

Issues in Victim Assistance and International Cooperation under the Treaty on the Prohibition of Nuclear Weapons: Taking Several National Compensation Measures by the Affected States into Consideration¹

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1. Introduction

The Treaty on the Prohibition of Nuclear Weapons (TPNW) imposes a comprehensive prohibition against nuclear weapons and specifies some measures toward their abolishment. It includes an article (Article 6) stipulating assistance for victims affected by the use or testing of nuclear weapons as well as environmental remediation of areas that have been contaminated as a result of the testing or use of nuclear weapons and other nuclear explosive devices. Another article (Article 7) stipulates international cooperation for the implementation of the treaty—including the victim assistance and the environmental remediation stipulated by Article 6. While provisions requiring prohibitions of nuclear weapons (especially Article 1) remain ineffective unless the nuclear-armed states and their allies participate in the treaty, Articles 6 and 7 become effective if the states suffering nuclear damage participate in the treaty, and thus these are significant factors in considering the effectiveness of the treaty. This explains why some experts expect Articles 6 and 7 to become one of the main points of discussion in the first meeting of states parties that is scheduled to be held in 2022².

On the other hand, Japan, which suffered nuclear attacks in war, and some states affected by nuclear testing have already taken national support measures for victims³.

This article examines the significance of each paragraph of Articles 6 and 7 and

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² For example, see Docherty 2020.

³ See the other articles in this collection.

analyzes challenges in implementing the treaty, while taking into consideration the national measures that have already been taken and are being taken by the states affected by the use or testing of nuclear weapons.

2. Article 6

A provision requiring assistance for victims of weapons to be banned is common in the treaties that take a humanitarian approach to disarmament (“humanitarian disarmament”), such as the Anti-Personnel Mine Ban Convention (APM) and the Convention on Cluster Munitions (CCM). In fact, Articles 6 and 7 of the TPNW were created in reference to relevant articles of the CCM (i.e., Articles 5 and 6).

2.1 Paragraph 1

Article 6 of the TPNW is about “[v]ictim assistance and environmental remediation,” and it imposes on each state party an obligation to provide assistance “with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons” (Paragraph 1). The TPNW thus requires each state party to provide assistance to victims who are under its jurisdiction. This is based on Article 5, Paragraph 1 of the CCM, which requires each state party to provide assistance “with respect to cluster munition victims in areas under its jurisdiction or control.” The CCM, however, limits the obligation of victim assistance to the state in which victims reside. In the original draft of the TPNW submitted by the President of the UN Conference, the phrase “in areas under,” which refers to territories where the victims reside, was also used, but this phrase was deleted in the adopted treaty. The absence of this phrase leads to an interpretation that the TPNW imposes an obligation of victim assistance on not only the states parties in which victims reside but also the states parties whose nationality victims have (i.e., the states parties which have personal jurisdiction over victims).

In reality, for example, Japan issues a “Health Handbook for Atomic Bomb Survivors”⁴ and provides assistance for “overseas atomic bomb survivors” who do not reside in Japan. South Korea, in which many of the “overseas atomic bomb survivors” reside, formulated “Special Act on the Support for Korean Atomic Bomb Victims” in 2016.

Interpreting the “jurisdiction” in Article 6, Paragraph 1 as both territorial and personal jurisdiction thus means that a larger number of states parties have the obligation

⁴ The Japanese “Atomic Bomb Survivors’ Support Law” stipulates that a “Health Handbook for Atomic Bomb Survivors” shall be issued to each “atomic bomb survivor.”

of victim assistance. This, at the same time, means that the states parties have to discuss ways of coordination if there arises a conflict of jurisdiction. For example, a draft of the abovementioned Korean act at first had a provision regarding livelihood support to the victims, who have already obtained similar support from Japan based on the 1994 “Atomic Bomb Survivors’ Support Law” of Japan. This was considered problematic and thus the provision was deleted before the act was enacted (Kikuchi 2016).

In terms of holding the states which have used or tested nuclear weapons accountable, it might be considered problematic that the TPNW requires the states which have territorial or personal jurisdiction over victims to provide assistance, but this victim assistance has to be understood from the perspective of ensuring the rights of victims. The CCM highlights this perspective in its preamble, which provides that the States Parties are “[d]etermined [...] to ensure the full realization of the rights of all cluster munition victims” (Preamble, Paragraph 6 of the CCM), and that they “[bear] in mind the Convention on the Rights of Persons with Disabilities” (Preamble, Paragraph 9), which was formulated at nearly the same time. In contrast, the TPNW does not have such provisions in the preamble. However, its preamble reaffirms the need to comply with international human rights law (Preamble, Paragraph 8 of the TPNW), and taking into consideration that the states in which victims reside or the states whose nationality victims have know the victims better and have easier access to them, it seems reasonable to require these states to provide assistance for victims in order to ensure their rights.

Another issue lies in who the victims—“individuals [...] who are affected by the use or testing of nuclear weapons” (Article 6, Paragraph 1)—are. On the basis of the non-retroactivity of treaties (Article 28 of the Vienna Convention on the Law of Treaties), some people may claim that the beneficiaries of the victim assistance of the TPNW should be limited to those affected after the TPNW entered into force. Based on the understanding that the victim assistance provisions in the TPNW are to ensure the rights of the victims, however, it is obvious that the victims who are currently suffering from nuclear damage are entitled to the assistance stipulated in the TPNW (Rietiker and Mohr 2018). At the same time, what should be noted is that, in contrast to the CCM, which says that the states parties are determined to “ensure the full realization of the rights of all cluster munition victims” (Preamble, Paragraph 6 of the CCM), the TPNW only refers to “the unacceptable suffering of and harm caused to” (Preamble, Paragraph 6 of the TPNW) victims. This is related to details of victim assistance, to be discussed below.

Another relevant issue is the scope of effects of the use or testing of nuclear weapons—that is, the question of who are deemed to be victims affected by the use or testing of nuclear weapons. It is difficult to prove a causal relationship between nuclear explosions and

damages—especially radiation effects—individual victims suffer, and thus, each state has taken different approaches in certifying victims. For example, the Atomic Bomb Survivors’ Support Law of Japan certifies victims based on the applicant’s corroboration of residence within the areas and time periods designated by the government and their movement history. Moreover, in order for their injuries or illnesses to be certified as caused by the effects of the atomic bombs, the applicant is required to prove a causal relationship between the injuries or illnesses and radiation exposure.

In the U.S., the Radiation Exposure Compensation Act (RECA) entitles those who resided or worked in designated areas and time periods and contracted designated diseases. The RECA clearly mentions that fallout emitted in the nuclear tests and radiation released in uranium mines which provided uranium for the nuclear weapons program are presumed to have generated cancers (Section 2 of the RECA).

In France, the Morin Law stipulates that all the people who resided or stayed in designated areas and contract designated diseases are entitled to compensation. The applicant has to prove the residency or stay in the designated areas, and in the review by the compensation committee, fulfillment of the residency/stay condition leads to presumption of causality between radiation exposure and the diseases. When the risk attributable to the nuclear tests are considered to be negligible in view of the nature of the diseases and the conditions of the radiation exposure, however, causality is not presumed.

In contrast, the Semipalatinsk Social Protection Law in Kazakhstan, which is one of the states parties to the TPNW, regards all the citizens who either lived, worked, or served in the military in designated areas as the “victims of nuclear tests,” and entitles them to compensation without questioning the relationship between radiation exposure and diseases.

Energy released in a nuclear explosion takes three forms: blast, heat, and radiation. Another point of discussion on the definition of victims “who are affected by the use or testing of nuclear weapons” (Article 6, Paragraph 1 of the TPNW) lies in whether the victims are limited to those who were directly affected by these three effects of nuclear explosions. As a point of reference, the CCM explicitly defines “[c]luster munition victims” in Article 1, Paragraph 1, according to which not only “those persons directly impacted by cluster munitions” but also “their affected families and communities” are included in the definition of the victims. Will the same kind of interpretation be adopted in the TPNW? The factors to be considered with regard to this question include relief for children or grandchildren of the victims, including atomic-bomb orphans and the kinds of damage to be compensated (i.e., whether not only physical and psychological effects but also loss or damage to property are compensated for).

Another point of discussion with regard to the interpretation of Paragraph 1 lies in whether not only the use or testing of nuclear weapons but related activities such as uranium mining and disposal of nuclear weapons waste are taken into consideration in defining victims (Rietiker and Mohr 2018). Since Paragraph 2 defines areas subject to environmental remediation as those “contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices,” the question of whether effects of such related activities are to be considered in the interpretation of the article will become one of the focuses of future discussion.

With regard to details of victim assistance, Article 6, Paragraph 1 of the TPNW mentions the following six factors: (1) age- and gender-sensitivity, (2) medical care, rehabilitation, psychological support, etc., (3) social and economic inclusion of victims, (4) accordance with applicable international humanitarian and human rights law, (5) non-discrimination, and (6) assistance to be provided “adequately.” They all refer to Article 5, Paragraph 1 of the CCM. Factor (6) makes it possible to interpret that the TPNW gives states parties a certain amount of discretion regarding details of victim assistance. As already mentioned above, in contrast to the CCM, the TPNW does not mention victims’ rights or needs. Therefore, how to specify criteria for evaluating “adequateness” will be one of the upcoming challenges. Note that the TPNW recognizes that “the catastrophic consequences of nuclear weapons cannot be adequately addressed” (Preamble, Paragraph 4) and presupposes that “suffering of and harm caused to the victims” are “unacceptable” (Preamble, Paragraph 6). Based on this logic, in contrast to the CCM, it is impossible “to ensure the full realization of the rights of all [...] victims” (Preamble, Paragraph 6 of the CCM). Article 6, Paragraph 1 of the TPNW, however, requires the treaty to be implemented in accordance with applicable international human rights law (Factor (4)), so victims’ needs should be valued as a criterion for evaluating “adequateness.” It is undeniable that Article 6, Paragraph 1, which stipulates the victim assistance, has the characteristics of a law on social rights, but the question of whether or not all kinds of victim assistance can be implemented progressively cannot be answered without knowing the needs of the victims.

Ongoing assistance measures implemented in different states have faced a lot of objections and challenges and thus they do not seem to succeed in addressing the needs of the victims. Some of the measures are only one-time or temporary. For example, when a U.S. hydrogen bomb test exposed a Japanese tuna fishing boat, Daigo Fukuryu Maru (also known as Lucky Dragon No. 5) to radiation in 1954, the incident was settled by an ex-gratia payment by the U.S. government. As another example, the RECA states that the act is applied only to claims filed within 22 years after the revision of the act in 2020 (until July 9, 2022). There is, however, no fixed line of demarcation between who are affected by the

use or testing of nuclear weapons and who are not. Moreover, the duration of the TPNW is defined to be unlimited (Article 17, Paragraph 1). Therefore, with regard to the TPNW, a permanent system of the victim assistance should be considered.

2.2 Paragraph 2

Article 6, Paragraph 2 requires each state party to remediate areas under its jurisdiction or control that are contaminated by the testing or use of nuclear weapons. Thus, there is no provision on remediation of international public domain (*res communis*) including the high seas, which is contaminated by nuclear weapons, and thus this is one of the future challenges. Furthermore, the meaning of “necessary and appropriate measures towards the environmental remediation” is not necessarily obvious, and thus future meetings of states parties will have to develop guidelines on this point. Since the TPNW refers to effects of nuclear-weapon activities on indigenous peoples (Preamble, Paragraph 7), taking their rights and needs into consideration will be indispensable in designing the guidelines.

2.3 Paragraph 3

In international law, the two basic principles for resolving conflicts of treaties are the principle of *lex specialis derogat legi generali* (a special law repeals a general law) and the principle of *lex posterior derogat priori* (a later law repeals an earlier law). Article 6, Paragraph 3 means that even if the obligations of victim assistance and environmental remediation stipulated in the preceding paragraphs of Article 6 are *lex specialis* or *lex posterior*, general international law or earlier laws take precedence over them. For example, the Compact of Free Association (COFA) between the U.S. and the Marshall Islands has a section regarding compensation by the U.S. for loss or damage to property and person that resulted from the U.S. nuclear testing (Section 177). Even if both states become states parties to the TPNW, the U.S. obligation stipulated by the COFA would remain unaffected.

Then, what if a treaty between involved states preceding the TPNW contains an agreement that no compensation for damage is to be made? For example, the Treaty of Peace with Japan (also known as the Treaty of San Francisco) provides, “Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war” (Article 19, Paragraph 1). Thus, it is understood that through this treaty, Japan waived claims for indemnity or compensation against the U.S. with regard to the atomic bombings on Hiroshima and Nagasaki. Suppose both Japan and the U.S. join the TPNW. According to Article 6, Paragraph 3 of the TPNW, obligations of victim assistance and environmental

remediation shall be without prejudice to the obligation of Japan stipulated by the Treaty of Peace with Japan (i.e., waiver of the right to claim), and thus joining in the TPNW would not impose a compensation obligation on the U.S. (Note, however, that obligations of states parties based on Article 7 of the TPNW should be discussed separately, and that the issue of the rights in general international law of the victims of a violation of international humanitarian law should also be considered separately.)

3. Article 7

As the previous section of this article analyzed, the characteristics of Article 6 lie in that it fixes the primary responsibility for victim assistance and environmental remediation on the states parties which are affected by the use or testing of nuclear weapons—which is based on a provision of the CCM. This obligation incurred by the affected states parties could be reduced through international cooperation and assistance stipulated by Article 7.

3.1 Paragraphs 1 and 2

Paragraph 1 stipulates a general obligation of cooperation between the states parties to facilitate the implementation of the treaty. The scope of this obligation of cooperation encompasses the whole treaty. Paragraph 2 defines states parties' right to seek and receive assistance from other states parties in fulfilling their obligations under the treaty. There are similar provisions in the CCM (Article 6, Paragraph 1) and the APM (Article 6, Paragraph 1), but while the CCM does not specify from whom each state party seeks and receives assistance, the TPNW and the APM provide that assistance can be sought and received from other states parties. Another common characteristic of the TPNW and the APM is that they specify a condition, "where feasible," for states parties to exercise the right to seek and receive assistance. With regard to the APM, what it means for the right to seek and receive assistance to be conditioned feasible is not necessarily clear. With regard to the TPNW, however, the impossibility of relief efforts right after nuclear explosions has been repeatedly discussed in the treaty-making process, and it recognizes that "the catastrophic consequences of nuclear weapons cannot be adequately addressed" (Preamble, Paragraph 4). Nevertheless, the meaning of "where feasible" remains ambiguous, and thus has to be discussed further.

3.2 Paragraphs 3 and 4

Paragraph 3 imposes on each state party an obligation to provide assistance to affected states parties, and Paragraph 4 an obligation to provide assistance for the victims. These provisions help reduce the primary responsibility of the affected states for victim assistance and environmental remediation. While Paragraph 3 provides that assistance to affected states parties can take the forms of “technical, material, and financial assistance,” based on the understanding that the goal of these paragraphs is to help the affected states fulfill their obligation of victim assistance stipulated by Article 6, Paragraph 1, assistance is expected to take a variety of different forms.

The obligations in Paragraphs 3 and 4 are imposed on “[e]ach State Party in a position to do so [i.e., provide assistance].” A similar phrase is used in Protocol V of the Convention on Certain Conventional Weapons (CCW), the APM, and the CCM. This phrase indicates that the obligation of assistance between states parties is to be fulfilled in accordance with the ability of each state party, but given that assistance can take many different forms, “[e]ach State Party in a position to do so” should be understood in a broad sense to include all the states parties (IHRC 2018).

The victims that Paragraph 4 refers to are not limited to victims under the jurisdiction of the states parties. Literally, Paragraph 4 is understood to refer to all the victims in the world of the use or testing of nuclear weapons or other nuclear explosive devices (Casey-Maslen 2019). Nevertheless, the phrase “assistance for the victims” in Paragraph 4 does not readily lead to the individual victims’ right to claim assistance.

It is worthy of attention whether some form of international framework of assistance for victims worldwide will be formulated based on Article 7, Paragraph 4.

3.3 Paragraph 5

This paragraph specifies modes of the abovementioned assistance between states parties, which include not just bilateral assistance but also assistance through international organizations and non-governmental organizations. There is a similar provision in the Protocol V of the CCW, the APW, and the CCM.

3.4 Paragraph 6

In the negotiation conference (the UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination), many participating states claimed that states which have used or tested nuclear weapons should be held responsible, and as a result, this paragraph was inserted right before the adoption of the treaty. This paragraph obliges “a State Party that has used or tested nuclear weapons

or any other nuclear explosive devices” to provide assistance to affected states parties “for the purpose of victim assistance and environmental remediation” (Paragraph 6).

Recipients of this assistance are not individual victims but affected states parties, but the purpose of the assistance to affected states parties is limited to victim assistance. Thus, the question of what kind of responsibilities the recipients of the assistance (i.e., the affected states parties) have for victim assistance and the question of whether the treaty entitles individual victims to any rights are open to discussion.

It has been argued that this paragraph applies to states which use or test nuclear weapons after joining the TPNW (Casey-Maslen 2019). Even if that is the case, “[e]ach State Party in a position to do so [provide assistance for the victims]” in Paragraph 4 includes the states which have joined the treaty after they used or tested nuclear weapons. The meaning of the phrase of “in a position to do so” is open to discussion, but it is expected that these states can at least take non-monetary measures such as disclosure of information on their use or testing of nuclear weapons.

Another question in the interpretation of Paragraph 6 is the nature of “a responsibility to provide [...] assistance” incurred by states parties which have used or tested nuclear weapons. Note that the TPNW takes into consideration that any use of nuclear weapons would be contrary to the rules of international law (Preamble, Paragraph 10), and that it bans testing or use of nuclear weapons “under any circumstances” (Article 1). Based on these points, the responsibility to provide assistance can be interpreted as a responsibility arising from illegal acts. The use of the term “responsibility” implies that it is premised on illegal acts. Another possible interpretation is that the responsibility only refers to an obligation of international cooperation since this paragraph is in Article 7, which is about international cooperation and assistance, and not in Article 6, which is about victim assistance and environmental remediation. At least, the treaty does not have any provisions which state that assisting affected states parties based on Article 7, Paragraph 6 exempts states parties which have used or tested nuclear weapons from a responsibility for their illegal acts. As the phrase “[w]ithout prejudice to any other duty or obligation that it may have under international law” (Paragraph 6) suggests, the question of responsibilities arising from the use or testing of nuclear weapons is left to rules of general international law.

4. Conclusion

The TPNW stipulates that the affected states parties have the primary responsibility for victim assistance and environmental remediation. This is related to the nature of Article 6 as a provision to ensure rights of victims. This characteristic might make the states where victims reside hesitate to join the treaty. On the other hand, this article pointed out that the provisions on international cooperation and assistance in Article 7 help reduce the primary burden incurred by the affected states parties.

The characteristics of the TPNW as a human rights treaty implies that issues regarding the treaty could be discussed in UN bodies dealing with human rights such as the UN Human Rights Council. While it is possible for such UN bodies to discuss the treaty, the provisions in Articles 6 and 7 of the TPNW are simpler than those in the preceding CCM, and thus discussions on interpretation of the treaty are expected to be deepened through its implementation, including at future meetings of states parties. This is why it is necessary for civil society to raise questions based on a solid understanding of victims' needs. The question of whether these provisions could function as "a tool for reinforcing victims' rights and ensuring their needs are met" (IHRC 2018, 1) is left open.

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