

Wind of Change in Nuclear Disarmament: The Treaty on the Prohibition of Nuclear Weapons as a New Example of Humanitarian, Victim-centered Arms Control

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I. INTRODUCTION

The adoption of the Treaty on the Prohibiting of Nuclear Weapons (TPNW) in New York, on July 7, 2017, shifted the paradigm in nuclear disarmament after more than twenty years of stagnation in the field.¹ After biological and chemical weapons bans in 1972 and 1993, respectively, the remaining weapons of mass destruction will be banned once the TPNW enters into force. Even though there is considerable disagreement on the practical impact of a treaty for nuclear disarmament and international security, the award of the Nobel Peace Prize in 2017 to the International Campaign to Abolish Nuclear Weapons (ICAN), the coalition that was instrumental in the negotiations and adoption of the treaty, demonstrates the treaty's significance and immediate impact.²

Article One of the treaty imposes certain prohibitions with a view to reaching a world free of nuclear weapons, such as use, threat to use, development, testing, production, manufacturing or transfer of nuclear weapons.³ Moreover, states are also obliged to refrain from assisting, encouraging or inducing anyone to engage in any activity prohibited by the treaty, and to seek or receive assistance in such activity.⁴ Importantly, states also undertake not to allow any stationing, installation or deployment of any nuclear weapons in their territory or at any place under their jurisdiction or

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1. United Nations Treaty on the Prohibition of Nuclear Weapons (Jul. 7, 2017), <https://www.un.org/disarmament/wp-content/uploads/2017/10/tpnw-info-kit-v2.pdf> [<https://perma.cc/UZK3-JVJN>].

2. See Press Release, The Norwegian Nobel Committee, *The Nobel Peace Prize for 2017* (Oct. 6, 2017), https://www.nobelprize.org/nobel_prizes/peace/laureates/2017/press.html [<https://perma.cc/DXSF-KHU6>] (awarding Nobel Peace Prize); see also Camila Domonoske, *International Campaign To Abolish Nuclear Weapons Wins 2017 Nobel Peace Prize*, <https://www.npr.org/sections/thetwo-way/2017/10/06/556047073/2017-nobel-peace-prize> [<https://perma.cc/B2M4-2YAT>] (noting ICAN's "inspiring and innovative support" of TPNW).

3. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at art. 1(a), (b), (d) (detailing prohibited state behavior under treaty).

4. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at art. 1 (e), and (f) (noting cooperation and assistance requirement between signatories).

control.⁵ This latter duty is aimed at states not possessing their own nuclear weapons or hosting foreign ones, for instance NATO members or allies such as Germany, Italy, Belgium, and Turkey allowing United States nuclear weapons on their territories.

Article Four, entitled “Towards the Total Elimination of Nuclear Weapons” provides for a disarmament regime for states possessing, or having possessed, nuclear weapons.⁶ As such, it can be regarded as a measure implementing Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which imposes on all states the duty “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”⁷

Unfortunately, states possessing nuclear weapons are not likely to join the treaty. Not only have they been absent from all negotiations that aimed at adopting the TPNW, but some of them—namely the United States, United Kingdom and France—even issued, only a few hours after the adoption of the treaty, a joint declaration in which they declared, *inter alia*, that they “do not intend to sign, ratify or ever become party to it.”⁸ In light of this declaration, there is the danger that only states not possessing nuclear weapons will adhere to the TPNW, which would naturally limit the impact of the treaty regarding its nuclear disarmament aspect.

The author, an expert in international, human rights, and arms control law, recently published the book *Humanization of Arms Control: Paving the Way for a World Free of Nuclear Weapons*,⁹ in which he argues that, given the stalemate in nuclear disarmament, new ideas have to be put forward. As a result, he proposes an approach that focuses less on states’s security than on the interests of the human being and victims of nuclear weapons. Moreover, he concludes on the illegality of nuclear weapons under humanitarian and human rights law. The author has closely followed the negotiations with a view of adopting the TPNW and considers its conclusion a confirmation of his thesis.

II. EARLY EXAMPLES OF HUMANITARIAN, VICTIM-CENTERED APPROACHES TO

5. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at art. 1 (g) (explaining treaty prohibits others from testing, deploying, or possessing nuclear weapons on signatory’s land).

6. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at art. 4 (detailing treaty’s ultimate goal and aims of each state party).

7. See United Nations Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (promoting peaceful nuclear energy usage and elimination of nuclear weapons).

8. See Press Release, United States Mission to the United Nations, *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://usun.state.gov/remarks/7892> [<https://perma.cc/N4RZ-T67P>] (noting some Security Council states not participating in TPNW negotiations or supportive of treaty).

9. DANIEL RIETIKER, *HUMANIZATION OF ARMS CONTROL: PAVING THE WAY FOR A WORLD FREE OF NUCLEAR WEAPONS* 218 (2017).

ARMS CONTROL

The new, human-centered approach to arms control is not an isolated phenomenon in international law, but was preceded by similar trends in the field of security (“human security” that reinforces the concept of state’s security)¹⁰ or development (“human development” instead of development of States).¹¹ Within the domain of arms control, the TPNW is not a completely new aspect either. In fact, the adoption of the 1996 Ottawa Convention on the Prohibition of Anti-personnel Mines and its sister treaty, the 2008 Oslo Convention on Cluster Munitions, has been driven by the conviction that those weapons are, from a humanitarian point of view, disproportionate given their modest military and strategic value. Also, the 2013 Arms Trade Treaty, which prohibits the delivery of certain conventional arms if there is a risk that those arms might be used to commit serious violations of human rights or humanitarian law, or to commit international crimes, aims to protect human beings. In brief, humanitarian ideals inspired each of the three most recent arms control treaties. This certain trend in the direction of a human-centered arms control is therefore undeniable.

III. THE PENETRATION OF THE HUMANITARIAN, VICTIM-CENTERED APPROACH INTO THE NUCLEAR FIELD

In light of this new trend in the non-nuclear field, human-centered ideals and goals should certainly permeate the domain of nuclear weapon arms control. Even though the NPT review cycles have recently considered certain humanitarian principles,¹² the adoption of the TPNW in 2017, which was clearly driven by such considerations, solidified the value of humanitarian ideals in the conversation. The human-centered nature of the TPNW flows from, at least, four elements. First, it can be derived from its preparatory works. Several elements of ICAN’s campaign are recognizable, and had already been the ingredients of the successful processes that led, in record time, to the adoption of the human-centered Ottawa and Oslo Conventions—namely, humanitarian ideals as the driving force; advocating and campaigning efforts in favor of those humanitarian ideals by civil society, international organizations and academia; the essential role played by medical and other professional experts, among others from the International Committee of the Red Cross (ICRC); and the involvement of victims of the weapons in the process.¹³

10. See Rietiker, *supra* note 9, at 12-15.

11. See Rietiker, *supra* note 9, at 15-16.

12. See generally Press Release, *Joint Statement on the Humanitarian Dimension of Nuclear Disarmament by Austria, Chile, Costa Rica, Denmark, Holy See, Egypt, Indonesia, Ireland, Malaysia, Mexico, New Zealand, Nigeria, Norway, Philippines, South Africa and Switzerland* (May 2, 2012), <http://www.acronym.org.uk/old/official-and-govt-documents/joint-statement-humanitarian-dimension-nuclear-disarmament-2012-npt-prepcom>.

13. See generally Rietiker, *supra* note 9, at 20-27, 259-267, 283-284 (providing examples).

Second, like the Ottawa and Oslo Conventions, Article One of the new treaty imposes a set of prohibitions with a view to eliminating the relevant weapons.¹⁴ From a humanitarian point of view, the most important prohibition is the ban on use. Quite surprisingly, the use of nuclear weapons has not yet been explicitly prohibited. It is important to stress that if one day the prohibition of use will be endorsed by numerous states, the existence of a parallel customary rule that would also bind non-states parties might be suggested.¹⁵

Third, the new treaty also clearly expresses its human-centered nature with human rights and humanitarian law language used in its preamble. In particular, the preamble articulates the principles of international humanitarian law—the rule of distinction between combatants and the civil population, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition to use weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the environment.¹⁶ The preamble states clearly that any use of nuclear weapons would be contrary to those principles.¹⁷

Moreover, the preamble reiterates that the catastrophic consequences of nuclear weapons cannot be adequately addressed as they pose grave problems for the survival of mankind and the environment, socio-economic development, the global economy, food security and the health of current and future generations.¹⁸ Indeed, recent research indicates that the use of a nuclear weapon would affect the whole planet. For example, should India and Pakistan engage in nuclear weapon use, this usage would likely trigger subsequent retaliatory nuclear attacks.¹⁹ It is also suggested that use of nuclear weapons could cause that temperature to fall, globally, to below those of the Little Ice Age of the fourteenth to nineteenth centuries.²⁰ The additional studies show nuclear arms usage would decrease agricultural production in parts of the United States and China by about 20% for four years after the explosion and by 10% for a decade.²¹ In his book, the author explains how and to what extent

14. See JOHN BURROUGHS, KEY ISSUES IN NEGOTIATIONS FOR A NUCLEAR WEAPONS PROHIBITION TREATY, ARMS CONTROL TODAY 6-13 (2017).

15. See Statute of the International Court of Justice, Article 38 § 1 (detailing customary law, another source of international law “evidence of a general practice accepted as law”).

16. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at preamble ¶ 9 (rooting the treaty in customary humanitarian international law).

17. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at preamble ¶ 11 (reiterating epic destruction and consequences of nuclear weapons).

18. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at preamble ¶ 4 (recognizing prohibition of nuclear weapons necessary for human survival).

19. See JOHN BORRIE AND TIM CAUGHLEY, AN ILLUSION OF SAFETY: CHALLENGES OF NUCLEAR WEAPON DETONATIONS FOR UNITED NATIONS HUMANITARIAN COORDINATION AND RESPONSE 43-44 (2014).

20. See *id.* at 44.

21. See generally Lili Xia and Alan Robock, *Impacts of a Nuclear War in South Asia on Rice Production in Mainland China*, 116 CLIMATE CHANGE 357 (2012).

this would affect the enjoyment of the economic, social and cultural rights of all people worldwide.²²

Fourth, the TPNW surprisingly features a clause on victim assistance and environmental remediation, which the Oslo Convention inspired and which also constitutes another expression of its humanitarian end.²³ It obliges states parties to provide adequate age-sensitive and gender-sensitive assistance to individuals under their jurisdiction who are affected by use or testing of nuclear weapons, including such past state activities. The TPNW also encourages parties to repair the environment where state nuclear action caused environmental harm.²⁴ The provisions on international cooperation and assistance further aid parties with these remedial efforts.²⁵

IV. FOCUSING ON VULNERABLE GROUPS: THE EXAMPLE OF INDIGENOUS PEOPLES

Human rights law particularly recognizes the special vulnerability of certain groups that are in need higher protection, as evidenced by the special treaties in their favor.²⁶ The TPNW reflects these protections. The preamble stresses the unspeakable human suffering of victims of the use of nuclear weapons in Hiroshima and Nagasaki in August 1945 (so-called “hibakusha”) and the testing of such weapons, thereby singling out the special vulnerability of female individuals of all ages and indigenous people.²⁷ The international community further recognizes that armed conflict, in general, and the radiation from nuclear weapons, in particular, impact those groups disproportionately.²⁸

For indigenous people, the treaty mentions two aspects of nuclear weapon use on this group—namely their special relationship to their lands that is heavily affected by the use or testing of nuclear weapons and the impact of such testing on the physical and mental health of those people. Regarding the first aspect, the Inter-American Court of Human Rights stressed, on several occasions, the special relationship between indigenous peoples and their traditionally owned lands that goes much beyond both a modern and Western concept of possession, ownership, and production:

22. See Rietiker, *supra* note 9, at 207-22.

23. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at art. 6 (codifying victim assistance and environmental remediation to remedy nuclear weapons use).

24. See *id.* (mandating environmental remediation from contamination caused by nuclear weapons).

25. See *id.* at art. 7 (creating cooperation agreement to achieve treaty’s ends).

26. See generally United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007), www.un.org/esa/socdev/unpfii/en/drip.htm [<https://perma.cc/Y55N-S3NG>] (declaring rights of indigenous peoples in order to protect their culture and land).

27. See United Nations Treaty on the Prohibition of Nuclear Weapons, *supra* note 1, at preamble (drawing attention to paragraphs four and six).

28. See Rietiker, *supra* note 9, at 222-38 (detailing special vulnerability of indigenous peoples, women and children).

The culture of the members of the indigenous communities corresponds to a specific way of life, of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are an integral element of their cosmology, their spirituality and, consequently, their cultural identity.²⁹

For instance, the United States carried out sixty-seven nuclear tests on the Marshall Islands between 1946 and 1958, most of them at the Bikini and Enewetak Atolls. The total explosive yield was approximately 100 megatons, the equivalent to more than 7000 Hiroshima bombs.³⁰ These tests displaced the indigenous people of the Marshall Islands, disconnecting them from their lands and their cultural and indigenous way of living. Laurence Carucci, a professor of anthropology, testifying before the Nuclear Claims Tribunal:

[The] Enewetak people were distraught, heartbroken, and in general state of mental and emotional trauma when they were forced to leave their homeland. Their very embeddedness in a place in the world, the very process through which the community had scratched their being into the physical contours of the earth, and the historied place that gave them a sense of meaningful connection with their communal past, were gone.³¹

Regarding the impact of nuclear testing on the health of indigenous peoples, the tests caused hundreds of additional cancer cases in the Marshall Islands, and provoked psychological trauma in the local population when they witnessed the explosions and were forced to relocate for their physical protection. A UN report details this impact.³² Additionally, Calin Georgescu, who undertook a mission to the Marshall Islands to study and report on the lasting effect of the nuclear tests, stressed the compelling testimony of survivors of the tests about their psychological trauma from witnessing explosions; the local population's increased stress and anxiety due to the nuclear tests are legitimate and serious health concerns.³³ It is therefore only fair to mention the special vulnerability of indigenous peoples in the new treaty, which prohibits the use and testing of nuclear weapons and imposes the duty to assist victims of these activities.

29. See *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, PP 40 (Aug. 24, 2010); see also *Yakye Axa v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, PP 76 (Aug. 24, 2010).

30. See Davor Pevec, *The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People*, 35 DENV. J. INT'L. & POL'Y 221, 221 (2006).

31. See *In the Matter of the People of Enewetak, et al.*, NCT No. 23-0902.

32. See *United Nations Special Rapporteur on the Implication for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, UNITED NATIONS COMMISSION ON HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/SRToxicWastesIndex.aspx> [<https://perma.cc/8FJU-FVY9>].

33. See Calin Georgescu, *Report of the Special Rapporteur on the Human Rights Obligations Related to Environmentally Sound Management and Disposal of Hazardous Substances and Waste*, A/HRC/21/48/Add.1, § 26 (Feb. 7, 2012).

V. CONCLUSION

The TPNW will create momentum for nuclear disarmament, increase the pressure on states possessing nuclear weapons, bring the debate positively at the forefront of international relations and constitute a new tool for civil society to push disarmament forward. The TPNW exemplifies the trend towards a humanitarian approach to arms control, catalyzed by the Ottawa and Oslo Conventions because the treaty provides the first example within the domain of nuclear weapons. This new treaty links arms control and human rights and, by placing the victims of use and testing of nuclear weapons at the center, illustrates that nuclear weapons inflict concrete suffering and harm. Maybe the new instrument will trigger debate and stimulate ideas on how to better address past injustice and discrimination caused to certain groups of people by the use and testing of nuclear weapons, in particular indigenous peoples. As usual in international relations, the treaty's success and impact will depend on the good faith of states parties in the implementation of the TPNW, in particular regarding the clauses on victim assistance and environmental remediation. It is hoped that the states will honor their commitments and engage with the same enthusiasm and spirit of cooperation as shown during the preparatory phase.