

# The TPNW and its implications for Norway

EXECUTIVE SUMMARY

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NORWEGIAN ACADEMY OF INTERNATIONAL LAW

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## EXECUTIVE SUMMARY

### INTRODUCTION

Nuclear disarmament has been a central objective of the international community for more than seven decades. All the world's states nominally subscribe to the goal of a world without nuclear weapons. But the global nuclear disarmament effort has been mired by setbacks and diplomatic gridlocks. Although the overall number of nuclear warheads in the world has been dramatically reduced since the Cold War peak, approximately 14,500 nuclear warheads remain in existence.<sup>1</sup> The nuclear-armed states possess large quantities of nuclear material that could be used to develop more weapons. The nine nuclear-armed states are currently modernizing or expanding their nuclear arsenals. Some analysts claim the world has entered a new nuclear arms race.<sup>2</sup>

Recent scientific findings have confirmed that a nuclear war would have devastating climatic impacts. A nuclear war involving just 100 warheads of the Hiroshima-bomb size – small compared to many of today's warheads – could cause climatic disruptions leading to global famine and displacement.<sup>3</sup> According to one estimate, such a war could leave two *billion* people at risk of

starvation.<sup>4</sup> If dropped on a city, a single nuclear bomb would cause a humanitarian catastrophe. No state or humanitarian organization would be able to offer satisfactory help to survivors.<sup>5</sup>

### WHY WAS THE TPNW ADOPTED?

Nuclear weapons have long been subject to international regulations. The general rules governing the conduct of hostilities (international humanitarian law) rule out the use of nuclear weapons in almost any realistic circumstances. The use of nuclear weapons would violate the rules of distinction (civilians may not be specifically targeted), proportionality (attacks must be proportional to the expected military advantage gained) and precautions in attacks (civilians must be alerted and protected). The 1968 Nuclear Non-Proliferation Treaty (NPT) prohibits “non-nuclear-weapon states” (states that had not acquired nuclear weapons by 1 January 1967) from acquiring nuclear weapons. It further commits all parties to pursue disarmament and codifies a right to use nuclear technology for civilian purposes. However, the NPT's explicit distinction between “nuclear-weapon states” and “non-nuclear-weapon states” appears to have rendered the treaty “structurally unable to categorically delegitimize nuclear weapons and the practice of nuclear deterrence.”<sup>6</sup> Representatives of the nuclear-weapon states

1 Hans M. Kristensen and Robert R. Norris, “Status of World Nuclear Forces”, Federation of American Scientists (June 2018). <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>.

2 E.g. Eric Schlosser, “The Growing Dangers of the New Nuclear Arms Race”, *The New Yorker* (24 May 2018). <https://www.newyorker.com/news/news-desk/the-growing-dangers-of-the-new-nuclear-arms-race>.

3 See e.g. Michael J. Mills et al., “Multidecadadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict”, *Earth's Future* 2, no. 4 (2014); Alan Robock et al., “Climatic Consequences of Regional Nuclear Conflicts”, *Atmospheric Chemistry and Physics* 7, no. 8 (2007).

4 Ira Helfand, *Nuclear Famine: Two Billion People at Risk?* (Boston, MA: IPPNW, 2013).

5 International Committee of the Red Cross, “Nuclear weapons – an intolerable threat to humanity” (7 August 2018). <https://www.icrc.org/en/nuclear-weapons-a-threat-to-humanity>.

6 Nick Ritchie, “Waiting for Kant”, *International Affairs* 90, no. 3 (2014), p. 621.

often argue that the NPT gives them an enduring right to possess nuclear weapons.<sup>7</sup>

Adopted by the UN General Assembly in July 2017, the Treaty on the Prohibition of Nuclear Weapons (TPNW) was designed to institute an unconditional norm against nuclear weapons. Although none of the nuclear-armed states are expected to join the treaty in the near future, supporters of the new treaty argue that the TPNW will help diminish the “prestige value” of nuclear armament and lay the foundation for nuclear disarmament in the future. Delegitimizing nuclear weapons is argued to constitute a necessary, albeit not sufficient, condition for the elimination of nuclear weapons. The TPNW is not intended as a substitute for longstanding disarmament proposals such as the entry-into-force of the Comprehensive Nuclear-Test-Ban Treaty or negotiation of a fissile material (cut-off) treaty, but rather as a tool to help create the normative conditions for the pursuit and implementation of disarmament measures in the future.

The Norwegian government has ruled out accession to the TPNW, claiming that the treaty is incompatible with Norway’s NATO membership. But several Norwegian political parties and civil society organizations have asserted their intention to push for Norwegian signature and ratification.

### THE CONTENTS OF THE TPNW

The TPNW contains a preamble, seven substantive articles and thirteen articles on technical and organisational matters.

<sup>7</sup> See e.g. Russia, Statement to the UN General Assembly First Committee, New York. UN doc. A/C.1/71/PV.22 (27 October 2016).

Article 1(1)(a) prohibits parties from developing, testing, producing, manufacturing, otherwise acquiring, possessing or stockpiling any nuclear explosive device. Article 1(1)(b) prohibits the transfer of nuclear weapons. Article 1(1)(c) prohibits receiving transfers or control of nuclear weapons. For the vast majority of potential states parties to the TPNW, these obligations overlap with their obligations under the NPT. The most significant difference between the NPT and the TPNW in this context is that the latter also includes a prohibition on “development”. The NPT’s lack of a prohibition on development has fostered diverging views about whether development activities and preparations short of the assembly of a nuclear weapon are prohibited. By explicitly prohibiting “development”, the TPNW leaves less room for contestation. “Development” is widely understood to include preparations and planning with a view to subsequent production/manufacture.<sup>8</sup>

Article 1(1)(d) explicitly prohibits parties from using or threatening to use nuclear weapons. This provision constitutes an entirely new element of international humanitarian law. While it might be argued that use of nuclear weapons could be lawful under the general rules of IHL in extreme circumstances, Article 1(1)(d) prohibits the use of nuclear weapons under absolutely all circumstances.

Article 1(1)(e) obliges the parties never under any circumstances to “[a]ssist,

<sup>8</sup> See e.g. Walter Krutzsch, “Article 1: General Obligations”, pp. 61–72 in Walter Krutzsch, Eric Myjer, and Ralf Trapp (eds), *A Commentary on the Chemical Weapons Convention* (Oxford: Oxford University Press, 2014), p. 65.

encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party” to the treaty. Article 1(1)(f) mirrors Article 1(1)(e), prohibiting states parties from seeking or receiving assistance to engage in any activity prohibited by the treaty.

Article 1(1)(g) prohibits stationing, installation or deployment of nuclear weapons in the territory or any place under the jurisdiction or control of states parties. This wording is wide and is meant to cover all forms of physical presence, be it temporary, short term or long term, of a nuclear weapon in a state’s territory or under its jurisdiction or control.

Article 3 of the TPNW provides that states parties that have not concluded a comprehensive safeguards agreement with the IAEA – an agreement that allows the IAEA to conduct audits and inspections to ensure that civilian nuclear installations are not used for military purposes – must do so within 18 months of accession to the TPNW. Article 3 also provides that parties that have in place voluntary safeguards measures that go beyond the minimum requirement under the NPT must maintain those safeguards. Thus, the TPNW locks down previously voluntary measures in a binding, multilateral treaty.

Article 4 commits any state party in possession of nuclear weapons to disarm. Such states must immediately remove their nuclear weapons from operational status, and then verifiably destroy their nuclear weapons and eliminate their nuclear-weapon programme according to a plan agreed with the TPNW parties. Article 4 also states that any state party that hosts nuclear weapons

on its territory or under its jurisdiction or control shall ensure the prompt removal of those weapons.

Articles 6 and 7 cover victim assistance and environmental remediation. States parties shall “adequately provide” victim assistance to persons under their jurisdiction who are affected by the testing or use of nuclear weapons and take measures to ensure the rehabilitation of any areas under their jurisdiction or control that have been contaminated by nuclear use, testing or production. States parties “in a position to do so” are obliged to “provide technical, material and financial assistance to States Parties affected by nuclear-weapons use or testing”.

#### **WHAT MUST NORWAY DO TO COMPLY WITH THE TPNW?**

While the TPNW is fully reconcilable with Norway’s existing legal obligations, Norway would have to adjust some of its current practices to comply with Article 1(1)(e). Specifically, Norway would have to refrain from “encouraging” or “inducing” the possession and use of nuclear weapons by its allies. Norway’s unqualified support for NATO’s current strategic concept (2010) and Deterrence and Defence Posture Review (2012) would appear to fall foul of this provision. By actively supporting NATO’s policy of extended nuclear deterrence, Norway “encourages” the nuclear-armed allies to retain their nuclear arsenals. Accession to the TPNW would override Norway’s current support for the possession and potential use of nuclear weapons by allies. After accession, Norway would have to desist from endorsing any NATO documents containing positive references

to the potential use of nuclear weapons. Norway would either have to block the adoption of alliance documents containing such language, or disassociate itself from such statements through interpretive declarations or “footnotes”. Norway would also have to adopt national legislation criminalizing the activities prohibited by the TPNW for its citizens (as has been done for other disarmament treaties, such as the Cluster Munitions Convention and the Chemical Weapons Convention).

### **NATO COMMITMENTS**

NATO member states bear no legal obligation to support extended nuclear deterrence or the retention of nuclear weapons. From a legal point of view, accession to the TPNW is compatible with NATO membership. However, accession to the TPNW would probably be interpreted by some allies as a breach of alliance solidarity and a threat to NATO’s security and political cohesion. Punitive measures by allies cannot be ruled out entirely. For those in favour of a healthy alignment with NATO, a worst-case scenario would be that Norway’s most important security partners cancelled their “security guarantees” to Norway (which would be a breach of *their* NATO obligations). The likelihood that allies impose significant punitive measures would probably depend, in part, on whether Norway decided to join the TPNW unilaterally or as part of a group of states, whether Norway interpreted the TPNW in a narrow or expansive manner (specifically with respect to “transit”) and the speed with which the decision to join was implemented.

The likelihood of allies renouncing their security guarantees is difficult to assess. From the perspective of other NATO

members, the most constructive line would probably be to go on as before, making as little as possible of Norway’s accession. While a non-nuclear ally’s accession to the TPNW would contradict NATO’s current policies, nuclear deterrence would continue to operate. As long as at least one NATO member retains nuclear weapons, aggression against any NATO member would inevitably involve a risk of nuclear escalation. Accession to the TPNW by Norway would not legally preclude France, the United Kingdom or the United States from using nuclear weapons in a conflict.

### **IMPLICATIONS OF JOINING/ NOT JOINING THE TPNW**

Joining the TPNW could strengthen the norm against nuclear weapons and help foster the conditions for a future disarmament process. The independent effect of Norwegian accession to the TPNW is of course difficult to assess – it might be marginal – but in the long run support for the goal of disarmament from states such as Norway could be critical. For example, the ratification of the NPT by Norway and other non-nuclear-weapon states helped realize the norm against nuclear proliferation. Most of the states capable of manufacturing nuclear weapons and delivery vehicles in the 1960s initially refused to join the NPT. It took several decades for the non-proliferation norm to take hold. Joining the TPNW could also bolster Norway’s reputation as a champion of international humanitarian law. At the same time, joining the TPNW could trigger negative reactions from allies. Some believe accession to the TPNW would also undermine Norway’s security. In this view, potential enemies might interpret the decoupling of Norway from NATO’s nuclear

strategy as a split in the alliance, increasing the likelihood of foreign provocations against Norway. Others argue that Norwegian accession to the TPNW could strengthen Norway's security in the long term and that the use of weapons of mass destruction is in any case both morally and legally indefensible.

Refusing to sign the TPNW could also have benefits. Most importantly, continuing to oppose the TPNW would mean that Norway did not run the risk of provoking negative reactions from allies. Further, to the extent that Norway's explicit reliance on nuclear deterrence is seen as a benefit, declining to join the TPNW would allow Norway to continue to base its security, in part, on an explicit endorsement of the potential use of nuclear weapons. But refusing to join the TPNW could also have negative effects. Declining to join the TPNW would help shield the nuclear-armed states from diplomatic pressure, counteracting the UN majority's effort at reinvigorating the disarmament agenda through prohibiting nuclear arms. Refusing to join the TPNW would also impede work for a rules-based international order, solidifying the notion that might trumps right in international affairs. Declining to join the TPNW would further rob Norway of the opportunity to influence the interpretation and further development of the TPNW, for example through the negotiation of additional protocols. Opposition to the TPNW will by all accounts harm Norway's image as a champion of disarmament and international humanitarian law. Snubbing the TPNW sends a signal that Norway considers humanitarian principles important only when such considerations do not have uncomfortable implications for Norwegian

policy. Some have also suggested that Norway's candidacy for the UN Security Council will be damaged by not supporting the TPNW, especially since Ireland – a leading TPNW proponent – is one of the other contenders for the Security Council seat in the next round.

Norwegian accession to the TPNW would probably be less dramatic than the debate sometimes indicates. Norwegian accession to the TPNW would not create new legal obligations for other NATO members or magically force Norway's nuclear-armed allies to disarm unilaterally. It might, however, help create the conditions for meaningful nuclear disarmament negotiations between the nuclear-armed states in the future.

