erecting new arrangements in the form of a ban treaty. North Korea's nuclear issue would have to be dealt separately as it is believed to have developed its nuclear capability while it was part of the NPT and therefore cannot be equated with the other three non-NPT states.

Revitalize the Conference on Disarmament

The Conference on Disarmament (CD) was established in 1979 and remains the only multilateral disarmament negotiating forum. Contrary to general perception, the CD has an impressive record of negotiating major international treaties, including the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), Environmental Modification and Seabed treaties, Biological and Toxic Weapons Convention (BTWC), Chemical Weapons Convention (CWC) and the Comprehensive Nuclear Test Ban Treaty (CTBT). Since 1996, the CD has not been able to make progress due to varying priorities of the different countries. The disproportionate focus on the issue of FMCT has led to an assumption that the CD is in a stalemate. Instead the CD could work to develop consensus on other issues that are on its agenda including nuclear disarmament, prevention of arms race in the outer space (PAROS), and the negative security assurances (NSAs).

Conclusion

The NPT based non-proliferation regime is inherently discriminatory, but it has helped limit the number of nuclear weapon states by preventing some states from pursuing nuclear weapons, while encouraging others to give up their nuclear weapons and join the NPT as NNWSs. It is not an ordinary achievement by a single multilateral treaty, which despite its shortfalls has been able to withstand several internal and external pressures. Instead of building on the earlier successes, the non-state actors have ventured on a radically new path by introducing a separate treaty to stigmatize, ban and eventually eliminate nuclear weapons. Despite its good intentions, this ambitious approach risks unravelling the whole edifice of the NPT based global non-proliferation regime with several threshold states using it as a justification to break away from their existing non-proliferation and disarmament obligations.

The use of nuclear weapons could lead to unimaginable humanitarian consequences, but if managed with responsibility nuclear weapons could also help deter large-scale conventional wars and prevent humanitarian crises. If the objective of the nuclear ban treaty is indeed to reduce the risks associated with nuclear weapons, this could possibly be

achieved by adopting a comprehensive approach involving conflict resolution, and working collectively towards complete and general disarmament within the established international framework. Piecemeal solutions without taking into consideration national security interests of individual states are unlikely to produce a meaningful outcome but could lead to further fragmentation within the already fractured international non-proliferation regime.

