

# *Questioning the status of the treaty on the prohibition of nuclear weapons as a ‘humanitarian disarmament’ agreement*

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# Questioning the Status of the Treaty on the Prohibition of Nuclear Weapons as a ‘Humanitarian Disarmament’ Agreement

RESEARCH ARTICLE

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## ABSTRACT

On 22 January 2021, the *Treaty on the Prohibition of Nuclear Weapons* (TPNW) entered into force. The TPNW has resulted in a mixed response from the international community, instigating much discussion on certain provisions and features of the TPNW. Yet underpinning these analyses rests a commonly shared premise; that the TPNW constitutes a further example of humanitarian disarmament, placing the interests of victims and humanity at the centre of discussions of nuclear weapons and disarmament. This article seeks to reveal a coinciding yet somewhat underexplored, hidden nature of the TPNW by demonstrating how the treaty also incorporates State-based security-driven interests alongside these humanitarian aspirations. While most commentators do not deny the existence of such interests at stake in the TPNW process, few have analysed the extent to which State-based security considerations have been incorporated in the final text of the TPNW. After having revealed the continued presence of State-centred security considerations in the TPNW’s negotiation, preambular provisions and operative text, this article concludes by discussing some possible implications stemming from the determination that the TPNW is inspired by, and reflects, both humanitarian and security objectives.

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## I. INTRODUCTION

The adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW)<sup>1</sup> in July 2017 has been described as 'the end of a period of stagnation' in international nuclear disarmament law which has lasted more than twenty years.<sup>2</sup> While TPNW proponents have hailed the treaty as a 'welcome addition to the nuclear non-proliferation and disarmament regime',<sup>3</sup> the nuclear weapon-possessing States (NWPS) and various commentators have criticised the treaty as both conceptually flawed and 'idealistic'.<sup>4</sup> On the day of the TPNW's adoption, the United States (US), the United Kingdom (UK) and France announced that they 'do not intend to sign, ratify or ever become party' to the treaty.<sup>5</sup> Russia and China later supported a similar joint statement released in October 2018.<sup>6</sup> Nevertheless, the TPNW has slowly been edging towards entry-into-force, and achieved its 50<sup>th</sup> ratification, by Honduras on 24 October 2020.<sup>7</sup> In accordance with Article 15(1), the TPNW entered into force on 22 January 2021 and its obligations are now binding upon each State party that has ratified the agreement.<sup>8</sup>

Much of the discussion concerning the TPNW so far has focused on three main aspects. First, the relationship of the treaty to the existing nuclear non-proliferation and disarmament regime<sup>9</sup> – particularly the 'cornerstone' Treaty on the Non-Proliferation of Nuclear Weapons (NPT) 1968.<sup>10</sup> Second, the scope of disarmament verification and safeguard measures imposed under Articles 3 and 4.<sup>11</sup> Third, the treaty's potential impact on nuclear deterrence policies and collective security arrangements.<sup>12</sup> However, behind the majority of these existing discussions rests an underlying assumption that the TPNW was inspired and motivated, at least primarily, by a growing concern and awareness of the catastrophic humanitarian consequences that would stem from any detonation of nuclear weapons. As such, many commentators have argued that the TPNW represents a further example and consolidation of 'Humanitarian Disarmament', whereby the interests of humans, victims and humanity as a whole generally take priority, while to some extent marginalising 'traditional' State-orientated security interests.<sup>13</sup> They have supported this assertion by tracing the negotiating history of the TPNW and identifying certain human-centred provisions to emphasise how the treaty instigates a new era of humanitarian-inspired normative pressure on the NWPS by stigmatising and delegitimising nuclear weapons on the basis of the catastrophic humanitarian consequences stemming from their use.<sup>14</sup>

It is certainly indisputable that humanitarian-centred considerations based around the overarching need to address the catastrophic harm and suffering caused by nuclear weapons use and testing played a significant role throughout the development of the TPNW.<sup>15</sup> At

the same time, however, these same commentators generally tend to concede that the TPNW also emerged due to co-existing concerns over the security threat posed by nuclear weapons to States, alongside frustration with the slow pace of nuclear disarmament pursuant to Article VI of the NPT. Yet despite recognising the presence of such State-centred interests, these 'security-driven' considerations have been somewhat cast-aside in recent assessments of the TPNW, relegated in favour of offering greater attention to the humanitarian concerns which inspired the negotiation of the treaty. Consequently, there has been virtually no extensive commentary and discussion thus far which has sought to reveal the features of the TPNW and its negotiations which reflect this existing, though underexplored, security dimension behind the TPNW process.

This article seeks to fill this void by attempting to highlight various elements and characteristics of the TPNW's provisions and negotiation process which allude to the co-existence of security-driven interests of States. The analysis that follows offers evidence for this claim by highlighting certain shared characteristics of 'traditional', or security-based disarmament instruments<sup>16</sup> identified elsewhere by proponents of humanitarian disarmament such as Bonnie Docherty<sup>17</sup> and Patrick McCarthy.<sup>18</sup> By referring to these common features and characteristics identified by advocates of humanitarian disarmament, this article seeks to shed light on a presently hidden layer of the TPNW's underlying purpose and turns to discuss some possible implications that this revealed security-driven nature may have for our assessment and engagement with the TPNW, humanitarian disarmament and efforts to categorise disarmament instruments generally.

Following this introduction, Part II briefly notes the shifting focus of disarmament efforts away from a State-centred security considerations to a more humanitarian-driven agenda, particularly since the 1990s. Part III then explains why the TPNW is frequently categorised as a further example of humanitarian disarmament by highlighting its various human and victim-focused features and provisions. Having acknowledged the humanitarian nature of the TPNW, Part IV seeks to reveal how the TPNW reflects security-driven considerations by incorporating certain elements and characteristics commonly included within 'traditional' disarmament instruments. Part V discusses some possible implications stemming from this article's analysis for both the TPNW's subsequent implementation and humanitarian disarmament generally, particularly in questioning the utility of the characterisations employed by commentators, alongside the benefits and need to categorise disarmament instruments. Part VI offers some concluding thoughts.

## II. FROM 'TRADITIONAL' TO 'HUMANITARIAN' DISARMAMENT

Although the emergence of humanitarian disarmament is generally regarded as a revolutionary and relatively recent phenomenon building upon the decreased tensions following the end of the Cold War,<sup>19</sup> the relevance of humanitarian considerations has to some extent contributed to the decision of States to regulate the use of certain weapons for over 100-years.<sup>20</sup> Notably, this has contributed partially towards the prohibitions on dum-dum bullets and asphyxiating gases by the 1899 and 1907 Hague Conventions.<sup>21</sup> However, despite this humanitarian influence, earlier disarmament negotiations generally tended to prioritise State-based security and strategic considerations as the primary justification for restricting certain arms.<sup>22</sup>

This 'modern' age of weapons regulation following the Second World War has been described as 'traditional',<sup>23</sup> or 'security' driven approaches to disarmament discussions among the major State powers of the time.<sup>24</sup> Notable examples of traditional disarmament instruments which are primarily State-interest and security-focused are the Biological Weapons Convention (BWC) of 1972<sup>25</sup> and the Chemical Weapons Convention (CWC) of 1993.<sup>26</sup> The underlying premise of this period of 'traditional disarmament' was that the desire to prohibit and ultimately abolish particular categories of weapons was 'dominated by security concepts focusing on external threats to states'.<sup>27</sup> As such, it was the fundamental interests of States that took prominence in earlier disarmament efforts, reflecting the fact that States were traditionally the only – or at least most significant – subject of the international legal system.<sup>28</sup>

Docherty, for example, has suggested that the regulation of biological and chemical weapons essentially aimed 'to protect the interests of sovereign states' by ensuring that these categories of weapons of mass destruction would not be used against themselves.<sup>29</sup> Indeed, once the major military powers perceived chemical and biological agents to be less militarily useful or desirable, it became strategically advantageous to prohibit such weapons to avoid their future use against the military dominant States.<sup>30</sup> This is not to suggest that humanitarian ideals had no impact or influence whatsoever on the development of the BWC and CWC.<sup>31</sup> Instead, any coinciding humanitarian benefits of the non-use of harmful chemical and biological weapons tended to be subordinated to the dominant security interests of States during traditional disarmament discussions.<sup>32</sup>

The concept of 'humanitarian disarmament' emerged in the mid-1990s as a challenge to the dominance of State-driven considerations.<sup>33</sup> Quite simply, and contrasting with the State-centrism of traditional disarmament instruments, '[h]umanitarian disarmament's overarching principle is that people, not States, should be at the centre

of efforts to govern problematic weapons'.<sup>34</sup> Through this more explicit prioritisation of human and victims' needs and interests, humanitarian disarmament 'focuses on preventing and remediating human suffering and environmental harm' caused by problematic weapons<sup>35</sup> – that is weapons which are indiscriminate, inhumane and cause unnecessary suffering.<sup>36</sup> This approach shifts the narrative away from the supposedly security-enhancing benefits brought by weapons, towards a focus on the unacceptable harm that the use of problematic weapons causes.<sup>37</sup> Alongside preventing future harm caused by problematic weapons, humanitarian disarmament is retrospective to an extent, and looks back to 'take care of the problems that already exist' by remediating prior harm caused as well.<sup>38</sup> Consequently, humanitarian disarmament maintains a connection to international humanitarian law,<sup>39</sup> but goes beyond 'questions of legality to include moral and political assessments of the effects of certain weapons on both civilians and combatants'.<sup>40</sup>

These principles underlying humanitarian disarmament have since become a regular feature of disarmament discussion after the Cold War,<sup>41</sup> and coincided with the broader interest in humanitarianism which has given rise to related concepts such as human security<sup>42</sup> and humanitarian intervention.<sup>43</sup> The first success for the humanitarian disarmament movement came with the adoption of the Anti-Personnel Mine Ban Convention in 1997 (APMBC), an instrument which sought to eliminate indiscriminate anti-personnel mines, and highlighting the need to adopt remedial measures to address the explosive remnants of anti-personnel mines left behind following the end of armed conflicts.<sup>44</sup> The negotiations, process and formula of the APMBC subsequently inspired the adoption of the Convention on Cluster Munitions (CCM) in 2008.<sup>45</sup> The TPNW is frequently regarded as the third invocation of humanitarian disarmament efforts,<sup>46</sup> particularly due to various characteristics and elements of its negotiation, purpose and provisions, discussed next.

## III. CHARACTERISTICS OF THE TPNW AS A HUMANITARIAN DISARMAMENT INSTRUMENT

With this relatively brief understanding of humanitarian disarmament in mind, the following section seeks to summarise which characteristics and features are supposedly indicative of the TPNW's human and victim-centred nature. In particular, both Docherty and Rietiker refer to three specific features of the TPNW to support their claims: first, the TPNW's negotiating history and process; second its humanitarian purpose reflected within the treaty's preamble paragraphs; and finally, various provisions of the TPNW which allude to the treaty's human-centred and victim-orientated approach.<sup>47</sup>

## A. NEGOTIATION PROCESS

A notable feature of humanitarian disarmament instruments is that the negotiation process frames the discussion of the specific weapon in question in terms of human-centred interests as the ‘driving force’ behind the treaty instrument adopted.<sup>48</sup> The Ottawa Declaration of October 1996, for example, explicitly acknowledged that ‘the extreme humanitarian and socio-economic costs associated with the use of anti-personnel mines requires urgent action on the part of the international community to ban and eliminate this type of weapons’.<sup>49</sup> Furthermore, the negotiation process tends to be inclusive, flexible and innovative,<sup>50</sup> in which engaged States are ‘open to viewing civil society groups as the possessors and purveyors of expertise, field experience and energy potentially beneficial to multilateral negotiation processes’.<sup>51</sup> The APMBC, for instance, was spearheaded by the International Campaign to Ban Landmines, which worked in conjunction with like-minded middle-power States, many of which had been heavily affected by anti-personnel mines long after the conclusion of armed conflicts.<sup>52</sup> In addition, both the academic and scientific community and victims of the use of problematic weapons play a central role during the negotiation process,<sup>53</sup> using their experience and expertise to highlight the humanitarian effects of the prohibited weapon in question, thereby giving ‘a voice to the people whom the weapons endangered as well as ownership over the outcome to a range of participants’.<sup>54</sup>

The TPNW negotiation process certainly reflects these identified trends.<sup>55</sup> The TPNW emerged from what is commonly referred to as the ‘Humanitarian Initiative’,<sup>56</sup> a global campaign which sought to reframe the debate around nuclear weapons towards a human-centred approach, with a particular emphasis on highlighting the catastrophic harm caused by nuclear weapons detonations on civilians.<sup>57</sup> This humanitarian reframing was explicitly included in the final document of the 2010 NPT Review Conference which noted the

‘deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law’.<sup>58</sup>

To further facilitate the reframing of nuclear weapons through a humanitarian lens, a series of ‘humanitarian conferences’ focusing upon the effects of nuclear weapon use were held in Oslo, Nayarit and Vienna between March 2013 and December 2014.<sup>59</sup> These conferences principally sought to raise awareness in both attending State participants and the wider public of ‘the devastating consequences of the use of nuclear weapons for the human being, as well as to assess the risk of nuclear war or of the accidental explosion of a nuclear weapon’.<sup>60</sup>

The final Vienna Conference in December 2014 saw the adoption of the ‘Humanitarian Pledge’ by the Austrian Representative Michael Linhart, which noted the need to ‘identify, and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons... in light of their unacceptable humanitarian consequences and associated risks’.<sup>61</sup> Alongside the pledge, further ‘joint statements on the humanitarian consequences of nuclear weapons’ were also issued by Switzerland on behalf of 16 States at the NPT Preparatory Committee 2012.<sup>62</sup> By the time the statement was delivered by New Zealand during the 2014 United Nations General Assembly (UNGA) First Committee, it was co-sponsored by 155 States,<sup>63</sup> while the humanitarian pledge had 127 co-sponsoring States by April 2016.<sup>64</sup> The growth of support for these various statements clearly reflects the broader swing in emphasis toward the humanitarian imperative of achieving nuclear disarmament which ultimately informed the TPNW process amongst participating States.<sup>65</sup>

Following the second Open-Ended Working Group held in 2016 on taking forward multilateral disarmament, the UNGA First Committee adopted Resolution L.41, which again expressed deep concern ‘about the catastrophic humanitarian consequences of any use of nuclear weapons’, and called upon states to ‘convene in 2017 a United Nations Conference to negotiate a legally binding instrument to prohibit nuclear weapons leading towards their total elimination’.<sup>66</sup> The fact that the TPNW was subsequently negotiated outside of the consensus-based Conference on Disarmament also bucked the trend of traditional nuclear non-proliferation and disarmament negotiations too, as did the expeditious four weeks of formal negotiations across two sessions in March and June–July 2017.

Furthermore, the TPNW negotiation process was inclusive, taking ‘into account the perspectives of those who might be affected by nuclear weapons rather than focusing on the interest of states that had the potential to use them’.<sup>67</sup> Ruff in particular notes that the level of civil society participation throughout the Humanitarian Initiative and TPNW negotiation conference was unprecedented in nuclear non-proliferation and disarmament law.<sup>68</sup> The International Campaign to Abolish Nuclear Weapons (ICAN), for example, served as an ‘umbrella organization for nuclear-disarmament groups’,<sup>69</sup> providing a single, credible ‘point of contact’ for like-minded middle-power non-nuclear weapon states (NNWS), notably Ireland, Mexico, Austria and New Zealand, to organise their efforts.<sup>70</sup> The International Committee of the Red Cross (ICRC) also took on a more prominent role in nuclear disarmament discussions in the late 2000s.<sup>71</sup> Following a powerful, humanitarian-framed speech given in 2010 by ICRC President Jakob Kellenberger recalling the vast devastation caused by nuclear weapons at Hiroshima,<sup>72</sup> the International

Red Cross and Red Crescent Movement released a Resolution in November 2011 endorsing the 'framework of humanitarian diplomacy'. The Resolution appealed to all States to 'conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement'.<sup>73</sup>

In addition, the academic community made a significant contribution to the three Humanitarian Conferences. Experts presented findings on the environmental,<sup>74</sup> economic and infrastructural consequences of nuclear weapon use,<sup>75</sup> alongside the dangers of nuclear risks and accidents.<sup>76</sup> Physician Ira Helfand, for example, presented a climate model which concluded that a limited nuclear exchange would result in devastating climatic change, global starvation and the collapse of the international agricultural system.<sup>77</sup> This evidence emphasised among participating NNWS the humanitarian imperative of prohibiting and eliminating nuclear weapons based upon their uncontrollable, catastrophic humanitarian effects.<sup>78</sup> In addition, *hibakusha* – survivors and descendants of the Hiroshima and Nagasaki bombings – including Tanaka Terumi and Setsuko Thurlow provided powerful testimonies of the physical, social and psychological impact of nuclear weapon use, describing first-hand the catastrophic harm and effects caused by nuclear weapons and exposure to radioactive fallout.<sup>79</sup> Alongside statements of support from the Holy See,<sup>80</sup> these speeches advanced the 'moral' imperative of eliminating nuclear weapons on the basis of their catastrophic impact on humanity.<sup>81</sup>

Finally, the involvement of experts and civil society groups continued throughout the TPNW negotiations sessions in 2017. Gibbons, for instance, notes that ICAN maintained its coordinating role by reviewing the latest developments and planning the upcoming day's strategies.<sup>82</sup> Other civil society groups including the Arms Control Association<sup>83</sup> and the ICRC presented working papers offering their expert insights on some of the core elements and features of the ban treaty.<sup>84</sup> Perhaps the most visible instance of civil society participation occurred during the First Session held between 27–31 March, where President Whyte Gómez convened two informal panel meetings, led by experts from civil society, to discuss matters of greater complexity such as verification issues and accession provisions.<sup>85</sup>

## B. PREAMBULAR PURPOSE

A further illustration of the TPNW's humanitarian nature can be found within its preambular provisions.<sup>86</sup> As a general matter, treaty preambles do not contain legally-binding obligations for States parties,<sup>87</sup> but instead, may define 'the purposes and considerations that led the parties to conclude the treaty'.<sup>88</sup> In this sense, the preamble forms part of a treaty's overall context,<sup>89</sup> which for the purposes of treaty interpretation in particular can

help determine the negotiating parties' motivations for adopting the treaty, thus helping identify the object and purpose of the treaty in question.<sup>90</sup>

Reflecting the humanitarian statements discussed in Part III.A, preambular paragraph 2 states that TPNW parties are '[d]eeply concerned about the *catastrophic humanitarian consequences* that would result from any use of nuclear weapons'.<sup>91</sup> This immediately reframes the proposition that nuclear weapons effect the interests of humanity as a whole, thus informing the very object and purpose of the TPNW. Consequently, the preamble proceeds to emphasise that the elimination of nuclear weapons is the 'only way to guarantee that nuclear weapons are never used again under any circumstances'.<sup>92</sup> The preamble further frames the TPNW as human and victim-orientated by noting that States parties are '[m]indful of the *unacceptable suffering and harm caused to the victims* of the use of nuclear weapons (*hibakusha*), as well as of those affected by the testing of nuclear weapons'.<sup>93</sup> This further illustrates the prioritisation of human and victim needs and interests, which are given extensive coverage within the TPNW preamble.<sup>94</sup>

The preamble also reiterates that 'the catastrophic consequences of nuclear weapons *cannot be adequately addressed*, transcend national borders, *pose grave implications for human survival*, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a *disproportionate impact on women and girls, including as a result of ionizing radiation*'.<sup>95</sup> This paragraph is clearly inspired by the scientific evidence presented during the three Humanitarian Conferences,<sup>96</sup> and the general conclusion noted at the first Oslo Conference that no State would be able to adequately respond to a nuclear weapon detonation.<sup>97</sup>

In addition, Docherty also notes that the preamble 'places the TPNW in a humanitarian legal framework' through its detailed references to principles of international humanitarian law (IHL).<sup>98</sup> Following the approach of both the APMBC<sup>99</sup> and CCM,<sup>100</sup> the preamble reaffirms 'the need for all States at all times to comply with applicable international law, *including international humanitarian law and international human rights law*'.<sup>101</sup> Paragraph 9 identifies specific IHL principles which must be respected, including:

'the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment'.<sup>102</sup>

Moreover, the preamble further declares ‘that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law’,<sup>103</sup> while proceeding to note that ‘any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience’.<sup>104</sup> Significantly, this reference goes considerably further than the ICJ’s conclusion reached in the *Nuclear Weapons Advisory Opinion* in 1996,<sup>105</sup> in which the Court suggested that the use of nuclear weapons would ‘generally’ be contrary to IHL principles, but could not ‘conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence’.<sup>106</sup> Although this preambular paragraph is certainly a controversial paragraph in light of the ICJ’s prior assessment,<sup>107</sup> given that one of the primary objectives of IHL is to ‘moderate the conduct of armed conflict and to mitigate the suffering that it causes’,<sup>108</sup> the ‘explicit invocation of that body of law [IHL] suggests a humanitarian nature’ and purpose within the TPNW.<sup>109</sup>

### C. HUMANITARIAN PROVISIONS

A final illustration of the TPNW’s humanitarian nature concerns the content of the treaty’s operative provisions. According to Docherty, three categories of the TPNW’s provisions are ‘characteristic of past humanitarian disarmament treaties: absolute preventive obligations, remedial measures and cooperative approaches to implementation’.<sup>110</sup> While this author agrees with the final two features, the discussion in Parts IV and V below questions the view that preventive obligations, particularly relating to absolute prohibitions and the destruction of stockpiles, are indicative of the TPNW’s humanitarian nature.<sup>111</sup>

For now, however, it is evident that the humanitarian nature of the TPNW is reflected within specific articles that establish positive obligations taking the form of remedial measures requiring States parties to assist victims and address the environmental damage caused by nuclear weapons use and testing.<sup>112</sup> Certain remedial measures were incorporated in the APMBC, specifically Article 5 which requires each State party to ‘destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control’.<sup>113</sup> Alongside comparable clearance obligations to the APMBC, CCM goes a step further by imposing a positive obligation relating to victim assistance under Article 5, which requires each State party to ‘adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion’.<sup>114</sup> Such provisions clearly seek to address the previous harm caused by anti-personnel mines and cluster munitions, whilst simultaneously aim to minimise any future harm that could be caused by unexploded remnants.

These evidently victim-focused provisions directly inspired the text of Article 6(1) of the TPNW,<sup>115</sup> which provides in full, that:

‘Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion’.<sup>116</sup>

This provision emphasises the centrality of humanitarian considerations within the TPNW by requiring parties to take clear steps to address prior harm and suffering caused to victims by both the use and testing of nuclear weapons within their jurisdiction.<sup>117</sup> Moreover, drawing from related preambular paragraphs,<sup>118</sup> this obligation seeks to address harm caused to specific groups, including women, children and indigenous populations who have been displaced from their cultural lands. This is a particularly significant obligation for the Pacific region where nuclear testing by both the US and France was rife throughout the Cold War in the Marshall Islands and French Polynesia respectively.<sup>119</sup>

In addition, Article 6(2) expressly requires States parties to ‘take necessary and appropriate measures towards the environmental remediation of areas so contaminated’ by the use or testing of nuclear weapons within areas under its jurisdiction or control.<sup>120</sup> Though not expressly couched in humanitarian concerns, it is evident that requiring steps to remediate damage caused to the environment serves an important humanitarian purpose in protecting a ‘global commons’ through the imposition of legally-binding positive commitments.<sup>121</sup> Importantly, contrary to the general principle of non-retroactivity of treaty provisions to cover past actions,<sup>122</sup> the positive obligations under Article 6(1) and (2) cover both past, present and future testing and use of nuclear weapons.<sup>123</sup>

Although primary responsibility for assistance remediation under Article 6 rests with the affected State in which the testing or use of nuclear weapons occurred<sup>124</sup> – which in many cases will not be the same State that carried out the nuclear testing activity, and may ultimately not be in a position to adequately fulfil its obligations under Article 6(1) and (2)<sup>125</sup> – Article 7 establishes a general obligation upon States parties to cooperate when implementing the positive obligations under Article 6. Article 7(3), for example, establishes an obligation on each State party ‘in a position to do so’ to provide technical, material or financial assistance to other TPNW parties affected by nuclear weapon testing.<sup>126</sup> Although this obligation is somewhat qualified,<sup>127</sup>

Docherty correctly notes that ‘[b]ecause assistance can come in a variety of forms – technical, material and financial – all states should be in a position to help in some way’.<sup>128</sup>

Finally, Article 7(6) recalls that a State party which has ‘used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to State Parties, for the purpose of victim assistance and environmental remediation’.<sup>129</sup> However, should no NWPS join the TPNW, this provision will remain of no immediate effect. Overall, by encouraging cooperative approaches to implementation, Article 7 reflects the shared goodwill on the part of TPNW States parties in meeting their humanitarian-based obligations under Article 6.

## IV. HOW THE TPNW INCORPORATES STATE-CENTRED SECURITY INTERESTS

Despite there being clear, and to some degree extensive, evidence that the TPNW constitutes a further example of humanitarian disarmament,<sup>130</sup> there are certain elements and features of the treaty which alludes to the continuing presence of coinciding State-orientated security interests. This Section intends to reveal and explore these present security characterisations in greater depth as indicated within the TPNW negotiation process, preambular purpose and operative provisions. Whilst again adopting the characterising features used by Docherty and McCarthy used in Part III above, it will become apparent that the identifying checklist used to categorise disarmament instruments becomes problematic and overly malleable in its application. Criticisms of these characterising features and their application by commentators will be explored further in Part V.<sup>131</sup>

### A. NEGOTIATION PROCESS

A defining feature of security disarmament instruments is that their negotiation processes are firstly ‘monopolized by states, specifically by military powers’,<sup>132</sup> and secondly, that the participating States seek to prohibit the weapon in question due to the threat such weapons pose to State security interests.<sup>133</sup> Furthermore, the negotiating history and process of traditional disarmament treaties often lack transparency, with the consultations being dominated by military officials and diplomats seeking to advance the agenda of their respective States.<sup>134</sup> This often leads to time-consuming and lengthy discussions in consensus-based forums such as the Conference on Disarmament, which in turn creates a *de facto* veto power in the hands of the military powerful States – in this case, present NWPS.<sup>135</sup>

The CWC serves as a useful example. Although humanitarian considerations helped motivate early efforts to prohibit the use of asphyxiating gases and

other chemicals in the Geneva Gas Protocol of 1925,<sup>136</sup> by the 1970s, the utility and benefits of chemical weapons as methods of warfare for the major military powers was no longer as strategically important.<sup>137</sup> Consequently, the military powers of the time sought to prohibit chemical weapons primarily due to strategic factors, with the aim of limiting the possible proliferation of chemical weapons by further States and prohibiting their use against the major military powers.<sup>138</sup> Another example of this would be the NPT,<sup>139</sup> in which the US and the Soviet Union which generally maintained control over the negotiations by exerting influence over their respective blocs within the Eighteen-Nation Disarmament Commission.<sup>140</sup> Indeed, the underlying concern shared by both the US and Soviet Union during the NPT negotiations to limit the spread of nuclear weapons was driven out of a desire to minimise the threat of nuclear weapons being in the hands of numerous, often adversarial States.

With this brief description in mind, it seems difficult to contend that the TPNW reflects traditional security-based disarmament negotiations, particularly given the above discussion in Part III.A.<sup>141</sup> Indeed, none of the nine NWPS or their military allies, with the exception of the Netherlands,<sup>142</sup> participated in the 2017 negotiations and their participation in the three Humanitarian Conferences also varied.<sup>143</sup> Furthermore, as noted previously, the TPNW negotiations took place in an independent conference, thus stepping outside of traditional nuclear disarmament forums such as the NPT Review Process.<sup>144</sup> Finally, and in contrast to the rules of procedure of the Conference on Disarmament and NPT Review Process, the 2017 negotiation conference rules of procedure confirmed that voting on matters of substance would be decided by a two-thirds majority of States present and voting if agreement could not be reached by consensus.<sup>145</sup>

Nevertheless, there remains some evidence to suggest that participating States also had security considerations in mind during the Humanitarian Initiative and negotiation conference.

First, as well as seeking to address the humanitarian consequences of nuclear weapons use, the non-aligned NNWS had a concurrent desire to address the slow pace of nuclear disarmament efforts pursuant to Article VI by the NPT-recognised nuclear weapon States (NWS),<sup>146</sup> despite the fact the NNWS have, for the most part, refrained from acquiring nuclear weapons in accordance with Article II of the NPT.<sup>147</sup> Indeed, it has been acknowledged by commentators analysing the humanitarian nature of the TPNW that this growing sense of frustration among the non-aligned NNWS, in conjunction with ‘an influx of advocates from previously successful [humanitarian] weapons-ban campaigns’,<sup>148</sup> helped facilitate the adoption of the TPNW.<sup>149</sup>

This rationale is further supported when one considers the comparable subject matter, purpose and preceding context of both the NPT and TPNW. Whilst the NPT was

originally negotiated to address the threat posed by horizontal proliferation which would increase the risk of nuclear war,<sup>150</sup> concerns over the increasing likelihood of nuclear exchange have arisen more recently given the development of nuclear weapon capabilities by ‘irresponsible’ States such as the DPRK and Pakistan,<sup>151</sup> alongside the escalation of US tensions with Russia, Iran, China and the DPRK. As such, these existing concerns over the deteriorating international security environment in the present day may further indicate that State-based security interests remained of relevance during the TPNW negotiations.

A further example of coinciding security interests can be found in both statements and UNGA resolutions endorsing the Humanitarian Initiative, which repeatedly framed the dangers posed by nuclear weapons and the need for nuclear disarmament in terms of the threats both to States and international peace and security. During the Nayarit Conference in February 2014, for example, Switzerland referred to nuclear weapons as both a ‘threat to international security and humankind’.<sup>152</sup> Austria advanced a comparable two-pronged stance during the 2017 negotiation conference, claiming that a prohibition treaty would mean that ‘every State – including every NWS and every umbrella State – would be more secure and their people would be safer if no State had nuclear weapons’.<sup>153</sup> These statements arguably indicate that both the Austrian and the Swiss delegations envisaged two types of dangers, which although perhaps closely interconnected, remain distinguishable in affecting both State and human security.

Similarly, during the 2016 Open-Ended Working Group ‘Taking Forward Multilateral Nuclear Disarmament’ that recommended convening the 2017 negotiation conference,<sup>154</sup> Sweden explained the underlying security dimension informing its own interest in pursuing new disarmament measures, stating:

‘One country’s claim to security through nuclear weapons, means another country’s insecurity and is problematic for non-proliferation efforts. Regional security concerns thought to be mitigated through the reliance on nuclear weapons don’t only affect that region negatively but also global security. In my government’s view a sustainable peace cannot be built with nuclear weapons and this makes the work we conduct here more important than ever’.<sup>155</sup>

While the Swedish statement also asserted that ‘[t]he humanitarian initiative continues to lay the foundation for our perspective’,<sup>156</sup> each of the aforementioned statements attest to the co-existing nature of the security and humanitarian considerations of participating NNWS which informed their desire to pursue the negotiation of the TPNW.

Another overlooked source which demonstrates the co-existence of State-based security interests amongst the non-aligned NNWS during the lead up to the TPNW negotiations are various UNGA resolutions concerning nuclear disarmament. Many of these resolutions emphasise on the one hand how nuclear disarmament is ‘essential for the prevention of nuclear war and for the *strengthening of international peace and security*’, while at the same time recognising the ‘most serious threat to the survival of *mankind*’ posed by nuclear weapons.<sup>157</sup> Others suggest that the use of nuclear weapons would be both a ‘violation of the UN Charter and a crime against humanity’.<sup>158</sup> Although some of these resolutions were issued to support the commencement of negotiations of a proposed Nuclear Weapons Convention,<sup>159</sup> they were still adopted with the support of many of the non-aligned NNWS involved in the Humanitarian Initiative and TPNW negotiations, albeit within some notable absentees,<sup>160</sup> and clearly allude to the dual-interests at stake informing their efforts towards disarmament.

Consequently, it seems that the TPNW negotiation process does indicate that State-based security-driven interests remained of importance amongst the non-aligned NNWS. Although it is perhaps fair to conclude that the existence of security-centred rhetoric took on a somewhat ‘secondary’ role compared to the broader humanitarian considerations underpinning the TPNW negotiation process as outlined previously,<sup>161</sup> this does not dispute the fact that such State-centred interests continue to exert some influence on the desire to negotiate the TPNW.

## B. PREAMBULAR REFERENCES TO SECURITY

Building upon the State-centred security references in the negotiation process of the TPNW, an additional feature of traditional disarmament instruments – specifically epitomised by the BWC and CWC – are explicit references to security framed objectives within their respective preambles. In categorising the CWC, Docherty argues that the Convention’s preamble ‘defines its security objectives in terms of preserving peace’<sup>162</sup> through the explicit recognition of the shared desire of States parties to ‘contribute to the realization of the purposes and principles of the Charter of the United Nations’,<sup>163</sup> with a determination to ‘act with a view of achieving effective progress towards general and complete disarmament’.<sup>164</sup> Put differently, by referencing the United Nations (UN) Charter, traditional disarmament instruments endorse the Charter’s objectives of ‘maintain[ing] international peace’ by settling breaches of the peace and international disputes by peaceful means,<sup>165</sup> and ‘developing friendly relations among nations’.<sup>166</sup> This has led Docherty to conclude that ‘[w]ith its references to the UN Charter and general and complete disarmament, the preamble of the Chemical Weapons Convention *indicates that its purpose is inextricably linked to the concerns of nation states*’.<sup>167</sup>

Despite clearly reflecting the humanitarian motivations behind the TPNW, its preamble incorporates similar security-orientated references immediately in paragraph 1, which –like the CWC – notes that States parties are ‘determined to contribute to the realization of the purposes and principles of the Charter of the United Nations’.<sup>168</sup> The preamble, however, goes beyond the CWC and recalls that ‘in accordance with the Charter of the United Nations, States must refrain in their international relations from the *threat or use of force against the territorial integrity or political independence of any State... and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments* of the world’s human and economic resources’.<sup>169</sup> These are clearly State-centred references under Docherty’s own assessment, emphasising the necessity of upholding the objectives of the UN Charter which seeks to promote peace and stability amongst States, coupled with reference to how international peace and security are enhanced through arms regulation.

Moreover, and perhaps most significantly, no comparable references to security-centred considerations or the UN Charter were included within either the APMBC or CCM; the prior two examples of humanitarian disarmament from which inspiration for the TPNW emerged.<sup>170</sup> In this respect, the TPNW’s reaffirmation of security objectives within the preamble marks a clear departure from existing humanitarian disarmament instruments. At the same time, it is certainly plausible to suggest that references to upholding the purposes of the UN Charter can serve a humanitarian objectives too. Indeed, while the Charter’s first, and arguably paramount objective is to ‘maintain international peace and security’, this incidentally brings further humanitarian benefits by reducing the frequency of armed conflict, thereby alleviating the suffering and harm caused by hostilities.

Finally, an explicit reference to State security interests is provided by preambular paragraph 5. Admittedly, this paragraph begins by acknowledging the ‘ethical imperatives for nuclear disarmament and the urgency of achieving and maintaining a nuclear-weapon-free world, which is a global public good’,<sup>171</sup> thereby framing the imperative necessity of nuclear disarmament in humanitarian based terms.<sup>172</sup> However, the paragraph subsequently continues by explicitly recognising that maintaining a nuclear-free world would also serve ‘both national and collective security interests’.<sup>173</sup> Like the various aforementioned statements noted during the TPNW negotiation process, preambular paragraph 5 explicitly notes both the humanitarian and State-centred security benefits that would result from achieving nuclear disarmament.

## C. OPERATIVE PROVISIONS

Despite the inclusion of humanitarian inspired positive obligations relating to victim assistance and

environmental remediation and the cooperative approaches to implementation under Articles 6 and 7 respectively,<sup>174</sup> the TPNW also contains provisions which reflect its security-orientated nature. According to Docherty, there are two primary operative provisions which clearly allude to a disarmament instrument’s State-centred security purpose:

‘[s]ecurity disarmament treaties focus on the elimination of certain weapons of war... They impose *absolute bans* on activities involving arms, such as use, production, transfer, and stockpiling. Security disarmament treaties also require the *destruction of existing stockpiles* to decrease the threat of future use’.<sup>175</sup>

As such, absolute prohibitions, coupled with stockpile destruction and disarmament provisions are common components of traditional disarmament instruments according to Docherty’s assessment. These features are also incorporated within the TPNW’s operative provisions.

Firstly, like the CWC,<sup>176</sup> Article 1 of the TPNW establishes an absolute ban on nuclear weapons related activities including prohibitions on the use or threat of use,<sup>177</sup> possession, manufacture, development and testing of nuclear weapons.<sup>178</sup> Moreover, the TPNW prohibits both the transfer and receipt of nuclear weapons by States parties,<sup>179</sup> alongside an undertaking never to assist or encourage ‘in any way, anyone to engage in any activity prohibited’ under the treaty.<sup>180</sup> Quite significantly, Article (1)(g) prohibits the stationing of nuclear weapons within the territory, jurisdiction or control of States parties too.<sup>181</sup> Given the breadth of these prohibitions, Casey-Maslen has suggested that the TPNW establishes the most comprehensive array of prohibitions of any international disarmament instrument negotiated so far.<sup>182</sup>

Moreover, like both the BWC and CWC,<sup>183</sup> the TPNW also imposes clear obligations to disarm and destroy existing stockpiles of nuclear weapons. Indeed, Article 4 establishes the primary disarmament obligations applicable to each acceding NWPS, requiring these States to accede to the TPNW and eliminate their respective nuclear weapons through one of two distinct disarmament ‘pathways’.<sup>184</sup> Article 4(1) takes a ‘destroy then join’ approach,<sup>185</sup> allowing NWPS to eliminate their nuclear weapons stockpiles and facilities first before acceding to the TPNW. Alternatively, Article 4(2) provides for a ‘join and destroy’ option, in which an acceding NWPS that ‘owns, possesses or controls nuclear weapons or other nuclear explosive devices shall immediately remove them from operational status, and destroy them as soon as possible but not later than a deadline to be determined by the first meeting of States Parties’.<sup>186</sup> These disarmament pathways are further supplemented by ‘Declaration’ requirements to be provided at the time of accession in accordance with Article 2,<sup>187</sup> and

the obligation under Article 4(5) for NWPS to report to the Meeting of States Parties on their progress towards eliminating both nuclear weapons and connected facilities.<sup>188</sup>

However, despite conforming to Docherty's characterisation of traditional disarmament instruments by including absolute prohibitions and stockpile destruction commitments in a similar manner to the CWC, a conceptual issue arises due to the determination that prohibitions and destruction provisions are also common to both the APMBC and CCM too.<sup>189</sup> Indeed, Docherty explicitly notes that '[w]hile the Chemical Weapons Convention and the Mine Ban Treaty were conceived of for security and humanitarian purposes, respectively, they share absolute preventive provisions'.<sup>190</sup> Put differently, reference to absolute preventive obligations can be indicative of *both* a treaty's humanitarian and security-driven objectives. Consequently, and as will be discussed further in Part V, highlighting absolute prohibitions and disarmament obligations as evidence of a particular treaty's 'nature' for the purposes of categorisation becomes open to overly flexible use. This may in turn undermine both the credibility and utility of the characterising 'checklist' employed by Docherty, McCarthy and Rietiker, among others, to categorise different disarmament instruments.<sup>191</sup>

A final illustration of how the TPNW's provisions indicate the co-existence of security-based considerations can be unearthed within the Article 17 withdrawal clause. The TPNW takes an innovative approach to withdrawal in comparison to existing nuclear arms control, non-proliferation and disarmament treaties, reflecting a balance between State-centred and humanitarian considerations.<sup>192</sup> On the one hand, if, after the 12-month notice period has expired, 'the withdrawing State Party is a party to an armed conflict, the State Party shall continue to be bound by the obligations of this Treaty and of any additional protocols until it is no longer party to an armed conflict'.<sup>193</sup> This clause is inspired by Article 20(3) of both the APMBC and the CCM,<sup>194</sup> and has the aim of preventing a TPNW party from announcing its withdrawal with the intention of using nuclear weapons in an armed conflict as soon as the 12-month notice period is satisfied.<sup>195</sup> This evidently serves a humanitarian purpose – at least to some extent – by delaying the potential use of nuclear weapons (thus avoiding human suffering and harm) precisely when they are most likely to be used – during an armed conflict.<sup>196</sup> Indeed, as Nystuen, Egeland and Graff Hugo note:

'Central to the TPNW is the prohibition of use of nuclear weapons, due to its catastrophic humanitarian impact and incompatibility with international humanitarian law (IHL). It is argued that involvement in armed conflict raises the risk of a nuclear weapons use, and excluding

*withdrawal from the TPNW in such a situation therefore makes good sense'.<sup>197</sup>*

On the other hand, these further requirements are preceded by Article 17(2) which contains what is commonly referred to as the 'extraordinary events' withdrawal clause. This clause was first included within the Partial Nuclear Test-Ban Treaty in 1963<sup>198</sup> and has been subsequently adopted in other 'traditional' disarmament instruments including Article X(1) of the NPT and Article XVI(2) of the CWC.<sup>199</sup> However, the 'extraordinary events' clause has been heavily criticised for establishing a purely subjective test, in which 'the ultimate authority to determine whether there exists "extraordinary events" that would justify the withdrawal of a party from the NPT lies with the withdrawing party itself'.<sup>200</sup> The subjective nature of the clause becomes apparent given the inclusion of phrases such as 'if it [ie the withdrawing State] decides' whether a particular extraordinary event related to the subject matter of the treaty has jeopardised 'its' subjectively determined supreme interests.

The extraordinary events clause in Article 17(2) is prone to these same weaknesses, but these are fortunately mitigated to some extent by the inclusion of the additional requirements of paragraph 3 noted above. However, most significantly for present purposes at least, are two points; first, neither the APMBC or CCM include an 'extraordinary events' clause within their respective withdrawal provisions; and second, the inclusion of the 'extraordinary events' clause arguably prioritises State-orientated subjectively determined 'supreme interests' – many of which will relate to self-defence and continuing survival – over collective humanitarian considerations. This has similarly been discussed by ICAN Director Beatrice Fihn who argues that the language of supreme interests in Article 17(2) 'feeds the narrative that there are certain interests, there are certain reasons to have nuclear weapons which is just counter to the whole beginning of the treaty that bans them under any circumstances'.<sup>201</sup> Indeed, Ritchie argued during the final stages of the negotiations that:

'[i]t is arguably incongruous to base a prohibition on the unacceptable consequences of nuclear violence whilst ostensibly enabling states to pursue nuclear weapons capability after the current three months notice, or even twelve months as the negotiators are now suggesting. The very logic of the nuclear ban treaty delegitimises the sovereign prerogative to understand security in terms of nuclear weapons'.<sup>202</sup>

As such, the inclusion of the extraordinary events clause arguably runs counter to the TPNW's central premise that nuclear weapons are considered illegitimate,

unacceptable weapons with devastating humanitarian consequences.<sup>203</sup> Consequently, retaining the language of supreme interests as commonly included in traditional disarmament instruments such as the NPT and CWC ultimately reflects the security-driven interests of certain, though admittedly a small minority,<sup>204</sup> of TPNW negotiating States which sought to retain a right to withdraw and prioritise individualistic considerations over human-centred objectives.

## V. IMPLICATIONS FOR THE TPNW AND HUMANITARIAN DISARMAMENT

In light of the discussion above, there is certainly sufficient evidence which indicates that security-orientated interests remained influential during the development of the TPNW. These security elements continue to exist in tandem with the oft-mentioned humanitarian reference and should not be neglected or overlooked. In light of this determination, the remainder of this article intends to discuss certain implications of this conclusion for the broader assessment of the TPNW and the understanding or conceptualisation of humanitarian disarmament instruments generally.

### A. RETHINKING THE IDENTIFYING ELEMENTS OF DISARMAMENT INSTRUMENTS

An initial observation concerns the characterising elements used by commentators to categorise disarmament instruments. Despite adopting what can essentially be described as a ‘checklists’ approach – establishing an initial point of reference when determining the nature of a particular disarmament instrument<sup>205</sup> – current analyses of the TPNW fail to accurately apply such characteristics when seeking to ‘categorise’ the treaty. Some commentators have consciously chosen not to discuss specific aspects of the TPNW preamble which demonstrate its security-driven nature.<sup>206</sup> Docherty, by contrast, seemingly acknowledges the existence of certain security references within the TPNW preamble, but seems to dismiss their significance as being

‘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’.<sup>207</sup>

However, this conclusion neglects the fact that a security-based reference emphasising the importance of upholding the purposes of the UN Charter is situated immediately in the second preambular paragraph,<sup>208</sup> before any mentioning of victims, IHL principles and environmental harm, and the disproportionate effects

of nuclear weapons on women, girls and indigenous populations.<sup>209</sup> Rather than a remnant of previous disarmament negotiations, the explicit inclusion of security references arguably indicates a prominent – as opposed to incidental – role of State-driven security-interests as reflected immediately in the preamble.

Furthermore, certain checklist ‘elements’ have been invoked as evidence to highlight *both* the security or humanitarian nature of a particular treaty. In other words, a single particular feature ‘X’ can, and has, been used as evidence to support both conclusion ‘Y’ and ‘Z’, thereby creating a situation of ‘double-counting’ of sorts. This ‘double-counting’ arises in connection to preventive obligations of the TPNW, taking the form of absolute prohibitions under Article 1 and disarmament obligations under Article 4.<sup>210</sup> Yet despite acknowledging that preventive obligations are commonly incorporated into the text of both ‘traditional’ and ‘humanitarian’ disarmament treaties,<sup>211</sup> Docherty claims that the comprehensiveness of the TPNW’s absolute prohibitions serves to ‘advance the treaty’s humanitarian goal by working to prevent future harm’.<sup>212</sup>

To some extent, Docherty’s assessment is seemingly justified by recalling the broader context of the instrument in question,<sup>213</sup> particularly in this case the IHL references in the TPNW preamble and positive obligations concerning Victim Assistance and International Cooperation in Articles 6 and 7.<sup>214</sup> However, her assessment fails to consider the entire TPNW context. Indeed, when one recalls the presence of various security-orientated references and characteristics present in the TPNW, such as the need to uphold the purposes of the UN Charter within the preamble – references noticeably absent in the APMBC and CCM<sup>215</sup> – alongside the subjective ‘extraordinary events’ clause of Article 17(2),<sup>216</sup> it can equally be argued that the preventive obligations under Articles 1 and 4 reinforce the underlying security-based interests of States participating in the TPNW’s broader process and negotiation.

As a result, referencing the absolute prohibitions and disarmament obligations under Articles 1 and 4 respectively as evidence of the TPNW’s humanitarian purpose loses some of its persuasive value when one can equally demonstrate that preventive obligations can similarly advance the security interests of States, as Docherty herself concedes.<sup>217</sup> This may subsequently suggest that at least some – though admittedly not all – of the identifying characteristics noted by Docherty and McCarthy are somewhat too flexible to effectively use as a ‘checklist’ in order to accurately determine a treaty’s underlying ‘nature’ and motivations. One implication, therefore, is that these identifying characteristics may require revision to address the malleable manner in which the ‘checklists’ used can be applied in practice. Alternatively, it may be that a more conservative

approach is needed, whereby only specific characteristics of a treaty which can *solely* indicate either its security or humanitarian nature should be cited as evidence of the treaty's predominant nature, thereby excluding the possibility of double-counting. This article is not the place to recommend such changes, but the present malleability of the identifying 'checklist' use by commentators must nonetheless be addressed if our assessment of the nature of a specific disarmament instruments in the future is to be credible.

## B. THE VALUE OF CATEGORISATION?

A further implication stemming from the discussion above, is that the general acceptance of the TPNW as an illustration of humanitarian disarmament may need to be reconsidered in light of the clear presence of security-centred references within the TPNW at various points. In contrast to McCarthy who identifies a dualistic distinction between traditional and humanitarian disarmament, Docherty endorses the existence of a middle-ground category disarmament instruments aptly named 'hybrid' disarmament.<sup>218</sup> Taking the Convention on Conventional Weapons (CCW) of 1980 and its associated protocols as an example,<sup>219</sup> Docherty argues that the underlying purpose of hybrid disarmament

'combines concerns for protecting security and minimizing suffering of individuals. As a result, they [hybrid disarmament instruments] represent a blend of elements characteristic of security disarmament and humanitarian disarmament, while moving increasingly towards the latter'.<sup>220</sup>

In light of the conclusions reached in Part IV, is it more accurate to categorise the TPNW as a 'hybrid' disarmament instrument? The TPNW certainly shares various characteristics with the CCW, particularly comparable preambular paragraphs which Not needed identify State security concerns by emphasising the need to uphold the principle and purposes of the UN Charter.<sup>221</sup> And as noted, the TPNW simultaneously pays recognition to human-centred considerations through reference to specific principles of IHL and the need to protect civilians as a means of showing a balance between security and human-centred objectives.<sup>222</sup>

At the same time, the greater frequency and explicit nature of the human and victim-focused provisions in Article 6 in particular, alongside detailed preambular references to IHL principles suggests that the TPNW is clearly distinct from 'hybrid' disarmament approaches such as the CCW, which frames its human-centred motives in a much vaguer fashion. Consequently, the TPNW's provisions do not demonstrate a progressive shift in the direction of humanitarian disarmament;<sup>223</sup> instead, the TPNW is *predominantly* human and victim-orientated in nature, coupled with a coinciding,

though perhaps less influential State-centred security dimension. This contrasts with the CCW, where Docherty notes that '[h]umanitarian concerns led to the convening of the conference [to adopt the CCW], but security interests determined its outcome'.<sup>224</sup> As such, seeking to categorise the TPNW not as a humanitarian instrument but rather a further example of hybrid disarmament seems somewhat forced and inaccurate.

However, both the malleability of identifying checklists,<sup>225</sup> and the alternative, albeit inaccurate attempt to categorise the TPNW as a 'hybrid' disarmament instrument ultimately gives rise to more demanding questions as to precisely what advantages are brought by categorising complex disarmament instruments into neatly separated groupings such as 'traditional', 'hybrid', or 'humanitarian' disarmament. What benefit does describing, or trying to place a treaty – which has been negotiated and developed by taking into account the views, interests and desires of a multitude of States and actors – actually bring? There are, of course, certain advantages, if implemented correctly. Categorisation can help identify trends, or periods in which certain interests dominated multilateral disarmament discourse.<sup>226</sup> From a historical perspective, these trends can help describe the evolution of disarmament over longer periods of time and can be informative of times of change and the prevalence of certain underlying interests.

At the same time, attempts to try and 'force' the categorisation of the TPNW should not come at the expense of reflecting the reality on the ground. The manipulation of identifying 'checklist' factors discussed previously, either knowingly or unwillingly, ultimately creates a misrepresentation of the TPNW, simply in order to describe or argue that the treaty conforms to an abstractly identified category of disarmament instruments; 'humanitarian disarmament'. By contrast, the underlying purpose of this discussion has been to provide an accurate reflection of the underlying motivations behind the TPNW. It seeks to delve beyond the human-centre narrative that has dominated discourse by instead acknowledging and highlighting the complex array of interests at stake during the negotiations. This may not paint the perfect picture of the TPNW that humanitarian disarmament proponents desire. But the conclusions reached goes beyond mere issues of semantics and may have tangible implications in our assessment of the provisions of the TPNW.

Using just one example, the conclusions reached here may affect our interpretation of certain aspects of the treaty.<sup>227</sup> As is well known, Articles 31 and 32 of the Vienna Convention of the Law of Treaties establishes general rules on treaty interpretation under international law.<sup>228</sup> Under Article 31(1), a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>229</sup> One must consider both the

subsequent agreement between parties and practice of States regarding the interpretation of provisions,<sup>230</sup> while recourse may also be given to the *travaux préparatoires* of the treaty ‘in order to confirm the meaning resulting from the application of article 31’, or to determine the meaning if the interpretation under Article 31 leads to an obscure or manifestly unreasonable result.<sup>231</sup>

Although the International Law Commission generally favoured an approach which prioritised the ordinary meaning of the text which ‘must be presumed to be the authentic expression of the intention of the parties’,<sup>232</sup> Articles 31 and 32 draw upon each of the traditional schools of interpretation;<sup>233</sup> the textual approach, which presumes the ‘intentions of the parties are reflected in the text of the treaty’; the intent approach, which seeks to determine the intention of the parties adopting the treaty to resolve ambiguity; and the teleological school, which aims to ascertain the object and purpose of a treaty and interpret the provisions in light of this.<sup>234</sup> As such, the intentions of the parties constitutes an important consideration in the process of interpretation, whether this is assumed from the actual text of an instrument, or assessing subjective intentions from the *travaux préparatoires* to provide additional guidance in the absence of clarity.

Considering this understanding of treaty interpretation, there is substantial practical value in, and indeed a genuine need to acknowledge both the co-existing security-driven and humanitarian inspired aspects of the TPNW in order to accurately account for the intentions and underlying motivations of the negotiating parties to the 2017 conference. In fact, even when one takes the text of the treaty to constitute an expression of the negotiating parties,<sup>235</sup> failure to consider the significance of the security-based references within the TPNW text ignores the intentions of negotiating States too. Ultimately, the failure to acknowledge the coinciding existence of security interests alongside genuine human-centred concerns could potentially result in misleading assessments and interpretations of the TPNW and may even present a false account of the underlying object and purpose of the treaty as well.

### C. DESCRIBING REALITY: THE ADVANTAGE OF RECOGNISING SECURITY INTERESTS

Finally, while security-based objectives and humanity considerations are often considered competing objectives balanced against each other, there seems to be no obvious reason why *both* altruistic humanitarian concerns and State-based security interests cannot co-exist in order to address the threat to international peace and security presented by nuclear war. In fact, these two approaches to disarmament, though somewhat distinct with independent purposes, require similar action in the same direction and may therefore be mutually reinforcing to an extent.<sup>236</sup> Borrie has previously made a

similar point in 2005 when discussing the added value of humanitarian perspectives for arms control and disarmament efforts, arguing that:

‘This “national security” reference point remains relevant and important. Nor is it likely to be eclipsed while the nation state remains the basic unit of international order. But new and complex challenges of security this century... increasingly call for supplementary perspectives in order for them to be addressed effectively. Humanitarian perspectives and concepts can constitute certain of these supplements. They do not need to be viewed as *exclusive alternatives to national security approaches in order to assist negotiating practitioners* and can help build common ground in responding to collective challenges in security’.<sup>237</sup>

Furthermore, given the predominant influence of State-based security considerations in prior nuclear non-proliferation and disarmament negotiations,<sup>238</sup> including the NPT,<sup>239</sup> it is arguably disingenuous to suggest that these existing interests were simply cast aside altogether by the non-aligned NNWS during the TPNW negotiations in favour of an exclusively humanitarian approach. In connection with the TPNW, Borrie, Spies and Wan have noted that simply;

‘because states and other actors aligned themselves with ICAN, it does not necessarily follow that they wholeheartedly accepted the value or principle-driven approach it promoted in support of a nuclear prohibition. Sometimes morals suit self-interest, and the normative pressure states supporting the TPNW hope will gather over time will presumably suit their national interests if it results in nuclear disarmament’.<sup>240</sup>

Put differently, while the human-centred approach advanced by ICAN offered a novel means of overcoming the stagnation in nuclear disarmament efforts which appealed to like-minded NNWS, this does not necessarily mean that this human-centred approach totally replaced underlying State-based interests in upholding security. Though Borrie, Spies and Wan certainly do not aim to discount the importance of the Humanitarian Initiative, they suggest that scholarly accounts which allude to a ‘purely’ humanitarian-interest rhetoric behind the TPNW process is ‘a little too neat and generalized’.<sup>241</sup> Instead, the TPNW demonstrates these co-existing interests operating in tandem, using the humanitarian reframing as a means of advancing co-existing State-based security interests. Equally, this does not contradict the fact that the TPNW process constituted a ‘genuine’ humanitarian venture by the non-aligned NNWS.<sup>242</sup>

Furthermore, acknowledging the coinciding and mutually beneficial influence of security-driven and humanitarian considerations may increase the TPNW's potential impact on the NWPS. It is worth noting that a primary criticism raised against the TPNW by opponents relates to the idealistic and morally-driven nature of the treaty that 'disregards the realities of the international security environment'.<sup>243</sup> This has led former US President Donald Trump to dismiss the TPNW and Humanitarian Initiative as magical thinking in January 2018,<sup>244</sup> while other commentators oppose the treaty as unrealistic and misguided in facilitating disarmament efforts.<sup>245</sup> As such, the TPNW arguably reflects an existing and growing divide between the non-aligned NNWS supporters of the treaty who seek progress on disarmament, and the fierce, reality-based perspective of the NWPS which oppose the solely humanitarian, moral arguments behind the TPNW. Continuing to solely emphasise the humanitarian inspirations of the TPNW whilst casting aside concurrently existing security concerns does nothing to bridge this growing divide.

However, by acknowledging the security driven concerns behind the TPNW, including the escalation of tensions between nuclear powers and the increased risk of nuclear war, TPNW supporters can provide a case for the necessity of the treaty on both security and humanitarian grounds. Rather than being condemned as idealistic, as opponents so frequently claim, acknowledging the influence of security-orientated objectives can ground the TPNW firmly in reality. By recognising these coinciding interests, TPNW proponents may be able to bridge-build between supporters and opponents, demonstrating how the motivations behind the adoption of the treaty are not based entirely on altruistic and moral arguments, but were equally driven by security-driven concerns which the NWPS can relate to. This embracing of the presence of security-concerns would not constitute a defeat for humanitarian disarmament; on the contrary, it offers a new perspective upon which the humanitarian-inspired motivations of both civil society and States can be achieved in tandem with security goals.

## VI. CONCLUSION

This article began with an important point that is worth repeating once more,<sup>246</sup> it is beyond question that humanitarian-based objectives contributed towards, and inspired, the negotiation of the TPNW. This humanitarian reframing in weapons discourse has been vital in raising awareness of the indiscriminate harm and the devastation that nuclear weapons leave behind after the security-driven interests of the user State have been advanced. The novelty and success of this approach, epitomised by the awarding of the Nobel Peace Prize to ICAN in 2017,<sup>247</sup> should not be understated. Humanitarian disarmament

has and will continue to play an important role in future disarmament discussions in the coming years.<sup>248</sup> This is certainly a welcome development and offers the potential to shake up nuclear disarmament efforts to better reflect the interests of States and humanity as a whole.

Nevertheless, the discussion in Part IV has revealed how such security-considerations have been reflected in the negotiation process, preambular language and operative clauses of the TPNW. This analysis has helped reveal and demonstrate the dual-nature of the TPNW, even if the underlying human-centred considerations could be seen as taking greater prevalence compared to earlier humanitarian disarmament instruments. Importantly, this article has highlighted some important practical implications of this assessment and questions the need for categorisation of disarmament instruments in place of an accurate assessment of the TPNW's actual nature.<sup>249</sup>

Yet perhaps the most significant conclusion reached is that these contrasting interests and perspectives each serve to add a different viewpoint on the necessity and urgency of achieving nuclear disarmament. By affording greater emphasis to the security-driven motivations, alongside the pressing humanitarian concerns which evidently inspired the TPNW process, one can begin to bridge the divide between opponents and supporters of the treaty by creating a case for the necessity of the treaty on both security and humanitarian grounds. Such recognition serves to reduce concerns that the TPNW is morally aspirational and therefore detached from reality. We must therefore embrace the diversity of State interests at play and acknowledge their coinciding, often mutually beneficial existence in order to fully appreciate and understand the underlying motivations of States to conclude disarmament instruments, including the TPNW.

## NOTES

1 Treaty on the Prohibition of Nuclear Weapons, UN Doc A/CONF.229/2017/8, 7 July 2017.

2 Daniel Rietiker, 'The Treaty on the Prohibition of Nuclear Weapons: A Further Confirmation of the Human and Victim-Centred Trend in Arms Control Law', in Jonathan Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law – Volume IV* (Springer 2019) 326.

3 Gro Nystuen, Kjølv Egeland, and Torbjørn Graff Hugo, 'The TPNW: Setting the Record Straight', *Norwegian Academy of International Law*, October 2018, 1.

4 'Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption' (*United States Mission to the United Nations*, 7 July 2017) <<https://usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-united-nations-of-the-united-states-united-kingdom-and-france-following-the-adoption/>> accessed 6 November 2020; Newell Highsmith and Mallory Stewart, 'The Nuclear Ban Treaty: A Legal Analysis' (2018) 60(1) *Survival: Global Politics and Strategy* 129; Michael Rühle, 'The Nuclear Weapons Ban Treaty: Reasons for Scepticism' (*NATO Review*, 19 May 2017) <<https://www.nato.int/docu/review/articles/2017/05/19/the-nuclear-weapons-ban-treaty-reasons-for-scepticism/index.html>> accessed 6 November 2020.

5 ibid.

- 6 'P5 Joint Statement on the Treaty on the Non-Proliferation of Nuclear Weapons' (UK Mission to UN in New York, 24 October 2018) <<https://www.gov.uk/government/news/p5-joint-statement-on-the-treaty-on-the-non-proliferation-of-nuclear-weapons>> accessed 6 November 2020.
- 7 United Nations Treaty Collection, Status of the Treaty on the Prohibition of Nuclear Weapons <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-9&chapter=26&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en)> accessed 6 November 2020.
- 8 TPNW (n 1) art 15(1).
- 9 Christopher Evans, 'Remedying the Limitations of the CTBT? Testing Under the Treaty on the Prohibition of Nuclear Weapons' (2020) 21(1) *Melbourne Journal of International Law* 46, 81–86; Stuart Casey-Maslen, 'The Relationship of the 2017 Treaty on the Prohibition of Nuclear Weapons with other Agreements: Ambiguity, Complementarity, or Conflict?' (EJIL: Talk! 1 August 2017) <<https://www.ejiltalk.org/the-relationship-of-the-2017-treaty-on-the-prohibition-of-nuclear-weapons-with-other-agreements-ambiguity-complementarity-or-conflict/#more-15450>> accessed 6 November 2020.
- 10 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 U.N.T.S. 161.
- 11 Eirini Giorgou, 'Safeguard Provisions in the Treaty on the Prohibition of Nuclear Weapons' (Arms Control Law, 11 April 2018) <<https://armscontrollaw.com/2018/04/11/safeguards-provisions-in-the-treaty-on-the-prohibition-of-nuclear-weapons/>> accessed 6 November 2020; Tytti Erästö, Ugnė Komžaitė, and Petr Topychkanov, 'Operationalizing Nuclear Disarmament Verification' (2019) No. 3, *SIPRI Insights on Peace and Security*.
- 12 Stuart Casey-Maslen, 'The Status of Nuclear Deterrence Under International Law in Light of the Treaty on the Prohibition of Nuclear Weapons', in Terry D Gill, Robin Geiß, Heike Krieger, and Christophe Paulussen (eds), *Yearbook of International Humanitarian Law – Volume 21* (Springer 2018); Anna Hood and Monique Cormier, 'Can Australia Join the Nuclear Ban Treaty Without Undermining ANZUS?' (2020) 44(1) *Melbourne University Law Review* 1 (advance copy).
- 13 See Rietiker (n 2); Rebecca Davis Gibbons, 'The Humanitarian Turn in Nuclear Disarmament and the Treaty on the Prohibition of Nuclear Weapons' (2018) 25(1) *Nonproliferation Review* 11, 11; Bonnie Docherty, 'A 'Light for all Humanity': The Treaty on the Prohibition of Nuclear Weapons and the Progress of Humanitarian Disarmament' (2018) 30(2) *Global Change, Peace and Security* 163; Kjølv Egeland, 'Banning the Bomb: Inconsequential Posturing or Meaningful Stigmatization?' (2018) 24(1) *Global Governance* 11; Tilman Ruff, 'Negotiating the UN Treaty on the Prohibition of Nuclear Weapons and the Role of ICAN' (2018) 30(2) *Global Change, Peace and Security* 233; Tom Sauer and Mathias Reveraert, 'The Potential Stigmatizing Effect of the Treaty on the Prohibition of Nuclear Weapons' (2018) 25(5) *The Nonproliferation Review* 437.
- 14 ibid.
- 15 See Part III.
- 16 See Part II which examines the notion of 'traditional' or 'security' disarmament in greater detail.
- 17 See eg Bonnie Docherty, 'Ending Civilian Suffering; The Purpose, Provisions and Promise of Humanitarian Disarmament Law' (2010) 15(1) *Austrian Review of International and European Law* 7; Docherty (n 13).
- 18 Patrick McCarthy, 'Deconstructing Disarmament: The Challenge of Making the Disarmament and Arms Control Machinery Responsive to the Humanitarian Imperative', in John Borrie, Vanessa M Randin (eds), *Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action* (UNIDIR 2005).
- 19 Docherty (n 17) 8, for example argued at the time of writing that '[t]he humanitarian disarmament movement has gained momentum over the last fifteen years', thus suggesting a greater significance since 1995. See generally, Nick Ritchie and Kjølv Egeland, 'The Diplomacy of Resistance: Power, Hegemony and Nuclear Disarmament' (2018) 30(2) *Global Peace Change and Security* 121, describing the humanitarian approach to nuclear weapons as 'radical' and an 'uprising'.
- 20 Dunworth, for example, argues that humanitarian considerations in the field of disarmament law generally has been prominent since the St Petersburg Declaration of 1868, and has influenced nuclear weapons regulation since the first use of nuclear weapons in 1945, see Treasa Dunworth, *Humanitarian Disarmament: An Historical Enquiry* (CUP 2020) 13–47.
- 21 ibid; Taylor Benjamin-Britton, Matthew B Bolton, and Sarah Njeri, 'The Humanitarian Disarmament Movement: An Assessment and Review', in Matthew B Bolton, Sarah Njeri, and Taylor Benjamin-Britton (eds), *Global Activism and Humanitarian Disarmament* (Palgrave Macmillan 2020).
- 22 Markus Reiterer and Cornelia Kratochvil, 'Introduction to the Agora on Humanitarian Disarmament' (2010) 15(1) *Austrian Review of International and European Law* 3, 4; John Borrie, 'Disarmament as Humanitarian Action: From Perspective to Practice', in John Borrie and Vanessa Martin Randin (eds), *Disarmament as Humanitarian Action: From Perspective to Practice* (UNIDIR 2006) 9.
- 23 As classified by McCarthy (n 18).
- 24 Docherty (n 17) 12–13. For consistency, this article uses the phrase 'traditional' disarmament as favoured by McCarthy (n 18) to refer to disarmament efforts which have at their centre State-oriented security interests.
- 25 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted on 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163.
- 26 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 UNTS 45.
- 27 John Borrie, 'Rethinking Multilateral Negotiations: Disarmament as Humanitarian Action', in John Borrie and Vanessa M Randin (eds), *Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action* (UNIDIR 2005) 7; Docherty (n 17) 13.
- 28 While the State undoubtedly remains the most important subject of international law, other actors have taken on increasing rights, obligations and abilities in recent decades, see Malcolm N Shaw, *International Law* (CUP 2017) 155–209.
- 29 Docherty (n 13) 166.
- 30 Docherty (n 17) 20.
- 31 Indeed, Mathews and McCormack note the influence of human suffering following Saddam Hussein's use of chemical weapons on Kurdish populations in 1988 as providing further impetus towards the adoption of the CWC, see Robert J Mathews and Timothy L H McCormack, 'The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties' (1999) 81(834) *International Review of the Red Cross* 331.
- 32 Docherty (n 17) 12–13; Benjamin-Britton, Bolton, and Njeri (n 21) 3.
- 33 ibid; Bonnie Docherty, Daniel Levine-Spound and Alice Osman, 'Humanitarian Disarmament: The Way Ahead', Harvard Law School, 5–6 March 2018, 1 <<http://hrp.law.harvard.edu/wp-content/uploads/2018/10/HumanitarianDisarmamentConferenceReport.pdf>> accessed 6 November 2020.
- 34 Docherty (n 13) 165; McCarthy (n 18) 56.
- 35 'Home' (*Humanitarian Disarmament: Seeking to Prevent and Remediate Arms-Inflicted Human Suffering and Environmental Harm*) <<https://humanitariandisarmament.org/>> accessed 6 November 2020.
- 36 See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 35(2).
- 37 Docherty, Levine-Spound and Osman (n 33) 1.
- 38 Stephen Goose, quoted in Docherty, Levine-Spound and Osman (n 33) 6.
- 39 Reiterer and Kratochvil (n 22) 3.
- 40 Benjamin-Britton, Bolton, and Njeri (n 21) 4.
- 41 Stephen Goose for example has said that humanitarian disarmament has 'become the normal way to do business', quoted in Docherty, Levine-Spound and Osman (n 33) 4.

- 42 As noted by Marc Finaud, “Humanitarian Disarmament”: Powerful New Paradigm or Naïve Utopia? Geneva Papers Research Series 21/17, 2017, Geneva Center for Security Policy, 10.
- 43 Docherty (n 13) 164; Madelaine Chiam and Anna Hood, ‘Nuclear Humanitarianism’ (2019) 24(3) *Journal of Conflict and Security Law* 473, 477.
- 44 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.
- 45 Convention on Cluster Munitions (adopted 20 May 2008, entered into force 1 August 2010) 2688 UNTS 39.
- 46 See (n 13).
- 47 See generally, Docherty (n 13); Bonnie Docherty, ‘Humanitarian Disarmament, the Treaty on the Prohibition of Nuclear Weapons, and Japan’ (*International Human Rights Clinic, Human Rights Programme Harvard Law School*, 27 July 2019) 2 <<http://hrp.law.harvard.edu/wp-content/uploads/2019/09/HD-TPNW-Japan-7-27-19.pdf>> accessed 6 November 2020; Rietiker (n 2) generally uses this three-pronged test to demonstrate how the TPNW is inspired by humanitarian considerations.
- 48 Docherty (n 17) 24.
- 49 ‘Towards a Global Ban on Anti-Personnel Mines’, Letter dated 16 October 1996 from the Representative and Ambassador of Canada to the United Nations for Disarmament address to the Secretary-General, UN Doc A/C.1/51/10, 18 October 1996, Annex I, [1].
- 50 McCarthy (n 18) 56–57.
- 51 *ibid.*
- 52 Benjamin-Britton, Bolton, and Njeri (n 21) 14.
- 53 McCarthy (n 18) 57.
- 54 Docherty (n 13) 168.
- 55 Rietiker (n 2) 327–32.
- 56 See for a useful summary of the Humanitarian Initiative, Elizabeth Minor, ‘Changing the Discourse on Nuclear Weapons: The Humanitarian Initiative’ (2015) 97(899) *International Review of the Red Cross* 711.
- 57 For a range of more comprehensive accounts of the TPNW negotiation and history, see Gibbons (n 13); Alexander Kmentt, ‘The Development of the International Initiative on the Humanitarian Impact of Nuclear Weapons and its Effect on the Nuclear Weapons Debate’ (2015) 97(899) *International Review on the Red Cross* 681; John Borrie, Michael Spies and Wilfred Wan, ‘Obstacles to Understanding the Emergence and Significance of the Treaty on the Prohibition of Nuclear Weapons’ (2018) 30(2) *Global Change, Peace and Security* 95.
- 58 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT. CONF/2010.50, Vol I, New York, 2010, 19 (emphasis added).
- 59 For a discussion of these conferences, see Minor (n 56) generally; Kmentt (n 57) 689–702.
- 60 Daniel Rietiker, *The Humanization of Arms Control: Paving the Way for a World Free of Nuclear Weapons* (Routledge 2018) 151. See also Statement by Norway (*First Preparatory Committee for the 2015 NPT Review Conference*, 30 April 2012) <<https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/NPT2015/PrepCom2012/statements/20120430/PM/Norway.pdf>> accessed 6 November 2020.
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- 62 Joint Statement on the Humanitarian Dimension of Nuclear Disarmament, delivered by Ambassador Laggner of Switzerland on behalf of 16 States (*First Preparatory Committee for the 2015 NPT Review Conference*, 2 May 2012) <[http://www.reachingcriticalwill.org/images/documents/Disarmamentfora/npt/prepcom12/statements/2May\\_IHL.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmamentfora/npt/prepcom12/statements/2May_IHL.pdf)> accessed 6 November 2020.
- 63 Joint Statement on the Humanitarian Consequences of Nuclear Weapons, delivered by Ambassador Higbie of New Zealand on behalf of 155 States (*United Nations General Assembly First Committee*, 69<sup>th</sup> Session, 20 October 2014) <[http://reachingcriticalwill.org/images/documents/Disarmamentfora/1com/1com14/statements/20Oct\\_NewZealand.pdf](http://reachingcriticalwill.org/images/documents/Disarmamentfora/1com/1com14/statements/20Oct_NewZealand.pdf)> accessed 6 November 2020.
- 64 The co-sponsoring States are listed by Europa Integration Äußeres: Bundesministerium Republik Österreich, (updated 7 April 2016) <[https://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abreustung/HINW14/HINW14vienna\\_update\\_pledge\\_support.pdf](https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abreustung/HINW14/HINW14vienna_update_pledge_support.pdf)> accessed 6 November 2020.
- 65 Rietiker (n 2) 330–31.
- 66 UNGA, First Committee, Res A/C.1/71/L.41, UN Doc A/C.1/71/L.41, 14 October 2016, 4. See also GA Res 71/258, UN Doc A/RES/71/258, 11 January 2017, with the mandate largely contained in [8]–[11].
- 67 Docherty (n 13) 174.
- 68 Ruff (n 13) 234.
- 69 As defined by Gibbons (n 13) 13.
- 70 Ruff (n 13) 238 argues a similar point, stating that governments wanted ‘one credible civil society partner in progressing the Humanitarian Initiative’.
- 71 Gibbons (n 13) 16.
- 72 ICRC President Jakob Kellenberger, ‘Bringing the Era of Nuclear Weapons to an End’ (Geneva, 20 April 2010) <<https://www.icrc.org/en/doc/resources/documents/statement/nuclear-weapons-statement-200410.htm>> accessed 6 November 2020 (emphasis added).
- 73 Resolution 1, ‘Working Towards the Elimination of Nuclear Weapons’ (*International Red Cross and Red Crescent Movement, Council of Delegates*, 26 November 2011) [3]–[4] <[www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm](http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm)> accessed 6 November 2020.
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- 76 Patricia Lewis, Heather Williams, Benoît Pelopidas and Sasan Aghlani, ‘Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy’ (*Royal Institute of International Affairs*, April 2014) <[https://www.chathamhouse.org/sites/default/files/field/field\\_document/20140428TooCloseforComfort-NuclearUseLewisWilliamsPelopidasAghlani.pdf](https://www.chathamhouse.org/sites/default/files/field/field_document/20140428TooCloseforComfort-NuclearUseLewisWilliamsPelopidasAghlani.pdf)> accessed 6 November 2020.
- 77 Ira Helfand, ‘Nuclear Famine: Two Billion People at Risk?’ (*International Physicians for the Prevention of Nuclear War and the Physicians for Social Responsibility*, November 2013) <<https://www.psr.org/wp-content/uploads/2018/04/two-billion-at-risk.pdf>> accessed 6 November 2020.
- 78 As noted by Richard Slade, Robert Tickner and Phoebe Wynn-Pope, ‘Protecting Humanity from the Catastrophic Consequences of Nuclear Weapons: Reframing the Debate Towards the Humanitarian Impact’ (2015) 97(889) *International Review of the Red Cross* 731, 744.
- 79 See eg Statement of Tanaka Terumi, ‘What did the A-Bomb do to Humans?’ (*Japan Confederation of A- and H-Bomb Sufferers Organisation*, 13–14 February 2014) <<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/Hibakusha-Tanaka.pdf>> accessed 6 November 2020; Statement of Setsuko Thurlow (Second Conference on the Humanitarian Impact of Nuclear Weapons, 13–14 February 2014) <<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/Hibakusha-Thurlow.pdf>> accessed 6 November 2020.
- 80 See Statement of the Holy See, ‘Nuclear Disarmament: Time for Abolition’ (*Vienna Conference on the Humanitarian Impact of Nuclear Weapons*, 8 December 2014) <<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/Hibakusha-Thurlow.pdf>> accessed 6 November 2020.

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- 81 Kmentt (n 57) 708; Ritchie and Egeland (n 19) 135–40. See also presentation by Nobuo Hayashi, 'From Consequentialism to Deontology' (NPT Review Conference 2015 side event, *Humanitarian Impact: Why Ethics Is Important to the Politics of Nuclear Weapons*, 15 September 2015) <<http://nwp.ilpi.org/?p=4166>> accessed 6 November 2020.
- 82 Gibbons (n 13) 27.
- 83 Working Paper submitted by the Arms Control Association, 'Topic 2: Core Prohibitions', UN Doc A/CONF.229/2017/NGO/WP.18, 31 March 2017.
- 84 Working Paper submitted by the ICRC, 'Elements of a Treaty Prohibiting Nuclear Weapons', UN Doc A/CONF.229/2017/WP.2, 31 March 2017.
- 85 As noted by William C Potter, 'Disarmament Diplomacy and the Nuclear Ban Treaty' (2017) 59(1) *Survival: Global Politics and Strategy* 75, 96; Borrie, Spies and Wan (n 57) 108–09.
- 86 Docherty (n 13) 175; Rietiker (n 2) 332–36.
- 87 Makane Moïse Mbengue, *Preamble*, Max Planck Encyclopaedia of International Law (September 2006). [14].
- 88 *ibid.* [1].
- 89 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(2) (VCLT).
- 90 See Richard Gardiner, *Treaty Interpretation* (2<sup>nd</sup> edn, OUP, 2016) 217–18; Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164(5) *University of Pennsylvania Law Review* 1281. This is also regularly confirmed by the ICJ, see *Asylum (Colombia v Peru) Case* [1950] ICJ Rep 266, 282; *Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 176, 196; and Dissenting Opinion of Judge Weeramantry, *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53, 142 and 146.
- 91 TPNW (n 1) preambular para 2.
- 92 *ibid.*
- 93 *ibid.* preambular para 6.
- 94 Similarly concluded by Rietiker (n 2) 334.
- 95 TPNW (n 1) preambular para 4.
- 96 Rietiker (n 2) 333 also notes how this reference reflects recent research into the use of nuclear weapons.
- 97 Espen Barth Eide, Former Norwegian Minister of Foreign Affairs (*Chairs Summary Humanitarian Impact of Nuclear Weapons*, Oslo, 4–5 March 2013) <[https://www.regeringen.no/en/historical-archive/Stoltenbergs-2nd-Government/Ministry-of-Foreign-Affairs/taler-og-artikler/2013/nuclear\\_summary/id716343/](https://www.regeringen.no/en/historical-archive/Stoltenbergs-2nd-Government/Ministry-of-Foreign-Affairs/taler-og-artikler/2013/nuclear_summary/id716343/)> accessed 6 November 2020.
- 98 Docherty (n 13) 176.
- 99 APMBC (n 44) preambular para 12.
- 100 CCM (n 45) preambular para 20.
- 101 TPNW (n 1) preambular para 8.
- 102 *ibid.* preambular para 9.
- 103 *ibid.* preambular para 10 (emphasis added).
- 104 *ibid.* preambular para 11 (emphasis added).
- 105 A point noted by Sweden and the Netherlands, who sought to alter that wording to include the word 'generally' here, see *Compilation of Amendments Received from States on the Revised Draft Submitted by the President*, UN Doc A/CONF.229/2017/CRP.Rev.1, 27 June 2017, 4.
- 106 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, [105(2)E].
- 107 Sweden, for instance, did not support this preambular paragraph, see Sweden, *Explanation of Vote*, (7 July 2017) <<https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/170707-EoV-Sweden.pdf>> accessed 6 November 2020. For a discussion of nuclear weapons and IHL, see Stuart Casey-Maslen, 'Nuclear Weapons and Rules on Conduct of Hostilities in Warfare', in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons Under International Law* (CUP 2014); Susan Breau, 'Low-Yield Tactical Nuclear Weapons and the Rule of Distinction' (2013) 15 *Flinders Law Journal* 219; Charles J Moxley, John Burroughs and Jonathan Granoff, 'Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty' (2011) 34(4) *Fordham Journal of International Law* 595.
- 108 Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) *European Journal of International Law* 109, 110.
- 109 Docherty (n 17) 15 (bracketed text added). See also Rietiker (n 2) 335, who calls this paragraph a 'deeply humanitarian expression'.
- 110 Docherty (n 13) 177.
- 111 See Part IV.C. below.
- 112 As suggested by Rietiker (n 2) 345.
- 113 APMBC (n 44) art 5(1).
- 114 CCM (n 45) art 5(1). Paragraph 2 proceeds to detail how each State party should go about implementing its obligations here under art 5.
- 115 For a useful assessment of these remedial measures, see Nidhi Singh, 'Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons: An Analysis' (2020) *Journal for Peace and Nuclear Disarmament* DOI: <https://doi.org/10.1080/25751654.2020.1856554>; Bonnie Docherty, 'From Obligation to Action: Advancing Victim Assistance and Environment Remediation at the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons' (2020) *Journal for Peace and Nuclear Disarmament* DOI: <https://doi.org/10.1080/25751654.2020.1842657>.
- 116 TPNW (n 1) art 6(1) (emphasis added).
- 117 Rietiker (n 2) 345.
- 118 See in particular, TPNW (n 1) preambular paras 4 and 7.
- 119 Rietiker (n 2) 347–48.
- 120 TPNW (n 1) art 6(2).
- 121 For the concept of global commons in international law, see Surabhi Ranganathan, 'Global Commons' (2016) 27(3) *European Journal of International Law* 693.
- 122 VCLT (n 89) art 28 recalls that 'Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'.
- 123 Daniel Rietiker, 'New Hope for Nuclear Disarmament or "Much Ado About Nothing?" Legal Assessment of the New "Treaty on the Prohibition of Nuclear Weapons" and the Joint Statement by the USA, UK, and France Following its Adoption' (2017) 59(Online) *Harvard International Law Journal* 22, 29.
- 124 Docherty (n 13) 179.
- 125 As similarly noted by Rietiker (n 123) 29.
- 126 TPNW (n 1) art 7(3).
- 127 Through the phrase 'in a position to do so'.
- 128 As noted by the International Human Rights Clinic, 'Victim Assistance and Environmental Remediation in the Treaty on the Prohibition of Nuclear Weapons: Myths and Realities' (*Human Rights Program at Harvard Law School*, April 2019) 2 <[https://hrp.law.harvard.edu/wp-content/uploads/2019/05/TPNW\\_Myths\\_Realities\\_April2019.pdf](https://hrp.law.harvard.edu/wp-content/uploads/2019/05/TPNW_Myths_Realities_April2019.pdf)> accessed 6 November 2020.
- 129 TPNW (n 1) art 7(6).
- 130 Part III.A.
- 131 See Part V.A. specifically.
- 132 McCarthy (n 18) 56.
- 133 As noted in Part II.
- 134 McCarthy (n 18) 56.
- 135 Docherty (n 13) 165–66.
- 136 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928).
- 137 Docherty (n 17) 20.
- 138 The rationale is also noted generally by Mathews and

- McCormack (n 31).
- 139 Almost all legal scholarship commenting on the NPT negotiations emphasises the State-centred nature of the negotiation process, see eg Dimitrios Bourantonis, 'The Negotiation of the Non-Proliferation Treaty, 1965–1968: A Note' (1997) 19(2) *International History Review* 347; Thomas P Graham Jr. and Damien J LaVera, *Cornerstone of Security: Arms Control Treaties in the Nuclear Era* (University of Washington Press 2002) 99–101; Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009) 3–76; Gro Nystuen and Torbørn Graff Hugo, 'The Nuclear Non-Proliferation Treaty', in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons Under International Law* (CUP 2014).
- 140 Bourantonis (n 139) 348 and 354.
- 141 Part III.A.
- 142 United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination: List of Participants', UN Doc A/CONF.229/2017/INF/4/Rev.1, 25 July 2017.
- 143 The UK and US only attended the final conference in Vienna.
- 144 See (n 66).
- 145 Rule 35(1), Rules of Procedure of the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination, UN Doc A/CONF.229/2017/5, 13 June 2017.
- 146 Sauer and Reveraert (n 13) 443; Gibbons (n 13) 15. The NWS here captures the five NPT-recognised 'nuclear weapon States' (NWS) as defined by Article IX(3), NPT, that is the United States, Russia, China, France, and the United Kingdom. The NWPS defined previously encompasses these five states, along with the four *de facto* nuclear weapons possessing states, Israel, the Democratic People's Republic of Korea (DPRK), India, and Pakistan.
- 147 Michael Hamel-Green, 'The Nuclear Ban Treaty and 2018 Disarmament Forums: An Initial Impact Assessment' (2018) 1(2) *Journal for Peace and Nuclear Disarmament* 436, 437.
- 148 Gibbons (n 13) 12 (bracketed text added).
- 149 See *ibid*; Daniel H Joyner, 'The Treaty on the Prohibition of Nuclear Weapons' (EJIL: Talk! 26 July 2017) <<https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/>> accessed 6 November 2020; Kmentt (n 57) 682 and 705. Interestingly, at the March 2017 Negotiations, Ireland noted that its interest in prohibiting nuclear weapons was not developed out of frustration, but on its obligations under international law and its moral responsibilities, see Statement of Ambassador O'Brien of Ireland (*United Nations Conference to Negotiate a Legally Binding Treaty to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination*, 27 March 2017) <<http://statements.unmeetings.org/media/2/14683259/ireland-national-statement-27-march-2017.pdf>> accessed 6 November 2020.
- 150 For an excellent overview of the history of the NPT, see Joyner (n 139) 3–11.
- 151 However, Meier argues that the 'line between responsible and irresponsible nuclear weapon states has been shattered, if it ever existed at all', Oliver Meier, 'Nuclear Arms Control and Disarmament: Obstacles and Ways to Tackle Them' (Written Evidence (NPT0045), House of Lords, Select Committee on International Relations: *Rising Nuclear Risk, Nuclear Disarmament and the Nuclear Non-Proliferation Treaty*, 26 February 2019) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-relations-committee/the-nuclear-nonproliferation-treaty-and-nuclear-disarmament/written/97214.html>> accessed 6 November 2020.
- 152 Final Remarks of Ambassador Laggner of Switzerland (Second Conference on the Humanitarian Impact of Nuclear Weapons, 14 February 2014) <<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/Switzerland.pdf>> accessed 6 November 2020.
- 153 Statement by Ambassador Marschik of Austria (*United Nations Conference to Negotiate a Legally Binding Treaty to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination*, 27 March 2017) <<http://statements.unmeetings.org/media/2/14683246/austria.pdf>> accessed 6 November 2020. See also Statement by Ambassador de Aguiar Patriota of Brazil (*United Nations Conference to Negotiate a Legally Binding Treaty to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination*, 28 March 2017) <<http://statements.unmeetings.org/media/2/14683334/brazil.pdf>> accessed 6 November 2020 ('although there is general agreement that these weapons, *far from helping to strengthen international security, on the contrary weaken it*').
- 154 Report of the Open-Ended Working Group, 'Taking Forward Multilateral Nuclear Disarmament Negotiations', UN Doc A/71/371, 1 September 2016, [67].
- 155 Statement by Thunborg, Department of Disarmament, Non-Proliferation and Export Control, Ministry for Foreign Affairs of Sweden to the 2016 OEWG (February 2016) <[https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/41CB099CB-9A10B47C1257F6900597EAB/\\$file/2016+Panel+I+Sweden.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/41CB099CB-9A10B47C1257F6900597EAB/$file/2016+Panel+I+Sweden.pdf)> accessed 6 November 2020.
- 156 *ibid*.
- 157 See e.g. GA Res 67/64, UN Doc A/RES/67/64, 3 December 2012; GA Res 68/58, UN Doc A/RES/68/58, 5 December 2013; GA Res 69/69, UN Doc A/RES/69/69, 2 December 2014; GA Res 70/62, UN Doc A/RES/70/62, 7 December 2015; GA Res 71/75, UN Doc A/RES/71/75, 15 December 2016 which largely adopts this language, subject to minor deviations.
- 158 See GA Res 1654, UN Doc A/RES/1654, 24 November 1961, and more recently GA Res 36/92, UN Doc A/RES/69/92, 9 December 1981.
- 159 The nuclear weapons convention is a much more elaborate disarmament agreement than the TPNW, containing detailed verification and disarmament steps, see Permanent Representatives of Costa Rica and Malaysia to the United Nations addressed to the Secretary-General, UN Doc A/62/650, 18 January 2008, Annex, Model Nuclear Weapons Convention.
- 160 See the voting record for GA Res 67/64, UN Doc A/67/PV.48, 14 December 2012, 29; GA Res 68/58, UN Doc A/68/PV.60, 5 December 2013, 36–37; GA Res 69/69, UN Doc A/69/PV.62, 2 December 2014, 33–34; GA Res 70/62, UN Doc A/70/PV.67, 7 December 2015, 30; GA Res 71/75, UN Doc A/71/PV.51, 5 December 2016, 41.
- 161 Part III.A.
- 162 Docherty (n 17) 18.
- 163 CWC (n 26) preamble para 2.
- 164 *ibid*, preamble para 1.
- 165 Charter of the United Nations (adopted 26 June 1945, entered into force 31 August 1945) 1 UNTS XIV, arts 1(1), 2(3) and 2(4).
- 166 *ibid*, art 1(2).
- 167 Docherty (n 17) 19 (emphasis added).
- 168 TPNW (n 1) preamble para 1.
- 169 *ibid*, preamble para 12 (emphasis added).
- 170 A point conceded by Docherty (n 13) 177.
- 171 TPNW (n 1) preamble para 5.
- 172 As suggested by Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary* (OUP 2019) 81, who notes that Ecuador sought an explicit reference to the inherent immorality of nuclear weapons, which 'in some sense' is captured by paragraph 5.
- 173 TPNW (n 1) preamble para 5.
- 174 See Part III.C. above.
- 175 Docherty (n 17) 12.
- 176 CWC (n 26) art I(1).
- 177 TPNW (n 1) art 1(1)(d).
- 178 *ibid*, art 1(1)(a).
- 179 *ibid*, art 1(1)(b) and (c).
- 180 *ibid*, art 1(1)(e) and (f).
- 181 *ibid*, art 1(1)(g).
- 182 Casey-Maslen (n 172) 132; Chiam and Hood (n 43) 474.
- 183 BWC (n 25) art II; CWC (n 26) art I(2) and art IV.
- 184 For a useful discussion of the Article 4 disarmament provisions of the TPNW, see Casey-Maslen (n 172) 188–201; Erästö, Komžaitė, and Topychkanov (n 11).
- 185 TPNW (n 1) art 4(1).

- 186 *ibid*, art 4(2).
- 187 *ibid*, art 2.
- 188 *ibid*, art 4(5).
- 189 See Docherty (n 17) 26–28.
- 190 *ibid*, 27.
- 191 See Part V below.
- 192 A useful overview of existing approaches to withdrawal is provided by the International Association of Lawyers Against Nuclear Arms, ‘Withdrawal Clauses in Arms Control Treaties: Some Reflections about a Future Treaty Prohibiting Nuclear Weapons’, UN Doc A/CONF.229/2017/NGO/WP.13, 31 March 2017.
- 193 TPNW (n 1) art 17(3).
- 194 APMBC (n 44) art 20(3); CCM (n 45) art 20(3).
- 195 Gaukhar Mukhatzhanova, ‘The Nuclear Weapons Prohibition Treaty: Negotiations and Beyond’ (2017) 47(7) *Arms Control Today* 12, 18; and similarly noted in relation to the APMBC and CCM respectively, see Stuart Casey-Maslen, *Commentaries on Arms Control Treaties Volume 1: The Convention on the Prohibition of Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (OUP 2005) 322; Stuart Casey-Maslen and Gro Nystuen, ‘Art. 20 Duration and Withdrawal’, in Gro Nystuen and Stuart Casey-Maslen (eds), *The Convention of Cluster Munitions: A Commentary* (OUP 2010) 540.
- 196 For a useful analysis of the implications of paragraph 3, see Casey-Maslen (n 172) 254.
- 197 Nystuen, Egeland, and Graff Hugo (n 3) 16 (emphasis added).
- 198 See Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Underwater (adopted 5 August 1963, entered into force 10 October 1963) 480 UNTS 43, art IV. Also known as the Limited Test-Ban Treaty.
- 199 The substantive and procedural requirements established by the NPT ‘extraordinary events’ withdrawal clause has been the topic of much discussion, see Daniel H Joyner and Marco Roscini, ‘Withdrawal from Non-proliferation Treaties’, in Daniel H Joyner and Marco Roscini (eds), *Non-Proliferation Law as a Special Regime, A Contribution to Fragmentation Theory in International Law* (CUP 2012); Guido den Dekker and Tom Coppen, ‘Termination and Suspension of, and withdrawal From WMD Arms Control Agreements in light of the General Law of Treaties’ (2012) 17(1) *Journal on Conflict and Security Law* 25; Masahiko Asada, ‘Arms Control Law in Crisis – A Study of the North Korean Nuclear Issue’ (2004) 9(3) *Journal of Conflict and Security Law* 331.
- 200 Asada (n 195) 349. This seems to be widely accepted, see Daniel H Joyner, ‘What if Iran Withdraws from the Nuclear Nonproliferation Treaty? Part 1: Can They Do That?’ (*ESIL Reflections*, 13 December 2012) 3 <<https://esil-sedi.eu/wp-content/uploads/2012/12/ESIL-Reflections-Joyner.pdf>> accessed 6 November 2020; Nicholas Sims, ‘Withdrawal Clauses in Disarmament Treaties: A Questionable Logic?’ (1999) 42 *Disarmament Diplomacy* 16 <<http://www.acronym.org.uk/old/archive/textonly/dd/dd42/42clause.htm>> accessed 6 November 2020 (‘Nevertheless, the withdrawal clause suffers from the disadvantage that the whole assessment is within the sole prerogative of the withdrawing states. It decided for itself if the three conditions have been met. It exercises its own judgement, which is then the final authority on the matter, regardless of how partial or faulty that judgment appears to others’). Winters has referred to Article X(1), NPT as a fundamental weakness of the treaty, see Raven Winters, ‘Preventing Repeat Offenders: North Korea’s Withdrawal and the Need for Revision to the Nuclear Non-Proliferation Treaty’ (2005) 38(5) *Vanderbilt Journal of Transnational Law* 1499, 1513; Rachel A Weise, ‘How Nuclear Weapons Changed the Doctrine of Self-Defense’ (2012) 44(4) *New York Journal of International Law and Politics* 1331, 1382.
- 201 Tony Robinson, ‘Beatrice Fihn, ICAN: Either you’re OK with mass murdering civilians with nuclear weapons or you’re not. Why would we build bridges to that?’ (*Pressenza: International Press Agency*, 7 September 2017) <<https://www.pressenza.com/2017/09/beatrice-fihn-ican-either-youre-ok-mass-murdering-civilians-nuclear-weapons-youre-not-build-bridges/>> accessed 6 November 2020.
- 202 Nick Ritchie, ‘Delegitimising Nuclear Weapons in the Nuclear Weapon Ban Treaty’ (2017) 2(7) *Nuclear Ban Daily* 4.
- 203 Nystuen, Egeland, and Graff Hugo (n 3) 16; Mukhatzhanova (n 195) 18; Laura Considine, ‘Contests of Legitimacy and Value: The Treaty on the Prohibition of Nuclear Weapons and the Logic of Prohibition’ (2019) 95(5) *International Affairs* 1075, 1090; Ray Acheson, ‘Nuclear Ban Daily’ (2017) 2(13) *Reaching Critical Will*, 1 (‘[t]he idea that there are circumstances in which the development, acquisition, use, or support for the use of nuclear weapons (thus permitting withdrawal) would ever be justifiable is anathema to the treaty’).
- 204 The inclusion of a withdrawal clause was strongly endorsed by only a small number of participants such as Egypt, Sweden and Switzerland, see for a summary of the negotiation of the withdrawal provisions, Casey-Maslen (n 172) 251–54; Ray Acheson, ‘Nuclear Ban Daily’ (2017) 2(12) *Reaching Critical Will*.
- 205 See Docherty (n 17) and (n 13); McCarthy (n 18).
- 206 See Rietiker (n 2) 332 (‘Among the 24 preambular paragraphs, only those expressing the humanitarian nature and spirit of the new treaty will be discussed here’).
- 207 Docherty (n 13) 177.
- 208 TPNW (n 1) preambular para 2.
- 209 *ibid*, paras 4, 6–11, in particular.
- 210 This concern was noted in Part IV.C.
- 211 Docherty (n 17) 12 and 16.
- 212 Docherty (n 13) 178.
- 213 Indeed, Docherty argues that preventive obligations are included alongside remedial measures and cooperation obligations, all three of which, when present together, can indicate the existence of a humanitarian disarmament treaty, see Docherty (n 17) 25–36; and in relation to the TPNW, Docherty (n 13) 169 and 177.
- 214 Parts III.B. and III.C.
- 215 Part IV.B.
- 216 Part IV.C.
- 217 Docherty (n 17) 12.
- 218 See generally the discussion of ‘hybrid’ disarmament by Docherty, *ibid*, 13–16 and 21–23.
- 219 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137.
- 220 Docherty (n 17) 13 (bracketed text added, emphasis added).
- 221 See TPNW (n 1) preambular para 1; CCW (n 219) preambular para 1.
- 222 TPNW (n 1) preambular paras 8–11; CCW (n 219) preambular paras 2–4.
- 223 Using Docherty’s description noted above, see Docherty (n 17) 13.
- 224 *ibid*, 22 (bracketed text added).
- 225 Discussed in Part V.A.
- 226 As suggested in Part II.
- 227 This is of course somewhat speculative, but nevertheless illustrative.
- 228 VCLT (n 89) arts 31 and 32.
- 229 *ibid*, art 31(1).
- 230 *ibid*, art 31(3).
- 231 *ibid*, art 32.
- 232 Report of the International Law Commission on the Work of the Second Part of Its Seventh Session, UN Doc A/6309/Rev.1, *United Nations Yearbook of International Law Commission*, Vol II (1969) 169, 220 (emphasis added). The ICJ has also endorsed this approach, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, [22].
- 233 For treaty interpretation generally, see Gardiner (n 90).
- 234 See Anthony Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> edn, CUP 2013) 206–07; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, MUP 1984) 114–15. See also Francis G Jacobs,

- 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference' (1969) 18(2) *International and Comparative Law Quarterly* 318, 318–20.
- 235 Following the approach of the International Law Commission.
- 236 This point is similarly recognised by United Nations Secretary General António Guterres, 'Securing our Common Future: An Agenda for Disarmament' (*United Nations Office for Disarmament Affairs*, 24 May 2018) 18 <<https://unoda-epub.s3.amazonaws.com/i/index.html?book=sg-disarmament-agenda.epub>> accessed 6 November 2014.
- 237 Borrie (n 27) 8 (emphasis added).
- 238 *ibid.*
- 239 Benjamin-Britton, Bolton, and Njeri (n 21) 6, who argue that the NPT was framed primarily in terms of State security to address the concerns of the superpowers of the time.
- 240 Borrie, Spies and Wan (n 57) 117.
- 241 *ibid.*
- 242 As phrased by Rietiker (n 2) 349.
- 243 See (n 5).
- 244 President Donald J Trump (*State of the Union Address*, 30 January 2018) <<https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>> accessed 6 November 2020.
- 245 See Christopher A Ford, 'Briefing on the Nuclear Ban Treaty' (*Carnegie Endowment for International Peace*, 22 August 2017) <<https://carnegieendowment.org/2017/08/22/briefing-on-nuclear-ban-treaty-by-nsc-senior-director-christopher-ford-event-5675>> accessed 6 November 2020.
- 246 See Part I.
- 247 'International Campaign to Abolish Nuclear Weapons' (*The Nobel Prize*) <<https://www.nobelprize.org/prizes/peace/2017/ican/facts/>> accessed 6 November 2020.
- 248 As noted by Allison Pytlak, 'Editorial: Humanitarian Disarmament is Here to Stay' (*Reaching Critical Will First Committee Monitor* 2018(3), 22 October 2018) <<https://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/FCM18/FCM-2018-No3.pdf>> accessed 6 November 2020.
- 249 Part V.

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## COMPETING INTERESTS

The author has no competing interests to declare.

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