How Can the TPNW Regime Be Sustained?

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ABSTRACT

Experience in implementing both other WMD treaties and other humanitarian disarmament treaties suggests that the TPNW regime can be effective in building and sustaining a global norm against nuclear weapons, even if no nuclear-armed state joins the treaty. Success will depend on the development of an active and diverse practitioner community focused on the core humanitarian aims of the treaty, practical implementation of its positive obligations, integration and communication with the wider international community, and further strengthening of the global nuclear non-proliferation regime.

Introduction

One of the most commonly levelled criticisms against the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) is that the treaty is merely a symbolic gesture that will make no real contribution to progress with nuclear disarmament. Opponents of the treaty have claimed, for example, that it will “not result in the elimination of a single nuclear weapon” (NATO 2020) and have pithily dismissed it as “emptily divisive virtue signalling” (Ford 2018). Their expectation – or perhaps hope – is that once the ceremony and excitement of adoption and entry into force have passed, the TPNW will gradually fade into obscurity and irrelevance as curious footnote in the turbulent history of the Nuclear Non-proliferation Treaty (NPT). Even the proponents of the TPNW do not expect any of the nine nuclear-armed states to join the treaty in the near term. For them, the aim of the TPNW is normative; supporters hope to “fill the legal gap”¹, further delegitimizing and stigmatizing nuclear weapons to the same degree as chemical and biological weapons.

If no nuclear-armed states join the treaty, there will obviously be no disarming to be done. In the early stages of implementation, there will be declarations to be submitted, national legislation to be adopted or updated, and various issues to be hammered out at the first meeting of states parties (as covered by the other articles in this issue). The novelty of the treaty, and the lively controversies associated with it, will no doubt provide opportunities for promotion of the norm it is intended to create. But what then? As the regime matures, what will it do? What can its states parties hope to achieve, even if no

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¹See the “Humanitarian Pledge” presented by Austria at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons in December 2014 and subsequently endorsed by 127 states: https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14vienna_Pledge_Document.pdf.

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nuclear-armed state joins? Will the treaty be able to continue building and strengthening a norm against the possession of nuclear weapons? To what extent will its effects be sustained over time?

This paper attempts to answer these questions by examining the evolution and development of existing disarmament treaty regimes and their contexts. Since the TPNW is both a WMD prohibition treaty and a disarmament treaty based on humanitarian principles, we consider both other WMD treaties and the humanitarian disarmament treaties dealing with conventional weapons. We review the various approaches taken to keeping these treaties alive, relevant and effective in the face of changing circumstances and fluctuating interests and strategic priorities. We then consider how these examples may or may not apply to the TPNW, and discuss the variations and adaptations that might usefully be employed. We do not aim for categorical conclusions or even clear recommendations; our purpose is rather to identify and clarify the range of possibilities for the future of the TPNW regime.

The TPNW provides a mechanism to maintain a critical proposition: that nuclear weapons are not compatible with the law (as a morally validated structuring of social relations) because their humanitarian consequences are unacceptable per se and too destructive for our contested political structures to be entrusted with in practice. At a societal and international political level, it is an open question whether this proposition will come to be seen as more or less true as the future unfolds. However, the TPNW illustrates that a sufficient body of states are able now to hold this as true for it to be codified by them, and binding upon them, as international law.

In turn, this legal codification strengthens the standing of the proposition within the normative landscape of society. Others, of course will object to that. For example, United Kingdom has stated that it “does not intend to sign, ratify or become party to [the TPNW] . . . Furthermore, the United Kingdom would not accept any argument that this treaty can constitute a development of customary international law binding on the United Kingdom or on other non-parties.”

The UK’s response here is focused on technically challenging any future legal arguments regarding customary standing of legal rules.

A problem for many of the nuclear armed states and their supporters is that they have tended to accept, at least rhetorically, that the world would be a better place without nuclear weapons. Most have accepted this not just as part of a vision of a minimisation of the role of weapons in the world in general, but recognising that nuclear weapons present specific and severe humanitarian concerns. Some are also in the awkward position of wanting to assert the importance of other people not acquiring nuclear weapons whilst wanting to hold onto them themselves. Whatever the motivation it is important to recognise that the humanitarian consequences of nuclear weapons have a role in the discourse that is separate from specific legal or policy frameworks.

The TPNW is arguably the legal framework that aligns itself most straightforwardly as a response to the humanitarian consequences of nuclear weapons. It developed out of consideration of those consequences, its preamble is built on these foundations and in its obligations it seeks both to prevent and to respond (as best as possible) to those

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2UK statement on treaty prohibiting nuclear weapons, 8 July 2017. https://www.gov.uk/government/news/uk-statement-on-treaty-prohibiting-nuclear-weapons.
consequences. A central argument of this paper is that the TPNW is founded upon a reasonable assessment of the humanitarian consequences of nuclear weapons. Maintaining that focus, despite the political challenges that will no doubt be presented to states parties, can build and sustain the TPNW as rational normative instrument. Building and sustaining social norms requires ongoing work and attention and the TPNW can provide a forum and a framework through which that work and attention can be organised.

**Lessons from other WMD treaties**

Given that the TPNW is intended to “fill the legal gap” and impose an absolute prohibition on nuclear weapons in the same way that the 1972 Biological Weapons Convention (BWC) and 1993 Chemical Weapons Convention (CWC) prohibit biological and chemical weapons absolutely, it is logical to begin with an examination of efforts to sustain the effectiveness of these two WMD treaties. Both have been in force for long enough to be worthy of study in this regard: the CWC for over 20 years, the BWC for over 40. The BWC in particular shares a key similarity with the TPNW: it is a simple and concise treaty dealing in clear but general precepts rather than detailed procedures. Like the TPNW, the BWC does not set out specific verification measures and does not provide for the establishment of an international organization to manage its implementation. While the BWC requires the destruction of any biological weapons held by a joining state, in practice all states parties known to have possessed biological weapons destroyed them before joining the treaty. No actual disarmament therefore has taken place under the auspices of the BWC.

The lack of verification machinery in the BWC has long been discussed and is viewed by many as a weakness of the treaty. Serious (and later substantiated) non-compliance concerns dogged the treaty throughout its first 15 years and led to an ultimately unsuccessful attempt in the 1990s to negotiate a legally-binding protocol to the treaty that would add verification mechanisms and an international organization to operate them.\(^3\) Yet despite this often-cited shortcoming, the BWC has successfully established a universally accepted global norm against biological weapons. While membership of the BWC itself – at 183 states parties – is not quite universal, it is clear that no government would today claim that biological weapons are a legitimate means of national defence. It is possible that clandestine government bioweapons programs exist, but if they do they are clandestine for a reason: discovery would bring universal opprobrium and serious political consequences. This situation represents a significant and encouraging normative change since the 1950s and 1960s, when biological weapons were just another part of the strategic arsenals of the Cold War superpowers and their allies.\(^4\) The BWC is therefore a compelling normative model for proponents of the TPNW.

How then has the BWC functioned and remained relevant over the four decades of its history, given that it does not require declarations, inspections, investigations, compliance monitoring, or indeed any specific regular activity? Like many other disarmament treaties, the BWC does have review conferences every five years. It is through these

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\(^3\) For a comprehensive account of the failed attempt to strengthen the BWC with a protocol, see Littlewood (2005).

\(^4\) For a concise overview of the history of biological weapons programs in the Cold War, see Riedel (2004).
conferences that BWC states parties maintain and “operate” the treaty, responding to challenges and adapting to changing circumstances. Review conferences in the 1980s developed procedures for consultations and resolving compliance concerns⁵, as well as a system of “confidence-building measures” (CBMs) – declarations of biodefence programs, relevant laboratories, legislation, etc, intended to increase transparency.⁶ Review conferences also commissioned and oversaw the abortive negotiation in the 1990s of a protocol to strengthen the BWC with verification and other measures.

None of these efforts solved the problems that motivated them; the protocol in particular was an expensive and time-consuming failure. Yet the efforts themselves were important to keeping the BWC alive and relevant. Rather than existing only as a rather general four-page legal document gathering dust in a file somewhere, the BWC became a forum for regular, intense – indeed, sometimes fractious and bitter – exchanges among states parties on how various provisions should be interpreted and implemented and how perceived shortcomings of the treaty should be addressed. Although the concrete outcomes of these discussions had at best a modest impact in practice, the norm itself was steadily consolidated and reinforced by the work, analysis, argument, negotiation and – in broad terms – attention.

This pattern was amplified by the fundamental reorientation that occurred in 2001–2002, following the collapse of the protocol negotiations in 2001, and the September 11 terrorist attacks and anthrax letters incident in the United States. BWC states parties were bitterly divided over the fate of the protocol negotiations, which the United States had withdrawn from amid controversy and recrimination. At the same time, the events in the United States had alarmed governments across the geopolitical spectrum and the possibility of biological weapons being used by terrorists was suddenly an immediate and pressing concern for all BWC states parties. This common ground enabled differences to be put far enough aside to launch what became known as the BWC “intersessional work programme”: a series of annual expert and political meetings held throughout the five-year period between review conferences, assigned to deal with specific topics related to improving the practical implementation and effectiveness of the BWC (Lennane 2006).

Expectations for this new process were initially low – it was widely seen as stop-gap, temporary measure – but it proved to be productive and useful, as it turned out that a wide range of governments were eager to share experiences and improve their capacity to prevent, detect and respond to possible BW terror incidents. The extensive collaboration and cooperation that emerged in the first round of this programme (2003–2005) laid the way for a successful review conference in 2006 that further developed the intersessional programme, and went some way to remedying the lack of institutional support for the convention by establishing a small Implementation Support Unit (ISU). This in turn facilitated a further increase in activity, cooperation and information-sharing among BWC states parties.

Again, regular attention to and activity around the treaty resulted in further reinforcement of the norm. Not only was the norm strengthened, but the focus on practical aspects

⁵See “Additional understandings and agreements reached by previous Review Conferences relating to each article of the Convention: Background information document submitted by the Implementation Support Unit”, United Nations document BWC/CONF.VIII/PC/4, 2016, paragraphs 55–62.

⁶See “History and operation of the confidence-building measures: Background information document submitted by the Implementation Support Unit”, United Nations document BWC/CONF.VIII/PC/3, 2016.
of national implementation, disease surveillance and response, and capacity-building resulted in a stronger regime in operational terms too, despite the lack of a dedicated international organization (Millett 2011).

The Chemical Weapons Convention provides an interesting contrast. The CWC is both much younger and much more elaborate than its sister convention. While its key prohibitions parallel those of the BWC, it contains extensive and detailed verification mechanisms, including provisions for declarations of certain chemicals and chemical facilities, routine inspections of declared facilities, and challenge inspections to deal with cases of alleged non-compliance. It establishes a dedicated international organization – the Organisation for the Prohibition of Chemical Weapons (OPCW) – with a standing inspectorate. And it was designed to supervise and verify the destruction of chemical weapons held by states parties once they joined.

This last aspect was a major focus – perhaps the major focus – of the CWC for the first 20 years of its operation. A large portion of the resources of the OPCW was devoted to monitoring the safe destruction of the vast chemical weapon stockpiles of the United States and Russia, along with the much smaller ones of a handful of other states parties (Arms Control Association 2020a). Perhaps inevitably, destruction of the US and Russian stockpiles took considerably longer than the 10 years stipulated by the treaty, but nevertheless as the end of the mammoth task finally approached, the CWC and OPCW were faced with a fundamental shift in mission and priorities. With known chemical weapon stockpiles eliminated, the CWC was no longer a disarmament regime but a non-proliferation one; the mission of the OPCW turned from destruction of chemical weapons to focus solely on preventing their re-emergence (Zanders 2013). The CWC therefore now resembles the BWC more closely in context and mission, although it benefits from much stronger institutional support and the associated in-house technical capacity.

In recent years, use of chemical weapons in the war in Syria has prompted much discussion and considerable agonizing over the effectiveness of the CWC and the durability of the global norm against possession and use of chemical weapons. While the situation has certainly thrown up operational challenges for the OPCW and political headaches for CWC states parties – and is yet to be resolved to anyone’s satisfaction – it has if anything only demonstrated the strength and global permeation of the norm. The various parties may trade accusations over who is responsible for chemical weapons use, but none attempt to argue that CW use is legitimate or excusable in any way (e.g. was dictated by military necessity, was a response to extreme circumstances, or was some kind of “fog-of-war” mistake). All rebuttals from alleged users are based either on claims that CW were not in fact used, or on claims that they were used by someone else. In other words, the controversy is conducted entirely within the bounds of the norm – despite the context of a long, brutal and chaotic intra-state conflict. As to the effectiveness of the CWC, it is important to recall that at the time of the first alleged uses of CW in the war, Syria was not a party to the treaty. Despite this, the international response was (by the admittedly dismal standards of multilateral disarmament action) robust and decisive: an ad hoc UN-OPCW investigation was conducted, in the midst of an active conflict, and Syria was strong-armed into joining the CWC (Arms Control Association 2020b). This

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7 For a concise overview of key events, allegations, statements and reactions see Arms Control Association (2020b).
collective action was based on a norm developed over many years, and in turn further strengthened that norm and pushed it closer to universality – even as violations continued.

**Lessons from other humanitarian disarmament treaties**

Whilst the TPNW clearly sits alongside the other two conventions addressing WMD in terms of its subject matter, in its origins, its mode of development and its underpinning rationale, it is closely related to the international treaties prohibiting anti-personnel landmines (the Mine Ban Treaty [MBT], adopted in 1997) and cluster munitions (the Convention on Cluster Munitions [CCM], adopted in 2008) (Docherty 2018). These instruments address specific types of explosive weapons through a combination of prohibitions on *inter alia* the development, production, stockpiling, transfer and use of the weapons, and prohibitions on assisting others with such acts, in conjunction with “positive obligations” that establish requirements on parties to address problems already affecting their territories or populations.

The MBT and the CCM both developed through “free-standing” political processes initiated as an alternative to work within the Convention on Conventional Weapons (CCW) where certain militarised states are traditionally able to exert an effective veto over all aspects of the work.\(^8\) The treaties were made possible by stepping outside of those structures, allowing states that were so inclined to develop a full legal expression of their collective position. This mode of treaty development brings with it, or is expressive of, certain political rationales. The logic is one of moral response to human suffering – which justifies and arguably demands action in the face of political opposition – and there is a recognition that the law is there to protect people from harm rather than to balance adversarial relationships between militarised states.

This political rationale was coupled with a collaborative mode of work across different stakeholder groups. In the development and in the continuation of these treaties, states worked closely with international organisations, notably the International Committee of the Red Cross (ICRC), UN agencies and organised international civil society partnerships in the form of the International Campaign to Ban Landmines (ICBL) and the Cluster Munition Coalition (CMC). The package as a whole presented a form of “disarmament as humanitarian action” – bringing together diplomatic, legal, humanitarian and military/technical skills towards a shared vision.\(^9\) Yet, despite these later instruments having a different political frame (and inspiring different communities of practice) from the previous international legal responses to WMD, still it should be noted that the text of the CWC provided the blueprint for the drafting the MBT. The CCM, in turn, took its initial architecture from there.\(^10\) So there is a common structural lineage through these legal instruments even if they are sometimes seen as occupying different political spaces.

Many of the themes brought out in these initial paragraphs have a bearing on the ways in which the MBT and the CCM have developed in their subsequent work. The issues sketched out below – in terms of norm-setting and universalisation as well as around

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\(^8\) For detailed background see Casey-Maslen (2005) and Casey-Maslen and Nystuen (2010).

\(^9\) For an overview see Borrie and Martin Randin (2006), and for details on the CCM process see Borrie (2009).

\(^10\) The direct relationship of the MBT to the CWC was noted by a diplomat directly engaged in drafting the MBT, the CCM’s basis in the MBT is noted in Borrie (2009, 173).
positive obligations, implementation goals and the maintenance of a community of practice – are suggested because they might bear further reflection as states work to develop the TPNW as a sustainable regime.

**Norm-setting and Universalisation**

There was a cross-over of practitioners from work on landmines and cluster munitions into the early stages of discussions that would lead to the humanitarian initiative on nuclear weapons and subsequently to the TPNW. This community brought with it a confidence in the power of norm setting based on humanitarian “realities” (Minor 2015). Both the MBT and the CCM had been negotiated and adopted in the knowledge that certain militarily and politically powerful states would not join or were very unlikely to join. Of the five permanent members of the UN Security Council, the United Kingdom and France joined these instruments from an early stage, whilst China, Russia and the United States broadly rejected them. It is notable also that India, Israel, North Korea and Pakistan have also not joined these instruments.

Rejection of the MBT and CCM by certain states, from the onset, was expected during the course of the negotiation of those treaties – just as it was later in the negotiation of the TPNW.\(^1\) Accepting that certain states would not join was arguably vital for empowering others to craft instruments that responded adequately to the humanitarian concerns that were the motivation. It is important to recognise that the power of norm-setting based on humanitarian realities can only effectively be brought to bear if the instrument that is constructed maintains a focus on those humanitarian realities and is not pulled away from them by political pressures.

Both the MBT and the CCM have expanded their pool of participants over time, but in neither case is complete universalisation expected or even aspired to. Recognising non-universality as a positive situation is possible based on commitment to the ethical foundations of the instrument as a reasonable response to human suffering. If certain states do not join, that is not a weakness or problem of the legal instrument, rather it reflects a problem borne by the rejecting state, that they remain committed to weapons that kill civilians, or cannot accept law-making processes over which they cannot wield a unilateral veto. These orientations can be considered unreasonable – but it can also be recognised that it is not within the persuasive power of a single legal instrument to fix them.

In the case of both anti-personnel mines and cluster munitions a degree of normative impact can be seen in the actions and narratives of states that remain outside the treaty regimes.\(^2\) Despite rejecting the instruments, few such states have used anti-personnel mines or cluster munitions since these treaties were adopted. Often instances of use have been accompanied by denials, reflecting a recognition that such actions diminished the authority of the state in question. In other cases, and in certain non-state group uses of improvised anti-personnel mines, use might be seen still as a form of norm constitution –

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\(^1\) For recognition that a treaty should be developed even without the participation of the nuclear armed states, see Acheson, Moyes, and Nash (2014).

\(^2\) See recognition of this, for example, in International Campaign to Ban Landmines (2019, 7).
with use of prohibited weapons bundled alongside, torture, disappearances or beheadings as expressive of a certain orientation to value structures.

Within the treaty regimes themselves there continue to be contestations over language in collective statements from States Parties which pivot on issues of external norm transmission. In 2020 in the context of the CCM, for example, the United Kingdom continued to object to declaratory language whereby States Parties “condemn any use of cluster munitions in any circumstances”, despite having virtually identical language a year earlier in relation to anti-personnel mines. This continued resistance to framing cluster munitions as categorically condemnable was considered by civil society to derive from a desire to reduce the pressure that might come to bear between the United Kingdom and its close allies who are not party to the treaty.13

This example could serve as a reminder that whilst prioritising a shared humanitarian vision over individual interests may be necessary to get a treaty established, its sustenance cannot be taken for granted and it needs to be actively maintained in order to avoid normative erosion. Building and sustaining social norms requires active attention and ongoing work. To that effect, both the MBT and the CCM have benefited from the treaties containing positive obligations that serve to drive continued engagement with the harms they were created to address.

**Positive obligations, implementation goals and a community of practice**

The MBT and the CCM are committed, in their preambles, to putting an end to the suffering and casualties caused by the weapons they address. A corollary of that commitment is that, in addition to prohibiting future use of the weapons, the treaties also contain “positive obligations” intended to address the problems these weapons already present. Both the MBT and the CCM contain an obligation on states parties to clear contamination on their territories as soon as possible and at least within 10 years of them joining (though extensions to that deadline are possible). Whilst the MBT promotes assistance to victims, this was developed into a substantial stand-alone “rights-based” article in the CCM (Article 2 (1) and Article 5).

These twin pillars of practical, positive action – addressing contamination and assisting those affected – have been central to the ongoing work of the treaty regimes. They bring together a number of components that deserve individual attention for the way they contribute to the culture and work of the treaty regime:

**Continued engagement with the humanitarian consequences of the weapons**

Effectively clearing landmines and unexploded cluster munition remnants is a challenging task, made urgent by the risk of accidents and by the denial of land from productive use. Responding to the ongoing physical and psychological harms caused to individuals, as well as to issues of social and economic marginalisation for individuals and affected communities is also difficult and many times insufficient. That these responses are difficult and that they can only partially ameliorate the problems posed

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13For background and analysis here see Article 36. (2015).
are fundamental to the humanitarian consequences of the weapons in question. The work of addressing these problems is the work of recognising and engaging with the human and moral issues that underpin the treaties.14

**A culture of partnership under obligations**

The treaty obligations to clear land and to assist victims (the former with specific time-bound requirements) bear upon affected countries – not upon the users of the weapons. This is significant because it affects how the source of these obligations should be understood, as well as how it frames the community working under these obligations. The source of obligation is not therefore a form of restorative justice but rather is a manifestation (in the specific) of a more general obligation of the state to protect its population. Given that many of the states worst affected by anti-personnel mines and cluster munitions had been impoverished by conflict and so have faced significant social and economic challenges, the requirement for those states to ensure implementation of extensive and costly operational responses required them to place trust in the supportive orientation of the community being formed. These positive obligations can therefore be seen to promote a culture of encouragement, mutual support and trust-building.15

**Funding**

Linked to the point above, states have also acted on the treaties’ obligations that those in a position to do so provide financial and technical support to States Parties working to fulfil their commitments. The legal instruments have helped to mobilise resources, providing a framework within which resource needs can be articulated and connections made between potential funders and potential recipients. Of course, funding for ‘mine action’ exists and is administered outside of these legal instruments, but the treaties provide a framework against which donors can report their contributions – whether through specific project funds or as components of broad bilateral arrangements. The relationship between treaty structures and funding has contributed to the overall culture of partnership between states and other partners, but it has also helped to maintain these instruments as contexts in which various stakeholders find ongoing utility.16

- **Diverse practitioner communities including affected individuals and victim’s groups, humanitarian organisations, national agencies, diplomats and civil society.**

Building again on the previous point, the positive obligations require technical responses and so bring together communities of technical practice and expertise. Researchers on the social, economic, physical or psychological impact of weapons, specialists in fields of explosive ordnance disposal, weapon survivors and representative organisations can interact

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14 Ongoing clearance work (mine action) and victim assistance are documented in publications of the Mine Action Review ([www.mineactionreview.org](http://www.mineactionreview.org)) and the Landmine and Cluster Munition Monitor ([www.the-monitor.org](http://www.the-monitor.org)).

15 This “spirit of cooperation” was noted by Herby and Haye (2007).

16 Although somewhat dated now, Devlin (2010) highlights “commitment to treaty obligations” amongst other factors motivating funding prioritisation in this space.
with project administrators and diplomats in the annual treaty meetings. Many people working in this space have known each other over many years, building long-standing relationships that can be both professional or social – sometimes weaving between the two. Many of the people who worked together in developing early work towards the TPNW had met whilst working within the framework of these treaties. The same is true of the people and organisations currently leading work to address the impact of explosive weapons in populated areas and to develop a legal response to autonomy in weapons systems, and these relationships cut across organisational boundaries, hierarchies and divisions between “state” and “non-state” affiliations.

All of the factors noted above have been facilitated by the use of the treaty structures such as intersessional work programmes, Meetings of States Parties, Review Conferences and broad collective action plans. Constructive use of such tools and structures is likely to be important to sustaining the TPNW over the period ahead.

The TPNW in Sustained Operation

In this section we examine the specific ways in which the TPNW regime might be sustained over the longer term, even if no nuclear-armed states join, drawing from the experience of the treaties discussed earlier.

Interpretation, application and national implementation

Since the TPNW, like the BWC, deals with general precepts rather than detailed procedures, states parties will have plenty to do in terms of working out how to interpret, apply and implement the various TPNW provisions. Some of this work is specifically assigned to by the treaty to the first meeting of states parties (MSP), including determination of the deadline for destruction of the nuclear weapons of any state that joins the treaty while still possessing them (this must be done regardless of whether any nuclear-armed state joins the treaty (Article 4(2)), and determination of the deadline for removal of any hosted nuclear weapons belonging to another state (Article 4(4)). Other specific matters are also assigned to states parties to resolve, including the designation of the “competent international authority” that Article 4 stipulates is to oversee stockpile destruction programs. Then there are various matters that will likely produce considerable discussion, analysis and work in order to interpret, clarify and apply in practice. Prominent among these are the meaning and scope of the prohibition in Article 1(e) on states parties to “assist, encourage or induce in any way” anyone to engage in any activity prohibited to states parties by the treaty, and the relationship with the IAEA in respect of the implementation of the safeguards provisions of the treaty.17

None of these matters will be quickly and simply resolved – and neither should they be. Managing their development over time, as the treaty regime matures, will be a key responsibility of states parties and an important means of sustaining the effectiveness and relevance of the treaty, as well as of integrating the TPNW regime with other parts of the international security system. The “assist, encourage or induce” question, for example, will affect the relations of various states parties with states not party in terms of bilateral

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17 For examples of existing analysis and discussion of these issues, see Casey-Maslen (2019), and International Committee of the Red Cross (2019).
or regional military cooperation, and may also raise complex legal problems involving other treaties and agreements. These situations are likely to evolve over time, as relations among states shift, security challenges emerge or recede, and national priorities alter. TPNW states parties will need to give this issue constant attention; this will no doubt involve much work, considerable disagreement and some degree of frustration, but the benefit is that the underlying norm against nuclear weapons will be steadily reinforced over time by constant examination of and debate over whether a particular action or policy “assists, encourages or induces” someone to possess or use nuclear weapons.

A further benefit is that dealing with this question will inevitably draw the non-states parties concerned into the orbit of the TPNW, interaction with its states parties, and contact with the norm. This of course does not necessarily mean they will join the treaty, or even become more sympathetic to it, but it will require them to deal with it as a reality of international law and contend with its provisions, their interpretation and their practical effects. This can only help to cement the TPNW’s place as a tool of international security and further reinforce the norm.

Implementing article 6: Victim assistance and environmental remediation

As we have noted in the context of the MBT and CCM, implementation of “positive obligations” can also provide a constructive basis for collective work. Article 6 of the TPNW establishes obligations on States Parties to assist victims of nuclear weapon use or testing and to remediate contaminated environments. This article is modelled conceptually on the positive obligations of previous humanitarian instruments such as the MBT and the CCM, though the provisions of the TPNW are not as fully elaborated as those found in its forebears: the obligations do not have separate articles, are in places more cautious in their wording and lack the more detailed “action-orientated” elaborations of the CCM. However, Article 6 provides an important basis for future work amongst the community of States Parties and other stakeholders.  

The cautiousness evident in the drafting of Article 6 likely reflected a number of political and technical tensions related to responding to the effects of nuclear weapons. These included uncertainty during the negotiations particularly among some states about embracing the “rights-based” approach to these rules, where the obligations bear on the state that has affected people or contaminated areas under their jurisdiction rather than on the state that caused the effect. Caution also likely reflected some uncertainty about the scale of the challenge, where people may be affected by nuclear weapons in diverse ways, determining causality of harm may not be possible and remediation of contaminated areas might require a balancing of costs against residual risks. Also, these positive obligations arose rather late in the treaty development process (being seriously engaged with by most only as text started to be drafted, and particularly during the second session of the TPNW negotiations) meaning that delegations were considering their implications under some pressure of time.

The critical point for States Parties to the TPNW in relation to Article 6 is to collectively set a positive and constructive agenda for work in this area. The legal

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18 See for background Docherty (2020).
19 See for background Bolton and Minor (2020).
provisions in the treaty provide a sufficient umbrella for the development of such an agenda, for whilst they do not stipulate specific courses or schedules of action, neither do they shut down the potential for constructive political work in that direction. In so far as the anxieties or uncertainties noted above may remain, a positive agenda should allow these to be confronted and managed, without allowing them to shape the focus of work unhelpfully. Already within the early signatories and joiners of the treaty there are a number of states affected by the history of nuclear weapons testing in North Africa, Central Asia and the Pacific. Reflecting on the positive lessons learned from previous instruments the bullet points below provide reflections for what they might mean in the context of the TPNW.

**Continued engagement with the humanitarian consequences of the weapons**

Article 6 can provide a space within which the TPNW community continues to keep to the fore the further development of understandings regarding the humanitarian consequences of nuclear weapons. The ability of victim assistance and environmental remediation programmes to resolve these humanitarian consequences will always be inadequate. Indeed the opening preamble of the treaty recognizes that directly. So the challenge for states is to work continuously and progressively to determine how responses can best be undertaken whilst remaining fully aware of what cannot be addressed.

States should not limit the consideration of humanitarian consequences to only those around which programmatic response can be organised. They should, however, provide space for detailed consideration of the experience and understanding of harms, and of the experience and understanding of operational responses to harms. Meetings of States Parties can continue to review research and analysis on harms as well as on the operational and policy structures of victim assistance and environmental remediation. Such review and analysis would not need to be limited only to the experience of States Parties but could bring in experiences and perspectives from elsewhere. Over time the community of States Parties and other stakeholders might choose to support the elaboration of specific lessons learned, good practices, guidelines or standards in relation to such operational responses.

**A culture of partnership under obligations**

The rights-based provisions of Article 6 bear primarily upon affected states. However, Article 7 provides for international cooperation and assistance, including technical, material and financial assistance. The analysis of harms and of operational responses to victim assistance and environmental remediation can facilitate understanding of the types and scale of assistance that certain States Parties might need. Recognising these as shared challenges can foster a sense of the treaty as a space for the development of

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20 For a review of facts about past nuclear weapons activities some of the known or potential ongoing consequences, see Bolton and Minor (2021).

21 Some review of existing programmatic/policy responses in affected countries has been done – see for example Van Duzer and Sanders-Zakre (2021).
a supportive community. As well as formalising a moral rejection of nuclear weapons, the treaty also then stands as a collaborative and constructive framework for addressing problems.

- Funding.

The point above can be strengthened further if the treaty can directly facilitate resources to strengthen programmatic responses – whether to states or to other organisations. The early parties and signatories to the TPNW are drawn predominantly from Latin America and the Caribbean, Africa and South East Asia. It may be a challenge in its early stages for the treaty to mobilise substantial financial resources towards operational programmes (e.g. for environmental remediation) from within its ranks. However, some funding flows are certainly possible and the treaty will provide a framework within which assistance needs might also be articulated outwards towards the wider international community. Elsewhere, for example, certain states not party to the Mine Ban Treaty have nonetheless been proud to highlight their support for landmine clearance programmes. Funding towards states that are working to meet their Article 6 obligations would be a way that states not currently choosing to join the treaty could engage with it in a constructive manner.

- Diverse practitioner communities including affected individuals and victim’s groups, humanitarian organisations, national agencies, diplomats and civil society.

Tying all of these points together is the idea of a building a community of practice. Such a community can work together on developing its shared expertise on the humanitarian consequences of nuclear weapons, on the operational and policy implications of victim assistance and environmental remediation and on better enabling the experiences of affected people and communities to be articulated within the international discourse. Nuclear weapons developed, in part, out of technical secrecy and racism. The latter enabled certain states to discount the people and environments that would bear the immediate and long term effects of their actions.\(^{22}\) The sharing of technical knowledge on these harms and the participation of affected people and communities in discussions of these harms and of possible policy and programmatic model can provide foundations for a response to that history.

Also important in this context will be the role of the International Campaign to Abolish Nuclear Weapons (ICAN) as the primary civil society partnership working in support of the treaty. Having a strong, well organised civil society coalition that is committed to the treaty’s strength and development over time should help to build the sense of working partnership across stakeholder groups and help to keep a proper focus on the humanitarian consequences of nuclear weapons as a foundation for the work.

**Non-proliferation of nuclear weapons**

The non-proliferation role of the TPNW has been largely overlooked by supporters and critics alike, but is a fundamental element of the treaty. As long as no nuclear-armed state

\(^{22}\)UN Special Rapporteur on toxics, Baskut Tuncak called on States to address the dangers of radioactive contamination from nuclear weapon tests which persist as a “harmful legacy of racism” surrounding a “tragic chapter of humanity”, UN News, 16 July 2020, “Nuclear testing legacy is ‘cruellest’ environmental injustice, warns rights expert”, [https://news.un.org/en/story/2020/07/1068481](https://news.un.org/en/story/2020/07/1068481).
joins the treaty and triggers the implementation of the disarmament provisions of Article 4, the TPNW will be principally a non-proliferation instrument. Just as the role of the BWC is to maintain a world free of biological weapons, and the post-destruction role of the CWC is to prevent the re-emergence of chemical weapons (and to respond to any incidents of re-emergence), a key role of the TPNW is to prevent states developing or otherwise acquiring nuclear weapons.

Of course, this is a role it shares with the NPT. Much of the criticism directed at the TPNW has focused on this overlap, with allegations that the TPNW “undermines” or even “contradicts” the NPT. Exactly how the TPNW does this is seldom articulated, but the concern seems to be that the TPNW will somehow lure NPT non-nuclear-weapon states parties out of the NPT, formally withdrawing from that treaty and joining the “weaker” and “unverified” TPNW instead. This concern is obviously misplaced – which is perhaps why it is so rarely elaborated in detail. First, the non-proliferation aspects of the TPNW (including the safeguards provisions) are at least as strong and verifiable as those of the NPT; a non-nuclear-weapon state withdrawing from the NPT and joining the TPNW would gain no additional freedom or ability to pursue a nuclear weapons program. Second, there is simply no reason for states joining the TPNW to withdraw from the NPT – any more than states joining the BWC and CWC would withdraw from the 1925 Geneva Protocol.25

In fact, the relationship between the 1925 Geneva Protocol and the BWC/CWC is a good model for the relationship between the NPT and the TPNW, and shows how the TPNW might evolve over the longer term as the central forum for global nuclear non-proliferation efforts. The Geneva Protocol remains an important piece of international law, but since the entry into force of the BWC and CWC, with their more comprehensive prohibitions and detailed provisions, almost all work on biological and chemical disarmament and non-proliferation has been conducted within those treaty regimes. This evolution is so natural as to not even have prompted any discussion, much less any alarm: nobody agonized that the BWC or CWC and their developing implementation might “undermine” or “harm” the Geneva Protocol.

The main advantage the TPNW has over the NPT as a non-proliferation instrument is its total prohibition of the possession of nuclear weapons in all circumstances, without qualification or exception. The non-proliferation norm of the NPT has always been compromised by the NPT’s recognition of the five nuclear-weapon states, all of which insist loudly and frequently on the legitimacy of their nuclear arsenals and on the vital security benefits they confer. As has been observed over the history of the NPT, this is a highly counterproductive non-proliferation message and has the effect of sabotaging the norm.26

Since the TPNW is free of this contradiction, it would be logical and natural for NPT non-nuclear-weapon states to gradually shift the locus of their non-proliferation efforts

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23See for example France (2017), and Highsmith and Stewart (2018).

24See for example Russian Federation (2018).

25The 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, also known as the 1925 Geneva Protocol, prohibits the use of chemical and bacteriological weapons in warfare, but not their development, possession or transfer.

26For a relatively recent discussion of the role of the NPT in legitimizing nuclear weapons, which also marked the beginning of the “humanitarian impact” movement that led to the TPNW, see Berry et al. (2010).
to the TPNW, as membership of that treaty grows. Continuing development and expansion of the nuclear safeguards system\(^\text{27}\), as well as issues such as Iran’s nuclear enrichment activities or North Korea’s weapons program – or their future analogues – would be discussed in TPNW meetings of states parties or expert working groups rather than in the NPT review process. None of this would “harm” the NPT; that treaty and its membership would remain intact, as would the various agreements reached at its review conferences, but future development and reinforcement of the global non-proliferation regime would increasingly be done in the TPNW.

Importantly, this evolution would have the effect of drawing the NPT nuclear-weapon states and their nuclear-weapon-dependent allies into the orbit of the TPNW, despite their opposition to the treaty. As long as preventing the spread of nuclear weapons remains a security priority for these states, and as long as they require the cooperation and support of non-nuclear-weapon states to ensure non-proliferation is sustained globally, it will be in their interest to at least engage and coordinate with official TPNW activities, even if they remain formally outside – and opposed to – the treaty. This effect is likely to become self-reinforcing, and can be expected further cement the place of the TPNW and strengthen its underlying norm over the longer term.

**Universalization**

The TPNW, like the MBT and the CCM before it, was negotiated and adopted by a group of states that fully recognised that there were other states that objected to the treaty and likely would not join it. The decision to pursue a treaty on that basis has to proceed from a belief that the legal response is morally appropriate and that articulating that position has a utility or significance on its own terms. It is known that nuclear armed states have exerted significant pressure on their allies and partners in an effort to persuade them against joining the TPNW and it can be expected that such pressure will continue.

Of importance for States Parties to the TPNW is not to feel that the scale or pace of universalisation, or the absence of certain states, represents a vulnerability or a weakness of the treaty. The TPNW exists in a politically contentious and polarised space where a group of actors wield immense destructive capability, (many) hold privileged positions on the UN Security Council, and are united in the opposition to the TPNW if little else. Being concerned at the scale or pace of universalisation simply concedes power to these states, suggesting that their non-participation and the non-participation they can secure from others has a meaningful impact on the normative effect of the treaty.

Of course in legal analysis, statements of opposition to the treaty and non-participation can all be argued as preventing acceptance that the rules of the TPNW represent customary international law. Yet focusing on such legal technicalities misses the wider social point. The legal status of nuclear weapons is now clearly contested. The states that have nuclear weapons are the ones rallying opposition to accepting their illegality and grasping at legal technicalities to explain that they are not behaving “unlawfully”.

\(^{27}\) Contrary to the impression given by some critics of the TPNW, the treaty does include obligations for IAEA safeguards in its articles 3 and 4(3).
Institutional support

In the absence of a large OPWC-style international organization to manage implementation, the creation of a small ISU has proved beneficial in maintaining the effectiveness and relevance of other regimes. The MBT was the first disarmament treaty to provide for an ISU rather than a large secretariat or international organization, with the idea being to support and coordinate, and thus amplify the effectiveness of, the implementation efforts of states parties and other stakeholders, without incurring the significant running costs of a large organization (which might divert resources from the key humanitarian objectives of mine clearance and victim assistance). The MBT ISU quickly proved to be a useful and cost-effective approach, and was used by BWC states parties as the model for the BWC ISU established by the Sixth Review Conference of the BWC in 2006 (the BWC itself contains no provision for institutional support), and subsequently as the model for the ISU of the CCM in 2015. The 2013 Arms Trade Treaty (ATT) established a “secretariat”, but this body closely resembles an ISU in size, structure and function.

A key function of an ISU is to act as a focal point for, and facilitator of communication and cooperation among, the diverse community of stakeholders involved in implementing the treaty and promoting and developing its underlying norm (see the section on diverse practitioner communities above). As the public face of and official contact point for a treaty, an ISU also plays an important role both in raising public awareness of the treaty and the problems it was created to address, and in integrating the treaty with other relevant international and regional organizations and activities, in the sphere of international security as well as other areas such as public health, science, humanitarian action, the environment, finance and trade.

The existence of a TPNW ISU would therefore appear to have important potential benefits for the longer-term sustainability and effectiveness of the treaty, but the TPNW does not provide for one. The only institution foreseen in the treaty itself is the “competent international authority” to be designated by states parties in accordance with Article 4 to manage the disarmament process should a nuclear-armed state join the treaty. It would however be possible for the TPNW states parties to decide to establish an ISU, as was done for the BWC in 2006. This decision could be taken at the first or any subsequent meeting of states parties, which pursuant to Article 8 are authorized to “take decisions in respect of any matter with regard to the application or implementation of this Treaty”.

A major factor in any such decision will be the cost. ISUs are much cheaper than traditional secretariats or intergovernmental organizations, with annual budgets typically in the range of USD 1–3 million rather than the tens or hundreds of millions needed for a full-blown international organization. But if a TPNW ISU is to be funded through the standard approach of assessed contributions levied on states parties according to the United Nations scale of assessments, this will impose an unusually heavy financial burden on each state party, since many of the wealthier states high on the scale of contributions

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28For a detailed rationale for the MBT ISU, see United Nations (2002).
29See United Nations (2006a, paragraphs 5–6), as well as the working papers United Nations (2006b) and United Nations (2006c) which outline the background and rationale for a BWC ISU.
30For the history and mandate of the CCM ISU, see https://www.clusterconvention.org/isumandate/
31See Article 18 of the Arms Trade Treaty, and https://thearmstradetreaty.org/role-of-the-secretariat.html.
(the United States, China, Japan, Germany, the United Kingdom, France and other Western countries) will be unlikely to join the TPNW, particularly in its early years of operation. These countries together account for over two-thirds of the UN scale,\(^{32}\), and the financial implications of funding an ISU without their contributions may give even the most fervent TPNW-supporting governments pause. There may be other means of financing – it would be up to the states parties to decide – but the TPNW, with its membership dominated by developing countries, will largely be exploring uncharted territory in this regard.

**Conclusion**

Although the TPNW builds on a number of precedents, few among its supporters and detractors would dispute that it is an unusual and innovative piece of international law. There has always been something counterintuitive about the idea that a multilateral disarmament treaty would be worth pursuing, and could be effective, without the support and involvement of any of the states possessing the weapon concerned. The fact that this approach is being applied to nuclear weapons, something still seen by the world’s most powerful states as the ultimate guarantee of their security, makes the notion seem even more unlikely.

Yet careful examination of the precedents, as we have attempted in this paper, shows that effective global norms can be built and sustained over time, largely independently of the cooperation or resistance of possessor states. The energetic, persistent and strident opposition to the treaty displayed by the nuclear-armed states and their allies suggests that, despite their public statements to the contrary, they assess that the TPNW has exactly this potential. Universal or near-universal membership of the treaty is not required; neither is meeting the criteria to become customary international law. Provided a reasonably large and globally representative number of states join the treaty and participate actively, constructively and visibly in its implementation and promotion, the norm will grow. If the TPNW can develop a broad and diverse practitioner community, ideally supported by an ISU, and if this community can consistently focus on the core humanitarian aims of the treaty, practical implementation of its positive obligations, integration and communication with the wider international community, and further strengthening of the global nuclear non-proliferation regime, we are confident that it will make a powerful and lasting contribution to the eventual elimination of nuclear weapons.

**Conflicts Of Interest**

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

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\(^{32}\)For the 2020 Scale of Assessments see United Nations (2019).
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