

A Tale of Two Treaties: Did the NATO Boycott of the TPNW Negotiations Violate Each Countries' Obligations Under Article VI of the NPT?

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I. Introduction

In building a regime that abolishes nuclear weapons, two things at a minimum are necessary: states with nuclear weapons must dismantle them, as South Africa did in the 1990s, and all states must commit to and comply with measures intended to ensure they do not build them again. Eventually, nuclear weapon states (“NWS”) will have to surrender their nuclear weapons, and whatever strategic advantage they might confer, in the name of long-term international stability.

In 1968, the UN adopted the Treaty on the Non-proliferation of Nuclear Weapons (“NPT”).¹ This Treaty created the non-proliferation regime, in which certain states were permitted to maintain nuclear arsenals (nuclear-weapon states, or “NWS”), and all others were expected to surrender their right to possess or build nuclear weapons.² The Treaty has been widely adopted by the international community; as of December 1, 2023, 188 of the 193 of UN recognized states have acceded to the Treaty.³ Despite its name, the NPT was concerned with two other “pillars,” in addition to non-proliferation: the peaceful use of nuclear technology and nuclear disarmament. This paper will focus on the latter pillar and, in particular, the relationship between the NPT and

¹ UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <https://disarmament.unoda.org/wmd/nuclear/npt/> (last visited Dec. 5, 2023).

² *Id.*

³ U.S. DEPARTMENT OF STATE, <https://www.state.gov/nuclear-nonproliferation-treaty/> (last visited Dec. 5, 2023). Israel, India, Pakistan, and South Sudan have never ratified the Treaty. *See* NTI, <https://www.nti.org/analysis/articles/overview-of-the-nuclear-disarmament-resource-collection/> (last visited Nov. 10, 2023). The DPRK ratified the Treaty in 1985 but left in 2003. *See id.*

the Treaty on the Prohibition of Nuclear Weapons (“TPNW”), adopted in 2017. The purpose the TPNW is to achieve the total and unequivocal elimination of nuclear weapons.⁴ Though many countries have acceded to the TPNW, none of its current party-states have ever possessed nuclear weapons.⁵ Regardless, many commentators consider the creation of the Treaty an important step towards the abolition of nuclear weapons, and the fulfillment of the NPT’s more forward-looking provisions.

This paper is concerned with two issues, relating to the interaction between the Treaty on the Non-Proliferation of Nuclear Weapons and Treaty on the Prohibition of Nuclear Weapons. First, we will discuss whether the various states who boycotted UN negotiations of the TPNW are in violation of their Article VI obligations under the NPT. The analysis entails a careful exegesis of the meaning of Article VI, an explanation of legal requirements for good faith, and an understanding of the basic purpose of the TPNW. Second, this paper will assess whether the NPT-TPNW regime is sufficient to bring about abolition (provisionally setting aside political concerns). I will identify current key weaknesses of the regime and offer solutions that may eliminate or at least attenuate those weaknesses.

II. Interpreting Article VI of the NPT

In this section I will argue that Article VI requires all party-states to negotiate in good faith towards three different but interrelated goals; that party-states are not obligated to *conclude* agreements related to those three goals. In the following section, I will argue that that the Treaty on the Prohibition of Nuclear Weapons (“TPNW”) effectively embodies one goal of Article VI;

⁴ Treaty on the Prohibition of Nuclear Weapons, art. 1, *opened for signature* Sep. 20, 2017, UN Doc. CN.476.2017.TREATIES-XXVI-9 [hereinafter TPNW].

⁵ See International Campaign to Abolish Nuclear Weapons, https://www.icanw.org/signature_and_ratification_status (last visited Dec. 2, 2023) (none of the 9 states known or assumed to possess nuclear weapons have signed or ratified the TPNW).

and that all party-states who boycotted negotiations of the TPNW were in contravention of their Article VI obligation to pursue negotiations in good faith on the matter of disarmament.

a. The Vienna Convention on the Law of Treaties

As a preliminary matter, I note that this analysis leans heavily on certain provisions of the Vienna Convention on the Law of Treaties (“VCLT” or “the Convention”), in particular Articles 31 and 32. In theory, because the VCLT is a treaty, its language is only binding on party-states. In practice, however, international courts have used the VCLT without first examining whether any of the parties before it had ratified the Convention.⁶ In fact, the International Criminal Court of Justice has said that “[a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary international law”⁷ The U.S., among others, has acknowledged “that many of provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”⁸ To conclude, my use of the VCLT in this analysis is, on the weight of the evidence, unproblematic.

The text of Article VI of the NPT reads, in full: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”⁹ The analysis will

⁶ See Karl Zemanek, *Vienna Convention on the Law of Treaties*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INT’L L., at 3(2009).

⁷ See *id.* at 2.

⁸ See Stephen G. Rademaker, “U.S. Compliance with Article VI of the Nonproliferation Treaty (“NPT), remarks to an Arms Control Association Panel, February 23, 2005, available at <https://2001-2009.state.gov/t/ac/rls/rm/41786.htm>.

⁹ Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

proceed in reverse; first, what does Article VI require parties to pursue negotiations towards; second, what does it mean to pursue negotiations in good faith.

b. The Three Goals of Article VI

Interpreting Art. VI “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose,”¹⁰ we can delineate three interrelated, but distinct goals of negotiation:¹¹ effective measures for ending the arms race at an early date, effective measures relating to nuclear disarmament, and a treaty “on general and complete disarmament under strict and effective international control.”¹² These goals are interrelated because the pursuit of one is likely implicates the others. If the nations of the world negotiate a treaty on general and complete disarmament (as perhaps they already have, see below), this will likely entail negotiations on effective measures relating to nuclear disarmament. And the first Strategic Arms Reduction Treaty (START) between the U.S. and Russia aimed to attenuate the nuclear arms race by placing limits on each nation’s stock of strategic weapons.¹³ This entailed the dismantling of vast numbers of strategic weapons.¹⁴ These goals are distinct in that they are equally and separately binding, and because the obligations as to one are not expressly conditioned on fulfillment of the others. For example, some commentators have argued that the U.S. is in fundamental compliance with Article VI because of its bilateral arms

¹⁰ Vienna Convention on the Law of Treaties, art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

¹¹ See Rademaker, *supra* note 8 (“Article VI calls for negotiations aimed at *three separate but related objectives*.”) (emphasis added)

¹² See NPT, *supra* note 5.

¹³ Treaty Between the United States of America and the Union of Socialist Soviet Republics on Further Reduction and Limitation of Strategic Arms, art. I, U.S.–U.S.S.R., https://www.nti.org/media/documents/start_1_treaty.pdf

¹⁴ NATIONAL PARK SERVICE, Strategic Arms Reduction Treaty of 1991, <https://www.nps.gov/articles/start-treaty-1991.htm> (last updated Oct. 20, 2020).

control agreements with Russia.¹⁵ But nothing in Article VI frees the U.S. and Russia from their obligation “to pursue negotiations in good faith . . . on a treaty on general and complete disarmament” merely because they’ve otherwise pursued the other two goals. A plain reading of the text places all three goals on equal footing. All three are conjoined with simple “ands;” the grammar does not subordinate one phrase to another. While the text seems suggest a rough chronology—the arms race should cease “at an early date,” followed by measures relating to nuclear disarmament, after which the foundation will exist for a treaty on general and complete disarmament—this reflects not an intent to condition each goal on the one preceding it, but the expectations of the drafters as to how the process would actually occur. One commentator argued that the effective measures on nuclear disarmament were to occur pursuant to a treaty on general and complete disarmament.¹⁶ But this argument relies on one specific paragraph from the preamble.¹⁷ “Although the preamble may comprise an element of the context of the treaty, . . . its value as an interpreted source should be examined critically.”¹⁸ Such an interpretation “contradict[s] the ordinary meaning of a treaty’s terms[] by imposing a conditionality requirement not found elsewhere.”¹⁹

The nuclear arms race concluded, or at least significantly slowed, with the end of the Cold War and the dissolution of the Soviet Union.²⁰ If this is so, it was the process of history and the logic of geopolitics, not the application of international law, that ultimately brought an end to

¹⁵ See Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 *NONPROLIFERATION REV.* 401, 421 (2007); Rademaker, *supra* note 8. As of this Nov. 23, 2023, only the New START is still in force. Russia suspended its participation in the Treaty in 2021.

¹⁶ See Ford, *supra* note 15, at 403.

¹⁷ See *id.*; GRO NYSTUEN ET AL., *NUCLEAR WEAPONS UNDER INTERNATIONAL LAW* 406 (Gro Nystuen et al. 2014).

¹⁸ GRO NYSTUEN, *supra* note 17, at 407.

¹⁹ *Id.* at 407.

²⁰ See Rademaker, *supra* note 8 (“I think it is manifest that this objective has been fully realized. The nuclear arms race ended well over a decade ago, and since then both we and the Russians have been working diligently to reduce our respective nuclear arsenals.”).

the nuclear arms race though some have argued to the contrary.²¹ Certain developments in international law no doubt played a big role in slowing the nuclear arms race. The long line of bilateral arms control agreements between the United States and Russia, such as the Strategic Arms Reduction Treaties, did lead to reductions in each country's arsenal.²² At its peak, the U.S. stockpile of nuclear weapons amounted to 31, 255; as of 2020, it possesses "only" 3750.²³ However, it was the end of the Cold War that portended the largest reduction of nuclear warheads.²⁴ There is also the question of whether the terms of the Treaty were satisfied, as the nuclear arms race was intended to end "at any early date."²⁵ The nuclear arms race, as contemplated by the NPT's drafters, centered on the U.S. and U.S.S.R., whose respective spheres of influence dominated the post-WW2 geopolitical landscape. If the consensus is to be believed, then, the nuclear arms race ended less than twenty-five years after the adoption of the NPT. This goal of Article VI, according to Stephen G. Rademaker, former Assistant Secretary of State for Arms Control, has already been fulfilled.²⁶ At any rate, the continuing modernization of nuclear arsenals,²⁷ the accelerated build-up of nuclear weapons in the People's Republic of China²⁸, and the spread of nuclear weaponry to countries after the Cold War, like the DPRK, militates against certainty on this matter, but the question is ultimately beyond the remit of this paper.

²¹ *See id.* ("Some might argue that it was the end of the Cold War rather than negotiations in accordance with Article VI that brought about the cessation of the nuclear arms race, but such an argument would overlook the contribution that arms control made to ending the Cold War.").

²² *See* CENTER FOR ARMS CONTROL AND NON-PROLIFERATION, <https://armscontrolcenter.org/strategic-arms-reduction-treaty-start-i/> (last visited Dec. 4, 2023) ("The treaty is considered one of the most successful arms control agreements because by the time of its full implementation in 2001, 80 percent of all the world's strategic nuclear weapons were dismantled.").

²³ *See* National Nuclear Security Administration, <https://www.energy.gov/nnsa/nuclear-stockpile-transparency> (last visited Dec. 4, 2023).

²⁴ *See id.*

²⁵ *See* NPT, *supra* note 5, at art. VI.

²⁶ *See* Rademaker, *supra* note 8.

²⁷ *See* GRO NYSTUEN, *supra* note 17, at 411.

²⁸ THOMAS D. GRANT, CHINA'S NUCLEAR BUILD-UP AND ARTICLE VI NPT: LEGAL TEXT AND STRATEGIC CHALLENGE 25 (Keith B. Payne et al. 2021).

The “treaty on general and complete disarmament” is, conversely, very forward-looking. Historically, the phrase “general and complete disarmament” has been used in a far more ambitious context.²⁹ It indicates not just the elimination of nuclear weapons, but complete conventional disarmament as well.³⁰ Essentially, the condition of general and complete disarmament would require states to maintain only the “non-nuclear armaments, forces, facilities and establishments” necessary to maintain internal order.³¹ It is, in one commentator’s view, “wildly optimistic.”³² The phrase is often neglected in NPT Conference documents.³³ And though the language might be interpreted, in light of its presence in a nuclear nonproliferation treaty, to mean “general and complete *nuclear* disarmament,” this reading seems untenable. If that was the intended meaning of the language, surely the TPNW, whose provisions would entail general and complete nuclear disarmament, could lay claim to being that very treaty.³⁴ And yet, the preamble of the TPNW indicates that the treaty was drafted “with a view to achieving *effective progress* towards general and complete disarmament;” it was not presented as the unequivocal fulfillment of the goal.³⁵

c. Effective Measures on Nuclear Disarmament and the Overall Purpose of Article

VI

The goal of interest in this analysis is the effective measures relating to nuclear disarmament. The structure of Article VI suggests that “effective measures on nuclear

²⁹ See GRO NYSTUEN, *supra* note 17, at 414–16.

³⁰ See *id.* at 416.

³¹ See *id.* at 415 (quoting UN General Assembly, Letter dated 20 September 1961 from the Permanent Representatives of the Union of Soviet Socialist Republics and of the United States to the United Nations, addressed to the President of the General Assembly, transmitting a report of their Governments constraining a joint statement of agreed principles for disarmament negotiations, UN doc. A/4879, 20 September 1961, at 2, para.2.)

³² *Id.* at 416.

³³ See *id.*

³⁴ See *infra* III.a.

³⁵ See TPNW, *supra* note 4, preamble.

disarmament” need not proceed through any specific channel (such as a Treaty, as this language is only used in relation to the last goal).³⁶ Even unilateral disarmament measures—such as those employed by the U.K.³⁷ or France³⁸—may count under Article VI.³⁹ Rademaker has argued that the U.S.’s bilateral arms control agreements with Russia and the former Soviet Union also to effected compliance with Article VI.⁴⁰ Such statements, however, belie a failure to render the appropriate distinction between arms control and disarmament.⁴¹ The two concepts share many qualities, but are distinguished from one another on the basis of their diverging long-term aims.⁴² Parties enter arms control agreements with an eye towards maintaining “strategic stability.”⁴³ The goal is not the destruction of nuclear arms as such, but the de-escalation of tensions between states.⁴⁴ According to the George Perkovich and Pranay Vaddi, writing for the Carnegie Endowment for International Peace, “[a]dversaries ‘pursue’ arms control when they recognize mutual interests in reducing costs and risks of destabilizing competition in building and deploying weapons.”⁴⁵ Disarmament, by contrast is a broad, more forward-looking process: “[e]ffective, sustainable nuclear disarmament of any nuclear-armed state requires much more than dismantling warheads and controlling fissile material stocks.”⁴⁶ An official statement by

³⁶ See GRO NYSTUEN, *supra* note 17, at 411.

³⁷ See NTI, <https://www.nti.org/analysis/articles/united-kingdom-nuclear-disarmament/> (last visited Dec. 4, 2023) (“[The UK] committed to reducing its existing nuclear weapons stockpile to less than 180 warheads by the mid-2020s.”).

³⁸ See NTI, <https://www.nti.org/analysis/articles/france-nuclear/> (last visited Dec. 4, 2023) (noting that France has taken some practical steps towards disarmament, such as ceasing the production of fissile material).

³⁹ See GRO NYSTUEN, *supra* note 17, at 411 (“Article VI thus grants relatively broader flexibility to determine how to meet this obligation – including, for example through unilateral disarmament.”).

⁴⁰ See Rademaker, *supra* note 11 (“I again think it is indisputable that we have more than fulfilled our obligations. Ever since the NPT entered into force in 1970, we have been negotiating and, in many cases, reaching agreement with first the Soviet Union, and today Russia, on effective measures relating to nuclear disarmament.”)

⁴¹ Daniel H. Joiner, *Disarmament is Good, but What We Need Now is Arms Control*, 10 J. Indon. J. Int’l & Compar. L (forthcoming 2023) (manuscript at 17) (on file with U. of Alabama).

⁴² See Joyner, *supra* note 41, at 17.

⁴³ See Joyner, *supra* note 41, at 19.

⁴⁴ See *id.*

⁴⁵ GEORGE PERKOVICH & PRANAY VADDI, *PROPORTIONATE DETERRENCE: A MODEL NUCLEAR POSTURE REVIEW* 79 (Carnegie Endowment for Int’l Peace, 2021).

⁴⁶ *Id.* at 94.

NATO also makes a distinction between arms control and disarmament.⁴⁷ The distinction is furthermore evidenced by the allowances arms control agreements, like the New START, generally make for parties states to modernize their arsenals.⁴⁸ Arms control is functionally broader than disarmament.⁴⁹ Certain instruments, like the Chemical Weapons Convention, can embody both arms control and disarmament, the purpose of the first is ultimately distinct from the second. The aim of the Chemical Weapons Convention was the complete elimination of chemical weapons, and it has, in fact, achieved this aim.⁵⁰ Modernization programs are understood to contradict, at least in the short-term, the goals of disarmament.⁵¹ And though disarmament may indicate a mere reduction in the stock of nuclear weapons, the subsequent history of Article VI suggests that the ultimate goal is the complete elimination of nuclear weapons.⁵² No doubt arms control and disarmament are mutually supportive endeavors, but they are not identical. The U.S. and Russia can—indeed, have—pursued the former without pursuing the latter.

There’s a unity of purpose to Article VI. In the 2000 Review NPT Conference final document contained a thirteen-step plan for implementing Article VI.⁵³ Step six called for “[a]n unequivocal undertaking by the nuclear-weapon states to accomplish the total elimination of

⁴⁷ See NATO, https://www.nato.int/cps/en/natohq/topics_48895.htm (last visited Dec. 2, 2023) (“While often used together, the terms arms control, disarmament and non-proliferation do not mean the same thing.”).

⁴⁸ See Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, U.S.–Russia, art. 5, April 8, 2010, S. Treaty Doc. No. 111-5 [hereinafter New START].

⁴⁹ See NATO, *supra* note 47.

⁵⁰ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. 1, Sep. 3, 1992, 1975 U.N.T.S. 45 [hereinafter CWC]. For evidence that the CWC has achieved its aim see Geoff Brumfiel, *The world is officially ‘free’ of chemical weapons. Here’s what that means*, NPR, (5:35 PM, July 7, 2023), <https://www.npr.org/2023/07/07/1186550955/the-world-is-officially-free-of-chemical-weapons-heres-what-that-means>.

⁵¹ See Joyner, *supra* note 41, at 17.

⁵² See *infra* II.b.

⁵³ See 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2000/28 (Parts I and II), Part I, pp. 14–15.

their nuclear arsenals leading to nuclear disarmament to which all states parties are committed under Article VI.”⁵⁴ As noted below, the ICJ has opined that the central thrust of Article VI is the pursuit of “nuclear disarmament in all its aspects.”⁵⁵ These statements appear to collapse the distinction between the goals—the ultimate concern of Article VI is that states parties take the obligation to pursue disarmament seriously.

Now that we’ve identified the goals parties must pursue negotiation towards, we will explain what it means to “pursue negotiations in good faith,” as Article VI requires. First, we will examine the ICJ’s interpretation of Article VI.

d. The ICJ’s “Strong” Interpretation of Article VI

As a starting point, we begin with the ICJ. At the end of its famous (or infamous) 1996 Nuclear Weapons Advisory Opinion, the ICJ proffered what appeared to be its own interpretation of Article VI:

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an *obligation to achieve a precise result – nuclear disarmament in all its aspects* – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith⁵⁶

(emphasis added). In other words, Article VI is not just an obligation to negotiate, but an obligation to *actually achieve* a specific result.⁵⁷ In this paper, this will be referred to as the “strong” interpretation of Article VI. The contrasting interpretation, that Article VI *does not* require party-states to actually conclude negotiations (say, via a new agreement), will be called the “weak” interpretation.

⁵⁴ *Id.* at 14.

⁵⁵ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 99 (July 8) [hereinafter Advisory Opinion].

⁵⁶ *Id.*

⁵⁷ See GRO NYSTUEN, *supra* note 17, at 405.

The strong interpretation rests on shaky ground. First, the ICJ does not explain its reasoning, even though its interpretation seems to contradict a plain meaning reading of the text. Second, the strong interpretation is part of an *advisory* opinion, and not binding on anyone.⁵⁸ Advisory opinions are no doubt entitled to a degree of respect, but they lack the real force of law. The ordinary meaning of the text, the negotiating history of the NPT, and subsequent documents related to its implementation provide ample evidence of a weaker interpretation of Article VI. The ICJ did not articulate its reasoning, so its statement Article VI has only as much force as the ICJ could muster in an advisory opinion. Third, the quotation above bears many of the hallmarks of *obiter dictum*. The ICJ was not called upon to give an authoritative interpretation of the language of Article VI; rather, the question posed to the Court was whether “the threat or use of nuclear weapons [is] in any circumstance permitted under international law?”⁵⁹ Thus, the strong interpretation of Article VI was only ancillary to the ICJ’s legal ends. Indeed, the language quoted above played no role in supporting the conclusion reached by the court. Finally, it is unclear whether an obligation to achieve a specific result is even enforceable. Christopher A. Ford has also articulated the view that such an obligation is incoherent and unenforceable.⁶⁰ For the foregoing reasons, we may conclude that, at minimum, the ICJ advisory opinion should not be taken as a definitive interpretation of Article VI. The Court is still a principal authority on international law, however, so its opinion is still worth citing for its persuasive value, especially insofar as it corroborates the interpretive work of other informed commentators.

⁵⁸ See INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/advisory-jurisdiction> (last visited Nov. 22, 2023).

⁵⁹ See Advisory Opinion, 1986 I.C.J. at 6, ¶ 1.

⁶⁰ See Ford, *supra* note 15, 409–10.

e. Article VI Creates a Genuine Obligation

Now we turn to articulating the weak interpretation in greater detail. Article VI is not toothless: it does seem to create some kind of obligation. The U.S., in a joint statement with the other P5, has said directly that it “remains committed to our Nuclear Non-Proliferation Treaty obligations, including our Article VI obligation.”⁶¹ And the 2010 NPT Review Conference noted “the reaffirmation by the nuclear-weapon States of their unequivocal undertaking to accomplish . . . the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty.”⁶² These statements of commitment, especially by countries who are actually known to possess nuclear weapons, militate against the possibility that Article VI is merely an aspiration.

The history of the NPT is similarly illuminating.⁶³ Early draft treaties by the United States and the Soviet Union made scant mention of disarmament, only including it in the preamble.⁶⁴ Under pressure of non-NWS, who insisted on the importance of disarmament, the NWS eventually acquiesced to the demands that such language appear in the text itself.⁶⁵ The language of the final document reflects the necessity of compromise; Article VI was, simultaneously, an unwelcome imposition for NWS, who would have preferred to avoid its inclusion in the NPT altogether, and an all-too-lax obligation for non-NWS, who would have preferred more detailed language or the inclusion of a timeline.⁶⁶ At any rate, Article VI

⁶¹ Joint Statement of the Leaders of the Five Nuclear-Weapon States on Preventing Nuclear War and Avoiding Arms Races, Jan. 3, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-war-and-avoiding-arms-races/>.

⁶² 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2010/50 (Vol. I), at p. 12, para. 79.

⁶³ Drafting history should not be taken as dispositive, of course. But it nonetheless helps frame the issue.

⁶⁴ See GRO NYSTUEN, *supra* note 17, at 399.

⁶⁵ See *id.*

⁶⁶ See *id.*

embodies a grand bargain between the two groups.⁶⁷ In exchange for non-NWS surrendering any legal right to develop or possess nuclear weapons, NWS are expected to make genuine efforts to achieve disarmament.⁶⁸ Weak though the obligation would appear to be, it is unlikely many non-NWS would have acceded to the Treaty if they were operating on the knowledge that Article VI imposed no obligation at all.

Article VI requires states to “pursue negotiations in good faith.” The principle of good faith is ubiquitous in international law.⁶⁹ In the tradition of English law, the principle of good faith is associated (*inter alia*) with contracts and negotiations, so this should come as no surprise.⁷⁰ Much of international law, after all, turns on substance of voluntary agreements, rather than the rules of an overarching sovereign body. According to the VCLT, good faith is a principle vital to both the interpretation of an treaties, and the satisfactory compliance thereof.⁷¹ And all negotiations are to be conducted in good faith. Indeed, without good faith “all international law would collapse.”⁷²

And yet the precise meaning of the term is notoriously difficult to pin down.⁷³ A hard-and-fast definition would do little to illuminate the concept, which might be better illustrated by way of a web of associations. In general, good faith reflects commonly held notions of honesty, fairness, and propriety.⁷⁴ The principle operates to prevent “arbitrary behavior and chaos” among states, and to allow states to “foresee [each others’] behavior.”⁷⁵ In the context of an

⁶⁷ See Joyner, *supra* note 41, at 13.

⁶⁸ See *id.*

⁶⁹ See Steven Reinhold, *Good Faith in International Law*, 2 UCL J. L & Juris. 40. 40 (2013).

⁷⁰ See *id.* at 43.

⁷¹ See Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *id.* at art. 31.

⁷² Moxley et al., 31 Fordham Int’l L. J. 594, 687 (2010).

⁷³ See Reinhold, *supra* note 69, at 40.

⁷⁴ See Cezary Mik, *Pactum de Negotiando and Pactum de Contrahendo as International Obligations in the Present International Law*, 40 Pol. Yearbook of Int’l L. 39, 58 (2020).

⁷⁵ Reinhold, *supra* note 69, at 48; Moxley et al/, *supra* note 72, at 687.

agreement between states, good faith is associated with the phrase *pacta sunt servanda* (“agreements must be kept”).⁷⁶ States are expected to “take into account other states’ legitimate expectations” and to abide “by agreements in a manner true to their purposes,” while “working sincerely and cooperatively . . . to attain agreed objectives.”⁷⁷

States are expected to enter negotiations with an eye towards reaching a satisfactory conclusion; “feet-dragging” (stubbornly avoiding opportunities to negotiate) or the intransigent refusal to take into account the reasonable demands of others are inappropriate.⁷⁸ And though states are not obligated to actually conclude an agreement if it would impede their interests, there is an expectation that states be willing to compromise.⁷⁹ The ICJ has noted that fulfillment of an obligation to negotiate is premised on “sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise.”⁸⁰ States should “proactively, diligently and consistently pursue negotiations.”⁸¹ Violations of a duty to negotiate in good faith may be shown by acts which “render the fulfillment of specific treaty obligations remote or impossible.”⁸² States should thus refrain from taking acting that makes a contemplated successful outcome unlikely.⁸³

III. Did the TPNW Boycott Violate Art. VI of the NPT?

⁷⁶ See Reinhold, *supra* note 69, at 47.

⁷⁷ See Moxley et al/, *supra* note 72, at 687.

⁷⁸ See GRO NYSTUEN, *supra* note 17, at 409.

⁷⁹ See *id.* at 410 (citing Government of Kuwait v. American Independent Oil Company (Aminoil), Award of 24 March 1982, 66 ILR 519, p. 578).

⁸⁰ See *id.* at .409–10 (citing Aminoil, 66 ILR at 578).

⁸¹ See GRO NYSTUEN, *supra* note 17, at 410.

⁸² Select Committee on Defence Written Evidence, Memorandum from Peacerights,(Dec. 16, 2006) available at <https://publications.parliament.uk/pa/cm200607/cmselect/cmdfence/225/225we23.htm> (citing G. Goodwin-Gill, *State Responsibility and the "Good Faith" Obligation in International Law*, in M Fitzmaurice & D Sarooshi,, *Issues of State Responsibility before International Judicial Institutions* (2004) 75, 84.

⁸³ See *id.*

a. The TPNW is a Disarmament Treaty

At base, the TPNW is a disarmament treaty.⁸⁴ Its specific provisions prohibit any and all states from possessing nuclear weapons.⁸⁵ If a nuclear weapon state accedes to the Treaty, it undertakes a duty to completely eliminate its nuclear arsenal. This elimination is intended to be irreversible and occurs under the auspices of an international authority.⁸⁶ Thus, compliance with the TPNW necessitates disarmament. In its preamble, the TPNW even acknowledges the connection between itself and Article VI.⁸⁷ The First meeting of States Parties made a similar acknowledgement: “[w]e are pleased to have advanced the implementation of the NPT’s Article VI by bringing into force a comprehensive legal prohibition of nuclear weapons.”⁸⁸ According to Daniel Joyner, the TPNW, along with Article VI of the NPT, were intended to form the “normative basis for the establishment of a rule of general customary international law” that prohibits the possession of nuclear weapons.⁸⁹

b. The Actions of the United States, NATO, and Other NWS

The United States has created or attempted to create an atmosphere of hostility towards general disarmament.⁹⁰ This pattern of behavior is manifest in various ways, three of which will be discussed below. Such actions very likely constitute a breach of the U.S.’s obligations under Article VI to “pursue good faith negotiations.”

The actions of the U.S. with regards to the TPNW have escalated over time. First, in 2016, the United States voted against UN Resolution 71/258, which created the mandate to

⁸⁴ See Joyner, *supra* note 41 at 21.

⁸⁵ See TPNW, *supra* note 4, at art. 1.

⁸⁶ See TPNW, *supra* note 4, at art. 4.

⁸⁷ See *id.* at preamble (“Reaffirm that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament on all its aspects under strict and effective international control.”).

⁸⁸ First Meet of States Parties to the Treaty on the Prohibition of Nuclear Weapons, Final Report, TPNW/MSP/2022/6, at p. 9, para. 12.

⁸⁹ Joyner, *supra* note 41, at 22.

⁹⁰ This paper focuses primarily on the United States for reasons of space.

convene UN negotiations on a legally binding treaty of general nuclear prohibition.⁹¹ Now, such action is not egregious on its face. As we have seen, the U.S.'s good faith obligations under Article VI constitute a fairly weak commitment to international cooperation on disarmament.⁹² But the U.S. did not stop at voting against resolution. In a document circulated internally within NATO, the U.S. urged NATO member states not to abstain from the resolution, but to vote no against it; it furthermore admonished them not to engage with negotiations if they did occur.⁹³

In 2017, the UN convenes for two rounds of negotiations on the TPNW.⁹⁴ The U.S. attends neither. As with before, this omission alone may well be permissible, even despite the U.S.'s stated concern for disarmament (as implied by its accession to Article VI). But, once again, the U.S. did not stop there. The U.S. actively organized boycotts of the negotiations. At least partially at the insistence of the U.S., many other states joined in the boycott.⁹⁵ For example, only one member of NATO attended the negotiation.⁹⁶ China and Russia, the remaining members of the P5, along with the non-NPT states known or believed to possess nuclear weapons, India, Pakistan, North Korea, and Israel, also refused to attend negotiations.⁹⁷

The U.S.'s frustrations with the TPNW did not conclude with the Treaty's adoption. In October 2020, the Associated Press reported that the U.S. had urged TPNW party-states to

⁹¹ *Voting on UN Resolution for nuclear ban treaty*, INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, (Dec. 23, 2016), https://www.icanw.org/voting_on_un_resolution_for_nuclear_ban_treaty.

⁹² See *supra* Part II.

⁹³ See INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, https://www.icanw.org/united_states (last visited Dec. 6, 2023) (under heading titled "TPNW Negotiations").

⁹⁴ See UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <https://disarmament.unoda.org/wmd/nuclear/tpnw/> (last visited Dec. 6, 2023).

⁹⁵ See Somini Sengupta & Rick Gladstone, *United States and Allies Protest U.N. Talks to Ban Nuclear Weapons*, N.Y. TIMES, (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/world/americas/un-nuclear-weapons-talks.html>.

⁹⁶ INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS <https://www.icanw.org/netherlands> (last visited Dec. 6, 2023) (under heading titled "TPNW Negotiations") (noting that the Netherlands was the only member of NATO to attend the TPNW negotiations).

⁹⁷ See Edith M. Lederer, *US urges countries to withdraw from UN nuke ban treaty*, AP NEWS, (8:30 PM, Oct. 21, 2020).

withdrawal from the Treaty ahead of its entry into force.⁹⁸ Article 15 of the TPNW states that the Treaty would enter into force “90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited.”⁹⁹ By the time the U.S. had circulated its request, 47 states had ratified the TPNW.¹⁰⁰ In September 2021, eight months after the TPNW had entered into force, the U.S. declared that it was no longer asking party-states to withdraw from the Treaty.¹⁰¹

The U.S. and other similarly aligned parties have given myriad reasons for opposing the TPNW both before and after negotiations. They have cited security concerns, the untimeliness of the Treaty, and the need to further bolster the nonproliferation regime established by the NPT.¹⁰²

c. These Parties Have Breached Their Good Faith Obligations

In the abstract, none of this behavior contravenes international law. A state is a sovereign entity, it has an inherent right to vote against UN conventions, to not attend treaty negotiations, to influence other states’ attitudes towards an issue, and to ask other states to withdraw from treaties it finds are harmful to its interests. And of course, a state has an inherent right to withdrawal from a treaty if it no longer wishes to be bound by its terms (according to that treaty’s exit clause, if it has one). But the principle of good faith creates genuine limitations on sovereignty when a state adopts a treaty.¹⁰³

⁹⁸ See *id.*

⁹⁹ See TPNW, *supra* note 4, at art. 15.

¹⁰⁰ See Lederer, *supra* note 97.

¹⁰¹ See INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, https://www.icanw.org/united_states (last visited Dec. 6, 2023) (under heading titled “National Position”).

¹⁰² See Tim Caughley & Yasmin Afina, *NATO and the Frameworks of Nuclear Non-proliferation and Disarmament: Challenges for the 10th NPT Review Conference*, Research Paper, CHATHAM HOUSE, at 15–19 (May 2020).

¹⁰³ See Reinhold, *supra* note 69, at 58.

The behavior of the U.S. before, during, and after the Treaty negotiations does not merely reflect a lack of interest in the TPNW. Indeed, the U.S. showed considerable negative interest in the Treaty by trying to stall its entry into force. And while the U.S. has presented legitimate criticisms of the TPNW, its attempt to build a consensus against the Treaty prior to negotiations could not have been premised on criticisms of the TPNW’s specific provisions—which hadn’t been worked out yet—but on its core principle: general prohibition. Their actions suggest not a mere substantive agreements with the Treaty, but a fundamental divergence on the topic of nuclear prohibition. The P5 wield disproportionate influence in the international community, and their open declarations that discussions of prohibition are completely inappropriate at this juncture amount to an attempt to minimize the impact of the Treaty and the overall discourse on multilateral disarmament.¹⁰⁴ Genuine disagreements had a place at the negotiations. The U.S. could have attended the negotiations, articulated its grievances, suggested alternatives or a possible path forward, engaged with the genuine interests of other states, many of whom believe the nuclear weapon states have dragged their feet on the matter of disarmament, and, ultimately, voted against the Treaty’s ultimate adoption. In this scenario, the U.S. would remain unbound by the terms of the Treaty, while still taking the proceedings—and the input of non-nuclear weapon states—seriously.

States could only muster the influence to finally negotiate a legally binding instrument on nuclear prohibition in 2017, nearly 50 years after the adoption of the NPT. Most non-NWS have adopted the more invasive Additional Protocol to the IAEA safeguard, even though accession to

¹⁰⁴ For example, *see* INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, https://www.icanw.org/united_states (last visited Dec. 6, 2023) (under heading titled “National Position”) (“[T]he US secretary of state, Antony Blinken, said: ‘We do not support the Treaty on the Prohibition of Nuclear Weapons. Seeking to ban nuclear weapons through a treaty that does not include any of the countries that actually possess nuclear weapons is not likely to produce any results.’”).

the Additional Protocol is entirely voluntary.¹⁰⁵ The non-proliferation regime has, in fact, been successful.¹⁰⁶ These states' obligations under Article VI are moot, since they do not and have never possessed nuclear weapons¹⁰⁷, but many of them have worked to effect the next best alternative in the form of nuclear-weapon free zone treaties. Most of the world's states and a third of the world's population—including nearly all of Africa and the entirety of Latin America—live in nuclear weapon free zones.¹⁰⁸ The majority of party-states have, so to speak, kept their end of the bargain, and displayed commitments to all three pillars of the NPT.

While security concerns are legitimate reasons to disapprove of a treaty, the actions of the U.S. go beyond the definition of disapproval. It is unclear how, for instance, the accession of willing states to the TPNW undermines the security interests of the U.S. As the U.S. has itself noted, the TPNW at present binds only non-NWS.¹⁰⁹ Nothing has essentially changed as of yet, compared to the NPT regime. At the UN boycott, former Ambassador Nikki Haley specifically noted concerns with the DPRK and Iran.¹¹⁰ But such concerns have little to do with the actions of the United States. The problems these countries pose for U.S. security are reasons not to *sign* the TPNW, but the U.S. has not merely refused to sign the treaty. They have instead acted to

¹⁰⁵ See IAEA, <https://www.iaea.org/topics/additional-protocol> (last visited Dec. 2, 2023) (“As of 31 March 2023, Additional Protocols are in force with 141 states.”).

¹⁰⁶ See Jackie O'Halloran Bernstein, *The NPT AT 50: Successes, Challenges, and Steps Forward for Nonproliferation*, ARMS CONTROL ASSOCIATION, (June 2018) (noting that the NPT has “to a good extent, achieved its objectives”).

¹⁰⁷ Except South Africa.

¹⁰⁸ See Tarja Cronberg, *The Security of Nuclear Weapon-Free Zones: The Middle East as a Test Case for Unconditional Security Assurances*, 5 J. for Peace & Nuclear Disarmament 45, 45 (June 2022).

¹⁰⁹ See INTERNATIONAL CAMPAIGN TO ABOLISH NUCLEAR WEAPONS, https://www.icanw.org/uk/united_states (last visited Dec. 6, 2023) (under heading titled “National Position”) (“[T]he US secretary of state, Antony Blinken, said . . . ‘[s]eeking to ban nuclear weapons through a treaty that does not include any of the countries that actually possess nuclear weapons is not likely to produce any results.’”).

¹¹⁰ See Somini Sengupta & Rick Gladstone, *United States and Allies Protest U.N. Talks to Ban Nuclear Weapons*, N.Y. TIMES, (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/world/americas/un-nuclear-weapons-talks.html> (“[Nikki Haley] cited North Korea and Iran in articulating her opposition to the talks.”).

minimize the impact of the negotiations by refusing to attend them and stall the entry of the Treaty into force by requesting signatory states withdraw.

If anything, the case of the DPRK militates against the single-minded development of the nonproliferation regime at the cost of pursuing disarmament more fervently. When the DPRK left the NPT, it was freed from any legal obligation that might constrain its development or possession of nuclear weapons. And as long as disarmament plays a secondary role to nonproliferation, this will always be the case. One purpose of the TPNW is to build, as the Biological and Chemical Weapons Conventions before it, a broad, international consensus on the illegality of nuclear weapons under customary law.¹¹¹ In this scenario, the DPRK's nuclear program would be illegal. By attempting to slow (or perhaps even reverse) progress on disarmament, NWS, ironically, risk undermining their own security.

IV. Bolstering the Effectiveness of TPNW Regime

The NPT was intended to represent a major step towards closing the era of the bomb.¹¹² The TPNW, which prohibits the ownership of nuclear weapons by all party-states, even those permitted to have such weapons under the NPT, represents the next step in this process. The drafters of the Treaty intended to create the conditions for multilateral and total nuclear disarmament. The Treaty aims to impose a regulatory scheme, similar to IAEA safeguard agreements, which prevents or at least discourages the reestablishment of a nuclear weapons arsenal.¹¹³ This section will analyze the potential of the TPNW to achieve this goal through the lens of transparency, verification, and irreversibility.

¹¹¹ See Joyner, *supra* note 41, at 22.

¹¹² See First Meet of States Parties to the Treaty on the Prohibition of Nuclear Weapons, Final Report, TPNW/MSP/2022/6, at p. 7, para. 1.

¹¹³ See TPNW, *supra* note 4, at art. 5, para. 3.

Transparency, verification, and irreversibility are key to the successful execution of any disarmament regime. These three concepts are closely linked and mutually-reinforcing. UK Ambassador Aidan Liddle has said as much: “[y]ou can’t tell whether what’s been done is irreversible unless you can verify it; you can’t verify it unless its transparent.” While these concepts are embedded in all arms control agreements and the NPT in one way or another, they were consciously identified as important elements of disarmament at different times. On one hand, verification has essentially always been identified as such, even as early as the Treaty of Tlatelolco, which predates the NPT.¹¹⁴ On the other hand, irreversibility first enters the discourse on disarmament with the Chemical Weapons Convention, drafted in 1992.¹¹⁵ It is first used in the context of the NPT in 2000 Review Conference Final Document.¹¹⁶ At any rate, the TPNW declares in its preamble that a world free of the bomb requires “the irreversible, verifiable and transparent elimination of nuclear weapons.”¹¹⁷

Verification describes the means by which other states and/or the relevant international body can ensure a country is complying with its obligations.¹¹⁸ The SALT Interim Agreement, the first bilateral arms control agreement between the U.S. and the Soviet Union, prescribed the use of “national technical means” (NTM) to verify compliance.¹¹⁹ At the time, this was a reference to the then-new orbital satellites that could take pictures of each country’s territory.¹²⁰ SORT only required each state to end the construction of new missile sites, so at the time, NTM were

¹¹⁴ See Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, art. 12, *opened for signature* Feb. 14, 1967, 634 U.N.T.S. 281.

¹¹⁵ See CWC, *supra* note 50, at Part IV(A)(C)12.

¹¹⁶ See Heather Williams & Jessica Link, *Introduction: Irreversibility in Nuclear Disarmament*, in *IRREVERSIBILITY IN NUCLEAR DISARMAMENT* 1, 1 (2023).

¹¹⁷ See TPNW, *supra* note 4, at preamble.

¹¹⁸ See Ola Dahlman, *Verification: to detect, to deter an to build confidence*, in 3 *DISARMAMENT FORUM* 3, 4 (2010).

¹¹⁹ See NTI, <https://www.nti.org/education-center/treaties-and-regimes/strategic-arms-limitation-talks-salt-i-salt-ii/> (last visited Dec. 7, 2023) (under heading titled “Verification and Compliance”).

¹²⁰ See Pavel Podvig, *Transparency in Nuclear Disarmament*, UNIDIR, p. 4 (Mar. 2012).

sufficient. Later verification methods were more robust. For instance, the IAEA Model Safeguard Agreement, mandated by the NPT, required inspections of areas designated by the agency as “strategic points.”¹²¹ These inspections were intended to verify whether the country’s records of its fissile material were accurate.¹²²

Transparency measures are intended to prevent countries from hiding prohibited activities.¹²³ The original SORT agreements forbid any intentional interference with either party’s satellites.¹²⁴ The New START, like its predecessor, required the parties to exchange missile telemetry—the data gathered during missile flight tests—on a regular basis.¹²⁵ As a transparency measure, encryption of any aspect of this telemetry was prohibited.¹²⁶ Transparency measure operate to build trust between states; assured that other parties are meeting their obligations, states become more amenable to keeping their own.

As noted above, one of the earliest uses of the term irreversibility in an arms control context was in CWC.¹²⁷ Under the Convention, chemicals were to be destroyed by their “essentially irreversibility” conversion into “form[s] unsuitable for production for chemical weapons.”¹²⁸ The 2000 NPT Review Conference, in its Final Document, declared that “the principle of irreversibility [is] to apply to nuclear disarmament, nuclear, and other related arms control and reduction measures.”¹²⁹

¹²¹ See INTERNATIONAL ATOMIC ENERGY AGENCY, <https://www.iaea.org/publications/factsheets/iaea-safeguards-overview> (last visited Dec. 6, 2023) (under heading titled “What kinds of inspections are done?”).

¹²² See *id.* (under heading titled “What verification measures are used?”).

¹²³ See Podvig, *supra* note 120, at 2.

¹²⁴ See NTI, <https://www.nti.org/education-center/treaties-and-regimes/strategic-arms-limitation-talks-salt-i-salt-ii/> (last visited Dec. 7, 2023) (under heading titled “Verification and Compliance”).

¹²⁵ See Podvig, *supra* note 120, at 6.

¹²⁶ See *id.*

¹²⁷ See WORKING GROUP 1, INTERNATIONAL PARTNERSHIP FOR NUCLEAR DISARMAMENT VERIFICATION, *Food-for-Thought Paper: Achieving Irreversibility in Nuclear Disarmament 2* (2018).

¹²⁸ CWC, *supra* note 50, at Part IV(A)(C)12.

¹²⁹ 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2000/28 (Parts I and II), Part I, p. 14, para. 5.

Irreversibility is not—in fact, cannot be—intended literally. Though one cannot unscramble an egg¹³⁰, any country with adequate recourses and technical know-how will always have the raw capacity to rebuild the bomb. Rather, irreversibility goes to the practical impediments of starting (or restarting) a nuclear weapons program.¹³¹ If the legal, political, and physical difficulties of such a program outweigh the projected benefits, a country is less likely to pursue it.¹³² Regulatory measures might, for instance, arrest the flow of certain fissile materials, raising their price; stiff fines might constitute an effective enforcement mechanism because their imposition raises the cost of noncompliance. With effective verification measures in place, other interested parties would have adequate notice to pursue legal or political action against the offending state. It follows from these examples that irreversibility on a spectrum.¹³³ The farther along the spectrum, the more time and resources it would take to rebuild a nuclear program.¹³⁴

With these concepts in mind, what follows is a recommendation for improving the TPNW regime.

First, as some commentators have noted, the TPNW only requires the IAEA Safeguard Agreement already mandated by the NPT.¹³⁵ But the ends of the Treaty would be better served, however, by adopting the IAEA Additional Protocol. Created in response to the agency's troubles with Iraq and the DPRK in the 1990s, the Additional Protocol is meant to patch the various weaknesses of the Model Safeguard Agreement.¹³⁶ Some of its measures include (inter

¹³⁰ This common adage has been proven wrong experimentally. See David Shultz, *Scientists unscramble egg proteins*, SCIENCE (Jan. 23, 2015), <https://www.science.org/content/article/scientists-unscramble-egg-proteins>.

¹³¹ See WORKING GROUP 1, INTERNATIONAL PARTNERSHIP FOR NUCLEAR DISARMAMENT VERIFICATION, *Food-for-Thought Paper: Achieving Irreversibility in Nuclear Disarmament* 4 (2018).

¹³² See *id.*

¹³³ See Rebecca David Gibbons, *Norms versus Security Approaches to Irreversible Nuclear Disarmament*, in IRREVERSIBILITY IN NUCLEAR DISARMAMENT 15, 16 (2023).

¹³⁴ See *id.*

¹³⁵ See TPNW, *supra* note 4, at art. 4.

¹³⁶ See Mark Hibbs, *The Unspectacular Future of the IAEA Additional Protocol*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 26, 2012).

alia) “broader declaration requirements with regard to nuclear-related activities” and “expanded access . . . to verify the completeness and accuracy of the declarations.”¹³⁷ The Additional Protocol thus constitutes a sturdier foundation for a verification regime. The majority of non-NWS party to the NPT have already signed onto the Additional Protocol, so there is already a broad base of support for it.¹³⁸

V. Conclusion

The NPT admonished its party-states to “beat their swords into ploughshares,” to move towards a world where nuclear technology was turned entirely to peaceful end.¹³⁹ Nearly fifty years later, the TPNW aimed to draw the international community further into Isaiah, by asking the wolf “to dwell with the lamb.”¹⁴⁰ Concerned that states’ obligation to work towards a broad policy of nuclear disarmament under the NPT had dwindled into mere aspiration, the majority of the world’s nations convened to draft a new treaty on the matter, partially in the hope that such an instrument would advance the discourse on prohibition, and to notify nuclear-weapons states, particularly the P5, of what may prove to be a burgeoning international consensus on the issue.¹⁴¹ The response of nuclear weapon states, as noted above, has not been enthusiastic.¹⁴² And yet, as of December 1, 2023, 70% of the world’s countries have given their support to the TPNW.¹⁴³ As this is being written, the second meeting of party-states concluded.¹⁴⁴ At the second meeting of party-states to the TPNW, which concluded on December 1, 2023, the party-states reiterated their

¹³⁷ UNITED STATES NUCLEAR REGULATORY COMMISSION, <https://www.nrc.gov/materials/fuel-cycle-fac/intl-safeguards/addtl-protocol-faq.html#q3> (last visited Dec. 3, 2023).

¹³⁸ See IAEA, <https://www.iaea.org/topics/additional-protocol> (last visited Dec. 2, 2023) (“As of 31 March 2023, Additional Protocols are in force with 141 states.”).

¹³⁹ *Isaiah* 2:4.

¹⁴⁰ *Isaiah* 11:6.

¹⁴¹ Joyner, *supra* note 41, at 20.

¹⁴² See *supra* Section III.b.

¹⁴³ NUCLEAR WEAPONS BAN MONITOR, <https://banmonitor.org/tpnw-status> (last visited Dec. 1, 2023).

¹⁴⁴ See United Nations Office for Disarmament Affairs <https://meetings.unoda.org/tpnw/tpnw-msp-2023> (last visited Dec. 3, 2023).

commitment “to the universalization and effective implementation of the Treaty.”¹⁴⁵ It’s unpopularity among certain powerful parties notwithstanding the TPNW is here to stay.

The world is trending towards multipolarity.¹⁴⁶ In such a set-up, states may calculate their interests differently; they may decide, for instance, that nuclear weapons are worth pursuing to secure their influence or protect themselves. If the P5 and their allies continue to demonstrate a lack of concern for disarmament, as I have argued, this may enter in to states’ future calculations of their interest. Disarmament is a pillar of the NPT. It is a part of the ultimate bargain the Treaty represents, and these states may decide other parties haven’t kept up their end of the bargain. In a working paper submitted to the Preparatory Committee for the 2020 NPT Review Conference, the New Agenda Coalition¹⁴⁷ note that “[t]he inclusion of article VI in the Non-Proliferation Treaty was key to persuading States that do not possess nuclear weapons to sign the Treaty” because it created “a reciprocal undertaking by nuclear-weapon States to eliminate their nuclear arsenals.”¹⁴⁸ If nuclear weapon states continue to ignore opportunities to further the cause of disarmament, this may be perceived as a *de facto* abrogation of this undertaking. Many critics of the TPNW argue that the Treaty risks undermining the NPT.¹⁴⁹ But unseriousness with respect to disarmament may also, on a long enough timeline, place the non-proliferation regime in peril.

¹⁴⁵ Second Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, U.N. Doc. TPNW/MSP/2023/CRP.4, Draft Declaration, at p. 5, para. 34.

¹⁴⁶ See Emma Ashford & Evan Cooper, *Yes, the World Is Multipolar*, FOREIGN POLICY, (4:19 AM, Oct. 5, 2023), <https://foreignpolicy.com/2023/10/05/usa-china-multipolar-bipolar-unipolar/>.

¹⁴⁷ The New Agenda Coalition consists of Brazil, Egypt, Ireland, Mexico, New Zealand, and South Africa. NTI, <https://www.nti.org/education-center/treaties-and-regimes/new-agenda-coalition/> (last visited Dec. 6, 2023).

¹⁴⁸ Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: reiterating the urgency of its implementation*, U.N. Doc. NPT/CONF.2020/PC.II/WP.13 (Mar. 15, 2018).

¹⁴⁹ NATO, https://www.nato.int/cps/en/natohq/news_180087.htm (last visited Dec. 6, 2023) (“[The TPNW] risks undermining the global non-proliferation and disarmament architecture, with the NPT at its heart for more than 50 years, and the IAEA Safeguard regime that supports it.”).