

# Total Elimination of Nuclear Weapons Goal and the TPNW:

Possible Impact that the TPNW Can Have in Relation to the NPT

INOUE, Naoko

(Junior Student Yoon Seminar)

- I Introduction
- II Movement to legislate nuclear power and the adoption of the NPT
- III Understanding of nuclear weapons for military purpose now
- IV Movement to create the TPNW
- V Treaty on the Prohibition of Nuclear Weapons
- VI Theoretical impact of a treaty based on its wording
- VII Difficulties when making the treaty in force
- VIII How the TPNW can impact the use of nuclear weapons by states that already possess them
- IX Conclusion

## I Introduction

Because of the increasing development of nuclear weapons in the international society, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was adopted in 1963.<sup>1)</sup> It codified three important elements: prevention of nuclear weapons proliferation, peaceful uses of nuclear energy, and nuclear weapons disarmament, with the ultimate goal of the elimination of nuclear weapons. However, even after the adoption of the NPT, the disarmament of nuclear weapons was stalled. With this fear, approaches from humanitarian perspectives were introduced, and the treaty going beyond proliferation and prohibiting the use of nuclear weapon – the Treaty

on the Prohibition of Nuclear Weapons (TPNW)– was concluded.<sup>2)</sup>

Currently, the TPNW is not yet in force, requiring fifty individual ratifications from states to be enacted. Not only this, nuclear weapons are not prohibited in a comprehensive and universal manner. Having this situation, it is questionable how the TPNW can influence the current landscape of nuclear weapons.

This paper first investigates the status quo of the international agreement regarding nuclear weapons by looking into the content of the NPT. Then, it goes on to examine the legality of nuclear weapons, which eventually leads to the creation of the TPNW. By exploring its content, three questions will be answered: what impact the TPNW will have towards the elimination goal, what the difficulties of its enforcement would be, and how it would affect the use of nuclear weapons by states that already possess them. Exploring the challenging environment where certain states are reluctant to agree with the TPNW and where there is a lack of concrete enforcement measures, this paper finds it difficult to make the TPNW provisions be actually implemented. In the end, after careful consideration of the reactions from different countries toward the treaty, the paper concludes that the TPNW reaffirms the ultimate goal of nuclear weapons elimination to the international society despite the limited impact it has on states to change their conducts in practice.

## II Movement to legislate nuclear power and the adoption of the NPT

In 1945, the very first and only example of nuclear bomb attack was conducted in Hiroshima and Nagasaki, Japan, causing more than 230,000 fatalities,<sup>3)</sup> most of whom were civilians.<sup>4)</sup> However, even after these horrible incidents, nuclear development kept advancing, including those for military purpose, backed up by the Cold War confrontation. The change in this attitude was triggered by the Cuban Missile Crisis, when the tension escalated to the brink of a full scale nuclear war.<sup>5)</sup> Agreeing that having more nuclear-weapon states would endanger the international security and multiply the risks of unauthorized use of nuclear weapons or conflict, the confrontation with nuclear power relaxed.

In December 1953, at the eighth session of the United Nations General Assembly (UNGA), the US President Dwight D. Eisenhower presented his “Atoms

for Peace” proposal, stating the need for an international organization which would disseminate peaceful nuclear technology and guard against the development of atomic materials for military purposes.<sup>6)</sup> In response to this proposal, the International Atomic Energy Agency (IAEA) was established in 1957.<sup>7)</sup> The IAEA was charged with the dual responsibility: (1) promotion of atomic energy by encouraging research and its development for peaceful uses, and (2) control of nuclear technology by establishing and administering safeguards designed to ensure the use of those special fissionable materials.<sup>8)</sup>

With the IAEA established, not only to prevent the spread of nuclear weapons and to promote cooperation in the peaceful uses of nuclear energy, but also to further achieve the goal of nuclear disarmament, the NPT was passed by the UNGA in 1963. It was opened for signature in July 1968, and entered into force in March 1970.

Its states-parties are classified in two categories: nuclear-weapon states (NWS) and non-nuclear-weapon states (NNWS). The NWS, defined as those states which have built and tested a nuclear explosive device before 1 January 1967 – the United States, Russia, the United Kingdom, France, and China (Article 9), agreed to share the benefits of peaceful nuclear technology and to pursue nuclear disarmament aimed at the ultimate elimination of their nuclear arsenals, while the others (NNWS) agree never to acquire nuclear weapons in exchange.<sup>9)</sup>

The NPT has three pillars in its provisions: prevention of nuclear proliferation, peaceful uses of nuclear energy and nuclear disarmament. First of all, for the prevention of nuclear proliferation, Article 1 demands the NWS not to transfer nuclear weapons or other nuclear explosive devices to other states. At the same time, the NNWS parties to the NPT agree not to receive, manufacture or acquire nuclear weapons, or to seek or receive any assistance in the manufacture of nuclear weapons (Article 2). Second, Article 4 recognizes the “inalienable right” of sovereign states to research, develop, and use nuclear energy for non-weapons purposes, while restricting this right for the NPT parties to be exercised in conformity with their nonproliferation obligations. Thirdly, Article 6 requires all parties to “undertake to pursue good-faith negotiations on effective measures relating to cessation of the nuclear arms race, to nuclear disarmament, and to general and

complete disarmament.”<sup>10)</sup>

The treaty is reviewed every five years in the Review Conferences of the NPT Parties. Though it was originally conceived with a limited duration of twenty-five years (Article 10), state parties unconditionally extended the treaty indefinitely in the Review Conference on 11 May 1995, affirming the need for achieving “the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament under strict and effective control.”<sup>11)</sup>

Currently with 191 ratifications, the NPT has almost universal membership. Even the five NWS has ratified the NPT: the United States, Russia and the United Kingdom in 1968, and France and China in 1992. Currently, the only remaining countries outside the treaty are South Sudan, India, Israel, Pakistan, and North Korea. North Korea acceded in 1985 but never came into compliance, and withdrew in 2003.

The NPT had significant impacts in making the NNWS step out of nuclear weapons development. For instance, South Africa had been undertaking a nuclear weapons program, but has renounced it and signed the treaty in 1991 after destroying its small nuclear arsenal.<sup>12)</sup> After this action, the remaining African countries signed the treaty. In addition, the former Soviet Republics where nuclear weapons had been based, namely Ukraine, Belarus and Kazakhstan, transferred those weapons to Russia and joined the NPT by 1994,<sup>13)</sup> following the signature of the Budapest Memorandum on Security Assurances.<sup>14)</sup>

This trend of advancing disarmament led the adoptions of the Nuclear-Weapon-Free-Zone (NWFZ) treaties. A NWFZ is where a group of states has freely established a treaty to ban the use, development or deployment of nuclear weapons. In fact, several NWFZs contain nuclear power bans as well.<sup>15)</sup> These prohibitions are only effective within certain geographical regions, and the UN does not always officially acknowledge them. Nevertheless, these treaties cover Latin America and the Caribbean, the South Pacific, Southeast Asia, Africa and Central Asia, which consists more than fifty percent of the Earth's surface, having more than a hundred state parties.<sup>16)</sup>

However, there are still some countries that hold nuclear weapons even though they are not part of the NWS according to the NPT. Four states are known or

believed to possess nuclear weapons: India, Pakistan and North Korea have openly tested and declared that its possession, while Israel is deliberately ambiguous regarding its nuclear weapons status.<sup>17)</sup> In addition, Iran, Syria and Myanmar are under suspicion of their nuclear weapons advancements.

There are also still questions surrounding the NWS whether or not progress has been made regarding disarmament. The five NWS still hold nuclear weapons, and the number of their shares seems to remain the same. Moreover, regarding the United States' nuclear weapons, there are five countries – Belgium, Germany, Italy, Netherlands and Turkey– hosting those nuclear weapons within its territories, based on the concept of nuclear sharing.<sup>18)</sup> Nuclear sharing is one of the NATO's policies, which allows member countries that do not possess nuclear weapons use nuclear weapons of NATO if necessary. This might be considered as an act of proliferation violating Articles 1 and 2 of the treaty. However, there is no transfer of the weapons or control over them intended “unless and until a decision were made to go to war, at which the treaty would no longer be controlling;” thus, it does not consist a breach of the NPT.<sup>19)</sup>

Additionally, there are nations in nuclear alliances, which claim to rely on the US nuclear weapons for their security known as “nuclear deterrence.”<sup>20)</sup> These are Albania, Australia, Belarus, Bulgaria, Canada, Croatia, Czech, Denmark, Estonia, Greece, Hungary, Iceland, Japan, Latvia, Lithuania, Luxembourg, Montenegro, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, besides the previous five nuclear sharing countries.

“Policy of deterrence” is a political strategy intended to dissuade another state not to act unfavorably, by using military threat indirectly. Based on the “nuclear deterrence” policy, states prevent military conduct from opponent countries by recalling the future reprisal of the US nuclear weapons.<sup>21)</sup> Although this is not a violation of the NPT, this concept hinders the advancement of nuclear disarmament.

### III Understanding of nuclear weapons for military purpose now

In general, the UN Charter forbids the use of military force against states, but holds exceptions for self-defense and for use of force authorized by the Security

Council. These rules in the Charter apply equally to all use of force against states, including the use of nuclear weapons. However, this does not mean that states have unlimited freedom of choice in the weapons they use.

In 1996, the International Court of Justice (ICJ) concluded a Nuclear Weapon Advisory Opinion on the legality of the threat or the use of the nuclear force,<sup>22)</sup> responding to the UNGA's resolution 49/75 adopted on 15 December 1994, which asked the question "Is the threat or use of nuclear weapons in any circumstance permitted under international law."<sup>23)</sup>

To begin, the ICJ looked into the applicable international law. It found that there is neither a customary nor conventional international law regarding any specific authorization of the threat or use of nuclear weapons (Paragraph 105a), but it cannot rule out the lawfulness of the use of a nuclear weapon in "extreme circumstances of self defense."<sup>24)</sup> While state practices still fall short of establishing an *opinio juris* on the illegality of nuclear weapons (Paragraph 71), it does not mean that it is illegal *per se*.

Next, the ICJ examined the requirements of the law applicable in armed conflict, especially the principles and rules of humanitarian law, when using nuclear weapons. The key instrument here is the 1977 Additional Protocol I to the 1949 Geneva Conventions,<sup>25)</sup> in addition to international customary law. In Paragraph 105c, the Court concluded that a threat or use of nuclear weapons, which is contrary to Article 2(4) of the UN Charter or is incompetent to the requirements of Article 51, is unlawful. A threat or use of nuclear weapons should also meet the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law (Paragraph 105d). Collating these principles with threat or use of nuclear weapons, it would generally be contrary to the rules of international law applicable in armed conflict (Paragraph 105e). The Court also mentioned the Marten Clause, which is codified in the 1977 Geneva Convention Additional Protocol I Article paragraph 2, stating that "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience (Paragraph 78)." That is to say, if an

envisaged use of weapons would not meet the requirements of customary law and humanitarian principles, a threat to engage in such use would also be contrary to that law, including nuclear weapons.

The principles important here are distinction, proportionality, precaution, and unnecessary suffering. First, it is prohibited to employ an indiscriminate attack. A nature of an attack must meet military objectives and there must be distinctions between civilians and combatants.<sup>26)</sup> Under this principle, the nuclear bombings of Hiroshima and Nagasaki would equally be ruled out since it was conducted in indiscriminately aerial bombardments.<sup>27)</sup> Second, the principle of proportionality has to be considered in that the conduct cannot be “excessive in relation to the concrete and direct military advantage anticipated.”<sup>28)</sup> This principle might not in itself exclude the use of nuclear weapons in self-defense in all circumstances. Thirdly, in the conduct of military operations, “constant care shall be taken to spare the civilian population, civilians and civilian objects,” by providing precautions of an attack.<sup>29)</sup> Regarding this rule of precautions, the International Committee of the Red Cross (ICRC) suggest that it “does not imply any prohibition of specific weapons.”<sup>30)</sup> Lastly, the fourth principle, unnecessary suffering, must be met. This is a prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, according to the Additional Protocol 1 of the Geneva Convention Article 35 (2). In addition to these four main principles, the ICJ added the fifth rule, the protection of the natural environment. It concerns the means of warfare that cause widespread, long-term, and severe damage to the environment, although it is questionable whether this rule applies to nuclear weapons.<sup>31)</sup>

With the question of legality of policy of deterrence, the Court does not pronounce reasoning that it is a political matter to be concerned (Paragraph 67). Yet, it still requires states to demonstrate those military aggressions with credible intention to use nuclear weapons (Paragraph 48).

For these reasons, the Court finds that even though every state has its fundamental right to survival and thus its right to resort to self-defense as written in Article 51 of the UN Charter, the use of nuclear weapons must be conducted under certain requirements even when its survival is at stake (Paragraph 96).

Based on this view, France and the United Kingdom have ratified the

Additional Protocol I, yet formulating reservations regarding its application to nuclear weapons. China, North Korea and Russia are parties to the Protocol I, but the remaining states possessing nuclear weapons—India, Israel, Pakistan, and the United States—are not parties.<sup>32)</sup>

The ICJ additionally defined the legal interpretation of the NPT Article 6. It stated that “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 (Paragraph 105f).”<sup>33)</sup> The Court explicitly acknowledged the NPT state parties’ obligation to negotiate in good faith a nuclear disarmament (Paragraph 99).

#### IV Movement to create the TPNW

One of the criticisms that the NPT has is the gap between nuclear disarmament and its ultimate goal to eliminate nuclear weapons. While the NPT prohibits the proliferation and obligates states to continuously negotiate to advance disarmament in Article 6, it does not impose the obligation to eliminate nuclear weapons. That said, depending on the intention of the NWS, it is possible to interpret the NPT as a treaty which indefinitely permits nuclear weapon possession unless it does proliferate. Under this interpretation, Article 6 does not strictly demand state parties to actually aim for disarmament treaty, rather only to negotiate in good faith. This attitude can be found in the fact that the pursuant of nuclear weapons disarmament has not been reflected in practice.<sup>34)</sup>

However, triggered by the ICJ Advisory Opinion 1996, the UNGA has passed resolutions calling all the NPT parties to comply with their disarmament obligations every year since 1996. Eventually in 2007, 127 countries voted in favor of this resolution, including four states with nuclear weapons: China, India, Pakistan and North Korea.<sup>35)</sup>

The year 2010 was a turning point of the international community, actually moving forward to achieve nuclear weapon elimination. The UN Security Council Resolution 1887 resolved to create a world without nuclear weapons,<sup>36)</sup> which



initiated the movement to go beyond of proliferation but ban the use of nuclear weapons. In addition, the resolution passed in the 2010 NPT Review Conference (i) resolved “to seek a safer world for all and to achieve the peace and security of a world without nuclear weapons, in accordance with the objectives of the Treaty,” (v) expressed “its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons,” reaffirmed “the need for all States at all times to comply with applicable international law, including international humanitarian law,” and (Action 1) resolved that all states parties shall “commit to pursue policies that are fully compatible with the Treaty and the objective of achieving a world without nuclear weapons.”<sup>37)</sup> Since then, the movement to examine nuclear weapons from a humanitarian perspective has accelerated.

## V Treaty on the Prohibition of Nuclear Weapons

The TPNW was adopted on 7 July 2017 by the United Nations conference. This is the first legally binding international agreement to prohibit “Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Use of Nuclear Weapons” and is aiming for “their Elimination.”

In the Preamble, three main and notable elements can be observed. First, it expresses its adoption of a humanitarian approach to promote the negotiation regarding nuclear weapons. It is identified that this approach was motivated by the “catastrophic consequences” of nuclear weapons use (Paragraph 2), by the risk of their continuous existence (Paragraph 3), by the suffering of the *hibakusha* (the surviving victims of the 1945 atomic bombings of Hiroshima and Nagasaki) and the victims of nuclear tests (Paragraph 6). There had finally realized that the complete elimination of these weapons was the only way to guarantee that nuclear weapons will never be used again (Paragraph 2).

Second, the Preamble indicates that the TPNW legally prohibits any use of nuclear weapons. Reaffirming the need of state’s compliance with applicable international law (Paragraph 8), indicating the basing on the principles and rules of international humanitarian law (Paragraph 9), and considering that any use of nuclear weapons would be contrary to the rules of international law applicable

in armed conflict (Paragraph 10) and would also be abhorrent to the principles of humanity and the dictates of public conscience (Paragraph 11), the Preamble recalls that states must refrain from threat or use of force in accordance with the UN Charter (Paragraph 12).

Lastly, it expresses concerns that previous nuclear disarmament had been slow due to the continued reliance on nuclear weapons in military and security concepts (Paragraph 14), even when the UNGA resolutions called for the elimination of nuclear weapons (Paragraph 13). Mentioning the importance of the obligation to pursue in good faith aiming to achieve nuclear disarmament, which is promised in the NPT Article 6 (Paragraph 17), eventually, it recognizes that a legally binding prohibition of nuclear weapons constitutes an important contribution towards the achievement and maintenance of a world free of nuclear weapons (Paragraph 15).

Following the Preamble, twenty provisions lay the prohibition of nuclear weapons. Article 1 prohibits any development, testing, production, stockpiling, stationing, transfer, use and threat of use of nuclear weapons. Moreover, any assistance and encouragement to the prohibited activities, and seeking or receiving those is forbidden. Article 2 asks state parties to declare whether it owned, possessed or controlled nuclear weapons or nuclear explosive devices, and whether it eliminated its nuclear-weapon program when joining the treaty. If a state has another country's nuclear weapons on its territory when it signs the treaty, it must remove them. The TPNW also requires state parties, which Article 4 does not apply, to maintain the existing IAEA safeguards obligations and, if they have not already done so, to accept safeguards based on the model for the NNWS under the NPT. In addition, the treaty acknowledges the possibility that states currently possessing nuclear weapons may wish to join the treaty at some point in the future. Article 4 provides a roadmap for this, mentioning that the states shall cooperate with, or designate competent international authority to negotiate and verify the elimination of nuclear weapons programs.

The TPNW is unique also because it stipulates the need for victim assistance and environmental remediation in Article 6. With respect to individuals who are affected by the use or testing of nuclear weapons (meaning *hibakusha*), state parties have to adequately provide assistance.

In addition, regarding the implementation of the TPNW, there must be an international cooperation and assistance to facilitate its implementation (Article 7), and each states shall encourage non ratified states to sign, ratify, accept, approve or accede to the treaty, with the goal of universal adherence (Article 12). When ratifying, Article 16 does not allow state's participation with reservation to this treaty, enabling states to make a loophole in the achievement of the complete nuclear weapon elimination. In the matter of relationship with other agreements, its implementation "shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are a party, where those obligations are consistent with the Treaty," according to Article 18.

The TPNW was passed by 122 votes in favor with 1 vote against (Netherlands) and 1 abstained (Singapore).<sup>38)</sup> 69 nations did not vote; among them all of the NWS, nuclear-armed states and all the NATO members except for Netherlands.<sup>39)</sup> As of May 2018, it has 58 signatories and 9 parties,<sup>40)</sup> but still needs at least 50 ratifications of countries to be in force, in accordance with the Article 15(1).

Reactions from the NWFZ countries are favorable; all 33 nations of Latin America and the Caribbean had subscribed to common regional positions supporting a ban treaty.<sup>41)</sup> However, no NWS has expressed support for a ban treaty; indeed, a number of them, including the United States,<sup>42)</sup> and Russia,<sup>43)</sup> has expressed explicit opposition. North Korea was the only nuclear state to vote for initiating ban negotiations.

The most problematic opposition in the international community is the one of NATO countries and the states in nuclear alliance. Many the NNWS NATO member states, along with Australia and Japan, are resistant to a ban treaty, as they believe that the US nuclear weapons enhance their security based on nuclear deterrence policy. However, Article 1 prohibits the stationing of nuclear weapon (Article 1g); hence, nuclear weapon hosting countries – Germany, the Netherlands, Belgium, Italy and Turkey – would have to end contracts on nuclear sharing with the United States before they possibly could sign the negotiated ban treaty. In addition, since the threat of nuclear weapon, and receiving assistance of prohibited activities is also prohibited (Article 1d, f), nuclear deterrence is not admissible under the TPNW, which makes nations in nuclear alliances be negative about this treaty. Having this

difficulty, several NATO members claimed that the treaty will be “ineffective in eliminating nuclear weapons,” and instead called for advanced implementation of Article 6 of the NPT.<sup>44)</sup>

## VI Theoretical impact of a treaty based on its wording

On the basis of these provisions, there is the possibility, both positive and negative, that the TPNW can influence the current landscape of nuclear weapons.

As a binding treaty, the TPNW filled the legal gap between disarmament and nuclear elimination, by explicitly banning the “Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Use of Nuclear Weapons” and with resolving its elimination as an ultimate goal. Prohibition of the use of nuclear weapon shall be a first step to move forward to its total elimination, in theory.

However, it is doubtful it can encourage and make states comply with the treaty in practice, since it lacks detailed provisions on how disarmament and non-use of nuclear weapon should be advanced to the point of elimination. The TPNW just prohibits the nuclear weapon use, but it does not mean that it will be totally eliminated. For example, under the current provisions, the NWS are not obligated to abolish their use of nuclear weapons as long as they do not ratify it. Thus, not having those countries ratified, the prohibition of nuclear weapons would never come into force. Here, it becomes important how to aggressively make those states to ratify the treaty, but those measures are not specified, and negotiation, as obligated in Article 6 of the NPT, is the only way provided. Another example of the TPNW’s lack of detailed regulation is that it does not stipulate rigid measures to put sanctions on those states which violate it. Article 4 indeed codifies the measures aiming for the total nuclear weapons elimination programs; however, it only asks ratified countries to comply with the imposed obligation to eliminate nuclear weapons, such as concluding safeguards agreements with the IAEA and submitting a final declaration of its obligation fulfillments to the Secretary General of the United Nations. The measure only available to ratified countries, which is threatened by other country’s breach of nuclear weapon possession, is to remove nuclear weapons or other nuclear explosive devices in its territory that are owned,

possessed or controlled by another state (Article 4.4). Article 4 also indicates that states shall cooperate with the “competent international authority” to pursue nuclear weapon elimination program, but the content of this is unclear, and the detail is left to be decided by future negotiations. Article 11 likewise stipulates the provision regarding settlement of disputes, yet this also remains to have deliberate mean such as conducting consultation, lacking aggressive measures. Not having detailed and aggressive processes towards the elimination, the TPNW remains to be a mere declaration that the nuclear weapon elimination is the international community’s ideal goal.

Some people contend the context of the TPNW conflicts with the existent NPT provisions. The adoption of the TPNW caused the situation where two different legal standards regarding nuclear power coexist at the same time. While the TPNW prohibits the possession of nuclear weapon by any ratified states, the NPT allows the five NWS to possess those weapons. Namely, the exact same conduct can be found illegal by one treaty, yet the other finds it lawful. This double standard in international law would endanger the legal stability, eventually undermining the international NPT regime that was created after a long struggle.

However, this concern is not going to be the case, because of how it was formulated from the drafting stage. At the UN conference to negotiate a legally binding instrument to prohibit nuclear weapons while leading towards their total elimination, the president of the conference, Elayne Whyte Gómez, submitted the Draft Convention (A/CONF.229/2017/CRP.1) on 22 May in 2017.<sup>45)</sup> Then, she presented four overarching principles guiding the preparation of the draft: complementarity, reinforcement, simple and non-discriminatory nature, and a basis for the future.<sup>46)</sup> First, the TPNW was aimed at strengthening and complementing the existing instruments, and would not undermine the NPT regime. Second, it should avoid making any loopholes that could possibly enable any state to evade existing non-proliferation norms; rather it reinforces the regime cooperatively. Thirdly, this instrument should be simple and nondiscriminatory, and should reflect a clear and strong prohibition of nuclear weapons. Lastly, the TPNW is aimed at the future so that it should be flexible and designed to endure for long term, with promotion of the achievement and maintenance of a nuclear-free world.

In other words, the TPNW was designed not to weaken the existing nuclear non-proliferation regime, but to demand explicit and powerful prohibition of nuclear weapons as well as to last for a long term with application flexibility, while keeping the future participation of the NWS and nations in nuclear alliances. This attitude can be shown in the TPNW Article 18, which explains its relationship with other agreements, in that the implementation of the treaty will not prejudice obligations imposed by existing international agreements to the extent those obligations are consistent with it.

Nevertheless, there are some claims that the logic that the TPNW would reinforce the NPT is not acceptable. At the first preparatory committee for the NPT Review Conference on 2 May 2017 in Vienna, Russia, one of NWS, stated that “In the framework of review cycles, disarmament aspects are prioritized while issues of non-proliferation and peaceful uses of nuclear energy are being pushed to the sidelines. It is high time to address this imbalance.”<sup>47)</sup> By saying this, Russia shows its position to favor the NPT regime, prioritizing the non-proliferation and peaceful use of nuclear energy.

Even if this is the case, still, the TPNW fulfills the United Nations’ principles and objectives as reflected in the UN Charter from legal perspective. Rather, in light of the original goal of the NPT, the NPT state parties should ratify the TPNW on the legal basis.

In the 2010 NPT Review Conference Final Document, it was concluded that seeking a safer world for all and achieving the peace and security of a world without nuclear weapons (A-i), the unequivocal undertaking of NWS to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all states parties are committed under Article 6 (A-ii), the need for all states to comply with applicable international humanitarian law, concerning the catastrophic humanitarian consequences of any use of nuclear weapons and (A-v), and the need for the NWS to reduce and eliminate their nuclear weapons are all promises shared by every NPT state parties (B-ii).<sup>48)</sup> In this regard, understanding that the TPNW was formulated based on all these promises recognized by the NPT state parties, not joining the TPNW negotiation is rather a violation of the NPT regime.<sup>49)</sup> It also can be said that it meets the NPT Article 6, which 191 states promised to good-faith

negotiations to general and complete disarmament.

For these reasons, even if it strikingly lacks detailed and aggressive measures to advance its enforcement, the TPNW has certain impact as a binding treaty which prohibits any possess of nuclear weapons and which resolves its elimination as an ultimate goal.

## VII Difficulties when making the treaty in force

While admitting its theoretical impact in the international community, it is a separate issue whether it would be able to have a practical impact, considering the passive attitude toward its ratification to the TPNW around the world. Especially, having nuclear deterrence policy, nations in nuclear alliance with the United States are reluctant to ratify the TPNW.

At this moment, only nine countries have ratified the treaty, and no countries with nuclear weapons have ratified it. The delegations of the United States, United Kingdom and France published a joint press statement saying that they “have not taken part in the negotiation of the treaty... and do not intend to sign, ratify or ever become party to it.”<sup>50)</sup> Since the TPNW prohibits any possession of nuclear power for military purpose, it is unlikely that these states would enter the treaty any time soon.

The states, which are notably reluctant to ratify the TPNW, are the countries in nuclear alliance. They claim that nuclear deterrence has been an essential policy to keep the peace in Europe and North Asia for over seventy years. However, the policy of nuclear deterrence and the content of the TPNW completely contradict each other, since the TPNW Article 1 also prohibits the treat of nuclear weapon which is the fundamental element of nuclear deterrence theory. Without the “nuclear umbrella” of the NWS, those states cannot impose pressure on another state with nuclear weapon not to use its nuclear weapon, while defending under the threat of nuclear weapon also means possession of it. Hence, having the status quo where the threat of nuclear weapon has been a core foundation of international security, treaties that denies nuclear deterrent is unlikely to have consent of NWS, nuclear-armed countries and nations that are depending on those countries’ nuclear

threat.

However, there is an interpretation of the TPNW Article 1 that a ratified country “receiving” assistance, encouragement or inducement of nuclear weapons or explosive devices from non-ratified country is not a violation of the provision.<sup>51)</sup> Under this theory, as far as the United States does not ratify the TPNW, countries currently in nuclear alliance with the United States can enter into the treaty, while remaining under the United States’ nuclear umbrella. This enables the increase in the state parties to the treaty, which may make it possible to validate the TPNW. Yet, this interpretation has its premise that nuclear weapons would keep its existence between non-ratified nuclear possessing states. Having its nature to aim at achieving the ultimate goal of the universal elimination of nuclear weapons, states in nuclear alliances entering into the TPNW is a self-contradiction. Also, there is no incentive for the NWS to provide nuclear power deterrence for states that have ratified the treaty, which demands themselves to eliminate nuclear weapons.

Having the current nuclear deterrence policy, even if states in nuclear alliance ratify the TPNW, they would have to encourage other states to prohibit the use of nuclear power while relying on nuclear umbrella, which is full of inconsistencies. Therefore, it seems greatly difficult to obtain assents from the NWS and countries in alliance, such as NATO members.

## VIII How the TPNW can impact the use of nuclear weapons by states that already possess them

Lastly, it is questionable how the TPNW can affect the use of nuclear weapons by the states that currently possess them. Even if the wording itself theoretically seems to be valid as examined, its impact in practical means may differ, even after achieving gaining more than fifty ratifications and entering into force.

The TPNW does not require any consensus from the NWS or nuclear-armed states; thus, it is possible to validate it with just fifty ratifications from non-nuclear-armed states (Article 15). However, if the treaty is enacted, it means that the TPNW demands those countries with nuclear weapons to agree with nuclear weapon elimination, ignoring the NWS’s intentions or situations around states depending on



nuclear deterrence. In this way, it is difficult to bring about and share norms toward total nuclear weapon elimination, and it may cause division of the international community, between states that accept the importance of nuclear deterrence and the others.

Not having aggressive and detailed enforcement mechanism in the treaty, the international community must rely on negotiations to advance the status of the TPNW; however, disagreements among states may worsen since nuclear deterrence policy is such a fundamental element of the current international security.

Additionally, this confrontation may demolish the harmony between the NWS and the NNWS, which had been established to some extent under the NPT, as represented by its almost universal ratification. Yet there is a gap between disarmament and elimination, the NPT might have had more practical impact in preventing the use of nuclear weapons in reality. A decrease in the political harmony itself may endanger the international peace and make it more difficult to achieve the total elimination.

For these reasons, at this moment, the TPNW cannot positively impact the use of nuclear weapons for those states that already possess them, as it may disarrange the harmony between the NWS and the NNWS. A negative impact may occur such that states with nuclear weapons may advance its use of nuclear weapons.

Following these interpretations, what the TPNW can do now to impact those states with nuclear weapons is to push them forward to agree with the provisions through negotiations, which is motivated by Article 6 of the NPT and which is aiming to pursue the universality of the TPNW as its Article 12 stipulates.

As evidence that the total elimination of nuclear weapon is a persistent final goal shared in the international community, the TPNW could play its role with prohibition of use of nuclear power as one step. Treaties can shift international expectations; moreover, a legal binding structure would increase political pressure for the complete elimination of nuclear weapons, so that it may result in policy change over time. When the NPT was established, it also was not expected that it would be able to obtain 191 ratifications. Depending on the future negotiations, it may be possible to actually reduce the use of nuclear weapons, yet it must be a long and arduous journey.

Therefore, standing on a long-term perspective, the treaty can stigmatize nuclear weapons by promoting its prohibition. The conclusion of the TPNW by itself cannot obtain the effect, but long term endeavor to push the whole international community forward to the elimination of nuclear weapon is necessary.

## IX Conclusion

It is certain that the NPT had its legal gap between disarmament and elimination of nuclear weapons. Having the situation where nuclear weapon disarmament was aspirational and its progress had been delayed, the adoption of the TPNW theoretically made a step forward to the total nuclear weapon elimination. While it has the problem of not having effective and detailed enforcement mechanism stipulated in it, the existence of a treaty by itself is influential. In light of the objective of the NPT, it is important to advance the ratification of the TPNW. However, actual enforcement is troublesome, since states with nuclear weapons are passive in being under the prohibition of nuclear weapon, and nations in nuclear alliance are reluctant to enter into the treaty by heavily relying on nuclear deterrence. In addition, even if it comes into force, there is a problem that the TPNW may generate a confrontation between state parties and non-ratified states. The lack of positive measures to implement the TPNW makes this situation depend on negotiation to solve the issue, but the current fixed reliance on nuclear power makes it difficult to proceed this smoothly; it rather may worsen political tensions. Eventually, the TPNW might end up disturbing the international harmony which was once achieved under the NPT.

Still, however, the TPNW plays its role in resolving the internationally shared goal to eliminate nuclear weapons. By prohibiting the use of nuclear weapon and stigmatizing its existence, it increases the international society's pressure to get rid of nuclear weapons universally. Nevertheless, it is a hardship to actually advance total elimination, and the TPNW will not be able to have strong impact on the present circumstances regarding nuclear weapons.

- 1) United Nations. *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968. 729 UNTS 161.
- 2) United Nations. *Treaty on the Prohibition of Nuclear Weapons*, 7 July 2017. TREATIES-XXVI-9.
- 3) LeMay, Curtis; Tibbets, Paul. "Bombing of Hiroshima and Nagasaki – 1945," Atomic Heritage Foundation. 5 June 2014. Accessed on 3 December 2018. Retrieved from <https://www.atomicheritage.org/history/bombings-hiroshima-and-nagasaki-1945>
- 4) The United States Chairman's Office. "The United States Strategic Bombing Survey: The Effects of the Atomic Bombings of Hiroshima and Nagasaki," *President's Secretary's File, Truman Papers*. 19 June 1946. Page 6. Retrieved from [https://www.trumanlibrary.org/whistlestop/study\\_collections/bomb/large/documents/index.php?pagenumber=11&documentid=65&documentdate=1946-06-19](https://www.trumanlibrary.org/whistlestop/study_collections/bomb/large/documents/index.php?pagenumber=11&documentid=65&documentdate=1946-06-19)
- 5) Scott, Len; Hughes, R. Gerald. *The Cuban Missile Crisis: A Critical Reappraisal*. London: Routledge. 10 April 2015. Page 17.
- 6) Eisenhower, Dwight D. *Atoms for Peace Speech*, at the 470th Plenary Meeting of the UNGA. 8 December 1953. Accessed on 29 November 2018. Available from <https://www.iaea.org/newscenter/multimedia/videos/atoms-peace-speech>
- 7) "History," *IAEA Homepage*. Accessed on 29 November 2018. Available from <https://www.iaea.org/about/overview/history>
- 8) Conference on the Statute of the International Atomic Energy Agency. *Statute of the International Atomic Energy Agency*. 23 October 1956. 276 UNTS 3. Article 2, 3.
- 9) Graham, Jr. Thomas. "Avoiding the Tipping Point," *Arms Control Association*. 1 November 2004. Accessed on 29 November 2018. Available from [https://www.armscontrol.org/act/2004\\_11/BookReview](https://www.armscontrol.org/act/2004_11/BookReview); Campbell, Kurt M. (ed.); Einhorn, Robert J. (ed.); Reiss, Mitchell B (ed.). *The Nuclear Tipping Point: Why States Reconsider Their Nuclear Choices*. Brookings Institution Press. July 2004.
- 10) *Treaty on the Non-Proliferation of Nuclear Weapons*. Article 6.
- 11) UN Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. *Final Document*. 5 May 1995. NPT/CONF.1995/32 (Part I), annex, Decision 3.
- 12) "Treaty on the Non-Proliferation of Nuclear Weapons: Status of the Treaty," *United Nations Office for Disarmament Affairs*. Accessed 29 November 2018. Available from <http://disarmament.un.org/treaties/t/npt>
- 13) Ibid.
- 14) Council on Foreign Relations. *Budapest Memorandums on Security Assurances, 1994*. 5 December 1994.
- 15) "Nuclear-Weapon-Free Zones," *United Nations Office for Disarmament Affairs*.

- Accessed on 29 November 2018. Available from <https://www.un.org/disarmament/wmd/nuclear/nwiz/>
- 16) Ibid.
  - 17) “Nuclear Arsenals,” *International Campaign to Abolish Nuclear Weapons*. Accessed on 29 November 2018. Available from <http://www.icanw.org/the-facts/nuclear-arsenals/>
  - 18) Ibid.
  - 19) Donnelly, Brian. “The Nuclear Weapons Non-Proliferation Articles I, II and VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” presentation at the conference “Non-Proliferation: Point of View from Latin America and the Caribbean.” Cancún, Mexico, 11–13 January 1995. Available from <http://www.opanal.org/Articles/cancun/can-Donnelly.htm>
  - 20) “Nuclear Arsenals,” *International Campaign to Abolish Nuclear Weapons*.
  - 21) Snyder, Glenn H. *Deterrence and Defense: Toward A Theory of National Security*. Princeton: Princeton University Press. 1961. Page 3.
  - 22) ICJ. *Legality of the Threat or the Use of the Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226. 8 July 1996.
  - 23) UNGA. *Resolution 49/75*. 15 December 1994. A/RES/49/75.
  - 24) ICJ. *Legality of the Threat or the Use of the Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226. 8 July 1996. Paragraph 105 (2)(E).
  - 25) International Committee of the Red Cross. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. 8 June 1977. 1125 UNTS 3.
  - 26) Ibid. Article 51(4)(c).
  - 27) *Shimoda et al. v. The State*, the Tokyo District Court. 7 December 1963.
  - 28) ICRC. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. Article 51(5)(b).
  - 29) Ibid. Article 57(1).
  - 30) Ibid. Paragraph 2201.
  - 31) Ibid. Article 35(3); Henckaerts, J.M. “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” *International Review of the Red Cross*, Vol. 87, No. 857. 2005. Page 191.
  - 32) ICRC. “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.” Accessed on 29 November 2018. Available from [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=Xpages\\_NORMStatesParties&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=Xpages_NORMStatesParties&xp_treatySelected=470)
  - 33) Nystuen, Gro; Casey-Maslen, Stuart; Golden, Annie (eds). “Nuclear Weapons

- Under International Law,” *International Review of the Red Cross*, 97 (899), The human cost of nuclear weapons. 2015. Page 913–921.
- 34) <https://www.asil.org/insights/volume/21/issue/12/treaty-prohibition-nuclear-weapons>
  - 35) Dunworth, Treasa. “The Treaty on the Prohibition of Nuclear Weapons,” Volume 21 Issue 12. 31 October 2017. Accessed on 29 November 2018. Available from <https://www.asil.org/insights/volume/21/issue/12/treaty-prohibition-nuclear-weapons>
  - 36) UN Security Council. *Maintenance of international peace and security: Nuclear non-proliferation and nuclear disarmament*. 24 September 2009. S/RES/1887.
  - 37) UN Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. *Final Document*. May 2017. NPT/CONF.2010/50 (Volume I).
  - 38) United Nations. *Voting record of the UN draft treaty on the prohibition of nuclear weapons*. 7 July 2017. Accessed on 29 November 2018. Available from [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf\\_.229.2017.L.3.Rev\\_.1.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/A.Conf_.229.2017.L.3.Rev_.1.pdf)
  - 39) Ibid.
  - 40) “Signature/ratification status of the Treaty on the Prohibition of Nuclear Weapons,” *International Campaign to Abolish Nuclear Weapons*. Accessed on 29 November 2018. Available from <http://www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/>
  - 41) United Nations. *Voting record of the UN draft treaty on the prohibition of nuclear weapons*.
  - 42) “Statement to Vienna Humanitarian Impact of Nuclear Weapons Conference: Impact of Nuclear Weapons Explosions,” *U.S. Mission to International Organizations in Vienna*. 8 December 2014. Accessed on 29 November 2018. Available from <https://vienna.usmission.gov/impact-of-nuclear-weapons-explosions/>
  - 43) “Statement by Russian Foreign Minister Sergey Lavrov at the Conference on Disarmament, Geneva, March 1, 2016,” *The Ministry of Foreign Affairs of the Russian Federation*. 16 August 2016. Accessed on 29 November 2018. Available from [http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2122859](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2122859)
  - 44) “Taking forward multilateral nuclear disarmament negotiations - Explanation of Position on behalf of the following states : Albania, Australia, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Poland, Portugal, Republic of Korea, Romania, Slovakia, Slovenia, Spain and Turkey,” *Reaching Critical Will*. Accessed on 29 November 2018. Available from <http://reachingcriticalwill.org/images/>

- documents/Disarmament-fora/1com/1com16/eov/LA1\_Poland-etal.pdf
- 45) United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. *Draft Convention on the Prohibition of Nuclear Weapons*. 22 May 2017. A/CONF.229/2017/CRP.1
  - 46) Gomez, Elayne Whyte. *Draft legally binding instrument to prohibit nuclear weapons, leading toward their total elimination*. 22 May 2017. REF.MCR-ONUG/2017-261.13.17. Accessed on 29 November 2018. Available from [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair\\_May-24-2017.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair_May-24-2017.pdf)
  - 47) Uliyanov, Mikhail I. *STATEMENT*. 2 May 2017. Accessed on 29 November 2018. Available from [http://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom17/statements/2May\\_Russia.pdf](http://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom17/statements/2May_Russia.pdf)
  - 48) UN Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. *Final Document*.
  - 49) Ibid.
  - 50) *Joint press statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France following the adoption of a Treaty Banning Nuclear Weapons*. July 7, 2017. Accessed on 29 November 2018. Available from <https://usun.state.gov/remarks/7892>
  - 51) Sato, Heigo. "Japan should not join the TPNW for nuclear weapon total elimination," *Gendai Is Media*. 21 August 2017. Accessed on 29 November 2018. Available from <http://gendai.ismedia.jp/articles/-/52629?page=3>