The Relationship between the NPT and the TPNW

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ABSTRACT

Great care was taken during the negotiations of the Treaty on the Prohibition of Nuclear Weapons (TPNW) to secure its full compatibility with the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). This goal has been accomplished. The TPNW strengthens and supports the NPT which has always anticipated further legal norms to achieve its purposes. Like in the other pillars of the NPT, reaching the objective of the disarmament pillar – a world free of nuclear weapons – will not be feasible without further legal instruments. For the full implementation of Article VI of the NPT, the creation of a legally binding norm to prohibit nuclear weapons is indispensable. The adoption of the TPNW on 7 July 2017 brought about this legal instrument.

Introduction

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is often referred to as the “cornerstone of the nuclear disarmament and non-proliferation regime.” This language is found also in Preambular Paragraph (PP) 18 of the Treaty on the Prohibition of Nuclear Weapons (TPNW). Going beyond that, PP 18 also contains a reaffirmation “that the full and effective implementation of the NPT, which serves as the cornerstone of the nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security.” The preambular already reflects the high importance that the negotiators of the TPNW have accorded to the NPT and, in particular, to securing full complementarity between the two treaties.

The NPT was never meant to be a comprehensive regulation of all aspects that were indispensable for the peaceful uses of nuclear energy, non-proliferation, and nuclear disarmament. The very brevity of its text underlines this fact. For its implementation, further legal norms are needed and have been established concerning all three pillars. Each of these three pillars are discussed here in turn to suggest how they have been added to in order to bolster the regime over time. Similarly, the TPNW has added to the existing “building” a layer necessary to realize a world without nuclear weapons.

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**Peaceful Uses**

A large number of legal instruments have been adopted over the last 50 years to give effect to the precise principles outlined in Article IV of the NPT. In the area of nuclear security, there has been a continual process of implementation and efforts to strengthen the regime. For example, the Convention on the Physical Protection of Nuclear Material deals with physical protection measures to be applied to nuclear material in international transport, as well as measures related to criminal offenses regarding nuclear material. The 2005 amendment increases the scope of the Convention to nuclear material in domestic use, storage in transport, and to nuclear facilities. The International Convention for the Suppression of Acts of Nuclear Terrorism contains agreements in relation to offenses regarding unlawful and intentional possession, the use of radioactive material or a radioactive device, and the use or damage of nuclear facilities.

Equally, in the field of nuclear safety, following the Chernobyl nuclear plant accident, the international community tried to alleviate the remarkable consequences of such disasters by further improving the international regime. The most pertinent examples here are the Convention on Early Notification of a Nuclear Accident as well as the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. More recently, the Convention on Nuclear Safety contains important safety principles related to the operation of land-based civil nuclear power plants. In addition, the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management have further enhanced the regime.

**Non-proliferation**

With regard to non-proliferation, the NPT itself foresees in Art. III, Safeguard Agreements which are to be concluded between the IAEA and the relevant country. In order to enable the IAEA full access to information concerning all parts of a state’s nuclear fuel cycle, these comprehensive safeguard agreements should be complemented by an additional protocol. At the beginning of 2020, more than 140 countries had such voluntary additional protocols in force.

Multilateral instruments have also been developed to implement the nonproliferation pillar, with varying degrees of success. One such instrument considered to contribute to Articles I, II, and VI is the Comprehensive Nuclear-Test-Ban Treaty adopted in 1996. While the Comprehensive Nuclear-Test-Ban Treaty – unlike the TPNW – makes no reference to the Non-Proliferation Treaty in its text, the NPT review process includes clear references and commitments to the Comprehensive Nuclear-Test-Ban Treaty, such as in actions 10–14 of the 2010 Action Plan. Regrettably, in the more than 20 years since its adoption, the treaty has not yet entered into force and, despite interim measures such as the creation of the Comprehensive Nuclear-Test-Ban Treaty Organization, has not been able to fully reach its potential to contribute to the NPT’s implementation.

Another relevant instrument would be a potential future treaty on fissile materials (fissile material cut-off treaty). By forbidding the production of fissile materials for nuclear weapons, the treaty would have the potential to contribute to the aims of both Articles I and II, and also of Article VI of the Non-Proliferation Treaty. Despite continuous attempts to make progress in the framework of the Conference on
Disarmament, even the start of negotiations on such a treaty has been blocked for decades, again holding back the implementation of the Non-Proliferation Treaty.

**Disarmament**

As is the case with regard to the other two pillars, the disarmament pillar in the NPT does not provide a comprehensive regulation of all aspects indispensable to nuclear disarmament. Article VI is very short and only provides a general obligation to pursue nuclear disarmament:

“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

These called-for effective measures can be either practical or legal measures. They are required under the NPT to implement its Article VI. Thus, the NPT itself foresees additional legal instruments.

While the above-mentioned fissile material cut-off treaty and the Comprehensive Nuclear-Test-Ban Treaty have the potential to positively impact the implementation of Article VI, to date this pillar has been primarily implemented via bilateral agreements. As such, concrete progress has been accomplished through the conclusion and implementation of arms control agreements between the Russian Federation and the United States, the two largest possessors. Their arms control treaties often include references to the NPT, such as the New START in its preambular:

“Committed to the fulfillment of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, and to the achievement of the historic goal of freeing humanity from the nuclear threat,” thus explicitly confirming that nuclear arms control and disarmament agreements serve to implement Article VI. Other examples include references to the Non-Proliferation Treaty and Article VI in the Strategic Offensive Reductions (SORT) Treaty (signed 2002), the Strategic Arms Reduction Treaty (START I), signed in 1991, and the Strategic Arms Limitation Talks Agreement (SALT I), signed in 1972.

The demise of important arms control treaties such as the Intermediate-Range Nuclear Forces (INF) Treaty are, therefore, steps away from the fulfillment of Article VI of the NPT and run counter to the NPT’s Article VI obligations. The failure to extend the New START would abolish the last standing major arms control treaty and would constitute a key dangerous development, opening the door to an unrestrained nuclear arms race.

**The TPNW Implementing Article VI of the NPT**

It is generally accepted that the full implementation of Article VI requires a legally binding norm to prohibit nuclear weapons, since otherwise a world free of nuclear weapons can neither be achieved nor maintained. Even nuclear weapons states have expressed this in their statements over the years. In their view, creating such a legally binding norm should only happen when the nuclear disarmament process has already progressed so much that the world would have come close to the total elimination of
nuclear weapons. The same possessor states did not hold the same opinion when they took part in banning other classes of weapons of mass destruction. Biological as well as chemical weapons were banned at a moment when they were still far from being almost totally eliminated. Also, with regard to other weapons that were prohibited by a convention, those weapons were destroyed only after the legal norm had come about. So, the timing of the elaboration of the TPNW has been fully in line with similar former diplomatic processes. Based on the history of conventions prohibiting other weapons of mass destruction, the TPNW is certainly not premature.

Experience from disarmament treaties shows that the prohibition norm comes first and destruction will follow, not the other way around. This was one of the reasons why a clear majority of UN member states (123:38:16) voted for UNGA Res.71/258 (2016) convening in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading toward their total elimination. As the result of the negotiations in 2017, the TPNW was adopted by 122 states on 7 July 2017, constituting the legally binding norm indispensable for the full implementation of Article VI.

An area where the text of the TPNW further concretizes the brief NPT language is safeguards. In its Article 3, the TPNW advances the existing safeguards regime by legally obliging its state parties to keep in place any additional safeguards arrangements they have voluntarily agreed to implement. Consequently, a country that already has an Additional Protocol is, under the TPNW, legally obliged to continue with it and has forfeited the right to withdraw from it. In the same Article, a state that has not yet done so is obliged to conclude with the International Atomic Energy Agency and bring into force a comprehensive safeguards agreement (INFCIRC/153 (Corrected)) within 180 days of the entry into force of the TPNW for the state. Finally, pursuant to Article 4, nuclear armed states that ratify the TPNW have to conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in that party as a whole within 180 days of the entry into force of the TPNW for the state. So, the TPNW has succeeded in strengthening the safeguards regime above the level contained in the NPT.

The TPNW uses the terminology of the NPT and other established disarmament treaties regarding weapons of mass destruction, e.g. in its Article 1 on prohibitions. Following the example of the NPT, no definition of “nuclear weapons” is contained in the TPNW in order to secure the full concordance of the two treaties.

In its Article 18, the TPNW stipulates that “The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the Treaty.” Since the provisions of the TPNW are fully compatible with the NPT, this does not result in any problems regarding the NPT.

In their statements in the First Committee, two nuclear weapons states have explicitly complained that the TPNW does not respect their prerogatives as nuclear weapon states that are contained in the NPT. Obviously, to grant certain states a prerogative to have nuclear weapons would run counter to the object and purpose of the TPNW. There are good reasons why neither the BTWC nor the CWC contain such exceptions. Also, in the NPT under Article VI, the nuclear weapon states are under an obligation to achieve nuclear disarmament, so the NPT is based on the assumption that the elimination of
nuclear weapons by the States Parties would be achieved after a number of years. While the duration of the NPT was extended indefinitely in 1995, this did not mean that the status granted to nuclear weapon states under the NPT was also meant to be extended for an indefinite period. Quite to the contrary, NPT membership agreed to this extension under the condition of the goal of achieving a world without nuclear weapons and the full implementation of Article VI. This was enshrined in the principles and objectives of the 1995 decision on the NPT extension and further concretized by the NPT Review Conferences in 2000 and 2010. To date, the nuclear weapon states have not achieved the implementation of Article VI. The insistence on the “prerogatives under the NPT” is therefore a highly questionable argument. A complete prohibition of nuclear weapons may not be to the liking of states demanding certain prerogatives. However, it is fully consistent with the NPT and the goal of achieving a world without nuclear weapons to which all NPT States Parties are committed to.

Acknowledging this reality, the TPNW has created an option for nuclear weapon possessor states to become States Parties even before they have completed the destruction of their nuclear weapons. Articles 2 to 4 of the TPNW set out a clear pathway for nuclear weapon possessor states.

The underlying assumption of the TPNW is that it is just one of the necessary legal instruments necessary to achieve a world without nuclear weapons and thus full implementation of Article VI of the NPT. Based on this logic, no prohibitions regarding fissile material as such are contained in the treaties text. It was the assumption of the negotiators that this issue would be covered by a separate treaty on fissile material.

In sum, the negotiations of the TPNW were marked by the utmost care to make the TPNW a new legal instrument in line with the existing disarmament and non-proliferation regime. The treaty explicitly and structurally fits into the framework created by the NPT and constitutes a necessary measure for the implementation of its Article VI. The TPNW therefore did not create a parallel universe to the traditional one founded on the NPT, but on the contrary, makes the existing universe of legal instruments around the NPT stronger.

Notes on Contributor

Thomas Hajnoczi, who graduated as a Doctor of Law at Vienna University in 1977, is the Director for Disarmament, Arms Control and Non-proliferation in the Austrian Federal Ministry for Europe, Integration and Foreign Affairs. From 2013 to 2017, he served as Permanent Representative of Austria to the United Nations Office at Geneva. Prior to his post in Geneva, Mr. Hajnoczi was Permanent Representative of Austria to the Council of Europe in Strasbourg. He also served as Austrian Ambassador to the Kingdom of Norway, Director for Security Policy in the Foreign Ministry, Deputy Permanent Representative to the United Nations in New York, and has held several other positions. Over the years, he has been closely involved in several multilateral humanitarian disarmament processes, including in the negotiations of the Anti-Personnel Mine Ban Convention and the Treaty on the Prohibition of Nuclear Weapons.