



NUCLEAR UMBRELLA ARRANGEMENTS AND THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

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This paper examines the implications of the Treaty on the Prohibition of Nuclear Weapons (TPNW) for “nuclear umbrella” states that wish to join the new instrument. The treaty makes it unlawful for a state party to rely on an ally’s nuclear weapons for defense; as a result, a state must withdraw from the protection of a nuclear umbrella if it chooses to sign and ratify the TPNW. A state party may, however, maintain relationships with nuclear armed states. In most cases, a state can join the TPNW without violating its legal obligations under a security treaty with a nuclear armed state. In addition, a state party may participate in joint military operations as long as it does not assist with prohibited acts. The TPNW thus requires a state party to renounce its nuclear umbrella status but does not stand in the way of alliances with states that continue to possess nuclear weapons.

What is a Nuclear Umbrella Arrangement?

A nuclear umbrella arrangement refers to military cooperation between at least two countries in which a nuclear armed state agrees to protect a non-nuclear armed state with nuclear weapons. It differs from an alliance in which some states possess nuclear weapons and others do not. In a nuclear umbrella arrangement, states must “consent to or acquiesce the potential use of nuclear weapons in their defence.”¹ A nuclear umbrella exists when: 1) “[a] nuclear-armed state is required to guarantee the security of a non-nuclear-armed state”; and 2) “both the extender and the receiver of this security guarantee has officially declared . . . that nuclear weapons could be used in order to fulfill this obligation.”² A nuclear umbrella is generally established through political commitments rather than legally binding security treaties.³

Incompatibility of Nuclear Umbrella Arrangements with the TPNW

Nuclear umbrella arrangements are incompatible with the purpose and provisions of the TPNW. Such arrangements contravene the treaty’s overarching aim because they are predicated on the continued existence of nuclear weapons. In addition, relying on another state’s nuclear arms for defense violates the TPNW’s prohibitions on: 1) assisting, encouraging or inducing another state to engage in a prohibited activity; 2) threatening to use nuclear weapons; and 3) receiving assistance to engage in a prohibited activity.

¹ International Law and Policy Institute (ILPI), “Nuclear Umbrellas and Umbrella States,” April 22, 2016, <http://nwp.ilpi.org/?p=1221> (accessed May 16, 2018).

² ILPI, *Under my Umbrella*, ILPI background paper no. 21/2016, August 5, 2016, <http://nwp.ilpi.org/?p=5380> (accessed May 16, 2018), p. 11.

³ ILPI, “Nuclear Umbrellas and Umbrella States.”

Object and Purpose of the TPNW

The TPNW seeks to rid the world of nuclear weapons to prevent humanitarian suffering. The preamble, which articulates the treaty's object and purpose, expresses deep concern about the "catastrophic humanitarian consequences" of nuclear weapons and recognizes a "consequent need to completely eliminate such weapons." The preamble also emphasizes the importance of "a legally binding prohibition of nuclear weapons" as a step towards a "world free of nuclear weapons."

Given that nuclear umbrella arrangements depend on the continued existence of nuclear weapons, they are inherently inconsistent with the TPNW's object and purpose. A state may not base its security on an ally's nuclear arms while being party to a treaty with the explicit goal of total elimination. In fact, the TPNW's preamble criticizes the "continued reliance on nuclear weapons in military and security concepts, doctrines and policies," which would encompass nuclear umbrella arrangements.

Prohibition on Assisting, Encouraging, or Inducing a Prohibited Activity

Article 1(1)(e) prohibits assisting, encouraging, or inducing anyone to engage in acts prohibited by the TPNW. When non-nuclear armed states enter into umbrella arrangements, they assist, encourage, and/or induce their nuclear armed protectors to possess, use, and threaten to use nuclear weapons, three activities banned under the treaty. Thus, a state may not be both a party to the TPNW and a beneficiary of a nuclear umbrella.

- Possess: Under an umbrella arrangement, one state promises to defend another state with nuclear weapons if it determines that circumstances so require. That obligation necessitates that the state responsible for providing protection possesses nuclear weapons; if it does not have a nuclear arsenal, it cannot uphold its pledge. Thus, by entering into such an arrangement, an umbrella state encourages or induces its protector to maintain possession of nuclear arms.
- Use: By entering into a nuclear umbrella arrangement, a state is asking a nuclear armed state to use as well as possess nuclear weapons if certain situations arise. Possessing nuclear weapons is in itself an insufficient means of defense; the possessor must also be willing to use them. An umbrella state is therefore encouraging the use of nuclear weapons under circumstances on which the state and its nuclear armed ally have agreed.
- Threaten to Use: Threatening to use nuclear weapons requires a credible message of a willingness to employ force that is directly or indirectly communicated.⁴ A nuclear armed state that has agreed to provide protection to an umbrella state has shown it is able and willing to use nuclear weapons; it possesses the weapons and has consented to use them to defend its non-possessing ally.⁵ A nuclear umbrella state assists with the threat because

⁴ See, e.g., Nobuo Hayashi, "Legality under *Jus Ad Bellum* of the Threat of Use of Nuclear Weapons," in *Nuclear Weapons under International Law*, eds. Gro Nystuen, Stuart Casey-Maslen, and Annie Golden Bersagel (Cambridge: Cambridge University Press, 2014), p. 51 ("one entity threatens force against another entity where the former communicates its intention to use force, and its intention to do so is apprehended as such by the latter").

⁵ In the nuclear weapons context, the threshold for what constitutes a threat has been disputed. While possession is a prerequisite for the nuclear deterrence policies on which nuclear umbrella arrangements are based, nuclear armed states have argued that possessing does not amount to threatening to use. The head of NATO's Energy Security Section wrote in the *NATO Review*, however, that "[d]eterrence is the threat of force in order to discourage an opponent from taking an unwelcome action," explicitly linking the concept of deterrence to the threat of force.

it helps communicate the threat through a public agreement to accept such protection; it also encourages and induces a nuclear armed state to threaten to use nuclear weapons on its behalf.

Prohibition on Threatening to Use of Nuclear Weapons

Nuclear umbrella states not only assist nuclear armed states in threatening to use the weapons, but they arguably also engage in threatening behavior themselves. By entering an umbrella arrangement and relying on another state's nuclear arsenals, the umbrella state communicates its willingness and ability to have nuclear weapons used on its behalf. It thus directly threatens to use nuclear weapons, which, if it joined the TPNW, would violate Article 1(1)(d)'s prohibition on such threats.

Prohibition on Seeking and Receiving Assistance to Engage in a Prohibited Activity

Nuclear umbrella arrangements raise additional concerns under TPNW Article 1(1)(f), which prohibits a state party from seeking or receiving assistance to engage in any activity prohibited by the treaty. When a non-nuclear armed state chooses to enter a nuclear umbrella arrangement, it aims to benefit from an ally's political commitment to use nuclear weapons on its behalf in certain circumstances. The non-nuclear armed state thus seeks and receives assistance that would help it threaten to use nuclear weapons. A state party to the TPNW could not take advantage of umbrella status in that way.

Existing Military Alliances with Nuclear Armed States

States parties to the TPNW must renounce nuclear umbrella arrangements, but the TPNW does not require them to abandon existing, long-standing security alliances. In addition, collective security agreements generally do not create insurmountable legal obstacles that prevent a member state from joining the TPNW.

North Atlantic Treaty Organization (NATO)

While it might face political opposition from its nuclear armed allies, a NATO member state would not violate its legal obligations to the alliance if it withdrew from the nuclear umbrella associated with NATO. The North Atlantic Treaty, which is the foundation of the alliance, is silent with respect to nuclear weapons, even in the context of collective security. Although Article 3 mandates that parties to the North Atlantic Treaty "separately and jointly . . . maintain and develop their individual and collective capacity to resist armed attack," it does not specify which capacities are necessary to fulfill this obligation.⁶

The 2010 NATO Strategic Concept discusses nuclear deterrence strategy, but that document is a political, rather than legally binding, commitment, under which divergence has been permitted.

Furthermore, the TPNW's object and purpose (to eliminate nuclear weapons) and its negotiating history indicate that negotiators included "threatening to use" in order to prohibit nuclear deterrence policies. See, e.g., Michael Ruhle, "Deterrence: What it Can (And Cannot) Do," *NATO Review* (2015), <https://www.nato.int/docu/review/2015/Also-in-2015/deterrence-russia-military/EN/index.htm> (accessed May 17, 2018); Statement of South Africa during TPNW negotiations, March 29, 2017 (calling for a ban on "threat of use" in order to "delegitimise the concept of nuclear deterrence"); Statement by High Representative of Disarmament Affairs, UN Office of Disarmament Affairs, during TPNW negotiations, March 27, 2017 (calling for an end to deterrence policies, "which are linked with the threat of [nuclear weapons] use").

⁶ North Atlantic Treaty, adopted April 4, 1949, entered into force August 24, 1949, art. 3.

The Strategic Concept explains that NATO's defense will be based on an "appropriate mix of nuclear and conventional capabilities," and notes that "[a]s long as nuclear weapons exist, NATO will remain a nuclear alliance."⁷ The Strategic Concept also embraces nuclear disarmament, however, and resolves "to create conditions for a world without nuclear weapons."⁸ The latter component of the Strategic Concept is consistent with the object and purpose of TPNW and suggests that joining the TPNW would be compatible with NATO's professed long-term nuclear aims.

Precedent shows that NATO member states have diverged on their nuclear-related practices, despite the Strategic Concept. For example, Denmark, Norway, and Spain "do not allow the deployment of nuclear weapons on their territory in peacetime," and Iceland and Lithuania do not allow "nuclear weapons to be deployed on their soil" even during conflicts.⁹ Such examples demonstrate that latitude exists in how NATO countries set their national nuclear weapons policies.

Australia, Japan, and South Korea

Australia, Japan, and South Korea have signed collective security treaties with the United States, a nuclear armed state. As is the case with the North Atlantic Treaty, none of their treaties reference nuclear weapons or require that parties accept a nuclear umbrella arrangement as part of a defense strategy.¹⁰ Their nuclear umbrella status comes from political commitments or official statements in which they accept the use of nuclear weapons on their behalf in certain circumstances. For example, the 2017 Joint Statement between the United States and South Korea articulates a "United States commitment to provide extended deterrence to [South Korea], drawing on the full range of United States military capabilities, both conventional and nuclear."¹¹ As none of their security treaties explicitly mention nuclear weapons, Australia, Japan, and South Korea could join the TPNW without violating their existing obligations under treaty law. They would, however, have to renounce prior political commitments or statements accepting the protection of the US nuclear umbrella.

Joint Military Operations with Nuclear Armed States

TPNW states parties may not only preserve existing alliances, but also participate in joint military operations with nuclear armed states. As is the case under other humanitarian disarmament treaties, "mere participation" in a joint operation with a nuclear armed state does

⁷ "Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation," adopted November 19-20, 2010, para. 17.

⁸ *Ibid.*, para. 26.

⁹ Stein-Ivar Lothe Eide, *A Ban on Nuclear Weapons: What's in it for NATO?* ILPI policy paper no. 5/2014, February 2014, <https://ilpi.org/wp-content/uploads/2014/02/PP05-14-NATO-and-a-BAN.pdf> (accessed May 16, 2018), pp. 6-7.

¹⁰ See Security Treaty between Australia, New Zealand and the United States of America (ANZUS), adopted September 1, 1951, entered into force April 29, 1952; Treaty of Mutual Cooperation and Security between Japan and the United States of America, adopted January 19, 1960, entered into force June 23, 1960; Mutual Defense Treaty between the United States and the Republic of Korea, adopted October 1, 1953, entered into force November 17, 1954.

¹¹ "Joint Statement Between the United States and the Republic of Korea," White House press release, June 30, 2017, <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-republic-korea/> (accessed May 13, 2018).

not itself violate the TPNW's provisions or its object and purpose.¹² While a state party may not knowingly engage in prohibited activities during joint military operations—and thus may be unable to assist with certain specific activities—involvement in such operations does not inherently violate the TPNW.

The same issue has arisen in context of the 1997 Mine Ban Treaty, which includes an identical prohibition on assistance.¹³ Authoritative commentary has interpreted that treaty's prohibition on assistance to mean that a state party cannot assist, encourage, or induce antipersonnel landmine use by a state not party, but it *can* participate in military activities not related to landmine use, provided that there is no “nexus” between the state party's actions and the prohibited weapons' use.¹⁴ Precedent shows that the Mine Ban Treaty's assistance provision has not hindered joint military operations. For example, NATO members have engaged in numerous operations with the United States, even though the United States is the only NATO country not party to the Mine Ban Treaty.¹⁵

States parties to the TPNW could similarly participate in joint military operations with nuclear armed states without running afoul of the treaty, assuming there is no “nexus” between a particular task and an activity prohibited by the TPNW.

Conclusion

The TPNW's comprehensive prohibitions make it unlawful for a state party to benefit from the protection of a nuclear umbrella arrangement. At the same time, the treaty allows a state party that has withdrawn from a nuclear umbrella to participate in ongoing security alliances and joint military operations with nuclear armed states as long as it does not assist with a prohibited activity in the process. This approach should make it possible for nuclear umbrella states to join the TPNW and thus help advance the treaty's goal of the total elimination of nuclear weapons.

¹² Stuart Casey-Maslen, *Commentaries on Arms Control Treaties Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Oxford: Oxford University Press, 2015), para. 1.71 [hereinafter Mine Ban Treaty Commentary].

¹³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty), adopted September 18, 1997, entered into force March 1, 1999, art. 1(1)(c).

¹⁴ Mine Ban Treaty Commentary, para. 1.71.

¹⁵ The 2008 Convention on Cluster Munitions, which has an assistance provision that is almost identical to the TPNW's, has also not interfered with such joint military operations. The permissibility of such participation is more explicit under the Convention on Cluster Munitions, however, because its Article 21(3) specifies that states parties “may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.” Convention on Cluster Munitions, adopted May 30, 2008, entered into force August 1, 2010, arts. 1(1)(c), 21(3).