Seeing the wood for the trees: Why situating the Nuclear Ban Treaty in the context of outlawing war makes sense

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Abstract

The Nuclear Ban Treaty, more formally known as The Treaty on the Prohibition on Nuclear Weapons (TPNW), has pessimistically been compared to the Kellogg-Briand Pact (or Paris Peace Treaty), more formally known as the General Treaty for Renunciation of War as an Instrument of National Policy, negotiated in 1928. Just as the latter did not prevent the Second World War slaughter, the Rwandan genocide, the Russian annexation of Crimea (a part of Ukraine), and other wars since it entered into force, some scholars argue that the Nuclear Ban Treaty, negotiated in 2017, will have equally little effect to abolish nuclear weapons. Oona Hathaway and Scott Shapiro in *The Internationalists and their plan to outlaw war* (2017) makes a strong argument that the Kellogg-Briand Pact ushered in a new world order based on the illegitimacy rather than the legitimacy of war.[1] I propose to investigate what currency can be had for the political work necessary to abolish nuclear weapons by situating the Ban Treaty in the context of outlawing war. The discursive history of the Ban Treaty, dubbed the humanitarian initiative, largely relies on international humanitarian law or *jus in bello*. But, does Hathaway and Shapiro's argument that war was made illegal and since has become illegitimate give us another way of thinking about how to make *de facto* what the Ban Treaty makes *de jure*, that is the abolition of nuclear weapons?

1. Introduction

In this paper I argue that outlawing nuclear weapons should be placed in the context of outlawing war. The discursive history of the Treaty on the Prohibition of Nuclear Weapons is that of the humanitarian initiative, which roots the argument for banning nuclear weapons in *jus in bello* or international humanitarian law. This move from the multi- and transnational

[1] Hathaway O A, & Shapiro, S J, (2017) *The Internationalists and their Plan to Outlaw War*, Penguin Random House

nuclear abolition movement, consisting both of activist states and civil society groups, may have been the most logical and direct way to achieve a ban treaty of this sort (it worked for chemical and biological weapons as well as anti-personnel landmines and cluster munitions). However, this paper warns that the IHL (or *jus in bello*) justification for banning nuclear weapons run up against *the idea* that nuclear weapons are essential to deter wars (i.e. to keep the peace) in general and nuclear war in particular. The Latin adage "Si vis pacem para bellum" or "If you want peace, prepare for war" has been seared into the minds of policy-makers and the public by the Wizards of Armageddon as Kaplan refers to Bernard Brodie and others, who devised nuclear deterrence theory in the US.[2] Powerful countries have used this justification for not taking part in the Nuclear Ban Treaty negotiations and some pundits labelled the treaty a danger to international peace and security for the same reason.[3] Discursively therefore, the treaty has to be contextualised in a broader set of arguments that reject the idea that nuclear weapons keep the peace. One way to do so is to proffer arguments against deterrence theory – that deterrence is immoral, inhumane, unfair, fallible, leads to arms races, and is in fact being undermined by nuclear armed states' own policies, e.g. developing missile defences. The other way is to argue that war has been outlawed and that the decline we see in aggressive inter-state war is the result of this normative shift in how international order is constituted. Banning nuclear weapons is therefore not simply an issue of not using or threatening to use a massively destructive and indiscriminate weapon *when going to war*, but an important step in rejecting war as national policy as such. The paper's focus is the latter. By contextualising the Ban Treaty in the outlawing of war, the aim is not to detract from the treaty's humanitarian foundations, but to expand them so as to deal with the critique against the treaty that capitalises on the discursive loopholes that a *jus in bello* approach has left.

2. Outlawing nuclear weapons: The Treaty on the Prohibition of Nuclear Weapons

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is rooted in international humanitarian law. The discursive[4] movement, dubbed the humanitarian initiative, that unfolded into the treaty emphasised the inhumane nature of nuclear weapons, their

[2] Kaplan, F (1983) The Wizards of Armageddon, Stanford, Ca: Stanford University Press.
[3] Stephens, B. 2017, Don't Ban The Bomb New York Times, Oct. 7, p. A23, https://www.nytimes.com/2017/10/06/opinion/nobel-peace-prize-nuclear-weapons.html
[4] Discursive here refers to ideas that inform practice (i.e. praxis) in the Foucauldian sense.

indiscriminacy, disproportionality, environmental impact, and the impossibility of the international community to respond to the humanitarian crisis that will result from nuclear weapon use.[5] In essence the treaty, like the conventions prohibiting chemical and biological weapons and anti-personnel landmines and cluster munitions, therefore speaks to *jus in bello*, or what is legal conduct *in* war. *Jus in bello* is distinguished from *jus ad bellum* – the latter focuses on when *going to* war is legal and is often framed by the just war tradition that argues that war can only be engaged in if there is a just cause.[6]

Driving the nuclear weapons abolition process from a *jus in bello* angle made sense, because precedent existed in law and in diplomatic process that could be drawn on. Surely if chemical weapons could be banned based on the harm they do to civilians during and long after war, it defies logic not to ban nuclear weapons that are in qualitative and quantitative terms massively more harmful to civilians and affect generations after their use. The Ottawa and Oslo processes that respectively led to the anti-personnel landmine and cluster munitions bans also set an example of how to move a class of weapons from the realm of arms control to that of a humanitarian concern.[7] These processes introduced the idea of 'stigmatizing' a weapon, innovatively, but not solely, through the stories of the victims of these weapons to bring home their humanitarian impact.[8]

Keeping the strict distinction between *jus in bello* and *jus ad bellum* and embedding the Ban Treaty in the former also means that no party (directly involved in armed conflict or allied to one of the conflicting parties) may use nuclear weapons, irrespective of the cause of war. As such, the TPNW closed an important legal gap that the International Court of Justice (ICJ)[9] left in 1996. The United Nations General Assembly (UNGA) requested the ICJ to provide an advisory opinion on the question: Is the threat or use of nuclear weapons in any circumstance permitted under international law? The Court found that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in a much debated

[5] Sauer, T. and Pretorius, J. (2014) Nuclear weapons and the humanitarian approach, *Global Change, Peace & Security*, 26:3, 233-250, DOI: 10.1080/14781158.2014.959753, p. 4.
[6] Moussa, J (2008) Can jus ad bellum override jus in bello? Reaffirming the sepration of the two bodies of law, *International Review of the Red Cross*. 90:872, 963-990.
[7] Cluster Munition Coalition, 2017, The Oslo Process: The Historic start to the cluster bomb ban, 23 February, http://www.stopclustermunitions.org/en-gb/media/news/2017/the-oslo-process-the-historic-start-to-the-cluster-bomb-ban.aspx (Retrieved on 28 March 2019)
[8] Männistö, I (2016) The Ottawa Process: Two Decades Later, *Society, Culture, and Security*, 27 November, http://natoassociation.ca/the-ottawa-process-two-decades-later/
[9] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* ***1.****C.J. Reports 1996,* p. 226 https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf

operative paragraph of the advisory opinion, the Court also stated: "In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[10] The Court's opinion left room for an interpretation that *jus in bello* is subordinate to *jus ad bellum*. In other words, a cause to go to war in the name of state survival may justify the use or threat of use of nuclear weapons in the conduct of war.[11] Nuclear armed states (or aspiring nuclear weapon states) could use such an interpretation of the ICJ's opinion in defence of retaining or obtaining nuclear weapons. The TPNW does not leave room for interpretation – nuclear weapons are illegal in all respects, including: possession, use, threat of use, stationing, and assisting or encouraging in any way these activities.[12] No *casus belli* can justify their use or threat of use in war and no *casus belli* therefore necessitates their possession or existence for that matter.

For the proponents of nuclear weapons abolition, the TPNW is a big step towards the eventual elimination of nuclear weapons in the following ways:

Firtsly, it is seen as an exercise in global democracy with the majority of states in favour of banning nuclear weapons exerting their will. A handful of powerful nuclear weapons states are perceived to have used disarmament forums to further their non-proliferation and nuclear security interests, but to have stalled implementation of their disarmament obligations. To change this power dynamic nuclear disarmament was diverted to the UNGA through a resolution that created an open-ended working group where the humanitarian consequences of nuclear weapons and multilateral nuclear disarmament negotiations were discussed. Norway, Mexico and Austria respectively hosted conferences on the humanitarian impact of nuclear weapons. In the words of the Mexican delegation: "What the humanitarian initiative did was to give the voice back to dozens and dozens of non-nuclear possessor states, who had remained quiet for many years…[it] provided them with a platform".[13] A resolution was later adopted by UNGA to convene negotiations in 2017 on a "legally binding instrument to prohibit nuclear weapons, leading towards their total elimination".

[10] ICJ, Legality of the Threat or Us of Nuclear Weapons (Advisory Opinion), (1996) ICJ Rep. 226, Paragraph 2E
[11] Moussa, *op cit*, p.970
[12] Treaty on the Prohibition of Nuclear Weapons (2017), see Article 1 for the list of prohibitions.
[13] ICAN, Podcast: UN talks to prohibit nuclear weapons. 16 March 2016.

Global democracy in this securitized[14] issue area was also furthered by the inclusion of civil society, coordinated largely by the International Campaign to Abolish Nuclear Weapons (ICAN), recipients of the 2017 Nobel Peace Prize. According to Ray Acheson, director of Reaching Critical Will, state voices could now be heard outside the negotiating room, improving transparency, while civil society voices could be heard inside the room, improving public participation.[15] The desecuritisation effect of the negotiation process is essential to the bigger goal of the TPNW.

The bigger goal of the TPNW, secondly, is to change the way actors think about nuclear weapons. As protrayed by the humanitarian initiative that grounds it, the TPNW has "build a new narrative around nuclear weapons, one based on the facts of nuclear detonation."[16] The TPNW reframes nuclear disarmament in human-centred language rather than the state-centred, technical and abstract language of arms control and nuclear deterrence. It especially drew on the stories of the Hibakusha, survivors of the Japanese nuclear bombings, and the victims of nuclear tests to do so.

Thirdly, the TPNW is hailed as an instrument to stigmatize nuclear weapons. Although there is disagreement whether the weapons or the possessors of the weapons are the right target of stigmatization – the point is to create "perceptions of unacceptability which can be incompatible with the identity a state wishes to hold in the world… and in the process make it difficult for nuclear-armed states to continue to justify possessing and planning to use nuclear weapons".[17] Instead of associating power, prestige or security with nuclear weapons, the TPNW's emphasis is on their repugnance.[18]

Finally, the Treaty has customary law value. In other words, even though the nuclear-armed states have not signed on to it, the treaty can over time come to be legally binding for all states. For a treaty to gain customary law status it has to meet certain criteria, e.g. be seen to express the general view of the international community and capture customary behaviour (or

[14] Securitisation is the process that lifts an issue from 'normal' politics into an emergency space where usually state actors justify extraordinary measures for example the need to breach (human) rights and (democratic) obligations in the name of security. See: Barry Buzan, Ole Wæver, and Jaap de Wilde, (1998) *Security: A New Framework for Analysis*, Boulder: Lynne Rienner Publishers, p. 25
[15] ICAN, Podcast: UN talks to prohibit nuclear weapons. 16 March 2016.
[16] Williams, H (2018) A nuclear babel: narratives around the Treaty on the Prohibition of Nuclear Weapons, *The Nonproliferation Review*, 25:1-2, 51-63, p.53
[17] Beatrice Fihn quoted in Sauer, T and Reveraert, M (2018) The potential stigmatizing effect of the Treaty on the Prohibition of Nuclear Weapons, *The Nonproliferation Review*, p.47.
[18] Egeland, K (2016) Change the incentives: Stigmatize nuclear weapons, March 15, 2016, *Bulletin of Atomic Scientists*, https://thebulletin.org/2016/03/change-the-incentives-stigmatize-nuclear-weapons/

general practice) of states. The nuclear taboo, or the norm that nuclear weapons must not be used, already reflects such customary behaviour.[19] The TPNW is "an instrument to reach an endgame in which non-use of nuclear weapons becomes what in law is termed *jus cogens*—a peremptory norm or compelling law that is simply assumed, and that cannot be derogated from—*by anyone, ever*."

For detractors the TPNW is both futile and downright dangerous. The charge of its futility follows from the absence of the nuclear armed states gerenrally, but the five nuclear weapons states in NPT terms in particular, in the negotiation process. The nuclear weapon states voted against the negotiation of the TPNW.[20] When the resolution passed and negotiations started, they chose not to participate in the negotiations and then rejected the treaty in public once it was adopted by the negotiation conference parties. Their boycott undermined the treaty in that many non-nuclear weapon states saw it as a reason not to support the negotiations or the treaty. Twenty-four states, most of them non-nuclear NATO members, but also Australia and South Korea, proffered the following explanation for voting against the treaty negotiations: "We are concerned that to start a process towards a nuclear weapon prohibition treaty now, without the support of nuclear weapon states and a large number of other countries with specific security interests, would be premature." Equally Iceland noted: "… we are also clear that nuclear disarmament can only be achieved with the direct involvement of the nuclear-weapons states." And Norway, a country that hosted the first conference on the humanitarian impact of nuclear weapons, stated: "We need to recognize that in the present circumstances nuclear weapon states are not ready to engage in negotiations on a prohibition of nuclear weapons. Negotiations in which nuclear-weapon states do not take part will not have any real impact."[21] It became a refrain for detractors to call the Treaty process a non-starter without the nuclear weapons states and four other nuclear armed states taking part in the process.[22] For Sauer and Reveraert this is one way in which NWS manage stigmatization efforts by employing the strategy of avoidance.[23] For the nuclear armed states, non-participation is rooted in the charge that the treaty is dangerous. The charge reads:

[19] Tannenwald, N (2007) *The Nuclear Taboo: The United States and the nonse of nuclear weapons since 1945*, Rhode Island: Browne University.
[20] The DPRK voted for the negotiations in the First Committee, India and Pakistan abstained and Israel voted no. None of them participated in the negotiations.
[21] ICAN, *Voting on UN resolution for nuclear ban treaty*, December 23, 2016, http://www.icanw.org/campaign-news/voting-on-un-resolution-for-nuclear-ban-treaty/
[22] Stephens, *op cit*
[23] *Op cit*, p.9

> "This initiative clearly disregards the realities of the international security environment. Accession to the ban treaty is incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years. A purported ban on nuclear weapons that does not address the security concerns that continue to make nuclear deterrence necessary cannot result in the elimination of a single nuclear weapon and will not enhance any country's security, nor international peace and security. It will do the exact opposite by creating even more divisions at a time when the world needs to remain united in the face of growing threats, including those from the DPRK's ongoing proliferation efforts. This treaty offers no solution to the grave threat posed by North Korea's nuclear program, nor does it address other security challenges that make nuclear deterrence necessary. A ban treaty also risks undermining the existing international security architecture which contributes to the maintenance of international peace and security."[24]

The TPNW process as dangerous is thus framed in two ways.

Firstly, the general and complete nuclear disarmament obligation of the nuclear weapon states is a burden on international peace and security, i.e. a world without these states' nuclear weapons keeping the peace would be an insecure and war-prone world. What lies behind the assertion that nuclear weapons keep the peace is the idea of an ultimate weapon, the imagined use of which frightens off[25]:

- State aggression, e.g. the idea that US nuclear weapons deterred Soviet efforts of communist world domination during the Cold War;
- Inter-state hostilities from escalating into major war, e.g. between India and Pakistan over Kashmir;
- Nuclear armed states from using nuclear weapons on each other, e.g. the idea of a US-Soviet balance of terror through mutually assured destruction prevented the two states from bombing each other with nuclear weapons; and

[24] 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, 7 July 2017, https://usun.state.gov/remarks/7892

[25] See Kaplan (*op cit*) for a detailed account of the various iterations of nuclear deterrence in the UK; and for an argument on a narrow, morally and legally defensible nuclear doctrine, see Perkovich, G (2013) *Do unto Others: Towards a defensible nuclear doctrine*. Washington: Carnegie Endowment for Peace.

- Nuclear weapons proliferation to and by irresponsible states, e.g. that somehow the P5's nuclear weapons is an essential tool to respond to the DPRK's nuclear weapons programme.

Secondly, the current nuclear order is portrayed as carefully crafted around the NPT as the cornerstone agreement among states. The NPT is interpreted as legitimising the peacekeeping function of the P5's nuclear weapons until the international conditions can be arrived at that would make that peace keeping function obsolete.[26] The only realistic way to approach nuclear disarmament until this time is through a cautious step-by-step approach in existing nuclear disarmament forums where the balance of (nuclear) power can largely be maintained through the consensus set-up of these forums. The ban approach to nuclear disarmament, it is argued, undermines the stable-as-can-be nuclear order by fragmenting disarmament forums and sowing division among NPT members. If the TPNW turns out to be worth the paper its written on and ushers in a new nuclear order by replacing the NPT, detractors ask: "what happens if the old rules are abandoned but the new ones aren't accepted by several dozen states?"… "Mightn't it be a truly Hobbesian nightmare in which everyone fights everyone, using all possible weapons".[27]

The way that proponents of the TPNW like myself have tried to respond to the charge that the Treaty is dangerous by dislodging the idea of nuclear deterrence is to proffer arguments against nuclear deterrence, e.g.:

- It is fallible, e.g. through miscalculation or if an irrational leader come to power;
- It is immoral for holding non-combatants hostage;
- It is irrational, because nuclear weapons use can lead to the annihilation of humanity – a nuclear war is therefore unwinnable;
- It provokes arms races, despite having no military utility, deterrence drives competition through the requirement of a credible second-strike capability to ward off a first strike.

[26] However, these conditions are usually deemed so far on the horizon that a date cannot be provided for general and complete disarmament or in Obama's words "not in my life time" if it is even considered possible at all.

[27] Sinovets, P (2016) Assessing the ban treaty from Ukraine, Round table on the question: Can a treaty banning nuclear weapons speed their abolition? *Bulletin of Atomic Scientists*, 16 December. https://thebulletin.org/roundtable/can-a-treaty-banning-nuclear-weapons-speed-their-abolition/

The way that proponents of the ban have responded to the charge that the TPNW will lead to the NPT's demise, risking a Hobbesian world, has been to argue that the TPNW builds on the NPT and is an interim step to the fulfilment of Article 6 of that Treaty. The majority of the non-nuclear weapon states parties to the NPT were already running out of patience – the NPT is afterall almost 50 years old. The only basis of the NPT's indefinite extension for these states was the nuclear weapon states' renewed commitment in 1995 to negotiate general and complete multilateral nuclear disarmament. The end of the Cold War signalled that "conditions" were finally right and triggered a spate of accession to the NPT. Instead, nuclear weapon states have not furthered these negotiations and continue to modernise their nuclear arsenals. Seen as an interim step to nuclear elimination, the TPNW is an instrument to prepare actors for a world without nuclear weapons. As such, the TPNW can actually lead to an orderly change of the nuclear order inside the NPT framework. If we start thinking about the TPNW in this vein – as a change in the nuclear order based on a change in the narrative around nuclear weapons - we go beyond points that counter the value of nuclear deterrence and we start seeing the bigger picture or "the wood". Placing the the TPNW discursively in the context of outlawing war, I argue, may help us to do this.

3. Outlawing war: The General Treaty for Renunciation of War as an Instrument of National Policy

Outlawing a practice, like war, means that it is deemed unacceptable by a community, which then creates law to put an end to (or abolish) the practice by making it illegal and illegitimate. This does not mean that no one will ever engage in the practice again, but when they do they will be on the wrong side of the law (or "outside" the law). When a person is outlawed, he/she is no longer entitled to the protection or benefits provided by the laws of that community.[28]

In 1928 in a process led by the US Secretary of State, Frank Kellogg, and French Foreign Minister at the time, Aristide Briand, a multilateral treaty was signed to outlaw war. The treaty was to a great extent rooted in the 'outlawry' movement that had gained significant support among religious organisations, peace movements, the women's movement,

[28] Kerr, P (1928), The Outlawry of War, *Journal of the Royal Institute of International Affairs,* 7: 6, 361-388, footnote p. 1

universities and newspaper editors of the time in the US and other states.[29] In short, the outlawry movement started from the premise that "the settlement of disputes between individual citizens or between groups of citizens by violence is fatal to any kind of social life or ordered progress. It therefore insists that the use of violence must be renounced and prevented, and that an alternative procedure must be maintained and enforced whereby disputes of every sort and kind can be settled by an appeal to reason and justice as interpreted by the law courts and the legislature." But, prior to 1928, in public opinion and international law war was treated as a lawful method of settling international disputes. Moreover, not only was it a way to legally enforce rights against other states, but a legal way to obliterate their rights. The principle of 'Might makes Right' was a constitutive principle of international order. For the outlawry movement this was the root cause of war. To end war the same principle responsible for peace inside states must be applied between states. "Violence must be renounced altogether as a method of settling international disputes, and pacific procedure, whereby reason and justice prevail over violence, must be put in its place."[30] This is precisely what the intention with the Kellogg-Briand Pact.

According to Koplow the social history of the Kellogg-Briand Pact was grounded in three aspects[31]:

Firstly, the horror of World War I – a war that seemingly no one wanted or benefitted from – brought home a sense that warfare had become so destructive, so total, to make war a pyrrhic endeavor. Whatever victory is to be had from it would come at such a cost as to render the victory hollow. Moreover, a widely held belief that war is "an inherent part of the social totality"[32], i.e. a given in human affairs, was replaced by a sense that war is a matter of volition –choice- which made it avoidable. Because people can exercise control over national policy, they can come together to limit reciprocally recourse to violence in the form of wars. How that would be done was to divest in war and invest in building peace "positively and

[29] Alonso, H (1997) The Women's Peace Union and the Outlawry of War, Syracuse Studies on Peace and Conflict Resolution; Koplow, DA (2014) Nuclear Kellogg-Briand Pact: proposing a Treaty for the Renunciation of Nuclear Wars as an instrument of National Policy, Syracuse Journal of International and Commons 42:1, 123-191.
[30] Kerr, *op cit*, p.361
[31] Koplow, *op cit*, p. 132-135
[32] Potgieter, T & Liebenberg, I (2002) Introduction, In Potgieter, T & Liebenberg, I (2002) *Reflections on War: Preparedness and Consequences*, Stellenbosch: SUN Press, p. 1

aggressively".[33]

Secondly, post-World War I saw a growing appreciation of the role of international law as precisely that, a mechanism to prevent war. Although the League of Natons Convenant did not outlaw war and in fact still presumed it a legal way to settle disputes, its instruments and procedures to prevent war, such as mandatory dispute resolution, cool-off periods and making war a concern of all members of the League illustrate the investment in international law to build positive peace. The outlawry movement in particular saw value in condemning war as illegal and was of the conviction that a public declaration to that effect would uproot war as habit or custom.

Thirdly, the spirit of "open covenants of peace, openly arrived at" infused thinking about international engagements. "Backroom transactions and private balance-of-power bargaining between selected state partners"[34] or self-serving special deals were rejected in favour of public and multilateral international undertakings by states. Hence Secretary Kellogg insisted that the pact be multilateral rather than a bilateral US-French treaty.

The Kellogg-Briand Pact was short by design in the interest of its speedy formulation and ratification.[35] It consisted of three articles: In Article I parties declare that they "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." In Article II parties "agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." Article 3 sets out the treaty logistics.[36] Unlike modern treaties it has no withdrawal clause, no recourse action tied to treaty breaking and did not create an institution to oversee the implementation of the treaty. Importantly, Koplow states: "the parties were completely clear among themselves that the function was to outlaw aggressive or offensive war; each state necessarily retained the inherent right to defend itself and its allies."[37] But the text did not include the distinction between defensive and offensive wars, neither is there an attempt to define "aggression" or to enshrine the right to self-defence in the text. Kellogg was wary

[33] Catt, C C (1928), The Outlawry of War, *The Annals of the American Academy of Political and Social Science*, 138, 157-163, p 162
[34] Koplow *op cit*, p. 135
[35] Kellogg avoided a negotiating conference for fear that such a forum would burden the endeavor with unnecessary detail and complexity and preferred diplomatic notes instead.
[36] General Treaty on the renunciation of war as an instrument of national policy, 1929
[37] Koplow, p. 146.

that wrangling over definitions would detract from the treaty's normative intention. Even though detractors criticised the treaty for being utopian and abstract, its crafters seem particularly realistic in what could be agreed upon and particularly skilful in the way they managed to incorporate what E.H. Carr calls "the world of abstract reasoning [in the form of absolute rhetoric against all war] and the world of political reality"[38] [the sub silentio preservation of the right to wage war against unprovoked aggression[39]]. For Koplow, the revival of the just war tradition started with the Treaty.

If we evaluate the treaty against the backdrop of the militarisation of the 1930s and World War II as is often done, it is perhaps understandable that the treaty is deemed "an abject failure of misguided idealism"[40], not worth the paper it was written on, a treaty which "everyone agreed to but no one took seriously"[41]. There is no shortage of derogatory terms that have been used to label the treaty. Important people have referred to the Treaty as "meaningless" (Henry Kissinger), "childish" (George Kennan), "a purely utopian project" (E.H. Carr) and "singularly vacuous" (Ian Kershaw).[42] But a number of scholars has recently evaluated the Kellogg-Briand Pact against a different backdrop, namely its normative aim, which was to render war illegal and illegitimate as a way to settle international disputes. Against this backdrop, the treaty represents a psychological shift in how people thought about war. War seen as an aberration rather than a matter-of-fact in human affairs needs justification, including in international law. Post 1928, states no longer have an unquestioned right to prepare for, threaten or conduct war. Instead they have an obligation to circumvent war and to find alternatives to resolve disputes or exert their rights.[43]

But if the Kellogg-Briand Treaty mattered, why did it not prevent World War II? For one, because it was a normative treaty around which an enforcement structure was still to be build – in Briand's words at the signature of the Pact: "We have proclaimed peace…now we have to organise it."[44] That organisation had not yet taken shape when historic factors such as the great depression and Hitler took the stage. We have to understand the Kellogg-Briand Treaty as nothing short of a revolution in the constitution of international society.[45] It triggered an

[38] Carr, E.H. 1995 (org 1939), The Twenty Years' Crisis 1919-1939, p.31.
[39] Koplow, *op cit*,
[40] *Ibid*, p. 144
[41] Sinovets, *op cit*
[42] Hathaway & Shapiro, *op cit*, p xii; Carr, *op cit*, p 30; Koplow, *op cit*, p 144
[43] Koplow, *op cit*, p 150
[44] As quoted in Hathaway and Shapiro, *op cit*, p 195
[45] I draw here on Philpott's idea of revolutions in international society. He provides a definition of "constitution of international society" as a set of norms, mutually agreed upon by polities who are

inversion of the system of international law that had far-reaching implications for international order to the extent that one can speak of the old world order where war was legal and legitimate and the new world order, where it wasn't. Prior to 1928 "War was not a breakdown in the rule of law — war was *an instrument* of the rule of law. As a result, when states went to war, they got to keep what they caught. And no one — even the losers — could be tried for having waged a war. Killing on the battlefield was completely immune from prosecution in a court of law. Economic sanctions imposed by neutral states on belligerents were illegal. Neutrals were required to treat warring nations with the strictest impartiality. And gunboat diplomacy was legitimate and common."[46] This is not the world of today.

World War II represents a collision of the old and the new world orders. Some states – Germany, Japan and Italy in particular – were caught in the old world order, still understanding the rules in Might makes Right terms. However, the very basis on which the US changed its neutrality laws to support the Allies before entering World War II, as well as charging German and Japanese officials at Nuremberg and Tokyo with the crime of aggressive war and crimes against the peace after the war suggest that the Kellog-Briand Pact was taken very seriously by the other major powers of the day. Hathaway and Shapiro also show how the psychological shift in the role of war was embraced at the Yalta conference where the Allies negotiated the United Nations. The UN was seen as providing the machinery for or "organisation" of peace that the Kellog-Briand Pact lacked. Although technically still in force, it is widely accepted that the UN Charter supercedes the Kellogg-Briand Pact and the history that Hathaway and Shapiro provides relates just how much it normatively informed the structures and procedures of the UN.

Against the aim of establishing a different normative order, the Kellogg-Briand Pact was remarkably successful. Its success is not just evident in the decline in inter-state warfare[47],

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members of the society that define the holders of authority and their prerogatives, especially in answer to three questions: Who are the legitimate polities? What are the rules for becoming one of these polities? And, what are the basic prerogatives of these polities. Constitutions of international society are both legitimate- that is sanctioned by authoritative agreements- and practiced, generally respected by all polities that are powerful enough regularly to violate them." See Philpott, D (2001) *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, Princeton University Press. p.12

[46] Hathaway & Shapiro (2017) What realists don't understand about international law, *Foreign Policy*, 9 October, https://foreignpolicy.com/2017/10/09/what-realists-dont-understand-about-law/

[47] Hathaway and Shapiro uses the Correlates of War data set to show the decline in aggressive war, but other authors have recognized the decline as well, most notably John Mueller in *Retreat from Doomsday: The Obsolescence of Major War* (1989) and more recently Steven Pinker in *The Better Angels of our Nature: A History of Violence and Humanity* (2011).

but in hardening of state borders as territorial conquest has just about vanished, also resulting in the survival of weak states, and the unprecedented growth in international organisations.

Stephen Walt, a staunch proponent of the realist school of thought in International Relations, questions Hathaway and Shapiro's interpretation of the impact of the pact.[48] He agrees that wars have declined. However, he argues that the legal norms embodied in the pact and in the UN Charter have neither restrained conduct in wars, nor have they prevent great powers from going to war without UN Security Council approval. Moreover, the cause of the decline in warfare may be linked to many other factors, e.g. nuclear weapons, economic interdependence, the spread of democracy, the shifting cultural attitudes towards war among great powers, or the spread of nationalism around the globe alongside small arms that increased the cost of occupation. He reasons for Hathaway and Shapiro to prove that outlawry's norms are reducing war-prone state behaviour, "[they] should be able to point to numerous cases where national leaders had a clear incentive to expand their territory and believed it would be easy to do, and then decided not to go ahead either because they believed such an act was inherently wrong or because they were convinced it would never, ever, ever, be accepted by the rest of the international community."[49]

Hathaway and Shapiro have responded to Walt stating that: "This reaction reveals a misunderstanding about how law works. When it is most effective, the law doesn't induce states to act contrary to incentives; it changes those incentives themselves."[50] Because war is illegal, whatever is acquired through war – territory, treasure of people - will not be seen to belong to the victor. Moreover, the aggressor will be condemned by the rest of the international community. These are powerful disincentives even for major countries. Some states may still have the power to make war, but they won't have the right; they will be outside the law and their actions will not be protected by law, their reputation as breakers of the law will also diminish their influence and expose them. A case in point is Russia's annexation of Crimea, which goes against the norms of *jus ad bellum* and has incurred sanctions and international condemnation for Russia and importantly non-recognition of its

[48] Walt, S (2017) There's still no reason to think that the Kellogg-Briand Pact accomplished anything. *Foreign Policy*, 29 September, https://foreignpolicy.com/2017/09/29/theres-still-no-reason-to-think-the-kellogg-briand-pact-accomplished-anything/
[49] Walt, *ibid*
[50] Hathaway & Shapiro (2017) What realists don't understand about international law, *Foreign Policy*, 9 October, https://foreignpolicy.com/2017/10/09/what-realists-dont-understand-about-law/

sovereignty over Crimea.[51] This is far different from a world where war is legal and legitimate and no one would have raised an eyebrow or based on that system, would have had to continue treating Russia as an international good citizen.

Hathaway and Shapiro acknowledge that powerful actors may 'make' law that is in their interests.[52] In fact, the Peace Pact itself has been critiqued as exactly a case in point of such behaviour[53], but law takes on a life of its own and come to have consequences for state behaviour that change the cost-benefit calculations of major powers too. Increasingly even the powerful have chosen the benefits of staying inside the law.

If we accept the claim that Hathaway, Shapiro and others make that (aggressive) war as a constitutional premise of international society has been outlawed (made illegal and deligitimized as an instrument of national policy)[54], how does that impact on the way we think about nuclear weapons and the TPNW as an effort to outlaw them?

4. The TPNW in the context of outlawry

There is a risk to blur the lines between *jus ad bellum* and *jus in bello* when thinking about the legal status of nuclear weapons in the context of the laws of war. As was noted above, the ICJ's advisory opinion on the legality of nuclear weapons is a case in point where some may argue that a case of extreme self-defence (*jus ad bellum*) can outweigh humanitarian considerations (*jus in bello*) and justify the use of nuclear weapons. Another case in point is when those who are concerned about the massive destruction and humanitarian consequences of nuclear weapons use in warfare propose that all war should be abolished, even 'just wars' (*jus contra bellum*).[55] The Russell-Einstein Manifesto that has a special place in Pugwash history, borders on blurring the lines in this way. It promotes the following resolution: "In view of the fact that in any future world war nuclear weapons will certainly be employed, and that such weapons threaten the continued existence of mankind, we urge the governments of

[51] Pompeo, M (2018) Crimea Declaration, Press Statement, 25 July, https://www.state.gov/secretary/remarks/2018/07/284508.htm
[52] *Op cit*
[53] Wertheim, S (2018) The War against War: What can we learn from the 1928 Paris Peace Pact? *The Nation*, https://www.thenation.com/article/liberal-internationalism-paris-peace-pact/
[54] The term 'national policy' is important here, because it confirms state sovereignty; it confirms that the club or society consists of sovereign nations, who determine to give up war as national policy as a balancing act between national self-interest and pro-social behaviour.
[55] Sharma, S K, (2009) The Legacy of Jus Contra Bellum: Echoes of Pacifism in Contemporary Just War Thought, Journal of Military Ethics, 8:3, 217-230, p 222

the world to realise, and to acknowledge publicly, that their purpose cannot be furthered by a world war, and we urge them, consequently, to find peaceful means for the settlement of all matters of dispute between them."[56] Although it argued that renouncing nuclear weapons was an important step to reduce tension and apprehension of sudden attack, the authors were sceptical that states would not revive nuclear weapons programmes if war was still on the table. For Rotblat the only path to a world free of nuclear weapons is for states to give up all military means to an international authority, evolving out of the UN, that will be responsible for global security.[57]

In this section I want to argue that the scholarship revising the Kellogg-Briand Pact's impact provides us with another option. It starts by taking the outlawry of war and the new legal order that it brought about as the explicit political context that the TPNW is born into and asks what currency such a contextualisation might have for the political work that needs to be done around the TPNW to reach its end-game, namely a world without nuclear weapons.

Firstly, thinking the two 'outlawing' efforts together helps us dismiss the charge that the TPNW is dangerous, because nuclear weapons keep the peace. It does this by providing a plausible alternative explanation for why aggressive wars have declined, namely that war has been outlawed. Moreover, it shows that nuclear deterrence does not share the current world order's normative underpinnings. Rather, nuclear deterrence reifies aggressive war by its very premise. In the language of Peace Studies "negative peace" is when peace is simply defined as the absence of war. The absence of battle under nuclear deterrence cannot be described even as negative peace, but as a form of unresolved conflict with much the same psychological, policy and economic effects as being at war. Nuclear deterrence may even prolong and intensify international disputes as have arguably been the case in political hotspots like the Middle East, the Korean Peninsula and India/Pakistan. From a South African perspective, it is not by chance that one of the first acts towards reconciliation, a peaceful end to apartheid and rejoining the international community was F.W. de Klerk's decision to dismantle SA's nuclear weapons.

[56] Russell-Einstein Manifesto, 11 July 1955, https://www.theguardian.com/world/2016/jul/11/russell-einstein-peace-manifesto-archive-1955

[57] Rotblat, J, Speech given at the 54th Pugwash Conference on Science and World Affairs 'Bridging a Divided World Through International Cooperation and Disarmament', Seoul, South Korea, 8 October 2004, published in *ISYP Journal on Science and World Affairs*, 2:1, 2006, 1-8.

Moreover, the nuclear weapon states' belief in nuclear weapons as a force for peace does not lead them to say more (nuclear weapon states) is better, unlike the realist theorist, Kenneth Waltz, has argued.[58] Instead, nuclear weapons should be restricted to a 'responsible few' – themselves. However, at least on two occasions, we come to see the intention of non-proliferation not as a process in the interest of peace as the NPT sets it out[59]. Rather, we see it as a way to monopolise the right to go to and win wars. This was best illustrated by the 2003 Iraq War, purportedly a preventive war in the interest of non-proliferation, where a US president threatened the use of nuclear weapons if the target state fought back on their own terms. Similarly, the Russian annexation of Crimea, where Russia's nuclear weapons were perceived to deter a Ukrainian and NATO response, again illustrates how nuclear deterrence enables international aggression as national policy in contradiction to *jus ad bellum*.[60]

Secondly, as we have seen, outlawry favoured positive peace. The Kellogg-Briand Pact as the trigger of a new order where war is illegal and the UN Charter as consolidating this order were positive peace measures. In the long run positive peace measures build international society on a balance between (national) self-interest and pro-social values in an international society.[61] The peace is "organised", to use Briand's term, not by employing a technology that is so destructive it frightens off battle, but by pro-social/humanitarian values embodied in international law. Peace is not a by-product of terror/fear that a massively destructive weapon will be used in wars; peace is the result of a community of states that have come to the conclusion that war can and should be avoided through renouncing it and engaging in peaceful means. Outlawry does not take away states' right to self-defence, but it does not elevate the right to self-defence as a keeper of the peace. In other words, peace in the outlawry sense is first and foremost based on a commitment to positive peace (*si vis pacem para pacem*); peace is not based on the idea that the right of states to defend themselves against aggression deters wars (*si vis pacem para bellum*).[62]

[58] Waltz, K, (1981) "The Spread of Nuclear Weapons: More May Better," *Adelphi Papers*, 171, London: International Institute for Strategic Studies.
[59] The non-proliferation obligation as per the NPT can only be properly understood in the context of Art 6, the obligation to negotiate complete and general disarmament. The grand bargain was that non-nuclear weapon states will not acquire nuclear weapons, but in lieu of negotiations towards general and complete disarmament.
[60] Sinovets, op cit
[61] See Robert Hinde's work on the sources of morality. Hinde, R (2002) *Why Good is Good: the Sources of Morality*, London: Routledge
[62] See also Waltz's (*op cit*) discussion on the difference between defense and deterrence.

In contrast to nuclear deterrence the TPNW is rooted in the same normative discourse that underpinned the Kellogg-Briand Pact, namely that "reason and justice should prevail over violence". In the Preamble, the TPNW is linked to the new order where war is illegal and illegitimate, by recalling: "… that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources." For the proponents of outlawry, (conventional) disarmament was an outflow of peace.[63] This is where I see the TPNW in history – as an outflow of the outlawry of war, as another positive peace measure to consolidate an order where wars of aggression have been outlawed.

5. Conclusion

In conclusion, I want to say a few words on the political work that can be done around the TPNW, juxtaposing my thoughts to that of John Mueller, who argues that war is becoming obsolete and that nuclear weapons are irrelevant in this process.[64] Culturally, he argues, war is an idea that is simply not fashionable anymore and is disappearing just as duelling and slavery did. Unlike John Lewis Gaddis argues in his 1986 essay "The Long Peace"[65], nuclear weapons cannot be credited for the long peace between major powers; rather the memory of World War II and the Korean War were enough to deter major powers from starting wars. I agree that most of humanity has turned its back on war by the end of World War I already and since then the process has been one of consolidation despite, rather than because, of nuclear weapons. However, mine is a constructivist and unashamedly normative argument. Mueller does not engage with the power of ideas and activism in the historical processes that he describes – at best he talks about state policy-making in the "black box" kind of way. But, history doesn't just happen and policy doesn't make itself; people make history and policy. The meaning and importance that humans attach to institutions such as war and peace and

[63] Carr, *op cit*
[64] Mueller, J (1989) *Retreat from Doomsday: The Obsolescence of Major War.* Basic Books.; Mueller, J (2018), Why nuclear weapons don't matter, *Foreign Affairs,* Nov/Dec, https://www.foreignaffairs.com/articles/2018-10-15/nuclear-weapons-dont-matter
[65] Gaddis, JL, (1986) The Long Peace: Elements of Stability in the Postwar International System, *International Security,* 10:4, 99-142

nuclear weapons in these institutions are contested and negotiated. Peace has to be 'organised'; denuclearization has to be "designed".[66] As such the outlawry movement and Kellogg-Briand Pact serve as a valuable example to draw on when it comes to outlawing and eliminating nuclear weapons, in addition to the discursive value of linking the two.

Firstly, we've already seen that both these outlawing efforts required an extensive public information and awareness campaign connecting several civil society groups to make them popular pursuits and eventually legal and political realities. Secondly, in Hathaway and Shapiro's narrative and a number of other scholars work on the Kellogg-Briand Pact, the role of passionate individuals relentlessly driving the process is illuminated. Although the major powers, who were behind the outlawing of war are not behind the TPNW, outlawry helps us understand that behind the term "states" there are individuals and groups who drive processes. These individuals are already active in powerful states and more will be added to their number as the ICAN campaign gains momentum. What we're working towards is a perfect storm (a critical mass in public opinion and the right individuals in the right positions and talking to the right people) to start a domino effect of disarmament. Thirdly, while we're waiting for the perfect storm, the TPNW is an interim step around which denuclearization (and a new nuclear order) can be imagined, organised and consolidated over time. To avoid a collision of the old and the new nuclear orders, the NPT must for now remain the forum in which to engage the nuclear weapon states and gain their assent to the new rules.

[66] Larkin, B, (2011) *Designing Denuclearization: An Interpretive Encyclopedia*, New Brunswick: Transaction Publishers