

# The TPNW and its implications for Norway

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## ABOUT

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Through close interaction with international organizations, NGOs, experts, and governments, NAIL seeks to actively participate in global discussions of international law, and to foster sustainable global solutions to the most important challenges of our time.

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## ACRONYMS

AP-I	Additional Protocol I to the Geneva Conventions of 1949
CTBT	Comprehensive Nuclear-Test-Ban Treaty
GDP	Gross domestic product
HLG	NATO High Level Group
IAEA	International Atomic Energy Agency
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
MFA	Norwegian Ministry of Foreign Affairs
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
NPG	NATO Nuclear Planning Group
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
TPNW	Treaty on the Prohibition of Nuclear Weapons
UK	United Kingdom
UN	United Nations
US	United States of America

# Executive summary

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

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

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

## WHY WAS THE TPNW ADOPTED?

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

Representatives of the nuclear-weapon states

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- 1 Hans M. Kristensen and Robert R. Norris, “Status of World Nuclear Forces”, Federation of American Scientists (June 2018). <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>.
  - 2 E.g. Eric Schlosser, “The Growing Dangers of the New Nuclear Arms Race”, *The New Yorker* (24 May 2018). <https://www.newyorker.com/news/news-desk/the-growing-dangers-of-the-new-nuclear-arms-race>.
  - 3 See e.g. Michael J. Mills et al., “Multidecadadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict”, *Earth's Future* 2, no. 4 (2014); Alan Robock et al., “Climatic Consequences of Regional Nuclear Conflicts”, *Atmospheric Chemistry and Physics* 7, no. 8 (2007).

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- 4 Ira Helfand, *Nuclear Famine: Two Billion People at Risk?* (Boston, MA: IPPNW, 2013).
  - 5 International Committee of the Red Cross, “Nuclear weapons – an intolerable threat to humanity” (7 August 2018). <https://www.icrc.org/en/nuclear-weapons-a-threat-to-humanity>.
  - 6 Nick Ritchie, “Waiting for Kant”, *International Affairs* 90, no. 3 (2014), p. 621.

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

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

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

### THE CONTENTS OF THE TPNW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **NATO COMMITMENTS**

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

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

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

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

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



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

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

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

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



# 1 Introduction

Nuclear disarmament has been a central objective of the international community for more than seven decades. Adopted by consensus in January 1946, the UN General Assembly's first-ever resolution called for the establishment of a commission that would make proposals for the "elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction."<sup>1</sup> The 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) commits each of its parties, including five nuclear-armed states,<sup>2</sup> to negotiate "effective measures" for nuclear disarmament. Officially, all the world's states agree on the goal of a world free of nuclear weapons. But the global nuclear disarmament effort has been mired by setbacks and diplomatic gridlocks. Although the overall number of nuclear warheads in the world has been dramatically reduced since the Cold War peak, around 14,500 nuclear warheads remain in existence<sup>3</sup> – more than enough to destroy human civilization as we know it.<sup>4</sup> In addition, the nuclear-armed states possess large quantities of fissile material that could be used to manufacture thousands of new weapons. All the world's nine nuclear-armed states are currently modernizing or expanding their nuclear arsenals. Some

analysts claim the world has entered a new nuclear arms race.<sup>5</sup>

The risks associated with nuclear war have been seriously underestimated. Recent scientific findings suggest that a nuclear war involving just 100 warheads of the Hiroshima-bomb size – small compared to many of today's warheads – could cause climatic disruptions leading to global famine and displacement.<sup>6</sup> A nuclear war would throw massive amounts of smoke into the upper troposphere, blocking enough sunlight from reaching the earth's surface to significantly lower the mean temperature. In the past, supervolcano eruptions caused mass extinction through similar dynamics.<sup>7</sup> According to one estimate, a war involving just 100 nuclear warheads of the Hiroshima-size could leave two *billion* people at risk of starvation.<sup>8</sup> Acknowledging the unprecedented risks posed by nuclear weapons, the NPT review conference expressed in 2010 "deep concern" at the

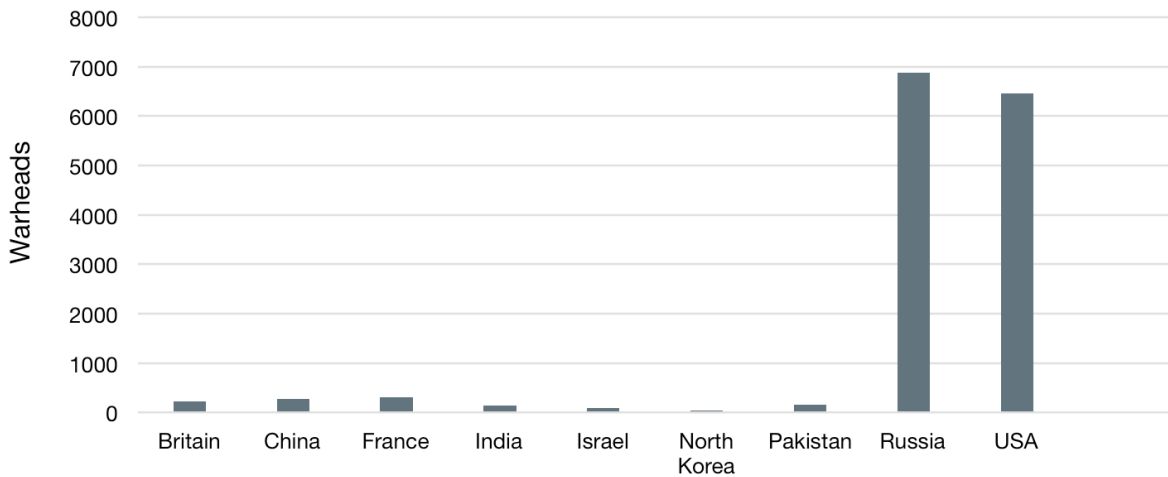
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1 UN General Assembly, "Resolution 1(l): Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy". London (24 January 1946).  
 2 China, France, Russia, the United Kingdom and the United States. Four nuclear-armed states are not parties to the NPT: India, Israel, North Korea and Pakistan.  
 3 Hans M. Kristensen and Robert R. Norris, "Status of World Nuclear Forces", Federation of American Scientists (June 2018). <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>.  
 4 Max Tegmark, "Nuclear War from a Cosmic Perspective" (22 May 2015). <https://arxiv.org/pdf/1505.00246.pdf>.

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5 Eric Schlosser, "The Growing Dangers of the New Nuclear Arms Race", *The New Yorker* (24 May 2018). <https://www.newyorker.com/news/news-desk/the-growing-dangers-of-the-new-nuclear-arms-race>;  
 Christina Pazzanese, "Stirrings of a new nuclear arms race", *The Harvard Gazette* (1 March 2018). <https://news.harvard.edu/gazette/story/2018/03/stirrings-of-a-renewed-nuclear-arms-race/>;  
 W.J. Hennigan, "Donald Trump Is Playing a Dangerous Game of Nuclear Poker", *Time* (1 February 2018). <http://time.com/5128394/donald-trump-nuclear-poker/>.  
 6 See e.g. Michael J. Mills et al., "Multidecadadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict", *Earth's Future* 2, no. 4 (2014); Alan Robock et al., "Climatic Consequences of Regional Nuclear Conflicts", *Atmospheric Chemistry and Physics* 7, no. 8 (2007).  
 7 Max Tegmark, "Nuclear War from a Cosmic Perspective" (22 May 2015).  
 8 Ira Helfand, *Nuclear Famine: Two Billion People at Risk?* (Boston, MA: IPPNW, 2013).

## Estimated nuclear stockpiles, 2018



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

"catastrophic humanitarian consequences of any use of nuclear weapons" and the "continued risk for humanity represented by the possibility that these weapons could be used".<sup>9</sup> According to the International Committee of the Red Cross (ICRC), a nuclear detonation in a city "would immediately kill tens of thousands of people, and tens of thousands more would suffer horrific injuries and later die from radiation exposure. [...] What would humanitarian organizations do in the event of a nuclear attack? The hard truth is that no State or organization could deal with the catastrophic consequences of a nuclear bomb."<sup>10</sup>

Many believed that the end of the Cold War would finally make disarmament possible. But not only have the established

nuclear powers continued to retain and modernize their nuclear arsenals, additional states have acquired nuclear weapons and joined the "nuclear club". A key factor behind the continued attraction of nuclear weapons, researchers believe, is that nuclear weapons are seen by many to confer national prestige.<sup>11</sup> Consider, for example, US President Donald Trump's tweets about the size of his "nuclear button", the North Korean leadership's frequent demands for respect and recognition,<sup>12</sup> and the former UK Prime Minister Tony Blair's claim that giving up nuclear weapons would constitute "too big a downgrading of our [the UK's] status as a nation".<sup>13</sup> Following India's nuclear-weapon tests in 1998, the ruling party

9 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, "Final Document", Vol. 1 (Part I). Doc. NPT/CONF.2010/50, pp. 12, 19. [http://undocs.org/NPT/CONF.2010/50%20\(VOL.I\)](http://undocs.org/NPT/CONF.2010/50%20(VOL.I)).

10 ICRC, "Nuclear weapons – an intolerable threat to humanity" (7 August 2018). <https://www.icrc.org/en/nuclear-weapons-a-threat-to-humanity>.

11 E.g. William Walker, *A Perpetual Menace* (London: Routledge, 2012), p. 5; Sverre Lodgaard, *Nuclear Disarmament and Non-Proliferation* (London: Routledge, 2011), p. 213.

12 Jina Kim, *The North Korean Nuclear Weapons Crisis* (Basingstoke: Palgrave Macmillan, 2014), p. 43.

13 Tony Blair, *A Journey* (London: Hutchinson, 2010), p. 636.

proclaimed a national “day of prestige”.<sup>14</sup> The retention and modernization of nuclear weapons is also sustained by the vested interests of the nuclear-weapon producers. Some of the world’s largest weapons manufacturers and aerospace companies make large profits off the production and maintenance of nuclear-weapon systems.<sup>15</sup>

The United States first acquired nuclear weapons in 1945, using them to devastating effects in Hiroshima and Nagasaki. The Soviet Union acquired nuclear weapons in 1949, and was followed by the United Kingdom in 1952, France in 1960 and China in 1964. Many believed the arms race and spread of nuclear weapons constituted grave threats to humanity. Negotiations on a nuclear non-proliferation treaty commenced in 1965, and the NPT was finally adopted by the UN General Assembly in 1968. Distinguishing between “nuclear” and “non-nuclear-weapon” states, the NPT obliged “non-nuclear-weapon states” not to acquire nuclear weapons, committed all parties to pursue disarmament and pronounced all parties’ right to use nuclear technology for peaceful purposes.

The NPT did not establish a watertight verification regime or regulations for export control. The treaty should be understood primarily as a normative or “declaratory” instrument. Its chief purpose, one analyst maintains, was to create a norm against the manufacture of nuclear weapons – to transform the acquisition of nuclear weapons

“from a symbol of national pride into a violation of international law.”<sup>16</sup> The NPT is usually considered a success in this respect. The spread of nuclear weapons has been slower than most analysts predicted before the adoption of the NPT. It is also notable that the only four states that have given up nuclear arms – Belarus, Kazakhstan, South Africa and the Ukraine – did not enjoy status as “nuclear-weapon states” under the NPT. By contrast, none of the states defined by the NPT as “nuclear-weapon states” have disarmed. In fact, the NPT has been seen to “sanctify” the established major powers’ right to possess nuclear weapons.<sup>17</sup> It has been argued that the NPT’s built-in distinction between “nuclear-weapon states” and “non-nuclear-weapon states” renders the treaty “structurally unable to categorically delegitimize nuclear weapons and the practice of nuclear deterrence.”<sup>18</sup> Representatives of the nuclear-weapon states often argue that they enjoy a special right to possess nuclear weapons.<sup>19</sup>

Adopted by the UN General Assembly in July 2017, the Treaty on the Prohibition of Nuclear Weapons (TPNW) was designed to institute an unconditional norm against nuclear weapons. In contrast to the NPT, which only prohibits the possession of nuclear weapons for *some* states, the TPNW

14 David Kinsella and Jugdep S. Chima, “Symbols of Statehood”, *Review of International Studies* 27, no. 3 (2001), p. 353.

15 See e.g. Nick Ritchie, “Relinquishing nuclear weapons”, *International Affairs* 86, no. 2 (2010).

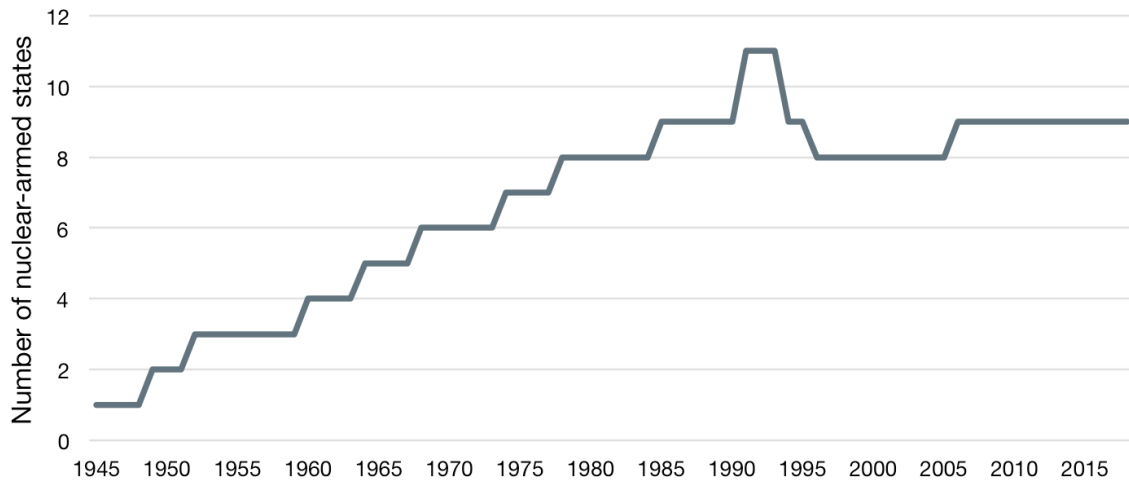
16 Dimitris Bourantonis, “The Negotiation of the Non-Proliferation Treaty, 1965–1968: A Note”, *The International History Review* 19, no. 2 (1997), p. 347.

17 John Maddox, “Prospects for Nuclear Proliferation”, pp. 74–108 in Gregory Trevorton (ed.), *Energy and Security* (Montclair, NJ: Allanheld, Osmund & Co, 1980), p. 77.

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

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

## Timeline of nuclear proliferation



declares the development, possession and use of nuclear weapons illegal for *all* its parties. Supporters of the new treaty argue that the TPNW will help create a stronger norm against nuclear weapons and diminish the prestige value of nuclear armament. Delegitimizing nuclear weapons is argued to constitute a necessary, albeit not sufficient, condition for nuclear disarmament. The TPNW is not intended as a *substitute* for longstanding disarmament proposals such as the entry-into-force of the Comprehensive Nuclear-Test-Ban Treaty or negotiation of a fissile material (cut-off) treaty, but rather as a tool to help create the normative conditions for the pursuit and implementation of disarmament measures in the future.

Norway has traditionally been a strong proponent of international humanitarian law (IHL) and disarmament. However, having played a key role in initial stages of the “humanitarian initiative” that led to the TPNW’s adoption, Norway decided to boycott the negotiation of the new treaty. This was an unprecedented decision; Norway had never before boycotted multilateral negotiations mandated by the UN General Assembly. The Norwegian

government’s explanation for the boycott was that a ban on nuclear weapons would be at odds with Norway’s NATO membership, a position the government has maintained in the period since. However, several Norwegian political parties and civil society organizations have asserted their intention to push for Norwegian signature and ratification.

This report explains the contents of the TPNW, discusses its compatibility with Norwegian defence arrangements and explores the details of some of the key dilemmas Norwegian policymakers are faced with.

## 2 The TPNW and international law

### 2.1 Existing international law and nuclear weapons

The TPNW prohibits the use, development, production, manufacture, acquisition, possession, hosting, and stockpiling of nuclear weapons. The treaty has been argued to “fill a legal gap” in international law because, unlike biological and chemical weapons, nuclear weapons were not explicitly prohibited under international treaty law. This has been one of the great paradoxes of international law – the by far most dangerous and indiscriminate weapon of all not being subject to the same explicit prohibitions as other weapons of mass destruction. This does not mean that nuclear weapons have not previously been subject to legal regulations. As set out in the following, nuclear weapons have been subject to a number of regulations by international treaty law and customary law.

The United Nations Charter prohibits the use of military force (and threats of use of force) against other states in general, with very few exceptions. These rules apply to all use of force against states, irrespective of weapon type.

While the UN Charter regulates the initiation of war (and self-defence) (*jus ad bellum*), international humanitarian law regulates how hostilities may be conducted once war has broken out (*jus in bello*). The key instrument in this context is the 1977 Additional Protocol I (AP-I) to the 1949 Geneva Conventions. AP-I codifies the rules of *distinction* (civilians may not be specifically targeted), *proportionality* (attacks must be proportional to the expected military advantage gained), and *precautions in attacks* (civilians must be alerted and secured). These rules are aimed at protecting

civilians and civilian objects. But AP-I also aims to protect combatants. Specifically, AP-I prohibits means of warfare (weapons) of a nature to cause *superfluous injury and unnecessary suffering*. These basic rules of international humanitarian law are also part of international customary law, meaning that they are binding also on states that have not ratified AP-I. There is no doubt that international humanitarian law renders the use of nuclear weapons illegal in almost all conceivable circumstances.<sup>20</sup> Given that use of nuclear weapons could constitute violations of IHL rules, nuclear weapons use could potentially also be subject to rules and proceedings under **international criminal law**.

**International environmental law** is also relevant to nuclear weapons. The core rules on the protection of the natural environment during armed conflict are partly to be found in AP-I to the Geneva Conventions and partly in other treaties, as well as in international customary law. Under AP-I, “it is prohibited to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment”.<sup>21</sup> International environmental rules also apply to the testing and manufacture of nuclear weapons (for example the release of pollution at various stages of the weapon-production cycle).

20 See Stuart Casey-Maslen, “The Use of Nuclear Weapons Under Rules Governing the Conduct of Hostilities”, in Gro Nystuen, Stuart Casey-Maslen and Annie G. Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge: Cambridge University Press, 2014).

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), Article 35(3).

**The Comprehensive Nuclear-Test-Ban Treaty (CTBT)** prohibits nuclear explosive testing in all environments (underground, underwater and in the atmosphere). The CTBT was adopted by the UN General Assembly in 1996. It has been signed by more than 180 states and ratified by 166, but it has not entered into force because some of the states that are required to ratify the treaty, including some nuclear-armed states, have not done so. However, atmospheric testing of nuclear weapons is now universally prohibited under the 1963 Partial Nuclear-Test-Ban Treaty, as well as international customary law.

Covering large geographical areas and a large number of states, treaties establishing **nuclear-weapon-free zones** prohibit *inter alia* use, production, transfer and testing of nuclear weapons in the various zones. Over 100 states worldwide are parties to such agreements. Most analysts believe the nuclear-weapon-free zones have contributed to defusing the risk of regional nuclear arms races and lowered the risk of nuclear weapons falling into the hands of non-state actors.

*THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT)*

The NPT was negotiated in recognition of “the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples.”<sup>22</sup> The treaty commits “non-nuclear-weapon states” not to manufacture or otherwise acquire nuclear weapons (Art. II), “nuclear-weapon states” not to assist non-nuclear-weapon

states to acquire nuclear weapons (Art. I) and obliges all parties to pursue the negotiation of effective measures for nuclear and general and complete disarmament (Art. VI). The treaty also codifies each party’s right to use nuclear technology for civilian purposes (Art. IV). The NPT does not prohibit the use or possession of nuclear weapons by the five “nuclear-weapon states” (defined as the states that had acquired nuclear weapons by 1 January 1967). The NPT has long been criticized for its discriminatory character. The treaty has also been criticized for its lack of a prohibition on the “development” of nuclear weapons by non-nuclear-weapon states – leading many to argue that it is lawful under the NPT to make preparations for the manufacture of nuclear weapons as long as you stop short of assembling a physical weapon – and its recognition of the concept of “peaceful nuclear explosions” (Art. V). In the 1950s and 1960s, a number of states and commentators believed it would be a good idea to use nuclear explosions for large infrastructure projects such as the digging of canals. The idea has since fallen into disrepute.

*PROHIBITIONS AGAINST INDISCRIMINATE AND INHUMANE WEAPONS*

Both the Convention on Biological Weapons (1972) and the Convention on Chemical Weapons (1993) were firmly based on the core rules of conventional and customary humanitarian law regarding *distinction*, *proportionality* and *superfluous injury*. It was argued that neither chemical nor biological weapons could be used without killing civilians or inflicting superfluous injuries to combatants, and that such weapons should therefore be explicitly prohibited. The same arguments were later applied to

22 Treaty on the Non-Proliferation of Nuclear Weapons (signed 1 July 1968, in force 5 March 1970), Preamble.



anti-personnel mines and cluster munitions, resulting in the prohibition of such weapons through the 1997 Mine Ban Convention and 2008 Convention on Cluster Munitions. Under the 1980 UN Convention on Certain Conventional Weapons, both blinding laser weapons and non-detectable fragments were banned with reference to the IHL rules governing the conduct of hostilities. It should be noted that most of these conventions go beyond the scope of humanitarian law – they are also non-proliferation and disarmament treaties: Production and transfer is prohibited and stockpiles are to be destroyed.

Existing international law lays out heavy restrictions on the possession and *use* of nuclear weapons. However, as mentioned above, there was until 2017 no explicit rule under international law prohibiting nuclear weapons for all states.<sup>23</sup> The negotiation and adoption of the Treaty on the Prohibition of Nuclear Weapons must be seen against this background.

## 2.2 Understanding the TPNW

The purpose of the TPNW is to prevent the use of nuclear weapons and promote the elimination of nuclear weapons. The treaty is founded on the knowledge, as expressed through the 2010 NPT Review Conference final document, that the humanitarian consequences of a nuclear explosion would be catastrophic.<sup>24</sup> Nuclear war would affect all states – not just the nuclear-armed states or those directly targeted. Accordingly, all

states have the right and obligation to try to prevent the humanitarian disaster of nuclear explosions. The treaty contains a preamble, seven substantive articles and thirteen articles on technical and organisational and other matters. For the purpose of this report, it is particularly the first seven articles that will be of interest.

### 2.2.1 PROHIBITIONS

Article 1 of the TPNW is the key provision of the treaty, laying down the rules on what the treaty prohibits.

Article 1(1)(d) explicitly prohibits the use of nuclear weapons. This provision constitutes an entirely new element of IHL. While it could be argued that the use of nuclear weapons might be lawful under the general rules of IHL in very specific circumstances (e.g. dropping a nuclear depth-charge to destroy an enemy submarine on the high sea<sup>25</sup>), Article 1(1)(d) prohibits the use of nuclear weapons under absolutely all circumstances. Article 1(1)(d) is thus at the core of the aim to “fill the gap” in international law and finally place nuclear weapons on the same footing as the other weapons of mass destruction.

In addition to prohibiting use, Article 1(1)(d) explicitly prohibits states from *threatening to use* nuclear weapons. The scope of the notion of “threaten to use” is disputed, but is usually understood to extend beyond *explicit* threats to also cover *implicit* threats to use nuclear weapons. Several such threats have been issued in recent years. For example, in March 2016, the Supreme Command of the

23 The treaty is binding on the states that decides to become party to it.

24 2010 Review Conference, “Final Document”, p. 12.

25 Vice-President Schwebel, “Dissenting Opinion”, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996), p. 98.

North Korean People's Army threatened a "pre-emptive nuclear strike of justice" and to turn Washington and Seoul into "flames and ashes".<sup>26</sup> In August 2017, US president Donald Trump maintained that North Korea "best not make any more threats to the United States", and added that North Korea would be met with "fire and fury [...] the likes of which this world has never seen before" should it endanger the United States.<sup>27</sup> These statements could reasonably be understood as threats covered by Article 1(1)(d).

Article 1(1)(a)–(c) codifies the non-proliferation element of the treaty. *Litra* (a) specifies that no state party must, under any circumstance, *develop, test, produce, manufacture, otherwise acquire, possess or stockpile* nuclear weapons or other nuclear explosive devices. These prohibitions rule out the practice of nuclear deterrence. Article 1(1)(b) prohibits all kinds of *transfer* of nuclear weapons. Article 1(1)(c) prohibits *receiving transfers* or control of nuclear weapons. For the vast majority of potential state parties to the TPNW, these obligations overlap with their obligations under the NPT. The most significant difference between the NPT and the TPNW in this respect is that the latter also includes a prohibition on "development". The NPT's lack of a prohibition on development has fostered diverging views about "whether weaponization activities prior to the

actual assembly of a nuclear weapon are prohibited."<sup>28</sup> By prohibiting development, the TPNW leaves less room for contestation. "Development" is widely understood to include preparations and planning with a view to subsequent production/manufacture.<sup>29</sup>

Article 1(1)(e) obliges the parties never under any circumstances to "[a]ssist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party" under the treaty. The wording "assist, encourage, induce" appears also in Article I of the NPT – the "nuclear-weapon states" are prohibited from assisting, encouraging or inducing any "non-nuclear-weapon State" to manufacture nuclear weapons – and was later used in the Chemical Weapons Convention, the Mine Ban Convention and the Cluster Munitions Convention.

Article 1(1)(f) mirrors Article 1(1)(e), prohibiting state parties from *seeking or receiving assistance* to engage in any activity prohibited by the treaty. Article 1(1)(g) prohibits *stationing, installation or deployment* of nuclear weapons in the territory or any place under the jurisdiction or control of states parties. This wording is wide and is meant to cover all forms of physical presence, be it temporary, short term

26 *The Guardian* (AP), "North Korea threatens to reduce US and South Korea to 'Flames and Ash'" (7 March 2016). <https://www.theguardian.com/world/2016/mar/07/north-korea-threatens-to-reduce-us-and-south-korea-to-flames-and-ash>.

27 Peter Baker and Choe Sang-Hun, "Trump Threatens 'Fire and Fury' Against North Korea if It Endangers U.S.," *New York Times* (8 August 2017). <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html>.

28 James Acton and Carter Newman, *IAEA verification of military research and development* (London: VERTIC, 2006), p. 13. <http://www.vertic.org/media/assets/Publications/MM5.pdf>.

29 Under the 1992 Chemical Weapons Convention, "the term 'develop' encompasses, by virtue of its purpose, a number of steps for creating a functioning weapon ready for production, stockpiling, and use, as distinct from permitted research." See Walter Krutzsch, "Article 1: General Obligations", in Walter Krutzsch, Eric Myjer, and Ralf Trapp (eds), *A Commentary on the Chemical Weapons Convention* (Oxford: Oxford University Press, 2014), p. 65.

or long term, of a nuclear weapon in a state's territory or under its jurisdiction or control.

### 2.2.2 DISARMAMENT AND VERIFICATION

Article 3 of the TPNW obliges any party that has not yet done so to conclude a “comprehensive safeguards agreement” (INFCIRC/153 (Corrected)) with the International Atomic Energy Agency (IAEA). Comprehensive safeguards agreements are “full-scope” safeguards agreements that allow the IAEA to control (“safeguard”) that states' declared nuclear material and facilities are not used for military purposes. All parties to the NPT have agreed comprehensive safeguards agreements with the IAEA. However, Article 3 of the TPNW specifies that any state party that, upon joining the TPNW, had in place *additional* safeguards arrangements – that is, safeguards arrangements that go beyond the minimum requirement of the NPT – *must* keep these in place. Accordingly, the 132 states that have accepted the IAEA's additional protocol – a voluntary agreement that allows the IAEA to inspect “undeclared” facilities – would be obliged under the TPNW never to withdraw from the additional protocol. The safeguards regime under the TPNW will thus be equal to, or stronger, than that of the NPT.

Article 4 commits any state parties in possession of nuclear weapons to disarm. Such states must immediately remove their nuclear weapons from operational status, and then verifiably destroy their nuclear weapons and eliminate their nuclear-weapon programme according to a plan agreed with the TPNW parties. Article 4 also states that any state party that hosts nuclear weapons on its territory or under its jurisdiction or control shall ensure the prompt removal of those weapons.

### 2.2.3 POSITIVE OBLIGATIONS

Articles 6 and 7 cover victim assistance and environmental remediation.<sup>30</sup> State parties shall “adequately provide” victim assistance to persons under their jurisdiction who are affected by the testing or use of nuclear weapons. Such victim assistance shall be provided in accordance with “applicable international humanitarian law and human rights law”. Similar provisions were introduced in the conventions on anti-personnel mines and cluster munitions, and have been of significant benefit for victims both in terms of practical measures and access to legal resources.

The provision on environmental remediation obliges state parties to take measures to ensure the rehabilitation of any areas under their jurisdiction or control that have been contaminated as a result of “activities related to the testing or use” of nuclear weapons. This provision thus covers contamination resulting from, for example, production, transport or stockpiling of nuclear weapons, as these are “activities related to” testing and use. Under Article 7, all parties “in a position to do so” are obliged to “provide technical, material and financial assistance to States Parties affected by nuclear-weapons use or testing”.

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30 For overviews of these provisions, see International Human Rights Clinic, “Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons”, Harvard Law School (April 2018). <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Victim-assistance-short-4-8-18-final.pdf>; International Human Rights Clinic, “Environmental Remediation under the Treaty on the Prohibition of Nuclear Weapons”, Harvard Law School (April 2018). <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Environmental-Remediation-short-5-17-18-final.pdf>.



# 3 The TPNW and Norway's legal and political commitments

## 3.1 The TPNW and Norway's legal obligations

Norway is bound by all of the treaties, as well as the customary law, mentioned in section 2 of this report. This section looks briefly at legal issues that may (or may not) arise if Norway were to become party to the TPNW.

### 3.1.1 *JUS AD BELLUM*

Norway is bound by the prohibition in Article 2 (4) of the UN Charter never to *use or threaten to use* military force against another state (subject to the exceptions of UN Security Council authorization and collective or individual self-defence). Accession to the TPNW would reinforce this commitment. Provided that Norway had not assisted, encouraged or induced the commission of such threats (see section 3.1.3), threats to use nuclear weapons by one of Norway's allies would not constitute a violation of the TPNW for Norway.

### 3.1.2 INTERNATIONAL HUMANITARIAN LAW (IHL)

The TPNW complements Norway's existing obligations under IHL. Existing IHL prohibits the use of indiscriminate and superfluously injurious weapons in general. The TPNW specifies that nuclear weapons are inherently indiscriminate, and that any use of such weapons would be unlawful.

### 3.1.3 ASSISTANCE, ENCOURAGEMENT AND INDUCEMENT OF UNLAWFUL ACTIVITIES

Assisting the execution of unlawful activities is already prohibited under international

law. A state that aids or assists another state in the commission of an internationally wrongful act is internationally responsible for doing so if "(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that [the assisting] State."<sup>31</sup> The TPNW and other disarmament treaties prohibit their parties from assisting "anyone" to engage in activities prohibited by the treaties.

The TPNW's assistance provision does not preclude membership in military alliances or participation in joint military operations with nuclear-armed states. In the case of Norway, accession to the TPNW would not legally rule out continued NATO membership. Although the TPNW does not provide an explicit authorization to engage in military cooperation with states not party to the treaty, there is nothing in the TPNW that precludes such cooperation per se. The Mine Ban Convention, the Biological Weapons Convention, the Chemical Weapons Convention and various protocols to the Convention on Certain Conventional Weapons similarly do not contain any such express authorizations, and have not been interpreted by their parties as proscribing membership in alliances that include states that do not adhere to those treaties.

The TPNW's prohibition on assistance would, however, prohibit Norway from carrying out specific acts of assistance such as the export of nuclear material to be used for the manufacture of nuclear warheads or

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<sup>31</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*. United Nations (2008), p. 66.

operational support for the use of nuclear weapons by an ally. The Convention on Cluster Munitions – which similarly prohibits the assistance of prohibited activities – has not precluded Norway from continued participation in NATO operations alongside the United States (a non-party to the Convention on Cluster Munitions).

The TPNW does not rule out trade in nuclear material or civilian nuclear technology. Provided that the exporter is unaware of any intention by the importer to use the material or technology for activities prohibited by the TPNW, transfers may proceed. The TPNW also permits its parties to allow foreign naval vessels to transit through their territories, including refuelling docked ships, without obtaining express declarations that the vessels in question are not carrying nuclear weapons. An explicit prohibition on transit was discussed during the TPNW negotiations, but left out of the final text.

While the TPNW is fully reconcilable with Norway's existing legal obligations, Norway would have to adjust some of its current practices to comply with Article 1(1)(e). Specifically, Norway would have to refrain from “encouraging” or “inducing” the possession and use of nuclear weapons by its allies. Norway's unqualified support for NATO's current strategic concept (2010) and the 2012 Deterrence and Defence Posture Review would appear to fall foul of this provision (see section 3.2). According

to a legal commentary on the Chemical Weapons Convention, encouragement and inducement “means contributing to the emergence of the resolve of anyone to commit a prohibited activity”.<sup>32</sup> As it stands, Norway's and other NATO allies' support for the doctrine of extended nuclear deterrence could indeed be argued to contribute to the nuclear-armed allies' resolve to retain and modernize their nuclear arsenals. The non-nuclear allies' demand for extended nuclear deterrence is frequently used by proponents of nuclear modernization to justify increased spending on nuclear weapons (i.e. continued development, manufacture and possession of nuclear weapons). Norway could arguably continue to participate in NATO's forums for nuclear policy deliberations (the Nuclear Planning Group and High Level Group). These groups facilitate discussions of all nuclear issues, including arms control. Participation in such groups would not obviously constitute either “assistance” or “encouragement or inducement” of activities prohibited by the TPNW. A more difficult case relates to the sharing of data and intelligence. In the summer of 2018, it emerged that the Norwegian government had plans to share satellite data with US nuclear submarines. Presumably, such data could be used for a range of activities not related to nuclear weapons. But at the same time, the data could certainly “assist” the United States in carrying out acts prohibited under the TPNW.

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32 See Walter Krutzsch, “Article 1: General Obligations”, in Walter Krutzsch, Eric Myjer, and Ralf Trapp (eds), *A Commentary on the Chemical Weapons Convention* (Oxford: Oxford University Press, 2014), p. 67.

### 3.1.4 THE NPT

Certain analysts and politicians, including Norway's former Foreign Minister, Børge Brende, have suggested that the TPNW and NPT are legally incompatible.<sup>33</sup> The following paragraphs examine the validity of this claim.

#### OBJECTIVE

The NPT's objective is to prevent the spread of nuclear weapons, to promote cooperation in the peaceful uses of nuclear energy and to further the goals of nuclear disarmament and general and complete disarmament. Norway is bound by all obligations pertaining to NPT non-nuclear-weapon states, including the obligation to pursue negotiations in good faith on effective measures for nuclear disarmament. Some commentators have argued that the NPT was not "really" intended to give rise to disarmament obligations – that it was only intended to freeze the status quo. Be that as it may, the text of the NPT obliges parties to pursue negotiations on effective measures for nuclear disarmament. According to the International Court of Justice, NPT parties are obliged to bring such negotiations "to a conclusion", i.e. to eliminate nuclear weapons.<sup>34</sup> The TPNW and the NPT thus share the goal of eliminating nuclear weapons.

33 Børge Brende, Reply to Written Question in Parliament (1 November 2016). <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=66945>.

34 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), p. 267.

#### USE OR THREATENING USE

The NPT does not regulate use or threatening use of nuclear weapons, save that use is implicitly prohibited for the non-nuclear weapon states. Thus, there is no overlap or legal inconsistency with respect to use.

#### NON-PROLIFERATION

The TPNW and NPT both contain provisions prohibiting the acquisition of nuclear weapons. The NPT prohibits "transfer" of nuclear weapons by the nuclear weapon states. It moreover prohibits the "reception", "manufacturing" and "acquisition" of nuclear weapons by the non-nuclear weapons state parties. The TPNW explicitly prohibits all of these activities. In addition, it specifically prohibits activities that also are assumed to be covered by the NPT wording, such as production, possession and stockpiling of nuclear weapons. There appear to be no *inconsistencies* between the two treaties on this score, other than the TPNW being more specific and, if anything, more extensive in content (see section 2.2.1). It cannot reasonably be argued that by entering the TPNW, a state would undermine its non-proliferation obligations under the NPT.

#### SAFEGUARDS

The NPT obliges "non-nuclear-weapon states" to "accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency" (Art. III). The TPNW also commits its parties to conclude safeguards agreements with the IAEA and adds that states that have accepted voluntary safeguards arrangements that go beyond the

minimum requirements shall maintain those arrangements. The TPNW thus sets out the same minimum safeguards requirement as the NPT. However, the TPNW adds that any state that has accepted additional safeguards measures – measures that are voluntary under the NPT – must maintain these indefinitely. The TPNW serves as a ratchet mechanism, making it impossible for states to lower their present standards in the future.

#### *DISARMAMENT*

Both the TPNW and the NPT contain provisions on disarmament, but neither of the two treaties offer a fully-fledged stockpile destruction regime. The TPNW obliges nuclear-armed parties to “immediately remove” their nuclear weapons from operational status, “and destroy them as soon as possible, [...] in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of that State Party’s nuclear-weapon programme” (Art. 4).

The disarmament obligation contained in the NPT is much less precise. According to Article VI, each party to the treaty is obliged to pursue negotiations in good faith on effective measures relating to the “cessation of the nuclear arms race”, “nuclear disarmament” and on a “treaty on general and complete disarmament”.<sup>35</sup> TPNW supporters have framed the negotiation and adoption of the TPNW as an attempt at implementing the NPT disarmament obligation. Representatives of the nuclear-weapon states and their allies have disputed this view. The TPNW supporters’

interpretation, however, is founded on the actual wording of the NPT and is not easily dismissible.

At the TPNW negotiations in July 2017, the Swedish delegation alluded that, given the NPT’s call for the pursuit of nuclear disarmament negotiations, a failure to attend such negotiations appeared inconsistent with the object and purpose of the NPT. It has been suggested by some that the disarmament negotiations foreseen by the NPT must be carried out within the institutional context of the NPT – presumably at NPT review conferences – but the treaty text makes no such demand. The NPT review cycle exists to review and facilitate the implementation of the NPT, not to negotiate new treaties.

It has also been argued that the NPT precludes the adoption of a prohibition on nuclear weapons before the completion of the nuclear disarmament process. In this view, the three elements mentioned in Article VI of the NPT (cessation of the nuclear arms race; nuclear disarmament; a treaty on general and complete disarmament) must be pursued in the order of their appearance on the list. But this view finds little support in the text of the NPT. First, the NPT does not define either effective measures to curb the “nuclear arms race” or effective measures for “nuclear disarmament”. Prohibiting nuclear weapons could be understood as an effective measure to curb the arms race *and* an effective measure for nuclear disarmament. Second, if a specific sequencing of activities or obligations is to be inferred by a list, then that would have to be explicitly specified in the text. This follows from ordinary rules of the interpretation of legal documents. Moreover, an approach whereby

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<sup>35</sup> NPT, Article VI.



the legal prohibition of a weapon could only be adopted after the elimination of all such weapons is inconsistent with the history of other disarmament processes. The Chemical Weapons Convention, the Biological Weapons Convention, the Mine Ban Convention and the Convention on Cluster Munitions were all adopted prior to the elimination of such arms. Prohibiting these weapons were intended to stimulate progress towards elimination, not to codify an existing state of affairs.<sup>36</sup>

### 3.2 Norwegian NATO commitments and the TPNW

NATO's nuclear posture has changed markedly over time. When founded in 1949, NATO had no explicitly articulated nuclear policy. NATO took no position on the legitimacy of specific weapons, leaving each member state with the responsibility to equip its armed forces as it saw fit. Over time, however, NATO adopted nuclear deterrence as an explicit element of its strategy and developed a range of "nuclear sharing" practices (foreign hosting of nuclear weapons and collective nuclear planning). In 2010, NATO declared itself a "nuclear alliance".<sup>37</sup> In recent years, representatives of non-nuclear-armed NATO states have

dismissed ratification of the TPNW on the grounds that prohibiting nuclear weapons would conflict with their "alliance commitments".<sup>38</sup>

It is worth distinguishing between two types of "alliance commitments": legal and political. *Legal* commitments (or obligations) are those that bind the allied states under international law. The central legal provision of NATO is that "an armed attack against one" of the allies "shall be considered an attack against them all".<sup>39</sup> *Political* commitments are shared understandings designed to guide policy. Violation of political commitments incurs no legal consequences, but could potentially provoke political reprisals or loss of favour.

NATO member states bear no legal obligation to support extended nuclear deterrence or the retention of nuclear weapons. NATO's founding and only legally binding document, the 1949 North Atlantic Treaty, does not mention nuclear weapons. Article 3 of the treaty provides that NATO members shall "maintain and develop their individual and collective capacity to resist armed attack", but does not specify the means with which this obligation should be met; members are at liberty to fashion their

36 For a more detailed discussion of Article VI and the sequencing of disarmament measures, see Kjølvi Egeland, Torbjørn G. Hugo, Magnus Løvold, and Gro Nystuen, "The nuclear weapons ban treaty and the non-proliferation regime", *Medicine, Conflict and Survival* 34, no. 2 (2018).

37 The term "nuclear alliance" was promoted by US Secretary of State Hillary Clinton and incorporated into NATO's seventh strategic concept: NATO, "Active Engagement, Modern Defence: Strategic Concept for

the Defence and Security of the Members of the North Atlantic Treaty Organization" (2010), para. 17.

38 See e.g. Marit B. Røsland, "Problemet med et atomvåpenforbud", *Klassekampen* (4 August 2017). [https://www.regjeringen.no/no/aktuelt/forbud\\_avaaper/id2565348/](https://www.regjeringen.no/no/aktuelt/forbud_avaaper/id2565348/); Netherlands, "Explanation of vote", TPNW negotiating conference (7 July 2017). <https://www.permanentrepresentations.nl/latest/news/2017/07/07/explanation-of-vote-of-ambassador-lise-gregoire-on-the-draft-text-of-the-nuclear-ban-treaty>.

39 North Atlantic Treaty (adopted April 4, 1949, entry into force 24 August 1949), Art. 5.

security policies and equip their military personnel according to their national preferences. Consequently, a recent Harvard Law School study concludes that “a NATO member state would not violate its legal obligations to the alliance if it withdrew from the nuclear umbrella associated with NATO.”<sup>40</sup>

The question of *political* alliance commitments is more complicated. Such commitments often arise from diffuse understandings that may or may not be codified in writing. For that reason, political commitments are often contested, disputed or even ignored by one or more of the actors involved. As in domestic politics and civil society, international political commitments are generally considered less binding than legal ones.

NATO’s first two “strategic concepts” (authoritative policy documents stipulating the alliance’s military posture and planning) did not mention nuclear weapons.<sup>41</sup> This was no coincidence: A positive reference to the potential use of nuclear weapons in the draft of the first strategic concept was removed from the final version at the insistence of Denmark.<sup>42</sup> In its early years, then, NATO did not take an official stance either on

nuclear deterrence or disarmament – much as it did not take a position on chemical or biological weapons. Nuclear weapons were first mentioned in NATO’s third strategic concept, in 1954, a document outlining what is often described as the “massive retaliation” doctrine, according to which NATO would respond “immediately” to Soviet aggression with a “devastating counter-attack employing atomic weapons”.<sup>43</sup> NATO’s practice of “nuclear sharing” emerged in the late 1950s and early 1960s, when a number of non-nuclear allies agreed to host US nuclear weapons on their territories.<sup>44</sup> Through the 1966 creation of the Nuclear Planning Group (initially called the Nuclear Defence Affairs Committee), the remaining allies were drawn into the sharing regime in “planning roles”.

The Nuclear Planning Group (NPG) is composed of all NATO members’ ministers of defence, but meets only rarely on ministerial level. The NPG discusses all policy issues associated with nuclear forces, including nuclear-sharing practices and arms control. The NPG receives input from the High Level Group (HLG) – the NPG’s senior advisory body. The HLG is composed of national experts and is permanently chaired by the United States.

From a legal point of view, accession to the TPNW would not require withdrawal from the NPG or HLG. Simply being in a room where activities prohibited by the TPNW are discussed would not *ipso facto* imply

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40 International Human Rights Clinic, “Nuclear Umbrella Arrangements and the Treaty on the Prohibition of Nuclear Weapons”, Harvard Law School (June 2018), p. 2.

41 NATO, “The Strategic Concept for the Defense of the North Atlantic Area” (DC 6/1) (1949). <https://www.nato.int/docu/stratdoc/eng/a491201a.pdf>; NATO, “The Strategic Concept for the Defense of the North Atlantic Area” (MC 3/5) (1952). <https://www.nato.int/docu/stratdoc/eng/a521203a.pdf>.

42 Paul Guillaume, *Allieret med forbehold* (Copenhagen: Eirene, 1995), p. 503.

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43 NATO, “The Most Effective Pattern of NATO Military Strength for the Next Five Years” (MC 48) (1954), para. 3(b). <https://www.nato.int/docu/stratdoc/eng/a541122a.pdf>.

44 Belgium, Canada, Greece, Italy the Netherlands, Turkey, and West-Germany.

either “assistance” or “encouragement or inducement” of such activities. Moreover, the NPG and HLG have mandates to discuss all nuclear matters, including arms control. From a political perspective, however, stepping out of the NPG and HLG could potentially ease intra-alliance friction.

The contours of NATO’s current nuclear posture came into relief in the early 1990s. According to NATO’s fifth strategic concept, adopted in 1991, the “supreme guarantee” of the allies’ security was “provided by the strategic nuclear forces of the Alliance, particularly those of the United States; the independent nuclear forces of the United Kingdom and France, which have a deterrent role of their own, contribute to the overall deterrence and security of the Allies.”<sup>45</sup> Furthermore, NATO’s nuclear deterrence posture was asserted to require “widespread participation by European Allies involved in collective defence planning in nuclear roles, in peacetime basing of nuclear forces on their territory and in command, control and consultation arrangements”.<sup>46</sup>

Although the strategic concepts are adopted by consensus, member states have shown varying degrees of willingness to implement the recommendations they contain. For example, despite nominal agreement that NATO’s nuclear deterrence posture requires “widespread participation” of European allies in the stockpiling of nuclear weapons, member states such as Denmark, Iceland, Norway and Spain have for decades opposed the deployment of US nuclear weapons

on their territories during peacetime. Lithuania’s constitution unconditionally prohibits the stationing of nuclear weapons on Lithuanian territory.<sup>47</sup>

NATO’s latest strategic concept, adopted at the NATO summit in Lisbon in 2010, makes several references to nuclear weapons. The 2010 concept may be said to contain at least four statements that could be construed as “alliance commitments” relevant to nuclear policy.

- **Commitment 1: Nuclear disarmament.** First, the strategic concept urges NATO to “create the conditions for a world without nuclear weapons”.<sup>48</sup> Advocates of disarmament have pointed out that this is precisely what the TPNW is for, and that NATO members should therefore support the new treaty. Others have contended that the goal of disarmament is better served by other means, such as bilateral negotiations between the United States and Russia and/or multilateral engagement through the NPT review process. The lack of disarmament results within the NPT call this latter approach into question.
- **Commitment 2: Nuclear sharing and deterrence.** Second, the 2010 strategic concept provides that the allies will “maintain an appropriate mix of nuclear and conventional forces” and “ensure the broadest possible participation of

45 NATO, The Alliance’s Strategic Concept (1991), para. 54. [https://www.nato.int/cps/ua/natohq/official\\_texts\\_23847.htm](https://www.nato.int/cps/ua/natohq/official_texts_23847.htm).

46 *Ibid.*, para. 55.

47 Constitution of Lithuania (adopted 25 October 1992). Art. 137. <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>.

48 NATO, “Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization” (2010), para. 26. <https://www.nato.int/lisbon2010/strategic-concept-2010-eng.pdf>.

Allies in collective defence planning on nuclear roles, in peacetime basing of nuclear forces, and in command, control and consultation arrangements”. The first of these statements – that NATO will maintain nuclear forces – is addressed to the nuclear-armed allies; the 2010 strategic concept commits at least one of the three nuclear-armed allies to retain an operational nuclear capability. The second statement – that the allies will ensure the broadest possible participation in nuclear planning and hosting of nuclear forces – is addressed to the non-nuclear allies (and perhaps France, which does not participate in the NPG). The qualifier “broadest possible” suggests that the commitment to nuclear sharing may be overridden by other concerns, such as legal obligations and national interests and values. As discussed above, several allies have long maintained official policies against the hosting of nuclear weapons on their territories.

- **Commitment 3:** Solidarity. The 2010 concept also commits the allies to pursue peace and security “on the basis of solidarity, shared purpose and fair burden-sharing” within the alliance. Certain supporters of nuclear sharing and deterrence have taken such words to imply that the smaller NATO allies must go along with whatever the larger allies decide. In the late 1970s, for example, Norway and Denmark were opposed to the deployment of intermediate-range nuclear forces to Europe, but were ultimately brought onside following appeals to alliance solidarity and cohesion.<sup>49</sup> That said, the

operationalization of solidarity norms is not straightforward, and there is an important distinction between solidarity and obedience.

- **Commitment 4:** Maintaining NATO as a “nuclear alliance”. The 2010 strategic concept further describes NATO as a “nuclear alliance”.<sup>50</sup> The 2010 concept was the first of NATO’s seven strategic concepts to use this phrase, and it is not clear what it means. After all, NATO has no supranational mandate to determine the policies of individual member states, be it to dictate the construction of nuclear weapons or adoption of disarmament agreements; there is no requirement for non-nuclear allies to support the nuclear-armed allies’ maintenance of their arsenals either financially or operationally; and, crucially, *NATO as an alliance does not possess nuclear weapons* – Britain, France and the United States do. Any transfer of control of nuclear weapons from the nuclear-armed allies to non-nuclear allies or to NATO as such would violate the letter and spirit of Article I of the NPT, which obliges nuclear-weapon-states “not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly”.<sup>51</sup> NATO’s self-proclaimed identity as a “nuclear alliance”, then, does not easily translate into specific commitments. If the statement that NATO

49 See e.g. Anker Jørgensen, *Brændingen: Fra mine dagbøger 1978–1982* (København: Fremad, 1990), p.

292; Oddvar Nordli, *Min vei: Minner og meninger* (Oslo: Tiden, 1985), p. 146–7; Knut Frydenlund, *Lille land – hva nå?* (Oslo: Universitetsforlaget, 1982), p. 131.

50 NATO, “Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization” (2010), para. 17.

51 NPT, Article I.

is a “nuclear alliance” simply means that at least one ally has access to nuclear weapons, non-nuclear allies’ ratification of the TPNW would not undermine NATO’s status as such.

The alliance commitments of relevance to nuclear policy enshrined in the strategic concept are at best vague. Yet the strategic concept’s multiple references to the utility of nuclear deterrence would appear to demand at least a minimum of support for the continued retention of nuclear weapons by one or more of the nuclear-armed allies. There is little doubt that a non-nuclear ally’s ratification of the TPNW would be framed by some – most notably the nuclear-armed allies – as a breach of alliance solidarity and a grave contradiction of NATO’s nuclear deterrence policy.

But although supporting the TPNW would contradict NATO’s *explicit* commitment to the policy of nuclear deterrence, supporting the TPNW would not in and of itself eliminate the material basis, or phenomenon, of extended nuclear deterrence. As long as at least one NATO member retains nuclear weapons, aggression against NATO would inevitably involve a risk of nuclear escalation. Given the North Atlantic Treaty’s provision that an armed attack against one of the allies “shall be considered an attack against them all”, aggression against any NATO member would invite a state of war against all of NATO’s members, including any nuclear-armed allies. Ratification of the TPNW by Norway would not legally preclude France, the United Kingdom or the United States from using nuclear weapons.

### 3.3 Norwegian defence policy and the TPNW

Since the Second World War, Norwegian governments have pursued security through three main tracks: national military preparedness, NATO alignment and promotion of international law (often described as Norway’s first line of defence). Norwegian policymakers have sought to manage Norway’s relationship to Russia/the Soviet Union through a combination of deterrence and assurance. Norway’s 1949 accession to NATO was thus accompanied by a declaration that foreign powers would not be allowed to establish permanent military bases on Norwegian soil.<sup>52</sup> Norway would not allow NATO exercises in Finnmark, the county bordering Russia, and would not accept visits from foreign naval vessels or military aircraft east of the 24th meridian.

In 1957, following the Labour Party Conference’s adoption of a motion to proscribe deployment of nuclear weapons on Norwegian soil, the Norwegian Prime Minister declared to his NATO colleagues that Norway would not allow the stationing

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<sup>52</sup> See e.g. Rolf Tamnes and Knut E. Eriksen, “Norge og NATO under den kalde krigen”, in C. Prebensen and N. Skarland (eds), *NATO 50 år: Norsk sikkerhetspolitikk med NATO gjennom 50 år* (Oslo: Den norske atlantehavskomiteé, 1999), pp. 7–38; and Simon Duke, *United States Military Forces and Installations in Europe* (Oxford: Oxford University Press, 1989), pp. 216–17. Minor corollaries were added to the Norwegian “base policy” in 1951 and 1977, due to changes in NATO’s posture. This included a more precise explanation of what the base policy did not preclude, such as the construction of military facilities, stationing of military equipment or NATO exercises on Norwegian soil (except in Finnmark).

of US nuclear weapons in Norway during peacetime.<sup>53</sup> Nevertheless, over the next few years, the Norwegian government solicited the construction of secret munitions sites for the possible receipt of nuclear weapons in the future, and the Norwegian military acquired nuclear-capable delivery vehicles and participated in nuclear military exercises. However, once the decision not to allow the stationing of nuclear weapons was reconfirmed in 1960/61 (including by the Norwegian parliament), the infrastructural preparations were reversed. The policy of not allowing the stationing of nuclear weapons on Norwegian territory during peacetime has since been upheld, and Norway does not possess nuclear-capable delivery vehicles.<sup>54</sup> Norway has, however, participated in NATO's Nuclear Defence Affairs Committee/Nuclear Planning Group (NPG) since its formation in the 1960s.

In recent years, successive Norwegian governments have promoted a “humanitarian approach” to nuclear disarmament. In May 2012, Norway co-sponsored a joint statement delivered to the 2012 NPT Review Conference Preparatory Committee declaring that it is of the “outmost importance that these [nuclear] weapons *never be used again, under any circumstances.*”<sup>55</sup> Over the following years,

Norway supported another five similarly worded statements. These declarations would appear to leave little if any room for nuclear deterrence in Norwegian policy. After all, nuclear deterrence relies inescapably on a willingness to use nuclear weapons in certain circumstances.

What is the role of nuclear weapons in Norwegian security policy? Norwegian governments have released five command papers on foreign policy and defence since 2008 (two white papers on foreign affairs and security, prepared by the Ministry of Foreign Affairs (MFA), and three long-term plans for the Norwegian Armed Forces, prepared by the Ministry of Defence (MoD)). Of these five, two do not mention any role for nuclear weapons in Norwegian defence, discussing nuclear weapons only as security threats and as objects of disarmament. The other three make vague references to NATO's “nuclear weapons policy” or “deterrence strategy”.<sup>56</sup> The following paragraphs summarize the five papers' treatment of nuclear deterrence and disarmament:

The 2008 long-term plan for the Norwegian Armed Forces does not mention any role for nuclear weapons in Norwegian defence policy. Weapons of mass destruction are instead identified as a source of insecurity. The plan laments the nuclear-armed states' limited progress towards disarmament and instructs the Norwegian Armed Forces to

53 Mats R. Berdal, *The United States, Norway and the Cold War, 1954–60* (Basingstoke: Macmillan, 1997), p. 166.

54 Rolf Tamnes and Knut E. Eriksen, “Norge og NATO under den kalde krigen”, in C. Prebensen and N. Skarland (eds), *NATO 50 år: Norsk sikkerhetspolitikk med NATO gjennom 50 år* (Oslo: Den norske atlantehavskomiteé, 1999), p. 29.

55 Joint statement on the humanitarian dimension of nuclear disarmament. Delivered by Switzerland on behalf of 16 states. NPT Review Conference Preparatory Committee (2 May 2012). <http://www.reachingcriticalwill.org/>

images/documents/Disarmament-fora/npt/prepcom12/statements/2May\_IHL.pdf. Emphasis added.

56 Certain aspects of Norwegian military planning are not public knowledge. This paper relies solely on public sources.

boost its preparedness to face chemical, biological, radiological and nuclear threats.<sup>57</sup>

The 2009 white paper on Norwegian foreign policy similarly does not explicitly identify any role for nuclear weapons in Norwegian security policy. Instead, the MFA repeatedly emphasizes the importance of nuclear non-proliferation and disarmament. The MFA reiterates Norway's commitment to the "complete elimination of nuclear weapons" and notes that the nuclear-weapon state parties to the NPT are legally obliged to disarm. The NPT disarmament process must be "revitalized", the MFA asserts.<sup>58</sup>

Next, the 2012 long-term plan for the Norwegian Armed Forces makes several references to the risks posed by nuclear weapons and urges the nuclear-weapon states to take greater responsibility for disarmament.<sup>59</sup> The plan also makes a single, indirect reference to the role of nuclear weapons in Norwegian defence. Discussing NATO's 2010 strategic concept, the plan notes that "NATO's deterrence strategy will still be based on both conventional and

nuclear capabilities."<sup>60</sup> Beyond this terse statement of fact, the plan says nothing about how a reliance on nuclear deterrence may be reconciled with the objective of disarmament or how the deterrence policy relates, if at all, to national defence planning and force structure.

The 2016 long-term plan for the Norwegian Armed Forces tones down the previous command papers' emphasis on disarmament. In contrast to previous papers' assertions that the nuclear-armed states' implementation of the NPT's Article VI has been insufficient, the 2016 long-term plan simply proclaims that "NATO supports the NPT's goal of a world without nuclear weapons" (a statement of dubious accuracy).<sup>61</sup> On the role of deterrence, the 2016 plan elaborates slightly on the 2012 plan, stating that the United States' and NATO's deterrence strategies are designed primarily to avert nuclear threats and attacks against NATO members: "NATO's deterrence strategy [...] includes both a nuclear and a conventional component, as well as missile defence. Given contemporary and future security challenges, these components must be seen in association in order to achieve necessary deterrence. The most important function of nuclear weapons is to avert threats or use of nuclear weapons against NATO's member states. This makes up the foundation of both American and NATO nuclear policy, through which it is maintained that NATO will remain an

57 Norwegian Ministry of Defence, "Et forsvar til vern om Norges sikkerhet, interesser og verdier", St.prp. nr. 48, 2007–2008 (28 March 2008), pp. 36, 66. <https://www.regjeringen.no/contentassets/93a935d7abc149509595f5e873a38041/no/pdfs/stp200720080048000dddpdfs.pdf>.

58 Norwegian Ministry of Foreign Affairs, "Interesser, ansvar og muligheter", St.meld. nr. 15, 2009–2009 (13 March 2009), p. 93. NAIL's translation from Norwegian. <https://www.regjeringen.no/contentasset/s/9c4165390a954c2a809ded2ef11e56c9/no/pdfs/stm200820090015000dddpdfs.pdf>.

59 Norwegian Ministry of Defence, "Et forsvar for vår tid". St.prp. nr. 73 S, 2011–2012 (23 March 2012), pp. 23, 145. <https://www.regjeringen.no/contentassets/e6b0d7ef3c26457ab6ef177cd75b5d32/no/pdfs/prp201120120073000dddpdfs.pdf>.

60 *Ibid.*, p. 26. NAIL's translation from Norwegian.

61 Norwegian Ministry of Defence, "Kampkraft og bærekraft: Langtidsplan for forsvarssektoren", Prop. 141 S, 2015–2016 (17 June 2016), p. 32. NAIL's translation from Norwegian. <https://www.regjeringen.no/contentassets/a712fb233b2542af8df07e2628b3386d/no/pdfs/prp201520160151000dddpdfs.pdf>.

alliance with nuclear weapons for as long as there are nuclear weapons in the world.”<sup>62</sup> The claim that the “foundation” of NATO’s nuclear policy is to “avert threats or use of nuclear weapons” is at best incomplete. NATO has always reserved the right to be the first to use nuclear weapons in a conflict (first-use policy), suggesting that nuclear weapons are seen not only as deterrents against nuclear use, but also as instruments to deter conventional threats, pre-emptively disarm nuclear-armed foes and/or blackmail or attack non-nuclear adversaries.<sup>63</sup> The statement that NATO will remain “an alliance with nuclear weapons” is also unclear, given that NATO as such does not possess nuclear weapons.

The 2017 white paper on defence and foreign policy reiterates Norway’s longstanding policy against hosting nuclear weapons on Norwegian territory: “Norway has made it clear that nuclear weapons are not to be stationed on Norwegian territory in peacetime. This policy has helped to reduce conflict and ease tensions. Norway has also stipulated that foreign military vessels that call at Norwegian ports must not have nuclear weapons on board. The Government will continue this policy.”<sup>64</sup>

62 *Ibid.*

63 It is widely accepted that the first-use of nuclear weapons goes beyond the requirements of deterrence against nuclear attack. See e.g. Frank Blackaby, Jozef Goldblat and Sverre Lodgaard, “No-First-Use of Nuclear Weapons”, *Bulletin of Peace Proposals* 15, no. 4 (1984), p. 326. A number of US commentators have advocated the adoption of a no-first-use policy. US President Barack Obama was reportedly eager to adopt a no-first-use policy, but was dissuaded from doing so by certain European allies. See e.g. Harald Müller, “Flexible Responses”, *Nonproliferation Review* 18, no. 1 (2011).

64 Norwegian Ministry of Foreign Affairs, “Setting the course for Norwegian foreign and security policy”,

The paper also declares that, “[a]s a NATO member, Norway is part of the Alliance’s nuclear weapons policy”.<sup>65</sup> This statement creates an impression that NATO membership by definition involves “being part of” NATO’s nuclear policy (whatever that means). But NATO membership does not in and of itself necessitate support for nuclear weapons. As discussed in section 3.2, the North Atlantic Treaty creates no rights or obligations with respect to nuclear weapons. Several NATO states have throughout the alliance’s history attached interpretive statements or “footnotes” to NATO documents on nuclear policy. The 2017 white paper further points out that “NATO has made it clear that it will remain a nuclear alliance as long as nuclear weapons exist”,<sup>66</sup> but as described above, it is not clear what it means to be a “nuclear alliance”. The Norwegian white paper does not provide any clarification.

Official Norwegian foreign and defence policy has traditionally included a strong commitment to nuclear disarmament. Nuclear deterrence, on the other hand, has been described in vague and often contradictory terms. For example, successive Norwegian governments have at the same time supported NATO language on nuclear deterrence *and* embraced diplomatic statements advocating that nuclear weapons should never be used again “under any circumstances”. As Canada’s former disarmament ambassador points out,

Meld. St. 36, 2016–2017 (21 April 2017), p. 30. <https://www.regjeringen.no/contentassets/0688496c2b764f029955cc6e2f27799c/en-gb/pdfs/stm201620170036000engpdfs.pdf>.

65 *Ibid.*

66 *Ibid.*, p. 34.



“advocacy that nuclear weapons ‘are never used again, under any circumstances’ directly contradicted allied nuclear policy which envisages, under certain circumstances, that nuclear weapons are used”.<sup>67</sup>

Beyond general references to NATO doctrine, Norwegian command papers prepared over the last decade have not spelled out the role of nuclear weapons in Norwegian defence planning. Any plans for the wartime deployment of nuclear weapons on Norwegian territory or for the use of nuclear weapons in defence of Norwegian territory are classified. Norway has not taken part in recent NATO exercises simulating the execution of nuclear strikes (as have Poland and the Czech Republic).<sup>68</sup> The Norwegian F-16 fighters, delivered in the early 1980s, were not wired for the delivery of nuclear warheads.<sup>69</sup>

The utility of nuclear weapons is seldom publically debated by military officials. In 2016, however, retired Norwegian Vice Admiral Colin C. Archer expressed serious reservations about the value of nuclear weapons: “Nuclear weapons have no military utility. The national and global security challenges we face cannot be solved

with these weapons; they simply amplify them. The deterrent effect nuclear weapons are claimed to have are also at best doubtful and in any case extremely risky.”<sup>70</sup>

Norwegian accession to the TPNW could support Norway’s longstanding goal of nuclear disarmament, as well as NATO’s goal of “creating the conditions” for a world without nuclear weapons. Acceding to the TPNW would, however, be seen by certain NATO members as a breach of “alliance solidarity” and a contradiction of agreed alliance policy. Accession to the TPNW would prohibit Norway from retaining any explicit role for nuclear deterrence in its security doctrine. Some believe this would damage Norway’s overall deterrence posture and security. However, accession to the TPNW would not necessarily eliminate nuclear deterrence from Norwegian (or NATO) defence arrangements. Even if Norway acceded to the TPNW, a future aggressor against NATO could not rule out the possibility that aggression against Norway could, ultimately, lead to a nuclear confrontation with other NATO members.

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67 Paul Meyer, “Policy Brief No 58 – folding the Umbrella: Nuclear Allies, the NPT and the Ban Treaty”, Asia-Pacific Leadership Network (26 February 2018). [http://www.apln.org/briefings/briefings\\_view/Policy\\_Brief\\_No\\_58\\_-\\_Folding\\_the\\_Umbrella:\\_Nuclear\\_Allies,\\_the\\_NPT\\_and\\_the\\_Ban\\_Treaty?ckattempt=1](http://www.apln.org/briefings/briefings_view/Policy_Brief_No_58_-_Folding_the_Umbrella:_Nuclear_Allies,_the_NPT_and_the_Ban_Treaty?ckattempt=1).

68 Hans M. Kristensen, “NATO Nuclear Exercise Underway with Czech and Polish Participation”, Federation of American Scientists (17 October 2017). <https://fas.org/blogs/security/2017/10/steadfast-noon-exercise/>.

69 Jacob Børresen, “Alliance Naval Strategies and Norway in the Final Years of the Cold War”, *Naval War College Review* 64, no. 2 (2011).

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70 Colin C. Archer, “Brendes valg”, *Dagsavisen* (5 February 2016). <https://www.dagsavisen.no/nyemeninger/brendes-valg-1.690008>. NAIL’s translation from Norwegian.

### 3.4 What would Norway have to do to comply with the TPNW?

Norway's unqualified endorsement of NATO's current strategic concept is not compatible with the TPNW's prohibition on "encouragement and inducement" of activities prohibited by the treaty (see section 3.1.3). However, since the strategic concept is a political declaration and the TPNW a legally binding treaty, accession of the TPNW would override Norway's previous support for the potential use of nuclear weapons. From a legal point of view, Norway would not necessarily have to make any further declaration or statement. However, to make its position absolutely clear, Norway could accompany its accession to the TPNW with a statement outlining its views on the TPNW's compatibility with Norwegian defence plans and existing international law. For example, Norway could state that its support for the TPNW does not impact on its views on NATO as a whole or the enduring validity of Article 5 of the North Atlantic Treaty.

The TPNW would preclude Norway from endorsing political declarations in support of nuclear deterrence in the future. Thus, to comply with the TPNW after acceding to it, Norway would have to distance itself from any alliance documents (for example strategic concepts) endorsing the potential use of nuclear weapons on Norway's behalf. Assuming that Norwegian policymakers want Norway to remain a member of NATO, sufficient distance to the nuclear strategy can be created in one of two ways: (1) At future NATO summits, Norway could (attempt to) block the adoption of alliance

documents containing positive references to the retention or use of nuclear weapons. This was done by Denmark in 1949 and the early 1950s. (2) Norway could allow NATO summits to adopt documents containing positive references to the retention or use of nuclear weapons, but actively disassociate itself from the relevant statements (e.g. by attaching "footnotes" to alliance documents). This practice has also been used by NATO members in the past.

Article 5 of the TPNW obliges parties to the treaty to "adopt the necessary measures to implement its obligations under this Treaty". Further, parties must "take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Treaty undertaken by persons or on territory under its jurisdiction or control." Similar clauses have been included in other disarmament instruments (e.g. the Chemical Weapons Convention and Cluster Munitions Convention). Norway has passed national laws criminalizing activities prohibited by the relevant treaties for Norwegian citizens (see e.g. Lov om gjennomføring av Konvensjonen om klaseammunisjon).

# 4 Scenarios and implications

The TPNW has interrupted the nuclear status quo. It compels states to take a position: to accept that nuclear weapons are inherently indiscriminate and illegal, or to refuse to do so. For Norway, as for many other NATO members, this is not an easy choice. On the one hand, Norway has a long history of promoting nuclear disarmament and the development of IHL. On the other hand, Norway is a founding member of NATO and is cautious about pursuing policies that could jeopardize its allies' commitment to protect Norway.

Both courses of action come with costs and benefits. While most of the world's states would welcome a Norwegian decision to sign and ratify the TPNW, certain NATO states would almost certainly oppose Norwegian accession and possibly carry out politically unpleasant "punitive" measures. *Refusing* to join the TPNW will also have consequences. While in the short term it would allow Norway to continue to explicitly rely on nuclear deterrence and dodge an uncomfortable conversation with its NATO allies, it would cast a long shadow on Norway's image as a champion of international humanitarian law and disarmament. This chapter assesses the likely implications of the two courses of action and offers recommendations for the way forward.

## 4.1 Implications of joining the TPNW

### 4.1.1 LIKELY POSITIVE IMPLICATIONS OF RATIFICATION

#### *STRENGTHEN THE NORMS AGAINST NUCLEAR WEAPONS*

None of the world's nuclear-armed states are likely to join the TPNW in the near future. Yet, Norwegian support for the TPNW could contribute towards the establishment of an unconditional norm against the use and possession of nuclear weapons, fostering the conditions for disarmament in the long term. The independent effect of Norwegian accession to the TPNW is of course difficult to assess – it might be marginal – but in the long run support from states such as Norway is most likely critical to ensure the viability and effectiveness of anti-nuclear norms. For example, the ratification of the NPT by Norway and other non-nuclear-weapon states helped realize the norm against nuclear proliferation. Most of the states capable of manufacturing nuclear weapons and delivery vehicles in the 1960s initially refused to join the NPT. It took several decades for the non-proliferation norm to take hold. Nuclear-capable states such as Argentina, Brazil, Chile and South Africa joined the NPT as recently as the 1990s.

While the nuclear-armed states and certain observers have criticized the TPNW – some even suggesting that it might *undermine* the disarmament agenda – the ICRC and a large number of civil society organizations are united in their support for the ban. In 2017, more than 3,500 scientists signed an open letter, coordinated by Max Tegmark and the Future of Life Institute, urging support for

a prohibition of nuclear weapons, so as “to stigmatize them like biological and chemical weapons, with the ultimate goal of a world free of these weapons of mass destruction.”<sup>71</sup> Later in 2017, the International Campaign to Abolish Nuclear Weapons (ICAN) was awarded the Nobel Peace Prize for its work to highlight the humanitarian dimension of nuclear disarmament and its advocacy for the TPNW. The UN Secretary General, António Guterres, has described the TPNW as being of “enormous importance” and a “form of useful pressure for effective, positive measures in disarmament”.<sup>72</sup> The UN Secretary General has also maintained that the TPNW is fully compatible with the NPT.

The continued support for extended nuclear deterrence by Norway and other non-nuclear allies enables the nuclear-armed states’ retention, modernization and upgrading of their nuclear arsenals. For example, successive US administrations have justified increased spending on nuclear weapons by reference to “extended deterrence commitments”. Ostensibly, these commitments oblige the United States to “retain numbers or types of nuclear capabilities that it might not deem necessary if it were concerned only with its own defense”.<sup>73</sup> A recent estimate indicates that the United States will spend \$1.7 trillion

on nuclear weapons over the next few decades (more than four times Norway’s entire GDP).<sup>74</sup> This, in turn, provides a key justification for the modernization of nuclear weapons by other nuclear-armed states (as *their* modernization, in turn, provides a justification for US modernization). The TPNW provides non-nuclear-weapon states with an opportunity to unequivocally disavow any use or possession of nuclear weapons in their name.

#### *BOLSTER NORWAY’S REPUTATION AS A CHAMPION OF PEACE AND HUMANITARIAN LAW*

The integrity of international law depends in part on its coherence and consistency. Prohibiting nuclear weapons would place nuclear arms in the same legal category as chemical and biological weapons, to wit, as fundamentally unacceptable weapons. Support for the TPNW could thus bolster Norway’s reputation as a champion of IHL and a rules-based international order. This reputation may have limited strategic or military value, but has had a significant political value and has been translated into “hard” diplomatic currency for Norway for decades. Support for the TPNW could also result in a greater likelihood of being elected to the UN Security Council.

71 Future of Life Institute, “An Open Letter from Scientists in Support of the UN Nuclear Weapons Negotiations”. <https://futureoflife.org/nuclear-open-letter/>.

72 *Kyodo News*, “U.N. chief calls for concrete steps toward nuke disarmament” (9 August 2018). <https://english.kyodonews.net/news/2018/08/39db093d43e9-un-chief-calls-for-concrete-steps-toward-nuke-disarmament.html>.

73 William Perry et al., *America’s Strategic Posture: The Final Report of the Congressional Commission on the*

*Strategic Posture of the United States* (Washington, DC: United States Institute for Peace Press, 2009), p. 8.

74 Kingston Reif, “U.S. Nuclear Modernization Plans”, Arms Control Association (August 2018). <https://www.armscontrol.org/factsheets/USNuclearModernization>.

#### 4.1.2 LIKELY NEGATIVE IMPLICATIONS OF RATIFICATION

##### *UNDERMINING DETERRENCE?*

One obvious consequence of Norway becoming party to the TPNW is that the country would no longer be able to rely explicitly on nuclear deterrence. Some believe accession to the TPNW would open Norway to foreign military aggression or blackmail. However, as discussed in section 3.3, acceding to the TPNW would not in and of itself eliminate extended nuclear deterrence from Norway's defence arrangements. It is also worth noting that the net utility of nuclear deterrence is disputed. While nuclear weapons may in some cases have a stabilizing effect, their presence can also create tensions that would otherwise not have emerged – as illustrated, for example, by the Cuban Missile Crisis in 1962. Nuclear deterrence might also have a polarizing effect on relationships between states, making the conditions for cooperation, confidence building and constructive interaction less propitious. This is precisely the reason why Norwegian policymakers have advocated the application of both assurance and deterrence *vis-à-vis* Russia. Norwegian “assurance-diplomacy” led to the introduction of a series of self-imposed restrictions with regard to NATO presence in Norway, such as the policy of not allowing nuclear weapons on Norwegian territory and the expectation that foreign ships would not carry nuclear weapons when visiting Norwegian ports (see section 3.3).<sup>75</sup> These reservations were introduced despite arguments that the stationing of US troops and nuclear weapons in Norway

could increase military preparedness, enhance deterrence and boost the credibility of the NATO security guarantee.<sup>76</sup> The question of pulling Norway out of NATO's explicit “nuclear umbrella” is in many ways an extension of the same logic. It is a question of where the balance should be struck between assurance and deterrence. It is noteworthy that one of the most dangerous episodes in modern Norwegian history involved Russian miscalculations about a research rocket fired from Andøya in Northern Norway in 1995. Russian personnel misidentified the rocket as a Trident nuclear missile heading towards Russian territory, prompting the President, Boris Yeltsin, to decide whether or not to “retaliate”. Luckily, the relationship between East and West was reasonably amicable at the time, leading the Russians to assess the likelihood of a surprise attack as low. The Russians concluded that the rocket had been misidentified.<sup>77</sup>

##### *NEGATIVE REACTIONS FROM NATO ALLIES*

Politically, a more immediate implication of a Norwegian TPNW-ratification is that it is likely to engender negative reactions from NATO allies. In a note sent to other NATO members in 2016, the US delegation to NATO strongly encouraged its allies to vote “no” on the UN General Assembly resolution that provided the mandate for the negotiation of the TPNW. A ban on nuclear weapons would be “fundamentally at odds with NATO's basic policies on deterrence

75 Rolf Tamnes and Knut E. Eriksen, “Norge og NATO under den kalde krigen” (1999), pp. 7–38.

76 *Ibid.*

77 Patricia Lewis, Sasan Aghlani, Benoît Pelopidas, and Heather Williams, “Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy” (London: Chatham House, 2014). <https://www.chathamhouse.org/publications/papers/view/199200>.

and our shared security interests”, the United States argued, further encouraging its allies not to take part in negotiations were they to commence.<sup>78</sup> The note did not include any specific warnings about what the consequences would be for a NATO member should it decide to support and eventually join the treaty, but it outlined some of the possible implications for NATO’s deterrence and defence posture: blocking of nuclear cooperation, prevention of military planning and coordination, and a splintering of alliance consensus on nuclear policy.<sup>79</sup> Potential negative reactions from NATO members are further discussed in section 4.3.

## 4.2 Implications of *not* joining the TPNW

The implications of not joining the TPNW are by and large the inverse of the implications of joining. First, refusing to join the TPNW would help shield the nuclear-armed states from political pressure, undermining the international community’s attempt at reinvigorating the disarmament agenda through prohibiting nuclear arms. Refusing to join the TPNW would also impede work for a rules-based international order, solidifying the notion that might trumps right in international affairs.

Second, declining to join the TPNW would rob Norway of the opportunity to influence the interpretation and further development of the TPNW, for example through the

negotiation of additional protocols on verification and safeguards. The TPNW is designed as a flexible instrument that may be amended and expanded as needs and opportunities arise.

Third, opposition to the TPNW will by all accounts harm Norway’s image as a champion of disarmament and international humanitarian law. Snubbing the TPNW sends a signal that Norway considers humanitarian principles important only when such considerations do not have uncomfortable implications for Norwegian policy. Some have also suggested that Norway’s candidacy for the UN Security Council will be damaged by not supporting the TPNW, especially since Ireland – one of the leading TPNW proponents – is one of the other contenders for the Security Council seat in the next round. Given the complex nature of the voting preferences of states in such elections, it would be difficult to conclude, even post-facto, whether Norway’s position on the TPNW had tipped the scales in one direction or another. It is clear, however, that certain civil society organizations are intent on using processes such as the Security Council election to promote support for the TPNW, and, depending on how things proceed, one cannot exclude the possibility that a number of states might choose to support Ireland over Norway due to the Norwegian opposition to the ban treaty so far.

Refusing to sign the TPNW could also have benefits. Most importantly, if Norway continued to oppose the TPNW, it would not run the risk of provoking negative reactions from allies. Further, to the extent that Norway’s explicit reliance on nuclear deterrence is seen as a benefit, declining

78 US Delegation to NATO, “Defense Impacts of Potential United Nations General Assembly Nuclear Weapons Ban Treaty” (17 October 2016). [http://www.icanw.org/wp-content/uploads/2016/10/NATO\\_OCT2016.pdf](http://www.icanw.org/wp-content/uploads/2016/10/NATO_OCT2016.pdf).

79 *Ibid.*

## SUMMARY OF SCENARIOS AND IMPLICATIONS

	Potential positive implications	Potential negative implications
Joining the TPNW	<ul style="list-style-type: none"> <li>■ Strengthening global security and the norms against nuclear weapons.</li> <li>■ Ability to influence the interpretation and development of the TPNW from “within”.</li> <li>■ Bolstering Norway’s reputation as a humanitarian champion.</li> <li>■ Lowering regional tensions.</li> </ul>	<ul style="list-style-type: none"> <li>■ Negative reactions from allies: weakened security guarantee, decreased political access, demarches.</li> <li>■ Weakening Norway’s deterrence posture.</li> </ul>
Not joining the TPNW	<ul style="list-style-type: none"> <li>■ Avoiding negative reactions from allies.</li> <li>■ Maintaining Norway’s current deterrence posture.</li> </ul>	<ul style="list-style-type: none"> <li>■ Continued enabling of the retention of nuclear weapons.</li> <li>■ Limited ability to influence the development of the TPNW and wider legal architecture.</li> <li>■ Undermining Norway’s reputation as a humanitarian champion.</li> <li>■ Continued regional tensions.</li> </ul>

to join the TPNW would allow Norway to continue to base its security, in part, on an explicit endorsement of the potential use of nuclear weapons on Norway’s behalf.

### 4.3 Factors relevant for the response from NATO allies

There is little doubt that a Norwegian decision to sign and ratify the TPNW would trigger some kind of reaction from some of Norway’s allies. The question is what form such reactions would take. The reactions could be mild – limited to symbolic gestures or demarches – or more severe. The severity of the reactions is likely to depend on a number of interrelated factors.

#### 4.3.1 NUMBER OF NATO MEMBERS JOINING

One key factor that could influence the type and scope of reactions from allies is

whether Norway joined the TPNW alone or as part of a group of NATO members. From the perspective of many Norwegian policymakers, the worst possible reaction would be that some or all of Norway’s most important allies declared that they were no longer committed to the defence of Norway, i.e. a *de facto* cancellation of their security guarantee (in breach of their NATO obligations under the North Atlantic Treaty). Such a reaction would be extreme and is not very likely to materialize. However, it would not be entirely without historical parallels. In the 1980s, New Zealand adopted a set of anti-nuclear policies – most notably a policy of not allowing nuclear weapons to transit through its ports or territory – and distanced itself from the US “nuclear umbrella”. Washington responded by limiting intelligence sharing, reducing political access, cancelling joint military exercises and eventually revoking its security guarantee to New Zealand (see box 1).

**BOX 1****New Zealand in ANZUS**

In 1984, New Zealand's newly elected Labour government introduced a policy of not allowing nuclear-armed or nuclear-powered ships into New Zealand's ports. At the time, New Zealand was a member of a 30-year-old security alliance with Australia and the United States, commonly referred to as ANZUS. New Zealand's nuclear-free policy meant that "the US navy would only be able to visit New Zealand if it provided the New Zealand government with an unambiguous assurance that its ships were nuclear free."<sup>80</sup> For the United States, this was an unacceptable requirement, as it meant that the United States would have to break its policy of neither confirming nor denying the presence of nuclear weapons on its ships and submarines. After the issue was put to the test in early 1985 – when New Zealand's cabinet rejected a berth request for a nuclear-capable US vessel – the Reagan administration initiated its response. Flows of intelligence information were curtailed, an upcoming ANZUS Council meeting was indefinitely postponed, ANZUS trilateral defence exercises were cancelled<sup>81</sup> and eventually, in 1986, the US "formally suspended its security obligation to New Zealand."<sup>82</sup> Despite all this, New Zealand did not budge. Security relations between New Zealand and the United States stayed sour until the early 2000s.<sup>83</sup> In 2010, New Zealand was invited to the first Nuclear Security Summit by then-President Obama. Also in 2010, the Wellington Declaration was adopted, paving the way for renewed strategic cooperation between the two countries.<sup>84</sup> New Zealand is now a NATO "Global Partner". Since 2012, New Zealand has cooperated with NATO through an "Individual Partnership and Cooperation Programme".<sup>85</sup>

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80 Amy L. Catalinac, "Why New Zealand Took Itself out of ANZUS: Observing 'Opposition for Autonomy' in Asymmetric Alliances", *Foreign Policy Analysis* 6, no. 4 (2010), p. 318.

81 Ramesh Thakur, "A Nuclear-Weapon-Free South Pacific: A New Zealand Perspective", *Pacific Affairs* 58, no. 2 (1985), p. 237.

82 Amy L. Catalinac, "Why New Zealand Took Itself out of ANZUS" (2010), p. 319.

83 Bruce Vaughn, "New Zealand: Background and Bilateral Relations with the United States", Congressional Research Service report (13 November 2017), p. 7.

84 *Ibid.*

85 NATO, "Relations with New Zealand" (1 March 2018). [https://www.nato.int/cps/ie/natohq/topics\\_52347.htm](https://www.nato.int/cps/ie/natohq/topics_52347.htm).



While parallels can be drawn, Norway's situation today is quite different from the one New Zealand faced three decades ago. NATO is bigger than ANZUS, has a more robust collective defence obligation<sup>86</sup> and has three – not one – nuclear-armed members. Moreover, NATO's institutional architecture and decision-making tradition is firmly based on the principle of consensus.<sup>87</sup> In the 70-year history of the alliance, no member has ever been expelled or suspended, and the treaty does not contain any provisions or mechanisms for doing so.<sup>88</sup> In the words of one observer, "NATO has no mechanism for punishing violators of institutional norms, principles, or procedures, and any member can prevent an action by blocking its discussion."<sup>89</sup> It is therefore unlikely that Norway would lose its *formal* NATO security guarantee.

Even so, a unilateral decision by Norway to join the TPNW carries a political risk that Norway's allies will *informally* revoke their security guarantees. However, that risk would be considerably lower if the decision to ratify the TPNW was done in collaboration and coordination with other NATO allies. The process that led to the adoption of the Convention on Cluster Munitions is a case in point (see box 2).

86 George K. Walker, "Anticipatory Collective Self-Defense in the Charter Era", *Cornell International Law Journal* 31, no. 2 (1998), p. 364.

87 See NATO, "North Atlantic Council" (10 October 2017). [https://www.nato.int/cps/ic/natohq/topics\\_49763.htm](https://www.nato.int/cps/ic/natohq/topics_49763.htm).

88 State parties can leave the treaty on their own accord, see Art. 13.

89 Sean Kay, "Putting NATO back together again", *Current History* 102, no. 662 (2003), pp. 106–12. See also Leo Michel, "NATO Decisionmaking: How the 'Consensus Rule' Works", *Croatian International Relations Review* 12 no. 42/43 (2007).

In late 2007, the United States circulated a paper to a number of NATO allies in which it warned of the negative effect that a ban on cluster munitions could have on the combined operations of the alliance.<sup>90</sup> The list of areas where the US foresaw a negative impact by the new treaty included "combined planning and joint staff operations, joint training, common procurement and integrated logistics and combined operations in the field."<sup>91</sup> In other words, not very different from the note they would send nine years later concerning the ban on nuclear weapons. But in the cluster munitions process, a considerable number of NATO states took part in the negotiations, and in the end most NATO members supported the new treaty. Of the 26 members of the alliance in 2009, 18 signed the Convention on Cluster Munitions when it was opened for signature in Oslo on 3 December 2008. Unsurprisingly, the political response from the remaining NATO members was relatively muted.

#### 4.3.2 IMPACT OF DECISION ON OTHER STATES

A second factor that could determine the scope of political reprisals from NATO members is the extent to which a decision to ratify the TPNW would force a change in the policies and practices of other allies. Norway does not have permanent NATO bases or nuclear weapons on its territory.

90 See John Borrie, *Unacceptable Harm: A History of how the Treaty to Ban Cluster Munitions was Won* (Geneva: UNIDIR, 2009), p. 199.

91 *Ibid.*

## BOX 2

### Anti-personnel landmines and cluster munitions

During the so-called Ottawa process, which led to the adoption of the Mine Ban Convention, most NATO member states supported the idea of restricting the use of anti-personnel land mines in some form. By the time of the adoption of the treaty in 1997, all but two NATO states backed it. The United States and Turkey were the only NATO members not to sign the Mine Ban Convention when it was opened for signature in December 1997. A decade later, in the process that led to the ban on cluster munitions, NATO states were also pitted against each other, with the United States on the one side, as the most vocal protester, and Norway on the other, as one of the key states driving the process forward. In between was a group of NATO members that recognized the need for some form of international regulation, but approached the issue with more caution. The United States refused to take part in the negotiation process, putting pressure on its allies to disengage as well. Norway understood the importance of having NATO allies on board, not just for the success of the treaty, but also to limit the political cost. The United Kingdom was one of the countries Oslo regarded as a potentially important partner. In the words of the Norwegian Foreign Minister at the time, Jonas Gahr Støre, “having the UK on the inside makes it harder [for others] to say you are doing something anti-NATO and anti-allies, let’s be frank about it”.<sup>92</sup>

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92 Quoted in John Borrie, *Unacceptable Harm* (2009), p. 141.

Moreover, the TPNW does not oblige its parties to prompt transiting ships to declare whether or not they are carrying nuclear weapons. This means that a Norwegian ratification of the TPNW would require very little change in the practices of other NATO members. By contrast, for Belgium, Germany, Italy, the Netherlands and Turkey, joining the TPNW would require the physical removal of foreign deployed US nuclear warheads.

For New Zealand, what brought the conflict with United States to a head was the decision to require visiting US ships to declare that they did not carry nuclear weapons. This challenged the long-standing US policy of neither confirming nor denying whether a ship carried nuclear weapons. The issue concerning port calls by foreign military vessels is a recurring one. New Zealand, Denmark and Norway all stepped into deep water when their governments floated more restrictive transit policies in the 1980s. New Zealand disregarded the warnings and

pressed ahead (see box 1), while Denmark and Norway both retracted (see box 3). In this regard, it is worth noting that the port call problem is not an issue that would necessarily be relevant for the TPNW. The TPNW does not prohibit transit of nuclear weapons, which means that if Norway decided to accede to the TPNW, it could still allow US and other ships to pass through its internal waters and ports without requiring said ships to declare that they did not have nuclear weapons on board.<sup>93</sup>

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93 The issue of transit was discussed during the negotiation of the TPNW, but it was eventually left out of the treaty.

## BOX 3

### Danish footnotes

By the mid 1980s, Denmark had come to be seen by Washington as “a free-riding ally on its way to dissociating itself from the Western security community.”<sup>94</sup> The backdrop for this was the so-called “footnote” period in Danish foreign policy. Beginning in 1982, Denmark had started requesting that its dissenting opinions and disagreements with official NATO policy be registered, either in the form of footnotes or by other means. Mostly, the disagreements concerned nuclear weapons policy, for instance over the Strategic Defence Initiative and the deployment of intermediate-range nuclear forces. Denmark’s footnoting policy was strongly opposed by several allies, most of all the United States. At one point, US Secretary of State, George Schulz, was reported to have told the Danish Foreign Minister, Uffe Ellemann-Jensen, that “if all Europeans were like you, there would be no NATO.”<sup>95</sup> The issue came to a head in 1987, when the Danish parliament (Folketing) debated following in New Zealand’s footsteps and requiring visiting ships to declare themselves nuclear-free. The Danish policy of not allowing nuclear weapons on its territory was not new. It was adopted in 1957, about the same time as the Norwegian equivalent. But a key part of this policy, concerning transit of ships, had never been strictly enforced; it was simply assumed that other states would respect this policy. When the Folketing started debating a possible tightening of the policy, the United States reacted strongly, and, in March 1988, US Ambassador to Copenhagen, Terrence Todman, made clear to the Danish government that the United States would be forced to cancel ship visits to Denmark if the proposed new policy was adopted. Efforts to formulate a compromise text ensued, partly in consultation with Washington and partly inspired by the relatively vague formulation adopted by the Norwegian government. A compromise was eventually found, and reluctantly agreed to by the United States. But after an acrobatic parliamentary manoeuvre that involved a procedural re-sequencing of the resolution voting, the government’s proposed text was rejected in favour of a resolution tabled by the opposition containing stricter language on port calls. Following the parliamentary decision, the United States issued an unambiguous warning against implementing the resolution in a way that could contradict the US doctrine of neither confirming nor denying the presence of nuclear weapons on US naval vessels. The United Kingdom expressed similar sentiments, and at that point, the Danish government saw no other way out than to call a general election. The outcome of that election was a reshuffle of the power balance in the Folketing, which in practice meant that the footnote period in Danish foreign policy was over.<sup>96</sup> The parliamentary resolution on port calls was never strictly implemented, and the United States was able to continue its established practice.

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94 Nikolaj Petersen, “Footnoting’ as a political instrument: Denmark’s NATO policy in the 1980s”, *Cold War History* 12, no. 2 (2012), p. 306.

95 *Ibid.*

96 *Ibid.*

### 4.3.3 SPEED OF IMPLEMENTATION

A third factor that could affect the political reactions from allies is the speed with which a full withdrawal from the nuclear umbrella is implemented. Norway's current policy on nuclear weapons was developed over decades and was implemented gradually. Neither the base-declaration of 1949 nor the decision to prohibit the peacetime deployment of nuclear weapons on Norwegian soil provoked significant reactions from allies. It was not until Norway in the early 1980s started flirting with the idea of a Nordic nuclear-weapon-free zone that the force of the resistance from allies, notably the United States, became stronger than the domestic anti-nuclear pressure.<sup>97</sup> And when Norway did a trial run of a more intrusive control regime for port visits by military vessels in 1986, the Defence Ministry quickly backed down.<sup>98</sup> Nevertheless, one could expect that a policy change implemented gradually would be less provoking and trigger less severe political reactions than policy changes implemented overnight.

Clearly, there is considerable uncertainty surrounding the reactions Norway could be faced with if it decides to sign and ratify the TPNW. But the factors listed above, informed by both historical and more contemporary cases, suggest that certain approaches could be more favourable than others. And in sum, they underline that the

question Norway is faced with is not only one of ratifying or not ratifying the TPNW, it is also a question of *how* such a decision is implemented.

## 4.4 Lessons

First, if Norway decides to accede to the TPNW, it should make every effort to ensure that other allies are prepared to follow suit.

Second, to the extent possible, any policy changes resulting from adherence to the TPNW should be designed in a way that minimizes the impact on other allies. This could mean, for instance, that Norway should refrain from implementing measures relating to the transit of nuclear weapons that go beyond the requirements of the TPNW.

Third, Norway should consider withdrawing from decision-making forums in NATO where nuclear issues are discussed, notably the NPG and the HLG. Withdrawal from those forums may not be strictly required by the TPNW, but might make Norway's position more transparent and ease NATO policymaking.

Fourth, Norway should consider whether adherence to the TPNW could be done in a gradual, yet determined manner. For instance, Norway could choose to sign the treaty, in recognition of its importance, and thereby declare its intention not to undermine the TPNW's object and purpose. It could then take more time to prepare the ground for ratification, ensuring that any questions relating to NATO interoperability could be sorted out before accession.

97 See Johan J. Holst, "A Nuclear Weapon-Free Zone in the Nordic Area: Conditions and Options – A Norwegian View", *Bulletin of Peace Proposals* 14, no. 3 (1983).

98 Rolf Tamnes and Knut E. Eriksen, "Norge og NATO under den kalde krigen", in C. Prebensen and N. Skarland (eds), *NATO 50 år: Norsk sikkerhetspolitikk med NATO gjennom 50 år* (Oslo: Den norske atlantehavskomite, 1999), pp. 30–31.

# 5 Supporting nuclear disarmament: Opportunities for Norway

The TPNW codifies the notion that nuclear weapons are unacceptable and should never be used again, under any circumstances. The purpose of the TPNW is to counter the view that certain states enjoy a special right to possess nuclear weapons, and to increase the pressure on the nuclear-armed states to honour their promises to disarm. Regardless of intention, refusing to sign up to the TPNW protects the nuclear-armed states from diplomatic censure, enabling them to continue to modernize and deploy nuclear weapons with low reputational costs. However, the eventual achievement of a world without nuclear weapons requires a range of undertakings that may be pursued also without ratifying the Treaty. This chapter outlines measures that could support the cause of nuclear disarmament irrespective of Norway's stance on the TPNW.

## 5.1 Civil society, disarmament education and research

When visiting Hiroshima in 2016, US President Barack Obama appealed for a “moral revolution” in the work for a nuclear-weapon-free world. Bringing about such a revolution will require sustained awareness raising, movement-building and dissemination of knowledge. A straightforward means of supporting the cause of nuclear disarmament, then, would be to fund nuclear disarmament campaigns and NGOs, disarmament-education initiatives and research into nuclear arms control and disarmament processes. From the campaign to end the slave trade to the prohibition of landmines, civil society organizations have often played central

roles in promoting social change.<sup>99</sup> In the context of nuclear disarmament, civil society organizations are crucial to the UN's agenda of “disarmament education”, the purpose of which is “to impart knowledge and skills to individuals to empower them to make their contribution, as national and world citizens, to the achievement of concrete disarmament and non-proliferation measures and the ultimate goal of general and complete disarmament under effective international control.”<sup>100</sup>

Regrettably, Norwegian governmental financial support for NGOs working in the field of nuclear disarmament has declined in recent years. This trend should be reversed. Norway should also increase funding for research on nuclear disarmament.

## 5.2 Diplomatic bridge-building and disarmament advocacy within NATO

Norway and other states opposing the TPNW have complained that the prohibition of nuclear weapons creates unwelcome “polarization” between non-nuclear-weapon states and the nuclear-armed states and their allies. Others have argued that any such “polarization” is a consequence of the latter's reluctance to implement long-standing disarmament agreements. As the

99 Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Richard Price, “Reversing the Gun Sights”, *International Organizations* 52, no. 3 (1998).

100 United Nations study on disarmament and non-proliferation education. Report of the Secretary-General, doc. A/57/124 (30 August 2002). <http://undocs.org/A/C.1/71/L.40>.

analyst Ramesh Thakur points out, there are two routes to bridging the divide: “One is for the nonnuclear states to embrace nuclear weapons and join the possessor countries with their own bombs. The alternative is for the nuclear powers and the umbrella states to engage with the international community in the pursuit of nuclear disarmament.”<sup>101</sup>

Beyond joining the TPNW, Norway could contribute to bridging the divide over nuclear disarmament in at least three ways. First, Norway could promote the cause of nuclear disarmament within NATO. Norway has previously pursued such aims through bilateral initiatives and informal groupings such as “Scandilux”<sup>102</sup> and the “NATO-5”,<sup>103</sup> but does not appear to be involved in any such efforts at present. Second, Norway could promote the denuclearization of NATO, that is, the transformation of NATO from a declared “nuclear alliance” to an alliance that includes nuclear-armed states. Denuclearizing NATO would require the removal of positive references to the potential use of nuclear weapons from future strategic concepts and withdrawal of US nuclear weapons from Belgium, Germany, Italy, the Netherlands and Turkey. NATO is currently the only military alliance in the world engaged in “nuclear sharing”. As part of this effort, Norway should initiate discussions, among allies and beyond, about how nuclear deterrence can be phased out over time. Third, Norway could engage

in diplomatic bridge-building between the nuclear-armed states and the parties to the TPNW. It could do so, for example, by recognizing the importance of the TPNW, and by acknowledging that the new treaty closes a legal gap in international law. Pending a decision to join the regime, Norway should also consider participating in TPNW meetings of states parties as an observer.

### 5.3 Non-proliferation and disarmament verification

The creation and maintenance of a world without nuclear weapons is commonly believed to necessitate a robust verification system. Providing the technical means to deter and detect “cheating”, robust verification arrangements could greatly advance mutual confidence.

*Nuclear non-proliferation verification* involves measures to verify that civilian nuclear material and facilities are not used to manufacture nuclear weapons. Regional nuclear-weapon-free-zone treaties and the NPT oblige all non-nuclear-weapon states to conclude safeguards agreements with the IAEA. Such agreements allow the IAEA to control that declared nuclear material and facilities are not used to manufacture nuclear weapons. A number of states have also signed and ratified the voluntary IAEA Additional Protocol, thus permitting the IAEA to also inspect “undeclared” nuclear facilities.

The TPNW obliges all parties that have not yet done so to “conclude with the International Atomic Energy Agency and bring into force a comprehensive safeguards

101 Ramesh Thakur, “Don’t obstruct efforts to ban nuclear weapons”, *Japan Times* (29 March 2017). <https://www.japantimes.co.jp/opinion/2017/03/29/commentary/japan-commentary/dont-obstruct-efforts-ban-nuclear-weapons/#.W3Z5Ph59igQ>.

102 Belgium, Denmark, Luxembourg, the Netherlands, Norway.

103 Belgium, Germany, Italy, the Netherlands, Norway.

agreement (INFCIRC/153 (Corrected)).”<sup>104</sup> The states that declare to have been in possession of nuclear weapons after to the adoption of the treaty (7 July 2017) are required to also accept verification provisions equivalent to the IAEA Additional Protocol. The TPNW further commits each of its parties to maintain, at a minimum, the safeguards standard it had in force when becoming party to the Treaty. This means that the states that joined the TPNW with an Additional Protocol in force cannot withdraw from the Additional Protocol without violating the TPNW. By contrast, a party to the NPT may withdraw from the Additional Protocol without directly violating the NPT. Norway has both a Comprehensive Safeguards Agreement and the Additional Protocol in force.

Norway should promote the universalization of the Additional Protocol, including by encouraging states to ensure that they have the Additional Protocol in force before ratifying the TPNW. Norway should also continue its financial support for the IAEA.

*Nuclear disarmament verification* involves measures to verify that existing nuclear weapons are destroyed, un-deployed or rendered unusable. Verifying the dismantlement of nuclear warheads involves complex security and sensitivity issues.<sup>105</sup> The verification arrangements for existing nuclear arms control agreements have therefore relied not on the verified destruction of nuclear *warheads*, but instead

on accountancy of *delivery platforms* such as missile silos, submarines and bombers. Some argue that progress towards lower numbers of weapons “will rely in part on the availability of viable treaty verification options that account for the entire life cycle of a weapon”.<sup>106</sup>

Norway has for several years been involved in international efforts to develop techniques to verify nuclear disarmament. Norwegian policymakers have invested considerable time and resources in these projects, in particular through the so-called UK–Norway Initiative launched in 2007. Some of the techniques being developed – such as methods to detect the presence of weapons-grade plutonium – have obvious and useful practical applications. Such methods could greatly assist efforts to verify observance of non-proliferation obligations and the completeness of warhead declarations (i.e. to verify that a disarming state has not withheld warheads from the dismantlement queue).<sup>107</sup> Norway has also been involved in the development of techniques to allow non-nuclear-weapon states (or multilateral teams of inspectors) to verify nuclear warhead dismantlement. While the development of such techniques would certainly add to the international community’s disarmament toolbox, some

104 TPNW, Article 3(1).

105 See e.g. Tim Caughley, “Nuclear Disarmament Verification: Survey of Verification Mechanisms” (Geneva: UNIDIR, 2016), pp. 11, 27. <http://www.unidir.org/files/publications/pdfs/survey-of-verification-mechanisms-en-657.pdf>.

106 Tamara Patton and Alexander Glaser, “Mapping Nuclear Verification”, 58th Annual INMM Meeting (July 2017), p. 1.

107 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, “The United Kingdom-Norway Initiative: Further research into the verification of nuclear warhead dismantlement”. Working paper submitted by Norway and the United Kingdom. Doc. NPT/CONF.2015/WP.31 (22 April 2015). <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/documents/WP31.pdf>.

have argued that it would be more efficient to allow any future verification of warhead dismantlement to be conducted by experts from nuclear-weapon states. After all, under the standard interpretation of the NPT, inspectors from non-nuclear-weapon states are prohibited from receiving information about the manufacture of nuclear weapons. The techniques being developed to allow inspectors from non-nuclear-weapon states to verify warhead dismantlement are therefore circuitous.

Furthermore, it is possible to establish confidence that a (previously) nuclear-armed state has disarmed without monitoring/verifying warhead dismantlement. When South Africa disarmed in the 1980s and early 1990s, it did so without international inspectors involved in the warhead dismantlement process. The international community gained confidence that South Africa had in fact disarmed only following the conclusion of an international verification mission launched after South Africa's (declared) completion of the disarmament process. The international verification mission did not verify the *destruction* of South Africa's nuclear warheads, but the *absence* of nuclear weapons in South Africa following South Africa's declaration of nuclear-free status.<sup>108</sup>

More generally, there could be a danger that the pursuit of watertight verification techniques becomes an end rather than a means. Throughout the Cold War, nuclear-armed states resisted the negotiation of a

comprehensive nuclear-test-ban treaty on the grounds that the technical means to verify such an agreement supposedly did not exist. The 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) could only be adopted once states stopped making unreasonable – arguably deliberately obstructionist – demands.<sup>109</sup> The verification measures incorporated in the CTBT builds on techniques and equipment that predates the CTBT by several decades.<sup>110</sup>

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108 VERTIC, "The IAEA and Nuclear Disarmament Verification: A Primer", Vertic Research Reports, no. 11 (September 2015), p. 35. <http://www.vertic.org/media/assets/Publications/MM11%20WEB.pdf>.

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109 Rebecca Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing* (Geneva: UNIDIR, 2009), p. 145.

110 Paul G. Richards and John Zavales, "Seismological Methods for Monitoring a CTBT", in E.S. Huseby and A.M. Dainty (eds), *Monitoring a Comprehensive Test Ban Treaty* (Dordrecht: Kluwer Academic, 1996).



## 6 Conclusion

The 2017 adoption of the Treaty on the Prohibition of Nuclear Weapons has put Norway in a difficult situation. For decades, Norwegian policymakers could cultivate an image of Norway as a champion of international humanitarian law and disarmament, while at the same time endorsing the potential use of nuclear weapons on Norway's behalf. The adoption of the TPNW has made Norway's traditional position untenable. If Norway refuses to join the TPNW – in effect shielding nuclear-armed states from diplomatic pressure – the majority of the world's states are likely to see Norway as part of the problem and not the solution. Norwegian officials may claim to pursue nuclear disarmament through the NPT framework and the Conference on Disarmament, but the stalemate on those fronts has rendered such talk lacking in credibility. After half a century, NPT Article VI on nuclear disarmament remains unfulfilled. Far from disarming the nuclear-weapon states, the NPT has helped the established major powers justify their continued retention of nuclear arms.

There are no legal obstacles to Norway joining the TPNW. The TPNW is compatible with the NPT, the North Atlantic Treaty and other international agreements by which Norway is bound. However, Norwegian accession to the TPNW would prohibit Norway from assisting, encouraging or inducing its allies to develop, possess or use nuclear weapons. To comply with the TPNW, Norway would have to distance itself from any alliance documents endorsing the potential use of such weapons.

Some believe accession to the TPNW would seriously undermine Norway's security. In this view, potential enemies would

interpret the decoupling of Norway from NATO's nuclear strategy as a split in the alliance, increasing the likelihood of foreign provocations against Norway. Others argue that Norwegian accession to the TPNW could help build a stronger norm against nuclear weapons – bolstering Norway's security in the long term – and that the use of weapons of mass destruction is in any case both morally and legally indefensible. Existing humanitarian law leaves little if any room for lawful use of nuclear weapons. According to Ian Brownlie, a renowned legal scholar, "the use, on any appreciable scale, of nuclear weapons involves the commission of crimes against humanity". Deterrence based on mutually assured destruction, he maintains, "involves the preparation of crimes against humanity".<sup>111</sup> It has, however, been argued that the use of small tactical nuclear weapons against military objectives in remote places could fall within the bounds of legal use of force. The TPNW closes any such gap, declaring any use of nuclear weapons unlawful. The TPNW places nuclear weapons in the same legal bracket as chemical and biological weapons.

Not joining the TPNW would be politically expedient *vis-à-vis* Norway's allies in NATO. A unilateral accession to the TPNW could well foster stern reactions from some of Norway's closest partners. From the point of view of the nuclear-armed states, the TPNW poses a challenge to the legitimacy of continued nuclear deployments and modernization programmes. It is thus not inconceivable that the nuclear-armed members of NATO would want to make an

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<sup>111</sup> Ian Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons", *The International and Comparative Law Quarterly* 14, no. 2 (1965), pp. 443, 451.

example of the first non-nuclear ally that ventured to join the TPNW. Other members of the alliance might also react negatively – partly because Norwegian accession would put their own hesitancy to join the agreement in a bad light. It is possible, however, that the fallout in NATO could be minimized through careful diplomacy and/or some form of material compensation (e.g. increased investment in another area of NATO cooperation).

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



