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Article 6 TPNW: Who is a “victim” of nuclear weapons’ testing and use and what could “adequate assistance” look like? Taking inspiration from the European Court of Human Rights

Working paper submitted by International Association of Lawyers Against Nuclear Arms¹

I. Introduction

1. The commitments under Articles 6 and 7 TPNW echo the concept of human- or victim-centred disarmament. Article 6 § 1 TPNW reads as follows: “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.”

2. This paragraph has to be read in light of paragraph 6 of the Treaty’s preamble which reads: “The States Parties...mindful of the unacceptable suffering of and harm caused to the victims of the use of nuclear weapons (hibakusha) as well as those affected by the testing of nuclear weapons...”

3. Insofar as Article 6 § 1 refers directly to human rights law, it seems appropriate for the States Parties to the TPNW to draw upon this branch of international law in implementing of Article 6. One of the useful sources of inspiration can be the practice of the European Court of Human Rights (“Court) implementing the European Convention on Human Rights (“ECHR”). The ECHR, ratified by 46 States, is widely considered one of the most effective and dynamic human rights mechanisms.

4. Part II will deal with the question of whom should qualify as “affected” by nuclear weapons and, therefore, to be a “victim” of their use or testing. Part III is devoted to the question of what assistance in the sense of Article 6 § 1 TPNW could look like and to what extent the ECHR can serve as a source of inspiration.

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II. Definition of “victim”

In general

5. The word “victim” under the ECHR denotes the person or persons affected by the alleged violation. It concerns not just the direct victims of the alleged violation, but also any indirect victims to whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end.² The notion of “victim” is interpreted autonomously and irrespective of domestic rules such as those concerning interest in or capacity to take action.³

6. In light of the last sentence, we are of the opinion that the Meeting of States Parties or a specific committee to be created for the implementation of Articles 6 and 7, the masters of the interpretation of the treaty, should be free, within the limits of the applicable rules on treaty interpretation,⁴ to define on their own who is a “victim” under the TPNW, independently from domestic law and regulations. Thanks to such an autonomous interpretation, narrow definitions of “victim” possibly existing in the domestic laws, can be broadened within the TPNW to render Article 6 § 1 effective.

Direct victim

7. In most of the situations, in order to be able to lodge an application in accordance with the ECHR, an applicant must be able to show that he or she was “directly affected” by the measure complained of.⁵

8. In the case of nuclear weapons’ use or testing, direct victims would be the actual victims that have endured the consequences of these acts through cancer or other health impairments.

9. It would also include persons who claim damage to property, for instance through destruction of houses and building. Even if a building resisted physically a nuclear blast, it might not be inhabitable anymore for a long time or even forever due to nuclear fallout.⁶ The ECHR protects the right to respect for private and family life, including home (Article 8 ECHR) and Article 1 of Protocol No. 1 to the ECHR protects the right to property. Both might come into play in the scenario of nuclear weapons’ testing or use.⁷

Indirect victim

10. Under the ECHR, and in particular concerning the right to life (Article 2 ECHR), if the alleged victim of a violation has died before the introduction of the application, it may be possible for the person with the requisite legal interest as next-of-kin to introduce an application raising complaints related to the death or disappearance of his or her relative.⁸ In such cases, the Court has accepted that close family members of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation of Article 2 ECHR (right to life).⁹

11. The States Parties to the TPNW will have to define who exactly can qualify as “affected” by nuclear weapons’ use or testing and, inter alia, to decide whether

² *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 47, ECHR 2013.

³ *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35.

⁴ Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties.

⁵ *Tănase v. Moldova* [GC], no. 7/08, § 104.

⁶ Daniel Rietiker, *Humanization of Arms Control – Paving the Way for a World Free of Nuclear Weapons*, Routledge, 2018, p. 197.

⁷ *Ibidem.*, 196-197.

⁸ *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 112.

⁹ *Van Colle v. the United Kingdom*, no. 7678/09, § 86, 13 November 2012.

family members of persons having died as a result of nuclear weapons' use or testing should be considered "victims" too and, as a result, be entitled to some assistance, in particular psychological support for their own suffering, or receive some monetary compensation for the loss of their beloved ones.

The condition of a causal link

12. Under the ECHR, there must be a causal link between a certain event, activity or omission and the breach of human rights. The case of *L.C.B. v. the United Kingdom*,¹⁰ decided by the Court in 1998, is of particular relevance for the implementation of Article 6 TPNW insofar as the application was lodged by the daughter of a serviceman who had been involved in UK nuclear testing.

13. In this case, the question was raised whether that State had taken sufficient measures in respect of the daughter of the serviceman present during Christmas Island atmospheric nuclear tests that were conducted between 1952 and 1967. During these tests, service personnel were ordered to line up in the open and to face away from the explosions with their eyes closed and covered until twenty seconds after the blast. The applicant alleged that the purpose of this procedure was deliberately to expose servicemen to radiation for experimental purposes. She was born in 1966 and a couple of years later, she was diagnosed as having leukemia.

14. Before the Court, she claimed that both the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests and the failure to monitor her father's radiation dose levels, gave rise to violations of the right to life (Article 2 of the ECHR). The Court held what follows: "Having examined the expert evidence submitted to it, the Court is not satisfied that it has been established that there is a causal link between the exposure of a father to radiation and leukemia in a child subsequently conceived. (...) The Court could not reasonably hold, therefore, that, in the late 1960s, the United Kingdom authorities could or should, on the basis of this unsubstantiated link, have taken action in respect of the applicant."¹¹

15. It follows that there has been no violation of Article 2.

16. The States Parties will have to consider whether to apply such a causality test in respect of victims of nuclear weapons' testing and use under the TPNW. It is noteworthy to mention in this regard that the Harvard Law School International Human Rights Clinic and the Conflict and Environment Observatory (CEOBS) set out a framework of rules covering responsibilities under humanitarian law in a 2020 paper on conflict pollution.¹² Principle 3 of the Harvard/CEOBS paper defines victims by stating: "...where a certain amount and duration of exposure to a toxic or radiological substance is strongly associated with a particular harm, that exposure should be presumed to be a cause of the harm." It enshrines a "presumption of causation" principle that might be more appropriate than the Court's causality test in the context of Article 6 TPNW.

III. What could adequate assistance look like?

17. Under the ECHR, if the Courts finds that there has been a violation of the ECHR, it may award the injured party just satisfaction, usually a sum of money which the respondent State is required to pay to the applicant under Article 41 ECHR. The Court can award just satisfaction under three limbs: pecuniary

¹⁰ *L.C.B. v. the United Kingdom*, no. 23413/94, 9 June 1998.

¹¹ *Ibidem.*, §§ 39-41.

¹² Harvard Law School International Human Rights Clinic & CEOBS (2020), *Confronting Conflict Pollution: Principles for Assisting Victims of Toxic Remnants of War*, <http://hrp.law.harvard.edu/wp-content/uploads/2020/09/Confronting-Conflict-Pollution.pdf>

(material) damage, non-pecuniary (moral) damage, as well as costs and expenses for the proceedings before the domestic courts and the Court.

18. Even though the concept of “assistance” of Article 6 § 1 TPNW is broader than “just satisfaction” under Article 41 of the ECHR, some aspects of the rich jurisprudence of the Court might still turn out relevant as a source of inspiration in the future implementation of the TPNW.

The objective under the ECHR: *restitutio in integrum*

19. Under the ECHR, the State Party having breached that treaty will be under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the ECHR not been disregarded.¹³

Compensation for material damage

20. The case of *Oyal v. Turkey*,¹⁴ decided by the ECHR in 2010, is particularly noteworthy in respect of material damage. In this case, the State failed to take preventive measures against the spread of HIV through blood transfusion. As a consequence, a newborn baby was infected with HIV at a state hospital. The Court considered the redress offered by the national authorities as clearly insufficient and therefore found a violation of the positive obligation under the right to life (Article 2 ECHR): “In view of the above, while the Court acknowledges the sensitive and positive approach adopted by the national courts in determining the responsibility of [XY] and the Ministry of Health and in ordering them to pay damages to the applicants, it considers that the most appropriate remedy in the circumstances would have been to have ordered the defendants, in addition to the payment of non-pecuniary damages, to pay for the treatment and medication expenses of the first applicant during his lifetime. The Court concludes therefore that the redress offered to the applicants was far from satisfactory for the purposes of the positive obligation under Article 2 of the [ECHR].”¹⁵

21. Following this approach, a State bound by a human rights treaty, such as the ECHR, might have to compensate the costs for health problems caused by nuclear testing, and this even during the entire life of the victim. We consider this approach as a valid source of inspiration for the States Parties to the TPNW in the implementation of Article 6.

22. To add another example, it is suggested that the most natural redress for the destruction of property by nuclear weapons’ testing or use, mentioned above, would be to replace or to compensate the loss of a house or building. As has been mentioned above, a building, even if it is still physically intact, might not be inhabitable anymore due to radioactive fallout, which can be considered a de facto expropriation that has to be compensated.¹⁶

Compensation for moral damage

23. The Court can grant redress for non-pecuniary (or moral) damage for the suffering that a person has been endured as a direct consequence of the human rights violation. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. In contrast with the material damage, the award of non-pecuniary damage can only be “equitable”.

¹³ *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249.

¹⁴ *Oyal v. Turkey*, no. 4864/05, 23 March 2010.

¹⁵ *Ibidem.*, § 72.

¹⁶ See Rietiker, cited above (note 6), pp. 196-197.

24. Under Article 6 § 1 TPNW, the main focus is not on monetary compensation, but on assistance to the victim on the ground, such as rehabilitation and psychological support, as well as to provide for their social and economic inclusion. Such direct assistance might not always be possible in practice or be too late to be effective. In fact, most of the nuclear testing took place decades ago.¹⁷ Therefore, assistance might not be regarded “adequate” anymore in the sense of that provision. In such circumstances, measures indicated by Article 6 § 1 TPNW could be replaced by monetary compensation. For these reasons, two examples shall be mentioned here, giving an approximative idea about the just satisfaction sums awarded.

25. Regarding *direct victims*, the case of *Vilnes and Others v. Norway*¹⁸ is relevant. It concerned complaints by divers that they are disabled as a result of diving in the North Sea for oil companies during the pioneer period of oil exploration (from 1965 to 1990). The Court held that there had been a violation of Article 8 ECHR (right to respect for private life), on account of the failure of the authorities to ensure that the applicants received essential information enabling them to assess the risks to their health and lives resulting from the use of rapid decompression tables. As a result, it awarded the applicants 8 000 EUR each for non-pecuniary damage.

26. Regarding a situation of *indirect victims*, the case of *Finogenov v. Russia*¹⁹ can be mentioned. In this case, the authorities had to deal with a situation in which 950 hostages were being held in a Moscow theatre by Chechen terrorists in 2002. It concluded that the rescue operation had not been adequately planned or implemented and, as a result, that the State breached its positive obligations under Article 2 ECHR.²⁰ The amounts having been awarded were the following:

- For the loss of a child: between 8 800 and 26 400 EUR
- For the loss of a parent: 13 200 EUR
- For the loss of a husband/wife: between 8 000 and 13 200 EUR
- For the loss of a brother or sister: 8 800 EUR
- For having been a hostage him-/herself: 13 200 EUR (direct victims)

IV. Conclusions

27. It is suggested here that human rights law, as the example of the ECHR shows, constitutes a significant source of inspiration for the implementation of Article 6 TPNW. IALANA proposes a broad definition of “victim” under Article 6 TPNW and that the Meeting of States Parties, or a specific body created for that purpose, shall have the power to define such key terms in the treaty.

28. Finally, it has to be reiterated that the duties under Article 6 § 1 shall not affect the obligations of States Parties imposed on them by virtue of other treaties, for example deriving from the ECHR or other human rights treaties.²¹

29. IALANA is familiar with the practice of the Court and will remain available for the States Parties in view of a successful implementation of the positive obligations under the TPNW.

¹⁷ To name one example, the last French Nuclear Test took place in 1996.

¹⁸ *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, December 2013.

¹⁹ *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03.

²⁰ *Ibidem.*, §§ 265-266.

²¹ Article 6 § 3 TPNW.