

LEGALITY OF PRODUCTION AND POSSESSION OF NUCLEAR WEAPONS

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In the case of the production of nuclear weapons, the framework of international law still has important gaps. According to the Non-Proliferation Treaty (NPT), to which 190 countries are members, only five countries (the United States, the United Kingdom, Russia, China, and France) can legally produce and possess nuclear weapons. Some countries (India, Pakistan, and Israel) have opted to produce them outside of this framework. North Korea, previously member to the NPT Treaty, withdrew from it in 2003. These countries are not legally producing or possessing them within the framework of the NPT Treaty, but nor are they formally illegally doing so. Open for signature in 2017, the Treaty on the Prohibition of Nuclear Weapons would comprehensively forbid every signatory country from doing production or possession. It has yet to enter in effect.

There are two comprehensive treaties which cover the production of nuclear weapons: The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) starting in 1970, and the more recent Treaty on the Prohibition of Nuclear Weapons (TPNW) which has not yet entered into force. There are also five treaties covering populated areas that together prohibit the production of nuclear weapons in Latin America and the Caribbean, the South Pacific, Southeast Asia, Central Asia, Africa and some other countries (Mongolia).

In March 1963, U.S. President John F. Kennedy warned of “having to face a world in which 15 or 20 or 25 nations may have [nuclear] weapons” and he regarded that “as the greatest possible danger and hazard” in the 1970s.¹ In the late 1950s and 1960s, the international community was first sensitized to the threat of nuclear weapons. This initial statement was made after the President had been made aware by the Department of Defense that “eight countries [...] would likely have the ability to produce nuclear weapons within ten years.”² After the United States and the Soviet Union submitted first drafts in 1965 to the Eighteen Nation Disarmament Committee, there followed a period of intense negotiation. Ultimately, the United Nations General Assembly adopted the text of the NPT in June 1968. While the Soviet Union, the United Kingdom, and the United States joined after the opening for signatures in July of the same year, France and China both only acceded to the NPT in 1992.

The NPT remains the only “worldwide” treaty forbidding the production of nuclear weapons, because the TPNW has yet to enter into force. The NPT has been joined by a total of 190 countries, including five nuclear-armed countries (the United States, Russia, the United Kingdom, France, and China.) These five countries can legally possess them under this treaty. The other 185 countries who are signatories of the NPT Treaty are not allowed to legally produce nuclear weapons.

Within the main framework of international law on nuclear weapons, only these five countries worldwide are officially allowed to produce them. Any other country that produces these weapons falls into a different category: India, Pakistan, North Korea, and Israel have produced

¹ Kimball, Daryl. and Reif, Kingston. “Timeline of the Nuclear Nonproliferation Treaty (NPT).” *Arms Control Association*, March 2020.

² Kimball, Daryl. and Reif, Kingston. “Timeline of the Nuclear Nonproliferation Treaty (NPT).” *Arms Control Association*, March 2020.

these devices outside of the international legal framework. This does not mean that these nations are producing them illegally, because treaties usually bind signatory members only.

Countries that have opted not to join the NPT treaty make the legality of nuclear weapons possession a little bit more complicated. Four states – India, Pakistan, Israel, and South Sudan, have never signed the Treaty. North Korea formally withdrew from the NPT in 2003. All of these five countries, except South Sudan, have produced, tested and stockpiled nuclear weapons. The question then is: have they done so legally? The answer might be dissatisfying: it wasn't legal, nor was it illegal--*per se*-- for them to do so. Had these countries been parties to the NPT, it would have been unreservedly illegal for them.

The Treaty on the Prohibition of Nuclear Weapons “prohibits States Parties [countries] from developing, testing, producing, manufacturing, acquiring, possessing, or stockpiling nuclear weapons or other nuclear explosive devices.”³ As such, it goes further than the NPT or other treaties have ever gone on the nonproliferation of such weapons. It is a “legally binding instrument to prohibit nuclear weapons [...] that grew out of a renewed recognition of the catastrophic humanitarian consequences of nuclear weapons use, the rising risk of accidental or intentional nuclear use, and a growing sense of frustration that key nuclear disarmament commitments made by the nuclear-weapon states were not being fulfilled.”⁴ It outright forbids members of the treaty from producing or possessing these weapons. The TPNW aspires to be a full-on ban, sort of like the area-specific Nuclear Weapons Free Zone treaties, but on a larger - worldwide - scale.

Once again, because of the nature of international law, the TPNW would only forbid countries that have *signed* the treaty from producing or possessing them. Which means that any of the nine countries currently producing or possessing them, or any of the NATO members that “host” nuclear weapons from other countries (see paper on “Legality of Nuclear Weapons Within Alliances”) would not be breaching any international law so long as they opted out of the TPNW.

The TPNW was adopted by 122 nations in July 2017, and then opened for signature. As of April 2020, it has yet to enter into force, having not yet reached the threshold of ratification by 50 countries. Nuclear-armed countries- and some NATO members hosting these weapons on their soil - have criticized the Treaty. They argue that it would “distract countries from other initiatives.”⁵ Meanwhile, proponents argue that the TPNW would close a legal gap, where the NPT does not expressly outlaw nuclear weapons⁶.

While the TPNW has not yet entered into force, Michael Hamel Green, from Victoria University Melbourne in Australia noted “some positive impact of the TPNW on the thinking and positions of the various participants [...] there was some evidence that diplomats were drawing upon the TPNW norms in discussion with nuclear-weapon-reliant states.”⁷ International law, even if not

³ “Treaty on the Prohibition of Nuclear Weapons (TPNW).” *NTI Building a Safer World*, 14 November 2019.

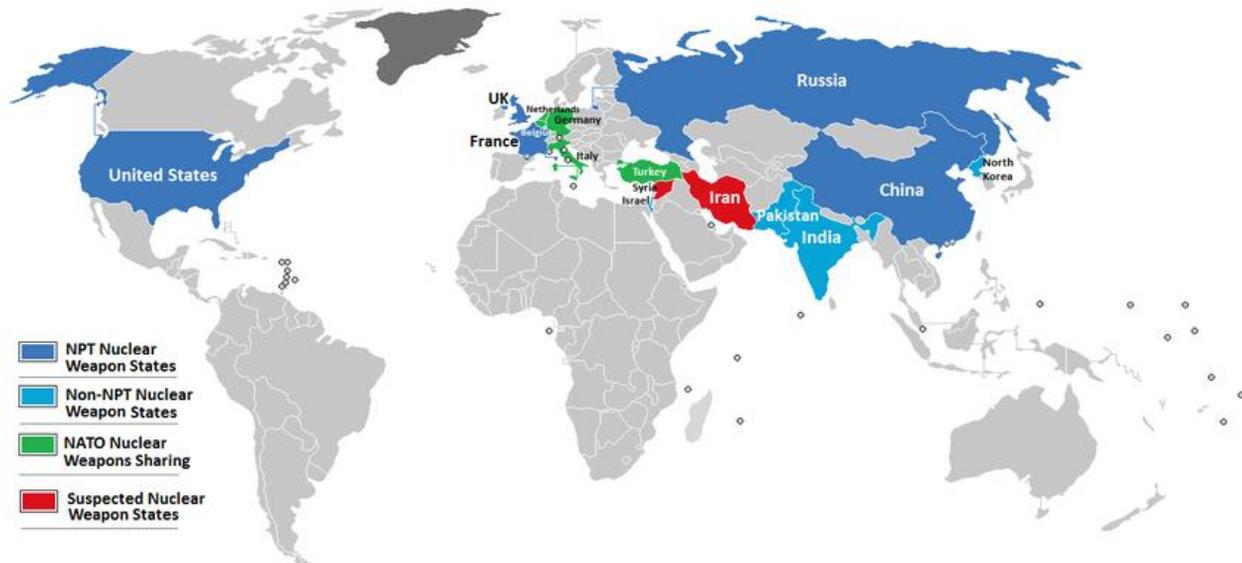
⁴ “Treaty on the Prohibition of Nuclear Weapons (TPNW).” *NTI Building a Safer World*, 14 November 2019.

⁵ “Treaty on the Prohibition of Nuclear Weapons (TPNW).” *NTI Building a Safer World*, 14 November 2019.

⁶ “Treaty on the Prohibition of Nuclear Weapons (TPNW).” *NTI Building a Safer World*, 14 November 2019.

⁷ Michael Hamel-Green. “The Nuclear Ban Treaty and 2018 Disarmament Forums: An Initial Impact Assessment.” *Journal for Peace and Nuclear Disarmament*, 456.

binding for all nations or enshrined into treaties, can have effects. Even if an action is not made illegal by law, because it is a *norm* (a principle - accepted by most), the TPNW can affect the behavior of nuclear - armed countries.



Areas in blue and red are nuclear weapon countries or suspected nuclear weapon countries. Areas in dark blue are the five NPT Nuclear Weapon Countries, meaning they possess them legally through the Treaty.

Source: Peter J. Hotez “Nuclear Weapons and Neglected Diseases: The «Ten-Thousand-to-One»”. *Journal PLOS Neglected Tropical Diseases*.

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