

INTERNATIONAL HUMAN RIGHTS LAW AND THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

Bonnie Docherty
Harvard Law School International Human Rights Clinic

Side-Event on Human Rights, Democracy, and Nuclear Weapons
Sponsored by Lawyers Committee on Nuclear Policy
NPT PrepCom
United Nations, New York City, May 1, 2019

Today I will discuss the specific role of international human rights law in the Treaty on the Prohibition of Nuclear Weapons (TPNW). I will place the TPNW in the context of humanitarian disarmament, which is distinct from but influenced by human rights law. I will examine the two explicit references to human rights in the TPNW, i.e., in the preamble and in the provision on victim assistance. I will also discuss relevance of this body of law to the TPNW's provision on environmental remediation. As my remarks will show, international human rights law provides both an added reason for states to join the TPNW and guidance for how to implement the TPNW's obligations once they do.

Humanitarian Disarmament

The TPNW is most recent humanitarian disarmament treaty, and it follows in the footsteps of the Mine Ban Treaty and the Convention on Cluster Munitions. Humanitarian disarmament, which is a people-centered approach to governing weapons, seeks to prevent and remediate the human and environmental harm inflicted by arms.

Humanitarian disarmament is not exclusively a human rights approach to addressing the effects of weapons, but it is informed by human rights law. It focuses on reducing the suffering of individuals rather than advancing national interests. Its treaties often reference international human rights law as well as international humanitarian law as a legal underpinning for their provisions. In addition, humanitarian disarmament treaties couple prohibitions with remedial measures, such as victim assistance, that are inspired by human rights law.

Preamble

As I noted, the TPNW explicitly refers to human rights twice. The first reference appears in the preamble, which reads: "*Reaffirming* the need for all States at all times to comply with applicable international law, including international humanitarian law and international human rights law." Although the preamble is non-binding, this paragraph foregrounds human rights law early in treaty, giving it equal status to international humanitarian law, which is more frequently discussed in context of nuclear weapons. The paragraph indicates that states parties see compliance with human rights law as relevant to nuclear weapons in general and the TPNW in particular.

In this context, the phrase “applicable . . . international human rights law” encompasses several rights. I will focus on a few. The most obvious is the right to life. Last year the Human Rights Committee adopted a new general comment on the right to life. Addressing nuclear weapons, the Committee concluded: “The threat or use of . . . nuclear weapons . . . is incompatible with respect for the right to life and may amount to a crime under international law.” States parties to the International Covenant on Civil and Political Rights (ICCPR) must in addition refrain from the development, production, stockpiling, and transfer of nuclear weapons. Accepting the TPNW’s prohibitions would thus facilitate compliance with the right to life.

In the same general comment, the Human Rights Committee said that states should respect their obligation to engage in good faith negotiations on nuclear disarmament. The negotiations that produced the TPNW exemplify such negotiations.

The Committee further called for “adequate reparation for victims.” Reparations are different from but related to victim assistance under the TPNW, which I will discuss later.

The need to comply with “applicable . . . international human rights law” implicates several other rights. On the economic, social, and cultural rights side, compliance with the right to health requires that people have health care that is available, accessible, acceptable, and of good quality. This right extends to individuals who have health problems as a result of the use and testing of nuclear weapons. The right to healthy environment is relevant given the significant environmental harm caused by the use and testing of nuclear weapons. Compliance with this right demands a ban on new use and testing as well as efforts to remediate past contamination.

TPNW states parties should also comply with applicable civil and political rights, such as the right to information and the right of people to participate in decisions that affect their lives. Indeed, in a separate paragraph, the preamble notes that “equal, full and effective participation of both women and men is an essential factor for the promotion and attainment of sustainable peace and security,” and that women’s participation in nuclear disarmament should be strengthened.

Thus, an analysis of the preamble’s reference to human rights law underscores that compliance requires a combination of preventive and remedial measures, like those in the TPNW’s operative paragraphs.

Victim Assistance

The second explicit reference to human rights in the TPNW is in Article 6(1) on victim assistance. The paragraph obliges states parties to provide assistance to individuals affected by the use and testing of nuclear weapons “in accordance with applicable international humanitarian and human rights law.” The phrase “in accordance with . . . human rights law” contributes to this provision in multiple ways.

First, this phrase implies that states parties have a duty under human rights law to assist affected individuals.

Second, the phrase places the obligation to assist victims within a human rights frame. Article 6 enumerates several types of assistance, notably “medical care, rehabilitation and psychological

support” as well as measures to provide for social and economic inclusion. Providing these forms of assistance “in accordance with . . . human rights law” goes beyond addressing the needs of affected individuals to ensuring that they can realize their human rights. This understanding of Article 6 is consistent with how victim assistance is understood in earlier humanitarian disarmament treaties. For example, the Convention on Cluster Munitions, which uses virtually the same victim assistance language as TPNW Article 6(1), recognizes in its preamble the need to “ensure the full realisation of the rights of all cluster munition victims” and to respect victims’ “inherent dignity.”

Third, international human rights law contributes to the TPNW’s victim assistance provision by offering principles and guidelines for implementation. I will highlight a few examples.

- Non-discrimination is a fundamental human rights principle, and as Article 6 states, victim assistance must be provided “without discrimination.” This principle means that states cannot discriminate on basis of such characteristics as age, gender, race, disability, etc. As is evident in the Convention on Cluster Munitions, humanitarian disarmament precedent makes clear that non-discrimination also means states may not “discriminate against or among . . . victims, or between . . . victims [of a banned weapon] and those who have suffered injuries or disabilities from other causes.” In the TPNW and its predecessors, the only legitimate reasons for differences of treatment are medical, rehabilitative, or psychological, or related to socioeconomic needs.
- Another human rights principle is inclusivity, which underscores the need to include affected individuals at every stage of the victim assistance process: design, implementation, and monitoring and assessment. The Convention on Cluster Munitions requires states parties to “closely consult and actively involve . . . victims and their representative organisations.” One of the principles of the Convention on the Rights of Persons with Disabilities is “full and effective participation and inclusion in society.”
- Human rights law also influences how the TPNW and humanitarian disarmament treaties spread responsibility for victim assistance across states. Affected states take the lead, an approach that is consistent with human rights law, under which states have to respect, protect, and fulfill their people’s human rights. Other advantages of this approach are that it recognizes that affected states are best suited to assess needs and ensure the delivery of assistance due to their proximity to victims, and it respects state sovereignty over matters within their borders.
- At the same time, human rights law recognizes that states often need help complying with their obligations. The International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically notes that states must realize rights “individually and through *international co-operation and assistance*.” TPNW Article 7 follows that approach, which is also common to the treaty’s humanitarian disarmament predecessors. It requires all states parties to cooperate to facilitate implementation of the treaty. It obliges all states parties in a position to do so to provide “technical, material and financial assistance” to support affected states’ victim assistance and environmental remediation efforts. Given

that assistance can come in a variety of forms, all states should be in position to provide something.

It is worth noting that while the TPNW's victim assistance provision does not constitute a mechanism for determining legal responsibility for unlawful acts, it does not preclude affected individuals or states from seeking other forms of redress, such as reparations under the right to life.

- Finally, international human rights law's principle of "progressive realization" makes victim assistance more manageable. Codified in the ICESCR, progressive realization requires states parties to strive to realize economic, social, and cultural rights, while recognizing that full attainment may take time due to resource constraints.

The phrase "in accordance with . . . human rights law" thus helps make victim assistance a realistic endeavor that can have a tangible impact on individuals' lives.

Environmental Remediation

Although victim assistance is the only TPNW obligation that explicitly refers to international human rights law, human rights principles can be applied to the treaty's other major positive obligation: environmental remediation. Article 6(2) obliges affected states to "take necessary and appropriate measures towards the environmental remediation of [contaminated] areas." As I discussed earlier, environmental remediation can help states fulfill duties corresponding to the right to a healthy environment.

Human rights law in turn can inform implementation of the obligation to remediate the environment. Articles 6 and 7 set up the same framework of shared responsibility for environmental remediation as they do for victim assistance. By obliging states to work "towards . . . environmental remediation," the TPNW recognizes that environmental remediation is a gradual process and returning a site to its pre-detonation state may never be possible. In other words, remediation can be progressively realized.

For those interested in learning more about the TPNW's positive obligations, I would recommend a new paper by Harvard Law School's International Human Rights Clinic regarding the myths and realities of victim assistance and environmental remediation.¹ The paper explains why the provisions are a valuable tool for advancing the TPNW's humanitarian aim and seeks correct misconceptions and misrepresentations about their content.

Conclusion

In conclusion, understanding the significance of international human rights law to the TPNW is more than an academic exercise. The need to comply with this body of law, which is articulated in the preamble, provides added incentive for states to join the TPNW. In addition, human rights law provides guidance for how states parties should meet their TPNW obligations, especially regarding victim assistance and environmental remediation.

¹ Harvard Law School International Human Rights Clinic, "Victim Assistance and Environmental Remediation in the Treaty on the Prohibition of Nuclear Weapons: Myths and Realities," April 2019, http://hrp.law.harvard.edu/wp-content/uploads/2019/05/TPNW_Myths_Realities_April2019.pdf.

