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A 'light for all humanity': the treaty on the prohibition of nuclear weapons and the progress of humanitarian disarmament

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ABSTRACT

Reframing nuclear weapons as a humanitarian issue revolutionised the diplomatic debate surrounding them, and in 2017, 122 countries adopted the Treaty on the Prohibition of Nuclear Weapons (TPNW). The humanitarian approach to disarmament provided inspiration for this historic achievement. While traditional disarmament aims primarily to protect state security, humanitarian disarmament strives to end human suffering. This article examines the TPNW as the latest step in humanitarian disarmament. Through a close analysis of process and text, it finds that humanitarian disarmament served as a catalyst to and model for the TPNW's negotiations and shaped its purpose and provisions. The article also shows how the humanitarian underpinnings of the TPNW allowed it to transform nuclear disarmament and how the new treaty strengthened humanitarian disarmament in return.

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When the Nobel Committee awarded the 2017 Peace Prize to the International Campaign to Abolish Nuclear Weapons (ICAN), the committee not only honoured ICAN for its efforts to achieve a treaty prohibiting nuclear weapons but also recognised the importance of humanitarian disarmament. In her speech at the award ceremony, committee chair Berit Reiss-Andersen praised the global coalition of more than 400 nongovernmental organisations for bringing 'a new direction and new vigour' to nuclear disarmament. She explained, 'ICAN's premise is humanitarian, maintaining that any use of nuclear weapons will cause unacceptable human suffering'.¹ This humanitarian approach to disarmament revolutionised the nuclear weapons debate and led to a ban on the world's deadliest weapons.

Humanitarian disarmament seeks to prevent and remediate human suffering caused by indiscriminate or inhumane weapons through the establishment of legal norms.² It originated with the 1997 Mine Ban Treaty, banning antipersonnel landmines. It was reaffirmed and strengthened by the 2008 Convention on Cluster Munitions, which prohibited cluster

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¹Berit Reiss-Andersen, Norwegian Nobel Committee chair, Nobel Peace Prize Award Ceremony Speech, Oslo, December 10, 2017, https://www.nobelprize.org/nobel_prizes/peace/laureates/2017/presentation-speech.html (accessed January 18, 2018).

²Bonnie Docherty, 'Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law', *Austrian Review of International and European Law* 15 (dated 2010, published 2013): 7.

munitions because they cause ‘unacceptable harm’.³ These two treaties and the processes that produced them illuminate specific characteristics of humanitarian disarmament and highlight its people-centred approach to governing arms.

Civil society, international organisations and states began to apply humanitarian disarmament to nuclear weapons in 2010. Since the adoption of the 1968 Nuclear Non-Proliferation Treaty (NPT), countries had made only gradual progress in nuclear disarmament at the multilateral level. The new approach changed the conversation. It spurred states to action by offering a fresh perspective and highlighting the universal importance and urgency of addressing the humanitarian consequences of nuclear weapons.

This article examines the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) as the latest step in humanitarian disarmament.⁴ Through a close analysis of process and text, it finds that humanitarian disarmament served as a catalyst to and model for the TPNW’s negotiations and shaped its purpose and provisions. The article also shows how the humanitarian underpinnings of the TPNW allowed it to transform nuclear disarmament and how the new treaty strengthened humanitarian disarmament in return.

Part I of this article identifies characteristics of humanitarian disarmament and distinguishes it from more traditional methods of governing weapons. Part II examines the process that led to the TPNW, demonstrating that the humanitarian approach was crucial to its success. Part III illuminates the humanitarian purpose of the treaty, as articulated in its preamble. Part IV discusses the TPNW’s inclusion of the three types of provisions characteristic of past humanitarian disarmament treaties: absolute preventive obligations, remedial measures and cooperative approaches to implementation. Part V analyses how the TPNW’s humanitarian character had a dramatic impact on nuclear disarmament. Part VI explains how the treaty advanced and revealed the adaptability of humanitarian disarmament. The article concludes that evolution of humanitarian disarmament inspired by the TPNW holds promise for efforts to address the harm caused by other weapons.

1. What is humanitarian disarmament

Humanitarian disarmament has dominated multilateral disarmament since it emerged in the 1990s. At that time, the international community’s interest in humanitarianism manifested itself in a number of ways, including the introduction of the concept of human security and the practice of humanitarian intervention. The 1997 Mine Ban Treaty and the Ottawa Process that produced it applied humanitarianism’s ‘concern for human welfare’ to indiscriminate and inhumane weapons.⁵ The approach pioneered by the treaty consists of procedural and substantive elements that distinguish it from traditional, state-centric disarmament. Humanitarian disarmament’s overarching

³The phrase ‘unacceptable harm’ comes from the Oslo Declaration that initiated the process to create the Convention on Cluster Munitions. Oslo Conference on Cluster Munitions, ‘Declaration’, February 22–23, 2007, <http://www.clusterconvention.org/files/2012/11/Oslo-Declaration-final-23-February-2007.pdf> (accessed January 18, 2018).

⁴Treaty on the Prohibition of Nuclear Weapons (TPNW), adopted July 7, 2017, opened for signature September 20, 2017.

⁵Humanitarianism has been defined as: ‘Concern for human welfare as a primary or pre-eminent moral good; action, or the disposition to act, on the basis of this concern rather than for pragmatic or strategic reasons’. Oxford English Dictionary online, ‘Humanitarianism’, <http://www.oed.com/> (accessed April 26, 2018).

principle is that people, not states, should be at the centre of efforts to govern problematic weapons.⁶

This article draws primarily on two sources for its explication of the various approaches to disarmament. By closely examining negotiating processes, the UN Institute for Disarmament Research (UNIDIR) identified two types of disarmament in a series of reports issued under its 'Disarmament as Humanitarian Action' project.⁷ Bringing to bear a more comprehensive and legal perspective, the author of this article developed a three-part taxonomy of disarmament, first published in the *Austrian Review of International and European Law*. She determined the key characteristics of each category by analysing the process, purpose and provisions of major disarmament treaties.⁸ While the methodologies and findings of these sources differ in certain details, their general conclusions, especially about humanitarian disarmament, are consistent.

1.1. Traditional disarmament

Disarmament has traditionally been driven by the interests of states, which have engaged in efforts to control weapons largely to advance their own security. While it remains relevant today, this approach to disarmament was predominant through the 1996 adoption of Amended Protocol II to the Convention on Conventional Weapons (CCW), which regulates landmines.

In a UNIDIR anthology, Patrick McCarthy describes three characteristics of the traditional approach. First, he writes, it 'tend[s] to frame the issues in terms of threats to states' and thus emphasises the need for state security.⁹ Second, its negotiating processes lack transparency and are exclusive, meaning they are 'dominated by diplomats, military experts, and select groups of scientific technical experts' and treat civil society organisations as 'outsiders'.¹⁰ Third, traditional disarmament is generally 'bureaucratic, cumbersome and time-consuming'.¹¹ Traditional disarmament negotiations have taken place primarily in consensus-based fora, such as the Conference on Disarmament and the

⁶At a major Harvard Law School conference on humanitarian disarmament in 2018, Stephen Goose, executive director of Human Rights Watch's Arms Division, said,

Essentially humanitarian disarmament is characterized by a focus on people, on civilians in particular. It is aimed at the protection of civilians both during armed conflict and in a post-conflict situation ... It's making sure civilians are not harmed unduly from armed conflict or the detritus of armed conflict.

Beatrice Fihn of ICAN echoed Goose's view that humanitarian disarmament focuses on people in her remarks at the same event. 'From Landmines to Nuclear Weapons: A Conversation with Nobel Peace Prize Laureates' (video of keynote of Humanitarian Disarmament: The Way Ahead conference, Harvard Law School, Cambridge, MA, March 5, 2018), <https://today.law.harvard.edu/humanitarian-disarmament-way-ahead/> (accessed April 26, 2018).

⁷See, e.g. John Borrie and Vanessa Martin Randin, eds., *Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action* (Geneva: UNIDIR, 2005); John Borrie and Vanessa Martin Randin, eds., *Disarmament as Humanitarian Action: From Perspective to Practice* (Geneva: UNIDIR, 2006).

⁸See generally Docherty, 'Ending Civilian Suffering'.

⁹Patrick McCarthy, 'Deconstructing Disarmament: The Challenge of Making the Disarmament and Arms Control Machinery Responsive to the Humanitarian Imperative', in *Alternative Approaches in Multilateral Decision Making*, eds. Borrie and Randin, 56. In the same volume, John Borrie explains that until recently, the field had 'been dominated by security concepts focusing on external threats to states and, in particular, threats posed by other states'. John Borrie, 'Rethinking Multilateral Negotiations: Disarmament as Humanitarian Action', 7.

¹⁰McCarthy, 'Deconstructing Disarmament', 56.

¹¹Ibid.

CCW, in which the potential for a single state to block an outcome leads to slower processes and weaker results.¹²

While generally agreeing with McCarthy's analysis, the author of this article divides traditional disarmament into two types: 'security disarmament' and 'hybrid disarmament'. Security disarmament, exemplified by the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention, seeks to protect the interests of sovereign states, rather than end human suffering. Military powers generally dominate the consensus-based negotiations of such legal instruments. The instruments themselves contain prohibitions and stockpile destruction obligations, but they do not require remedial measures to address past and ongoing harm or incorporate cooperative approaches to implementation.¹³ The Chemical Weapons Convention, for example, mandates that states parties provide assistance to another state party only when the latter faces new use or a threat of new use of chemical weapons and only in the form of protective equipment and antidotes needed for a first response. To promote compliance, this convention lays out a rigorous verification regime allowing for challenge inspections that reflects limited trust among negotiating states.¹⁴

Hybrid disarmament, associated primarily with the 1980 CCW and its protocols, strives to address both security and humanitarian interests.¹⁵ States parties to the CCW often claim that it is an appropriate forum for disarmament because it balances military necessity and humanitarian considerations and includes the major military powers, although they have undue influence because of the need for consensus.¹⁶ The hybrid protocols attached to the framework convention regulate and, in some cases, prohibit the use of problematic weapons. They contain few provisions on production, stockpiling and transfer, however, and often weaken their obligations with qualifiers.¹⁷ In addition, only two of the protocols require states parties to take any remedial measures and cooperate with regard to implementation.¹⁸ Indeed, the shortcomings of Amended Protocol II motivated

¹²Rüdiger Wolfrum and Jakob Pichon, 'Consensus', in *Max Planck Encyclopedia of Public International Law* (2011), paras. 20–1.

¹³Docherty, 'Ending Civilian Suffering', 12–3, 18–21, 34–5; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention), opened for signature April 10, 1972, entered into force March 26, 1975, arts. I, II; 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.

¹⁴Chemical Weapons Convention, arts. X(1, 8), IX. Two decades after the adoption of the Chemical Weapons Convention, states parties established an International Support Network for Victims of Chemical Weapons; the creation of such a programme, which was not mentioned in the original security disarmament convention, was likely inspired by the increasingly humanitarian focus of multilateral disarmament. Organisation for the Prohibition of Chemical Weapons, 'The International Support Network for Victims of Chemical Weapons', <https://www.opcw.org/special-sections/victims-of-chemical-weapons-network/> (accessed April 26, 2018). The Biological Weapons Convention has a very general assistance provision, which applies only if the UN Security Council determines the recipient state party 'has been exposed to danger a result of violation of the Convention'. Biological Weapons Convention, art. VII.

¹⁵Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), adopted October 10, 1980, entered into force December 2, 1983. The CCW has five protocols dealing with different types of weapons.

¹⁶See, e.g. Report of the 2017 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS), CCW/GGE.1/2017/CRP.1, November 20, 2017, para. 16(a), [https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/B5B99A4D2F8BADF4C12581DF0048E7D0/\\$file/2017_CCW_GGE.1_2017_CRP.1_Advanced_+corrected.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/B5B99A4D2F8BADF4C12581DF0048E7D0/$file/2017_CCW_GGE.1_2017_CRP.1_Advanced_+corrected.pdf) (accessed April 26, 2018).

¹⁷Docherty, 'Ending Civilian Suffering', 13–6, 21–3, 29, 31.

¹⁸*Ibid.*, 29, 31, 37; CCW Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), adopted May 3, 1996, entered into force December 3, 1998, arts. 3, 10, 11; CCW Protocol on Explosive Remnants of War (Protocol V), adopted November 28, 2003, entered into force November 12, 2006, arts. 3, 5, 11.

states and civil society to abandon the CCW and negotiate the Mine Ban Treaty, which gave rise to humanitarian disarmament, in an independent forum.

Traditional disarmament's emphasis on state security does not mean it has not been informed by humanitarian concerns. For example, according to John Borrie of UNIDIR, a humanitarian appeal from the International Committee of the Red Cross (ICRC) helped inspire the 1925 Geneva Gas Protocol.¹⁹ Saddam Hussein's gassing of the Kurdish people of Halabja, Iraq, in 1988 provided added impetus to complete the lengthy negotiations of the Chemical Weapons Convention, which were initiated in 1969.²⁰ While prohibitions and regulations can have humanitarian benefits by reducing the impact of problematic weapons, 'the actual negotiations of [traditional disarmament treaties] ... have been motivated primarily by national and international security concerns'.²¹ The traditional approach to disarmament generally prioritises state interests over those of the individual, and thus its humanitarian characteristics are not comprehensive.

1.2. A new humanitarian approach

By applying a people-centred approach to disarmament, the Mine Ban Treaty revolutionised the field. Its adoption demonstrated the power of 'citizen diplomacy'; under the auspices of the International Campaign to Ban Landmines (ICBL), a global civil society coalition, 'ordinary people [did] extraordinary things'.²² Its text focuses on human rather than state security and aims to reduce the impact of landmines, especially on civilians.²³ South African Ambassador Jacob S. Selebi, president of the treaty's final negotiating conference, has described the Mine Ban Treaty as a 'benchmark in the achievement of international disarmament [that] ... establishes an international norm by also addressing humanitarian concerns'.²⁴ McCarthy writes that the treaty 'is to arms control what the Guggenheim Museum in Bilbao is to architecture – an approach that transcends the constraints of traditional disarmament to create something new and never seen before'.²⁵

In the decade that followed the Mine Ban Treaty's adoption, some experts wondered whether the success of the Ottawa Process could be replicated.²⁶ In 2008, Stephen Goose of Human Rights Watch, a leader of the campaigns to ban landmines and cluster munitions, asked, 'Can lightning strike twice?'²⁷ The answer proved to be 'a resounding

¹⁹ John Borrie, 'Disarmament as Humanitarian Action: From Perspective to Practice', in *Disarmament as Humanitarian Action*, eds. Borrie and Randin, 9.

²⁰ Robert J. Mathews and Timothy L.H. McCormack, 'The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties', *International Review of the Red Cross* no. 834 (1999), <https://www.icrc.org/eng/resources/documents/article/other/57jpty.htm> (accessed April 26, 2018).

²¹ Ibid.

²² Stephen D. Goose, Mary Wareham, and Jody Williams, 'Banning Landmines and Beyond', in *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security*, eds. Williams, Goose, and Wareham (Plymouth: Rowman & Littlefield Publishers, 2008), 1. See also Jody Williams and Stephen D. Goose, 'Citizen Diplomacy and the Ottawa Process: A Lasting Model?' in *ibid.*, 181–98.

²³ 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, pmbl., para. 1.

²⁴ Jacob S. Selebi, foreword to *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross*, eds. Louis Maresca and Stuart Maslen (Cambridge: Cambridge University Press, 2000), xxii.

²⁵ McCarthy, 'Deconstructing Disarmament', 63.

²⁶ 'In the aftermath of the Mine Ban Treaty's adoption, some had argued that the Ottawa process was an approach – and a humanitarian disarmament outcome – that would not be repeated'. Geneva Forum and Disarmament Insight, 'Learn, Adapt, Succeed: Potential Lessons from the Ottawa and Oslo Processes for Other Disarmament and Arms Control Challenges', summary of conference held in Glion, Switzerland, November 19–20, 2008, 1–2.

²⁷ Stephen D. Goose, 'Cluster Munitions in the Crosshairs', in *Banning Landmines*, eds. Williams, Goose, and Wareham, 217.

yes'.²⁸ In May 2008, 107 states adopted the Convention on Cluster Munitions, showing that the Mine Ban Treaty was not an aberration. Like its predecessor, the new convention was motivated by a desire to protect civilians, and its negotiations followed a similar process with similar results.²⁹ Once it became clear that the humanitarian approach to disarmament was not a one-off, a generally accepted name emerged. In 2000, UNIDIR used the phrase 'disarmament as humanitarian action' to describe this approach to controlling weapons; by 2008, the term 'humanitarian disarmament' had gained currency in disarmament circles.³⁰

Humanitarian disarmament is distinguishable from traditional disarmament in a number of ways. In the UNIDIR anthology discussed above, Patrick McCarthy highlights three points of contrast. First, it shifts the focus from the security of states to 'the security and well-being of people living within states'.³¹ It thus relates to the idea of human security, which the UN Development Programme defined in 1994 as equating 'security with people rather than territories, with development rather than arms'.³² Second, the negotiating processes for humanitarian treaties tend to be more transparent and inclusive than traditional ones. Civil society organisations, representing the interests of people who have been or could be harmed by certain weapons, play a greater role in identifying issues and determining how to address them. The organisations also bring humanitarian perspectives to the table, including through both the participation of survivors, deminers and aid workers, and the dissemination of field research. Third, the new approach 'put[s] more emphasis on speed, innovation and flexibility', which protects lives and limbs by ensuring tangible results in a timely fashion.³³

The author of this article further differentiates humanitarian from traditional disarmament by using the Mine Ban Treaty and Convention on Cluster Munitions to illuminate key aspects of its process, purpose and provisions.³⁴ The Ottawa and Oslo Processes that created these treaties framed the critique of landmines and cluster munitions in humanitarian terms, highlighting the harm the weapons inflict on civilians. The negotiations were also inclusive, independent and intensive.³⁵ Spurred to action by civil society coalitions and survivors, a variety of states – including users and producers, affected and unaffected states – along with the ICRC and certain UN agencies participated in the processes. This inclusiveness gave a voice to the people whom the weapons endangered as well as ownership over the outcome to a range of participants. The negotiators held their meetings outside of the United Nations, which freed them from the constraints of consensus. They responded to the humanitarian urgency of the problem by following strict deadlines for adopting a final treaty.

²⁸Human Rights Watch, *Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions* (New York: Human Rights Watch, 2010), 120, <https://www.hrw.org/sites/default/files/reports/armsclusters1110webwcover.pdf> (accessed January 18, 2018).

²⁹For an overview of the Oslo Process, see *ibid.*, 120–38. For a detailed history, see John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (Geneva: UNIDIR, 2009).

³⁰Patricia Lewis, introduction to *Alternative Approaches in Multilateral Decision Making*, eds. Borrie and Randin, 2; Geneva Forum and Disarmament Insight, 'Learn, Adapt, Succeed', 1.

³¹McCarthy, 'Deconstructing Disarmament', 56.

³²UN Development Programme, 'Human Development Report 1994', <http://hdr.undp.org/en/content/human-development-report-1994> (accessed April 26, 2018).

³³McCarthy, 'Deconstructing Disarmament', 57.

³⁴Docherty, 'Ending Civilian Suffering', 16–7, 23–6, 38–44.

³⁵For a discussion of these procedural characteristics in the context of the Oslo Process, see Human Rights Watch, *Meeting the Challenge*, 120–7.

As the preambles of the two treaties make clear, their purpose is to reduce the adverse human effects of problematic weapons. The Mine Ban Treaty opens by expressing its determination ‘to put an end to the suffering and casualties caused by anti-personnel mines’, and the Convention on Cluster Munitions includes comparable language. Both treaties highlight the breadth of the weapons’ impacts, including death, physical and psychological injury, socioeconomic harm and displacement of persons. They cite international humanitarian law and, in the cluster munition ban, international human rights law as their legal bases.

The Mine Ban Treaty and Convention on Cluster Munitions contain three types of provisions that accord with their humanitarian aims. They establish absolute preventive obligations, notably comprehensive prohibitions and stockpile destruction requirements, to avert future harm. They oblige states parties to adopt remedial measures to assist victims and clear contaminated land. To ensure they live up to their humanitarian potential, the treaties incorporate cooperative approaches to implementation: states parties must help each other meet their legal responsibilities and are encouraged to work collaboratively to promote compliance.³⁶ The treaties’ prohibitions are similar to those in traditional disarmament treaties, but the complete package of process, purpose and provisions is unique to humanitarian disarmament.

1.3. The wider influence of humanitarian disarmament

Beyond the ban treaties for which it is best known, humanitarian disarmament has informed other efforts to reduce the effects of weapons.³⁷ While retaining some of the characteristics of a hybrid disarmament instrument, the CCW’s 2003 Protocol V recognises in its preamble the ‘humanitarian problems caused by explosive remnants of war’. This reference suggests that ‘minimizing civilian harm has a greater role than it did in earlier CCW instruments’.³⁸ More recently, the humanitarian approach to disarmament influenced the creation and content of the 2013 Arms Trade Treaty. The civil society coalition Control Arms advocated for the treaty to increase protections for civilians, and the final instrument regulates arms transfers in part to prevent genocide, crimes against humanity, and war crimes.³⁹ Ongoing civil society campaigns have also looked to humanitarian disarmament in their quests for a political commitment to end the use of certain explosive weapons in populated areas, guidelines for reducing the environmental impacts of war, and a pre-emptive ban on ‘killer robots’.⁴⁰

While humanitarian disarmament originated in response to conventional weapons, the adoption of the TPNW in 2017 proved its applicability to weapons of mass destruction. As this paper argues, the TPNW embodies the characteristics of a humanitarian disarmament

³⁶Mine Ban Treaty, arts. 1, 4–6, 8; Convention on Cluster Munitions, adopted May 30, 2008, entered into force August 1, 2010, arts. 1, 3–6, 8.

³⁷While he does not use the term ‘humanitarian disarmament’, Daniel Rietiker discusses the influence of these treaties and the general humanization of arms control in nuclear and non-nuclear weapon contexts. Daniel Rietiker, *Humanization of Arms Control: Paving the Way for a World Free of Nuclear Weapons* (London: Routledge, 2017).

³⁸Docherty, ‘Ending Civilian Suffering’, 37.

³⁹Arms Trade Treaty, adopted April 2, 2013, entered into force December 24, 2014, art. 6(3). For a discussion of the influence of humanitarian disarmament on the Arms Trade Treaty, see Susan O’Connor, ‘Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and its New Zealand Application’, *New Zealand Yearbook of International Law* 11 (2013): 74–5.

⁴⁰See generally International Network on Explosive Weapons, <http://www.inew.org/>; Toxic Remnants of War Project, <http://www.toxicremnantsofwar.info/>; Conflict and Environment Observatory, <https://ceobs.org/>; Campaign to Stop Killer Robots, <http://www.stopkillerrobots.org/> (all accessed April 26, 2018).

treaty in its process, purpose and provisions. It was achieved through a humanitarian reframing of the issue, seeks to address the catastrophic human consequences of nuclear weapons and includes preventive, remedial and cooperative provisions. The TPNW also demonstrates humanitarian disarmament's effectiveness as an approach to disarmament and its ability to evolve in response to different weapons and different contexts.

2. Humanitarian process

Humanitarian disarmament gave rise to and guided the process that led to the TPNW. Conceptually, it motivated countries to look beyond their security interests and address the risks of catastrophic harm that nuclear weapons pose to humans. Practically, the humanitarian approach to disarmament provided a model for negotiating a strong ban treaty.

2.1. Earlier security-driven processes

Until 2010, state security concerns drove the development of nuclear weapons law. According to Austrian Ambassador Alexander Kmentt, the nuclear armed states and their allies consider nuclear weapons 'the backbone of a security policy that is based on nuclear deterrence as the "ultimate security guarantee" and as a means to maintaining a strategic – albeit precarious – stability between them'.⁴¹ States' interest in maintaining nuclear deterrence policies set the parameters for nuclear disarmament efforts for decades.

The 1968 Nuclear Nonproliferation Treaty (NPT), often called the 'cornerstone' of nuclear disarmament,⁴² exemplifies this approach. Adopted at the height of the Cold War, the NPT was a product of its times. The United States and Soviet Union drafted a proposed text that the UN General Assembly ultimately endorsed.⁴³ Judging by the rhetoric surrounding the process, states sought to avoid nuclear war primarily to protect their own security interests rather than to prevent the suffering of individuals. For example, in introducing the draft treaty to the UN General Assembly's First Committee on disarmament, the United States said that the burden of new treaty obligations would be 'far outweighed by the degree to which it will serve our national security and our national interests'. The United States continued: 'We fully expect that every sovereign State represented here, in deciding its own attitude, will measure the treaty by the same yardstick: its own enlightened national interest and its national security'.⁴⁴ Many other countries and the UN secretary-general echoed the need to promote state security.⁴⁵

⁴¹Alexander Kmentt, 'The Development of the International Initiative on the Humanitarian Impact of Nuclear Weapons and Its Effects on the Nuclear Weapons Debate', *International Review of the Red Cross* 97 (2015): 682.

⁴²Treaty on the Non-Proliferation of Nuclear Weapons (NPT), adopted June 12, 1968, entered into force March 5, 1970. For descriptions of NPT as a 'cornerstone', see, e.g. US Department of State, 'Nuclear Nonproliferation Treaty: Overview', <https://www.state.gov/t/isn/npt/> (accessed January 18, 2018); James J. Wirtz, 'Arms Control and Nuclear Weapons', in *Arms Control: History, Theory, and Policy: Volume I*, eds. Robert E. Williams Jr. and Paul R. Viotti (Santa Barbara, CA: Praeger, 2012), 207.

⁴³Haralambos Athanasopoulos, *Nuclear Disarmament in International Law* (Jefferson, NC: McFarland & Company, 2000), 46; 'Treaty on the Non-Proliferation of Nuclear Weapons', UN General Assembly Resolution 2373 (XXII), June 12, 1968.

⁴⁴Statement of United States to First Committee Meeting on Non-Proliferation of Nuclear Weapons, *UN General Assembly Official Records*, A/C.1/PV.1556, New York, April 26, 1968, 3.

⁴⁵See, e.g. statements to First Committee Meeting on Non-Proliferation of Nuclear Weapons by Finland (May 2), Australia (May 17), Argentina (May 22) and Romania (May 22), *UN General Assembly Official Records*, A/C.1/PV.1559, 1570 and 1572, New York, May 1968. The UN secretary-general warned that proliferation of nuclear weapons could have 'dire

By restricting the proliferation of nuclear weapons, the NPT has humanitarian as well as military benefits, but it also establishes a legal divide between the non-nuclear armed states and the five states with nuclear arms at the time of its adoption. Under the so-called Grand Bargain, states parties possessing nuclear weapons may retain their arsenals, at least for the immediate future, but may not transfer the arms to any recipient. Non-nuclear armed states sacrifice the right to acquire the weapons in exchange for a guarantee that they may develop and produce nuclear energy for peaceful purposes.⁴⁶

Article VI of the NPT obliges states parties to work in good faith towards general and complete disarmament, but since the treaty's adoption, their progress towards this goal has been limited at the multilateral level.⁴⁷ While states have negotiated a number of new nuclear-weapon-free zone agreements, these instruments apply only to specific regions.⁴⁸ The Conference on Disarmament produced the Comprehensive Nuclear-Test-Ban Treaty (CTBT) in 1996,⁴⁹ yet more than 20 years later, it has not entered into force. After the adoption of the CTBT, international deliberations continued with no tangible results.

Although NPT meetings provided a forum for ongoing debate, progress towards general and complete disarmament became mired in paper diplomacy.⁵⁰ The 1995 Review Conference accepted a plan of action to fulfil Article VI's obligations. Over the next two decades, however, the NPT's five-year review conferences alternated between embracing plans to achieve total elimination of nuclear weapons and failing even to produce a consensus outcome document. Overall, states' implementation of their commitments under the NPT has been 'woefully inadequate'.⁵¹

2.2. Reframing the debate

As NPT discussions stalled, a new approach to nuclear disarmament radically changed the debate. In 2010, proponents of a nuclear weapon ban treaty reframed the issue as a humanitarian, rather than a state security, one. Speaking to the Geneva diplomatic corps, ICRC President Jakob Kellenberger said, 'The currency of this debate must ultimately be about human beings, about the fundamental rules of international humanitarian law, and about the collective future of humanity'.⁵² A 2011 resolution from the International Red Cross

consequences for the security of all States, large and small, nuclear and non-nuclear' and 'would lead to greater tension and greater instability in the world at large'. Statement of UN Secretary-General U Thant to First Committee Meeting on Non-Proliferation of Nuclear Weapons, *UN General Assembly Official Records*, A/C.1/PV.1556, New York, April 26, 1968, 2.

⁴⁶NPT, arts. I, II, IV, V. For use of the term 'Grand Bargain', see, e.g. Paul Meyer, 'The Nuclear Nonproliferation Treaty: Fin de Regime?' *Arms Control Today*, April 2017, <https://www.armscontrol.org/act/2017-04/features/nuclear-nonproliferation-treaty-fin-de-regime> (accessed January 18, 2018).

⁴⁷Rietiker, *Humanization of Arms Control*, 2.

⁴⁸States in four regions concluded nuclear-weapon-free zone agreements after the NPT's adoption. See UN Office of Disarmament Affairs, 'Nuclear-Weapon-Free Zones', <https://www.un.org/disarmament/wmd/nuclear/nwzf/> (accessed January 18, 2018).

⁴⁹The UN General Assembly voted 158 to 3 to accept the treaty in September 1996. Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted September 17, 1996; David B. Thomson, *A Guide to the Nuclear Arms Control Treaties* (Los Alamos, NM: Los Alamos Historical Society Publications, 2001), 46.

⁵⁰For an overview of NPT Review Conferences since 1995, see Women's International League for Peace and Freedom (WILPF), *2017 NPT Briefing Book*, April 2017, 8, <http://www.reachingcriticalwill.org/images/documents/Publications/2017-npt-briefing-book.pdf> (accessed January 18, 2018); Rietiker, *Humanization of Arms Control*, 256–57.

⁵¹WILPF, *2017 NPT Briefing Book*, 4.

⁵²Jakob Kellenberger, 'Bringing the Era of Nuclear Weapons to an End', April 20, 2010, reprinted in *International Review of the Red Cross* 97 (2015): 883.

and Red Crescent Movement explicitly called for using ‘the framework of humanitarian diplomacy’ to work toward a treaty prohibiting nuclear weapons.⁵³ ICAN took a similar position, declaring in 2013, for example, that ‘[t]he catastrophic humanitarian consequences make it an imperative ... to ban and eliminate nuclear weapons’.⁵⁴ To support their case, international and nongovernmental organisations issued publications highlighting the horrific harm caused by past use and testing and describing the potential effects of exponentially more powerful contemporary weapons.⁵⁵

States responded to these calls by holding a series of conferences known as the Humanitarian Initiative. Austrian Ambassador Kmentt described the initiative as ‘perhaps the most serious challenge to the nuclear deterrence orthodoxy’.⁵⁶ Each meeting was attended by diplomats from more than 125 countries as well as representatives of ICAN, the ICRC, and UN agencies, among others. Norway, which had also spearheaded the Oslo Process on cluster munitions, convened the first conference in Oslo in March 2013. It focused on the humanitarian and development consequences of nuclear weapons and the international capacity to address them.⁵⁷ The second conference, held in Nayarit, Mexico in February 2014, gave a greater voice to the *hibakusha* (survivors from Hiroshima and Nagasaki) and examined the risks that a nuclear explosion might occur.⁵⁸

The final conference, hosted by Austria in Vienna in December 2014, not only explored new factual and legal concerns, but also generated a political response that became known as the Humanitarian Pledge.⁵⁹ Endorsed by 127 states by April 2016, the pledge committed them to working with ‘all relevant stakeholders ... to stigmatise, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks’.⁶⁰ States also agreed to ‘follow the imperative of human security for all and to promote the protection of civilians against risks stemming from nuclear weapons’.⁶¹ The pledge’s emphasis on preventing civilian harm contrasts with the NPT’s focus on promoting state security.

Reframing the debate in humanitarian terms broke down barriers to diplomatic action for two reasons that reflect the people-centred character of humanitarian disarmament. In

⁵³Council of Delegates of the International Red Cross and Red Crescent Movement, ‘Resolution 1: Working towards the Elimination of Nuclear Weapons’, Geneva, November 26, 2011, para. 4, <https://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm> (accessed January 18, 2018).

⁵⁴Rebecca Johnson, ICAN co-chair, ‘ICAN Intervention in Final Session of the Conference on the Humanitarian Impact of Nuclear Weapons’, Oslo, March 4–5, 2013, <http://www.icanw.org/wp-content/uploads/2013/03/ICAN-final-statement5.3.13.pdf> (accessed January 20, 2018).

⁵⁵See, e.g. Beatrice Fihn, ed., *Unspeakable Suffering: The Humanitarian Impact of Nuclear Weapons* (Geneva: Reaching Critical Will, 2013), <http://www.reachingcriticalwill.org/images/documents/Publications/Unspeakable/Unspeakable.pdf>; John Borrie and Tim Caughley, *An Illusion of Safety: Challenges of Nuclear Weapon Detonations for United Nations Humanitarian Coordination and Response* (New York: UNIDIR, 2014), <http://www.unidir.org/files/publications/pdfs/an-illusion-of-safety-en-611.pdf>; Ira Helfand, *Nuclear Famine: Two Billion People at Risk?* (Somerville, MA: International Physicians for the Prevention of Nuclear War and Physicians for Social Responsibility, 2013), <http://www.ipnw.org/pdf/nuclear-famine-two-billion-at-risk-2013.pdf> (all accessed January 18, 2018).

⁵⁶Kmentt, ‘The Development of the International Initiative’, 682.

⁵⁷*Ibid.*, 689–91.

⁵⁸*Ibid.*, 691–94 (quoting chair’s summary).

⁵⁹*Ibid.*, 694–702.

⁶⁰Humanitarian Pledge, https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14vienna_Pledge_Document.pdf; Austrian Federal Ministry for Europe, Integration and Foreign Affairs, ‘Formal Endorsement and/or Expressions of Support for the Humanitarian Pledge’, April 7, 2016, https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14vienna_update_pledge_support.pdf (both accessed January 18, 2018).

⁶¹Humanitarian Pledge.

focusing on the threat to human rather than state security, supporters of the Humanitarian Initiative treated nuclear weapons like other inhumane and indiscriminate weapons, including landmines and cluster munitions, rather than as arms made unique because of purported strategic value. Following the model of past humanitarian disarmament processes, advocates spotlighted the ‘unacceptable harm’ caused by nuclear weapons on legal, moral, political and other grounds.⁶² According to Elizabeth Minor of the UK-based disarmament organisation Article 36,

Situating nuclear weapons within this conceptual framework denies the special status claimed for them [as tools of deterrence]. Humanitarian disarmament considers weapons from an apolitical perspective, concentrating on their effects on people and places rather than their military utility and strategic beliefs about them.⁶³

By thus demystifying nuclear weapons, humanitarian disarmament practitioners opened up the possibility of real progress.

Proponents of a nuclear weapon ban treaty also effectively marshalled information to underscore that the threat posed by nuclear weapons was a humanitarian and global one. In 2005, UNIDIR’s John Borrie noted that unlike in the case of landmines, limited use and government secrecy had made it ‘difficult for a comprehensive survey of [nuclear weapons] humanitarian effects to be developed’.⁶⁴ By 2010, advocates had found ways to overcome that challenge. They provided opportunities for victims of past use and testing to share their first-hand experiences publicly, enlisted scientific experts to develop data about the potential impact of future use, and illuminated the risks of nuclear explosion by describing dangerous practices and recounting examples of ‘near nuclear misses’.⁶⁵ In a summary of the findings of the first Humanitarian Initiative conference, Norwegian Minister of Foreign Affairs Epsen Barthe Eide observed, ‘The effects of a nuclear weapon detonation, irrespective of cause, will not be constrained by national borders, and will affect States and people in significant ways, regionally as well as globally’.⁶⁶ By highlighting that the consequences of a nuclear weapon explosion would transcend the interests of specific countries, these awareness-raising efforts rallied a majority of the world’s nations to act.

Driven by the humanitarian imperative of nuclear disarmament, the UN General Assembly convened an Open-Ended Working Group in early 2016 to consider ways to achieve a world free of nuclear weapons. In December, the UN General Assembly passed a resolution to implement the working group’s recommendation to negotiate a legally binding ban on nuclear weapons.⁶⁷ While reaffirming the importance of the NPT, the resolution makes its humanitarian motivations clear by expressing deep concern about ‘the catastrophic

⁶²As discussed above, the phrase ‘unacceptable harm’ comes from the Oslo Process.

⁶³Elizabeth Minor, ‘Changing the Discourse on Nuclear Weapons: The Humanitarian Initiative’, *International Review of the Red Cross* 97 (2015): 722.

⁶⁴Borrie, ‘Rethinking Multilateral Negotiations’, 26.

⁶⁵See, e.g. Kmentt, ‘The Development of the International Initiative’, 691 (discussing report on near misses released at Nayarit conference).

⁶⁶*Ibid.*, 689 (quoting Eide). See also Peter Maurer, ‘Nuclear Weapons: Ending a Threat to Humanity’, February 18, 2015, reprinted in *International Review of the Red Cross* 97 (2015): 889 (describing the risks of nuclear weapons as a ‘global concern’); Kmentt, ‘The Development of the International Initiative’, 692 (quoting Nayarit Conference Chair Juan Manuel Gómez Robledo concluding, ‘Today the risk of nuclear weapons use is growing globally.’).

⁶⁷Report of the Open-Ended Working Group Taking Forward Multilateral Nuclear Disarmament Negotiations, A/71/371, September 1, 2016, para. 67. Opponents to this recommendation preferred ‘practical steps’ that addressed ‘national, international, and collective security concerns.’ *Ibid.*

consequences of any use of nuclear weapons' and 'the risks related to the existence of nuclear weapons'.⁶⁸

On 7 July 2017, 122 states adopted a global ban on nuclear weapons, with only the Netherlands voting against and Singapore abstaining.⁶⁹ Speakers highlighted the treaty's humanitarian underpinnings at the time of its adoption and its signing. At the signing ceremony, ICRC President Peter Maurer said,

We urge all States, those with and those without nuclear weapons, to sign the treaty as a humanitarian imperative and to work steadfastly towards its implementation. ... Do not extinguish this light for all humanity. It is our hope for today, and our legacy for future generations.⁷⁰

2.3. The process in practice

The process that produced the TPNW followed the humanitarian disarmament model in its practical elements as well as its conceptual framing. As in the Ottawa and Oslo Processes, its inclusive, independent and intensive character enhanced its humanitarian impact.⁷¹

The inclusiveness of the TPNW process ensured that the negotiations took into account the perspectives of those who might be affected by nuclear weapons rather than focusing on the interests of states that had the potential to use them. Indeed, one of the breakthroughs of the Humanitarian Initiative was the belief that banning nuclear weapons did not require the approval of nuclear armed states, which had historically dominated the international debate.⁷² Turning again to citizen diplomacy, civil society, led by ICAN, kept the pressure on states and the focus on humanitarian goals. The ICRC and International Red Cross and Red Crescent Movement also played critical roles in pushing for the humanitarian approach to nuclear weapons and contributing legal and factual expertise. Working in partnership with governments, these nongovernmental and international organisations influenced the shape of the treaty.

The process's inclusiveness on the government side gave a range of states ownership over the final product. Speaking of the Humanitarian Initiative, Austrian Ambassador Kmentt commented that 'all States, including those that normally have a less visible role or voice in multilateral disarmament efforts, can participate and make substantive contributions from a humanitarian perspective rather than the traditional military security or nuclear deterrence-based perspective'.⁷³ The Core Group, which led the process, consisted primarily of small and mid-sized states: Austria, Brazil, Ireland, Mexico, New Zealand and South Africa; Costa Rican Ambassador Elayne Whyte Gómez served as president of the negotiating conference.⁷⁴ While the nuclear armed states and most nuclear

⁶⁸'Taking Forward Multilateral Nuclear Disarmament Negotiations', UN General Assembly Resolution 71/258, A/RES/71/258, December 23, 2016.

⁶⁹'UN Conference Adopts Treaty Banning Nuclear Weapons', *UN News Centre*, July 7, 2017, http://www.un.org/apps/news/story.asp?NewsID=57139#.WI_7R0tG30F (accessed January 18, 2018).

⁷⁰ICRC President Peter Maurer, 'The Hope for a Future without Nuclear Weapons: ICRC Statement to the United Nations General Assembly', September 20, 2017, <https://www.icrc.org/en/document/hope-future-without-nuclear-weapons> (accessed January 20, 2018).

⁷¹See Human Rights Watch, *Meeting the Challenge*, 120 (discussing those characteristics in the Oslo Process).

⁷²Meyer, 'The Nuclear Nonproliferation Treaty'.

⁷³Kmentt, 'The Development of the International Initiative', 704.

⁷⁴Arms Control Association, 'Core Group of Negotiators for the Treaty on the Prohibition of Nuclear Weapons Voted "2017 Arms Control Persons of the Year"', January 9, 2018, <https://www.armscontrol.org/pressroom/2018-01/acpoy-2017-winner> (accessed January 18, 2018).

umbrella states boycotted the negotiations,⁷⁵ at least 124 countries from Africa, Asia, the Caribbean, Europe, Latin America, the Middle East and the Pacific participated.⁷⁶ They included developed and developing countries, states affected by use and testing and states with no direct connection to nuclear weapons, states with high-tech militaries and those with limited military power. Having gained the buy-in of such diverse states will promote universalisation of the treaty and increase its impact regardless of whether the nuclear armed states become parties.

The process leading to the TPNW had an independent quality although it reversed the previous humanitarian disarmament trajectory. The Mine Ban Treaty and Convention on Cluster Munitions were both negotiated outside of the United Nations, after meetings of the Convention on Conventional Weapons failed to achieve a satisfactory result. The TPNW, by contrast, originated in an independent international process that broke the stalemate of traditional, security-based fora and then went to the United Nations for negotiation and adoption. The UN process followed General Assembly rules of procedure, which avoided the consensus requirements of the Conference on Disarmament and the CCW.

As in the Oslo and Ottawa Processes, the deadline to negotiate the TPNW generated intensity and ensured adoption of the nuclear weapons ban in a timely fashion.⁷⁷ The UN General Assembly resolution convening the negotiations set a strict schedule that allowed for only four weeks of meetings, one in March plus three in June and July. This timetable was even tighter than the ones that produced past humanitarian disarmament treaties. The Oslo Process, for example, consisted of about five-and-a-half weeks of meetings spread over 15 months. The tighter timeline made it more difficult for states to obtain instructions from capital or to engage in in-depth diplomacy outside of the negotiating room. It avoided, however, the potentially risky prospect of having to seek a renewed mandate from the UN General Assembly, which could have slowed or halted the negotiations. Both humanitarian and diplomatic urgency thus warranted an intensive process.

3. Humanitarian purpose

Applying a humanitarian approach to the process of nuclear disarmament ensured that the focus on people carried over to the purpose and provisions of the TPNW. While non-binding, a treaty's preamble provides evidence of its object and purpose. In this case, the preamble makes clear from the outset that the purpose of the TPNW is to reduce human suffering through the elimination of nuclear weapons. Through both the concerns it foregrounds and the legal sources it cites, the preamble places the TPNW in the line of humanitarian disarmament treaties.

⁷⁵Despite the absence of many of these states, the Netherlands, a NATO member, Sweden, a close partner of NATO, and the Marshall Islands, which has detailed collective security agreements with the United States, participated actively in the negotiations. A nuclear umbrella state relies on an ally's nuclear arsenals for its national security.

⁷⁶ICAN, 'Positions on the Treaty', <http://www.icanw.org/why-a-ban/positions/> (accessed January 18, 2018).

⁷⁷The February 2007 Oslo Declaration expressed a commitment to conclude a ban treaty by 2008; the Ottawa Declaration called for 'the earliest possible conclusion' of a treaty banning antipersonnel mines. Oslo Conference on Cluster Munitions, 'Declaration'; 'Declaration of the Ottawa Conference', Annex I, in UN General Assembly, 'General and Complete Disarmament', A/C.1/51/10, October 18, 1996, https://www.apminebanconvention.org/fileadmin/APMBC/10th-anniversary/The_1996_Ottawa_Declaration.pdf (accessed January 18, 2018).

3.1. Catastrophic consequences and the need for elimination

The preamble of the TPNW parallels those of the Mine Ban Treaty and Convention on Cluster Munitions by expressing both a recognition of suffering attributable to the weapon at hand and a determination to end it. The second paragraph declares that states parties are '[d]eeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons', while the paragraph that follows notes that 'accident, miscalculation or design' also pose risks.

The preamble then elaborates on the breadth of the harm people would experience. It describes the 'grave implications for human survival, the environment, socioeconomic development, the global economy, food security, and the health of current and future generations'. It further acknowledges the 'unacceptable suffering' experienced by victims of use and testing and references in particular the disproportionate impacts on women, girls and indigenous peoples. Highlighting the overwhelming scale of a nuclear explosion, the preamble notes that these 'catastrophic consequences of nuclear weapons cannot be adequately addressed [and] transcend national borders'.

In linking the risks of such catastrophic humanitarian consequences to the very existence of nuclear weapons, the preamble lays out the goal of the TPNW. The second paragraph concludes that the devastating effects necessitate complete elimination of such arms, 'the only way to guarantee that nuclear weapons are never used again under any circumstances'. Like past humanitarian disarmament treaties, the TPNW strives to rid the world of a specific class of weapons for the humanitarian purpose of ending the suffering they inflict on people rather than states.

3.2. Legal sources

While the first half of preamble deals largely with the effects of nuclear weapons and the reasons for banning them, the second half places the TPNW in a humanitarian legal framework. Like the Convention on Cluster Munitions, the treaty refers to two bodies of international law that focus on protecting individuals; it '[r]eaffirm[s] the need ... to comply with applicable international law, including international humanitarian law and international human rights law'.

The preamble not only cites specific legal sources but also takes a stand on their application to nuclear weapons. It declares that 'any use of nuclear weapons would be contrary to ... the principles and rules of international humanitarian law' and thus contrasts with the 1996 International Court of Justice advisory opinion, which left ambiguity about the legality of use.⁷⁸ The preamble also states that use of nuclear weapons would 'be abhorrent to the principles of humanity and the dictates of public conscience'. Nuclear weapons would thus contravene international humanitarian law's Martens Clause, which provides that in the absence of specific legal rules, the means and methods of warfare must still meet certain ethical standards.⁷⁹

⁷⁸The International Court of Justice found that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict' but could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake'. International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, July 8, 1996, para. 105(2)(E).

⁷⁹The Martens Clause originated in the preamble of the 1899 Hague Convention and appears in similar forms in multiple instruments. Additional Protocol I to the Geneva Conventions, for example, states:

Unlike its predecessors, the TPNW's preamble includes references to state security. It acknowledges that 'a nuclear-weapon-free world ... is a global public good of the highest order, serving both national and collective security interests'. It cites the UN Charter, which deals primarily with relations between nations and is not mentioned in the Mine Ban Treaty or Convention on Cluster Munitions.⁸⁰ These additions to the preamble are unsurprising given that for decades before the TPNW was adopted, states viewed nuclear weapons through a security lens. They do not dilute the treaty's humanitarian purpose, which is made clear by the quantity, placement and strength of relevant preambular paragraphs.

4. Humanitarian provisions

Humanitarian disarmament also shaped the TPNW by influencing the content of its provisions. The treaty contains the three categories of provisions that are characteristic of past humanitarian disarmament treaties: absolute preventive obligations, remedial measures and cooperative approaches to implementation. Together these provisions create a strong legally binding instrument that evinces and advances an underlying humanitarian aim.

4.1. Absolute preventive obligations

The TPNW seeks to avert the humanitarian consequences of nuclear weapons through two types of preventive obligations: prohibitions and steps towards the elimination of nuclear weapons, particularly stockpile destruction.

4.1.1. Prohibitions

As in other humanitarian disarmament treaties, the prohibitions enumerated in Article 1 of the TPNW are both absolute and wide ranging. The prohibitions apply 'under any circumstances', which includes times of international or non-international armed conflict, during which nuclear weapons might be used, and times of peace, when development, testing and other activities may take place.

The prohibitions are comprehensive because they encompass all stages of a nuclear weapon's lifespan. They cover activities associated with the creation of nuclear weapons, e.g. development, testing, production and manufacture. They apply to activities involved with obtaining nuclear weapons, notably acquisition and transfer. The prohibitions deal with possession and stockpiling. Finally, they address use and threat of use.

Article 1(1)(e) further prohibits assisting, encouraging or inducing anyone to engage in any of these banned activities. This broad provision leaves room for interpretation, but understandings of comparable provisions in the Mine Ban Treaty and Convention on

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, entered into force December 7, 1978, art. 1(2).

⁸⁰The UN Charter's purposes include 'maintain[ing] international peace and security', 'develop[ing] friendly relations among nations', 'achiev[ing] international co-operation in solving international problems', and 'harmonizing the actions of nations in the attainment of these common ends'. UN Charter, June 26, 1945, art. 1.

Cluster Munitions offer clues to how it should be treated under the TPNW.⁸¹ For example, building on the precedent set by the Convention on Cluster Munitions, a significant number of states said during the TPNW negotiations that they would view the prohibition on assistance to encompass financing because it entails assisting with the production of nuclear weapons.⁸²

Article 1 also includes multiple prohibitions associated with a state party's relationship with a state not party that possesses nuclear weapons. It explicitly bars a state party from hosting the nuclear weapons of another state on its territory. The prohibition on encouraging use, threat of use or possession means that a state must withdraw from a nuclear umbrella if it joins the treaty. In other words, a state party may not depend on another state's nuclear weapons for its national security.

Because the TPNW aims to bring an end to the existence, not merely use, of nuclear weapons, the thoroughness of its prohibitions is essential. These provisions advance the treaty's humanitarian goal by working to prevent future harm.

4.1.2. Steps towards elimination

Designed to achieve the total elimination of nuclear weapons, Articles 2 through 4 impose additional preventive obligations, which are akin to the stockpile destruction provisions in the Mine Ban Treaty and Convention on Cluster Munitions.⁸³ Most notably, Article 4 obliges nuclear armed states to destroy their stockpiles 'as soon as possible'.⁸⁴ States parties hosting other states' nuclear weapons are likewise obliged to ensure their removal 'as soon as possible'.⁸⁵ While the TPNW does not indicate a specific deadline for completing these obligations, it notes that the first Meeting of States Parties will set one.⁸⁶

The TPNW promotes adherence to these elements of prevention by requiring reporting, also a feature of past humanitarian disarmament treaties.⁸⁷ Article 2 obliges all states parties to declare whether they possess nuclear weapons or have nuclear weapons on their territory. Article 4 mandates that states parties report to each Meeting of States Parties on their progress in destroying their own stockpiles or removing the nuclear weapons of others.⁸⁸ When they fulfil these obligations, they must submit a declaration to the UN secretary-general.⁸⁹ Such transparency measures can illuminate areas where states parties have fallen short or need assistance and help civil society and other watchdogs hold them to account.

Like comparable provisions in the Mine Ban Treaty and Convention on Cluster Munitions, these articles allow possessing and hosting states to join the TPNW and then destroy or remove the banned weapons. In so doing, the articles facilitate universalisation

⁸¹Mine Ban Treaty, art. 1(1)(c); Convention on Cluster Munitions, art. 1(1)(c); Human Rights Watch, *Staying Strong: Key Components and Positive Precedent for Convention on Cluster Munitions Legislation*, September 2014, 19–34, https://www.hrw.org/sites/default/files/reports/cluster0914_ForUpload_0.pdf (accessed January 21, 2018).

⁸²See, e.g. Don't Bank on the Bomb, 'Nuclear Weapons Outlawed!' August 2, 2017, <https://www.dontbankonthebomb.com/nuclear-weapons-outlawed/> (accessed January 20, 2018) (quoting South Africa and the Philippines).

⁸³Mine Ban Treaty, art. 4; Convention on Cluster Munitions, art. 3.

⁸⁴TPNW, art. 4(2).

⁸⁵*Ibid.*, art. 4(4).

⁸⁶*Ibid.*, art. 4(2, 4).

⁸⁷Mine Ban Treaty, art. 7; Convention on Cluster Munitions, art. 7.

⁸⁸TPNW, art. 4(5).

⁸⁹*Ibid.*, art. 4(3, 4).

of the new treaty, which advances elimination of nuclear weapons and thus the TPNW's humanitarian aim.⁹⁰

4.2. Remedial measures or positive obligations

The TPNW's prohibitions and stockpile destruction obligations are prerequisites to the elimination of nuclear weapons, but the treaty does not stop there. To further its humanitarian purpose, the treaty packages preventive measures with remedial ones. In particular, it requires states parties to assist victims and clean contaminated areas. Often referred to as the 'positive obligations', these provisions address ongoing harm from past use and testing as well as any future harm that the treaty might fail to pre-empt.

Article 6(1) of the TPNW obliges states parties to provide individuals affected by the use or testing of nuclear weapons with a range of assistance, including physical and psychological care, rehabilitation and measures to promote their socioeconomic inclusion. This assistance, which is not conceived as a form of charity, ultimately seeks to ensure that victims of nuclear weapons can exercise their rights. It must be provided without discrimination among nuclear weapon victims or between them and other persons with disabilities.⁹¹ The TPNW's requirements for victim assistance draw heavily from those in the Convention on Cluster Munitions.⁹² Given this link, the latter, which provides additional details on operationalising the obligations, can guide implementation of the new treaty.

Under Article 6(2), states parties must work to address the environmental harm caused by nuclear weapon use or testing. It obliges states parties to 'take necessary and appropriate measures towards the environmental remediation of [contaminated] areas'. This provision parallels the requirements to clear remnants of war in the Mine Ban Treaty and Convention on Cluster Munitions, which offer principles for implementation that can be adapted to the nuclear weapon context.⁹³

Primary responsibility for assisting victims and remediating the environment rests with affected states parties, although as discussed below, they do not bear the burden by themselves. While it may seem counterintuitive that the country harmed by use or testing of nuclear weapons should have such obligations, affected state responsibility makes both practical and legal sense. Affected states are well situated to understand their own needs and those of their people. They are also in the best position to provide assistance because they are closest to the problem. The approach protects the sovereignty of the affected state by allowing it to manage matters within its own boundaries. In addition, it is consistent with both humanitarian disarmament law and international human rights law, under which a state must take care of ensuring its people can enjoy their rights.⁹⁴

⁹⁰Article 12 of the TPNW also obliges states parties to work for universalisation by encouraging other states to join the treaty.

⁹¹ICAN, 'Victim Rights and Victim Assistance in a Treaty Prohibiting Nuclear Weapons: A Humanitarian Imperative', working paper for the UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading towards Their Total Elimination, A/CONF.229/2017/NGO/WP.14, March 31, 2017, para. 12.

⁹²Convention on Cluster Munitions, art. 5.

⁹³Mine Ban Treaty, art. 5; Convention on Cluster Munitions, art. 4.

⁹⁴See Molly Doggett and Alice Osman, 'Responsibility for Victim Assistance and Environmental Remediation', *Nuclear Ban Daily*, 2, no. 7, June 23, 2017, 2, <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/reports/NBD2.7.pdf> (accessed January 18, 2018) (laying out argument for the type of affected state responsibility that the TPNW adopted).

4.3. Cooperative approaches to implementation

To ensure that people benefit from its preventive and remedial measures, the TPNW draws on humanitarian disarmament's cooperative approaches to implementation. Article 7, which borrows heavily from the Mine Ban Treaty and Convention on Cluster Munitions,⁹⁵ requires states parties to provide international cooperation and assistance to help other states meet their obligations, particularly with regard to victim assistance and environmental remediation. Article 7(3) requires other states parties 'in a position to do so' to help an affected state party meet its positive obligations. Because assistance can come in a variety of forms – technical, material and financial – all states should be in a position to help in some way.⁹⁶ The obligations related to international assistance are essential to ensuring that individuals who have experienced the impacts of nuclear weapons receive the help they need even if the states that used or tested nuclear weapons have yet to join the treaty.

The duty to support other states parties extends beyond victim assistance and environmental remediation to other aspects of the TPNW. Article 7 requires all states parties to cooperate to 'facilitate implementation of this Treaty' and grants each state party a 'right to seek and receive assistance' in 'fulfilling its obligations'.⁹⁷ Countries could, for example, help fellow states parties meet their responsibilities to develop national implementation measures or to report on and destroy stockpiles of nuclear weapons. Article 7(5) provides details about the process of international assistance, noting that it may be provided through a range of institutions, including, *inter alia*, the United Nations, nongovernmental organisations and the ICRC.

The TPNW does not include a general compliance article, but it has related provisions that further reflect its cooperative approach. To promote compliance with stockpile destruction obligations, Article 4 requires a state party that possesses nuclear weapons to develop a 'legally binding, time-bound plan for the verified and irreversible elimination' of its nuclear weapon program.⁹⁸ Within 60 days of the treaty entering into force for it, the state must submit its plan to the Meeting of States Parties for approval. By not imposing an identical, detailed plan on all parties, Article 4 gives the possessing state party a voice in determining how to implement its legal responsibilities.⁹⁹ In turn, the Meeting of States Parties has the opportunity to influence each plan in the course of reviewing it for approval. This requirement levels the playing field among countries, unlike the NPT, which effectively allows nuclear armed states to dictate the timetable and process for disarmament. By allowing for collective decision-making about implementation mechanisms, the TPNW encourages cooperation among states parties.

5. Impact on nuclear disarmament

The humanitarian character of the TPNW is inextricably linked to its impact. Some commentators have dismissed the treaty because the nuclear armed states boycotted

⁹⁵Mine Ban Treaty, art. 6; Convention on Cluster Munitions, art. 6.

⁹⁶TPNW, art. 7(3).

⁹⁷*Ibid.*, art. 7(1, 2).

⁹⁸*Ibid.*, art. 4(2).

⁹⁹This power makes joining the treaty a more appealing option for the nuclear armed states, none of which participated in the TPNW negotiations.

the negotiations and seem unlikely to join in the near future. These critics argue that the treaty will not lead to the destruction of a single nuclear weapon.¹⁰⁰ They ignore, however, that humanitarian disarmament provided a game-changing alternative to traditional nuclear disarmament, which had accomplished little multilaterally since the Comprehensive Nuclear-Test-Ban Treaty's adoption more than 20 years ago. By prioritising the interests of people rather than states, humanitarian disarmament offered new incentive for and a fresh approach to governing nuclear weapons. The treaty it produced challenges conventional wisdom, makes nuclear weapons illegal and imposes positive obligations to address the humanitarian harm that they cause.

5.1. Challenge to conventional wisdom

The TPNW challenges conventional wisdom that the road to nuclear disarmament should respect states' reliance on nuclear deterrence policies and proceed gradually. For decades, the belief that nuclear weapons promote peace and security by making armed conflict too dangerous influenced the content of nuclear weapons law. As noted above, for example, the NPT allows nuclear armed states to retain their arsenals for an undetermined period of time. The TPNW, by contrast, recognises that the humanitarian threat posed by nuclear weapons outweighs any potential advantages of deterrence. Through its prohibitions on use and threat of use, it makes it unlawful for a state party to base its national security policy on nuclear weapons. The TPNW further prohibits states parties from encouraging others to possess, threaten to use or use nuclear weapons, making it illegal for a state party to remain under a nuclear umbrella. By delegitimising nuclear deterrence policies, the TPNW removes a key obstacle to eliminating nuclear weapons.

The TPNW also rejects the premise that progress towards a world free of nuclear weapons should proceed incrementally. Article VI of the NPT obliges states parties to work in good faith towards general and complete disarmament, but as discussed above, their meetings have pursued a slow, 'step-by-step' approach that has yet to achieve that goal. Influenced by the intensity of past humanitarian disarmament processes, countries negotiating the TPNW followed an accelerated timetable and demonstrated that nuclear disarmament could be advanced in months rather than decades. In addition, unlike the NPT, the text of the TPNW requires states parties to act quickly to meet their obligations. They must cease production, transfer, use and testing of nuclear weapons upon joining the treaty. Nuclear armed states must remove their nuclear weapons from operational status 'immediately' and destroy them 'as soon as possible' while states parties hosting another country's nuclear weapons must ensure their 'prompt removal'.¹⁰¹ The TPNW thus shows the feasibility of an expedited negotiating process and time-bound obligations for nuclear disarmament.

¹⁰⁰Peter D. Zimmerman, 'This New U.N. Treaty Seeks to Ban Nuclear Weapons. But We'd Regret It If We Did', *Washington Post*, September 14, 2017, https://www.washingtonpost.com/news/posteverything/wp/2017/09/14/the-u-n-s-new-treaty-banning-nuclear-weapons-sounds-like-a-good-idea-its-not/?utm_term=.71103ff1109e (accessed April 26, 2018); 'Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom and France Following the Adoption of a Treaty Banning Nuclear Weapons', July 7, 2017, <https://www.scribd.com/document/353174842/Joint-Press-Statement-by-UK-France-US-on-nuclear-ban-treaty> (accessed April 26, 2018).

¹⁰¹TPNW, art. 4(2, 4).

5.2. Illegality of nuclear weapons

The TPNW makes nuclear weapons illegal as well as immoral. Since their development and use in the Second World War, many people have criticised the immorality of these weapons of mass destruction. Dr Marcel Junod, head of the ICRC delegation to Japan that visited Hiroshima shortly after the dropping of the atomic bomb, wrote: 'The physical impact of the bomb was beyond belief, beyond all apprehension, beyond imagination. Its moral impact was appalling'.¹⁰² More recently, Nobuo Hayashi told the audience at a 2015 NPT Review Conference side event, 'We should reject nuclear weapons, not because they fail to serve the purposes that their proponents say they do, but because their use and threat are inherently immoral'.¹⁰³

Despite longstanding moral outrage about nuclear weapons, until 2017, the international law dealing with nuclear weapons consisted only of partial prohibitions or restrictions. The NPT prohibited proliferation but did not require an immediate end to possession or use. The 1963 Partial (or Limited) Test Ban Treaty applied only to testing in outer space, underwater and the atmosphere;¹⁰⁴ as of April 2018, the CTBT had not entered into force. The nuclear-weapon-free zone agreements outlawed many nuclear weapon-related activities, but their legal effects were confined to certain regions.

As discussed above, the TPNW takes a radically different approach. Article 1 absolutely prohibits all major activities associated with nuclear weapon and applies to all states parties, regardless of the region from which they come. The humanitarian aim of the treaty necessitates such an approach. As the preamble notes, only complete elimination of nuclear weapons will ensure that they no longer present the risk of catastrophic consequences.

By making nuclear weapons clearly and comprehensively unlawful, the TPNW not only limits the actions of states parties, but also increases the weapons' stigma, pressuring those outside the treaty to abide by its rules. Although the Netherlands voted against the treaty's adoption, six months later ABP, which provides pensions for Dutch civil servants, decided to end its investments in nuclear weapon producers.¹⁰⁵ The influence of past humanitarian disarmament ban treaties on the conduct of states not party further demonstrates the power of stigma.¹⁰⁶

¹⁰²Marcel Junod, 'The Hiroshima Disaster: A Doctor's Account', excerpts from Junod's journal republished by ICRC, September 12, 2005, www.icrc.org/eng/resources/documents/misc/hiroshima-junod-120905.htm (accessed January 18, 2018).

¹⁰³Nobuo Hayashi, 'From Consequentialism to Deontology' (presentation at side event entitled Humanitarian Impact: Why Ethics Is Important to the Politics of Nuclear Weapons held during 2015 NPT Review Conference, September 15, 2015), 4, <http://nwp.ilpi.org/?p=4166> (accessed January 18, 2018). Hayashi elsewhere concluded, 'We categorically reject nuclear strikes because they rob their victims, fellow human beings, of human qualities by subjecting them to unspeakable inhumanity and reducing them to the status of mere instruments for the benefit of the rest of us.' Nobuo Hayashi, 'On the Ethics of Nuclear Weapons', ILPI-UNIDIR NPT Review Conference Series, no. 2 (2015): 7, <http://unidir.ilpi.org/wp-content/uploads/2015/04/No-2-Ethics-NOHA.pdf> (accessed January 18, 2018).

¹⁰⁴Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, opened for signature August 8, 1963, entered into force October 10, 1963.

¹⁰⁵PAX, 'Largest Dutch Pension Fund ABP to Divest from Nuclear Weapons', January 11, 2018, <https://nonukes.nl/largest-dutch-pension-fund-abp-divest-nuclear-weapons/> (accessed January 20, 2018). The Nobel Foundation announced it would divest from nuclear weapon producers in October 2017, just weeks after the Nobel Committee awarded the Peace Prize to ICAN. PAX, 'Nobel Foundation to Divest from Nuclear Weapon Producers', October 30, 2017, <https://www.dontbankonthebomb.com/nobel-foundation-to-divest-from-nuclear-weapon-producers/> (accessed January 20, 2018).

¹⁰⁶For example, the US decision to end transfers of cluster munitions to Saudi Arabia after reports that they caused civilian casualties 'shows how global perception of these weapons has shifted, even among nations that remain outside the international treaty to ban the weapons'. Mary Wareham, 'On Cluster Munitions, A Tentative Step toward Sanity', *Huffington*

5.3. Imposition of positive obligations

The imposition of positive obligations regarding victim assistance and environmental remediation constitutes a major development in the law governing nuclear weapons. Because previous treaties focused on security rather than humanitarian concerns, they did not seek to reduce the harm already caused by nuclear weapons, whether through use or testing. Certain states established compensation regimes, but they were national or bilateral, were not human rights based and sometimes required the establishment of legal liability.¹⁰⁷

These positive obligations, modelled on humanitarian disarmament precedent, give the TPNW the power to have an immediate humanitarian impact. Their implementation does not depend on nuclear armed states, which are likely to remain outside the treaty for the near future. Instead affected states parties bear primary responsibility for the TPNW's remedial measures, and all other states parties must support them. Therefore, implementation can and should begin as soon as the treaty enters into force.

6. Impact on humanitarian disarmament

In addition to representing a sea change in the governance of nuclear weapons, the TPNW has had a positive effect on humanitarian disarmament. It reaffirms that this approach is a powerful, feasible and effective way to address the human impacts of inhumane and indiscriminate weapons. In taking on the challenges associated with nuclear weapons, the TPNW has strengthened humanitarian disarmament and demonstrated its ability to adapt to different weapons and different contexts.

6.1. Extension to new weapons

Earlier humanitarian disarmament instruments dealt exclusively with conventional weapons. In the course of putting people first, governments focused on arms that caused demonstrable harm. The Ottawa Process, for example, dealt with 'weapons that kill[ed] hundreds of thousands of civilians each year, predominately in the developing world'.¹⁰⁸ Nuclear weapons did not seem to fit this mould because they were weapons of mass destruction possessed by only nine military powers, and their contemporary impact was less evident. Many states and even civil society disarmament advocates regarded them as an exceptional category of weapons that required its own rules.¹⁰⁹

The successful application of humanitarian disarmament to nuclear weapons disproved this assumption. The TPNW showed that the approach could extend effectively to unconventional weapons, traditionally considered inseparable from the security interests of states. In the process, it closed a major gap in disarmament law; nuclear weapons, which have the potential to cause the greatest harm, are no longer the only weapons of mass destruction not banned.

Post, June 6, 2016, https://www.huffingtonpost.com/mary-wareham/on-cluster-munitions-a-te_b_10319504.html (accessed January 18, 2018).

¹⁰⁷See, e.g. Radiation Effects Research Foundation, 'A-Bomb Survivors Medical Treatment Law', http://www.rerf.jp/glossary_e/reliefme1.htm; US Department of Justice, 'Radiation Exposure Compensation Act', <https://www.justice.gov/civil/common/reca> (both accessed January 20, 2018).

¹⁰⁸McCarthy, 'Deconstructing Disarmament', 56.

¹⁰⁹See, e.g. Minor, 'Changing the Discourse', 722 (discussing how the humanitarian approach overcame that view).

6.2. Advancement and adaptability of humanitarian disarmament

Because the TPNW deals with a different category of weapons, its process, purpose and provisions diverge in certain ways from its humanitarian disarmament predecessors. In most cases, these differences have strengthened the approach by building legal precedent. In a few others, they have modified it in response to the sensitive nature of nuclear weapons debate. Regardless, the evolution embodied in the TPNW reflects the innovation and flexibility that McCarthy praised when characterising humanitarian disarmament.¹¹⁰ The TPNW proves that humanitarian disarmament is an adaptable framework for ending the human suffering caused by all types of problematic weapons.

The TPNW imposes several obligations that do not appear in past humanitarian disarmament treaties. It prohibits threatening to use nuclear weapons and testing them, activities that are less relevant to landmines and cluster munitions and were not previously covered. The TPNW also bans allowing the 'stationing, installation or deployment of any nuclear weapons',¹¹¹ which is analogous to hosting foreign stockpiles of landmines or cluster munitions. While the latter has been interpreted as a prohibited form of assistance,¹¹² the TPNW's more explicit provision leaves no doubt that permitting stationing is unlawful.

In Article 7, the TPNW imposes for the first time a legal obligation on states parties that used or tested a banned weapon to provide 'adequate assistance' to help affected states parties assist victims and remediate the environment.¹¹³ The Convention on Cluster Munitions 'strongly encourages' user states parties to provide assistance for the clearing of cluster munition remnants,¹¹⁴ but the TPNW goes further. It makes user state responsibility a legal instead of political obligation and applies it to victim assistance as well as clearance of contaminated areas. During the negotiations, many states argued that inclusion of such a provision was of vital importance as a matter of principle and practical impact.¹¹⁵

In response to the 'grave implications' nuclear weapons pose for the environment, the TPNW extends humanitarian disarmament's remedial measures to addresses the harm caused by toxic rather than just explosive remnants of war. A toxic remnant of war is: 'Any toxic or radiological substance resulting from military activities that forms a hazard to humans or ecosystems'.¹¹⁶ Past humanitarian disarmament treaties require clearance of landmines and unexploded submunitions because the explosive effects of these remnants of war can endanger civilians long after a conflict. The nature of nuclear weapons presents different threats. While the initial blast creates an enormous explosion with devastating effects, the enduring harm of a nuclear weapon results from the toxins and radioactivity it releases. The TPNW's positive obligations deal with such consequences by requiring states parties to assist victims and clean areas affected by toxic remnants of war.

¹¹⁰McCarthy, 'Deconstructing Disarmament', 57–8.

¹¹¹TPNW, art. 1(a, d, g).

¹¹²Human Rights Watch, *Staying Strong*, 28.

¹¹³TPNW, art. 7(6).

¹¹⁴Convention on Cluster Munitions, art. 4(4).

¹¹⁵Nothing in the framework of positive obligations precludes an affected state from seeking other forms of legal redress from states that used or tested nuclear weapons in their territory.

¹¹⁶Aneaka Kellay, *Pollution Politics: Power, Accountability and Toxic Remnants of War*, section 3.0, <https://ceobs.org/pollutionpolitics-power-accountability-and-toxic-remnants-of-war/> (accessed April 12, 2018).

In addition to environmental harm, the TPNW highlights other adverse effects of weapons that humanitarian disarmament should address. The TPNW's preamble notes that the impact of nuclear weapons can 'transcend national borders' given the scale of an explosion and the geographic reach of its fallout. The preamble also explicitly recognises the disproportionate impacts on certain groups, notably indigenous peoples, who have borne the brunt of nuclear testing, and women and girls, whose health is at particular risk from radiation. The TPNW's victim assistance and environmental remediation provisions apply to the adverse impacts caused by nuclear weapon use *and* testing; earlier instruments deal only with use.

A few elements of the TPNW and the process behind it run counter to humanitarian disarmament's previous trajectory, but these variations illustrate how it can respond to challenging weapons and political contexts. While civil society and the ICRC always had a seat at the negotiating table during the Oslo Process,¹¹⁷ the president of the TPNW negotiations was able to exclude these groups from certain smaller sessions because the process took place at the United Nations. Such limitations on citizen diplomacy should not be adopted as precedent, but the decision to hold the negotiations in a UN forum bolstered the legitimacy of a politically sensitive treaty. Fortunately, nongovernmental and international organisations continued to influence the outcome of the TPNW's process through plenary interventions and other forms of public and behind-the-scenes advocacy.

With regard to the treaty text, negotiators sacrificed a degree of specificity to achieve an effective result in a timely way. The delegation of decisions about stockpile destruction deadlines and verification measures to future Meetings of States Parties was intended to attract states for whom those provisions would be most relevant by giving them the chance to have input after the treaty's adoption. In addition, by not dwelling on the details of certain provisions, such as implementation guidelines for the positive obligations, the drafters were able to conclude a strong nuclear weapon ban in four weeks and avoid seeking a renewed mandate from the UN General Assembly.

In the end, the TPNW's deviations from earlier processes and treaties pushed the humanitarian approach to disarmament forward. They created stronger obligations and expanded its scope to address a wider range of harm. They also demonstrated the adaptability of humanitarian disarmament, which allowed for the application of a people-centred approach to the most contentious disarmament challenge of the day.

7. Conclusion

The adoption of the TPNW and awarding of the Nobel Peace Prize to ICAN placed humanitarian disarmament in the global spotlight for a third time. Two decades earlier, the Mine Ban Treaty shifted the paradigm of disarmament and gave birth to the humanitarian approach. In 2008, the Convention on Cluster Munitions established humanitarian disarmament as an internationally accepted body of law, setting higher standards in almost every area and inspiring the genesis and growth of new disarmament campaigns. In successfully tackling the toughest disarmament issue of the past 70 years, the TPNW illuminated the potential for humanitarian disarmament to gain strength and evolve.

¹¹⁷The Cluster Munition Coalition, a collection of hundreds of nongovernmental organizations, participated on a level equal to states except that it could not submit formal proposals or adopt the final convention. Human Rights Watch, *Meeting the Challenge*, 123.

The accomplishments of the TPNW augur well for other disarmament efforts motivated by a desire to prevent and remediate the harm associated with problematic weapons. As mentioned earlier, current campaigns are working to limit the use of certain explosive weapons in populated areas, reduce the effects of toxic remnants of war and pre-emptively ban fully autonomous weapons, recognised as the third revolution in armed conflict after gunpowder and nuclear weapons. Based on the overarching principle that people not states should be at the heart of efforts to govern arms, humanitarian disarmament offers an effective and adaptable means to achieve these goals.

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No potential conflict of interest was reported by the author.

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