The Future of the Nuclear Taboo: Framing the Impact of the TPNW

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ABSTRACT
How might the Treaty on the Prohibition on Nuclear Weapons (TPNW) help prevent the use of nuclear weapons? Since the adoption of the TPNW in 2017, much has been said about the Treaty’s impact on nuclear disarmament. Less has been said about how the Treaty’s international humanitarian law (IHL)-based prohibition of the use of nuclear weapons may be best leveraged to further strengthen the long-standing norm against such use. This article explores how the design of the first meeting of States Parties to the TPNW may help ensure respect for the Treaty’s prohibition on the use of nuclear weapons.

TPNW: A Question about Impact
The adoption of the Treaty on the Prohibition on Nuclear Weapons (TPNW) on 7 July 2017 was a momentous achievement. The Treaty’s comprehensive prohibition on nuclear weapons reflects the long-standing goals and aspirations of many States and generations of anti-nuclear activists. For the International Committee of the Red Cross (ICRC), the Treaty’s adoption was a moment for our own history books. The ICRC has been appealing for nuclear weapons to be prohibited since September 1945 – a few weeks after the atomic bombings of Hiroshima and Nagasaki (Schroeder 2017; Kellenberger 2010). The adoption of the TPNW responds to a call that the ICRC has made for nearly half of its existence as an organisation.

As the TPNW enters into force as a new instrument of international law, States and other stakeholders will have to look for ways to maximise its impact. While the TPNW’s value as a strong and unequivocal moral statement against nuclear weapons should not be discounted, the success of the TPNW will ultimately be measured in terms of its ability to achieve its objectives. No treaty is an end in itself. Ultimately, the TPNW will be what States and its stakeholders make of it, to paraphrase Alexander Wendt (Wendt 1992). The fact that none of the nuclear-armed or nuclear-allied States have so far joined the TPNW, makes questions about the new prohibition regime’s expected impact more pressing. These discussions are likely to intensify in the run-up to the TPNW’s first meeting of States Parties.
TPNW as a Disarmament Tool

The expected impact of the TPNW is a function of the Treaty’s objectives. Broadly speaking, the TPNW has two interlinked objectives: First, considered as a disarmament treaty, the TPNW seeks to achieve the long-standing goal of a world without nuclear weapons. Second, furthering the object and purpose of international humanitarian law (IHL) and contributing to its respect, the TPNW seeks to prevent and mitigate the suffering and devastation on a massive scale that any use of nuclear weapons would generate. These two objectives, both reflected in the Treaty’s preamble, are linked. The total elimination of nuclear weapons is generally considered as a means to guarantee the non-use of nuclear weapons (Casey-Maslen 2019). The prevention of the humanitarian consequences of nuclear use, on the other hand, appears as an independent objective – an end in and of itself that requires no further justification.

Since the TPNW’s adoption, much has been said about the Treaty’s expected impact on nuclear disarmament. This is not surprising. The bulk of the prohibitions contained in the TPNW’s Article 1—including the prohibitions on the development, testing, production, manufacturing, acquisition, possession, stockpiling, stationing, installation, and deployment of nuclear weapons—can be described as disarmament-related provisions. These prohibitions are complemented by the legal pathways outlined in Article 4 to destroy or remove any nuclear weapons according to an agreed timeline.

The TPNW’s disarmament provisions also appear to have been the main focus of the debates between the Treaty’s proponents and its critics. Many of the TPNW’s proponents have argued that the Treaty stigmatises or delegitimises the possession of nuclear weapons, thereby adding pressure on the nuclear-armed States to eliminate their nuclear arsenals (Kurosawa 2018).

The Treaty’s critics, on the other hand, have focused on the Treaty’s impact (or, in their view, lack thereof) on nuclear disarmament. “A purported ban on nuclear weapons that does not address the security concerns that continue to make nuclear deterrence necessary cannot result in the elimination of a single nuclear weapon [...]”, the United States, United Kingdom and France stated in a press release issued on the day of the Treaty’s adoption in 2017 (USDS 2017). The nuclear-armed States’ rejection of the Treaty has furthermore been presented as evidence for the claim that the TPNW will not lead to nuclear disarmament. A variation of this line of criticism is that the TPNW undermines the existing nuclear disarmament and non-proliferation framework, notably the safeguards provisions of the Treaty on the Non-Proliferation Treaty (NPT) (Nystuen, Egeland, and Hugo 2018).

It is clear that the debate about the TPNW’s impact on nuclear disarmament is likely to intensify with the Treaty’s entry into force and its first meeting of States Parties. The Treaty text stipulates that States Parties make a number of decisions related to the Treaty’s disarmament provisions during the first meeting, including determining how much time a State Party with nuclear weapons will be given to destroy its nuclear arsenal and eliminate its nuclear weapons programme (Article 4.2), and how quickly a state with nuclear weapons in its territory must, upon becoming a party to the Treaty, remove these weapons (Article 4.4). The credibility of these decisions hinges on an assessment of how long it would conceivably take a state to destroy its nuclear arsenal or remove nuclear weapons from its territory. It will be challenging to arrive at a realistic assessment of the
time required for these processes without the input and perspective of the nuclear-armed and the nuclear-allied States.

It seems doubtful that a focus on the TPNW’s disarmament provisions will convincingly demonstrate the Treaty’s impact – at least in the short term. The example above suggests that such a focus will highlight rather than address the difficulties involved in designing a disarmament regime without the participation of the States that possess these weapons. Insistence on the TPNW’s impact on disarmament may therefore challenge rather than reinforce the universality of the prohibition norm.

TPNW as a Means to Prevent Nuclear Use

The TPNW’s disarmament-related provisions are integral and important elements of the Treaty. However, there is a risk that discussions about these provisions drown out the equally – if not more – important discussions about the TPNW’s impact on the long-standing international norm against use of nuclear weapons. While long-standing frustrations with the nuclear-armed States’ failure to implement their disarmament obligations and commitments were undoubtedly one of the conditions that made the TPNW possible, the process to negotiate and adopt the Treaty was triggered more directly by a growing recognition of the unacceptable suffering and devastation caused by their use (Fihn 2017).

It is therefore surprising that there has not been more discussion about the Treaty’s use-related provisions. The TPNW’s explicit prohibition of the use of nuclear weapons (Article 1.1(e)) is a significant legal development. Although the general rules and principles of IHL apply to the use of nuclear weapons (Maresca and Mitchell 2015), the TPNW’s explicit and unequivocal prohibition of such use fills one of the glaring gaps in the existing nuclear disarmament and non-proliferation regime, notably the NPT, which says nothing about the use of nuclear weapons. Alongside the provisions on victim assistance and environmental remediation in the Treaty’s Article 6, the prohibition on the use of nuclear weapons is what makes the TPNW a contribution to IHL – the body of law that seeks to limit the suffering caused by armed conflict by regulating inter alia which weapons a party to an armed conflict can and cannot use. Moreover, it is the TPNW’s use-related provisions that connect most directly with the TPNW’s humanitarian rationale.

The most obvious way in which the TPNW may help prevent the use of nuclear weapons is by strengthening the taboo against such use. While the alleged utility of nuclear possession as a means to international security remains a fundamentally contested issue both amongst States and the general public, there already exists a strong taboo against the use of nuclear weapons. In The Nuclear Taboo, Nina Tannenwald argues forcefully for the existence and causal significance of this “nuclear taboo”. According to Tannenwald, the fact that nuclear weapons have not been used in armed conflict since the atomic bombings of Hiroshima and Nagasaki cannot be fully explained without assuming the existence of a “powerful de facto prohibition against first use of nuclear weapons” (Tannenwald 2007, 10).

A powerful taboo against the use of nuclear weapons has developed in the global system, which, although not (yet) a fully robust prohibition norm, has stigmatised nuclear weapons
as unacceptable weapons – “weapons of mass destruction”. Without this normative stigma, there might have been more “use” (Tannenwald 2007, 2)

It can be argued that the TPNW – and the process that built the case for it – has already strengthened the nuclear taboo. The three conferences on the humanitarian impact of nuclear weapons, which took place in 2013 and 2014, not only contributed to a reframing of the nuclear weapons issue by placing humanitarian concerns at the centre of the discourse (Eide 2013). The conferences also gave civil society and humanitarian actors a much more prominent role than in existing nuclear disarmament and non-proliferation arenas, thus opening new pathways for societal pressure and normative power politics. By institutionalizing these pathways, the TPNW provides an arena for the continued strengthening of the nuclear taboo.

Moreover, by explicitly prohibiting the use of nuclear weapons in a legally binding instrument, the TPNW sends a powerful signal that such use would not only be unacceptable from a moral and humanitarian perspective, but also that such use would not be above legal rules that go beyond the treaty itself. On the contrary, the Treaty explicitly recognizes that the principles and rules of IHL apply fully to the use of nuclear weapons (Maurer 2019), thus placing nuclear weapons on a par with other weapons prohibited under IHL.

Importantly, because the TPNW’s prohibition on nuclear use can lean on an already well-established taboo against first use, it seems well placed to demonstrate the Treaty’s impact. As shown above, the nuclear-armed States have the ability to render the TPNW’s disarmament provisions ineffectual by refusing to reduce and eliminate their nuclear arsenals. While the nuclear-armed States may also continue – as they do – to express their disagreement with this provision and thereby prevent it from becoming a customary legal norm, they cannot, it seems, assert the same level of control over the impact-assessment of Treaty’s prohibition of use of nuclear weapons. While a framing focused on the TPNW’s disarmament provisions will play into the hands of those who argue for the Treaty’s ineffectiveness, a framing focused on the TPNW’s prohibition on the use of nuclear weapons will – unless nuclear weapons are used again – strengthen the case of those who maintain that the Treaty is an effective instrument of international law.

The scope of the TPNW’s prohibition on the use of nuclear weapons is broader than the nuclear taboo as conceptualised by Tannenwald. While the nuclear taboo constitutes a moral-political taboo against first use of nuclear weapons, the TPNW contains a legal norm against any use of these weapons. This has important implications. While a taboo against first use can live quite happily alongside doctrines relying on retaliatory or second-strike nuclear use – indeed, as noted by Tannenwald, paradoxically “the taboo has helped to stabilize and legitimate the practice of nuclear deterrence […]” (Tannenwald 2007, 18) – a prohibition against any use seems to imply a rejection of nuclear deterrence. However, in contrast with a disarmament-based rejection of nuclear deterrence – which begs the question of how a world without nuclear weapons would not imperil international peace and security – a focus on the TPNW’s use-related provisions appears to shift the discursive burden of proof onto the nuclear-armed and nuclear-allied States: Confronted with the TPNW’s categorical prohibition on any use of nuclear weapons, the states that are relying on nuclear deterrence will have to argue the position that use of these weapons is not or should not be categorically prohibited, and outline the
circumstances under which such use could be permitted. Against the backdrop of the compelling evidence of long-term suffering and devastation caused by past use of nuclear weapons, this seems a difficult position to maintain.

**Implications**

The entry into force of the TPNW on 22 January 2021 will force its States Parties to make a number of decisions regarding the Treaty’s implementation architecture. A key question in this regard is how the Treaty’s meetings of States Parties, to be convened within 12 months of the Treaty’s entry into force, can be designed so as to strengthen the taboo against use of nuclear weapons. Differently put, what can the parties to the TPNW do to ensure respect for the Treaty’s prohibition on the use of nuclear weapons, even among non-parties?

Tannenwald (2007) identified several factors that, in her analysis, led to the formation of the nuclear taboo, including societal pressure, normative power politics, the construction of categories, institutionalisation and iterated behaviour of non-use over time. Of these, and drawing on John Borrie’s framework for transforming unpropitious environments for dealing with the effects of weapons (Borrie 2013), it is possible to identify number of ways in which the TPNW’s explicit prohibition of the use of nuclear weapons may be leveraged so as to further strengthen and expand the norm against such use:

First, the TPNW may provide an arena for the continued collection and dissemination of testimonies of survivors and evidence of the humanitarian impact of the use of nuclear weapons. The process to build the case for the TPNW was driven by a strategic effort to “constructively upsetting the status quo” (Borrie 2013) in nuclear disarmament and non-proliferation by using evidence of the catastrophic humanitarian consequences of nuclear weapons and the IHL rules regulating the means and methods of warfare to challenge a framing or categorisation of these weapons as tools of security and protection (Løvold 2020). The meetings of States Parties to the TPNW provides a key opportunity to take this reframing strategy forward. Procedurally, this may be achieved by establishing a subsidiary body on evidence of harm or another science-policy interface to report to the Treaty’s States Parties. The expert meeting on the humanitarian impact and risks of nuclear weapons, organised by the ICRC and the International Federation of Red Cross and Red Crescent Societies in March 2020, demonstrated that there is both a need for and a considerable appetite for more research on the humanitarian and environmental impacts of nuclear weapons (ICRC 2020).

Second, the TPNW may be used as a tool to mobilise public opinion. Opinion polls, including the ICRC’s Millennials on War Survey (2020), show that the public remains firmly opposed to the use of nuclear weapons as a means of warfare, while opinions about the potential utility of nuclear possession are more divided (Løvold 2020). The adoption of the TPNW was a result of a strategic partnership between civil society, international organisations, researchers and States to mobilise the public in favour of a nuclear ban treaty on the basis of the unacceptable consequences of the use of nuclear weapons. The implementation architecture of the TPNW may provide opportunities to strengthen and expand these partnerships. To achieve this, the meetings of States Parties should be designed so as to facilitate participation from a broad set of stakeholders and opinion-makers, including parliamentarians, city representatives, faith leaders, academics,
journals, humanitarian actors and other interest groups, civil society organisations and influencers.

Finally, the meetings of States parties to the TPNW may be used to question the practice of nuclear deterrence. The Treaty’s Article 8.5 stipulates that States not party “shall be invited to attend the meetings of States Parties and the review conferences as observers”. States Parties may use this participation clause to invite representatives of the nuclear-armed and nuclear-allied States not party to share their assessment of the IHL implications of existing nuclear doctrines, strategies and concepts, including the circumstances in which the use of nuclear weapons, in their view, may be permissible under the rules and principles of IHL. By turning the meetings of States Parties into an arena for engagement with nuclear-armed and nuclear-allied States not party, the TPNW membership may pave the way for a more empirically grounded and less polarized debate about how to prevent the humanitarian catastrophe that would result from the use of nuclear weapons.

Disclosure Statement

No potential conflict of interest was reported by the author(s).

Notes on Contributor

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