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Negotiating the UN treaty on the prohibition of nuclear weapons and the role of ICAN

Tilman Ruff

Nossal Institute for Global Health, University of Melbourne, Australia

ABSTRACT

The Treaty on the Prohibition of Nuclear Weapons is historic not only in its substance but in the process of its development. It was led by states free from nuclear weapons; based on humanitarian evidence and imperatives; involved civil society, hibakusha and survivors of nuclear testing to a degree that is unprecedented in the nuclear field; and is the first nuclear disarmament treaty negotiated through the UN General Assembly, with the process proving both effective and efficient, despite fierce opposition from a number of nuclear-armed states, whose lack of commitment to nuclear disarmament was made very plain. The International Campaign to Abolish Nuclear Weapons (ICAN) became the main civil society partner for governments leading and supporting the 'Humanitarian Initiative' which resulted in the negotiations. ICAN's principles, strategy and work are discussed in the context of the 'stigmatise – prohibit – eliminate' approach which has proven effective for other inhumane and indiscriminate weapons.

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The treaty

The UN Treaty on the Prohibition of Nuclear Weapons (TPNW, Treaty) is a landmark achievement, enshrining the first categorical and comprehensive prohibition of nuclear weapons in international law. Finally, this crucial step on the path to their elimination has been taken for the last and worst weapons of mass destruction to be prohibited, the only weapons that pose an existential threat to human life and to many fellow species.

The Treaty is not only historic in substance; the process of its genesis also transformed the previously moribund nuclear disarmament landscape. With continued determination and partnership between civil society and governments, the factors that enabled the treaty to be negotiated could also play an important role in its implementation and progressing the elimination of nuclear weapons.

What enabled the bringing into being of the treaty?

Firstly, the process leading to the negotiation and adoption of this Treaty was managed and led by states without nuclear weapons. This changed the status quo of nuclear

disarmament steps being almost solely in the hands of the states that claim a special right to threaten all humanity with indiscriminate nuclear violence; and the rest of the world being sidelined to wait for whatever crumbs of tweaks of nuclear weapons numbers or policy the nuclear-armed states might deign to offer from time to time. As the treaty preamble emphasizes: '... these risks concern the security of all humanity, and ... all states share the responsibility to prevent any use of nuclear weapons'.¹

Secondly, this treaty has an unequivocal basis in humanitarian evidence and norms. This is laid out more clearly and comprehensively than in any other nuclear disarmament treaty. It builds directly on the essentially unchallenged evidence-based conclusions of the three historic first-ever intergovernmental 'Humanitarian Impacts of Nuclear Weapons' conferences in Oslo, Nayarit and Vienna in 2013–2014.²

Thirdly, the level of participation of civil society was unprecedented in the nuclear field. Both during the negotiations and the preceding 'Humanitarian Initiative' which ramped up in 2010, civil society groups, coordinated particularly through the International Campaign to Abolish Nuclear Weapons (ICAN), played an active and prominent role as a partner to governments. While such involvement and partnership were key factors in the development of the treaties banning anti-personnel landmines and cluster munitions, which also have a strong humanitarian basis, this had not previously occurred regarding nuclear weapons.

Academic and other civil society experts also made important contributions to the negotiation of the Treaty, including in relation to safeguards and verification provisions.³ The International Committee of the Red Cross (ICRC), in particular, made seminal contributions on behalf of the world's largest humanitarian organisation to a strong final treaty.

Fourthly, those directly harmed by nuclear weapons had prominence and a voice unprecedented in intergovernmental forums regarding nuclear weapons: Japanese hibakusha such as Setsuko Thurlow, Terumi Tanaka and Toshiki Fujimori; and nuclear test survivors, mostly indigenous, including Abacca Anjain-Maddison from the Marshall Islands, Sue Coleman-Haseldine and Karina Lester from Australia, Roland Oldham from French Polynesia and Karipbek Kuyukov from Kazakhstan. This had the powerful effect of constantly grounding discussions and negotiations in the reality and lived experience of what nuclear weapons actually do, reminding diplomats why their work mattered, and why concluding an effective treaty by the date specified in the negotiating mandate, 7 July 2017, was of utmost importance. Their prominent participation lent the process legitimacy, moral weight and humanity.

Fifthly, the negotiation of the Treaty through the UN General Assembly (UNGA) was highly effective. This was the first time in 21 years the UN was the forum in which a nuclear disarmament treaty was negotiated. Crucially, its most inclusive and democratic forum, the General Assembly, is able to decide substantive matters by two-thirds majority

¹UN General Assembly, *Treaty on the Prohibition of Nuclear Weapons*. A/CONF.229/2017/8 (2017), <http://undocs.org/A/CONF.229/2017/8> (accessed February 27, 2018).

²Europe Integration and Foreign Affairs Federal Ministry, Republic of Austria, 'Report and Summary of Findings of the Conference, Vienna Conference on the Humanitarian Impacts of Nuclear Weapons', 9 Dec 2014, https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Chair_s_Summary.pdf (accessed February 27, 2018).

³Princeton University, 'A Path to Universality through Cooperative, Transparent, Verifiable and Irreversible Disarmament' (working paper, United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination, A/CONF.229/2017/NGO/WP.46, 22 June 2017), <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/06/A-CONF.229-2017-NGO-WP.46.pdf> (accessed February 27, 2018).

vote if consensus is unable to be achieved. This is in sharp contrast to the nuclear non-proliferation treaty (NPT) review conferences and the UN Conference on Disarmament (CD), which are shackled by a requirement for consensus, meaning lowest common denominator or no agreed outcomes (and explains why the CD has been unable to agree even on an agenda for 22 years); and also the UN Security Council, where each of five nuclear-armed permanent members is able to veto any decision. Being adopted in the most inclusive global forum by such an overwhelming majority (122 to 1) also affords the Treaty credibility.

Not only was the UNGA process effective in negotiating a comprehensive prohibition of nuclear weapons, it was efficient as well. The Treaty was able to traverse from negotiating mandate to adopted text in just eight months, with only four weeks of face-to-face negotiations. The naysayers largely choosing to boycott the process helped it move along without manufactured obstructions, but there was also a remarkable determination by most of the world's governments to seize this landmark opportunity in the time available, and put aside much of the national and parochial agendas that often beset international negotiations. Each successive draft of the treaty was strengthened during the negotiations. In over three decades of working for the eradication of nuclear weapons, I have never previously witnessed such a level of commitment of governments in a decision-making forum about nuclear weapons.

The Treaty in both process as well as substance thus represents a seismic shift in bringing global democracy to nuclear disarmament, and in asserting the interests of shared humanity. It bodes well for other negotiations that might be undertaken in the UNGA. This disruption of the hegemony of nuclear-armed states is no doubt one of the reasons why these states oppose the treaty so vociferously.⁴

Sixthly, as the Humanitarian Initiative progressed, fierce pressure was brought to bear on states supporting the prohibition of nuclear weapons by nuclear-armed states, particularly the US, France, Russia and the UK. This pressure was coordinated and at times regionally allocated, and included diplomatic demarches and political, economic and aid threats. For example, the US reportedly threatened one heavily landmined least developed country with the withdrawal of its funding support for clearance of landmines (mostly laid by the US) if the country voted in support of an UNGA resolution supporting banning nuclear weapons.

Such pressure escalated dramatically during the last week of the negotiations, when it became clear that the adoption of a treaty was in sight. Understandably though regrettably, this pressure is hardly documented publicly. The forthright ambassador of South Africa, H. E. Nozipho Joyce Mxakato-Diseko, was the only negotiating diplomat after the vote adopting the Treaty to publicly call out the 'incredible pressure' brought to bear on African states in an attempt to discourage them from supporting the treaty. A number of supportive states, particularly smaller and poorer countries more vulnerable to political and economic pressure from nuclear-armed bullies, simply stayed away or did not vote. In four of the regions covered by nuclear weapon-free zones – Africa, Latin America, Southeast Asia and the South Pacific – where support for disarmament and the Treaty is most widespread, pressure from nuclear-armed states forced some

⁴United States Mission to the North Atlantic Treaty Organisation, *United States Non-paper, Defense impacts of potential United Nations General Assembly Nuclear Weapons Ban Treaty*, 17 October 2016, AC/333-N(2016)0029 (INV), http://www.icanw.org/wp-content/uploads/2016/10/NATO_OCT2016.pdf (accessed February 27, 2018).

states not to vote or to abstain. The largest number (11) of these were in Africa, including 9 which have ratified the African Nuclear Weapons Free Zone Treaty.

However crucially, the majority supporting the Treaty was so overwhelming that nuclear-armed states failed to derail the Treaty's negotiation or adoption.

Whether continuing strong-arm tactics will disrupt the entry into force of the Treaty remains to be seen. Cracks have emerged among the nuclear-armed. In the voting in UNGA First Committee to mandate negotiation of a ban treaty, while most nuclear-armed states disappointingly voted against, China, India and Pakistan abstained and, for its worth, DPRK (North Korea) voted in favour. China considered joining the negotiations, and its eventual decision in March 2017 not to participate nevertheless had a much more positive tone than the rejections of any of the other nuclear-armed states. A Chinese Foreign Ministry spokesperson stated: 'China consistently upholds and actively advocates a final comprehensive ban on and total destruction of nuclear weapons, which is fundamentally in line with the purposes of negotiations on the nuclear weapon ban treaty'.⁵

In boycotting the first Humanitarian Impact of Nuclear Weapons international conference in Oslo in 2013 – the first time governments had ever met specifically to consider this topic – the five nuclear-armed permanent members of the Security Council (P5) made a joint decision and used similar language to justify it. However, by the time of the adoption of the Treaty text, a quick angry joint statement dismissing the Treaty and stating 'We do not intend to sign, ratify or ever become party to it' was issued by only three of the P5 – the US, the UK and France.⁶

Seventhly, the boycotting of the negotiations by all nuclear-armed states, and all additional states that claim protection from US nuclear weapons except for the Netherlands (not supportive but forced to participate by public and parliamentary pressure), throws into sharp relief their current commitment to retaining and modernising nuclear arsenals, and continuing to threaten and plan for use of nuclear weapons, rather than implementing their obligation to eliminate them. Many of these governments claim to be good international citizens, to respect and promote human rights and the rule of law, to support disarmament, and have joined other treaties to prohibit and provide for the elimination of inhumane and indiscriminate weapons. Boycotting multilateral negotiations to ban the worst weapons of mass destruction and opposing the resultant international treaty makes clear the gap in their sincerity, consistency and good faith to deliver on their NPT Article 6 obligation 'to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament'.

How did the ICAN come to be the main civil society coalition partner for governments in negotiating the treaty?

Distinguished Malaysian obstetrician and former co-president of International Physicians for the Prevention of Nuclear War (IPPNW) Datuk Dr Ron McCoy first proposed the idea

⁵Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Hua Chunying's regular press conference on March 20, 20 March 2017, http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1447146.shtml (accessed February 27, 2018).

⁶United States Mission to the United Nations, *Joint press statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France following the adoption of a treaty banning nuclear weapons*, 7 July 2017, <https://usun.state.gov/remarks/7892> (accessed February 27, 2018).

of ICAN in 2005. That year saw the 5-yearly Review Conference of the NPT fail to agree anything. The World Summit of heads of state that followed also failed to deliver even a single line of agreement on disarmament. Nuclear disarmament was clearly going nowhere. Yet at the same time, a treaty banning landmines had been achieved over not many years by the International Campaign to Ban Landmines (ICBL), working with Canada and initially just a few other governments, despite the opposition of the large possessors including China, Russia and the US.

Dr McCoy proposed a new global campaign coalition, modelled on the ICBL. He wrote: 'We can call it an International Campaign to Abolish Nuclear Weapons, with the acronym ICAN. Let's start working on this right now'.

His idea struck a deep chord in IPPNW's Australian affiliate, the Medical Association for Prevention of War. A plan was developed to build a broad campaign coalition linking diverse partner organisations around the world, focused on a clear compelling goal based on what is working for biological and chemical weapons, cluster munitions and landmines: that is, to seek a comprehensive binding treaty to prohibit nuclear weapons and provide for their elimination.

Key principles formulated at the outset in 2005 have stood the campaign in good stead. It needed to be global. It needed to engage young people. It needed to be rooted in the humanitarian unacceptability of nuclear weapons – the evidence of catastrophic, indiscriminate consequences that would inevitably follow any use. We needed to include and provide a platform for the courageous voices and lived human experience of survivors of nuclear weapons use and testing, who are the most compelling advocates for the case that what happened to them must never again happen to anyone, anywhere. The campaign needed to develop engaging materials which balanced horror, humour and hope. We needed to engage with governments but also work hard to reinvigorate a global groundswell of people that could influence governments. We needed to engage a very wide range of civil society partner organisations, not only those for whom nuclear disarmament was core business but also a broad church of organisations who might be convinced that getting rid of the world's worst weapons, even if not their reason for being, should be part of their business – faith, professional, trade union, environment, humanitarian, social justice, development, young and indigenous people's organisations, and many others.

The campaign should be lean and minimalist in governance and set-up, not only working through its staff and leadership group but also multiplying efforts by facilitating, drawing on and coordinating the work of its partner organisations. Initial funding support was generously provided by the Poola Foundation, based in Melbourne. Unanimously endorsed by its International Council at IPPNW's 2006 World Congress in Helsinki, IPPNW provided the initial organisational base and host to build a global campaign coalition. Prominent early supporters included former International Court of Justice vice-president Judge Christopher Weeramantry and former Australian Prime Minister Malcolm Fraser, who were among those who first launched ICAN in Parliament House Melbourne on 23 April 2007.

The first ICAN office was established in Melbourne in 2006; another was established in Oslo in 2010. With funding principally from the Norwegian government between 2010 and 2015, ICAN was able to engage staff based in Geneva to expand campaign outreach and

coordination, initially in Europe, the Middle East and Africa. By 2017, ICAN had grown to 468 partner organisations in 101 countries.

Key governments determined to act for nuclear disarmament made it clear that they could not deal with many different NGOs with varying agendas and priorities; they wanted one credible civil society partner in progressing the Humanitarian Initiative. ICAN became the designated partner to coordinate civil society participation for each of the three Humanitarian Impacts of Nuclear Weapons conferences in Norway, Mexico and Austria in 2013–2014. In Oslo and Vienna, ICAN organised large civil society forums. By 2012, ICAN had become the most active civil society organisation promoting the humanitarian imperative for elimination of nuclear weapons and filling the legal gap for their prohibition and elimination, able to consistently mobilise 100–200 well-coordinated campaigners from around the world to participate in key international gatherings – such as the UNGA and its 2016 Open-Ended Working Group (OEWG) on nuclear disarmament; NPT PrepComs and Review Conferences.

ICAN's work was responsible for bringing around 40 countries on board a number of humanitarian-based statements/resolutions. From the first humanitarian-based statement for nuclear disarmament presented by the Swiss government on behalf of 16 states at the 2012 NPT PrepCom,⁷ at the 2015 UNGA a similar resolution (A/C.1/70/L.37) was supported in the final vote by 144 states; and the resolution bringing the Humanitarian Pledge for the prohibition and elimination of nuclear weapons to the GA (A/C.1/70/L.38) was supported in the final vote by 139 states.⁸ This groundswell of the great majority of the world's governments, frustrated with the manifest failure of progress in disarmament, alarmed by the growing danger of nuclear war and supporting prohibition and elimination of nuclear weapons, set the stage for the negotiation of the TPNW.

A key strategy shift

In 1997, a model nuclear weapons convention was developed by a coalition of professional groups, including the International Association of Lawyers Against Nuclear Arms, the International Network of Engineers and Scientists Against Proliferation and IPPNW. It applied the lessons of successful treaties like the Chemical Weapons Convention and nuclear disarmament agreements, which had verifiably reduced or eliminated whole classes of nuclear weapons, to develop a model of what a comprehensive treaty to prohibit and eliminate nuclear weapons could look like. While detailed and credible, and submitted by Costa Rica to the UN Secretary-General as a discussion draft, it had disappointing political traction.

The founders of ICAN felt an updated model convention would be a valuable resource in building the campaign to demonstrate the feasibility of a comprehensive regime of prohibition and verified, time-bound elimination of nuclear weapons. Launched in 2007, the updated model convention was tabled as an NPT document

⁷Joint statement on the humanitarian dimension of nuclear disarmament by Austria, Chile, Costa Rica, Denmark, Holy See, Egypt, Indonesia, Ireland, Malaysia, Mexico, New Zealand, Nigeria, Norway, Philippines, South Africa, Switzerland (First Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Vienna, 2 May 2012), http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom12/statements/2May_IHL.pdf (accessed February 27, 2018).

⁸The text and voting record for both these resolutions can be found at <http://reachingcriticalwill.org/disarmament-fora/unga/2015/resolutions> (accessed February 27, 2018).

by Costa Rica and Malaysia.⁹ It remains the most thorough blueprint available for a comprehensive nuclear weapons prohibition and elimination regime.

However, the harsh reality is that none of the nuclear-armed states are serious about fulfilling their obligation to disarm, and in fact they are all doing the opposite – arguing that conditions are not right to disarm, planning to retain their nuclear weapons indefinitely, and investing over US\$100 billion per year in modernising their nuclear arsenals, making them more accurate, deadly and ‘usable’. So the game-changing breakthrough needed must come from the states without the weapons, most of them alarmed and frustrated about being held under a nuclear sword of Damocles, with no end in sight, by governments that refuse to fulfil a legally binding disarmament commitment they made under the NPT since 1970.

The Non-Aligned Movement (NAM), including 120 states, has long advocated nuclear disarmament through a comprehensive nuclear weapons convention negotiated in the CD. However, this is foreseeably a recipe for failure on two counts – elimination requires the active cooperation of currently recalcitrant nuclear-armed states; and the CD for 22 years has not been able to agree an agenda, let alone negotiate and agree an ambitious convention.

Thus around 2009/10, ICAN strategy sharpened around a nuclear weapons ban treaty led by states without nuclear weapons as the next best step that could be taken. Governments that do not possess nuclear weapons cannot eliminate them; the most feasible significant step they could take was to fill the legal gap that saw the worst of all weapons not yet outlawed. With, or if necessary without, nuclear-armed and dependent states, they could ban nuclear weapons under international law if they utilised a forum where an overwhelming majority could not be blocked. As experience with the treaties banning biological and chemical weapons, landmines and cluster munitions has shown, such treaties can have substantial effect even on states which have not joined them.

This approach drew wide international support through the Humanitarian Pledge initiated by Austria in December 2014, signed by 127 states;¹⁰ and very explicitly in the recommendations to the UNGA by the OEWG on nuclear disarmament in August 2016,¹¹ which provided the basis for the UNGA’s December 2016 mandate for the negotiation of the ban treaty.¹² It was at the 2016 OEWG that influential NAM states like Brazil and Indonesia came on board with this approach.

The negotiations

Many felt that an Ottawa or Oslo style negotiating process initiated by a group of like-minded states, at least initially operating outside the UN, independently of existing

⁹International Physicians for the Prevention of Nuclear War, International Association of Lawyers Against Nuclear Arms, International Network of Engineers and Scientists Against Proliferation. Merav Datan, Felicity Hill, Jürgen Scheffran, Alyn Ware, Martin Kalinowski, Victor Sidel, *Securing our Survival: The Case for a Nuclear Weapons Convention*, ed. Tilman A. Ruff and John Loretz (Cambridge, MA: IPPNW, 2007).

¹⁰Europe Integration and Foreign Affairs Federal Ministry, Republic of Austria, *Support for Pledge*, https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abroestung/HINW14/HINW14vienna_update_pledge_support.pdf (accessed February 27, 2018).

¹¹UN General Assembly, *Report of the Open-ended Working Group taking forward multilateral nuclear disarmament negotiations* (Geneva: UN, 2016), <http://fissilematerials.org/library/un16a.pdf> (accessed February 27, 2018).

¹²UN General Assembly, *Resolution adopted by the General Assembly on 23 December 2016: Taking Forward Multilateral Nuclear Disarmament Negotiations* (A/RES/71/258), <http://undocs.org/A/RES/71/258> (accessed February 27, 2018).

forums, was most likely to be needed. ICAN wisely did not put effort into advocating for a particular negotiating forum, but rather stuck to the core of what such negotiations needed to accomplish, wherever they could be made to work. In the end, the conduct of negotiations through the UNGA worked remarkably effectively and efficiently, with the additional advantages of embedding the Treaty in the UN right from the outset, and affording the authority of the most inclusive and fundamental UN organ.

Civil society participation in the negotiations as a real partner was unprecedented in the nuclear weapons field. This took various forms, including presence in the room during formal sessions (for some sessions with a requirement not to report outside the room on what was happening inside, indicating a welcome level of trust), the ability to make interventions during debate on each topic, submit working papers and organise and participate in side events. A productive development was the creative use by Conference President, Costa Rican Ambassador Elayne Whyte Gómez, of well-timed informal facilitated sessions, including academic and civil society experts, to discuss complex or contentious topics. Many delegations found these useful to ask questions, clarify options and issues, and help them formulate positions, seek common ground and develop draft treaty text. Civil society members were not able to be present during closed consultations or three working groups which hammered out close to final text for different parts of the treaty.

While the Treaty is a historic achievement, there are a few unfortunate elements, and some gaps, some of which may hopefully be amenable to subsequent amendment or addition. A number derive from cost concerns, especially as the largest states and biggest financial contributors to the chronically underfunded UN will not foreseeably join the Treaty anytime soon. An undesirable aspect of the Treaty is the inclusion of NPT language affirming the 'inalienable right of its States Parties to develop research, production and use of nuclear energy for peaceful purposes', though without the directly accompanying safeguards caveats specified in the NPT. Explicit mention of transit and financing of nuclear weapons among prohibited activities arguably may have strengthened the Treaty's prohibitions. Nevertheless, the absence of their specific mention in no way means that they are not covered by the prohibitions not to 'assist, encourage or induce, in any way' any prohibited activity. Annual rather than biennial meetings of States Parties would have better maintained focus and momentum in implementing the Treaty. Many felt that inclusion of a provision allowing withdrawal from the Treaty was regrettable and inconsistent with its nature and purpose, and wanted to see no provision for withdrawal, as applies to the UN Charter and a number of key human rights instruments. A dedicated secretariat to provide capacity and consistency in promoting and implementing the Treaty is unfortunately missing.

Conclusion

The Treaty delivers on the UNGA negotiating mandate, 'to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination'. In both substance and process, it breaks new ground. The Treaty follows the proven path of 'stigmatise – prohibit – eliminate' which is working for the treaties addressing all the other major types of inhumane, indiscriminate weapons. It lays out the only currently defined path to the elimination of nuclear weapons. Humanity should take that path. All states can and should sign and implement this Treaty as a matter of utmost importance and urgency.

Disclosure statement

I was one of the founders and the founding Australian and international Chair of the International Campaign to Abolish Nuclear Weapons (ICAN), and serve as a Co-president of International Physicians for the Prevention of Nuclear War.

Notes on contributor

Tilman Ruff is Associate Professor in the Nossal Institute for Global Health at the University of Melbourne; international medical advisor for Australian Red Cross; Co-President of International Physicians for the Prevention of Nuclear War (IPPNW, Nobel Peace Prize 1985); and founding international and Australian Chair of the International Campaign to Abolish Nuclear Weapons (ICAN), awarded the Nobel Peace Prize for 2017 'for its work to draw attention to the catastrophic humanitarian consequences of any use of nuclear weapons and for its ground-breaking efforts to achieve a treaty-based prohibition of such weapons'. He headed the IPPNW delegation to and participated throughout the negotiations for the Treaty on the Prohibition of Nuclear Weapons in New York in 2017.