



AUSTRALIA AND THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

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On July 7, 2017, 122 states voted to adopt the Treaty on the Prohibition of Nuclear Weapons (TPNW), which prohibits states from developing, possessing, or using nuclear weapons.¹ While Australia did not participate in the negotiations, there is a strong movement, particularly within the Labor Party, to join the TPNW. As a self-professed “umbrella state,” Australia does not produce or possess nuclear weapons, but it claims to rely on US nuclear weapons for its defense under a policy of so-called “extended nuclear deterrence.” Although the TPNW does not explicitly address the status of nuclear umbrella states like Australia, its prohibitions make it unlawful for a state party to base its national defense on an ally’s nuclear weapons. Therefore, as a state party to the TPNW, Australia would be obliged to renounce its nuclear umbrella. From a legal perspective, Australia can take this step without undermining its collective security agreement with the United States, i.e., the Australia, New Zealand, United States Security Treaty (ANZUS Treaty).² Joining the TPNW would further Australia’s longstanding commitment to nuclear disarmament, while preserving Australia’s military alliance with the United States.

Opinion in Australia is Divided over the TPNW

While Australia is not a signatory to the TPNW and did not participate in the treaty’s negotiation, government officials, political parties, and the general public have expressed divergent views about the treaty.

The Government of Australia officially opposed the TPNW process. On December 23, 2016, 113 nations voted for UN General Assembly Resolution 71/258 launching negotiations on a “legally binding instrument to prohibit nuclear weapons, leading towards their total elimination.”³ Australia was one of 35 nations to vote against this resolution.⁴ On February 16, 2017, Australia announced its boycott of the treaty negotiations. A foreign affairs spokesperson explained, “The Australian government’s long-standing position is that the proposed treaty to ban nuclear weapons does not offer a practical path to effective disarmament or enhanced security.”⁵

¹ Treaty on the Prohibition of Nuclear Weapons (TPNW), adopted July 7, 2017, A/CONF.229/2017/8, <https://www.un.org/disarmament/wmd/nuclear/tpnw/> (accessed December 11, 2018).

² Security Treaty between Australia, New Zealand and the United States of America (ANZUS Treaty), adopted September 1, 1951, entered into force April 29, 1952.

³ “Taking forward Multilateral Nuclear Disarmament Negotiations,” UN General Assembly Resolution 71/258, A/RES/71/258, December 23, 2016, <http://undocs.org/A/RES/71/258> (accessed December 11, 2018).

⁴ Thirteen states abstained from the vote. “Taking forward Multilateral Nuclear Disarmament Negotiations: Recorded Vote in the General Assembly,” GA Resolution/Decision: 71/258, December 23, 2016, <https://gafv-vote.un.org/UNODA/vote.nsf/511260f3bf6ae9c005256705006e0a5b/e0a1c9a46590adde852580b8005484da?OpenDocument> (accessed December 11, 2018).

⁵ Ben Doherty, “Australia to Boycott Global Summit on Treaty to Ban Nuclear Weapons,” *Guardian*, February 16, 2017, <https://www.theguardian.com/world/2017/feb/17/australia-to-boycott-global-summit-on-treaty-to-ban-nuclear-weapons> (accessed December 12, 2018).

This position on the nuclear weapons ban treaty is far from universal in Australia, however. According to an Ipsos public opinion poll released in November 2018, 78.9% of the public said they supported Australia joining the TPNW, and 82.7% of Labor voters said they would support a future Labor government joining the treaty.⁶ The local councils of both Melbourne and Sydney have endorsed the International Campaign to Abolish Nuclear Weapons (ICAN) Cities Appeal, declaring that they “firmly believe that [their] residents have the right to live in a world free from this threat,” and calling on the Australian government to join the TPNW.⁷

The main opposition party, the Labor Party, incorporated its support for the negotiation of a global treaty banning nuclear weapons into its 2015 National Platform, its most recent platform at the time of this paper’s publication.⁸ When the Australian government announced its vote against negotiations, the Labor Party expressed strong support for negotiating a ban treaty.⁹ Senator Penny Wong called on the government to explain its vote and stated that, “Labor shares international frustrations with the pace of disarmament and we remain committed to the cause of eliminating nuclear weapons.”¹⁰ The Senate passed a Labor-initiated motion “urg[ing] the Australian Government to participate constructively” in the negotiations.¹¹ Despite Australia’s decision not to join the TPNW after its adoption, a notable number of Australian federal

⁶ In response to the survey questions, only 7.2% and 7.7% of respondents opposed Australia or a future Labor government joining the TPNW, with 10.1% and 13.5%, respectively, answering that they were unsure. The Medical Association for Prevention of War (MAPW) Peace Fund commissioned the poll in collaboration with the Australian Conservation Foundation and ICAN Australia. Ipsos Public Opinion Poll, “Support for the UN Treaty on the Prohibition of Nuclear Weapons,” November 13, 2018. See also Robert Tickner, “It’s Time: Why Labor Must Join the Global Push to Outlaw Nuclear Weapons,” *Sydney Morning Herald*, December 10, 2018, <https://www.smh.com.au/politics/federal/its-time-why-labor-must-join-the-global-push-to-outlaw-nuclear-weapons-20181206-p50kpx.html> (accessed December 12, 2018).

⁷ International Campaign to Abolish Nuclear Weapons (ICAN), “Los Angeles, Sydney and Toronto Join New ICAN Cities Appeal,” November 7, 2018, <http://www.icanw.org/campaign-news/los-angeles-sydney-and-toronto-join-new-ican-cities-appeal/> (accessed November 14, 2018).

⁸ The Labor Party is scheduled to adopt a new National Platform at the 48th annual ALP National Conference from December 16 to 18, 2018. The 2015 National Platform stated: “Prohibiting and eliminating nuclear weapons is a humanitarian imperative. . . . Given the catastrophic humanitarian consequences of any use of nuclear weapons, Labor firmly supports the negotiation of a global treaty banning such weapons and welcomes the growing global movement of nations that is supporting this objective.” Labor’s National Platform, *A Smart, Modern, Fair Australia* (2015), https://cdn.australianlabor.com.au/documents/ALP_National_Platform.pdf (accessed December 11, 2018), p. 176.

⁹ ICAN, “Australian Labor’s Position on the UN Nuclear Weapon Ban Treaty,” <http://www.icanw.org/labor-support-for-a-un-treaty-to-prohibit-nuclear-weapons/> (accessed December 11, 2018).

¹⁰ Senator Penny Wong, “UN Nuclear Weapons Ban Treaty,” press release, October 28, 2016, <http://www.icanw.org/wp-content/uploads/2017/05/Wong-press-release.pdf> (accessed October 31, 2018). Senator Wong, a Labor Party member, was supportive of UN efforts towards a nuclear disarmament instrument and opposed Australia’s decision to boycott the negotiations. More recently, however, Senator Wong expressed concerns with specific aspects of the TPNW, such as its safeguards and the fact that no nuclear-armed states have signed the treaty. See Senator Penny Wong, “The Disarmament Challenge in a Time of Nuclear Disruption,” speech at the Australian Institute of International Affairs National Conference, Canberra, October 15, 2018, <https://www.pennywong.com.au/speeches/the-disarmament-challenge-in-a-time-of-disruption-australian-institute-of-international-affairs-national-conference-canberra/> (accessed December 11, 2018).

¹¹ The motion also declared, “Australia, as a state party to the Non-Proliferation Treaty, is legally required to pursue negotiations in good faith for nuclear disarmament.” Senator Lisa Singh, “The Senate Motions: Nuclear Weapons,” speech, March 27, 2017, http://www.icanw.org/wp-content/uploads/2017/05/hansard_frag2.pdf (accessed December 11, 2018), p. 2; Ben Doherty, “Negotiations to Ban Nuclear Weapons Begin, but Australia Joins US boycott,” *Guardian*, March 27, 2017, <https://www.theguardian.com/world/2017/mar/28/negotiations-to-ban-nuclear-weapons-begin-but-australia-joins-us-boycott> (accessed December 11, 2018).

parliamentarians, including nearly two-thirds of the current Shadow Cabinet, have signed ICAN's Parliamentary Pledge, which commits parliamentarians around the world "to work for the signature and ratification of this landmark treaty by [their] respective countries."¹²

National Security is Australia's Primary Concern about Joining the TPNW

Australian opponents to the TPNW are primarily concerned with national security implications of signing and ratifying the treaty. Some government leaders worry that, as a state party to the TPNW, Australia would be obligated to repudiate its military alliance with the United States, including by withdrawing from the ANZUS Treaty.¹³ Others contend that the integration of Australian and US defense systems—exemplified by the Joint Australian-US military facility at Pine Gap and the incorporation of US extended nuclear deterrence throughout Australia's national security policies—poses too many logistical challenges to untangle.¹⁴ In response to a question from Senator Penny Wong during a Foreign Affairs, Defence, and Trade Legislation Committee hearing, the Department of Foreign Affairs and Trade (DFAT) asserted that it would be "impossible to separate out . . . bilateral activities under the Alliance . . . that support nuclear as opposed to non-nuclear deterrence-related functions." DFAT added, "[I]t would be impossible for Australia to restrict cooperation with the United States to non-nuclear missions . . . without significant repercussions for the Alliance, the nature of ongoing US commitment and Australia's national security."¹⁵

Some people, even from within the Labor Party,¹⁶ have expressed concern that the nuclear weapons ban treaty threatens the effectiveness of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), to which Australia is party.¹⁷ Then-Minister for Foreign Affairs Julie Bishop

¹² Members of the current Shadow Cabinet who have signed ICAN's pledge include: Tanya Plibersek MP, Chris Bowen MP, Tony Burke MP, Mark Butler MP, Anthony Albanese MP, Brendan O'Connor MP, Mark Dreyfus MP, Senator Kim Carr, Michelle Rowland MP, Joel Fitzgibbon MP, Catherine King MP, and Julie Collins MP. ICAN, "ICAN Parliamentary Pledge," <http://www.icanw.org/projects/pledge/> (accessed December 11, 2018).

¹³ "[T]he Prohibition Treaty poses a serious question: it raises the prospect of Australia needing to repudiate our longstanding defence relationship with the US." Richard Marles, MP, "The Nuclear Weapons Prohibition Treaty, National Security and ANZUS," United States Studies Centre at the University of Sydney, October 15, 2018, <https://www.usssc.edu.au/analysis/the-nuclear-weapons-prohibition-treaty-national-security-and-anzus> (accessed December 11, 2018). See also Testimony of Richard Sadleir, First Assistant Secretary, International Security Division, DFAT, before the Foreign Affairs, Defence and Trade Legislation Committee, *Hansard Senate Hearing Transcript*, May 31, 2018, p. 84 ("[T]he prohibitions contained in article 1 of the prohibition treaty are fundamentally inconsistent and incompatible with Australia's alliance relationship with the US.").

¹⁴ See, e.g., Testimony of Richard Sadleir before the Foreign Affairs, Defence and Trade Legislation Committee, May 31, 2018, pp. 83–85 (describing the Australian-US military alliance as consisting of "many separate interlocking structures," including systems related to "intelligence collection, ballistic missile early warning, submarine communications, nuclear detonation, detection and satellite based communications"); Marles, "The Nuclear Weapons Prohibition Treaty, National Security and ANZUS" (raising specific concerns about the "Australia-US Joint Facilities [at Pine Gap], where integrated Australian and US staffs make the facilities truly 'joint'").

¹⁵ Foreign Affairs, Defence and Trade Committee, Foreign Affairs and Trade Portfolio, "Question on Notice No. 11," July 13, 2018, pp. 2–3.

¹⁶ Labor Party MP Richard Marles wrote, "This is a crucial difference between the Non-Proliferation Treaty and the emerging push for a Treaty on the Prohibition of Nuclear Weapons. . . . The Prohibition Treaty is a cause which has little prospect of achieving our goal of a nuclear-free world but might undermine a cause which does." Marles, "The Nuclear Weapons Prohibition Treaty, National Security and ANZUS."

¹⁷ See, e.g., Foreign Affairs, Defence and Trade Committee, Foreign Affairs and Trade Portfolio, "Question on Notice No. 11," July 13, 2018, p. 3 (noting "the nuclear weapons ban treaty's other fundamental weaknesses and failures (e.g. regarding . . . impact on existing nonproliferation and disarmament architecture etc."); Testimony of Richard Sadleir before the Foreign Affairs, Defence and Trade Legislation Committee, May 31, 2018, pp. 83–84;

argued before the TPNW's negotiation that even "pushing for a ban would divert attention from the sustained, practical steps needed for effective disarmament."¹⁸ The step-by-step approach to nuclear disarmament is often associated with the NPT. More recently, a few officials, including Senator Wong of the Labor Party, have raised questions over the effectiveness of the TPNW's safeguards compared to those in the NPT.¹⁹ This paper will discuss below how the TPNW is legally compatible with Australia's alliance with the United States and how it advances the NPT and its safeguards regime.

Nuclear Umbrella Arrangements Violate the TPNW

If Australia became party to the TPNW, it would have to give up its nuclear umbrella status. Nuclear umbrella arrangements run counter to the spirit of the TPNW and violate its prohibition on assistance, encouragement, and inducement.

A nuclear umbrella arrangement refers to military cooperation between at least two countries in which a non-nuclear-armed state relies on a nuclear-armed state to protect it with nuclear weapons. According to one definition, a nuclear umbrella generally exists when: 1) a "nuclear-armed state is required to guarantee the security of a non-nuclear-armed state;" and 2) "[b]oth the extender and the receiver of this security guarantee [have] officially declared . . . that nuclear weapons could be used in order to fulfill this obligation."²⁰ The *Nuclear Weapons Ban Monitor 2018* stated that nuclear umbrella states "function as enablers of nuclear armament and bear responsibility for the perpetuation of nuclear risks," thereby playing a "role in preventing progress towards a world without nuclear weapons."²¹

Nuclear umbrella arrangements are at odds with the spirit of the TPNW, which seeks to prevent human suffering caused by nuclear weapons. While not legally binding, the preamble of the TPNW expresses deep concern "about the catastrophic humanitarian consequences that would result from any use of nuclear weapons" and recognizes "the consequent need to completely eliminate such weapons." It also recognizes "that a legally binding prohibition of nuclear weapons constitutes an important contribution towards the achievement and maintenance of a

Australian Department of Foreign Affairs and Trade, "Australia's Nuclear Non-Proliferation and Disarmament Policy," <https://dfat.gov.au/international-relations/security/non-proliferation-disarmament-arms-control/nuclear-weapons/Pages/australias-nuclear-non-proliferation-and-disarmament-policy.aspx> (accessed December 11, 2018) ("In fact, a ban treaty risks undermining the NPT which Australia rightly regards as the cornerstone of the global non-proliferation and disarmament architecture.").

¹⁸ Julie Bishop, "We Must Engage, Not Enrage Nuclear Countries," *Sydney Morning Herald*, February 14, 2014, <https://www.smh.com.au/opinion/we-must-engage-not-enrage-nuclear-countries-20140213-32n1s.html> (accessed December 11, 2018).

¹⁹ "Failing to adopt the strongest safeguards and verification regime not only undermines the potential effectiveness of the Ban Treaty, it has the unintended effect of undermining the effectiveness of the existing NPT's safeguards system. It offers signatories an alternative, less onerous, safeguards standard that does not extend to the IAEA's Additional Protocol directed to undeclared sites or facilities." Senator Penny Wong, "The Disarmament Challenge in a Time of Nuclear Disruption." See also Testimony of Richard Sadleir before the Foreign Affairs, Defence and Trade Legislation Committee, May 31, 2018, p. 83 ("[W]e are concerned that the prohibition treaty doesn't contain viable mechanisms for verification of disarmament. That's something that is left for future processes. It also creates a safeguard standard which actually is weaker than the current gold standard.").

²⁰ International Law and Policy Institute (ILPI), *Under My Umbrella*, ILPI background paper no. 21/2016, August 5, 2016, http://nwp.ilpi.org/wp-content/uploads/2016/08/BP21-16_UMBRELLA.pdf (accessed November 6, 2018), p. 11.

²¹ *Nuclear Weapons Ban Monitor 2018* (Oslo: Norwegian People's Aid and ICAN, 2018), http://www.icanw.org/wp-content/uploads/2018/10/Nuclear-Weapons-Ban-Monitor_WEB_NEW.pdf (accessed December 11, 2018), p. 6.

world free of nuclear weapons.”²² Addressing the practice of depending on nuclear weapons for defense, which underlies nuclear weapon arrangements, the preamble notes with concern “the continued reliance on nuclear weapons in military and security concepts, doctrines and policies.”²³ Nuclear umbrella arrangements are predicated on the existence of nuclear weapons and associated policies, which create the risk of catastrophic consequences and impede the achievement of a world free of nuclear weapons. They are thus inconsistent with the TPNW’s overarching aims.

In addition, nuclear umbrella arrangements contravene TPNW Article 1(1)(e). That provision prohibits states parties from assisting, encouraging, or inducing anyone to engage in an activity prohibited under the treaty. A state party could not remain in a nuclear umbrella arrangement because in so doing it would encourage or induce its protector state to possess nuclear arms.²⁴ If the protecting state does not have a nuclear arsenal, it cannot uphold its pledge to defend its ally. If the term “threaten” is interpreted to encompass deterrence policies, i.e., as a threat of future use, an umbrella state party would arguably violate the prohibition on encouraging and inducing the nuclear-armed state to threaten to use nuclear weapons on its behalf. The umbrella state party would also unlawfully assist the nuclear-armed state’s threat of use by helping to communicate the threat through a public agreement to accept such protection.²⁵

Although states parties to the TPNW must therefore renounce their nuclear umbrella arrangements to comply with the treaty, they may still maintain existing security alliances, including collective security agreements. The *Nuclear Weapons Ban Monitor 2018* concluded that Australia was not compliant with Article 1(1)(e) because of its status as a nuclear umbrella state.²⁶ The *Monitor* added, however: “The TPNW does not preclude membership in security alliances or joint military operations with nuclear-armed states as long as this does not involve assistance or encouragement of prohibited activities.”²⁷

²² TPNW, pmbl. paras. 2, 15.

²³ *Ibid.*, pmbl., para. 14.

²⁴ *Nuclear Weapons Ban Monitor 2018*, p. 33.

²⁵ Some authors have argued that threat may have a broader meaning in the TPNW that it does in the UN Charter. Thus, even if one believes that reliance on nuclear weapons does not constitute “threat of force” under the UN Charter, which focuses on the threat of force in specific circumstances, deterrence could still be considered threatening to use under the TPNW. For example, Gaukhar Mukhatzhanova, who advised the delegation from Chile during the TPNW negotiations, wrote, “The UN Charter prohibition seems to apply to a more immediate threat to use nuclear weapons. . . . Those that argued for the inclusion of the threat of use in the prohibition treaty, however, were targeting nuclear deterrence policies more broadly because a general threat to use nuclear weapons in retaliation is at the core of nuclear deterrence. The latter logic ultimately prevailed, and the negotiators agreed to include “threaten to use” in the activities prohibited under Article 1 of the treaty.” Gaukhar Mukhatzhanova, “The Nuclear Weapons Prohibition Treaty: Negotiations and Beyond,” *Arms Control Today*, September 2017, <https://www.armscontrol.org/act/2017-09/features/nuclear-weapons-prohibition-treaty-negotiations-beyond> (accessed December 11, 2018). See also, e.g., Seana K. Magee, “Treaty Ban on Threatening to Use Nukes Puts Japan in Difficult Position,” *Japan Times*, July 18, 2017, https://www.japantimes.co.jp/news/2017/07/18/national/japan-spurns-nuke-treatys-ban-threat-use/#.XA_VwSd7n0F (accessed December 11, 2018) (quoting John Burroughs, executive director of the International Association of Lawyers against Nuclear Arms, saying, “[T]here is an ongoing threat of use of nuclear weapons that is at the core of doctrines of nuclear deterrence.”).

²⁶ *Nuclear Weapons Ban Monitor*, p. 31.

²⁷ *Ibid.*, p. 32.

Australia Can Renounce its Nuclear Umbrella Arrangement and Preserve Its Military Alliance with the United States

Australia can renounce its nuclear umbrella arrangement with the United States, as required by the TPNW, without inherently contravening the legal underpinnings of its alliance. Furthermore, taking such a stance would be consistent with its defense policies of self-reliance and independent thinking.

Legal Obligations under the ANZUS Treaty

The ANZUS Treaty neither refers to nuclear weapons nor requires that parties accept a nuclear umbrella arrangement as part of a defense strategy.²⁸ Article IV of the treaty declares that in the event of an “armed attack in the Pacific Area on any of the Parties,” states parties will “act to meet the common danger.” The article does not specify how that obligation should be fulfilled, and its only invocation, to date, in the wake of the September 11, 2001 terrorist attacks, involved conventional forces.²⁹ In an interpretation of the ANZUS Treaty, international law scholar Joseph Starke wrote, “Each party retains the general right to determine for itself what action it should take” in response to an armed attack that implicates the treaty.³⁰

Australia’s dependence on US nuclear weapons is based upon policy statements, rather than a legally binding instrument, such as the ANZUS Treaty. Australia first publicly claimed this protection in its 1994 Defence White Paper, issued more than 40 years after the treaty’s adoption.³¹ More recently, the Australian Department of Defence’s 2016 Defence White Paper stated: “Only the nuclear and conventional military capabilities of the United States can offer effective deterrence against the possibility of nuclear threats against Australia.”³²

The US position on the umbrella arrangement is not entirely clear. The United States has not explicitly and officially agreed to provide Australia nuclear protection, although some statements

²⁸ See generally ANZUS Treaty.

²⁹ Under the ANZUS Treaty, Australia provided military support, including Special Forces troops and Navy, Army, and Air Force assets and personnel, to the US coalition in the aftermath of the September 11 attacks. Nicole Brangwin with Ann Rann, “Australia’s Military Involvement in Afghanistan since 2001: A Chronology,” Parliament of Australia, July 16, 2010,

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/MilitaryInvolvementAfghanistan (accessed December 11, 2018). See also Prime Minister, “Application of ANZUS Treaty to Terrorist Attacks on the United States, September 14, 2001,”

https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/YFY46/upload_binary/yfy462.pdf;fileType=application/pdf#search=%22media/pressrel/YFY46%22 (accessed December 11, 2018).

³⁰ Joseph Gabriel Starke, *The Anzus Treaty Alliance* (Melbourne: Melbourne University Press, 1965), p. 130.

³¹ Monique Cormier and Anna Hood, “Australia’s Reliance on US Extended Nuclear Deterrence and International Law,” *Journal of International Law and International Relations*, vol. 13, no. 2 (2017), pp. 20–21. The Defence White Papers are not binding documents, but they provide guidance and insight into the Department of Defence’s vision of national security. For example, the 2016 Defence White Paper begins: “This Defence White Paper explains how the Government is strengthening Australia’s defence capabilities to meet the challenges of the more complex strategic environment Australia is likely to face in the years ahead.” Australian Department of Defence, *2016 Defence White Paper* (2016), <http://www.defence.gov.au/whitepaper/docs/2016-defence-white-paper.pdf> (accessed December 11, 2018), para. 1.1.

³² Australian Department of Defence, *2016 Defence White Paper*, para. 5.20. See also Australian Department of Defence, *Defence 2000: Our Future Defence Force* (2000), <http://www.defence.gov.au/publications/wpaper2000.PDF> (accessed December 11, 2018), para. 5.15 (“Australia relies on the extended deterrence provided by US nuclear forces to deter the remote possibility of any nuclear attacks on Australia.”).

have implied such a relationship.³³ While silence by the United States does not necessarily mean it accepts responsibility, scholars Monique Cormier and Anna Hood explain that it likely amounts to acquiescence in this case because Australia's position has been clear for a long time and a response from the United States was expected.³⁴ They argue that such subsequent practice would shift the alliance between Australia and the United States from a conventional to a nuclear one.

If Australia rejected the nuclear umbrella, the United States could respond in two ways. It could assent to its ally's position, or at least remain silent, thus accepting that the alliance was a conventional one. Alternatively, the United States could protest, indicating that it had previously acquiesced to the transition of the ANZUS Treaty relationship to a nuclear alliance and that the alliance would not return to its original conventional status. Regardless, Cormier and Hood argue, Australia's renouncement would not amount to a breach of Article IV because that provision "does not create any legal obligation on Australia to continue to adhere to a policy of extended nuclear deterrence."³⁵ They write,

[I]n light of US acquiescence to Australia's repeated assertions that ANZUS offers Australia nuclear protection, Article IV of ANZUS does now place Australia under US nuclear protection. This does not mean, however, that Australia is legally required to maintain its policy of relying on US extended nuclear deterrence. To the contrary, Australia would not be in breach of ANZUS if it decided to give up its reliance on US nuclear protection.³⁶

Australia would also not violate the TPNW if it became a state party and renounced US nuclear protection. Nuclear umbrella arrangements traditionally require the acceptance of both parties so Australia's change of position would break the arrangement. Australia thus would no longer be encouraging the United States to possess nuclear weapons. In addition, while the United States could still employ nuclear weapons in Australia's defense, as long as Australia did not request, and even opposed, the use of such weapons, it would not violate the prohibition on encouraging use. States parties to disarmament treaties with comparable prohibitions, such as the Mine Ban Treaty and the Convention on Cluster Munitions, also cannot prevent their allies' choice of weapons, but those treaties do not require a state party to control the action of a state not party. Thus, while Australia may face political pressure to reject the TPNW and preserve its reliance on US nuclear weapons, from a legal perspective, these actions would not prevent Australia from continuing its alliance with the United States.

³³ A US Department of Defense and Department of Energy paper implied the existence of the relationship, stating, "Nuclear forces continue to be a key element in U.S. alliances with other countries, for example, NATO Allies, Japan, South Korea, and Australia." US Department of Defense and Department of Energy, *National Security and Nuclear Weapons in the 21st Century*, September 2008, <https://dod.defense.gov/Portals/1/Documents/pubs/nuclearweaponspolicy.pdf> (accessed December 11, 2018), p. 3. See also General John Hyten, US Strategic Command, speech at John F. Kennedy, Jr. Forum, Cambridge, MA, November 13, 2018, <http://www.stratcom.mil/Media/Speeches/Article/1701452/john-f-kennedy-jr-forum/> (accessed December 11, 2018) (stating, in response to a question from the audience, "I have a role in providing extended deterrence – nuclear deterrence – to many of our allies: The Republic of Korea, Japan, Australia.").

³⁴ Cormier and Hood, "Australia's Reliance on US Extended Nuclear Deterrence and International Law," p. 18.

³⁵ *Ibid.*, p. 25.

³⁶ *Ibid.*, p. 26.

Defense Principles of Self-Reliance and Independent Thinking

Australia has also espoused principles of strategic defense that would be consistent with a decision to reject continued reliance on US nuclear weapons for protection. The Australian policy papers previously discussed highlight the importance of self-reliance and independent thinking. Self-reliance refers to the principle that, even within the context of its alliances, Australia “should not rely on the combat forces of others to defend Australia.”³⁷ The 2009 Australian Department of Defence White Paper envisioned only narrow circumstances, i.e., “where we were under threat from a major power whose military capabilities were simply beyond our capacity to resist,” in which it would “expect the United States to come to our aid.”³⁸ While, as explained above, US aid in such extreme situations could involve use of nuclear weapons, the principle of self-reliance suggests Australia should determine the aid it wishes to receive rather than bowing to its ally’s preferences. In addition, Australia should not base its national defense on the nuclear arms of other states, thereby allowing narrow exceptions to replace its general rule of self-reliance.

The Australian Department of Defence has also emphasized that the country is a “dynamic, independent-thinking and, on occasion, constructively critical partner of the United States.”³⁹ In its 2000 Defence White Paper, the Australian Department of Defence predicted that times would arise when “the United States and Australia will differ in [their] approaches to issues, or on the priority we give them. When that happens, it is important that Australia has an ability to pursue [its] interests independently.”⁴⁰ In the 2016 Defence White Paper, the department again acknowledged the reality that “the interests of Australia and the United States will not always align.”⁴¹ Rejecting the nuclear umbrella in order to join the TPNW should be a case of non-alignment. It would allow Australia to preserve its military alliance with the United States while advancing its commitment, discussed below, to a nuclear-weapon-free world.⁴²

The TPNW’s Provisions Would Not Conflict with Australia’s Underlying Military Alliance with the United States or Prevent Joint Military Operations with the United States

If Australia were a state party to the TPNW, the treaty’s provisions would not conflict with the underlying military alliance between Australia and the United States. They would also not prevent Australia from continuing joint military operations with nuclear-armed states like the United States.

³⁷ “Australia’s defence policy is founded on the principle of self-reliance in deterring or defeating armed attacks on Australia, within the context of our Alliance with the United States and our cooperation with regional partners. A commitment to self-reliance does not reflect any lack of confidence in our Alliance or partners. We would seek and expect help from our friends if Australia came under direct attack. But we should not rely on the combat forces of others to defend Australia.” Australian Department of Defence, *Defence White Paper 2013* (2013), http://www.defence.gov.au/whitepaper/2013/docs/WP_2013_web.pdf (accessed December 11, 2018), para. 3.36. See also Australian Department of Defence, *Defence 2000*, paras. 5.14–5.15, 6.4–6.5.

³⁸ Australian Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030* (2009) http://www.defence.gov.au/whitepaper/2009/docs/defence_white_paper_2009.pdf (accessed December 11, 2018), para. 6.32.

³⁹ Australian Department of Defence, *Defence 2000*, para. 5.18.

⁴⁰ *Ibid.*

⁴¹ Australian Department of Defence, *2016 Defence White Paper*, para. 5.30.

⁴² “Australia strongly supports nuclear disarmament and action towards the goal of a world free of nuclear weapons.” Australian Department of Foreign Affairs and Trade, “Australia’s Nuclear Non-Proliferation and Disarmament Policy,” <https://dfat.gov.au/international-relations/security/non-proliferation-disarmament-arms-control/nuclear-weapons/Pages/australias-nuclear-non-proliferation-and-disarmament-policy.aspx> (accessed November 26, 2018).

Some opponents of the TPNW have voiced concerns that TPNW Article 18, which governs the relationship of the treaty with other agreements, would undermine the ANZUS Treaty.⁴³ For example, Richard Marles, MP, wrote in October 2018, “Article 18 of the Prohibition Treaty appears to call into the question the validity the North Atlantic Treaty, the ANZUS Treaty, the US-Philippines Mutual Defense Treaty or the US-Republic of Korea Mutual Defense Treaty, since they would be deemed inconsistent with the Prohibition Treaty. This network of treaties has been, and continues to be, the security blanket under which Australia and much of our region sleeps.”⁴⁴ Article 18, however, simply requires that the TPNW take precedence over inconsistent or less restrictive obligations in other treaties.⁴⁵ Where other treaty obligations are “consistent with” the TPNW, Article 18 carries no consequences for the continuation of that earlier treaty relationship. Because from a legal perspective the TPNW’s requirement to renounce nuclear umbrella status does not inherently conflict with the ANZUS Treaty, Article 18 poses no problem on this front.

Article 18 of the TPNW would also generally be compatible with other military agreements between Australia and the United States that are related to the ANZUS Treaty.⁴⁶ Like the ANZUS Treaty, such defense agreements do not specifically require Australia to rely on US nuclear weapons for protection. Furthermore, the agreements oblige the United States to respect Australia’s sovereignty, which could include its right to sign and ratify the TPNW.⁴⁷

While, as discussed above, some critics of the TPNW have highlighted the logistical challenges of separating the Australian and US defense programs, the prohibition on assistance articulated in TPNW Article 1 would not stand in the way of ongoing joint military operations between these countries. Australia could participate in joint military operations with the United States, so

⁴³ “The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the Treaty.” TPNW, art. 18.

⁴⁴ Richard Marles, MP, “The Nuclear Weapons Prohibition Treaty, National Security and ANZUS.” It should be noted that the Philippines, party to the US-Philippines Mutual Defense Treaty referenced by Marles, has signed the TPNW. ICAN, “Signature/Ratification Status of the Treaty on the Prohibition of Nuclear Weapons,” <http://www.icanw.org/status-of-the-treaty-on-the-prohibition-of-nuclear-weapons/> (accessed December 12, 2018).

⁴⁵ Stuart Maslen, “The Relationship of the 2017 Treaty on the Prohibition of Nuclear Weapons with Other Agreements: Ambiguity, Complementarity, or Conflict?” *EJIL Talk*, August 1, 2017, <https://www.ejiltalk.org/the-relationship-of-the-2017-treaty-on-the-prohibition-of-nuclear-weapons-with-other-agreements-ambiguity-complementarity-or-conflict/> (accessed December 11, 2018).

⁴⁶ For publicly available agreements, see, e.g., the Force Posture Agreement Between the Government of Australia and the Government of the United States (Force Posture Agreement), adopted August 12, 2014, entered into force March 3, 2015; Agreement between the Government of Australia and the Government of the United States of America relating to the Operation of and Access to an Australian Naval Communication Station at North West Cape in Western Australia (Harold E. Holt Naval Communication Station Agreement), adopted July 16, 2008, TIAS 11-1124, entered into force November 24, 2011; Agreement between the Government of Australia and the Government of the United States of America Relating to the Establishment of Joint Defence Facility at Pine Gap (Pine Gap Agreement), adopted and entered into force December 9, 1966, 607 UNTS 83, amended and extended October 19, 1977, TIAS 8969; November 16, 1988, TIAS 12266; June 4, 1998, 2171 UNTS 89.

⁴⁷ The Force Posture Agreement contains an express reference to the “full respect [of the United States] for Australian sovereignty.” Force Posture Agreement, art. IV(1). Similarly, the Harold E. Holt Naval Communication Station Agreement states that US use “of the station shall be in accordance with the Australian Government’s policy of full knowledge *and concurrence*” (emphasis added), and the Pine Gap Agreement qualifies the availability of Pine Gap to the United States as subject to “terms and conditions to be agreed between the two Governments,” demonstrating the importance of Australian consent to the operations occurring at these shared facilities. Harold E. Holt Naval Communication Station Agreement, art. 4; Pine Gap Agreement, art. 2.

long as there was no “nexus” between a particular action taken by Australia and an activity prohibited by the TPNW.⁴⁸ Other disarmament treaties, such as the 1997 Mine Ban Treaty, to which Australia is a party, have been interpreted to allow “mere participation” in a joint military operation with a state not party to the treaty that might use the prohibited weapons.⁴⁹ The TPNW, similarly, permits states parties to participate in joint military operations with a nuclear-armed state. Under Article 1, a state party may not knowingly assist with, encourage, or induce prohibited activities during joint military operations, and thus it may be unable to support certain activities. Nevertheless, involvement in such operations more generally does not inherently violate the TPNW.⁵⁰

Therefore, as a state party to the TPNW, Australia could not assist with nuclear-weapon-related activities prohibited by the treaty, but it could participate in military operations with the United States. For example, the joint Australian-US intelligence facility at Pine Gap plays a role in collecting signals intelligence and communications data and relaying information for missile defense systems.⁵¹ Australia might violate the assistance prohibition of the TPNW by helping the United States collect information to be used in nuclear-weapon-related activities. If Australia knowingly contributed to the gathering of intelligence that would be used to identify or engage targets of attacks with nuclear weapons, it would likely be in breach of the TPNW’s prohibition on assistance.⁵² Australia could continue, however, to provide other intelligence and communications services to the United States, such as for counter-terrorism measures or monitoring of weapons testing. Australia could also engage in non-nuclear military operations, such as those of the United States-led coalition in Afghanistan.⁵³

Joining the TPNW Would Further, not Undermine, the Goals of the NPT

While, as noted above, some Australian officials have expressed concerns about the relationship between the TPNW and the NPT, the TPNW advances rather than undermines the NPT.⁵⁴ Australia’s Department of Foreign Affairs and Trade has argued that a “ban treaty risks undermining the NPT” because a ban treaty would cause “ambiguity and confusion” and because

⁴⁸ Stuart Maslen, *Commentaries on Arms Control Treaties Volumes 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (2nd edition) (Oxford: Oxford University Press, 2005), para. 1.71 (“What is critical is the nexus between the actions of a State Party and specific prohibited activities.”)

⁴⁹ See, e.g., Declaration of the United Kingdom of Great Britain and Northern Ireland to the Mine Ban Treaty, July 31, 1998, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en#EndDec (accessed December 12, 2018). Other states, including Australia, have made similar declarations upon ratifying or acceding to the Mine Ban Treaty. UN Treaty Collection, Status of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en#EndDec (accessed December 12, 2018).

⁵⁰ The *Nuclear Weapons Ban Monitor 2018* clarified that in order to violate Article 1(1)(e), the “assistance must make a substantive contribution to a prohibited activity: insignificant contributions (for example, a screw or bolt that is used in a nuclear missile) would not violate the prohibition.” *Nuclear Weapons Ban Monitor 2018*, p. 31.

⁵¹ Richard Tanter, “Pine Gap: An Introduction,” *Nautilus Institute*, February 21, 2016, <https://nautilus.org/publications/books/australian-forces-abroad/defence-facilities/pine-gap/pine-gap-intro/> (accessed December 11, 2018).

⁵² Stuart Casey-Maslen, “The Nuclear Weapons Prohibition Treaty: Interpreting the Ban on Assisting and Encouraging,” *Arms Control Today*, October 2018, <https://www.armscontrol.org/act/2018-10/features/nuclear-weapons-prohibition-treaty-interpreting-ban-assisting-encouraging> (accessed December 11, 2018).

⁵³ See Brangwin with Rann, “Australia’s Military Involvement in Afghanistan Since 2001.”

⁵⁴ See Treaty on the Non-Proliferation of Nuclear Weapons (NPT), adopted June 12, 1968, entered into force March 5, 1970.

of issues of verification under the TPNW.⁵⁵ These arguments are unfounded, however. The TPNW does not create conflicting obligations to the NPT. The preamble of the TPNW reaffirms that the “full and effective implementation of the [NPT] . . . has a vital role to play in promoting international peace and security.”⁵⁶ In addition, the nuclear weapons ban treaty fills in the legal gaps left by the NPT and advances the treaty’s goals of nuclear disarmament and a “world free of nuclear weapons,” both of which are supported by Australia.⁵⁷

Even critics of the TPNW acknowledge the shortcomings of the NPT. In her op-ed criticizing the movement to “ban the bomb,” then-Minister for Foreign Affairs Julie Bishop acknowledged that there are now more nuclear-armed states than there were at the adoption of the NPT, and that “some states’ arsenals are still growing.”⁵⁸ Senator Wong lamented that the “yearly NPT Review Conferences have become increasingly fractious as states ventilate their frustration at the lack of progress towards effective nuclear disarmament . . . At this stage, few are anticipating the 2020 NPT Review Conference to do much better.”⁵⁹

The TPNW would allow Australia to help advance the objectives of the NPT. NPT Article VI requires states parties to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” This article has been considered a failure by many: “In the eyes of the non-nuclear-weapon states, progress on nuclear disarmament has been woefully inadequate and has essentially ground to a halt in the current period.”⁶⁰ In banning nuclear weapons and requiring all states parties to disarm, the TPNW takes a significant step towards achieving the nuclear disarmament goals of Article VI. By joining the TPNW, Australia would support these efforts and better meet its Article VI obligations.

In addition, the TPNW builds on and strengthens the NPT’s safeguard regime.⁶¹ The TPNW essentially incorporates the NPT’s safeguard provisions because the new treaty obliges states parties to uphold their International Atomic Energy Agency (IAEA) agreements pursuant to the

⁵⁵ Australian Department of Foreign Affairs and Trade, “Australia’s Nuclear Non-Proliferation and Disarmament Policy.”

⁵⁶ TPNW, pmb., para. 18.

⁵⁷ Australian Department of Foreign Affairs and Trade, “Australia’s Nuclear Non-Proliferation and Disarmament Policy.”

⁵⁸ Bishop, “We Must Engage, Not Enrage Nuclear Countries,” *Sydney Morning Herald*.

⁵⁹ Wong, “The Disarmament Challenge in a Time of Nuclear Disruption.”

⁶⁰ Paul Meyer, “The Nuclear Non-Proliferation Treaty: Fin de Regime?” *Arms Control Today*, April 2017, <https://www.armscontrol.org/print/8538> (accessed December 11, 2018) (discussing four key failures of the NPT: “(1) the failure of the nuclear-weapon states to fulfill their disarmament commitments, (2) the inability to effect universalization of the treaty and resolve its major regional security threats, (3) the absence of crucial institutional support for the NPT, and (4) the erosion of the ‘common purpose’ that had animated NPT parties around its core nuclear nonproliferation norm.”).

⁶¹ Eirini Giorgou, “Safeguards Provisions in the Treaty on the Prohibition of Nuclear Weapons,” *Arms Control Law*, April 11, 2018, <https://armscontrollaw.com/2018/04/11/safeguards-provisions-in-the-treaty-on-the-prohibition-of-nuclear-weapons/> (accessed December 11, 2018). See also Letter from Gem Romuld and Tim Wright, ICAN, to Senator Penny Wong, October 19, 2018, p. 3 (“Like the NPT, the TPNW requires all of its states parties to conclude and maintain a safeguards agreement with the International Atomic Energy Agency to ensure that nuclear materials and technology for peaceful purposes are not diverted to weapon programmes. We are pleased that the TPNW goes a step further than this in requiring an Additional Protocol for all those that have already accepted it. The safeguards under the TPNW are thus stronger than under the NPT, as the NPT does not require the Additional Protocol for any states.”).

earlier instrument.⁶² The TPNW also binds states parties that have signed the IAEA's Additional Protocol to its stronger rules; the Additional Protocol, which supplements a standard safeguard agreement, is not required by the NPT.⁶³ If a state party does not have a safeguard agreement, the TPNW mandates that it conclude one. Finally, the TPNW's Article 4 extends safeguard obligations to nuclear-armed states.⁶⁴ Therefore, the TPNW's safeguard provisions advance rather than conflict with the obligations under the NPT.

Australia's Commitment to Nuclear Disarmament Calls for Joining the TPNW

Joining the TPNW would further Australia's commitment to a nuclear-weapon-free world, a goal which Australia has clearly and consistently endorsed. For example, the Department of Foreign Affairs and Trade affirmed in 2017, "Australia strongly supports nuclear disarmament and action towards the goal of a world free of nuclear weapons."⁶⁵ The 2016 Defence White Paper similarly assured that "Australia has historically been a prominent supporter of this international effort [to address the threat associated with the proliferation of weapons of mass destruction]."⁶⁶ Such statements echo those in earlier defense documents.⁶⁷

Australia has also manifested its commitment to achieving a nuclear-weapon-free world by becoming a state party to other disarmament treaties with similar aspirations. For example, Australia ratified the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) in 1986. The preamble of that treaty notes that states parties were "gravely concerned that the continuing nuclear arms race presents the risk of nuclear war which would have devastating consequences for all people" and "convinced that all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons."⁶⁸ If it renounced its reliance on nuclear weapons for defense and joined the TPNW, Australia would be acting in accord with the spirit of the Treaty of Rarotonga.⁶⁹

Australia committed itself to nuclear disarmament when it joined the NPT. Despite the treaty's shortcomings in relation to disarmament, states parties to the NPT have declared their "intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament."⁷⁰ Furthermore, as discussed above, Article VI commits states parties to work toward general and complete disarmament. Joining the TPNW represents the next step towards achieving the NPT's nuclear disarmament goals. UN

⁶² TPNW, art. 3.

⁶³ For more on the Additional Protocol, see IAEA, "Additional Protocol," <https://www.iaea.org/topics/additional-protocol> (accessed December 11, 2018).

⁶⁴ TPNW, art. 4(3).

⁶⁵ Australian Department of Foreign Affairs and Trade, "Australia's Nuclear Non-Proliferation and Disarmament Policy."

⁶⁶ Australian Department of Defence, *2016 Defence White Paper*, para. 2.104.

⁶⁷ See, e.g., Australian Department of Defence, *Defence 2000*, para. 4.12. The 2000 Defence White Paper declared Australia's "interest in preventing the spread of weapons of mass destruction (WMD)," as it has both "an interest in helping to ensure that no-one should experience the horrors of nuclear, chemical or biological warfare" and "a strategic interest in minimising the risk that WMD might one day be used or threatened against us."

⁶⁸ South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), signed August 6, 1985, entered into force December 11, 1986, pmbl., paras. 2-3.

⁶⁹ Michael Hamel-Green, "Nuclear Umbrella or Nuclear-Free? Australia's Disarmament Dilemma," International Law and Policy Institute (ILPI) background paper no. 8/2014, June 2014, <http://nwp.ilpi.org/?p=2479> (accessed December 11, 2018) (noting that "Australian reliance on extended nuclear deterrence appears to contradict the spirit of the Rarotonga Treaty as set out in its Preamble principles and aims.").

⁷⁰ NPT, pmbl., para. 8.

Secretary-General António Guterres has described the TPNW as being fully compatible with and complementary to the NPT.⁷¹ International lawyer Stuart Maslen wrote that the TPNW “augments the existing nuclear disarmament and non-proliferation treaty regime, it does not pull it apart or undermine it. But by adhering to the Treaty on the Prohibition of Nuclear Weapons states are going beyond the obligations they accepted in earlier global treaties and agreements.”⁷²

Conclusion

From a legal perspective, Australia’s security arrangements with the United States should not be considered a barrier to becoming party to the TPNW. If Australia became party to the instrument, it would have to renounce its nuclear umbrella arrangement with the United States; however, it can do so without undermining its alliance with the United States, which is created by the ANZUS Treaty. Australia could also continue joint military operations and exercises with the United States, so long as its conduct does not rise to the level of assistance prohibited by the TPNW. The TPNW does not conflict with the NPT, and in fact furthers the goals of the NPT. In addition, there are compelling political reasons for Australia to choose to join the TPNW, particularly its longstanding commitment to nuclear disarmament.

Australia should therefore join the TPNW as soon as possible and renounce its nuclear umbrella arrangement with the United States. Signing and ratifying this instrument would further its declared desire for a nuclear-weapon-free world, while preserving its military alliance with the United States.

⁷¹ ICAN, “Totalement compatible avec le TNP,” May 25, 2018, <http://www.icanswitzerland.ch/totalement-compatible-avec-le-tnp/> (accessed December 12, 2018).

⁷² Maslen, “The Relationship of the 2017 Treaty on the Prohibition of Nuclear Weapons with Other Agreements.” *EJIL Talk*.