

## **An Analysis of the Treaty on the Prohibition of Nuclear Weapons in Light of its Form as a Framework Agreement\***

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## A. Introduction

Nuclear weapons present a unique problem and risk to global safety and security. The destructive capability of nuclear weapons, which extends beyond intended targets, is what sets these weapons apart from all else; they are *sui generis*. These weapons are indiscriminate in both their scale of destruction, which cannot be said to involve proportionate force, and in their residual effects of radioactive fallout, which some scholars have equated to the effect of a poisoned weapon.<sup>1</sup>

The *Treaty on the Prohibition of Nuclear Weapons* (TPNW) was adopted at the United Nations Headquarters on 7 July 2017, with 122 States voting in favour of the final draft, one voting against, and one abstaining.<sup>2</sup> As of July 2019, the Treaty has twenty-three parties and seventy signatories.<sup>3</sup> It is currently not in force as it requires ratification by a minimum of fifty States in order to come into effect.<sup>4</sup> The core prohibitions of the Treaty are set out in its first Article, in which State parties agree to never develop, acquire, use or threaten to use, transfer, or stockpile nuclear weapons. What the Treaty does not do, however, is directly eliminate any nuclear weapons; a challenging task in itself considering that none of the current possessors of nuclear weapons even partook in the negotiation of the Treaty.

State parties to the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT) have obligations under Article VI to undertake negotiations on effective measures leading to disarmament.<sup>5</sup> Against a backdrop of little discernible progress on the implementation of Article VI over the last fifty years, Ireland, on behalf of the New Agenda Coalition, submitted a Working Paper outlining possible pathways to nuclear disarmament in an effort to fulfil the provisions

<sup>1</sup> Elliott L. Meyrowitz, 'The Laws of War and Nuclear Weapons', 9 *Brooklyn Journal of International Law* (1983) 2, 227, 235-236.

<sup>2</sup> United Nations vote to negotiate a legally binding instrument to prohibit nuclear weapons: *Draft treaty on the prohibition of nuclear weapons*, UN Doc A/CONF.229/2017/L.3/Rev.1 (7 July 2017).

<sup>3</sup> United Nations Treaty Collection, 'Status of the Treaty on the Prohibition of Nuclear Weapons, Chapter XXVI Disarmament', available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-9&chapter=26&clang=\\_en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en) (last visited 08 July 2019).

<sup>4</sup> *Treaty on the Prohibition of Nuclear Weapons*, UN Doc A/CONF.229/2017/8, opened for signature 20 September 2017, not yet in force, Art. 19 [TPNW].

<sup>5</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, UN Doc 729 UNTS 161, opened for signature 1 July 1968, entered into force 5 March 1970, Art. VI [NPT].

of Article VI.<sup>6</sup> These pathways were debated in 2016 during the Open-Ended Working Group (OEWG), which was set up for the purpose of providing a forum for discussion regarding advancing nuclear disarmament.

The argument of this paper is that the TPNW has the potential to function radically as a disarmament mechanism. At first glance, the Treaty appears to fit within the second pathway outlined in the Irish Working Paper, effectively functioning as a simple Ban Treaty. However, a careful analysis reveals that it more neatly fits into the third pathway – a framework arrangement. It is this characteristic which makes the TPNW a novel and profound instrument as well as a potential foundational solution to the problem of nuclear weapons.

The core section of the paper is divided into two parts. The first delves into the three main pathways discussed in the Irish Working Paper and analyzes how well each of the proposals can address the problem of achieving nuclear disarmament. As suggested by Brazil in the OEWG debates in 2016, three categories are key in establishing the degree to which each pathway can achieve progress in achieving nuclear disarmament – universality, effectiveness, and political viability.<sup>7</sup> All nuclear disarmament treaties must intend to be universal in light of the humanitarian consequences of their usage. However, a disarmament treaty can be successful with universality as one of its objectives, rather than a precondition. Widespread support for a treaty also lends to its effectiveness, as do mechanisms for verification and enforcement.<sup>8</sup> The political viability of a treaty is key as, without the willing participation of governments, proposals can easily be discarded. The analysis is centred on these categories.

The second core part of the paper analyzes the structure of the TPNW with a focus on Articles 4 and 8. It demonstrates that the TPNW surreptitiously

<sup>6</sup> New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa), 'Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons', Working Paper NPT/CONF.2015/PC.III/WP.18, 2 April 2014 [New Agenda Coalition Working Paper].

<sup>7</sup> Working paper submitted by Brazil 'Effective measures, legal norms and provisions on nuclear weapons: A hybrid approach towards nuclear disarmament' Working Paper A/AC.286/WP.37 (9 May 2016), para. 3.

<sup>8</sup> Some scholars argue that in order to be effective, arms control regimes should have a two-tiered verification system, as states will not rely on good faith, but on evidence that the other party is towing the line, cf. R. Thakur & W. Maley 'The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control', 5 *Global Governance* (1999) 3, 273, 290. Whilst there are some arms control agreements which have achieved success and compliance without exhaustive verification measures, such as the Ottawa Treaty, nuclear weapons are *sui generis* due to their potential humanitarian consequences if used, and would require either immediate verification provisions, or the potential for amending the instrument with such provisions.

functions as a framework agreement and that this attribute has enormous value, both in practice and in shaping norms. The flexibility and adaptability of framework agreements is what makes them the most suitable mechanisms for nuclear disarmament.

## B. Pathways to the Treaty

### I. First Pathway – A Comprehensive Nuclear Weapons Convention

The first option that was suggested in the Irish Working Paper is that of the comprehensive Nuclear Weapons Convention. As the name suggests, this is an exhaustive multilateral instrument which aims to both prohibit and eliminate all nuclear weapons simultaneously. Within the Convention itself would be an all-encompassing legal architecture which would include: general obligations, declarations obligation, phased process of arms elimination, detailed verification process, procedures for domestic implementation, the establishment of an agency to implement the Convention, guidelines regarding fissile material, processes for dispute resolution, clarification of how the Convention would relate to existing international agreements, details as to financing, and the inclusion of an optional protocol regarding energy usage.<sup>9</sup> One of the first comprehensive Conventions in the arms control sphere was jointly proposed by the Soviet Union and the United States in 1961, known as the McCloy-Zorin Agreement, which was followed by more detailed proposals presented separately by both countries.<sup>10</sup> Both of these propositions were extremely aggressive and had very short timelines, with the goals of comprehensive nuclear disarmament and the elimination of all stockpiles. Ultimately, they proved to be politically unattainable. They were too ambitious and were also thwarted by the onset of the Cuban missile crisis and the Cold War.<sup>11</sup> Despite the fact that the agreements were far too quixotic for their time, they have proven to have normative value and, in particular, the

<sup>9</sup> New Agenda Coalition Working Paper, *supra* note 6, 11-12.

<sup>10</sup> J. Dhanapala, 'The Hierarchy of Arms Control and Disarmament Treaties', 19 *Denver Journal of International Law and Policy* (1990) 1, 37, 46. For the US 1962 plan, cf. United States Arms Control and Disarmament Agency, *Blueprint for the Peace Race: Outline of Basic Provisions of a Treaty on General and Complete Disarmament in a Peaceful World*, 1962. For the Soviet 1962 proposal, cf. 'Treaty on General and Complete Disarmament under Strict International Control: Draft submitted by the Union of Soviet Socialist Republics', 56 *American Journal of International Law* (1962) 3, 899, 926.

<sup>11</sup> D. Cortright, 'The Coming of Incrementalism', 52 *Bulletin of Atomic Scientists* (1996) 2, 32, 36.

McCloy-Zorin Agreement laid the foundation for the principles that were to be found in the NPT.<sup>12</sup>

More recently, a comprehensive Convention was proposed by Costa Rica and Malaysia to the United Nations in 1997.<sup>13</sup> The updated version was endorsed by the then Secretary-General of the UN, Ban Ki-moon.<sup>14</sup> More recently, at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons in 2014, Cuba put forth a proposal for another comprehensive Convention to be negotiated pursuant to *General Assembly Resolution 68/32*. Cuba envisaged that such a convention would be adopted no later than 2018.<sup>15</sup> Several countries showed support for a comprehensive Convention during the NPT Review Conference of 2015, and Sweden suggested that it would be the most palatable as by definition it is global in reach.<sup>16</sup>

Initially, a comprehensive Convention appears to provide an exhaustive solution to the problem of nuclear disarmament. It would be an instrument that provides for the prohibition and elimination of nuclear arms. A well drafted convention is detailed, measured, unambiguous and clear. The draft convention tabled by Costa Rica and Malaysia would certainly meet the objectives and principles of the NPT and would also fulfill Article VI. The model convention has detailed verification and monitoring provisions, which provide a sense of transparency and accountability in the instrument. It has been said that an effective monitoring regime is paramount in arms control regimes, as States are more likely to relinquish their weapons if they have assurance that other states

<sup>12</sup> D. S. Jonas, 'General and Complete Disarmament: Not Just for Nuclear Weapons States Anymore', 43 *Georgetown Journal of International Law* (2012) 3, 587, 598.

<sup>13</sup> *Letter dated 31 October 1997 from the Chargé d'Affaires a.i. of the Permanent Mission of Costa Rica to the United Nations addressed to the Secretary-General*, UN Doc A/C.1/52/7, 17 November 1997. Costa Rica and Malaysia submitted an updated version in 2007, *Letter dated 17 December 2007 from the Permanent Representative of Costa Rica and Malaysia to the United Nations addressed to the Secretary-General*, UN Doc A/62/650, 18 January 2008.

<sup>14</sup> Ban K., '*Contagious*' *Doctrine of Deterrence Has Made Non-Proliferation More Difficult, Raised New Risks, Secretary-General Say in Address to East-West Institute*, UN Doc SG/SM/11881-DC/3135, 24 October 2008.

<sup>15</sup> Cuba, *Statement by the Delegation of Cuba in the Third International Conference on Humanitarian Impact of Nuclear Weapons*, 9 December 2014, 2.

<sup>16</sup> Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 'Substantive Recommendations for Incorporation into the Final Document of the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons', Working Paper NPT/CONF.2015/PC.III/WP.17, 1 April 2014, 5; A. Thunborg, *Statement to the Open-Ended Working Group taking forward multilateral disarmament negotiations: Panel V*, 11 May 2016, 4.

will also “play by the rules” lest they be hindered by surprise inspections and sanctions.<sup>17</sup> In this sense, such a model nuclear weapons convention could account for issues of transparency and indeterminacy.<sup>18</sup> A comprehensive Convention could also result in the stigmatization and delegitimization of nuclear weapons, which revolves around the collective ethical unacceptability of the potential usage of nuclear weapons, in light of their devastating humanitarian consequences.<sup>19</sup> However, the negotiation of a comprehensive Convention is reliant on the nuclear-armed States to participate and lead the process, something which they have not wanted to engage in.<sup>20</sup> Therefore, any stigmatization effect of nuclear weapons would be muted without their participation at the outset.

A Nuclear Weapons Convention requires the cooperation of most if not all Nuclear Weapon States (NWS), and they should lead the process or else it will prove futile. This is one characteristic that differentiates a comprehensive Convention from a Nuclear Ban Treaty.<sup>21</sup> It also presents a major stumbling block, as NWS have refused thus far to participate in any such negotiations. Such an instrument may therefore not be politically feasible to achieve. Also, a comprehensive Convention requires all parties to agree concurrently to all of the provisions in the instrument.<sup>22</sup> This is challenging in a political environment where the NWS all rely on a national security policy of deterrence, and no state is willing to be the first one to pivot on this issue.<sup>23</sup> Furthermore, Non-

<sup>17</sup> J. M. Beard, ‘The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention’, 101 *American Journal of International Law* (2007) 2, 271, 272.

<sup>18</sup> Note that the proposal tabled by Costa Rica and Malaysia is only a model of a comprehensive pathway; the actual instrument would not necessarily have to be identical.

<sup>19</sup> For a discussion on stigmatization, cf. N. Ritchie, ‘Nuclear Disarmament and a Nuclear Weapons Ban Treaty’, in P. Meyer & N. Ritchie, *The NPT and the Prohibition Negotiation: Scope for Bridge-building* (2017), 11.

<sup>20</sup> Article 36 and the Women’s International League for Peace and Freedom, ‘A Treaty Banning Nuclear Weapons’, Working Paper A/AC.286/NGO/3, 24 February 2016, para. 2.

<sup>21</sup> R. Acheson, T. Nash & R. Moyes, *A Treaty Banning Nuclear Weapons: Developing a Legal Framework for the Prohibition and Elimination of Nuclear Weapons* (2014), 15.

<sup>22</sup> J. Borrie *et al.*, *A prohibition on nuclear weapons: A guide to the issues* (2016), 21 [Borrie *et al.*, A Prohibition on Nuclear Weapons].

<sup>23</sup> This is perfectly exemplified in Donald Trump’s State of the Union Address of 2018 where he said that, “we must modernize and rebuild our nuclear arsenal, [...] making it so strong and powerful that it will deter any acts of aggression”, cf. D. Trump, ‘President Donald J. Trump’s State of the Union Address’ (30 January 2018), available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> (last visited 14 June 2019).

Nuclear Weapon States (NWS) who are dependent allies to NNWS and rely on extended deterrence would be reluctant to accept a comprehensive Convention.<sup>24</sup> A comprehensive Convention would likely have a verification and enforcement mechanism, and would thus be effective as a disarmament mechanism. However, for the aforementioned reasons, this will not happen in the current political climate. Although such a Convention would theoretically provide an ideal solution to the problem of nuclear disarmament, in reality it is utopian and idealistic.

## II. Second Pathway – A Nuclear Weapons Ban Treaty

The second suggestion posited in the Irish Working Paper is that of a Nuclear Weapons Ban Treaty, or a simple Ban Treaty. Such a treaty would briefly outline general obligations on State parties as well as setting out prohibitions relating to nuclear weapons. These could mimic those outlined in the Model Comprehensive Convention tabled by Costa Rica and Malaysia. Where a Ban Treaty diverges from a Convention is in its distinct lack of legal architecture prescribing, for example, verification and enforcement measures; it would also not include any provisions relating to existing nuclear stockpiles and their elimination.<sup>25</sup> At its simplest, a Ban Treaty would only seek to prohibit nuclear weapons. Having said that, it is useful to note that a Ban Treaty could potentially have a wider scope of prohibition, bringing it more closely to that of a comprehensive Convention.<sup>26</sup> The salient difference between a standalone Ban Treaty and that of a comprehensive Convention is that the former advocates prohibition of weapons before elimination, entailing a full separation between prohibition and elimination, and the latter envisages a simultaneous occurrence of both.<sup>27</sup> Furthermore, supporters of a Ban Treaty suggest it would not need the support of NWS or require universality to be effective, unlike a comprehensive Convention.<sup>28</sup> This is because its linchpin is the prohibition of

<sup>24</sup> J. Quinn, “First Committee – Nuclear Weapons” (UNGA 72, New York, USA, 12 October 2017), 4.

<sup>25</sup> New Agenda Coalition Working Paper, *supra* note 6, 14.

<sup>26</sup> T. Dunworth, ‘Pursuing “effective measures” relating to nuclear disarmament: Ways of making a legal obligation a reality’ 97 *International Review of the Red Cross* (2015) 899, 601, 610.

<sup>27</sup> Borrie *et al.*, *A prohibition on nuclear weapons*, *supra* note 22, 19.

<sup>28</sup> Chair of the Open-Ended Working Group Taking Forward Multilateral Nuclear Disarmament Negotiations, *Synthesis Paper*, UN Doc A/AC.286/2, 20 April 2016, 4, para. 22.

nuclear weapons and not the elimination of existing arsenals. A Ban Treaty is supported by civil society actors such as Article 36, an organization which works to prevent the unacceptable harm caused by certain weapons, including nuclear weapons. Article 36 argues that the prohibition of weapons often precedes their elimination, citing the precedent of the 1925 Geneva Protocol, a Ban Treaty which prohibited chemical weapons. The Protocol laid the foundation for the Chemical Weapons Convention in 1993.<sup>29</sup>

It has been suggested that a normative prohibition on the first use of nuclear weapons has developed since 1945 and is merely the “tip of the iceberg”; even the mere act of harbouring nuclear weapons as a deterrent factor may one day be considered taboo and illegitimate.<sup>30</sup> A Ban Treaty could act as a vital stepping stone in this process. Even if NWS do not join such a Treaty, it would nonetheless have an impact on their behaviour by acting as a direct challenge to the notion that it is justifiable to possess, threaten to use, or use nuclear weapons.<sup>31</sup> This would bolster the inception of a new norm against both the use and possession of nuclear weapons, and would provide much needed clarification of the International Court of Justice (ICJ) Advisory Opinion in 1996, which held that “the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”<sup>32</sup> To highlight the importance normativity can have on changing State behaviour, one need only to point to the Ottawa Treaty, which has achieved widespread cooperative compliance against the use of landmines, despite lacking an exhaustive verification mechanism.<sup>33</sup> It has achieved this largely through its normative processes, such as stigmatization on the part of civil society and other

<sup>29</sup> Article 36 (ed.), ‘Banning nuclear weapons: Responses to ten criticisms’ (December 2013), 4.

<sup>30</sup> N. Tannenwald, ‘The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use’, 53 *International Organization* (1999) 3, 433, 464.

<sup>31</sup> B. Fihn, ‘The Logic of Banning Nuclear Weapons’, 59 *Survival* (2017) 1, 43, 45.

<sup>32</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Report of the ICJ 1995/1996, 266; for further reading about norms and nuclear weapons, cf. W. Walker, ‘The Absence of a Taboo on the Possession of Nuclear Weapons’, 36 *Review of International Studies* (2010), 865.

<sup>33</sup> A. Bower, ‘Norms Without the Great Powers: International Law, Nested Social Structures, and the Ban on Antipersonnel Mines’, 17 *International Studies Review* (2015) 3, 347, 357-358; K. Rutherford, ‘The Hague and Ottawa Conventions: A Model for Future Weapon Ban Regimes?’, 6 *The Nonproliferation Review* (1999) 3, 36.



states.<sup>34</sup> Canada's former Ambassador for Disarmament, Paul Meyer, has also commented that a Ban Treaty could act as a precursor to a future comprehensive agreement and that the two would be complementary.<sup>35</sup>

Universality of a Ban Treaty would be an objective of the instrument, and not a precondition. This in itself is not a deal breaker, as the NPT has demonstrated that it can achieve support despite not having universality as a precondition at its inception.<sup>36</sup> Furthermore, because of a lack of technical detail that would need to be negotiated in a Ban Treaty initially, NWS would not need to be involved in the negotiation or adoption of it. This is indeed a positive. Politically, a Ban Treaty would be much more feasible as it would propose prohibition before elimination. A simple prohibition on nuclear weapons would set forth a strong political goal towards disarmament without the inclusion of any elimination mechanisms. This means that NWS could be more inclined in the future, under a different political climate, to agree to an instrument which would stigmatize nuclear weapons without having to commit to any immediate relinquishment.<sup>37</sup> However, the crux of the issue lies in that a Ban Treaty would not be effective as a disarmament mechanism. Arguably, a simple Ban Treaty with no further provisions or commitment towards the elimination of nuclear weapons would be no better, and in fact would be less effective, than Article VI of the NPT. It would continue to uphold the tacit bargain at the core of the NPT, which maintains that NWS who ratify it have the privilege of continuing to possess nuclear weapons.<sup>38</sup>

Scholars have suggested that norm development is a three-stage process culminating in internalization whereby conformance with the norm is axiomatic.<sup>39</sup> However, it can be argued that norm development is not a simple teleological process which results in norm internalization, but is instead dynamic and complex. Norms that have been previously internalized may degenerate or even erode. Norm contestedness, therefore, is central to the

<sup>34</sup> cf., for example, R. A. Matthew, 'Human Security and the Mine Ban Movement I: Introduction', in R. A. Matthew, B. McDonald & K. R. Rutherford (eds), *Landmines and Human Security: International Politics and War's Hidden Legacy* (2004), 8.

<sup>35</sup> P. Meyer, 'From Vienna to New York: The Bumpy Road to Nuclear Disarmament' (29 January 2015) available at <https://www.opencanada.org/features/from-vienna-to-new-york/> (last visited 14 June 2019).

<sup>36</sup> Working paper submitted by Brazil, *supra* note 7, para. 5.

<sup>37</sup> After the adoption of the TPNW, no nuclear armed States have signed the Treaty.

<sup>38</sup> I. Bellany, *Curbing the Spread of Nuclear Weapons* (2006), 140-141.

<sup>39</sup> M. Finnemore & K. Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998) 4, 887, 895.

evolution of norms.<sup>40</sup> A Ban Treaty could have a powerful stigmatizing and delegitimizing effect, and it could serve to strengthen the norm against nuclear weapons, as institutionalizing norms in treaty law legitimizes the deleterious humanitarian consequences of nuclear weapon use.<sup>41</sup> However, it does not necessarily follow that the other pathways would be without normative effect. If Paul Meyer is correct in his assertion that a Ban Treaty would successfully act as a precursor to a comprehensive Convention, then this would reduce a Ban Treaty to a mere building block in the progressive approach, which has not seen any forward movement in the last fifty years. Lastly, the Irish Working Paper notes that, whatever form a Ban Treaty might take, it would need to make some sort of contingency for the elaboration of disarmament obligations such as verification mechanisms, timelines, etc. These provisions could either be included immediately in the Ban Treaty or could be negotiated subsequently.<sup>42</sup> The issue here is that this would then start to overlap with the characteristics of a framework treaty, which will be discussed below.

### III. Third Pathway – A Framework Arrangement

The third option suggested in the Irish Working Paper is that of a framework agreement. A framework arrangement is a treaty with a chapeau agreement which outlines key obligations and provisions that can facilitate further negotiations on issues that cannot be agreed upon at the outset. These issues could include verification and enforcement mechanisms. It can also be characterized as an umbrella treaty and has been a relatively new phenomenon in international law. It is mostly found in international environmental law, but it is not restricted to this area.<sup>43</sup> A key feature of a framework arrangement is that, although the head agreement contains only general obligations and prohibitions, the subsequent negotiation mechanisms allow for the inclusion of more contentious issues such as elimination processes. There is no set model for what a framework convention must look like, though usually these subsequent

<sup>40</sup> C. Wunderlich, 'Theoretical Approaches in Norm Dynamics', in H. Müller & C. Wunderlich (eds), *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice* (2013), 28.

<sup>41</sup> A. Chayes & D. Shelton, 'Multilateral Arms Control', in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System* (2000), 527.

<sup>42</sup> New Agenda Coalition Working Paper, *supra* note 6, 15.

<sup>43</sup> Cf. for example *WHO Framework Convention on Tobacco Control*, 16 June 2003, 2302 UNTS 166.

agreements take the form of protocols.<sup>44</sup> In this way, a framework agreement maintains a legal architectural link between prohibition and elimination.<sup>45</sup> This is in contrast to a comprehensive Convention where the prohibition and elimination of nuclear weapons is agreed upon simultaneously and, unlike in a Ban Treaty, where prohibition precedes elimination.

Another key characteristic of framework agreements is their structural flexibility. Each framework agreement can be set up between parties and adapted to suit individual needs and goals. They can range from the aforementioned model of a procedural chapeau agreement with protocols detailing essential issues to more substantive head instruments outlining certain but not all substantive arrangements and leaving the door open for further negotiation or discussion on contentious matters.<sup>46</sup> Framework agreements will also establish a plenary body for meetings and negotiations of State parties, which are the fora for establishing subsequent agreements such as protocols.<sup>47</sup> These subsequent agreements have the same legal effect as the head treaty and both fall under the rules in the *Vienna Convention on the Law of Treaties*.<sup>48</sup>

<sup>44</sup> N. Matz-Lück, 'Framework Agreements', *Max Planck Encyclopedia of Public International Law* (2011), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e703?rskey=VXw5nz&result=1&prd=EPIL> (last visited 14 June 2019).

<sup>45</sup> Borrie *et al.*, *A Prohibition on Nuclear Weapons*, *supra* note 22, 21.

<sup>46</sup> N. Matz-Lück, 'Framework Conventions as a Regulatory Tool', 1 *Goettingen Journal International Law* (2009) 3, 439, 441. An example of the first model is the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 10 April 1981, 1342 UNTS 137. An example of the second model is the *United Nations Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 107 which contains more substantive issues in its chapeau agreement.

<sup>47</sup> J. Brunnée, 'Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements', in R. Wolfrum & V. Röben (eds) *Developments of International Law in Treaty Making* (2005), 101, 105.

<sup>48</sup> Matz-Lück, 'Framework Agreements', *supra* note 44; *Vienna Convention on the Law of Treaties* (VCLT) 23 May 1969, Art. 31 (3) (a), 1155 UNTS 331. Note that there is some debate as to whether memoranda of understanding (MOUs) that can follow umbrella treaties have the same legal force as other subsequent agreements. The ICJ seems to not distinguish between the two, however States will sometimes conclude agreements where they purport to hold no legal obligations. Cf. J. Klabbers, *International Law* (2017), 46-48; G. Nolte, 'Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings', in G. Nolte (ed), *Treaties and subsequent practice* (2013), 25-26.

An elusive element of framework agreements is that it may not always be clear as to whether an instrument can be characterized as being a framework agreement. Some drafters include the word “framework” in the title of a treaty, such as in the *United Nations Framework Convention on Climate Change* (UNFCCC). However, this is not a requirement to be constitutive of a framework treaty. The nomenclature of a legal instrument is largely irrelevant. What is fundamental, though, is how the instrument functions rather than what it is called.<sup>49</sup> The *Convention on Biological Diversity* is an example of a treaty that is considered to be a framework agreement despite not explicitly referring to this fact in the text.<sup>50</sup> Rather, what constitutes a framework treaty is an arrangement where parties agree to provisions allowing for the further negotiation of subsequent agreements, as a sort of gestalt. In essence, framework agreements are dynamic and evolving, effectively serving as living instruments.

Despite this fluidity, most framework conventions will have similar fundamental elements. First, usually included in an instrument’s preamble are the objectives and principles which help guide consensus among States. Second, there are general obligations or fundamental principles included in the chapeau agreement. Third, there are provisions for the creation of institutions or plenary bodies to provide ongoing negotiation and governance, such as conferences or meetings of State parties. Fourth, implementation mechanisms are occasionally included in framework treaties, which may include provisions for dispute resolution and national reporting. These are usually not exhaustive but included in later protocols. Fifth, framework agreements must include provisions for the future amendment of the treaty through negotiation and the adoption of amendments or protocols. Lastly, final clauses provide for details regarding ratification and entry into force.<sup>51</sup> These elements are not exhaustive, and framework arrangements can include other components and provisions. Framework protocol agreements have several advantages over the other models discussed. Consensus of all parties is not needed on every substantive or technical issue.<sup>52</sup> It is much simpler to negotiate an agreement on an overarching

<sup>49</sup> D. Bodansky, J. Brunnée & L. Rajamani, *International Climate Change Law* (2017), 72-73.

<sup>50</sup> Matz-Lück, ‘Framework Agreements’, *supra* note 44; *Convention on Biological Diversity*, 5 June 1992, Art 28 (1), 1760 UNTS 79 which allows for the formulation and adoption of protocols. Another example is the *Convention for the Prevention of Pollution from Ships* (MARPOL), 2 November 1973, 1340 UNTS 184.

<sup>51</sup> D. Bodansky, *Framework Convention on Tobacco Control*, WHO/NCD/TFI/99.1 (1999), 19-31.

<sup>52</sup> Bodansky, Brunnée & Rajamani, *supra* note 49, 57.

issue and decide on thornier issues at a later stage. Also, it has been posited that framework agreements create “positive feedback loops” whereby States may feel normative pressure to agree upon subsequent arrangements which they would not have had they been tabled simultaneously in one instrument.<sup>53</sup> Flexibility is therefore a key characteristic of framework agreements and lends to their overarching aim, which is to encourage State participation with the accession of a modest agreement, and then over time to incrementally broaden obligations and commitments.

Despite these constructive and pragmatic features, framework arrangements can have their drawbacks. For example, constitutional problems can arise. As per Article 40 of the Vienna Convention, amendments enter into force only for new parties to the treaty after the entry into force of the amending agreement. Although every State party is entitled to be a party to the amending agreement, this does not occur automatically.<sup>54</sup> The inevitable result is that a treaty can be amended for some States but not for others. As such, an uneven overlap of both new and old obligations between sets of parties can occur, bringing with it a lack of uniformity. This can be problematic particularly if amendments are passed regarding core prohibitions of a treaty. One solution to this issue comes from inserting a clause in the treaty which stipulates that the treaty will be amended for all State parties automatically if the amendment is adopted and ratified by a majority.<sup>55</sup> Although this solution does solve the issues of asymmetry with regard to obligations, politically this can be an issue as parties to a treaty may find themselves bound to amendments to which they have not agreed. The TPNW does not contain this provision and amendments shall enter into force only for those State parties which accept the amendment by depositing an instrument of ratification.<sup>56</sup>

A framework agreement model for a new treaty prohibiting nuclear weapons was discussed at the OEWG debates of 2016 and was advanced by some States and civil society.<sup>57</sup>

<sup>53</sup> D. Bodansky, *The Art and Craft of International Environmental Law* (2010), 186-187.

<sup>54</sup> VCLT, *supra* note 48, Art 40.

<sup>55</sup> A. E. Boyle & C. M. Chinkin, *The Making of International Law* (2007), 243-244.

<sup>56</sup> TPNW, *supra* note 4, Art 10. Prior to the adoption of the Treaty, Liechtenstein noted that the formulation and wording of the article regarding amendments could lead to differing regimes, cf. N.N., ‘News in brief’, 2 *Nuclear Ban Daily* (2017) 5, 5, 9.

<sup>57</sup> Middle Powers Initiative, ‘Options for a Framework Agreement’, Working Paper A/AC.286/NGO/20 (4 May 2016); Article 36 and the Women’s International League for Peace and Freedom, ‘A Treaty Banning Nuclear Weapons’, Working Paper A/AC.286/NGO/3, *supra* note 20.

Politically speaking, framework arrangements make sense when there is a lack of overall political agreement on technical details and substantive measures on an issue, but where there is overarching broad agreement. They would provide the necessary flexibility for future negotiation on the gradual path to nuclear disarmament, while providing a forum for discussion in the form of meetings or conferences of State parties.

However, politically framework arrangements can potentially be problematic. As these treaties only begin with very broad obligations, they can often lack clear political end goals and have inadequate or indeterminate time frames. The nature of a framework treaty can be a boon or a bane. The very ambiguous nature of a framework treaty can be seen as a great strength, encouraging incipient negotiation of a politically challenging issue. This characteristic can also lead to either the stalling of the entire negotiating process or lead to treaties with structural deficiencies containing indeterminate language which contribute to their ineffectiveness.<sup>58</sup> It is evident that political will on the part of States will always be a necessary element in the success of a framework arrangement. It is also clear from the outset that it would be politically less risky for States to agree to a framework agreement over a comprehensive Convention. Therefore, universality is likely to be highest through the framework pathway.

A framework arrangement also has the potential to be effective, though the extent of this effectiveness depends upon the political will of parties to negotiate subsequent protocols or implementing agreements. Balancing the competing issues, a framework arrangement could serve as an effective model for a new treaty prohibiting nuclear weapons, attracting support and participation, initially obviating discussions around contentious issues; it could potentially prove to be a compelling disarmament mechanism in the long term.

### C. Structure and Characteristics of the Treaty

At first glance, it is not immediately obvious what pathway the drafters have chosen. The only clear indication that the Treaty is likely not a comprehensive Convention is its relatively short length of only ten pages, which suggests it is unlikely to be exhaustive. Overall, the TPNW contains objectives and principles,

<sup>58</sup> Brazil, 'Consolidated Answers to the Guiding Questions Submitted by Panel I on Substantively Addressing Concrete Effective Legal Measures, Legal Provisions and Norms That Will Need to be Concluded to Attain and Maintain a World Without Nuclear Weapons', Working paper A/AC.286/WP.10, 24 February 2016, 3; Cf. J. M. Beard's paper where he discusses the problems of indeterminacy in the Biological Weapons Convention, a framework arrangement – Beard, *supra* note 17, 272, 280-281.

general obligations, a provision for the creation of a meeting of State parties, and non-exhaustive implementation. It is lacking in detail, for example, with respect to fissile materials. On the other hand, its verification mechanisms, although not as exhaustive as in the *Chemical Weapons Convention*, are more substantial than what was envisaged in the earlier drafts. Compare, for example, Article 4(1) in the June draft as against the final Treaty text.<sup>59</sup>

Ultimately, there are two key elements which cement the Treaty as a framework agreement and not any other pathway. The first is Article 8, which provides for additional issues to be negotiated through meetings of State parties in the form of protocols, in order to fulfil the effective measures needed to achieve nuclear disarmament as per Article VI NPT.<sup>60</sup> The second is Article 4, which provides a time-bound plan for both the elimination and verification of a State party's nuclear weapons program.<sup>61</sup> Both of these provisions will be examined in turn.

## I. Article 8 – Meeting of States Parties

Prior to the adoption of the final text, the provisions in Article 8 were initially included in Article 5 as “Additional Measures” in both the May and June drafts, which metamorphosed into Article 8 in the final text.<sup>62</sup> Article 5 in both the May and June drafts allows for the creation of a plenary body in the form of a Meeting of State Parties that allows for the negotiation of further measures for nuclear disarmament. These measures include not only the implementation of the Treaty but also measures for the elimination of nuclear

<sup>59</sup> Article 4(1) in the final text provides for verification of the elimination of nuclear weapons of nuclear possessor States who adopt the treaty after eliminating their nuclear arms. In the draft text there was no substantive verification, cf. *Draft Treaty on the Prohibition of Nuclear Weapons*, 27 June 2017, Art. 4(1), A/CONF.229/2017/CRP.1/Rev.1; TPNW, *supra* note 4, Art. 4(1). Cf. R. Acheson, ‘One Week to the Nuclear Ban’, 2 *Nuclear Ban Daily* (2017) 11, 1, 3; R. Acheson, ‘We’ve Got a Treaty Banning Nuclear Weapons’, 2 *Nuclear Ban Daily* (2017) 12, 1, 2.

<sup>60</sup> TPNW, *supra* note 4, Art 8. This one provision is akin to Article II(2) of the very short Polaris Sales Agreement which authorised the entry into “such technical arrangements, consistent with this Agreement, as may be necessary”, *Polaris Sales Agreement*, 6 April 1963, Art II(2), 479 UNTS 49.

<sup>61</sup> TPNW, *supra* note 4, Art 4.

<sup>62</sup> TPNW, *supra* note 4, Art 8.

weapons and the creation of additional protocols to fulfil the objectives and principles of the Treaty.<sup>63</sup>

Some States, such as the Netherlands, were concerned that the creation of Meetings of State Parties in Article 5 would circumvent the established process of negotiation in the Conference on Disarmament and so proposed that these should be removed. New Zealand clarified that, although this was not the intent of the article, it would provide for an additional forum for the negotiation and adoption of protocols which could include “legally-binding negative nuclear security assurances for non-nuclear weapon States” and which would exist outside of the scope of the Conference of Disarmament.<sup>64</sup> As a result, a framework agreement took shape which provided an open door for future negotiations on substantive issues that would not be included in the main Treaty but could be discussed at these meetings. The Treaty was formulated so as to be adaptable in the future through the formation of protocols. Provisions for the creation of plenary bodies to provide ongoing negotiation of a treaty, as well as provisions for its future amendment, are fundamental characteristics of both framework agreements and of comprehensive Conventions such as the *Chemical Weapons Convention*.<sup>65</sup>

## II. Article 4 – Towards the Elimination of Nuclear Weapons

The final text of the Treaty requires State parties, who after 7 July 2017 eliminated their nuclear weapons program, to cooperate with international authorities for the purposes of verifying this elimination. In the previous May draft, the Treaty did not permit either nuclear possessor States or States who participated in nuclear weapon alliances from joining the Treaty. Article 4 outlined a “destroy and join” option, whereby States would first need to eliminate their nuclear weapons before adopting the Treaty. During the 2017 Conference, some States advocated for the addition of a “join and destroy” option which would

<sup>63</sup> *Draft Treaty on the Prohibition of Nuclear Weapons*, 22 May 2017, Art 5, A/CONF.229/2017/CRP.1; *Draft Treaty on the Prohibition of Nuclear Weapons*, 15 June 2017, *supra* note 59, Art 5.

<sup>64</sup> A. Sanders-Zakre, ‘Banning the Bomb – A Blog of the Nuclear Weapons Prohibition Talks’ (2017), available at [www.armscontrol.org/print/8518](http://www.armscontrol.org/print/8518) (last visited 09 July 2019).

<sup>65</sup> *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, 13 January 1993, 1974 UNTS 45. Note that Article 10 of the TPNW is the provision which directly provides for the amendment of the Treaty. However, this in itself does not necessarily point either way to a particular pathway, as most treaties have provisions for amendments.



allow States possessing nuclear weapons to join the Treaty. Ireland suggested that nuclear possessor States, who could not submit a declaration that they had not possessed, manufactured, or acquired nuclear weapons as per Article 2, could still join the Treaty. Conditions for their accession would be negotiated at future Meetings of State Parties.<sup>66</sup> Malaysia agreed with the general ethos that the Treaty should be dynamic and adaptable, capable of incorporating protocols in the future without the negotiation of every minutiae.<sup>67</sup> As such, in the final text, both “join and destroy” and “destroy and join” options were included in Article 4.

Ireland’s proposal to allow the details of a nuclear possessor State’s accession to be discussed at a later date was not incorporated in the final text, which outlines that such State parties must remove all nuclear weapons from operational status within 60 days of entry into force of the Treaty for that State party and must submit a time-bound plan for the destruction of its weapons. This plan is to be submitted to other State parties and negotiated with a competent international authority, which is then to submit the plan to a Meeting of State Parties for its acceptance.<sup>68</sup> This is significant as it illustrates that the Treaty is not a simple Ban Treaty, since it provides much more substantial detail regarding the elimination and verification of weapons than would normally be expected of a Ban Treaty. Recalling that a Ban Treaty advocates for the prohibition of weapons before elimination and a comprehensive Convention envisages both to occur simultaneously, it is evident that the TPNW does not fit neatly into either category. Article 4 provides for a time-bound plan for both the elimination and verification of a State party’s nuclear weapons program, but the actual details are left for negotiation. The final version of Article 4 is much more detailed than in the draft versions, and points away from the Treaty being just a simple Ban Treaty.<sup>69</sup>

Articles 4 and 8 are foundational to the TPNW. In fact, Articles 4 and 8 were initially negotiated as part of a package that also included Articles 2

<sup>66</sup> R. Acheson, ‘Pathways to Elimination’, 2 *Nuclear Ban Daily* (2017) 4, 1, 2.

<sup>67</sup> N.N., ‘News in brief’, 2 *Nuclear Ban Daily* (2017) 4, 3, 6.

<sup>68</sup> TPNW, *supra* note 4, Art 4(2).

<sup>69</sup> There are diverging opinions regarding the verification measures in Article 4. For example, regarding the final text of Article 4, the Philippines warned of creating something overly detailed and complicated, lest a “Frankenstein” is produced that will have to be dealt with in the future, cf. R. Acheson, ‘We’ve Got a Treaty Banning Nuclear Weapons’, *supra* note 59, 2. Note the criticism of the structure of Article 4 in N. Highsmith & M. Stewart, ‘The Nuclear Ban Treaty: A Legal Analysis’, 60 *Global Politics and Strategy* (2018) 1, 129, 132-135.

and 3, regarding declarations and safeguards respectively.<sup>70</sup> The provisions of Article 5 were removed in the final text as the drafters felt they could adequately incorporate these into Article 9 of the June draft (Article 8 of the final text).<sup>71</sup> Their inclusion shifts the Treaty away from being a Ban Treaty and towards a framework agreement.

This characteristic of the TPNW as a framework arrangement is valuable and has the potential to provide a solution to the problem of nuclear weapons specifically through its flexible intrinsic evolutionary mechanism.

## D. Conclusion

The TPNW grew out of the frustrations of the ongoing failure on the part of States to pursue effective measures relating to disarmament as per Article VI NPT, as well as the political standstill and the inadequacies of the NPT conferences to meet their action plans and goals in the 21st century.

Upon close investigation, it is apparent that the TPNW is a framework arrangement, comprised of a chapeau agreement outlining general obligations, followed by provisions which allow for the further negotiation on matters through a Meeting of State Parties. The TPNW has a flexible and loose structure, which allows for any elimination and disarmament plan, likely to be complicated and tailored to the specific needs of each State, to be left to be worked out in future negotiations. Despite the assertion by some States that this renders the Treaty inefficient and imprecise, its structure is actually its greatest strength.<sup>72</sup> It enhances the potential for universality of the treaty, makes it politically viable, and therefore the most effective model to attain a world free of nuclear weapons. A simple Ban Treaty would be restricted and would not easily allow for practical measures of disarmament. A comprehensive Convention, although exhaustive, would be politically unfeasible. It is therefore not a toothless tiger as suggested by its critics but has the potential to have a strong normative effect, stigmatizing and delegitimizing nuclear weapons, with an eye to the future of nuclear disarmament. The flexibility and adaptability of framework agreements is what makes the model most suitable as a mechanism for nuclear disarmament. The TPNW has the potential to have a positive practical effect on the state of nuclear arms control and disarmament.

<sup>70</sup> N.N., 'News in brief', *supra* note 66, 6.

<sup>71</sup> N.N., 'News in brief', 2 *Nuclear Ban Daily* (2017) 11, 6.

<sup>72</sup> Cf. for example R. A Wood, 'State Thematic Discussion on Nuclear Weapons', UNGA 72, 12 October 2017, 1.