

ORIGINAL ARTICLE

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You were bombed and now you have to pay for it: Questioning the positive obligations in the Treaty on the Prohibition of Nuclear Weapons

Anna Hood* 

University of Auckland, Faculty of Law, Auckland, New Zealand
Email: a.hood@auckland.ac.nz

Abstract

One of the central components of the Treaty on the Prohibition of Nuclear Weapons (TPNW) is its victim assistance and environmental remediation provisions (known collectively as the Treaty's 'positive obligations'). While there is much to celebrate about efforts to remedy the damage caused by nuclear weapons, the way the TPNW distributes responsibility for this work is troubling. Under the Treaty, the primary responsibility for fulfilling the positive obligations is placed on the states parties that have individuals under their jurisdiction who are affected by the use or testing of nuclear weapons and areas under their jurisdiction or control that have been contaminated by the use or testing of nuclear weapons ('the affected states') despite the fact that, often, these were not the states responsible for detonating the nuclear weapons. This article examines and critiques the reasons the Treaty's drafters placed the main responsibility for victim assistance and environmental remediation on affected states. It argues that the rationales underpinning these provisions rest on shaky grounds, and that the Treaty's approach has potential negative ramifications for nuclear disarmament and understanding the history of the use and testing of nuclear weapons. Further, it explores how the Treaty may play into worrying broader dynamics in public international law whereby the Global North is frequently absolved of responsibility for the harms it causes while the Global South is saddled with obligations to redress an array of harms.

Keywords: environmental remediation; Global South-Global North; nuclear weapons; positive obligations; victim assistance

1. Introduction

Since 1945, the use and testing of nuclear weapons have caused severe damage in communities around the world. From the streets of Hiroshima and Nagasaki, to the deserts of Australia and Algeria, the steppes of Kazakhstan, and the island nations of the Pacific, nuclear weapons have destroyed natural environments, polluted food and water sources, displaced populations, caused a

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wide array of intergenerational medical conditions, and disrupted people's spiritual connections to the land and sea.¹

In 2021, the Treaty on the Prohibition of Nuclear Weapons (TPNW)² entered into force. Central components of the Treaty are provisions that assist the victims of the use and testing of nuclear weapons³ and provide for environmental remediation in areas where nuclear weapons have wreaked havoc.⁴ Commonly referred to as the 'positive obligations' of the TPNW,⁵ these articles have been widely lauded with states and civil society labelling them 'vitally important',⁶ 'imperative',⁷ and 'an integral part of [the TPNW]'.⁸ Similarly, the academic literature has described them as 'ground-breaking'⁹ and 'an important new opportunity for addressing the consequences of nuclear detonations'.¹⁰

While there is much to celebrate about the international community taking steps to remedy the litany of harms caused by the use and testing of nuclear weapons, the way the TPNW distributes responsibility for this work should give us pause. Under the Treaty, the primary responsibility¹¹ for delivering victim assistance and environmental remediation is placed on the states parties that have individuals under their jurisdiction who are affected by the use or testing of nuclear weapons¹² and areas under their jurisdiction or control that have been contaminated by the use or testing of nuclear weapons¹³ ('the affected states'). The architects of the articles justified this

¹For an excellent overview of many of the harms caused by nuclear weapons testing see Alexis-Martin et al., 'Addressing the Humanitarian and Environmental Consequences of Atmospheric Nuclear Weapon Tests: A Case Study of UK and US Test Programs at Kiritimati (Christmas) and Malden Islands, Republic of Kiribati', (2021) 12(1) *Global Policy* 106; M. B. Bolton and E. Minor, 'Addressing the Ongoing Humanitarian and Environmental Consequences of Nuclear Weapons: An Introductory Review', (2021) 12(1) *Global Policy* 81.

²2017 Treaty on the Prohibition of Nuclear Weapons (TPNW), UNTS 56487.

³*Ibid.*, Art. 6(1):

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.

⁴*Ibid.*, Art. 6(2):

Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated.

⁵This is because they require states parties to take proactive steps to address the harm caused by nuclear weapons.

⁶New Zealand at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁷Egypt at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁸Liechtenstein at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁹B. Docherty, 'From Obligation to Action: Advancing Victim Assistance and Environmental Remediation at the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons', (2020) 3(2) *Journal for Peace and Nuclear Disarmament* 253, at 253.

¹⁰Alexis-Martin et al., *supra* note 1, at 108.

¹¹The fact that affected states have the primary responsibility for fulfilling these positive obligations is explained in more detail in Section 2 below. See also S. Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary* (2019), para. 6.29; D. 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 *Harvard International Law Journal* 22, at 29; D. Rietiker, 'The Treaty on the Prohibition of Nuclear Weapons: A Further Confirmation of the Human and Victim-Centred Trend in Arms Control Law', in J. L. Black-Branch and D. Fleck (eds.), *Nuclear Non-Proliferation in International Law – Volume IV: Human Perspectives on the Development and Use of Nuclear Energy* (2019), 325, at 346.

¹²See 2017 TPNW, *supra* note 2, Art. 6(1).

¹³*Ibid.*, Art. 6(2).

on three grounds: it was the most practical way to ensure that assistance and remediation could occur;¹⁴ it was consistent with an international human rights law framework;¹⁵ and it was appropriate because the TPNW was conceived as a humanitarian disarmament treaty and other humanitarian disarmament treaties (namely, the Anti-Personnel Mines Treaty¹⁶ and the Convention on Cluster Munitions¹⁷) adopted this approach.¹⁸ However, in many cases where nuclear weapons have been used or tested, the states that detonated the nuclear weapons (the ‘user states’) were not the affected states. Indeed, Japan was bombed by the United States (US); the Pacific was a nuclear testing ground for the US, United Kingdom (UK), and France; Australia was subject to tests from the UK; Algeria was used by France; and Kazakhstan by the Soviet Union. The extent to which it is thus fair and equitable to place the primary responsibility for assistance and remediation on the affected states is open to question.

In this article, I question the drafters’ decision to place the primary responsibility for fulfilling the positive obligations on affected states and not the states that have used or tested nuclear weapons.¹⁹ I start in Section 2 by explaining how the TPNW places the primary responsibility for victim assistance and environmental remediation on affected states. In Sections 3 to 5, I turn to engage with each of the main arguments that have been put forward in favour of placing the responsibility on affected states. I suggest that there are complexities within each argument that should make us wary of accepting them. In Section 3, I challenge the idea that putting primary responsibility for the positive obligations on the affected states is necessarily the most pragmatic approach to redressing the harm caused by nuclear detonations. I examine the idea that user states often have better resources and knowledge to address the harm caused by nuclear detonations than affected states and I cast doubt on suggestions that have been made that placing the burden on user states would make fulfilling the positive obligations illusory.

In Section 4, I question the suggestion that the TPNW’s approach aligns well with international human rights law by showing that the reasoning underpinning this rationale relies on a partial account of the principles of international human rights law and by querying the extent to which a human rights framework is able to address all forms of harm that flow from the testing and use of nuclear weapons. In Section 5, I discuss reasons why the decision to place the primary responsibility for positive obligations on affected states in the Anti-Personnel Mines Convention and the Convention on Cluster Munitions may be problematic precedents to follow. I focus on the ways that the humanitarian ideals that underpin these treaties obscure certain forms of harm and play into problematic dynamics in international law whereby the Global North is absolved of responsibility for harm it causes while the Global South is required to address an array of harms. I also

¹⁴See Mine Action Canada statement at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; B. Docherty at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; and New Zealand at 26th Meeting of the UN Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

¹⁵B. Docherty, ‘Completing the Package: The Development and Significance of Positive Obligations in Humanitarian Disarmament Law’, in T. Dunworth and A. Hood (eds.), *Disarmament Law: Reviving the Field* (2020), 57, at 66.

¹⁶1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211.

¹⁷2008 Convention on Cluster Munitions, 2688 UNTS 39.

¹⁸See Austria, Ireland and International Campaign to Abolish Nuclear Weapons (ICAN) statements at 17th Meeting of the UN to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

¹⁹There are many other issues and questions that could be raised about the victim assistance and environmental remediation provisions in the TPNW including whether they are the best way of framing the harm that occurred and whether they are the best way of remedying the damage inflicted. While these are important matters, this article for the most part confines itself to examining the way responsibility under the provisions was allocated in the Treaty.

draw attention to the idea that in the nuclear context there are other precedents that could have been drawn on which would have placed the onus on user, not affected, states.

Having cast doubt on the strength of the rationales put forward in favour of affected states bearing the primary responsibility for positive obligations, I then turn in Section 6 to consider some additional reasons why the current attribution of responsibility for victim assistance and environmental remediation is problematic. I focus in particular on arguments made by states from the Global South that the current formulation cuts across natural law notions of justice and fairness which hold that states that cause harm should be responsible for remedying it. I also explore how placing the main burden on affected states poses risks for nuclear disarmament initiatives and for hopes of fully understanding and grappling with the history surrounding the use and testing of nuclear weapons. In Section 7, I conclude and reflect on what steps might be taken in response to the critiques set out in the body of the article.

2. How the TPNW imposes the primary responsibility for positive obligations on affected states

Where responsibility should lie for victim assistance and environmental remediation was an issue that generated great debate at the TPNW drafting conference in 2017 (2017 TPNW Conference). The debate split predominantly along Global North-South lines.²⁰ A number of countries from the Global North argued that affected states should have the primary responsibility for the positive obligations. For example, Switzerland asserted that a 'state party with people in their jurisdiction should, first and foremost be a national responsibility'.²¹ This position was supported by Aotearoa New Zealand and Sweden,²² as well as by a number of civil society actors including the International Campaign to Abolish Nuclear Weapons (ICAN), Mine Action Canada, and Bonnie Docherty from Harvard University.²³

A significant number of countries from the Global South countered this position and advocated for the states that had used or tested nuclear weapons to bear primary responsibility for fulfilling the positive obligations. For example, Egypt argued that the Treaty should say that:

... states parties that have used or tested nuclear weapons or other nuclear explosive devices shall, in accordance with applicable international humanitarian law, bear the responsibility to provide assistance including medical care, rehabilitation and psychological support, and their social and economic inclusion.²⁴

Similarly, Algeria declared that:

... we would like to support other delegations which are calling for robust measures such as reflecting further the responsibility of nuclear weapons states not only through meeting or providing assistance to victim states but also through compensation on all levels.²⁵

²⁰It is important to note that there was at least one state from the Global South that explicitly supported placing on the responsibility for the positive obligations primarily on the affected states: Ghana.

²¹17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

²²*Ibid.*

²³*Ibid.*

²⁴Egypt at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

²⁵Algeria at 18th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914099/.

Comparable views were expressed by Vietnam,²⁶ Brazil,²⁷ Ecuador,²⁸ Cuba,²⁹ Iran,³⁰ Malaysia,³¹ Palestine,³² Philippines,³³ Thailand,³⁴ Fiji,³⁵ Chile,³⁶ and Indonesia.³⁷ In a similar vein, other states made the argument that the affected states should not have to bear the cost of redressing the harm caused: the Marshall Islands stated that it would be ‘inequitable and ineffective to shift the entire burden to states that did not cause those impacts and who may also have limited capacity’;³⁸ and Nigeria argued that ‘states . . . should not be made to pay for what they never solicited’.³⁹

Ultimately, after lengthy discussions, the states advocating for affected states to have the primary responsibility for delivering positive obligations won out. This is apparent from the fact that in the final Treaty text, the states parties that have the most direct and onerous role in providing victim assistance and environmental remediation in the wake of the use or testing of nuclear weapons are affected states. This is made clear in Articles 6(1) and 6(2) of the Treaty which provide:

- 6(1). 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.
- 6(2). Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear

²⁶Vietnam at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

²⁷Brazil at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

²⁸Ecuador at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

²⁹Cuba at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; Cuba at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³⁰Iran at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; Iran at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³¹Malaysia at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; see also Malaysia 21st Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 27 June 2017, transcript of the Meeting on file with the author.

³²Palestine at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³³Philippines at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³⁴Thailand at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³⁵Fiji at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³⁶Chile at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³⁷Indonesia at 26th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

³⁸Marshall Islands at 18th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914099/.

³⁹Nigeria at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated.

In contrast, the user states have a much less direct and less onerous role in the provision of positive obligations. Under Article 7(6) they have ‘a responsibility to provide adequate assistance to affected States Parties for the purpose of victim assistance and environmental remediation’. The relative weakness of this provision compared to the obligations placed on affected states in Articles 6(1) and 6(2) is apparent from the fact that it only requires user states to provide assistance to affected states with positive obligations; not to provide victim assistance and environmental remediation directly. Further, efforts to have the words ‘fundamental’ or ‘primary’ inserted before the word ‘responsibility’ in Article 7(6) were defeated.⁴⁰ Finally, there is a possibility that in addition to creating a less direct role for user states than affected states, Article 7(6) only creates a moral obligation, not a legal one. Stuart Casey-Maslen has asserted that had the drafters intended the provision to create a legal obligation on user-states, they would have crafted a provision whereby states parties that have ‘used or tested nuclear weapons or any other nuclear explosive devices, shall provide adequate assistance ...’ rather than ‘shall have a responsibility to provide adequate assistance ...’.⁴¹

It is important to note that the Treaty does carve out a space for other non-affected states parties to provide assistance and co-operation to affected states around victim assistance and environmental remediation. Specifically, Article 7(2) allows for affected states ‘to seek and receive assistance, where feasible, from other States Parties’ and Articles 7(3) and 7(4) require each state party ‘in a position to do so ... [to] provide technical, material and financial assistance to States Parties affected by nuclear weapons’ as well as ‘assistance to victims’. It is apparent, however, that like Article 7(6), these provisions are subsidiary to those in Articles 6(1) and 6(2). As with Article 7(6), the idea of non-affected states parties providing ‘assistance’ signals that such contributions will be supplementary to initiatives led by affected states. Additionally, the requirements on non-affected states to assist with the positive obligations in Articles 7(3) and 7(4) are conditioned on such assistance being ‘feasible’ or the relevant state being ‘in a position’ to provide the required assistance, whereas the obligations on affected states to provide victim assistance and environmental remediation in Articles 6(1) and 6(2) are unconditional.⁴²

A final point to note about affected states bearing primary responsibility for the provision of victim assistance and environmental remediation is that Article 6(3) states that the obligations on affected states in Articles 6(1) and 6(2) ‘shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements’. This provision was inserted into the Treaty to ensure that affected states would not be precluded from seeking remedies for nuclear weapons harm caused by user states.⁴³ It is possible that this provision will assist affected states in fulfilling their positive obligations if they are successful in obtaining remedies from user states for harm caused. It does not, however, undermine the fact that affected states have the primary

⁴⁰On the second to last day of the Conference the states advocating for user states to bear primary responsibility believed that they had secured the insertion of wording in the Treaty that would declare that states parties that had used or tested nuclear weapons bore the ‘primary’ or ‘fundamental’ responsibility for victim assistance and environmental remediation. They asserted that the working group that had been tasked with finalizing the text of Arts. 6 and 7 had reached a unanimous agreement on this matter. However, when the text came before a plenary session of the Conference later that day, the text simply declared that states parties that had used or tested nuclear weapons had ‘a responsibility’ to provide victim assistance and environmental remediation. Despite great concern being raised about the change, the working group’s text was not reinstated. See: 26th Meeting of the UN Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author; see Casey-Maslen, *supra* note 11, paras. 7.05–7.06.

⁴¹See Casey-Maslen, *ibid.*, para. 7.20.

⁴²It should be noted that Art. 7(6) of the TPNW is also not conditional. However, for the reasons noted above, it is still a much weaker provision than Arts. 6(1) and 6(2).

⁴³See Casey-Maslen, *supra* note 11, paras. 6.33–6.38

responsibility under the Treaty for ensuring victim assistance and environmental remediation are delivered. What is more, given the difficulties many states have faced holding user states to account for their use or testing of nuclear weapons,⁴⁴ the extent to which it will be of assistance to affected states is unfortunately questionable.

It is, thus, clear that the states that shoulder the primary responsibility for the TPNW's positive obligations are the affected states.⁴⁵ In the following three sections, I turn to examine the three key rationales that have been provided for this approach – namely, pragmatism, consistency with international human rights law, and consistency with other humanitarian disarmament treaties – and explore some of the weaknesses and tensions within them.

3. Questioning the idea that the TPNW's approach to positive obligations is pragmatic

The first rationale that has been put forward in support of placing primary responsibility for positive obligations on affected states is that it is the most pragmatic way to ensure that victims receive assistance and the environment is remediated.⁴⁶ There have been two manifestations of this idea: first, that the state that is best placed to provide assistance is the state where the victims of nuclear testing or use are based and the damaged environment exists;⁴⁷ and second, that any hope of victim assistance and environmental remediation goals being met would be 'illusory' if the burden were placed first and foremost on the states that detonated the nuclear weapons.⁴⁸ In this section, I examine the logic underpinning each of these ideas and argue that while these points have some merit, they skate over complexities surrounding the fulfilment of the positive obligations. On closer examination it is not clear that the most pragmatic approach to delivering victim assistance and environmental remediation is to place primary responsibility on the affected states.

3.1 Questioning the idea that affected states are best placed to provide assistance

During the drafting of the TPNW and in some of the literature that has emerged since the Treaty was concluded, a number of states, civil society organizations, and academics have argued that it is appropriate for affected states to bear the primary responsibility for fulfilling the Treaty's positive obligations because they are in the best position to ensure the obligations are met effectively. For example, at the 2017 TPNW Conference, Mine Action Canada argued that affected states were 'best suited to coordinate activity in their sovereign territory'.⁴⁹ Similarly, in her academic writing, Bonnie Docherty has said that affected states' 'proximity to the problem puts them in the best place to assess needs and render assistance' and the formulation ensures respect for affected states' sovereignty.⁵⁰

⁴⁴See the discussion below in Section 5.3.

⁴⁵This understanding of where responsibility lies for the positive obligations is supported by Casey-Maslen, *supra* note 11, at 629; see Rietiker (2017), *supra* note 11, at 29; see Rietiker (2019), *supra* note 11, at 346.

⁴⁶See Mine Action Canada and B. Docherty statements at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; see Docherty, *supra* note 15, at 66.

⁴⁷Mine Action Canada and B. Docherty at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/; see Docherty, *ibid.*, at 66.

⁴⁸New Zealand at 26th Meeting of the UN Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

⁴⁹See Mine Action Canada statement at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁵⁰See Docherty, *supra* note 15, at 66.

There is no question that affected states should be involved in some aspects of victim assistance and environmental remediation in their territory. There are forms of victim assistance that can only be provided by affected states. For example, the TPNW calls for measures to be put in place to ensure the victims of nuclear weapons are afforded ‘social and economic inclusion’ in the societies in which they live.⁵¹ It is difficult to see how such measures could come from any source other than the affected states. Further, Docherty’s point that there is a need to ensure respect for the sovereignty of affected states is well made. There are real risks that without the proper protections in place, user states could potentially use victim assistance and environmental remediation obligations to interfere in the territories, governance, and economies of affected states. It does not take much imagination to see how an obligation on a user state to address environmental harm in the Pacific – a site of growing geopolitical interest and tension – could be used as a Trojan horse for gaining influence and power in the region.

However, the fact that some level of affected state involvement is needed to fulfil aspects of the positive obligations does not necessarily mean that affected states need to have, or should have, primary responsibility in this space. This is particularly so given, first, there are many aspects of victim assistance and environmental remediation that can be met by user states and, second, other aspects that can *only* be met by user states. With respect to the first category, it is possible for user states to provide the funding for medical and psychological treatments for victims as well as the funding, equipment and, if needed, technical expertise for addressing environmental damage. Given many user states have far greater national budgets than the states where they used or tested nuclear weapons and the amounts needed to address much of the harm caused by nuclear weapons run into the hundreds of millions of dollars, from a pragmatic perspective it arguably makes more sense to place this burden on user, not affected, states. In terms of the second category, user states often possess scientific data about the effects of the nuclear tests.⁵² Without such data, it is difficult, if not impossible, to accurately identify the harm that has been caused by nuclear weapons and how it can be remedied.

Proponents of the TPNW’s approach to apportioning responsibility for the positive obligations would no doubt respond to these points by emphasizing the existence of the co-operation and assistance provisions in the TPNW and arguing that they provide an appropriate mechanism for involving the user states. As set out in Section 2, Article 7(2), allows affected states ‘to seek and receive assistance, where feasible from other States Parties’ and Articles 7(3) and 7(4) oblige each state party ‘in a position to do so . . . [to] provide technical, material and financial assistance to States Parties affected by nuclear weapons’ as well as ‘assistance to victims’. The TPNW also provides, in Article 7(6) that states parties that have ‘used or tested nuclear weapons or any other nuclear explosive devices, shall have a responsibility to provide adequate assistance to affected States Parties’. There are, however, a number of reasons to question the strength and efficacy of these provisions.

To start, as discussed above in Section 2, the notion of non-affected and user states parties providing ‘assistance’ indicates that their offerings will be secondary to the efforts of affected states. Given the fact that there are numerous remedies that user states are well placed to provide, and others that only they can provide, there is reason to query the appropriateness of this terminology. One wonders whether provisions that placed the primary responsibility on user states and assistance provisions on other states parties, or perhaps provisions that specified the types of duties that user states and other states should have for victim assistance and environmental remediation, might have been more suitable.⁵³

⁵¹See 2017 TPNW, *supra* note 2, Art. 6(1).

⁵²See Alexis-Martin et al., *supra* note 1, at 114.

⁵³The concern that user states are unlikely to join the TPNW (especially if they are saddled with primary responsibility for positive obligations) and that therefore this suggestion is unhelpful is addressed in Section 3.2 below.

Even if the idea of requiring user and non-affected states to provide ‘assistance’ were suitable, the way the Treaty provisions have been drafted leaves plenty of room for states parties to provide no, or very limited, assistance. The inclusion of the words ‘where feasible’ in Article 7(2) and ‘in a position to do so’ in Articles 7(3) and 7(4) curtail the obligations on non-affected states to provide assistance. This is apparent not just from the plain language of these words but also from the TPNW’s *travaux préparatoires*. Early on in the drafting process, Article 6(1) only required affected states to provide victim assistance when they were ‘in a position to do so’ but this was removed because multiple states argued that it would weaken and ‘neutralize’ the obligation in this part of the text.⁵⁴ While the words were removed from Article 6(1), they remained in Articles 7(3) and 7(4) limiting the need for non-affected states to provide assistance. This was despite attempts from delegations such as the Holy See to remove this language and strengthen the provisions by declaring that states parties had to ‘make every effort’ to assist with the positive obligations.⁵⁵ The limited nature of this part of the Treaty is heightened by the fact that it is unclear what places a state in a position to provide assistance and what might legitimately preclude it from providing assistance. Further, as Casey-Maslen highlights, the provisions do not specify how much assistance a state party must provide.⁵⁶

Concerns about the robustness of Article 7 continue when regard is had to Article 7(6).⁵⁷ In addition to the possibilities noted above that Article 7(6) is weak because it only creates ‘a responsibility’ on user states and not a primary or fundamental responsibility as many states advocated for, and because it does not provide for the provision of assistance directly to victims or the environment, the provision is very broad and general. It does not make it clear what constitutes ‘adequate’ assistance or how this is to be assessed. Is assistance adequate if it makes some contribution to remedying the harm to victims and the environment or does it need to be a substantial amount of the harm, or all of the harm, or an amount of the harm that is proportionate to the user state’s annual budget or the harm it caused? Is it even possible to reach a decision about what is ‘adequate’ when considering harm in the nuclear context given the harm from the testing and use of nuclear weapons frequently stretches over vast areas of time and space?⁵⁸ Further, it is unclear which harm each user state has a responsibility to assist with. One might assume that user states must assist with the harm that they were responsible for causing but this is far from clear on the face of the text. Article 7(6) provides that ‘a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected States Parties’; it does not say that it shall have a responsibility to provide adequate assistance to states parties it has affected.⁵⁹ The overall sense from the provisions is that they have been drafted in a way that encourages altruism from non-affected and user states but does not impose clear, concrete requirements on them.

⁵⁴See Ghana, Brazil and Mozambique at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁵⁵See Holy See at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/. This interpretation is supported by Casey-Maslen. See Casey-Maslen, *supra* note 11, para. 7.13.

⁵⁶Casey-Maslen, *ibid.*, para. 7.16. Interestingly, similar wording in the Anti-Personnel Mines Convention has attracted comparable criticism. For example, Alexander Kmentt has stated that the words ‘in a position to do so’ indicate a political, not legal, obligation and allow each state to work out for themselves how much, if anything, they contribute. See A. Kmentt, ‘A Beacon of Light: The Mine Ban Treaty Since 1997’, in J. Williams, S. Goose and M. Wareham (eds.), *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (2008), 17, at 23.

⁵⁷Indeed, Casey-Maslen argues that the provision has ‘several drawbacks’. See Casey-Maslen, *ibid.*, para. 7.20.

⁵⁸This point was made by Brazil during the negotiations. See Brazil at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁵⁹See Casey-Maslen, *supra* note 11, para. 7.20.

It is, of course, possible that in time the different aspects of Article 7 could be strengthened and clear systems for implementing the Treaty's co-operation and assistance provisions could be developed through work at the Meetings of States Parties. It is certainly the case, for example, that work has been done to operationalize the co-operation and assistance provisions in the Anti-Personnel Mines Convention and Convention on Cluster Munitions since they entered into force. Action Plans for both treaties have included steps to encourage states parties to provide assistance to affected states⁶⁰ and independent Implementation Support Units have been set up to facilitate the co-ordination of international assistance.⁶¹ These initiatives have seen some significant support flow from certain states parties to affected states.⁶²

However, there have been a number of limitations with the attempts to enliven the treaties' assistance provisions. Contributions have tended to come from only a limited number of states⁶³ and the amount of money donated by states parties has declined over time. For example, the International Committee of the Red Cross (ICRC) reported in 2018 that '[o]verall, the financial contributions of the international community towards mine action and the clearance of explosive remnants of war have decreased in recent years'.⁶⁴ In its 2020 report, the Landmine and Cluster Munition Monitor noted that from 2018–2019 international financial contributions to landmines, cluster munitions and other explosive remnants of war declined by 13 per cent.⁶⁵ In addition to difficulties with attracting financial support from non-affected states, the Anti-Personnel Mines Convention and the Convention on Cluster Munitions have struggled to get non-affected states to provide adequate technical expertise and non-financial resources such as technology and equipment.⁶⁶ Further, there have been difficulties with channelling the assistance that is provided to those most in need. For example, the Landmine and Cluster Munitions Monitor reported that in 2019, '[a]s in previous years, a large number of States Parties in which there are significant numbers of victims did not receive any victim assistance support, or very little, whereas needs remained great and available resources were lacking'.⁶⁷

Examples of assistance and co-operation provisions beyond disarmament law also provide very limited sources for hope. For instance, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that states parties 'undertake . . . to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of [their] available resources' to achieve progressively the Covenant rights. Despite this

⁶⁰The Action Plans under the Anti-Personnel Mines Convention have been: Nairobi Action Plan (2005–2009), Cartagena Action Plan (2010–2014), Maputo Action Plan (2014–2019), and Oslo Action Plan (2020–2024). The Action Plans under the Convention on Cluster Munitions have been: Vientiane Action Plan (2010–2015), Dubrovnik Action Plan (2015–2020), and Lausanne Action Plan (2021–2026).

⁶¹For information on the Implementation Support Unit for the Anti-Personnel Mines Convention see: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, available at www.apminebanconvention.org/en/implementation/implementation-support-unit/. For information on the Implementation Support Unit for the Convention on Cluster Munitions see the 2008 Convention on Cluster Munitions, available at www.clusterconvention.org/implementation-support-unit/#:~:text=The%20Implementation%20Support%20Unit%20was,Beirut%2C%20Lebanon%2C%20in%202012.

⁶²From 2010–2019 annual international financial contributions for mine action (that is landmines, cluster munitions and other explosive remnants of war) ranged from 376.5 to 696.3 million US dollars: Landmine and Cluster Munition Monitor, 'Landmine Monitor 2020: Support for Mine Action', October 2020, available at www.the-monitor.org/en-gb/reports/2020/landmine-monitor-2020/support-for-mine-action.aspx.

⁶³For example, in 2019 just five states provided 72 per cent of the international assistance mine action and 15 states provided 96 per cent of the international assistance: see Landmine and Cluster Munition Monitor, *ibid.* See also ICRC, 'The Convention on Cluster Munitions: The First 10 Years', Ref. 4364/002 (2018), at 10.

⁶⁴See ICRC, *ibid.*, at 10. In this context 'mine action' refers to work on both cluster munitions and landmines.

⁶⁵See Landmine and Cluster Munition Monitor, *supra* note 62.

⁶⁶See ICRC, *supra* note 63, at 10. See also President of the Seventh Meeting of States Parties, Convention on Cluster Munitions 7MSP Progress Report — monitoring progress in implementing the Dubrovnik Action Plan, UN Doc. CCM/MSP/2017/9 (2017), para. 80(a), available at www.clusterconvention.org/wp-content/uploads/2017/02/Progress-Report.pdf.

⁶⁷See Landmine and Cluster Munition Monitor, *supra* note 62.

Article requiring states to assist one another with the realization of economic, social and cultural rights, numerous (often wealthy) states have argued that the provision is not a binding one but only aspirational in nature.⁶⁸ They have further resisted attempts to flesh out the provisions in Article 2(1) either by generating targets for international assistance in this space or creating mechanisms to assist with the redistribution of resources.⁶⁹

I do not want to foreclose the possibility that, in time, the TPNW's Article 7 provisions could be activated in innovative and effective ways. However, the way they have been drafted, and the experience of assistance and co-operation provisions in other humanitarian and human rights contexts, means there is room for considerable concern as to whether they will be able to facilitate high levels of involvement from non-affected and user states.

One further reason to question the pragmatism of placing primary responsibility for the positive obligations on affected states is that it means that the environmental harm that is addressed by the Treaty is confined to that which comes within the jurisdiction or control of affected states;⁷⁰ there is no provision for addressing environmental harm that falls outside the jurisdiction or control of affected states (for example, on the high seas) to be remedied.⁷¹ This is concerning given the fact the effects of nuclear use and testing can travel far beyond the boundaries of particular states where the nuclear detonation occurred and the fact that, historically, some nuclear testing took place on the high seas.⁷² While it is understandable that the Treaty drafters did not want to burden affected states with addressing environmental damage beyond the bounds of their states, if the onus had been placed on the user states and not the affected states then it might have been possible for a broader approach to addressing environmental harm to be taken.

In light of the above discussion, there is, thus, doubt as to the extent to which the Treaty will provide a pragmatic approach to victim assistance and environmental remediation as proponents of the positive obligations claim.

3.2 Questioning the idea that making nuclear weapons states responsible for harm caused is 'illusory'

The second way that pragmatism has been used to support affected states bearing primary responsibility for the positive obligations is via the argument that placing responsibility on the user states would make any hope of victim assistance or environmental remediation occurring 'illusory'.⁷³ This argument was made forcefully by Aotearoa New Zealand at the 2017 TPNW Conference. It argued that giving primary responsibility to user states would make the article 'a feel-good provision but it [would] have no impact in the real world' as it '[would]n't advance the realistic prospect of assistance' given the nuclear weapon states were not participating in the development of the Treaty.⁷⁴

In certain respects, this sentiment is understandable. In 2017, the nuclear weapons states were vehemently opposed to discussing, let alone joining, the TPNW, and their positions have not shifted in the subsequent five years. Nonetheless, Aotearoa New Zealand's argument is a somewhat curious one for a proponent of the Treaty to make. One of the chief criticisms of the Treaty

⁶⁸R. Wilde, 'Socioeconomic Rights, Extraterritorially', in E. Benvenisti and G. Nolte (eds.), *Community Interests Across International Law* (2018), 381, at 391.

⁶⁹*Ibid.*, at 393.

⁷⁰See 2017 TPNW, *supra* note 2, Art. 6(2).

⁷¹My thanks to Chris Evans for drawing this point to my attention.

⁷²G. Handl, 'High Seas Governance Gaps: International Accountability for Nuclear Pollution', in R. Beckman et al. (eds.), *High Seas Governance: Gaps and Challenges* (2019), 195, at 199; R. Prävälje, 'Nuclear Weapons Tests and Environmental Consequences: A Global Perspective', (2014) 43 *Ambio* 729.

⁷³New Zealand at 26th Meeting of the UN conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, 5 July 2017, transcript of the Meeting on file with the author.

⁷⁴*Ibid.*

as a whole is the fact that it has little hope of attracting the states most needed to progress nuclear disarmament: the nuclear weapons states. However, most supporters of the Treaty (Aotearoa New Zealand included), have maintained that while the nuclear powers of the world may oppose the Treaty at this point in time, this does not foreclose the possibility that they will change their minds. To the contrary, Treaty supporters frequently assert that with the right strategies and pressure the nuclear weapons states can be persuaded to join the regime.⁷⁵ One wonders why this logic (or faith) could not be applied to the victim assistance and environmental remediation provisions in the Treaty.

It is conceivable that this sort of argument might be rebutted with the assertion that while it is possible that the nuclear weapon states will join the Treaty in time, requiring them to assume primary responsibility for positive obligations would reduce the likelihood of this occurring because of the financial burden to which it would subject them. It may be that such a provision would prove a slight deterrent to a nuclear weapon state joining the TPNW. In many ways, however, the provision of assistance and remediation is a far lesser imposition on nuclear weapon states than requiring them to surrender their nuclear weapons programmes. Thus, if they can overcome their concerns about relinquishing their nuclear weapons, one would hope that they could overcome any aversion to remedying the harm they have caused. Indeed, it may well be that user states could use the savings obtained from dismantling their nuclear weapons programmes to fulfil their positive obligation requirements. What is more, some nuclear weapon states have already set up processes to provide some level of compensation for the harm caused by their detonation of nuclear weapons independently of the TPNW, which suggests that they are not completely averse to the idea of providing victim assistance and environmental remediation.⁷⁶

Another potential concern is that placing the primary responsibility on the nuclear weapons states would delay the provision of assistance to victims and the environment because of the time it will take for the nuclear weapons states to accept and join the Treaty. I have sympathy for this point. However, issues of delay in the delivery of the positive obligations exist in the current formulation of the text. It has been very difficult to get states parties (many of whom, be they affected or non-affected states, have very small budgets) to commit resources to the positive obligations and attempts to develop frameworks for the delivery of the positive obligations are still in their infancy.⁷⁷ What is more, some affected states have chosen not to join the TPNW because they would be saddled with responsibility for positive obligations thus creating delay in the positive obligations in their jurisdictions being fulfilled. One such affected state is the Marshall Islands. Among its chief concerns in this area is the fact that it has limited resources as a nation to spend on these obligations.⁷⁸

The reality is that there is no fool-proof way within the framework of the TPNW to ensure that victims and the environment receive the assistance and support they need. No state – be it a user state, affected state or some other state party – is likely to be keen to part with the significant resources required to fulfil the Treaty’s positive obligations. However, as noted above, the nuclear weapon states are in a much better financial position to be able to take on this role than affected

⁷⁵For example, ICAN discusses how they are building support for the TPNW within nuclear weapon states by getting state legislatures and individual politicians in national legislatures to express support for the Treaty: ICAN, ‘The Significance of the Entry Into Force of the Treaty on the Prohibition of Nuclear Weapons’, September 2020, available at d3n8a8pro7vhmxc.cloudfront.net/ican/pages/1718/attachments/original/1601295290/Briefing_Paper_on_the_Significance_of_TPNW{EIF_FINAL_September_2020.pdf?1601295290.

⁷⁶For a discussion of such schemes see below in Section 5.3.

⁷⁷This is apparent from the Vienna Action Plan that was adopted at the First Meeting of States Parties to the TPNW in June 2022. The part of the Vienna Action Plan that focuses on the positive obligation looks at the need for states parties to do things such as establish national focal points, co-ordinate and develop mechanisms, co-operate with the UN and recognize the importance of information exchange. These actions are all well and good but they are a significant way away from a comprehensive approach to the delivery of victim assistance and environmental remediation. See First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, ‘Draft Vienna Action Plan’, TPNW/MSP/2022/CRP.7 (2022), available at documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP_2022.CRP_7-Draft-Action-Plan-new.pdf.

⁷⁸ICAN, ‘Marshall Islands Summary’, available at www.icanw.org/marshall_islands#:~:text=Nuclear%2Dweapon%2Dfree%20state&text=The%20Marshall%20Islands%20has%20not,of%20Nuclear%20Weapons%20.

states such as the Marshall Islands. Consequently, we should be wary of arguments that the pragmatic option for delivering victim assistance and environmental remediation is to place the primary responsibility for the positive obligations on affected, not user, states.

4. Questioning the idea that the TPNW's approach to positive obligations aligns with international human rights law

A second argument that is made for placing primary responsibility for the positive obligations on affected states is that it aligns with international human rights law. At the 2017 TPNW Conference, proponents of this view – including some states, ICAN, and the ICRC – argued that, as international human rights law requires states to provide human rights to those within their borders, it follows that international human rights law supports the notion under the TPNW that affected states have positive obligations to those within their states.⁷⁹

However, this understanding of how international human rights law operates is only a partial one. While states do have obligations to respect and fulfil the rights of persons within their borders, a key tenet of international human rights law is that it is the wrong-doing state that is responsible for remedying any human rights violations.⁸⁰ This means that it should be the states that tested or used nuclear weapons that are responsible for affording relief to the victims for the harm they experience,⁸¹ not the states where those victims now live. A potential complication with this arises because under international human rights law states only owe human rights to persons outside their state territory in certain circumstances and precisely when states owe international human rights obligations extra-territorially is subject to debate.⁸² However, while there is some uncertainty in this area, it is widely accepted that at the very least a state will owe human rights extra-territorially when it exercises effective control over another territory⁸³ and there are strong arguments to be made that a significant number of user states exercised effective control over the territories and/or persons that were subject to their nuclear testing programmes. This is particularly so for the US, the UK, and France who tested nuclear weapons in their colonial and trust territories where they clearly exercised effective control as they were the governing authorities in these territories.⁸⁴ It would be more difficult to establish that the US owed human rights to the victims of its bombing of Hiroshima and Nagasaki because courts have been reluctant to find that aerial bombardments alone can give rise to human rights obligations.⁸⁵ This should not detract, however, from the fact that in a significant number

⁷⁹See Docherty, *supra* note 15, at 66.

⁸⁰D. Shelton, *Remedies in International Human Rights Law* (2006), at 114; A. Crowe, 'Human Rights-Humanitarianism in Disarmament Law', in T. Dunworth and A. Hood (eds.), *Disarmament Law: Reviving the Field* (2020), 80, at 96–7. For a broader and very insightful discussion of further difficulties and limitations with the TPNW's use of human rights law see the entirety of Crowe's chapter.

⁸¹Relief can come in an array of forms including a declaratory judgment, compensation damages, or orders for specific state action: see Shelton, *ibid.*, at 1–2.

⁸²M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (2015), at 11–18, 118–19. See also *Al Skeini v. The United Kingdom*, Judgment (Merits and Just Satisfaction) of 7 July 2011, [2011] ECHR, paras. 138–140; *Loizidou v. Turkey*, Judgment (Preliminary Objections) of 23 March 1995, [1995] ECHR (Ser. A.), para. 62.

⁸³See Milanovic, *ibid.*, at 118–19.

⁸⁴The US was the trust power in the Marshall Islands where it conducted 67 nuclear tests; the UK was the colonial power in Kiribati where it carried out nuclear tests; and France was the colonial power in both Algeria and French Polynesia where it carried out its nuclear tests. Under the case law of the European Court of Human Rights, effective control has often been found as a consequence of military action (see, e.g., *Al Skeini*, *supra* note 82, para. 139). While military action was not the immediate source of the US, the UK, and France's effective control in their colonial and trust territories, their source of effective control was in fact much stronger as they governed the territories, exercised authority of the peoples in the territories, imposed laws, and controlled the territories' defence and foreign affairs.

⁸⁵See, e.g., *Bankovic v. Belgium*, Decision (Admissibility) of 12 December 2001, [2001] ECHR; *Georgia v. Russia*, Judgment of 21 January 2021, [2021] ECHR; M. Milanovic, 'Georgia v Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos', *EJIL:Talk!*, 25 January 2021, available at www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/.

of nuclear testing situations, a human rights lens would dictate that it is the user states, not affected states, that are responsible for remedying the harm caused thus casting into question the reasoning put forward at the 2017 TPNW Conference.⁸⁶

Beyond the issues that arise from a very truncated view of international human rights law being applied to the positive obligations in the TPNW, is the question of whether the international human rights law framework should have informed the development of the positive obligations in the first place. There are some forms of damage flowing from nuclear use and testing that can be construed as rights violations. For example, medical and psychological harm can be understood as violations of the right to health and perhaps in some cases violations of the right to be free from cruel, inhuman, and degrading treatment. It is less clear, however, whether other harms are best addressed as rights violations. It is beyond the scope of this article to offer an in-depth discussion of this issue but a brief example of harm that might not be best addressed through a human rights lens is the environmental damage caused by nuclear weapons. While a nascent right to ‘a clean, healthy and sustainable environment’ was recognized by the Human Rights Council in late 2021, this area of the law is very underdeveloped.⁸⁷ Further, and more significantly, it is questionable whether the extensive harm done to the sea, fish, animals, plants, land, and atmosphere by nuclear weapons is best addressed by thinking about it through a human-focused lens.

In concluding this section, it can be seen that, contrary to what was advanced at the 2017 TPNW Conference, international human rights law does little to support the current formulation of the positive obligations in the TPNW. The fact that human rights obligations can apply extra-territorially and international human rights law works to hold the perpetrators of rights violations accountable means the field provides limited support for burdening affected states with the primary responsibility for victim assistance and environmental remediation. That support is diminished even further when consideration is given to the fact that a human rights frame may not adequately capture all of the harms perpetrated by nuclear weapons.

5. Questioning the idea that the TPNW’s approach to positive obligations should follow the trend set in other humanitarian disarmament treaties

A third argument made in support of affected states bearing the primary responsibility for the TPNW’s positive obligations is that this is the broad approach to positive obligations⁸⁸ adopted in the Anti-Personnel Mines Convention⁸⁹ and Convention on Cluster Munitions.⁹⁰ The reason

⁸⁶It is also worth noting that in some instances of nuclear testing, the governments of affected states assisted the user states with the testing. For example, the Australian government gave permission for Britain to test nuclear weapons on its territory in the 1950s. In such instances, it might be that both the user and affected state bear some responsibility for the harm caused by the nuclear tests. For a fuller discussion of divided responsibility for harm caused see Section 6.1, *infra*.

⁸⁷Human Rights Council, The Human Right to a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/48/L.23/Rev.1 (2021), available at www.undocs.org/a/hrc/48/l.23/rev.1.

⁸⁸While the positive obligation provisions across the Anti-Personnel Mines Treaty and the Convention on Cluster Munitions are not uniform, they favour a strong role for affected states with supporting roles for other states that were ‘in a position to do so’ and, at times, a weak role for user states. See the 1997 Anti-Personnel Mines Treaty and 2008 Convention on Cluster Munitions.

⁸⁹The 1997 Anti-Personnel Mines Treaty placed primary responsibility for the clearance of landmines on affected states (Arts. 4 and 5) while requiring states parties ‘in a position to do so’ to provide assistance with mine clearance (Art. 6(4)). Its victim assistance provisions did not single out a role for affected states or user states but rather required all states parties ‘in a position to do so’ to ‘provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs’ (Art. 6(3)).

⁹⁰The 2008 Convention on Cluster Munitions placed the primary responsibility for clearing and destroying cluster munitions on affected states (Art. 4(1)) while ‘strongly encourag[ing]’ user states ‘to provide, inter alia, technical, financial, material or human resources assistance’ to affected states (Art. 4(4)) and requiring all states parties ‘in a position to do so’ to provide ‘technical, material and financial assistance’ and assistance for clearing and destroying cluster munition remnants to affected states (Arts. 6(2) and 6(4)). With respect to victim assistance, the Convention on Cluster Munitions stated that affected states

this is seen as important is that these two treaties are commonly understood as humanitarian disarmament treaties – that is, treaties that focus on the interests of individuals who are harmed and affected by weapons – and the TPNW is also designed as a humanitarian disarmament treaty. The drafters argued that to ensure the TPNW had strong humanitarian underpinnings, it should follow and develop the approach taken to positive obligations in the two earlier humanitarian disarmament treaties.⁹¹ While this explanation makes sense on one level, there are a number of reasons to question it. This section explores three such reasons.

5.1 Questioning humanitarian disarmament's heavy focus on individuals and subordination of states

The first reason to query the idea that obligations for victim assistance and environmental remediation should primarily be provided by the affected state because this follows the logic of earlier humanitarian disarmament treaties is that just because something has been done a few times before in the same field, does not necessarily mean it is a sound approach. Far more significant is whether the idea(s) underpinning the approach stand(s) up to scrutiny and, in this case, there is a need to be wary of how the central idea connecting the three treaties – humanitarianism – operates in this space.

Proponents of humanitarian disarmament frequently frame the field as one that arose in the 1990s when there was a shift in disarmament circles from a focus on state-centric security notions (where the actors most in need of protection are states), to an emphasis on humanitarianism and human security (which stresses the importance of centring the lives, experiences and harm suffered by individuals).⁹² Under such an approach it is logical that a significant focus of the treaties would be on remedying the harm suffered by the victims of weapons' use and testing.

While it makes sense, and is important, that individuals who suffer harm from weapons should be afforded avenues for assistance and redress, it is concerning that under the logic of humanitarianism the emphasis on individuals has become so great that the prospect of any other actors being seen as victims or injured parties who have suffered damage has all but disappeared. In particular, the idea that the states where nuclear weapons were used or tested have suffered harm has faded.⁹³ These states have been labelled merely 'affected states' as opposed to 'victim' or 'injured' states. This framing inhibits such states from being afforded relief under the TPNW for the array of harms they have suffered from the use and testing of nuclear weapons. Examples of such harms include the litany of harms that Australia and Aotearoa New Zealand set out in their pleadings to the International Court of Justice in 1973 when they argued that France's nuclear testing programme in the Pacific was unlawful and must be stopped. These encompassed the fact that the tests violated their territorial sovereignty and the right to determine

have primary responsibility for providing victim assistance (Art. 5(1)) while other states parties 'in a position to do so' must provide assistance in this space (Arts. 6(7)–6(9)).

⁹¹See Austria, Ireland, and ICAN statements at the 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

⁹²B. 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 & Security* 163, at 164–5; N. Ritchie and K. Egeland, 'The Diplomacy of Resistance: Power, Hegemony and Nuclear Disarmament', (2018) 30(2) *Global Change, Peace & Security* 121, at 128. It is important to note that this conventional narrative has been subject to significant challenge. For example, as Dunworth reveals in her monograph, there is in fact a very long history of humanitarian ideas influencing disarmament: see T. Dunworth, *Humanitarian Disarmament: A History* (2020). See also M. Chiam and A. Hood, 'Nuclear Humanitarianism', (2019) 24(3) *Journal of Conflict and Security Law* 473.

⁹³Efforts were made by Ecuador at the 2017 TPNW Conference not only to focus on the rights of individuals but to 'also maintain the rights of those states where explosions took place'. Unfortunately, however, these efforts went unheeded: Conference, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/.

what happened within their territory,⁹⁴ their right not to have their terrestrial, maritime, and aerial environments contaminated by radio-active material,⁹⁵ and their right to freedom of the high seas including the freedom to explore and exploit the resources of the sea and seabed.⁹⁶ Examples of other harms arising from nuclear testing or use that states have suffered include damage to state property and resources, and violations of trusteeship agreements.

It is, of course, possible that states affected by the weapons addressed in the humanitarian disarmament treaties could seek to address harms done to them by launching court proceedings against user states or negotiating separate treaties for redress.⁹⁷ However, as has already been noted, this avenue is a fraught and uncertain one making it challenging for harm to states to be recognized. Moreover, it does not detract from the fact that under the humanitarian disarmament treaties, the harms suffered by individuals are dealt with directly while harms suffered by states are side-lined and required to be addressed through other, external legal regimes.

By highlighting the victimhood of individuals and obscuring injuries to states, humanitarianism not only diverts attention from redressing the harm done to affected states but it also makes it much easier to task affected states with the burden of remedying the harm to individuals within their territory as they are not perceived to have suffered any harm in their own right. To be clear, I am not suggesting that individuals are unworthy of receiving assistance. Rather, I am concerned that the narrow focus on individuals that has emerged through the humanitarian disarmament movement has distracted us from other harms that exist and, most pertinently here, the harms that certain states have suffered.⁹⁸ This state of affairs should give us pause when considering whether to follow the formula for positive obligations set down in the early humanitarian disarmament treaties.

5.2 How humanitarian disarmament treaties' approach to positive obligations may play into unjust and inequitable international dynamics

A further reason to question the idea that the TPNW's approach to positive obligations should mirror the logic of the Anti-Personnel Mines Convention and Convention on Cluster Munitions is that the approach of these treaties plays into a broader international dynamic around responsibility for grave harm that is inequitable and unjust. Over the last two to three decades there has been a widely remarked upon trend in international law towards anti-impunity. Scholars have documented a great move towards holding individuals who commit human rights abuses, violations of humanitarian law and international crimes to account, most notably through international criminal trials.⁹⁹ Significantly, however, this trend has not been a universal one. Rather, as scholars such as Vasuki Nesiah,¹⁰⁰ Richard Falk,¹⁰¹ and

⁹⁴*Nuclear Tests (Australia v. France)*, Request for the Indication of Provisional Measures of Protection submitted by the Government of Australia of 9 May 1973, at 44.

⁹⁵*Nuclear Tests (New Zealand v. France)*, Request for the Indication of Interim Measures of Protection Submitted by the Government of New Zealand of 14 May 1973, at 49.

⁹⁶*Ibid.*

⁹⁷Indeed, as noted above in Section 2, Art. 6(3) of the TPNW explicitly provides that the positive obligation provisions in Arts. 6(1) and 6(2) 'shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements'.

⁹⁸The idea that humanitarianism obscures certain forms of harm and/or creates hierarchies of harm has been explored in an array of other contexts. See, e.g., Dunworth, *supra* note 92, at 239; M. Koskeniemi, 'Humanity's Law, Ruti G. Teitel', (2012) 26(3) *Ethics and International Affairs* 395, at 395–6; Chiam and Hood, *supra* note 92, at 497.

⁹⁹See, e.g., K. Engle, Z. Miller and D. M. Davis, 'Introduction', in K. Engle, Z. Miller, and D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (2017), 1, at 1.

¹⁰⁰V. Nesiah, 'Doing History with Impunity', in Engle, Miller and Davis, *ibid.*, 95, at 100.

¹⁰¹R. Falk, 'Opposing Impunity for Geopolitical Criminality', *Foreign Policy Journal*, 6 April 2015, available at www.foreignpolicyjournal.com/2015/04/06/opposing-impunity-for-geopolitical-criminality/.

William Schabas¹⁰² have identified, it has primarily focused on ensuring those in the Global South who violate human rights and humanitarian standards are brought to ‘justice’; their counterparts in the Global North have been at little risk of finding themselves in the dock. There is a double standard embedded within international law that has generated, in the words of Nesiiah, ‘distinctive and repetitive geopolitical and distributive patterns over time’.¹⁰³

While operating in a different international legal realm, the apportionment of responsibility for harm caused by weapons in the Anti-Personnel Mines Convention, Convention on Cluster Munitions and TPNW plays into this dynamic. In an age of anti-impunity, it might be expected that any system addressing the harm caused by nuclear weapons would seek to place the burden of remedying that harm on the states or individuals responsible for using or testing the nuclear weapons in question. Instead, however, in the humanitarian disarmament treaties we see a mirroring of what happens in international criminal law. In the instances where nuclear harm has occurred outside the territory of the user state, it has primarily been at the hands of states in the Global North (for example, the US, UK, and France) and against states in the Global South (for example, Algeria and states in the Pacific). Aligning with the patterns in international criminal law, a system has been developed by the Anti-Personnel Mines Convention, Convention on Cluster Munitions and TPNW that ensures the states of the Global North do not have to own or bear the brunt of remedying the damage they have caused. What is more, the humanitarian disarmament treaties take this trend one step further by making states in the Global South assume responsibility for remedying harms they have not caused.

The way the positive obligations provisions in the TPNW play into a global trend towards impunity for the Global North did not receive any proper consideration at the TPNW Conference. It is interesting, however, to note that there was a deep divide at the Conference over the obligations with states from the Global South arguing vehemently for user states to bear the primary responsibility for victim assistance and environmental remediation, and states and civil society advocates from the Global North pushing for affected states to play the crucial role.¹⁰⁴ Both the inequitable dynamic the positive obligations play into and the strong views of states in the Global South should make us question the decision to require affected states to carry the primary responsibility for harm caused by nuclear weapons.

5.3 The existence of other precedents for apportioning responsibility for harm caused by nuclear weapons

A final reason to question the idea that the apportionment of responsibility in the TPNW is justified because it fits with the approaches taken in the Anti-Personnel Mines Convention and Convention on Cluster Munitions is that these are not the only precedents that could have guided decisions about where responsibility for addressing harm caused by nuclear weapons should lie. To the contrary, in the nuclear weapons realm there are a number of precedents for user states bearing the cost of remediating harm they have caused through nuclear testing. For example, pursuant to a 1986 treaty between the Marshall Islands and the US, the Marshall Islands Nuclear Claims Tribunal was established to hear claims from Marshallese affected by the US nuclear testing programme. Successful claimants were able to secure compensation from the US government.¹⁰⁵ Another model is the one that was established by France in 2010 which enables any

¹⁰²W. Schabas, ‘Global Insider: Ten Years In, ICC’s Acquittal Rate is Extraordinarily High’, *World Politics Review*, 19 March 2013, available at www.worldpoliticsreview.com/trend-lines/12798/global-insider-ten-years-in-icc-s-acquittal-rate-is-extraordinarily-high.

¹⁰³See Nesiiah, *supra* note 100, at 100.

¹⁰⁴See the discussion above in Section 2.

¹⁰⁵Atomic Heritage Foundation, ‘Marshall Islands’, available at www.atomicheritage.org/location/marshall-islands. See also D. Pevec, ‘The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People’, (2006) 35(1) *Denver Journal of International Law & Policy* 193.

person who suffered an illness as a result of France's nuclear testing programmes in Algeria and the Pacific to claim compensation.¹⁰⁶

It is important to note that both the US and French models contain flaws including that both have struggled from insufficient funding.¹⁰⁷ The fact, however, that the models have not always been executed as well as they could have been should not detract from the fact that they demonstrate a way that responsibility for victim assistance and environmental remediation can be placed on a user, not affected, state. They are templates that could have provided the foundation for a different approach to be developed for the positive obligations in the TPNW.

6. Further problems with affected, not user, states bearing primary responsibility for the positive obligations

It is apparent from the discussion in Sections 3 to 5 that the three main justifications for the TPNW placing primary responsibility for positive obligations on affected states contain some significant weaknesses and should make us question the way that this part of the TPNW was formulated. I have several further concerns about placing the primary responsibility for the positive obligations on the affected, not user states that I want to explore in this section.

6.1 The current formulation undermines the idea that states that cause harm should be responsible for remedying that harm

My first concern with placing the main burden on affected states for the delivery of victim assistance and environmental remediation relates to a point which has been touched on in the discussion above, but which is worth making more explicit and developing a little further. It is that, as an array of states from the Global South stated in the 2017 TPNW Conference, basic notions of fairness and equity dictate that entities that cause harm should bear the onus of remedying that harm, not the states that were subjected to that harm.¹⁰⁸ For the most part, the states of the Global South did not ground this reasoning in any positivist legal doctrines but instead drew on natural law notions about what is intrinsically the most appropriate way to address the harm caused by nuclear weapons.¹⁰⁹

The case for user states bearing primary responsibility for victim assistance and environmental remediation is particularly strong in instances where the affected state was not consulted or

¹⁰⁶Library of Congress, 'France: Compensation of Victims of French Nuclear Testing', 22 January 2010, available at www.loc.gov/item/global-legal-monitor/2010-01-22/France-compensation-of-victims-of-french-nuclear-testing-2/.

¹⁰⁷See Pevec, *supra* note 105; J. Henley, 'France Has Underestimated Impact of Nuclear Tests in French Polynesia, Research Finds', *Guardian*, 9 March 2021, available at www.theguardian.com/world/2021/mar/09/france-has-underestimated-impact-of-nuclear-tests-in-french-polynesia-research-finds.

¹⁰⁸See the quotes from, and references to, statements by states in the Global South at the start of Section 2 of this article.

¹⁰⁹One state that did seek to tie its reasoning to positive law was Egypt which suggested that placing responsibility on the user states would be compatible with notions of responsibility in international humanitarian law. The strength of this reasoning in this context is, however, open to question given it would be dependent on finding that each user state had violated international humanitarian law and it is unclear that this occurred with nuclear testing that took place outside the context of armed conflicts. Egypt at 17th Meeting of the UN Conference to negotiate a legally-binding instrument to prohibit nuclear weapons, leading towards their total elimination, 20 June 2017, available at www.unmultimedia.org/avlibrary/asset/1914/1914100/. Another legal framework that could potentially support the arguments in this section is the International Law Commission's Articles on State Responsibility (ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) YILC, Vol. II (Part Two), hereinafter 'Articles on State Responsibility'). There would be considerable work to be done to show that each instance where nuclear weapons were used or tested was a breach of an international legal obligation at the time it took place. While possible, it is beyond the scope of this article to provide extensive analysis on this point. Thus, in the main, this section focuses on the natural law ideas that were raised by the states of the Global South at the 2017 TPNW Conference. Where relevant, however, footnotes are provided to principles from the Articles on State Responsibility that support the reasoning provided.

informed about the use or testing of nuclear weapons. The bombings of Hiroshima and Nagasaki clearly fall within this category as does much of the nuclear testing that occurred in the Pacific. For example, the UK carried out tests in its colony Kiribati (known then as the Gilbert and Ellice Islands) without the consent of the colony's residents and in the face of significant protests and opposition from across the Pacific.¹¹⁰ Similarly, the US carried out testing in its United Nations (UN) trust territory, the Marshall Islands, despite Marshallese protests which included petitions to the UN Trusteeship Council to try to shut down the US testing programme.¹¹¹

In cases where a state gave permission for nuclear tests to be carried out in its territory by another state – as was the case with the Australian Prime Minister Robert Menzies consenting to the British conducting nuclear tests in Australia in the 1950s¹¹² – the situation is potentially a little more complicated and it may well be that both states involved should play a role in providing victim assistance and environmental remediation. Relevant factors for apportioning the participating states' respective contributions might include the level of knowledge the territorial state had about the likely effects of the testing, the extent to which it was involved in supporting the tests, the legal and political relationship between the user and territorial states and any diplomatic assurances given by the testing state as to the possible consequences of the tests.

A further category of state that may bear some responsibility for nuclear testing encompasses those states that were not the testing or territorial state, but which offered to assist with the testing programmes.¹¹³ An example of such a state is Aotearoa New Zealand which provided significant assistance to the British testing programme in Kiribati in 1957 and 1958. The country supplied navy frigates and radiation monitoring equipment, transported individuals involved in the tests around the Pacific, and undertook nuclear test monitoring duties.¹¹⁴ Similarly to the situation of states that allowed their territory to be used for testing by others, the degree to which such supporting states should be required to contribute to the positive obligations might turn on factors such as the extent to which they were cognisant of the potential dangers,¹¹⁵ the extent of their involvement in the testing activities,¹¹⁶ the relationship between the user and territorial states, and any diplomatic assurances the territorial state may have received.

An example of a diplomatic assurance from a user state that might diminish the responsibility of the supporting state was the declaration the UK made to Aotearoa New Zealand about its Pacific testing programme. The UK promised Aotearoa New Zealand that 'full precautions would

¹¹⁰For example, Western Samoa sent a petition to the UN on 25 May 1956 expressing concern about the effects the tests would have: Petition from the Members of the Council of State, Non-Official Members of the Executive Council and Legislative Assembly and Members of the Fono of Faipule of the Territory of Western Samoa Concerning Samoa to the Trusteeship Council, UN Doc. T/PET.1/7 (XVIII) (1956). For further information about objections to the testing in the Pacific in the 1950s and 1960s, see N. Maclellan, 'The Nuclear Age in the Pacific Islands', (2005) 17(2) *The Contemporary Pacific* 363.

¹¹¹For example, in 1954, a number of Marshallese petitioned the UN Trusteeship Council outlining the harm that the nuclear tests to date had caused and asking that '[a]ll experiments with lethal weapons within this area be immediately ceased': Petition from the Marshallese People Concerning the Pacific Islands, UN Doc. T/PET.10/28 (1954), available at [nsarchive2.gwu.edu/nukevault/ebb459/docs/doc%2010A%20%20Marshall%20Islands%20petition%20dec%20files%2050-54%20\(1\).pdf](https://nsarchive2.gwu.edu/nukevault/ebb459/docs/doc%2010A%20%20Marshall%20Islands%20petition%20dec%20files%2050-54%20(1).pdf).

¹¹²See Maclellan, *supra* note 110.

¹¹³It is apposite to note that the Articles on State Responsibility provide that states that aid or assist other states in the commission of internationally wrongful acts will be held responsible for their aid and assistance: see Articles on State Responsibility, *supra* note 109, Art. 16.

¹¹⁴Examples of the support Aotearoa New Zealand supplied to the British testing programme can be seen in K. Holyoake, 'Prime Minister's Nuclear Broadcast', 23 May 1957. See also A. Hood, 'Aotearoa New Zealand in International Nuclear Weapons Law', in A. Hertogen and A. Hood (eds.), *International Law in Aotearoa New Zealand* (2021), 331, at 344.

¹¹⁵The Articles on State Responsibility require an assisting state to have 'knowledge of the circumstances of the internationally wrongful act': see Articles on State Responsibility, *supra* note 109, Art. 16.

¹¹⁶The commentary on the Articles on State Responsibility provides that 'the assisting state will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act': 'Report of the International Law Commission on the work of its fifty-third session' (2001) YILC, Vol. II (Part Two), at 66.

be taken to avoid danger to islands, shipping or fishing through radioactive contamination'.¹¹⁷ Any such claim, however, would need careful scrutiny. In the case of Aotearoa New Zealand, archival documents reveal that despite diplomatic assurances from the UK there was significant disquiet and uncertainty in the government and diplomatic service as to whether the tests were in fact safe, thus making it questionable that the country should be able to absolve itself completely for the role it played.¹¹⁸

6.2 The broader consequences of placing responsibility on affected, not user, states

A further problem with placing the primary onus for victim assistance and environmental remediation on affected, not user, states is that it potentially has a number of broader consequences for the field of international nuclear law. To start it might inadvertently weaken the case for nuclear disarmament. One of the central barriers to nuclear weapons states disarming is that they see nuclear weapons as central to their security, not a threat to it.¹¹⁹ Nuclear weapons are perceived as instruments that provide their possessors with unrivalled might and power.¹²⁰ In the myths that surround nuclear weapons in possessor states, the weapons' existence ensures protection for the nation's goods, values and way of life.¹²¹ Indeed, they have been described as the 'prince of peace' because their mere presence in a nation is seen to deter attacks.¹²² This image of nuclear weapons as delivering peace and security can only be maintained if the true destructive potential of nuclear weapons remains concealed and nuclear weapons states' populations do not have to confront the catastrophic harms that nuclear weapons cause.¹²³

Putting the main onus to address the harm inflicted by nuclear weapons on affected states means that the user states and their publics are unlikely to have to engage directly with the devastation nuclear weapons cause. While there is a weak duty under the TPNW for user states to assist with remediation efforts, as noted above, there is plenty of room for them to avoid grappling with all of the intergenerational injuries and medical conditions, psychological damage, and environmental destruction the use and testing of the weapons cause. The destruction is predominantly cleaned up by others and the harm remains out of the public consciousness in user states, allowing the illusion that nuclear weapons are a safe and effective instrument for delivering and maintaining international peace and security.

Further, failing to place primary responsibility on user states for victim assistance and environmental remediation means that the user states, and perhaps the international community more broadly, are unlikely to have cause to acknowledge or engage with the political forces, ideologies and structures that supported the use and testing of nuclear weapons. The history of nuclear weapons is one that is intimately connected with colonialism and racism.¹²⁴ The US, UK, and France not only used their colonies and territories to test nuclear weapons but they also provided the populations who lived in the regions where the tests were conducted with fewer protections than those afforded to the Western scientists, military personnel, and technicians executing the tests.¹²⁵ For example, reports from the time reveal that an i-Kiribati woman was taken offshore in a British

¹¹⁷Petition from the Members of the Council of State, Non-Official Members of the Executive Council and Legislative Assembly and Members of the Fono of Faipule of the Territory of Western Samoa Concerning Western Samoa (T/PET.1/7): Observations of the Government of New Zealand as Administering Authority, UN Doc. T/OBS.1/5 (1956), at 2.

¹¹⁸See Hood, *supra* note 114, at 345.

¹¹⁹N. Ritchie, 'Valuing and Devaluing Nuclear Weapons', (2013) 34(1) *Contemporary Security Policy* 146, at 146.

¹²⁰I. Chernus, *Dr Strangelov: On the Symbolic Meaning of Nuclear Weapons* (1986), at 13, 17.

¹²¹*Ibid.*, at 39.

¹²²*Ibid.*, at 41.

¹²³As Alexis-Martin et al. have argued, '[t]he UK, and to a lesser extent, the USA, have avoided acknowledging the humanitarian and environmental costs of their test programs in Kiribati in part because they have seen survivors' stories as inconvenient to the deterrence narrative that nuclear weapons kept the "free world" safe'. See Alexis-Martin et al., *supra* note 1, at 117.

¹²⁴*Ibid.*, at 110–12.

¹²⁵*Ibid.*, at 110–11.

vessel during some of the testing in Kiribati and that '[a]lthough the crew were wearing protective clothing over their heads, she was in her everyday clothes when the rain fell'.¹²⁶ Another i-Kiribati account noted that 'the British authorities gave them blankets and some eye protection, "but not enough glasses for everyone"'.¹²⁷ Further, Pacific Islanders who were engaged to assist with testing also faced discriminatory, racist treatment with reports from Fijians engaged in the British tests noting that one person 'never saw any protective gear at all' and others documenting that Fijian troops were 'often allocated dirty, difficult or dangerous tasks'.¹²⁸

While colonialism and racist practices were integral to the testing programmes and are important for understanding both the harm suffered by many affected individuals and the ways that the testing programmes functioned, there is a high chance that the roles of colonialism and racism will be obscured when affected states, not user states, are given primary responsibility for victim assistance and environmental remediation. This is because, under this approach, the harm that needs to be remedied is divorced from those who perpetrated it and the political conditions that underpinned and propelled their actions.

It is thus apparent that in addition to the weaknesses with the three main rationales offered in support of primary responsibility for positive obligations being placed on affected states, there are a number of further reasons why we should perhaps question the decision reached at the 2017 TPNW Conference.

7. Concluding reflections and pathways for the future

The impetus behind the positive obligations to provide support for those affected by nuclear weapons and to address the environmental damage caused by nuclear use and testing is admirable. There is a real need to ensure that the many different harms that have flowed from the detonation of nuclear weapons are addressed. There are, however, important reasons to question the decision to place the primary burden for remedying these harms on affected, not user, states in the Treaty text.

The ideas that the TPNW's allocation of responsibility for the positive obligations is the most pragmatic, accords with international human rights law principles and follows good precedents set by other humanitarian disarmament treaties are all open to question. What is more, the Treaty's formulation around the positive obligations undermines the idea that those who perpetrate harms should be made to remedy that harm. This is particularly problematic given the TPNW's approach works to place the burden for addressing the positive obligations on states of the Global South who rarely played an active role in the detonation of nuclear weapons and places very little onus on states in the Global North who caused the nuclear detonations. Further, protecting user states from having to engage and grapple with positive obligations in meaningful ways potentially has ramifications beyond the provision of assistance to the individuals and environments that have suffered from the detonation of nuclear weapons. It may negatively affect the nuclear disarmament movement as it allows user states to preserve an image of nuclear weapons in their states' national imaginations as safe and security-enhancing. Additionally, it may further obscure the role that colonization and racism played in the use and testing of nuclear weapons.

While it is unfortunate that more heed was not given to the arguments of the Global South when the TPNW's positive obligations were being negotiated and prospects for amending the Treaty at this point in history appear negligible,¹²⁹ there may well be opportunities for the burden on affected states to be lessened and the responsibility on user states increased in the future.

¹²⁶*Ibid.*, at 111.

¹²⁷*Ibid.*, at 111.

¹²⁸*Ibid.*, at 110.

¹²⁹While, pursuant to Art. 10(2) the TPNW can be amended by a positive vote of two-thirds of the Treaty's states parties, there is little appetite at this point in time for reopening the text and adjusting key provisions in it.

Pursuant to Article 8 of the Treaty, the ‘States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Treaty’. This broadly drafted provision creates space for considerable work to be done to operationalize the co-operation and assistance provisions in Article 7 in effective and meaningful ways. I hope that some of the ideas in this article will act as an impetus for the strengthening of Article 7. I also hope that the issues raised in this piece are more fully discussed and considered when any future disarmament treaties are negotiated. Remedying the harm caused by weapons should be a key part of disarmament endeavours but more thought needs to be given to the way in which this work is done and the frameworks that inform it.