

THE LEGAL CONTENT AND IMPACT OF THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

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Thank you for inviting me to participate in this legal seminar. It's an honor to talk about the Treaty on the Prohibition of Nuclear Weapons (TPNW) as part of a celebration that recognizes not only the tireless and effective advocacy of the International Campaign to Abolish Nuclear Weapons (ICAN), but also the importance of the treaty that the coalition helped produce and the humanitarian disarmament movement of which the treaty is part.

Today I will examine the content and legal impact of the TPNW through a humanitarian lens. I will focus on: the key elements of the TPNW and how they fit the characteristics of a humanitarian disarmament treaty; the impact of the treaty on nuclear weapons law; and the impact of the treaty on humanitarian disarmament law. The significance of the humanitarian approach to nuclear weapons will be evident throughout the discussion. It served as a catalyst to the negotiation process, shaped the purpose and provisions of the treaty, and will affect its long-term impact.

Humanitarian Origins of the TPNW

Humanitarian concerns about nuclear weapons gave rise to and propelled the process that led to the TPNW. For at least two decades, nuclear disarmament had been mired in discussions dominated by national security interests. Meetings of the Nuclear Non-Proliferation Treaty (NPT) provided a forum for debate, but progress toward negotiating a nuclear disarmament treaty (required under Article 6 of the NPT) was minimal.

The Humanitarian Initiative, which emerged around 2010, changed the landscape by reframing the issue of nuclear weapons as a humanitarian one. During meetings in Norway, Mexico, and Austria in 2013-2014, proponents of a ban treaty highlighted the horrors of nuclear weapons. They documented the harm caused by past use and testing and described the potential effects of exponentially more powerful contemporary weapons. In so doing, they emphasized the importance and urgency of addressing nuclear weapons.

At the same time, the Humanitarian Initiative treated nuclear weapons like other inhumane and indiscriminate weapons. By thus demystifying them, it opened up the possibility of real progress.

The UN General Assembly responded by adopting a resolution in 2016 that called for negotiations of a treaty banning nuclear weapons. The treaty was adopted July 7, 2017, by 122

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states. As of December 10, 2017, it has 53 signatories and 3 states parties, with more expected soon.

While the focus of my remarks is substance not process, the humanitarian origins of the TPNW inform both its content and its legal impact

Content of the TPNW

TPNW includes 20 articles but the key provisions can be divided into four groups:

- The preamble,
- Preventive measures (including prohibitions and requirements to eliminate nuclear weapons),
- Remedial measures (better known as “positive obligations”), and
- Implementation provisions.

Together these provisions create a strong legally binding instrument that evinces and advances an underlying humanitarian aim.

Preamble: Object and Purpose

The preamble makes clear that the object and purpose of the treaty is to reduce human suffering through the elimination of nuclear weapons. It foregrounds concern about the impacts of nuclear weapons from use, testing, accidents, and other causes. The second paragraph declares that states parties are “deeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons.”

The preamble goes on to highlight a range of effects, including the “grave implications for human survival, the environment, socioeconomic development, the global economy, food security, and the health of current and future generations.” It also recognizes the “unacceptable suffering” experienced by victims.

The preamble links these harms to the very existence of nuclear weapons, and concludes that the catastrophic consequences require completely eliminating nuclear weapons. It describes elimination as “the only way to guarantee that nuclear weapons are never used again under any circumstances.” It also considers the treaty to be “an important contribution” toward a “world free of nuclear weapons.”

Preamble: Sources of Law

While the first half of preamble deals largely with the effects of nuclear weapons and the motivations for banning them, the second half places the TPNW in a human-centered legal framework. It begins its series of paragraphs on the law by “reaffirming the need . . . to comply with applicable international law, including international humanitarian law and international human rights law,” and specifying that it is based on the “principles and rules of international humanitarian law.”

The preamble explicitly 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. The preamble also states that use of nuclear weapons would “be abhorrent to the principles of

humanity and the dictates of public conscience.” These words derive from the Martens Clause, a provision of international humanitarian law that suggests the means and methods of warfare must meet certain moral standards.

The content of the TPNW’s preamble is not exclusively humanitarian in nature. It refers in several places to “international peace and security” and notes the importance of “national and collective security interests.” Toward the end, the preamble recognizes the importance of past nuclear weapons-specific instruments that were driven by national security interests, notably the NPT, the Comprehensive Test Ban Treaty (CTBT), and the nuclear-weapon-free zone agreements. Overall, however, the preamble gives precedence to humanitarian concerns through the quantity, placement, and strength of relevant paragraphs.

Preventive Measures: Prohibitions

The treaty addresses two types of preventive measures that seek to avert the humanitarian consequences before they happen: prohibitions and steps toward the elimination of nuclear weapons, particularly stockpile destruction.

The prohibitions enumerated in Article 1 are both absolute and wide ranging. The prohibitions apply “under any circumstances,” which would cover 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 take place.

The prohibitions are comprehensive because they ban activities at every step of a nuclear weapon’s lifespan, including:

- Those involved with the creation of nuclear weapons, i.e., development, testing, production, and manufacture;
- Those involved with obtaining nuclear weapons, notably acquisition and transfer;
- Those involving possession and stockpiling; and
- The use and threat of use.

Article 1 also prohibits assisting, encouraging, or inducing anyone to engage in any of these activities. This broad provision leaves room for interpretation, but it should be understood to cover a range of acts, such as financing. A significant number of states said during the negotiations that they would understand the prohibition to encompass financing because it entails assisting with the production of nuclear weapons. Interpretations of parallel provisions in past humanitarian disarmament treaties support that understanding.

Finally, Article 1 includes multiple prohibitions associated with a state party’s relationship with a state not party that possesses nuclear weapons. A state party is explicitly obliged not to allow a nuclear weapon state to station or deploy nuclear weapons on its territory. Prohibitions on threat of use and on assistance, encouragement, and inducement prohibit states parties from depending on another state’s nuclear weapons for their national security. In other words, a state may not remain under a nuclear umbrella if it joins the treaty.

The comprehensiveness of the TPNW's prohibitions is essential because it aims to bring an end to the existence, not merely use, of nuclear weapons. In so doing, it advances the treaty's humanitarian goals by striving to prevent future harm.

Preventive Measures: Steps toward Elimination

Another set of preventive measures appears in Articles 2-4, which are directed at the total elimination of nuclear weapons. They list required actions rather than prohibited ones, but they serve the same purpose of preventing future harm.

To promote transparency, Article 2 obliges all states parties to declare whether they possess nuclear weapons or have nuclear weapons on their territory. Article 3 mandates that they comply with International Atomic Energy Agency safeguards.

Most important, Article 4 establishes a process by which nuclear weapon states must destroy their stockpiles "as soon as possible." Similarly, states parties hosting other states' nuclear weapons are obliged to ensure their removal "as soon as possible." The treaty does not detail verification measures, but it calls for their development at a later date.

These articles are designed to attract nuclear weapon states by allowing them to join the TPNW and then destroy their nuclear weapons. The articles advance the TPNW's aims because they promote both universalization of the new treaty and the elimination of nuclear weapons.

Positive Obligations: Victim Assistance and Environmental Remediation

The TPNW's preventive measures are a prerequisite to the elimination of nuclear weapons, but the treaty does not stop there. To further its humanitarian goals, it draws on international human rights law and establishes "positive obligations" to assist victims and remediate the environment.

Article 6 of the TPNW obliges states parties to provide individuals affected by use *or* testing of nuclear weapons with a range of assistance, including physical and psychological care, rehabilitation, and measures to ensure their socioeconomic inclusion. Assistance is designed to be not a form of charity but a means to ensure victims can exercise their human rights. Consistent with the treaty's interest in guaranteeing human rights, the TPNW states that assistance must be provided without discrimination.

States parties must also take steps to remediate the environment contaminated by nuclear weapons use or testing. The treaty does not presume states parties can return the environment to a pre-detonation state—that would be impossible—but states must take "necessary and appropriate measures" in that direction.

The provisions on victim assistance and environmental remediation are designed to address ongoing harm from past use and testing as well as any harm from future use and testing, which hopefully the treaty will preempt.

Positive Obligations: Hierarchy of Responsibility

To promote implementation, the treaty establishes a framework of shared responsibility for the positive obligations. Primary responsibility for assisting victims and remediating the

environment rests with affected states parties. While it may seem counterintuitive that the state harmed by use or testing of nuclear weapons should have such obligations, the approach is both practical and consistent with legal precedent.

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. In addition, this approach follows the precedent set by past disarmament treaties—such as the Convention on Cluster Munitions and the Mine Ban Treaty—and is consistent with human rights law, under which a state must take care of ensuring its people can enjoy their rights. Finally, the approach protects the sovereignty of the affected state by allowing it to manage matters within its own boundaries.

That said, the affected state does not have to bear the burden by itself. The TPNW makes clear that all states parties have a role to play in victim assistance and environmental remediation. Article 7 on international cooperation and assistance requires other states parties “in a position to do so” to help the 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.

A third level of responsibility rests with states parties that used or tested nuclear weapons. They must provide “adequate assistance” to help affected states parties assist victims and remediate the environment. The inclusion of a user state responsibility provision was very important to many of the negotiating states. It was a matter of principle as well as practical impact. Nothing in the framework of positive obligations, however, precludes an affected state from seeking other forms of legal redress from user states.

Implementation Provisions

Last group of provisions I will discuss relate to the implementation of the treaty. I won't examine them all in detail but there are some worth highlighting.

Article 5 requires states parties to take national measures to implement the treaty. It specifies that they must adopt legislation imposing penal sanctions for the commission of prohibited acts. States parties must also adopt “necessary measures to implement its obligations,” indicating that they are required to implement positive as well as negative obligations at the national level.

The treaty requires additional state actions at the international level. States parties are obliged to promote the universalization of the treaty by encouraging states not party to join. They must also hold regular meetings of states parties and review conferences to assess progress in implementation. Such meetings will help hold states parties to account.

Finally, the treaty seeks to maintain its strength by allowing no reservations and placing restrictions on withdrawal. Many states and civil society organizations would have preferred that the treaty not permit withdrawal, but at least Article 17 imposes some limitations. It forbids withdrawal during an armed conflict. Furthermore, it allows a state party to withdraw only when “extraordinary events” have “jeopardized [its] supreme interests,” and requires that states parties explain those extraordinary events when giving notice of its intention to withdraw.

This cluster of provisions promotes the implementation and power of the treaty.

The TPNW as a Humanitarian Disarmament Treaty

With the elements I just outlined, the TPNW possesses the key characteristics of a humanitarian disarmament treaty. Humanitarian disarmament seeks to end civilian suffering from indiscriminate or inhumane weapons. The movement originated in the 1990s with the creation of the 1997 Mine Ban Treaty, banning antipersonnel mines. It was reinforced and strengthened by the 2008 Convention on Cluster Munitions, which prohibited cluster munitions because they cause “unacceptable harm.” The latter treaty emerged from a Norwegian initiative that led to the Oslo Process, and it was signed nine years ago at the venue where yesterday’s Nobel Peace Prize ceremony took place.

The TPNW fits the definition of a humanitarian disarmament treaty both in its purpose and its provisions. As I discussed, the TPNW seeks to end the “catastrophic humanitarian consequences” of nuclear weapons. Its goal is reminiscent of Convention on Cluster Munitions, which expresses “determin[ation] to put an end for all time to the suffering and casualties caused by cluster munitions...”

Regarding preventive measures, the TPNW—like the Mine Ban Treaty and Convention on Cluster Munitions—contains absolute prohibitions on use, production, stockpiling, and transfer of nuclear weapons, as well as on assistance with these activities. It also seeks to prevent future use and testing through its obligation to destroy stockpiles.

The TPNW obliges states to take remedial measures to minimize the harm caused by nuclear weapons. It establishes basic requirements for victim assistance that are almost identical to those in the Convention on Cluster Munitions, the gold standard in this area. The TPNW also requires states parties to clear territory affected by remnants of the weapons.

Finally, TPNW adopts a cooperative approach to implementation. It mandates that all states parties provide international assistance to help other states meet their obligations. Rather than establish a detailed verification regime or an adversarial enforcement mechanism, it encourages states parties to settle disputes through negotiation or “other peaceful means.”

Impact on Nuclear Weapons Law

The humanitarian nature of the TPNW is inextricably linked to its legal impact as well as its content. The humanitarian disarmament approach allowed the TPNW to revolutionize the law governing nuclear weapons. It facilitated significant progress toward the weapons’ elimination and an increase in civilian protection. In return, the TPNW reinforced and advanced humanitarian disarmament law, demonstrating its continued effectiveness and ability to evolve.

I will highlight three major impacts of the TPNW on nuclear weapons law. Each represents a sea change made possible by the application to nuclear weapons of the humanitarian approach to disarmament, which offered a fresh perspective and underlined the urgency of stronger law.

Illegality of Nuclear Weapons

First, the treaty makes nuclear weapons illegal as well as immoral. For many people, nuclear weapons have long been considered immoral. The TPNW echoes that view with preambular clauses. For example, it refers to the “ethical imperatives for nuclear disarmament.”

Until now, however, 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. The various test ban treaties only restricted testing, and with exception of CTBT, which has not entered into force, they applied only to certain areas, such as outer space, underwater, and the atmosphere. The nuclear-weapon-free zone agreements provided the strongest restrictions in that they outlawed nuclear weapons, but their effects were limited to certain regions.

The TPNW takes a radically different approach. Article 1 creates a legally binding prohibition on all major activities associated with nuclear weapons. It applies “under any circumstances” and to all states parties, regardless of the region they come from. The treaty already has signatories from Africa, Asia, Latin America, the Middle East, and the Pacific.

By making nuclear weapons clearly and comprehensively unlawful, the TPNW not only limits the actions of states parties, but also increases the stigma against the weapons, putting political pressure on even states not party to abide by its rules. The widespread compliance with the Mine Ban Treaty’s rules by states not party exemplifies the power of stigma.

Challenge to the Status Quo

The second impact of the treaty on nuclear weapons law is that it challenges the status quo. Earlier law took a gradual step-by-step approach toward general and complete disarmament, but in the process, it reinforced the existing situation. The NPT, for example, sought to limit the spread of nuclear weapons, but in the process, it preserved the hierarchy of haves and have nots. While non-nuclear weapon states agreed not to obtain nuclear weapons, nuclear weapon states were allowed to keep their nuclear arsenals. They agreed, under Article 6, to work in good faith toward nuclear disarmament, but they have made little progress on that front, at least through the NPT framework.

The TPNW directly rejects such an incremental approach. It requires all states parties to cease production, transfer, use, and testing of nuclear weapons when joining the treaty, and it obliges states parties to remove their nuclear weapons from operational status “immediately” and destroy them “as soon as possible.” A specific deadline will be set at the First Meeting of States Parties.

The TPNW also challenges the status quo by making it illegal for states parties to rely on the protection of a nuclear umbrella. Its provisions on both threat of use and on assistance, encouragement, and inducement prohibit a state party from depending on nuclear weapons, even those possessed by a state not party, for its national security.

Drafters included the threat of use specifically to achieve this end. Depending on nuclear weapons for security constitutes a threat because it indicates the state party is willing and able to

have nuclear weapons used on its behalf and it has clearly communicated that position through collective security arrangements, statements, or other means.

In addition, the treaty prohibits states parties from receiving assistance with a prohibited act. By accepting a nuclear weapon state's nuclear protection, a state party is receiving assistance with the threat of use. Finally, being part of a nuclear security arrangement runs counter to the prohibition on encouraging prohibited activities because it encourages another state to possess, threaten to use, and use.

These provisions make it more challenging for nuclear weapon states and nuclear umbrella states to join the TPNW, but the obstacles they face are primarily political rather than legal. By upending the status quo, the treaty was able to take a leap, rather than small step, toward elimination of nuclear weapons.

Positive Obligations

The third impact of the TPNW involves its positive obligations. Previous international law did not seek to reduce the harm already caused by nuclear weapons, whether through use or testing. Some states established compensation regimes, but they were national or bilateral, they were not human rights-based, and they sometimes required the establishment of legal liability.

Even in the early stages of the process to achieve a nuclear weapon ban treaty, many states, and even some civil society members, did not envision the inclusion of positive obligations, but in the end, the TPNW created an international framework of responsibility that focuses on meeting the needs of victims and the environment.

Positive obligations are also important because they constitute an area where the treaty can have an immediate humanitarian impact. Their implementation does not depend on nuclear weapon states, which are unlikely to join the treaty in the near future. All states parties bear some responsibility for the TPNW's remedial measures. Implementation should begin as soon as the treaty enters into force.

Impact on Humanitarian Disarmament Law

Reinforcement of Existing Law

The legal impact of the TPNW will extend beyond nuclear weapons law to disarmament law, and humanitarian disarmament in particular. As the most recent humanitarian disarmament treaty, it confirms that that body of law is a powerful, effective, and feasible way to address the effects of inhumane and indiscriminate weapons.

The TPNW has the same general goal as its predecessors—i.e., ending civilian suffering caused by problematic weapons. It borrows key elements and, in many cases, exact language from its predecessors. For example, the wording of its victim assistance provision and several paragraphs of its international cooperation and assistance article are almost identical to those in the Convention on Cluster Munitions. In so doing, the TPNW demonstrates that humanitarian disarmament is both widely accepted and adaptable.

New Scope of Application

The TPNW also advances humanitarian disarmament by applying it to a new class of weapons—weapons of mass destruction, and nuclear weapons in particular. Although biological and chemical weapons have long been banned, the treaties that govern them focus on addressing national security concerns. This approach is evident, for example, in the Chemical Weapons Convention’s preambular language and in its provisions, which emphasize prohibitions and a strict verification regime. The TPNW brings a humanitarian approach to weapons of mass destruction. It includes remedial as well as preventive measures and adopts a cooperative approach to compliance.

More specifically, the TPNW applies humanitarian disarmament to nuclear weapons, long viewed as the most challenging weapon to legally control. Over the years, both states and many disarmament advocates viewed nuclear arms as an exceptional class of weapons to which different rules would have to apply. Humanitarian disarmament rose to the challenge, however. Through the TPNW, it successfully closed a gap in disarmament law. Previously nuclear weapons were the only weapons of mass destruction not banned, even though they have the potential to cause the greatest harm. In turn, the TPNW showed that humanitarian disarmament can work for all types of weapons—both in driving the process and in shaping the contents of the treaty

Advancement of Humanitarian Disarmament

In the course of adapting humanitarian disarmament’s provisions to a new type of weapon, the TPNW advances that body of law in several ways. In its preamble, it incorporates several progressive elements not included in past humanitarian disarmament treaties. For example, it explicitly recognizes the disproportionate impacts on certain groups, notably indigenous peoples and women and girls. It highlights the importance of disarmament education, a tool for raising awareness of the human consequences of weapons and disseminating the legal norms that deal with them.

The TPNW also creates rules related to activities—notably testing and the threat or use—that are not addressed in past humanitarian disarmament treaties. Both testing and threat of use have contributed significantly to the problems of nuclear weapons.

A large portion of the human and environmental harm attributable to nuclear weapons has come from testing. The TPNW highlights the consequences of testing in its preamble. It seeks to mitigate the harm by prohibiting future testing and applying its positive obligations to the effects of testing as well as use.

Nuclear deterrence policies have long been used as an excuse for retaining nuclear weapons. But the TPNW bans threat of use in order to prohibit dependence on such policies by nuclear weapon states or nuclear umbrella states.

Past humanitarian disarmament treaties do not touch on testing or threat of use, presumably because the activities are less relevant to landmines or cluster munitions, but their inclusion in the TPNW shows humanitarian disarmament’s ability to adapt to the problems of different

weapons. It may also set important precedent for dealing with future weapons, such as fully autonomous weapons, if technology outpaces efforts to preemptively ban them

Finally, the TPNW expands the scope of positive obligations to address the harm caused by toxic remnants of war rather than just explosive remnants of war. 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 character of nuclear weapons necessitated a different approach. While the initial blast of a nuclear weapon creates a huge explosion with devastating effects, many of its long-lasting impacts are the result of toxins and radioactivity. The TPNW addresses these harms as part of its positive obligations. It requires states parties to assist victims of toxic remnants of war as well as remediate contaminated areas.

Conclusion

In conclusion, the TPNW is a legal breakthrough. It establishes comprehensive rules to reduce the harm from nuclear weapons and promote their ultimate elimination. It will have a significant effect on the future of nuclear weapons law and humanitarian disarmament law.

Nonetheless, much work remains to be done. The TPNW needs to be universalized expeditiously, interpreted strongly, and implemented fully so that it can achieve its true humanitarian potential.