

THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS AND ITS COMPATIBILITY WITH SWEDEN'S SECURITY ARRANGEMENTS



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INTRODUCTION

Sweden participated actively in last year's negotiations of the Treaty on the Prohibition of Nuclear Weapons (TPNW), and on July 7, 2017, it joined 121 other states in voting to adopt this groundbreaking instrument. Given the country's historically strong support for nuclear non-proliferation and disarmament, Sweden should now advance the treaty's objectives and expedite its entry into force by joining as soon as possible.

To inform its decision about whether to join the TPNW, Sweden has appointed an inquiry chair to "analyse the content of the Treaty and the consequences of Swedish accession."¹ The chair's tasks include examining the impacts on Sweden's defense policy cooperation and its obligations under other treaties and agreements.²

This paper demonstrates the compatibility of Sweden's existing security arrangements with the TPNW. If it joined the TPNW, Sweden could not assist allies with prohibited activities involving nuclear weapons. It could, however, maintain its relationships with the North Atlantic Treaty Organization (NATO) and the European Union (EU), and continue to participate in joint military operations without contravening the TPNW.

Prohibition on Assistance

Since Sweden neither possesses nuclear weapons nor has been affected by past use and testing, it already complies with the majority of the TPNW's provisions.³ Sweden's alliances with nuclear armed states and nuclear umbrella states, however, have the potential to implicate Article 1(1)(e), the treaty's prohibition on assistance. That provision prohibits states parties from "assist[ing], encourag[ing] or induc[ing], in any way, anyone to engage in any activity prohibited to a State Party under this Treaty." Prohibited activities include, *inter alia*, developing, testing, producing, stockpiling, transferring, using, and threatening to use.

The prohibition on assistance is a standard component of modern disarmament treaties, including those governing nuclear weapons, other weapons of mass destruction, and conventional weapons.³ The TPNW's version of the provision copies verbatim the 1993 Chemical Weapons Convention and the 1997 Mine Ban Treaty and is almost identical to the 2008 Convention on Cluster Munitions, all of which Sweden is party to.⁵ Because those treaties do not define assist, encourage, or induce, the exact parameters of the prohibition have been subject to different interpretations.⁶ Oxford University Press commentaries on the treaties offer guidance for how the prohibition

should be understood. Based on an analysis of the text and state positions, the Mine Ban Treaty commentary concludes that to assess whether a particular act contravenes the prohibition on assistance, “[w]hat is critical is the nexus between the actions of a State Party and specific prohibited activities.”⁷

That commentary discusses three types of assistance—logistics, security, and planning—and examines when they run afoul of the Mine Ban Treaty.⁸ For example, a state party would violate the treaty if its troops assisted a state not party by fueling trucks carrying antipersonnel landmines or loading such trucks with mines. These activities would be unlawful because they supported a “*specific* operation involving anti-personnel mines.”⁹ Similarly, while a state party’s military personnel “should not be required to leave the room” during discussions about the use of mines, they could not lawfully “engage actively in planning for the [mines’] use.”¹⁰ If Sweden joined the TPNW, it could not assist a state not party with comparable activities involving nuclear weapons.

Because of the nexus requirement, however, mere participation in joint military operations with states not party does not fall under the prohibition on assistance. Adopting a widely accepted view, Sweden wrote in 2001 that the relevant provision of the Mine Ban Treaty “ought not to be interpreted so that any kind of participation in a joint military operation with a non-party would be considered as an encouragement to activities” under that treaty. The Oxford University Press commentary on the treaty agrees, saying: “This is clearly correct as there is no nexus between mere participation in such an operation and any specific instance of prohibited activity.”¹¹ The TPNW should similarly be understood to allow participation in joint military operations when there is no such a nexus.

Sweden’s Relationship with NATO

Sweden has ties to NATO through multiple programs, including the Partnership for Peace (PfP), the Enhanced Opportunities Partnership, and a Host

Nation Support Agreement. It also regularly participates in joint military operations and exercises with NATO forces. The North Atlantic Treaty, which imposes collective security obligations on its members, does not mention nuclear weapons; in policy documents, NATO has described itself as a “nuclear alliance” while pledging to work toward nuclear disarmament.¹² If Sweden joins the TPNW, it will have to ensure that it does not assist, encourage, or induce NATO members with prohibited activities involving nuclear weapons.

Sweden need not abandon its existing relationship with NATO, however. Because it is not itself a member of NATO, it falls outside the “nuclear umbrella,” meaning it does not rely on nuclear armed states’ nuclear weapons for defense. Government officials recently confirmed to civil society representatives in Sweden that there is no cooperation between the United States and Sweden in this regard, there is no US policy to extend the nuclear umbrella to Sweden, and Sweden has no connection to US nuclear weapons in Europe.¹³ As a result, Sweden would comply with the TPNW’s implicit prohibition on accepting the protection of a nuclear umbrella. Its multiple partnerships also give it the flexibility to cooperate with NATO and participate in joint military operations in ways that would comply with the TPNW’s prohibition on assistance. Therefore, Sweden should view neither its links to NATO nor the TPNW’s prohibition on assistance as obstacles to joining the new treaty.

Partnership for Peace and Euro-Atlantic Partnership Council

Sweden first established a relationship with NATO when it joined the Partnership for Peace in 1994. According to NATO, this program is designed “to increase stability, diminish threats to peace and build strengthened security relationships between NATO and non-member countries in the Euro-Atlantic area.” The PfP grants significant flexibility to partner states, including Sweden, to determine the nature of their relationships. It allows these states to “develop an individual relationship with NATO, choosing

their own priorities for cooperation.”¹⁴ As a result, Sweden can be part of the PfP without embracing NATO’s position on nuclear weapons or assisting it with nuclear weapons-related activities.

Other PfP states have already concluded that the partnership is compatible with the TPNW. Both Austria, which has ratified the TPNW, and Ireland, which has signed it, participate in the PfP.¹⁵ They, like Sweden, are also members of the associated Euro-Atlantic Partnership Council, a “multilateral forum for dialogue and consultation on political and security-related issues among Allies and partner countries.”¹⁶

Enhanced Opportunities Partnership

In 2014, Sweden became one of only five Enhanced Opportunities Partners. This NATO partnership seeks to promote interoperability among allies. It gives Sweden the opportunity to engage in security consultations, have greater access to information and interoperability programs, and develop closer partnerships during crises and the preparation of operations.¹⁷

Like the PfP, the Enhanced Opportunities Partnership gives Sweden discretion on matters related to its engagement with NATO. The partnership allows Sweden to develop “a more tailor-made relationship” with NATO.¹⁸ Because Sweden can influence the character of the partnership to ensure it complies with national positions, the arrangement should not interfere with it joining the TPNW.

Host Nation Support Agreement

In 2016, Sweden approved another arrangement with NATO when it ratified a Host Nation Support Memorandum of Understanding (originally signed in 2014).¹⁹ The agreement allows NATO to deploy forces and equipment in Sweden, with Sweden’s approval.²⁰ As the Swedish Parliament was reviewing a draft bill on the Host Nation Agreement, the country’s defense minister made clear that adoption of the bill would not open the door to allowing nuclear weapons on Swedish soil. He said, “I’m under the impression that

other member states respect this demand. There will not be any nuclear weapons on Swedish territory.”²¹ This position makes Sweden’s role as a host nation more compatible with the TPNW, which prohibits assisting anyone with the transfer and stockpiling of nuclear weapons.

The host nation agreement does raise questions regarding the transit of nuclear weapons through Swedish territory in certain circumstances. At the time of his comments mentioned above, the defense minister stated that Sweden would not search NATO warships for nuclear weapons.²² Because the United States has a policy of neither confirming nor denying whether its ships are carrying nuclear weapons, Sweden is unlikely to have knowledge of, or be able to prevent, the entry of nuclear weapons into its waters if it allows access to US ships.²³ Many states and non-governmental organizations understand past treaties with similar assistance provisions to prohibit knowingly permitting transit as a form of assistance. Under the Mine Ban Treaty, Sweden has taken the position that the treaty prohibits such transit.²⁴ In the context of the Convention on Cluster Munitions, however, Sweden has argued that transit is not prohibited.²⁵ While interpreting the TPNW to prohibit transit would best uphold its object and purpose, the legality of allowing transit of nuclear weapons, whether knowingly or unknowingly, was left unresolved by the TPNW’s negotiators. It is thus uncertain whether a state party to the TPNW would contravene the prohibition on assistance if it allowed a vessel that might carry nuclear arms to enter its territory. Almost all treaties contain some interpretive issues that need to be resolved after negotiations. Sweden should not let uncertainty on one point stand in the way of its joining a treaty that is otherwise consistent with its support for nuclear non-proliferation and disarmament.

Joint Military Operations and Exercises

The TPNW would allow Sweden to continue participating in joint military operations and exercises with its NATO allies if it becomes a state party. Sweden has participated in numerous NATO-led military operations since 1995. In the 1990s, it contributed troops to

the peacekeeping mission in Bosnia and Herzegovina and supported a similar mission in Kosovo. In Afghanistan, it partnered first with the International Security Assistance Force (ISAF) and more recently participated in the Resolute Support Mission “to further train, assist and advise the Afghan security forces and institutions.”²⁶ During Operation Unified Protector in 2011, Sweden contributed aircraft to support the no-fly zone in Libya.²⁷ Since 2013, Sweden has also participated in the NATO Response Force, “a rapid-reaction group” of forces from NATO and NATO-allied countries that can respond to military situations.²⁸

Sweden has further engaged with the armed forces of NATO member states through numerous military exercises. For example, at least 19,000 Swedish troops joined more than 1,500 troops from the United States and other countries in Exercise Aurora in 2017. The exercise sought in part to prepare Sweden to provide host nation support under the relevant agreement addressed above.²⁹ In May 2018, Sweden, Finland, and the United States signed a non-binding agreement designed in part to facilitate future military exercises.³⁰

Based on precedent from states’ interpretations of other treaties, mere participation in such joint operations and exercises, even with members of a nuclear alliance, does not constitute a form of assistance. For example, many states parties to the Mine Ban Treaty and Convention on Cluster Munitions, including Sweden, have participated in joint operations with the United States, which has yet to join the instruments.³¹ As long as Sweden does not change its activities in a way that would rise to the level of assistance, it could continue to contribute to such operations as a TPNW state party.

Sweden’s Relationship with the European Union

While not a member of NATO, Sweden is party to the Treaty of the European Union, which contains a mutual defense provision. According to Article 42(7), there is an obligation to come to the aid of an attacked EU state. The obligation does not override the “specific

character of the security and defence policy” of individual member states.³² Reference to the “specific character” of domestic policies allows states to “choose means of assistance which are not incompatible with their status or domestic law requirements” including the “policy of military neutrality.”³³ Therefore, Sweden can choose how it fulfills its assistance obligation and is not obligated to assist the use of nuclear weapons if its policy is not to participate in any nuclear weapons-related activities. Other EU members, Austria and Ireland, have ratified and signed the TPNW, respectively, indicating they do not see the EU Treaty and the TPNW as inconsistent. The Treaty of the European Union should, therefore, not pose an obstacle to Sweden joining the TPNW.

Conclusion

While political considerations are beyond the scope of this paper, from a legal perspective, Sweden’s security arrangements should not be viewed as barriers to its joining the TPNW. If it became party to the new instrument, Sweden could not allow its military involvement with states not party that possess nuclear arms to rise to the level of assistance prohibited by the TPNW, but it could maintain its relations with NATO and the EU and continue to participate in joint operations and exercises. Sweden’s experiences as a party to the Mine Ban Treaty and the Convention on Cluster Munitions have demonstrated its ability to work within such parameters. Taking into account that precedent and a legal analysis of its partnerships with nuclear armed states, Sweden should decide to join the TPNW without hesitation.

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FOOTNOTES:

1. Government Offices of Sweden, "Inquiry into the Consequences of a Possible Swedish Accession to the Treaty on the Prohibition of Nuclear Weapons," October 23, 2017, <http://www.government.se/press-releases/2017/10/inquiry-into-the-consequences-of-a-possible-swedish-accession-to-the-treaty-on-the-prohibition-of-nuclear-weapons/> (accessed May 13, 2018).
2. *Ibid.*
3. Sweden is also largely compliant with the TPNW due to its obligations as a non-nuclear weapon state party to the 1968 Nuclear Non-Proliferation Treaty.
4. For a list of disarmament agreements with similar provisions, see Walter Krutzsch, Eric Myjer, and Ralf Trapp, eds., *The Chemical Weapons Convention: A Commentary* (Oxford: Oxford University Press, 2014), p. 67, n. 22.
5. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention), adopted January 13, 1993, entered into force April 29, 1997, art. I(1)(d); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty), adopted September 18, 1997, entered into force March 1, 1999, art. 1(1)(c); Convention on Cluster Munitions, adopted May 30, 2008, entered into force August 1, 2010, art. 1(1)(c).
6. Stuart Casey-Maslen, *Commentaries on Arms Control Treaties Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Oxford: Oxford University Press, 2015), para. 1.53.
7. *Ibid.*, para. 1.71.
8. *Ibid.*, para. 1.57.
9. *Ibid.*, para. 1.58.
10. *Ibid.*, para. 1.60.
11. *Ibid.*, para. 1.65.
12. North Atlantic Treaty, adopted April 4, 1949, entered into force August 24, 1949; "Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organisation," adopted November 19-20, 2010, para. 17.
13. Communication from representatives of the International Campaign to Abolish Nuclear Weapons on their meeting with Swedish Minister of Defence Peter Hultqvist and his officials, March 28, 2018.
14. NATO, "Partnership for Peace Programme," June 7, 2017, https://www.nato.int/cps/su/natohq/topics_50349.htm (accessed May 16, 2018).
15. NATO, "Signatures of Partnership for Peace Framework Document," January 10, 2012, https://www.nato.int/cps/en/natolive/topics_82584.htm (accessed May 16, 2018).
16. NATO, "Euro-Atlantic Partnership Council," June 9, 2017, https://www.nato.int/cps/ic/natohq/topics_49276.htm (accessed May 16, 2018).
17. NATO, "Partnership Interoperability Initiative," June 7, 2017, https://www.nato.int/cps/ic/natohq/topics_132726.htm (accessed May 16, 2018).
18. *Ibid.*; Mission of Finland to NATO, "Finland Continues as Enhanced Opportunities Partner," November 17, 2017, <http://www.finlandnato.org/public/default.aspx?contentid=369003&nodeid=39170&culture=en-US> (accessed May 16, 2018).
19. NATO, "Relations with Sweden," March 30, 2017, https://www.nato.int/cps/ic/natohq/topics_52535.htm (accessed May 16, 2018).

20. "Government Keen on NATO Forces in Sweden," *The Local*, August 27, 2014, <https://www.thelocal.se/20140827/swedish-government-to-allow-nato-to-deploy-troops> (accessed May 16, 2018).

21. "NATO Agreement Won't Bring Nuclear Weapons to Sweden," *Eye on the Arctic*, March 1, 2016, <http://www.rcinet.ca/eye-on-the-arctic/2016/03/01/nato-agreement-wont-bring-nuclear-weapons-to-sweden/> (accessed May 16, 2018).

22. *Ibid.*

23. Terje Maloy, "Directed against Russia: 'Aurora', the Largest Military Exercise in Sweden in 20 years, Aligns Sweden Even Closer with NATO," *Global Research*, July 28, 2017, <https://www.globalresearch.ca/directed-against-russia-aurora-the-largest-military-exercise-in-sweden-in-20-years-aligns-sweden-even-closer-with-nato/5601267> (accessed May 16, 2018).

24. Landmine and Cluster Munition Monitor, "Landmine Monitor 2004: Sweden," <http://archives.the-monitor.org/index.php/publications/display?url=lm/2004/sweden.html#Heading16187> (accessed May 17, 2018).

25. Landmine and Cluster Munition Monitor, "Cluster Munition Monitor 2017: Cluster Munition Ban Policy," <http://www.the-monitor.org/en-gb/reports/2017/cluster-munition-monitor-2017/cluster-munition-ban-policy.aspx> (accessed May 16, 2018). The differences in Sweden's interpretations might be attributable to the inclusion in the Convention on Cluster Munitions of Article 21, which addresses states parties' relations with states not party. Civil society and most states that have spoken on the issue argue that Article 21 clarifies but does not qualify the meaning of the prohibition on assistance, but some states contend it creates exceptions to that prohibition.

26. NATO, "Relations with Sweden."

27. *Ibid.*

28. *Ibid.*

29. U.S. Department of Defense, "U.S. Forces Participate in Swedish Military Exercise," September 19, 2017, <https://www.defense.gov/News/Article/Article/1316420/us-forces-participate-in-swedish-military-exercise/> (accessed May 16, 2018); "French and US Troops Head to Gothenburg as Sweden's Biggest Military Drill in 20 Years Kicks Off," *The Local*, September 12, 2017, <https://www.thelocal.se/20170912/french-and-us-troops-head-to-gothenburg-as-swedens-biggest-military-drill-in-20-years-kicks-off> (accessed May 16, 2018); Maloy, "Directed against Russia," *Global Research*.

30. Aaron Mehta, "Finland, Sweden and US Sign Trilateral Agreement, with Eye on Increased Exercises," *Defense News*, May 10, 2018, <https://www.defensenews.com/training-sim/2018/05/09/finland-sweden-and-us-sign-trilateral-agreement-with-eye-on-increased-exercises/> (accessed May 16, 2018).

31. The permissibility of such participation is more explicit under the Convention on Cluster Munitions because its Article 21(3) specifies that states parties "may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party."

32. Treaty of the European Union, signed February 7, 1992, entered into force November 1, 1993, art. 42(7).

33. European Parliament, "The EU's Mutual Assistance Clause," November 2015, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI\(2015\)572799_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI(2015)572799_EN.pdf) (accessed May 16, 2018), p. 4.