

CAN AUSTRALIA JOIN THE NUCLEAR BAN TREATY WITHOUT UNDERMINING ANZUS?

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There is a current debate as to whether Australia can join the Treaty on the Prohibition of Nuclear Weapons (‘TPNW’) and remain party to the Security Treaty between Australia, New Zealand and the United States of America (‘ANZUS’). The debate centres around the fact that if Australia were to join the TPNW it would have to give up its policy of extended nuclear deterrence and the support it provides to US nuclear activities via the Joint Defence Facility at Pine Gap. There is a strong argument that ANZUS has evolved to require Australia’s participation in such nuclear-related security activities. This article explores whether Australia could in fact give up such activities in order to join the TPNW and nevertheless remain in compliance with ANZUS.

CONTENTS

I	Introduction.....	133
II	Australia’s Involvement in Activities Related to Nuclear Weapons.....	137
	A Australia’s Reliance on Extended Nuclear Deterrence.....	137
	B The Nuclear Activities Supported by Pine Gap.....	138
III	The Incompatibility of Australia’s Nuclear Weapons-Related Activities with the TPNW	141
	A Would Australia Be in Breach of Art 1(1)(e)?.....	142
	1 Is Australia ‘Encouraging’ Prohibited Activity by Relying on Extended Nuclear Deterrence?	143
	2 Is Australia ‘Assisting’ Prohibited Activity through the Activities at Pine Gap?	144
	(a) The Scope of ‘Assist’ under the TPNW.....	145
	(b) The Assisting State’s Contribution to the Prohibited Activity	146

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(c) The Subjective Aspect of ‘Assist’	147
B Conclusion	148
IV Is Joining the <i>TPNW</i> Compatible with <i>ANZUS</i> ?.....	148
A Traditional Understandings of Art II That Suggest It Does Not Require Australia to Continue to Support Nuclear Activities	149
B Has Art II Evolved to Require Australia to Continue Supporting US Nuclear Activities?	151
1 Are There Any Subsequent Agreements to <i>ANZUS</i> That Require Australia to Remain under the US Nuclear Umbrella and/or Ensure Pine Gap Continues to Support US Nuclear Activities?	151
(a) Are There Any Subsequent Agreements about Australia’s Position under the US Nuclear Umbrella?	152
(b) Are There Any Subsequent Agreements about the Support of US Nuclear Activities through Pine Gap?	153
2 Is There Any Subsequent Practice around <i>ANZUS</i> That Requires Australia to Remain under the US Nuclear Umbrella and/or Ensure Pine Gap Continues to Support US Nuclear Activities?	154
(a) Subsequent Practice and the US–New Zealand <i>ANZUS</i> Dispute.....	154
(b) Is There Any Subsequent Practice Relating to US Extended Nuclear Deterrence?	155
(c) Is There Any Subsequent Practice Regarding Pine Gap? ...	156
C Escaping the Conflict.....	159
V Concluding Reflection.....	160

I INTRODUCTION

In 2017, the *Treaty on the Prohibition of Nuclear Weapons* (*TPNW*) was adopted and opened for signature.¹ It contains the most comprehensive limitations on nuclear weapons in history and has been lauded as ‘a landmark global agreement.’² Australia was not among the negotiating states, having chosen to boycott the talks on the grounds that it saw ‘no value in ban treaty negotiations

¹ *Treaty on the Prohibition of Nuclear Weapons*, opened for signature 20 September 2017, 57 ILM 347 (not yet in force) (*TPNW*).

² ‘The Treaty’, *International Campaign to Abolish Nuclear Weapons* (Web Page) archived at <<https://perma.cc/6NS4-W9QW>>.

that are disconnected from the current security environment.³ While the governing Liberal–National coalition has steadfastly refused to contemplate Australia joining the *TPNW*, there has been a concerted push by civil society to educate and mobilise the public in favour of Australia’s accession to the *TPNW*. Employing the humanitarian rhetoric that characterised the campaign to ban nuclear weapons,⁴ *TPNW* proponents remain hopeful that Australia will become a party to the treaty sooner rather than later.⁵

Proponents of the treaty have widely attributed its successful conclusion to the humanitarian campaign that was conducted between 2010 and 2017. In particular, they have suggested that the use of humanitarianism allowed security concerns that have traditionally dominated nuclear weapons discussions to be circumvented.⁶ There is much to celebrate about the use of humanitarianism and the role it played in the adoption of the *TPNW*. However, there is a need for caution with respect to the idea that humanitarian concerns can trump security interests in the nuclear realm given the complex international legal frameworks that govern security alliances. In the three years since the *TPNW* was opened for signature, it has become apparent that a number of pre-

³ Department of Foreign Affairs and Trade, ‘UN Negotiations on a Nuclear Weapons Ban Treaty’ (Media Talking Points Declassified File 17/6434, 16 February 2017) 2, archived at <<https://perma.cc/Z7C4-4CH4>>.

⁴ Between 2010 and 2017, a coalition of non-nuclear weapon states and non-government organisations worked to highlight the catastrophic humanitarian consequences that would eventuate from a nuclear weapon explosion and argued that, from a humanitarian perspective, it was vital that states adopt a nuclear prohibition treaty: see Nick Ritchie and Kjølv Egeland, ‘The Diplomacy of Resistance: Power, Hegemony and Nuclear Disarmament’ (2018) 30(2) *Global Change, Peace and Security* 121, 128–30; Bonnie Docherty, ‘A “Light for All Humanity”: The Treaty on the Prohibition of Nuclear Weapons and the Progress of Humanitarian Disarmament’ (2018) 30(2) *Global Change, Peace and Security* 163, 171–4.

⁵ See International Campaign to Abolish Nuclear Weapons, *Choosing Humanity: Why Australia Must Join the Treaty on the Prohibition of Nuclear Weapons* (Report, July 2019) (*Choosing Humanity*). It has been suggested that Australia could ‘sign’ the treaty immediately and ratify later, but under *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 18 (‘*VCLT*’), signatory states must refrain from acts which defeat the object and purpose of the treaty. Unless Australia immediately ceased all nuclear-related activity (see below Part III), it is difficult to see how it could stay in compliance with this requirement.

⁶ Docherty (n 4) 164, 170–4. See also Tilman Ruff, ‘Negotiating the UN Treaty on the Prohibition of Nuclear Weapons and the Role of ICAN’ (2018) 30(2) *Global Change, Peace and Security* 233, 239. It is important to note, that while humanitarianism was a significant force in the development of the *TPNW* (n 1), humanitarianism was not a new force in nuclear debates. Humanitarian ideas have permeated international nuclear discussions since the dawn of the atomic age: see Treasa Dunworth, ‘“What’s Past Is Prologue”: Humanitarian Disarmament from St Petersburg to New York’ (PhD Thesis, The University of Melbourne, 2019); Madelaine Chiam and Anna Hood, ‘Nuclear Humanitarianism’ (2019) 24(3) *Journal of Conflict and Security Law* 473.

existing security treaties may make it difficult for some states to sign and ratify the *TPNW*.⁷ We focus in this article on the question of whether one particular security treaty — the *Security Treaty between Australia, New Zealand and the United States of America* ('ANZUS')⁸ — precludes Australia from joining the *TPNW*.⁹

Whether Australia can join the *TPNW* and continue to fulfil its obligations under *ANZUS* was an issue in the lead-up to the 2019 federal election. At its National Conference in December 2018, the Australian Labor Party ('ALP') adopted a resolution committing Australia to sign and ratify the *TPNW* if it won the election.¹⁰ The announcement led to some back and forth in the media about whether Australia could join the *TPNW* and maintain its security alliance with the United States ('US'). Former Foreign Minister Gareth Evans asserted that joining the *TPNW* would amount to Australia 'tearing up our US alliance commitment'.¹¹ This was followed by refutations of Evans' statement by pro-

⁷ There have, for example, been questions about whether states can be parties to both the *North Atlantic Treaty*, signed 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949) ('*North Atlantic Treaty*') and the *TPNW* (n 1): see, eg, Alicia Sanders-Zakre, 'How Can Norway, Sweden and Switzerland Stay Engaged with the *TPNW*?', *Arms Control Now* (Blog Post, 1 February 2019) archived at <<https://perma.cc/X4DX-X2NH>>. As this article will examine, there have also been questions about whether Australia can be a party to both the *Security Treaty between Australia, New Zealand and the United States of America*, signed 1 September 1951, 131 UNTS 83 (entered into force 29 April 1952) ('*ANZUS*') and the *TPNW* (n 1): see, eg, Paul Karp, 'Labor Set for Nuclear Showdown as Gareth Evans Warns of Risk to US Alliance', *The Guardian* (online, 17 December 2018) archived at <<https://perma.cc/LJ7Y-HKVD>>.

⁸ *ANZUS* (n 7).

⁹ While this article is limited to an examination of *ANZUS* (n 7), some of the issues and questions raised in this piece may well be useful for those looking at the relationship between the *North Atlantic Treaty* (n 7) and the *TPNW* (n 1). It should be noted that *ANZUS* (n 7) did not prevent New Zealand from signing the *TPNW* (n 1) in 2017 because *ANZUS* (n 7) has been suspended between the United States ('US') and New Zealand since 27 June 1986: Bernard Gwertzman, 'Shultz Ends US Vow to Defend New Zealand', *The New York Times* (online, 28 June 1986) archived at <<https://perma.cc/8BPH-SRZF>>.

¹⁰ Australian Labor Party, *National Platform* (2018) 261 <<https://www.alp.org.au/about/national-platform/>>, archived at <<https://perma.cc/R2CK-E7JX>>; 'Australian Labor Party Commits to Joining Nuclear Ban Treaty', *International Campaign to Abolish Nuclear Weapons* (Campaign News, 18 December 2018) archived at <<https://perma.cc/5SQV-XZY>>.

¹¹ Karp (n 7). It is also notable that some senior ALP politicians were also highly cautious about pledging support for the *TPNW* (n 1) given the apparent risks to *ANZUS* (n 7): Richard Marles, 'The Nuclear Weapons Prohibition Treaty, National Security and *ANZUS*', *United States Studies Centre* (Web Page, 15 October 2018) archived at <<https://perma.cc/5TMX-C36H>>; Penny Wong, 'The Disarmament Challenge in a Time of Disruption' (Speech, Australian Institute of International Affairs National Conference, Canberra, 15 October 2018) archived at <<https://perma.cc/8RSQ-GJBW>>.

TPNW campaigners.¹² The competing claims about the relationship between the *TPNW* and *ANZUS* remain unresolved and to date very little legal analysis has been done to try to resolve the differences of opinion.¹³ Assertions that there are no conflicts between the *TPNW* and Australia's security alliance may too readily discount some of the complexities in this area. In this article, we take a closer look at whether it is possible for Australia to join the *TPNW* without violating *ANZUS*.

The reasons that questions about the compatibility of the *TPNW* and *ANZUS* exist are that Australia relies on US extended nuclear deterrence as a key security policy and hosts the US–Australia Joint Defence Facility Pine Gap ('Pine Gap') which plays a role in supporting US nuclear activities.¹⁴ For Australia to join the *TPNW*, it is highly likely that it will have to give up both its position under the US nuclear umbrella and its involvement with nuclear-affiliated activities at Pine Gap.¹⁵ Whether it is permissible for Australia to unilaterally do either of these things under *ANZUS* is uncertain.

As pro-*TPNW* advocates have noted, there is nothing in *ANZUS* that states that the treaty is a nuclear agreement or that Australia is otherwise obliged to engage in nuclear-related activities.¹⁶ However, there is potential for art II of *ANZUS*, which requires States Parties to take steps to ensure they can resist armed attack, to be interpreted as requiring Australia to continue its support of, and commitment to, US nuclear activities. The purpose of this piece is to determine whether art II of *ANZUS* requires Australia to maintain its reliance

¹² International Human Rights Clinic, 'Nuclear Umbrella Arrangements and the Treaty on the Prohibition of Nuclear Weapons' (Paper, Harvard Law School, June 2018) 4 ('Nuclear Umbrella Arrangements'); International Human Rights Clinic, 'Australia and the Treaty on the Prohibition of Nuclear Weapons' (Report, Harvard Law School, December 2018) 9 ('Australia and the *TPNW*'); Marianne Hanson, 'Australia Needs to Support the Ban on Nuclear Weapons', *Australian Outlook* (Blog Post, 10 January 2019) archived at <<https://perma.cc/NRN5-2UKH>>; Gem Romuld, 'Labor Sets the Right Course on Nuclear Disarmament', *The Canberra Times* (online, 27 December 2018) archived at <<https://perma.cc/BZM4-3J23>>.

¹³ Harvard Law School's International Human Rights Clinic provided a legal opinion on the relationship between the *TPNW* (n 1) and *ANZUS* (n 7) in December 2018. It did not, however, cover art II of *ANZUS* (n 7): International Human Rights Clinic, 'Australia and the *TPNW*' (n 12).

¹⁴ See below Part II.

¹⁵ See below Part III.

¹⁶ See, eg, *Choosing Humanity* (n 5) 22. See also Richard Tanter, 'An Australian Pathway through Pine Gap to the Nuclear Ban Treaty', *John Menadue: Pearls and Irritations* (Blog Post, 5 August 2019) archived at <<https://perma.cc/J3Z6-DMRW>> ('An Australian Pathway through Pine Gap'). When it was first created, *ANZUS* (n 7) was envisaged as a conventional, not a nuclear, defence treaty: see Monique Cormier and Anna Hood, 'Australia's Reliance on US Extended Nuclear Deterrence and International Law' (2017) 13(2) *Journal of International Law and International Relations* 3, 11–15.

on extended nuclear deterrence or continue to support US nuclear activities through Pine Gap, and thus whether any problems will arise if or when Australia joins the *TPNW*.¹⁷ By examining this topic we hope to provide some clarity around the debate over the *TPNW* and *ANZUS* in Australia.

The article will proceed in five Parts. Following this introduction, Part II will provide a brief overview of the ways that Australia is involved in nuclear activities. Part III will then explain, drawing on the principles of treaty interpretation set out in arts 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*VCLT*'),¹⁸ why Australia will need to give these activities up if it joins the *TPNW*. Part IV will turn to examine whether Australia giving up its nuclear activities will create any problems with its obligations under *ANZUS*. It will be argued that, although there is potential for some issues to arise under *ANZUS*, there are a number of ways for them to be addressed. Finally, Part V will conclude by offering some reflections on what the Australian case study reveals about the complexities between humanitarianism and security issues in the nuclear context.

II AUSTRALIA'S INVOLVEMENT IN ACTIVITIES RELATED TO NUCLEAR WEAPONS

Before proceeding with the analysis of whether Australia would be able to join the *TPNW* and maintain its security alliance with the US under *ANZUS*, it is necessary to understand how Australia, as a non-nuclear weapon state, is nevertheless implicated in US nuclear weapons activity. This Part provides a brief overview of Australia's policy of extended nuclear deterrence and some of the activities at Pine Gap as background to the rest of the article.

A *Australia's Reliance on Extended Nuclear Deterrence*

Extended nuclear deterrence is essentially a nuclear protection agreement under which a state with nuclear weapons will use, or threaten to use, those weapons in defence of a non-nuclear ally. The specific details of such an agreement might vary, but at its core, the idea behind extended nuclear deterrence is that potential enemy attacks on the non-nuclear state will be deterred by the credible threat that the nuclear weapon state will use those weapons to protect

¹⁷ We have previously written on the compatibility between Australia being under the US nuclear umbrella and art IV of *ANZUS* (n 7); Cormier and Hood (n 16) 8–26.

¹⁸ *VCLT* (n 5).

its ally.¹⁹ Australia has relied on US nuclear protection as a key component of its international security policy for decades.²⁰ Since the early 1990s, it has also consistently and openly interpreted ANZUS as having a nuclear security component which allows the US to use, or threaten to use, nuclear weapons in defence of Australia.²¹ As discussed in detail below in Part IV, while the US has not publicly acknowledged that ANZUS places Australia under the US nuclear umbrella, it has acquiesced to Australia's repeated assertions on this point.²² We have written elsewhere in more detail about Australia's reliance on extended nuclear deterrence and what it means for Australia's nuclear disarmament obligations.²³ For the purposes of this article, the policy of extended nuclear deterrence is one of two main ways that Australia is indirectly involved with nuclear-related activities that we are examining in the context of the TPNW and ANZUS. The second way that Australia might potentially be complicit in nuclear weapons use is through the mass surveillance and intelligence activities that take place at the joint defence facility known as Pine Gap.²⁴

B *The Nuclear Activities Supported by Pine Gap*

Largely shrouded in secrecy, what we know about the Australia–US joint defence facilities comes from reports from former personnel,²⁵ leaked documents,²⁶ and painstaking investigations undertaken by a group of academics

¹⁹ Christine M Leah, 'US Extended Nuclear Deterrence and Nuclear Order: An Australian Perspective' (2012) 8(2) *Asian Security* 93, 95–6.

²⁰ It is apparent, for example, from statements made by some Australian diplomats during the Cold War that, at times, Australia assumed ANZUS (n 7) provided it with nuclear protection: see generally Wayne Reynolds and David Lee (eds), *Australia and the Nuclear Non-Proliferation Treaty 1945–1974* (Australian Department of Foreign Affairs and Trade, 2013). See especially at 75–6.

²¹ Cormier and Hood (n 16) 20–1. See also below Part IV(B)(2)(b).

²² In treaty interpretation, the term 'acquiescence' has a particular legal effect: see below n 110 and accompanying text.

²³ Cormier and Hood (n 16); Monique Cormier, 'Running Out of (Legal) Excuses: Extended Nuclear Deterrence in the Era of the Prohibition Treaty' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law: Legal Challenges for Nuclear Security and Deterrence* (TMC Asser Press, 2020) vol 5, 269.

²⁴ Pine Gap is not the only joint facility involved in activities related to nuclear weapons, but for the purposes of this article will be used as the principal example: see below n 29.

²⁵ See, eg, David Rosenberg, *Pine Gap: The Inside Story of the NSA in Australia* (Hardie Grant Publishers, 2018).

²⁶ US National Security Agency documents were leaked by Edward Snowden in 2013: Peter Cronau, 'Pine Gap Plays Crucial Role in America's Wars, Leaked Documents Reveal', *ABC News* (Web Page, 21 August 2017) archived at <<https://perma.cc/CA53-VZF6>>.

led by Desmond Ball, Bill Robinson and Richard Tanter.²⁷ Tanter in particular has published a number of articles on the facilities' involvement with nuclear weapons.²⁸ Of the various joint defence facilities stationed in Australia, Pine Gap, located near Alice Springs, has been identified as having particular significance for Australia's involvement in intelligence activities related to nuclear weapons.²⁹ The history, objectives and functions of Pine Gap are politically and technologically complex, and the brief background provided here is necessarily simplified to provide context for the ensuing analysis.³⁰

In December 1966, the US entered into an agreement with Australia to establish a ground site near Alice Springs³¹ that would control geosynchronous satellites to be placed over the equator, the western Pacific Ocean, South-East Asia and the Indian Ocean. These satellites would intercept electronic signals from the Soviet Union, giving the US a significant strategic advantage in the Cold War.³² In the early years, the primary purpose of the facility was defensive:

²⁷ For a list of their papers and reports, see Richard Tanter, 'The Pine Gap Project', *Nautilus Institute for Security and Sustainability* (Web Page, 22 February 2016) archived at <<https://perma.cc/NV3S-LRVU>>.

²⁸ See, eg, Richard Tanter, 'Our Poisoned Heart' (October 2016) *Arena Magazine* 12; Richard Tanter, 'The US Military Presence in Australia: Asymmetrical Alliance Cooperation and Its Alternatives' (2013) 11(45) *Asia Pacific Journal: Japan Focus* 4025:1–22; Richard Tanter, 'The "Joint Facilities" Revisited: Desmond Ball, Democratic Debate on Security, and the Human Interest' (Special Report, Nautilus Institute for Security and Sustainability, 12 December 2012) ('The "Joint Facilities" Revisited'); Tanter, 'An Australian Pathway through Pine Gap' (n 16).

²⁹ Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2018, 125 (Richard Sadleir); Tanter, 'An Australian Pathway through Pine Gap' (n 16). Sadleir also identified the Joint Geological and Geophysical Research Station (also near Alice Springs) as a facility that undertakes monitoring of nuclear activity: Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2018, 125. and Tanter identified the Naval Communications Station Harold E Holt (North West Cape) as comprising systems that support nuclear armed submarines. Given that Pine Gap 'is by far the more important' of these facilities, it is sufficient to use Pine Gap as the primary example in our article: *Choosing Humanity* (n 5) 23.

³⁰ We have purposely tried to keep the discussion of the complex technological aspects of Pine Gap as straightforward as possible. We fully acknowledge that this means we have likely missed important technical nuances and distinctions about the activities and operations of the facility. For the purposes of our article, capturing the gist of what occurs at Pine Gap is sufficient for the legal analysis, but we recommend the comprehensive reports and analyses published by the Nautilus Institute for Security and Sustainability and Richard Tanter for detailed and accurate descriptions of what occurs at Pine Gap and the other joint defence facilities in Australia: see above nn 27–9.

³¹ *Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America Relating to the Establishment of a Joint Defence Space Research Facility*, signed 9 December 1966, 607 UNTS 83 (entered into force 9 December 1966) ('*Pine Gap Treaty*'). See below Part IV(1)(b).

³² Tanter, 'Our Poisoned Heart' (n 28).

one of its tasks was to intercept telemetry from Soviet missile testing, for example.³³ Back then, the US was very much in control of what was happening at Pine Gap, with Australians relegated to minor support roles.³⁴

But Pine Gap has evolved, and in the 1990s control was transferred from the Central Intelligence Agency to the National Reconnaissance Office with a much larger role for the US military.³⁵ Australia's role in Pine Gap has also grown, with Australians now participating in all aspects of its operations and fully integrated into the management structure.³⁶ According to Tanter, '[t]hrough its participation in and acquiescence to all ... activities, the Australian Defence Force is both literally and institutionally hard-wired into the US global surveillance system and military operations, with consequent legal and moral responsibilities.'³⁷

Today, the principal function of Pine Gap remains surveillance, with three distinct surveillance systems in operation at the facility. Two of these systems are relevant to nuclear weapons activities.³⁸ The first is 'signals intelligence' which collects, processes and analyses transmissions relayed from the geosynchronous satellites stationed over the Indian Ocean.³⁹ The vast majority of Pine Gap's signals intelligence is used for non-nuclear military purposes, but the same system provides intelligence that may be used for nuclear weapons activities. For example, satellite transmissions include missile telemetry and radars, the collection of which is essential for planning in relation to nuclear deployment.⁴⁰ Through mass collection of signals, the US can gain intelligence about the nuclear capabilities of enemy states and, if necessary, take action to jam radar defences in advance of a nuclear attack.⁴¹

The second Pine Gap surveillance system of relevance for nuclear weapons is known as Overhead Persistent Infra-Red ('OPIR'). OPIR plays a significant

³³ Ibid.

³⁴ Desmond Ball, Bill Robinson and Richard Tanter, 'Australia's Participation in the Pine Gap Enterprise' (Special Report, Nautilus Institute for Security and Sustainability, 9 June 2016) 9–20.

³⁵ See, eg, Tanter, 'Our Poisoned Heart' (n 28).

³⁶ Ball, Robinson and Tanter (n 34) 53–4.

³⁷ Tanter, 'Our Poisoned Heart' (n 28).

³⁸ Tanter, 'The "Joint Facilities" Revisited' (n 28) 27; Tanter, 'Our Poisoned Heart' (n 28).

³⁹ Tanter, 'Our Poisoned Heart' (n 28).

⁴⁰ Ibid.

⁴¹ Ibid.

role in both nuclear deterrence and potentially ‘nuclear war-fighting’ activities.⁴² Under this system, the Relay Ground Station at Pine Gap receives data from military satellites equipped with powerful infra-red sensors which can detect and provide crucial information about nuclear missile launches and trajectory estimation essential for early warning of a possible nuclear strike and subsequent missile defence.⁴³ The same technology that detects an enemy nuclear missile launch can identify which of that enemy’s missile silos remain capable of firing, and are therefore a prime target for a retaliatory US nuclear strike.⁴⁴

When future Australian governments consider whether and how they might join the *TPNW*, the fact that jointly operated systems at Pine Gap collect and process data that can be used by the US for nuclear war planning purposes is a reality that needs to be taken into account. The following analysis examines how and why these functions of Pine Gap, alongside Australia’s policy of extended nuclear deterrence, would currently preclude Australia from joining the *TPNW*.

III THE INCOMPATIBILITY OF AUSTRALIA’S NUCLEAR WEAPONS-RELATED ACTIVITIES WITH THE *TPNW*

The *TPNW* provides a comprehensive list of prohibited nuclear weapons-related activities in art 1:

- (1) Each State Party undertakes never under any circumstances to:
 - (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
 - (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
 - (c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;

⁴² Richard Tanter, ‘Hiding from the Light: The Establishment of the Joint Australia–United States Relay Ground Station at Pine Gap’ (Report, NAPSNet Policy Forum, Nautilus Institute for Security and Sustainability, 2 November 2019) 10 (‘Hiding from the Light’); Tanter, ‘An Australian Pathway through Pine Gap’ (n 16).

⁴³ Tanter, ‘Hiding from the Light’ (n 42) 9–10.

⁴⁴ *Ibid* 10.

- (d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
- (e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
- (f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
- (g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.⁴⁵

At a minimum, the US is currently undertaking prohibited activity enumerated in art 1(1)(a),⁴⁶ and given that the US possesses nuclear weapons, there is the very real possibility that it might use, or threaten to use, those weapons which is proscribed in art 1(1)(d). While Australia is not directly involved in any such prohibited activity undertaken by the US, there are two avenues through which Australia, as a non-nuclear weapon state, could nevertheless fall afoul of the complicity provision of the *TPNW* in art 1(1)(e). The first is by virtue of its policy of extended nuclear deterrence, and the second is due to its joint participation in the activities at Pine Gap. Each of these will be discussed in turn, with a view to clarifying whether and how these circumstances would put Australia in contravention of the *TPNW*.

A Would Australia Be in Breach of Art 1(1)(e)?

Article 1(1)(e) of the *TPNW* bans States Parties from '[a]ssist[ing], encourag[ing] or induc[ing], in any way, anyone to engage in any activity prohibited to a State Party under this Treaty'. A version of this provision has become a standard inclusion in most international disarmament treaties.⁴⁷

⁴⁵ *TPNW* (n 1) art 1.

⁴⁶ For a more comprehensive picture of US nuclear weapons-related activities, see Office of the Secretary of Defense, *Nuclear Posture Review* (Report, February 2018); Hans M Kristensen and Matt Korda, 'United States Nuclear Forces, 2020' (2020) 76(1) *Bulletin of the Atomic Scientists* 46.

⁴⁷ See, eg, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 3 December 1997, 2056 UNTS 211 (entered into force 1 March 1999) art 1(1)(c); *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997) art 1(d) ('*Chemical Weapons Convention*'); *Convention on the Prohibition of the Development,*

Of the three modes of complicity, ‘assist’ and ‘encourage’ are the two that are potentially relevant to Australia, specifically in relation to whether Australia’s policy of extended nuclear deterrence amounts to encouraging the US to engage in prohibited activity, and whether Australia’s involvement in Pine Gap means that it is assisting the US to engage in prohibited activity.

1 *Is Australia ‘Encouraging’ Prohibited Activity by Relying on Extended Nuclear Deterrence?*

Article 31(1) of the *VCLT* requires a treaty to be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. The term ‘encourage’ is generally understood to mean to ‘allow or promote the continuance or development’ of something.⁴⁸ In the context of the *TPNW*, extended nuclear deterrence arguably promotes, at the very least, the continuance of nuclear weapons possession and stockpiling which is prohibited by art 1(1)(a).⁴⁹ The Preamble to the *TPNW* is specifically ‘[c]oncerned by ... the continued reliance on nuclear weapons in military and security concepts, doctrines and policies’, which lends further support for interpreting the prohibition on encouraging in art 1(1)(e) as a prohibition on extended nuclear deterrence.⁵⁰ Further, given the object of the *TPNW* is ‘to completely eliminate’ nuclear weapons and its purpose is ‘to guarantee that nuclear weapons are never used again under any circumstances’, there is little scope to argue that relying on extended nuclear deterrence is compatible with the *TPNW*.⁵¹ By maintaining its position under the US nuclear umbrella, Australia is encouraging the US to possess and stockpile nuclear weapons for deterrence purposes.

Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975) art III; *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) art I (‘*NPT*’).

⁴⁸ *Oxford English Dictionary* (online at 14 April 2020) ‘encourage’ (v, def 3b). Dictionaries are often used to undertake ‘basic discovery of ordinary meanings of a term’ and to identify a ‘functional’ meaning of a word, but such definitions are not synonymous with a term’s ordinary meaning without further context: Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd ed, 2015) 186.

⁴⁹ An argument could be made that extended nuclear deterrence also encourages the US to ‘[d]evelop, test, produce [and] manufacture’ nuclear weapons to maintain and modernise its nuclear forces for the purposes of ensuring a credible deterrent: *TPNW* (n 1) art 1(1)(a). Australia’s policy of extended nuclear deterrence could also perhaps be said to be encouraging the US to ‘[u]se or threaten to use nuclear weapons’: art 1(1)(d).

⁵⁰ *TPNW* (n 1) Preamble para 14; *VCLT* (n 5) art 31(2) allows for consideration of a treaty’s preamble to ascertain the context for the purpose of art 31(1).

⁵¹ *TPNW* (n 1) Preamble para 2.

2 *Is Australia 'Assisting' Prohibited Activity through the Activities at Pine Gap?*

The question of whether, under art 1(1)(e), Australia is 'assisting' prohibited nuclear activity by virtue of its role in Pine Gap is more complex. How the term 'assist' should be interpreted in the context of the *TPNW* is not readily ascertained from the text of the treaty, which does not provide any guidance on the type of activities that might amount to assistance. However, the prohibition on assisting internationally unlawful activity is common in international law,⁵² which is why the question of a state's responsibility for assisting an internationally wrongful act has been addressed by the International Law Commission ('ILC') in its Draft Articles on Responsibility of States for Internationally Wrongful Acts ('Draft Articles').⁵³ Article 16 of the Draft Articles provides that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with the knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.⁵⁴

Article 16 reflects customary international law⁵⁵ which means that under art 31(3)(c) of the *VCLT* it may be used to shed light on the meaning of the term under art 1(1)(e) of the *TPNW*. The commentary around art 16 of the Draft Articles makes it clear that there are three components to 'assistance': scope, contribution and a subjective element.⁵⁶ Whether Australia would ultimately be liable for assisting prohibited activity under the *TPNW* depends on the fulfilment of these three elements. We will briefly address each.

⁵² See above n 47 for examples.

⁵³ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex.

⁵⁴ *Ibid* art 16.

⁵⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 216–17 [419]–[420] ('*Genocide Case*').

⁵⁶ Commentaries and explanatory reports are frequently used in treaty interpretation, which are considered to be supplementary means of interpretation for the purposes of the *VCLT* (n 5) art 32: Gardiner (n 48) 401–3. It is also 'an accepted and established practice' to use other treaties with the same or similar provisions to aid interpretation of the treaty under consideration: at 323.

(a) *The Scope of 'Assist' under the TPNW*

During the *TPNW* negotiations, a number of states expressed the view that the term 'assist' in art 1(1)(e) should be broadly construed to encompass a wide range of possible activities.⁵⁷ States did not identify precisely what type of activities might constitute assistance under art 1(1)(e), although it was generally agreed that the inclusion of the term 'in any way' operates to significantly broaden the scope of any assistance.⁵⁸ Consideration of how the prohibition on assistance has been interpreted in the equivalent provisions of other disarmament treaties sheds some light on possible assisting activities that might fall within the scope of art 1(1)(e).⁵⁹ In a commentary on the identical provision in the *Chemical Weapons Convention*,⁶⁰ for example, assistance

can be given not only by means of material or intellectual support ... but also through financial resources, technological-scientific know-how, or provision of specialized personnel, military instructors, etc to anyone who is resolved to engage in such prohibited activity or by supporting the concealment of such activities ...⁶¹

Two activities that were mentioned during *TPNW* negotiations were financing of nuclear activities and allowing transit of nuclear weapons through a state's territory. Neither of these activities are specifically prohibited in the *TPNW* as it was considered that they could fall within the prohibition on assisting in art 1(1)(e).⁶²

While the scope of possible activities that amount to assistance under art 1(1)(e) of the *TPNW* is broad, it is not unlimited. Negotiating states agreed

⁵⁷ See, eg, '14th Meeting: UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading towards Their Total Elimination', *UN Web TV* (United Nations, 16 June 2017) 2:28:07–2:30:33 (Bangladesh) <<http://webtv.un.org/watch/player/5474686560001>> ('14th Meeting of the UN Conference'). The preparatory work of a treaty may be considered to aid in its interpretation in accordance with art 32 of the *VLCT* (n 5).

⁵⁸ See, eg, 14th Meeting of the UN Conference (n 57) 2:28:07–2:29:23 (Bangladesh).

⁵⁹ Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary* (Oxford University Press, 2019) 162–3. See also Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) 195–230.

⁶⁰ *Chemical Weapons Convention* (n 47) art 1(1)(d).

⁶¹ Walter Krutzsch, 'Article I: General Obligations' in Walter Krutzsch, Eric Myjer and Ralf Trapp (eds), *The Chemical Weapons Convention: A Commentary* (Oxford University Press, 2014) 61, 67, cited with approval in Casey-Maslen (n 59) 162.

⁶² '14th Meeting of the UN Conference' (n 57) 1:36:35–1:43:38 (Austria), 2:12:56–2:19:43 (Mozambique), 2:32:31–2:33:34 (Mexico); '15th Meeting: UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading towards Their Total Elimination', *UN Web TV* (United Nations, 19 June 2017) 0:41:38–0:51:32 (Austria) <<http://webtv.un.org/watch/player/5478134100001>> ('15th Meeting of the UN Conference').

that the mere fact of being in a military alliance with a nuclear-armed state would not amount to a violation of art 1(1)(e), nor would activities relating to the use and development of nuclear technology for peaceful purposes.⁶³ It follows, then, that the signals collection and analysis activities that take place at Pine Gap would be unlikely to amount to ‘assistance’ for the purposes of the *TPNW* to the extent that they are used for nuclear weapons monitoring and early warning purposes. The problem is that the same systems can be used for US nuclear weapons targeting, which would amount to prohibited activity under the *TPNW*.⁶⁴ Whether Australia would be liable for assisting such banned activity depends on two additional factors that are required under the doctrine of state responsibility before a state can be considered complicit in the unlawful acts of another state. The first is a question of contribution and the second a matter of subjectivity.

(b) The Assisting State’s Contribution to the Prohibited Activity

James Crawford, one of the ILC’s Special Rapporteurs on State Responsibility, affirmed that ‘the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act’.⁶⁵ Such a contribution does not need to be essential as long as it ‘contributed significantly’ to the prohibited act.⁶⁶ Presuming the US uses one or more nuclear weapons and relies on information received from Pine Gap to find its target, the facility will almost certainly be considered to have contributed significantly to the use of those weapons.⁶⁷

⁶³ ‘14th Meeting of the UN Conference’ (n 57) 2:03:12–2:10:00 (Switzerland), 1:53:25–2:03:00 (Sweden); Casey-Maslen (n 59) 165. This interpretation of ‘assistance’ has been adopted in relation to earlier disarmament treaties: see, eg, *Convention on Cluster Munitions*, opened for signature 3 December 2008, 2688 UNTS 39 (entered into force 1 August 2010) art 21, discussed in Aust (n 59) 204–5.

⁶⁴ Tanter, ‘Our Poisoned Heart’ (n 28); Tanter, ‘Hiding from the Light’ (n 42) 10–11. Targeting would likely be considered a threat to use nuclear weapons, in contravention of art 1(1)(d) of the *TPNW* (n 1).

⁶⁵ *Report of the International Law Commission: Fifty-Third Session*, Supp No 10, UN Doc A/56/10 (1 October 2001) 155 (‘Draft Articles Commentary’).

⁶⁶ *Ibid* 156. See also International Committee of the Red Cross, *The Prohibition to Assist, Encourage or Induce Prohibited Activities under the Treaty on the Prohibition of Nuclear Weapons* (Briefing Note, 24 April 2019) 5–6 archived at <<https://perma.cc/B9CZ-32EJ>> (‘ICRC Briefing Note’).

⁶⁷ For further information about how Pine Gap systems might contribute to nuclear war-fighting, see Tanter, ‘Hiding from the Light’ (n 42) 10–11.

(c) *The Subjective Aspect of 'Assist'*

Article 16 of the Draft Articles on State Responsibility provides that an assisting state is only responsible for the internationally wrongful act if it provides such assistance 'with the knowledge of the circumstances of the internationally wrongful act'. There is some uncertainty as to how this subjective 'knowledge of the circumstances' should be interpreted. The issue of whether Australia would be in breach of art 1(1)(e) of the *TPNW* for assisting the use of nuclear weapons by virtue of its involvement with activities at Pine Gap will turn on this interpretation.

In his Commentary on the Draft Articles on State Responsibility, Crawford indicated that the assisting state had to *intend* to facilitate the wrongful act in order for it to be considered complicit in said act.⁶⁸ Austria has adopted this view with respect to art 1(1)(e) of the *TPNW*, arguing that '[assistance] is to be understood as referring to measures taken by states parties with the object and purpose of actively supporting' prohibited activities.⁶⁹ There is no question that a state that intentionally facilitates prohibited nuclear activities under the *TPNW* would breach art 1(1)(e). During the *TPNW* negotiations, however, Sweden's attempt to insert the word 'intentionally' in front of 'assist, encourage or induce' was not supported by other states, which lends credence to the argument that the requisite mental element in art 1(1)(e) should not be limited to intent only.⁷⁰

In his commentary on the *TPNW*, Stuart Casey-Maslen declared that 'the correct test' for complicity under international law comes from the International Court of Justice's 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the Court held that the minimal mental requirement for complicity under international law is *knowledge* of what the principal perpetrator intends to do.⁷¹ In other words, where State A does not necessarily intend to facilitate internationally wrongful acts, but it knows that it is assisting State B to intentionally commit a wrongful act, then State A will be complicit in that wrongful act. We agree that this should be the same standard that applies to 'assist' under art 1(1)(e) of the *TPNW*.⁷²

⁶⁸ *Draft Articles Commentary* (n 65) 156.

⁶⁹ Casey-Maslen (n 59) 165, quoting email from Thomas Hajnoczi, Director of the Department for Disarmament, Arms Control and Non-Proliferation, Austrian Federal Ministry for Europe, Integration and Foreign Affairs, to Stuart Casey-Maslen, 19 April 2018.

⁷⁰ *Compilation of Amendments Received from States on the Revised Draft Submitted by the President*, UN Doc A/CONF.229/2017/CRP.1/Rev.1 (27 June 2017) 4.

⁷¹ Casey-Maslen (n 59) 161–2, citing *Genocide Case* (n 55) 218 [421].

⁷² Casey-Maslen (n 59) 162. See also *ICRC Briefing Note* (n 66) 7.

While it might be difficult to demonstrate that Australia, through the joint signals collection activity at Pine Gap, *intends* for the US to use the data for nuclear targeting, Australia cannot deny that it knows that the intelligence could be used for this purpose. In the event that the US decided to undertake a nuclear strike using information obtained via Pine Gap, Australia may very well claim that it was not privy to the high-level US decision to authorise the nuclear strike. It is unlikely, however, that this would be sufficient to keep Australia from breaching the art 1(1)(e) prohibition on assisting.

B Conclusion

If Australia were to join the *TPNW* today, without any modification of its security policy and Pine Gap activities, it would, at a minimum, be in breach of the treaty for encouraging the US to possess nuclear weapons, and quite possibly for assisting the US to use nuclear weapons. *TPNW* advocates have been quick to argue that Australia could give up its reliance on extended nuclear deterrence and extricate itself from the nuclear assisting activities at Pine Gap without compromising its security alliance with the US.⁷³ Whether this is indeed the case requires a closer examination of *ANZUS*.

IV IS JOINING THE *TPNW* COMPATIBLE WITH *ANZUS*?

It is apparent from the above analysis that if Australia wanted to join the *TPNW*, it would have to give up its reliance on US extended nuclear deterrence and stop providing support to US nuclear activities through Pine Gap. The question that then arises is whether either of these changes would put Australia in breach of its commitments under *ANZUS*.

The *ANZUS* provision that is most likely to pose problems for Australia is art II. Article II provides:

In order more effectively to achieve the objective of this Treaty the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.⁷⁴

What needs to be determined is whether Australia withdrawing from the US nuclear umbrella or extricating Pine Gap from being used to support US

⁷³ *Choosing Humanity* (n 5) 23–4. The logistics of how Australia could disengage from nuclear-related activities at Pine Gap is beyond the scope of this article: see generally Tanter, ‘Hiding from the Light’ (n 42).

⁷⁴ *ANZUS* (n 7) art II.

nuclear activities would amount to a failure to maintain and develop its capacity (alone and with the US) to resist armed attack.

This Part explores how the rules of treaty interpretation in the *VCLT* apply to art II of *ANZUS*.⁷⁵ It begins by showing how traditional understandings of art II based on the ordinary meaning of the words in the article, coupled with the drafting history of *ANZUS*, support the idea that the provision does not require Australia to stay involved in nuclear activities. We go on to demonstrate, however, that when regard is had to subsequent agreements and subsequent practice that have emerged over the life of *ANZUS*, the picture becomes much murkier.

*A Traditional Understandings of Art II That Suggest It Does Not Require
Australia to Continue to Support Nuclear Activities*

There are strong arguments to be made that in accordance with how art II was traditionally interpreted in its first three decades, Australia does not need to remain under the US nuclear umbrella or continue to support any US nuclear activities through Pine Gap. Historically, art II was interpreted in a way that ensured that *ANZUS* States Parties did not have to make any specific contributions to their own defence or the defence of other States Parties.⁷⁶ Indeed, the early literature on *ANZUS* made it very clear that the ordinary meaning of art II did not stipulate the nature or extent of States Parties' contributions to self-defence efforts.⁷⁷ Rather, it was up to each State Party to make its own good faith assessment about what it thought was necessary to ensure that it, and the other States Parties, could resist attack.⁷⁸ In the words of JG Starke, 'each ally should make at least an honest judgement as to what it can and should do to develop and maintain its own capacity to resist attack, and to help others'.⁷⁹

This understanding of art II was supported by the fact that it was based on art III of the *North Atlantic Treaty* (which in turn was drawn from the

⁷⁵ Note that, although the US has not ratified the *VCLT* (n 5), it is accepted that the provisions in arts 31 and 32 represent customary international law and thus apply to *ANZUS* (n 7): *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53, 69–70 [48]. Further, *VCLT* (n 5) arts 31 and 32 represented the status of customary law prior to the entry into force of the *VCLT* (n 5) and thus can be used to interpret *ANZUS* (n 7) even though it was drafted in 1951 before the creation of the *VCLT* (n 5): see *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045, 1059 [18].

⁷⁶ JG Starke, *The ANZUS Treaty Alliance* (Melbourne University Press, 1965) 103.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

Vandenberg Resolution,⁸⁰ passed by the US Senate in 1948, which sets down the conditions for the US entering into any collective defence arrangement).⁸¹ The debates that took place prior to the adoption of the *North Atlantic Treaty* revealed that art III did not impose any particular obligations on States Parties. The US Senate Committee on Foreign Relations' report on the *North Atlantic Treaty* stated that, with respect to art III, '[e]ach member of the pact will have to exercise its own honest judgment as to what steps it should take to give effect to this principle' and that it 'did not bind the United States to accept ... any particular kind of implementation program.'⁸² Further, it was noted at the time that pursuant to art III, 'there is no specific obligation with respect to the timing, nature and extent of assistance to be given by any party'⁸³ and that the scope of a state's contributions would depend on a range of factors including domestic policies, financial capacity and its own assessments of its security needs.⁸⁴

Applying this understanding of art II of *ANZUS* to Australia's current situation, it can be argued that it is entirely reasonable for Australia to make a good faith determination that supporting nuclear activities is no longer something that enhances its self-defence interests. Indeed, in recent years, a number of senior foreign policy experts in Australia have asserted that far from strengthening the state's self-defence capacities, Australia's reliance on US extended nuclear deterrence and its support for nuclear activities through Pine Gap has undermined Australia's security. Tanter, for example, has argued that Australia's connection to nuclear activities makes it a nuclear target,⁸⁵ and the

⁸⁰ Vandenberg Resolution, S Res 239, 80th Congress (1948).

⁸¹ Starke (n 76) 102.

⁸² Senate Committee on Foreign Relations, United States Congress, *North Atlantic Treaty* (Senate Executive Report No 81-8, 6 June 1949) 25. See also Richard H Heindel, Thorsten V Kalijarvi and Francis O Wilcox, 'The *North Atlantic Treaty* in the United States Senate' (1949) 43(4) *American Journal of International Law* 633, 641.

⁸³ Heindel, Kalijarvi and Wilcox (n 82) 642.

⁸⁴ The idea that North Atlantic Treaty Organization members have control over the extent to which they contribute to individual and collective efforts to build up their defensive capacities can be seen in practice with Norway and Denmark refusing to allow nuclear weapons to be stationed on their territories: 'Norway and NATO', *North Atlantic Treaty Organization* (Web Page) archived at <<https://perma.cc/89BT-E896>>; 'Denmark and NATO', *North Atlantic Treaty Organization* (Web Page) archived at <<https://perma.cc/K6H8-5PBZ>>.

⁸⁵ Richard Tanter, 'Pine Gap and a Possible Korean Nuclear War', *John Menadue: Pearls and Irritations* (Blog Post, 9 January 2018) archived at <<https://perma.cc/B5DG-PPNB>>. See also Tanter, 'Hiding from the Light' (n 42) 11–12.

former Prime Minister Malcolm Fraser asserted that nuclear weapons ‘are not relevant to the defence of any country’.⁸⁶

Using the argument that nuclear-related activities do not enhance security, Australia could justify ending its reliance on US extended nuclear deterrence and its support of nuclear activities via Pine Gap without breaching art II of ANZUS. This conclusion is not, however, the end of the enquiry. Treaties are living instruments that can change and develop over time. Consequently, Part IV(B) turns to consider whether, in the nearly 70 years since its inception, understandings of art II have evolved in ways that mean it now imposes certain obligations on Australia to maintain and support certain US nuclear activities.

*B Has Art II Evolved to Require Australia to Continue
Supporting US Nuclear Activities?*

Articles 31(3)(a) and (b) of the *VCLT* provide that the meaning of a treaty’s terms may be affected by any subsequent agreements or subsequent practice between the states parties. In light of this, it is necessary to consider whether, since 1952, there have been any subsequent agreements concluded or whether any subsequent practice has developed requiring art II to be interpreted in a way that obliges Australia to stay under the US nuclear umbrella or ensure that Pine Gap continues to support US nuclear activities. Part IV(B) will examine these matters and argue that although there have not been any relevant subsequent agreements, subsequent practice may have altered the scope of art II, at least with respect to Australia being a recipient of US extended nuclear deterrence.

1 Are There Any Subsequent Agreements to ANZUS That Require Australia to Remain under the US Nuclear Umbrella and/or Ensure Pine Gap Continues to Support US Nuclear Activities?

It is widely accepted that the reference to ‘subsequent agreements’ in art 31(3)(a) of the *VCLT* concerns agreements between the states parties about

⁸⁶ Tilman Ruff, ‘Malcolm Fraser Fought to Abolish Nuclear Weapons’, *The Age* (online, 26 March 2015) archived at <<https://perma.cc/ZQN9-83FZ>>. For further analysis of the problems inherent in nuclear deterrence, see, eg, Ward Wilson, ‘The Myth of Nuclear Deterrence’ (2008) 15(3) *Nonproliferation Review* 421; Adam Roberts, ‘The Critique of Nuclear Deterrence’ (1983) 23(183) *Adelphi Papers* 2; David P Barash, ‘Nuclear Deterrence Is a Myth. And a Lethal One at That’, *The Guardian* (online, 14 January 2018) archived at <<https://perma.cc/FD3E-QJAD>>; George P Shultz et al, ‘Deterrence in the Age of Nuclear Proliferation’, *The Wall Street Journal* (online, 7 March 2011) archived at <<https://perma.cc/6AYV-G2VZ>>.

the interpretation or application of a provision in a treaty.⁸⁷ Subsequent agreements must have been reached after the treaty was concluded and can include both formal treaties and more informal agreements.⁸⁸ With these definitional points in mind, this Part now turns to consider whether any such agreements have been made about art II of ANZUS and US extended nuclear deterrence, or art II of ANZUS and the nuclear support activities at Pine Gap.

(a) *Are There Any Subsequent Agreements about Australia's Position under the US Nuclear Umbrella?*

In 2017, we undertook extensive research into Australia's reliance on extended nuclear deterrence but were unable to find any public agreement between Australia and the US about it.⁸⁹ We did come across a statement by Hugh White that noted that, when he was the Australian Deputy Secretary for Strategy in the Department of Defence in the late 1990s, he had had 'explicit discussions with US officials' to the effect that the US 'would threaten nuclear retaliation against a country that attacked Australia with nuclear missiles.'⁹⁰ It is possible for oral agreements to satisfy the criteria in art 31(3)(a) of the *VCLT*⁹¹ and consequently there is a possibility that the discussions could evidence some form of subsequent agreement between the US and Australia. However, for White's discussions to amount to a relevant subsequent agreement for the purposes of ANZUS, we would need more information about whether the US officials mentioned had the requisite authority to make binding statements and there would need to have been an explicit reference to the idea that the offer of nuclear protection was being made in the context of ANZUS.⁹² As neither of these things are apparent from White's comments or other publicly available sources, it seems at this stage that there has been no subsequent agreement that

⁸⁷ Gardiner (n 48) 242–3; International Law Commission, *Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, UN Doc A/CN.4/L.907 (11 May 2018) 2.

⁸⁸ Gardiner (n 48) 243–50.

⁸⁹ Cormier and Hood (n 16) 16–17.

⁹⁰ Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 26 March 2004, 59 (Hugh John White). Richard Tanter has explicitly confirmed with Hugh White that the discussions were never recorded in writing: Richard Tanter, "'Just in Case': Extended Nuclear Deterrence in the Defense of Australia" (2011) 26(1) *Pacific Focus* 113, 121 n 23.

⁹¹ Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104(2) *American Journal of International Law* 179, 199.

⁹² Cormier and Hood (n 16) 16–17.

has transformed ANZUS so that it requires Australia to remain under the US nuclear umbrella.⁹³

(b) *Are There Any Subsequent Agreements about the Support of US Nuclear Activities through Pine Gap?*

In order to determine whether there have been any subsequent agreements to ANZUS that suggest that art II requires Australia to ensure Pine Gap continues to support US nuclear activities, it is relevant to consider the series of agreements between the US and Australia regarding the facility. The first such agreement was a treaty signed in 1966 that established Pine Gap as a joint defence facility.⁹⁴ The treaty references ANZUS in the Preamble and notes ‘in particular, Article II of that Treaty which provides that the parties thereto will separately and jointly maintain and develop their individual and collective capacity to resist armed attack.’⁹⁵ The treaty was originally in force for ten years and has subsequently been extended by a series of other agreements.⁹⁶

The fact that the original treaty referenced ANZUS suggests that it might be considered a subsequent agreement between the US and Australia that affects the scope of the two states’ commitments under art II. Historically, however, whether the 1966 treaty was a subsequent agreement that affected the scope of ANZUS has been disputed, with a number of international lawyers maintaining that as the 1966 treaty did not include New Zealand as a State Party, it could not affect the scope of art II of ANZUS.⁹⁷

Given the US suspended its obligations to New Zealand under ANZUS in 1986, it is perhaps easier to make the argument that the agreements about Pine

⁹³ Ibid.

⁹⁴ *Pine Gap Treaty* (n 31).

⁹⁵ Ibid Preamble paras 2–3.

⁹⁶ *Exchange of Notes Constituting an Agreement Amending and Extending the Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America Relating to the Establishment of a Joint Defence Space Research Facility of 9 December 1966*, signed 19 October 1977, 1113 UNTS 306 (entered into force 19 October 1977); *Exchange of Notes Constituting an Agreement Amending the Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America Relating to the Establishment of a Joint Space Research Facility of 9 December 1966, As Amended*, signed 16 November 1988, 1536 UNTS 380 (entered into force 16 November 1988); *Exchange of Notes Constituting an Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America to Further Extend in Force the Agreement Relating to the Establishment of a Joint Defence Space Research Facility of 9 December 1966, As Amended*, signed 4 June 1998, 2171 UNTS 89 (entered into force 18 August 2000).

⁹⁷ Campbell McLachlan, ‘ANZUS: The Treaty Reappraised’ [1985] (August) *New Zealand Law Journal* 271, 277. See also Christine M Chinkin, ‘Suspension of Treaty Relationship: The ANZUS Alliance’ (1990) 7(1–2) *University of California, Los Angeles Pacific Basin Law Journal* 114, 137.

Gap do today affect the scope of art II of ANZUS.⁹⁸ Even then though, there is nothing in the original *Pine Gap Treaty* or extension agreements that suggest that Pine Gap will be used to support US nuclear targeting. Consequently, while it is perhaps possible to argue that art II of ANZUS now needs to be read to incorporate the Pine Gap agreements (or at least those concluded after 1986) and a commitment to operate Pine Gap as a joint military facility with the US, it cannot be concluded that this amounts to Australia having to ensure that Pine Gap continues to support US nuclear activities.

2 *Is There Any Subsequent Practice around ANZUS That Requires Australia to Remain under the US Nuclear Umbrella and/or Ensure Pine Gap Continues to Support US Nuclear Activities?*

While it is difficult to conclude that there have been any subsequent agreements that have affected the scope of art II of ANZUS, it is a different story when it comes to subsequent practice. Pursuant to the rules of treaty interpretation, the meaning of a treaty provision can change over time where there are acts or communications from states parties that 'establish a discernible pattern implying the agreement of the parties regarding [the treaty's] interpretation.'⁹⁹ The discernible pattern must be 'concordant, common and consistent'¹⁰⁰ and must take place over a period of time; isolated incidents of behaviour are not sufficient.¹⁰¹

This Part turns to consider whether there has been any subsequent practice around art II regarding either US extended nuclear deterrence or Pine Gap. It first provides some brief information about historic debates that took place about subsequent practice in relation to art II during the 1980s, as they provide useful context for the present issue.

(a) *Subsequent Practice and the US–New Zealand ANZUS Dispute*

Whether the meaning of art II of ANZUS has been affected by subsequent practice is an issue that has arisen before. When the ANZUS dispute between the US and New Zealand took place in the mid-1980s, it revolved primarily

⁹⁸ It is questionable, however, whether the 1966 *Pine Gap Treaty* (n 31) can retrospectively be understood as a subsequent agreement if it was not technically a subsequent agreement at the time it was made.

⁹⁹ Appellate Body Report, *Japan: Taxes on Alcoholic Beverages*, WTO Docs WT/DS8/AB/R, DS10/AB/R and DS11/AB/R (4 October 1996) 12–13.

¹⁰⁰ Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984) 137, quoted in Gardiner (n 48) 256–7.

¹⁰¹ Sinclair (n 100) 200; Anthea Roberts (n 91) 200.

around art II and questions of subsequent practice.¹⁰² The dispute concerned New Zealand's desire to ban US nuclear-powered and nuclear-armed ships from entering its waters and the US's objection to this ban.¹⁰³ The legal foundation for the US's objection to the New Zealand position was that pursuant to art II of ANZUS, it was necessary for the US to send its nuclear-powered and nuclear-armed ships into New Zealand waters so that it could ensure that it was in a position to adequately defend New Zealand.¹⁰⁴ Further, the US maintained that it had been sending nuclear-powered and nuclear-armed ships to New Zealand to fulfil its art II obligations for several decades and that this constituted subsequent practice, which therefore meant that it was bound to continue this activity. New Zealand's response was to point to the fact that the US's history of sending nuclear-powered and nuclear-armed ships to New Zealand had not been an uninterrupted practice but instead one that had at times been opposed and halted by New Zealand governments.¹⁰⁵ This enabled New Zealand to argue that the US had failed to satisfy the subsequent practice requirement in the *VCLT* because the practice it referred to had not been consistent and had not amounted to a discernible pattern.¹⁰⁶

(b) Is There Any Subsequent Practice Relating to US Extended Nuclear Deterrence?

The issue that Australia faces with US extended nuclear deterrence is somewhat different to the US ship issue that New Zealand dealt with in the 1980s. As outlined above in Part II(A), Australia has repeatedly and publicly asserted that it is under the US nuclear umbrella. More significantly, the Australian government has continually linked its reliance on extended nuclear deterrence to ANZUS. For example, in 2013, Foreign Minister Bob Carr stated: '[i]f you want to abrogate the possibility of us falling under the American nuclear umbrella ... you must follow through on that logic. That logic mandates abandoning the ANZUS Treaty, withdrawing from the ANZUS Treaty.'¹⁰⁷ Further, since the

¹⁰² Another argument put forward by the US at the time was that there had been a subsequent agreement reached at an ANZUS Council meeting regarding the right of US ships to visit New Zealand: McLachlan (n 97) 271.

¹⁰³ Ibid.

¹⁰⁴ Grant Hewison, 'Withdrawal from ANZUS' [1986] (March) *New Zealand Law Journal* 87, 88–9.

¹⁰⁵ McLachlan (n 97) 278.

¹⁰⁶ It should be noted that whether art II of ANZUS (n 7) had been changed by subsequent practice by the 1980s is an issue that was never definitively resolved; to this day both the US and New Zealand continue to advance their respective understandings of the dispute.

¹⁰⁷ Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 6 June 2013, 35 (Bob Carr).

early 1990s, Australia has consistently asserted that ANZUS places Australia under the US nuclear umbrella in its defence policy documents. The Department of Defence's 1997 Strategic Policy, for example, provided that the 'alliance does provide a clearer expectation of US support ... against nuclear attack',¹⁰⁸ and its 2009 White Paper stated that the alliance 'means that, for so long as nuclear weapons exist, we are able to rely on the nuclear forces of the United States to deter nuclear attack on Australia.'¹⁰⁹ Such statements are clear evidence that Australia is operating under the assumption that the US provides nuclear protection for Australia because of the ANZUS security alliance.

The issue that then arises is whether the US agrees with Australia's assertions. Subsequent practice can arise from the actions or assertions of just one state party to a treaty but they must be agreed to, or at the very least acquiesced to, by the other states parties.¹¹⁰ In our view, it is difficult to avoid the conclusion that the US has acquiesced to Australia's assertions about extended nuclear deterrence and ANZUS. This is because the Department of Defence's Strategic Policies and White Papers have been public documents and it is common practice for Australia to consult with its allies, including the US, during the drafting process.¹¹¹ It is thus clear that the US is well aware of the contents of the Strategic Policies and White Papers and Australia's assertions about extended nuclear deterrence and ANZUS.¹¹² When this is combined with the fact that the US has never publicly rejected the claims made in the policies, it strongly suggests that the US has acquiesced to the Australian position. It is thus apparent that subsequent practice may have altered art II of ANZUS to require the US to provide Australia with extended nuclear deterrence.

(c) *Is There Any Subsequent Practice Regarding Pine Gap?*

Whether the fact that Pine Gap is being used to support US nuclear activities amounts to subsequent practice that has also altered art II of ANZUS is less clear. In order for the nuclear-related support activities at Pine Gap to be deemed 'subsequent practice', it would be necessary to know that Australia and

¹⁰⁸ Department of Defence, *Australia's Strategic Policy* (Policy Document, 1997) 18.

¹⁰⁹ Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030* (White Paper, 2009) 50 [6.34].

¹¹⁰ Acquiescence occurs when a state party does not dissent to the actions or assertions of another state party when that other state party's actions or assertions have been 'in plain view for a long time' and call for some reaction: Georg Nolte, 'Jurisprudence of the International Court of Justice and Arbitral Tribunals of Ad Hoc Jurisdiction Relating to Subsequent Agreements and Subsequent Practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013) 169, 192–4.

¹¹¹ Cormier and Hood (n 16) 20–1.

¹¹² *Ibid.*

the US saw those activities as being undertaken in the application of *ANZUS*.¹¹³ Finding evidence of this has proved difficult. In 2018, there were a number of Australian public figures who made statements that could be construed as support for the idea that *ANZUS* requires the continuation of nuclear-related support activities at Pine Gap. Each of the statements, however, was problematic for certain reasons.

To start with, the former Foreign Minister Gareth Evans stated that Pine Gap and its nuclear support activities are ‘critical components of the alliance relationship’.¹¹⁴ While this statement suggests that the activities that occur at Pine Gap are done under the cover of *ANZUS*, Evans had retired from politics when he made this statement and thus cannot be taken to have spoken for Australia.

A second assertion was made by Shadow Minister for Defence Richard Marles. Marles declared:

ANZUS today has evolved from its beginning as an agreement to respond to threats to one focused on the strategic aspirations and purposes of both countries.

This is nowhere more clear than in the arrangements introduced at the Australia–US Joint Facilities, where integrated Australian and US staffs make the facilities truly ‘joint’.

The original purpose of the Joint Facilities — collecting signals intelligence — has expanded to include a key role in monitoring arms control agreements, among other things. With the continued growth of technical capacity, the Joint Facilities now permit the US and Australia greater operational integration.¹¹⁵

The problem with this statement is that while Marles indicates that *ANZUS* has evolved to cover a range of activities at Pine Gap that it did not originally envision, he does not specifically refer to the nuclear support activities at Pine Gap or link them to *ANZUS*. Additionally, Marles was in opposition at the time he made this statement and thus, similarly to Evans, his views do not represent Australia’s.

A third example of a statement that could perhaps be read to suggest that Australia sees the nuclear-related activities at Pine Gap as an application of *ANZUS* comes from comments made by Richard Sadleir, the First Assistant Secretary of the International Security Division at the Australian Department

¹¹³ Gardiner (n 48) 254–5.

¹¹⁴ Karp (n 7).

¹¹⁵ Marles (n 11).

of Foreign Affairs and Trade, to a Senate Estimates Hearing in 2018. At the hearing, Sadleir stated:

[T]he basis of Australia's US alliance is the *ANZUS Treaty*. But a lot is built on that foundation. The practical substance of the relationship is the many separate interlocking structures, understandings, agreements and joint activities and facilities. Through this architecture, Australia furthers our own strategic interests and makes an important contribution to US national security, strategic decision-making and global stability. We do this, as senators know, by hosting and supporting some of the most sensitive critical strategic US capabilities. These include systems that relate to intelligence collection, ballistic missile early warning, submarine communications, nuclear detonation, detection and satellite based communications. The architecture, including the joint defence facilities at Pine Gap, is mutually beneficial and multifaceted, entailing deterrence missions and arms controls verification.¹¹⁶

This statement confirms that the foundation of the US–Australia alliance is *ANZUS*. It also confirms that there are many other components of the US–Australia alliance ‘architecture’, including Pine Gap. What is uncertain from Sadleir’s statement is what the link is between *ANZUS*, as the foundation of the alliance, and the other components of the alliance. On the one hand, Sadleir claims that all the different components of the US–Australia alliance are ‘built on [the] foundation’ of *ANZUS*, which would seem to suggest that such components could be used to interpret *ANZUS* as the umbrella agreement. On the other hand, Sadleir refers to the joint activities and facilities as ‘separate’ components of the alliance. The ambiguity inherent in this statement about how the relationship between the nuclear activities at Pine Gap and *ANZUS* is viewed means that it is not possible to count it as subsequent practice.

That there are problems with all three of the above statements for the purposes of identifying subsequent practice is compounded by the fact that we have not been able to find any clear articulations of how the US understands the connection between *ANZUS* and the nuclear support activities at Pine Gap. It is thus not possible to conclude that such activities at Pine Gap have altered the scope of art II of *ANZUS*.

In concluding this Part, it appears that subsequent practice has changed the scope of art II of *ANZUS* to require the US to provide extended nuclear deterrence to Australia to help it to resist attack. Subsequent practice has not,

¹¹⁶ Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2018, 124–5 (Richard Sadleir).

however, altered the scope of art II to require Australia to maintain the nuclear support activities at Pine Gap.

C *Escaping the Conflict*

The idea that art II of ANZUS requires Australia to remain under the US nuclear umbrella will probably strike fear into the hearts of anti-nuclear advocates. ANZUS is an integral element of the Australian security policy and politicians across the political spectrum are unlikely to be willing to give it up for anything, let alone so that Australia can become a State Party to the TPNW. However, the fact that ANZUS currently requires Australia to stay under the US nuclear umbrella does not mean it will always require this. As this article has demonstrated, treaties constantly evolve through subsequent agreements and subsequent practice. Indeed, if one state party repeatedly makes a statement about their understanding of a treaty provision and the other state party accepts it, that statement then becomes the accepted interpretation of the provision.¹¹⁷ Thus if Australia were to stop asserting that it benefited from the US nuclear umbrella and/or were to state on numerous occasions that it no longer wanted to be under it then, assuming the US did not object, the meaning of art II would transform and Australia would be released from these obligations.¹¹⁸ Alternatively, Australia could look to negotiate an agreement with the US that would make clear that Australia is no longer under the US nuclear umbrella. Similarly, if it ever became apparent that art II of ANZUS required Australia to allow Pine Gap to be used to support nuclear activities, it could seek to undo this requirement via negotiations with the US. It is relevant to note here that there have been questions raised as to whether it is practically possible to shut down those systems at Pine Gap that support nuclear activities without compromising other systems at the facility.¹¹⁹ Recent research by Tanter, however, has revealed that while more work is required to determine how certain systems at Pine Gap that support nuclear activity could be closed, it is 'technically and strategically' possible to close the part of Pine Gap that is at the heart of supporting US nuclear activities — the Relay Ground Station — without genuine disadvantage to US nuclear security.¹²⁰ In time, solutions for extricating the other systems at Pine Gap that support nuclear activities may well emerge.

¹¹⁷ Anthea Roberts (n 91) 200.

¹¹⁸ See Nolte (n 110) 192–4.

¹¹⁹ Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2018, 125 (Richard Sadleir).

¹²⁰ Tanter, 'An Australian Pathway through Pine Gap' (n 16).

The prospect of engaging with the US about these matters may sound daunting. However, if *ANZUS* were not part of the picture, Australia would still have to negotiate with the US to come out from under the US nuclear umbrella and divorce Pine Gap's nuclear support activities from the rest of its activities before it could join the *TPNW*. The only additional element that Australia will need to do to ensure that no issues arise under *ANZUS* is to clarify that *ANZUS* no longer requires these practices.

There may be scepticism about the willingness of the US to accede to these requests given how attached it is to its nuclear programmes. However, as a State Party to the *Treaty on the Non-Proliferation of Nuclear Weapons* ('*NPT*'),¹²¹ the US is under an obligation to take steps towards nuclear disarmament.¹²² At present, its lack of action on this front places it perilously close to being in breach of this widely respected treaty. Releasing Australia from the nuclear umbrella and disestablishing Pine Gap's nuclear capabilities would be a useful step for the US to take to show it is prepared to move towards nuclear disarmament and stay on the right side of the *NPT*. Australia should also bear in mind that it too is under an obligation, pursuant to the *NPT*, to support nuclear disarmament. In 2017, we argued that Australia was possibly already in breach of this requirement and needed to take urgent steps to remedy this state of affairs.¹²³ In light of their obligations under the *NPT*, it is our strong recommendation that both Australia and the US begin to find ways to wind back the nuclear practices with which they are involved in Australia.

V CONCLUDING REFLECTION

Our analysis in this piece has shown that while concerns about conflicts between the *TPNW* and *ANZUS* are not illusory, there are ways that such conflicts can be navigated and resolved by Australia and the US revisiting the security arrangements and practices that they have built up under *ANZUS*. In closing, we would like to reflect on the idea that our conclusion has ramifications, not just for immediate debates about Australia's ratification of the *TPNW*, but also for broader discussions about the role of humanitarianism in the pursuit of nuclear disarmament more generally. As we noted above in Part I, the *TPNW* is understood as a humanitarian treaty and it is widely believed that appealing to humanitarian concerns in the development of the treaty allowed security concerns that have traditionally stymied discussions about nuclear

¹²¹ *NPT* (n 47).

¹²² *Ibid* art VI. For a detailed discussion of the nuclear disarmament obligation in art VI, see Cormier and Hood (n 16) 26–40.

¹²³ Cormier and Hood (n 16).

disarmament to be circumvented. Some of the *TPNW*'s proponents now hope that continuing to appeal to humanitarian ideas will encourage more states to join the treaty and that debates about security matters will be avoided.¹²⁴ Unfortunately, our research suggests that it is unlikely to be possible for states to simply ignore existing security frameworks. Security treaties, such as *ANZUS*, have pre-existing obligations embedded in them that cannot be side-stepped but rather need to be re-worked and discussed. This state of affairs does not mean that humanitarian ideas have no place in efforts to rid the world of nuclear weapons. It does, however, reveal that humanitarian discourse has its limitations¹²⁵ and suggests that perhaps, rather than side-lining security concerns, there is a need for those pushing for a nuclear-free world to begin to think about how to navigate the legal complexities of existing security treaties such as *ANZUS*.

¹²⁴ Evidence of this includes the fact that some proponents of the *TPNW* (n 1) have gone to great lengths to show that security pacts such as *ANZUS* (n 7) and the *North Atlantic Treaty* (n 7) can exist alongside the *TPNW* (n 1) and that states can be parties to both instruments without conflict: see, eg, International Human Rights Clinic, 'Nuclear Umbrella Arrangements' (n 12) 3–4; International Human Rights Clinic, 'Australia and the *TPNW*' (n 12) 8–9.

¹²⁵ For a more extensive discussion of the limitations of humanitarianism in the context of nuclear disarmament, see Chiam and Hood (n 6); Dunworth (n 6) ch 8.