

TPNW's First meeting of States Parties and beyond: Implementing Articles 6 and 7 – some comments, expectations and proposals

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2 December 2021

The authors³ submit the following observations as independent experts in private capacity.

I. On the commitments, their relevance and nature (1MSP's declaration)

1. Articles 6 and 7 contain **positive obligations** which are of specific relevance, as distinct from negative, or banning, stipulations contained in the Treaty. Implementing these obligations is a priority, and has immediate practical effects for victims and the natural environment affected by the (past) use or testing of nuclear weapons. Those commitments are of relevance even without the joining of Nuclear Weapon States to the Treaty – thus underlining the great, overall importance of the instrument. According to Article 6, the point of departure for victim assistance and environmental remediation lies with the jurisdiction of affected States Parties, which may not be Nuclear Weapon States.

2. The commitments and respective parts of the Treaty echo the present general tendency of dealing with the subject of war and the environment. This is indicated, among other things, by the draft of the **International Law Commission (ILC) on principles on the protection of the environment in relation to armed conflict (PERAC) (A/74/10)**, or the **2020 Guidelines of the International Committee of the Red Cross on the Protection of the Natural Environment in Armed Conflict**. The trend – which also establishes a connection to the global issue of climate change – is reflected through endeavors like the one of the Harvard Law School's International Human Rights Clinic and the Conflict and Environment Observatory (CEOBS) outlining 14 principles for assisting victims of toxic remnants of war (*Confronting Conflict Pollution, 2020*).

3. The special relevance and strength of art. 6 and 7 commitments result from the fact that they are linked to, or rooted in, existing international law. As Para. 8 of the Treaty's preamble reaffirms: "...the need for all States at all times to comply with applicable international law, including **international humanitarian law and international human rights law**". The three main branches of law pertinent here are International Humanitarian Law (IHL), Human Rights, and Environmental Law – while Para. 10 of the preamble puts a focus on IHL as did the International Court of Justice in its 1996 Advisory Opinion on the (II) Legality of the threat or use of nuclear weapons. There is a multitude of legal arguments – many of them of a customary character – available to further victim assistance and environmental

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³ See also: Treaty on the Prohibition of Nuclear Weapons. A short commentary article by article (April 2018, to be updated in 2022).

remediation in the case of testing or use of nuclear weapons, standards existing outside of, and being confirmed by, the Treaty, in particular Articles 6 and 7.

4. The language of the MSP's declaration should emphasize that the respective commitments are an expression of the humanitarian disarmament concept: to pursue a **victim-centered approach** which is concentrating on practical, or pragmatic solutions and help for the people negatively affected by nuclear weapons – **human security** complementing national security. This is, as Para. 6 of the Treaty's preamble has put it, being "...*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..."

Again, efforts and proclamations by non-State actors may have an instructive value. An example in point is the Declaration of the World Nuclear Victims Forum in Hiroshima, containing Draft Elements of a Charter of World Nuclear Victims' Rights (2015).

II. On the framework and principles (1MSP's action plan)

1. Apart from IHL, as mentioned already, another emphasis is on human rights, as Article 6 Para. 1 refers to the "...accordance with applicable international humanitarian and human rights law..." They form the basis for victim assistance as well as for environmental remediation, their framework, principles and substance. The main right areas are connected with:

- the right to life;
- the right to human dignity (reflected, inter alia, in the prohibition of torture and inhuman or degrading treatment)
- the right to health and a decent standard of living;
- the right to a healthy environment (emerging);
- the right to information and to a remedy.

Whereas the right to life, the right to human dignity, and the right to information and to a remedy are generally considered "civil" rights, the rest of the mentioned rights belong to "**social and economic**" rights, that are equally important in modern times. It is therefore appropriate and relevant that the TPNW refers in para. 1 of Article 6 to "social and economic inclusion".

2. One should also not underestimate the importance of the **right to information and to a remedy**. Just in the case of nuclear weapons victims and damage, information about the real extent of the actual harm to the environment and health of the affected population, as well as the imminent or potential risks of environmental pollution and degradation in future, and access to remedies are of paramount importance. Risk education and public information

campaigns are, as a result, coming into play, as well as dissemination work comparable to what is done within the IHL/Red Cross.

Other points of reference in this connection are Principle 24 of the ILC draft on “Sharing and granting access to information” as well as the (spirit of the) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

3. The ILC draft deals with another aspect which is particularly important when it comes to environmental remediation (like decontamination) being always quite challenging and expensive, namely Draft Principle 25 that reads as follows: “Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.”

4. Article 7 of the Treaty on International cooperation and assistance is based on the idea of **shared responsibility** as described, for instance, in Principle 6 of the Harvard/CEOBS paper. The ILC draft, more generally and principally, formulates the Principle of State responsibility (No. 9) which also seems to be the background of Para. 6 of Article 7 of the Treaty – a unique and novel statement of the individual responsibility of nuclear weapons user States to promote adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation. Such a responsibility, in essence, is of a legal, not only a moral, nature. It emanates both from existing international law and the Treaty itself, under which it – operationally – may be replaced by the cooperation schemes of other States Parties, in line with Article 7. Consequently, again, the Treaty may be functioning even without nuclear weapons membership [see for more details further below, IV).

5. Another principle relevant for implementing Art. 6 and 7 commitments would be worth mentioning: the **presumption of causation**. Principle 3 of the Harvard/CEOBS paper is defining victims, and states: “...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.”

6. Finally, implementation of the commitments should be **interpreted broadly**, in a pro-victima fashion. As an example, the phrase “activities related to the testing or use of nuclear weapons” found in Para. 2 of Article 6 could be conceived as covering the domains of **uranium mining, or waste cleaning** – all necessary for the production, hence the use, or testing of nuclear weapons. Experience shows to what great extent those activities have a disastrous impact on the environment and local population, in particular on indigenous peoples.

III. On the implementation and reporting procedure

1. There still has to be developed a fully-fledged implementation system under the Treaty. This might center round a reporting procedure, for which an abundance of examples exist within international treaty law, in particular the area of human rights law. On the other

hand, implementation and reporting systems of existing international law branches, especially those of human rights, remain relevant and should be used in parallel to secure the implementation and application of the Treaty's commitments. The new treaty mechanism has to be considered **complementary to existing human rights procedures and bodies**, and not contradictory or exclusive.

2. It is important that the respective supervisory body has the power to draw conclusions and deliver statements on the interpretation of the rights and duties under the instrument. A pertinent example is represented by the Human Rights Committee, overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR), and its authority to formulate General Comments. In **General Comment No. 36 (2019) on the right to life**, the Committee demands States Parties "...to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction", in particular nuclear weapons (Para. 66). This has to be done "in accordance with principles of international responsibility" (ibid.) – thus connecting to the responsibility topic discussed above.

3. Reporting and related scrutiny should focus on national measures of all sorts taken to effectively implement the rights of the victims of nuclear weapons. The legal, or judicial sphere is of specific importance here: case law can be developed and discussed – as, for instance and quite importantly, in relation to Japanese jurisprudence and experience.

4. Reporting mechanisms may be coupled with other structures, like those existing within the UN Office of the High Commission for Human Rights (OHCHR), or the Special Rapporteurs of the Human Rights Council. A relevant example can be seen in the 2012 fact-finding mission of the **Special Rapporteur of human rights and hazardous waste to the Marshall Islands**, reporting about the negative consequences of the US nuclear tests for the enjoyment of human rights, especially the right to health (A/HRC/21/48/Add. 1).

5. In any event, implementation schemes have to be **accessible** – apart from victims – to non-State, or civil society actors. In this connection, organizations such as ICAN or IALANA can play a constructive role, being aware of the legal complexity of the victim- and environment-related commitments of the Treaty.

6. Special attention shall be paid to **particularly vulnerable peoples such as women, children and indigenous peoples**. It is not by chance that these groups have been singled out by the drafters of the treaty, as mentioned explicitly in the preamble, to be particularly affected by nuclear weapons. Moreover, for indigenous peoples, a specialized international treaty body is so far lacking and, as a result, the representation and right to be heard before the future TPNW mechanisms will be of paramount importance.

IV. On the (legal) duty of States to cooperate

1. It derives from Article 6 paras. 1 and 2 of the TPNW that the main responsibility of the territorial State for victim assistance and environmental remediation lies upon the **territorial**

States, thus the States where the testing or use of nuclear weapons has taken place. This can be criticised, but it is fair to stress that this primary burden is nevertheless tempered in several ways.

2. First of all, paragraph 3 recalls that the obligations of any other State under international law or bilateral agreements shall remain unaffected. In other words, and to mention just one example, the new treaty would be without prejudice to the reparation that the USA owes to the Marshall Islands based on the “Compact of Free Association” **Agreement between the USA and the Marshall Islands** concluded in 1983 (The Compact of Free Association, US-Marsh. Is., June 25, 1983, 99 Stat. 1770 (1986)) and in particular its subsidiary Section 177 Agreement establishing a \$150 million Nuclear Fund as “a means to address past, present and future consequences of the Nuclear Testing Program”.

3. Article 6 of the TPNW has moreover be read in conjunction with Article 7. It derives from this provision that the burden imposed on the States on whose territory the use or testing of nuclear weapons has taken place is tempered by clauses on international cooperation and assistance. Paragraphs 1 and 2 represent general cooperation and assistance measures, not limited to victim assistance and environmental remediation. The **duty to cooperate, as a legal and not only a moral obligation**, is a well-recognized principle of international law, as enshrined in Article 1 para. 3 of the UN Charter.

4. Paragraph 3 is tailored to **victim assistance and environmental remediation**, imposing on “each State Party in a position to do so” the duty to provide technical, material and financial assistance to States Parties affected by the use or testing of nuclear weapons. Paragraph 4 is even more specific in the sense as it imposes the duty on “each State Party in a position to do so” to provide assistance for the victims of the use or testing of nuclear weapons. These rules correspond to similar rules contained in other instruments of humanitarian disarmament which sometimes are more detailed but, again, it matters to have them in the nuclear weapons context.

5. In one respect, the new treaty even goes further insofar as paragraph 6 of Article 7 recalls that a State Party that has used or tested nuclear weapons shall have a responsibility to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation without affecting any other duty or obligation that it may have under international law. This duty is confirmed, as has been indicated already above (III.2), in **General Comment No. 36(2019) on the right to life (Human Rights Committee)**, that indicated that it is not the territorial State that has to provide adequate reparation to victims, but the State that is accountable under the principles of international responsibility (para. 66). It is noteworthy to mention, in this regard, that all States that are recognized as possessing nuclear weapons under the NPT are Parties to the ICCPR, with the exception of China, that has at least signed it.