

NPT 2022: An Opportunity to Advance Nuclear Justice

Jana Baldus, Caroline Fehl and Sascha Hach
Peace Research Institute Frankfurt

Abstract

2022 will see intense discussions on nuclear non-proliferation and disarmament at two high-profile global conferences, the Review Conference of the Nuclear Non-Proliferation Treaty (NPT) and the first Meeting of States Parties of the young Treaty on the Prohibition of Nuclear Weapons (TPNW). While both meetings are likely to be overshadowed by the ongoing war in Ukraine and the Russian nuclear threats, it is important not to lose sight of key long-term challenges that need to be discussed at both meetings. Specifically, we draw attention to the long-neglected question of how to deal with the ‘nuclear past’ and provide justice to the victims of past nuclear use and testing. We make the case for discussing this issue through the conceptual prism of transitional justice and elaborate how the principle of redress for victims can be put in practice in the nuclear context. We propose the creation of a Victim Assistance and Environmental Remediation Fund (VAERF) that both TPNW members and non-members should contribute to and that would help build bridges between the two major nuclear treaties.

Policy Recommendations

- At the NPT Review Conference and the TPNW Meeting of States Parties, urgent debates about the nuclear dimension of the ongoing war in Ukraine must not come at the expense of addressing key long-term challenges for nuclear disarmament and non-proliferation.
- The increasing risk of nuclear escalation highlights the significance of addressing the consequences of the use of nuclear weapons. In particular, the question of how to deal with the historical damage caused by nuclear weapons must be brought to the fore in order to avoid future nuclear injustice.
- At the TPNW meeting, a focus on implementing the treaty’s ‘positive obligations’ for victim assistance and environmental remediation would offer a promising route for advancing the treaty agenda in a time of strong political headwinds for nuclear disarmament.
- In discussing ‘positive obligations’, activists and engaged governments should draw on concepts and ideas from the field of transitional justice to frame support for victims and environmental clean-up as (shared) legal and moral responsibilities of both nuclear and non-nuclear states.
- The proposal to set up a “trust fund” for nuclear victims merits particular attention. We propose that TPNW members conceptualize and plan such a fund as a Victim Assistance and Environmental Remediation Fund (VAERF) that both TPNW members and non-members can and should contribute. Contributions by nuclear and non-nuclear should be based on an agreed formula that reflects principles of nuclear justice.
- Nuclear weapon states and umbrella states concerned about the growing nuclear threat associated with the Ukraine war and seeking joint action should address the nuclear justice issue prominently at the NPT Review Conference.
- This could include supporting the initiative to establish a VAERF fund as a joint NPT-TPNW cooperative framework and making a substantial contribution to it.

At the upcoming Review Conference of the Nuclear Non-Proliferation Treaty (NPT), 1st – 26th August 2022, problems and opportunities of current nuclear disarmament and arms control policy are condensed in a unique way. A range of unresolved questions and pressing concerns have piled up in the seven years (Kimball, 2021) that have passed since the last NPT Review Conference. Most recently, Russia's threats to use nuclear weapons to deter third-party interference in its war of aggression have raised the risks of nuclear escalation in Ukraine and beyond. Not only for Europe and NATO, but also for the entire international community, this represents a new dimension of nuclear threat that must be addressed.

The tangible risk of nuclear escalation brings to the fore the question of how to deal with the (historical) harm caused by nuclear weapons. The NPT has historically struggled to address the humanitarian and environmental consequences of nuclear weapons use and threats, and has remained silent on the associated legacies of the nuclear past. This is in stark contrast to the Treaty on the Prohibition of Nuclear Weapons (United Nations, 2018), which was adopted in 2017, entered into force in 2021 and will be in global spotlight shortly before the NPT Review Conference with the first Meeting of TPNW states parties on 21st - 23rd June, 2022. The treaty provides options for non-recurrence and redress for harm caused by nuclear weapons. Yet ultimately, only through cooperation between the NPT and TPNW, between nuclear weapon states and non-nuclear

weapon states within and beyond the NPT, can the issue of nuclear justice be addressed.

Nuclear justice and the TPNW

The TPNW's genesis was an expression of a sense of injustice that had been swelling for decades within the NPT regime. The intensified nuclear arms race (FAS, 2022), in which all five NPT nuclear-weapon states are now gearing up, has reignited the historic and so familiar nuclear justice debate on inequality and discrimination (Müller, 2010) between nuclear weapon states and non-nuclear weapon states within the NPT. The traditional dispute over nuclear justice with regard to the nuclear weapon states' unfulfilled disarmament obligations (Article VI) and the disproportionately greater monitoring to which non-nuclear weapon states are subject under the NPT is one of the motivations underlying the creation of the TPNW.

However, the TPNW is not only a new tool to restore the authority of Article VI. It also introduces a new dimension of nuclear justice: one that addresses injustices experienced both individually and collectively by the victims of past nuclear use and testing. For the first time, a multilateral treaty mentions the victims of the Hiroshima and Nagasaki bombings and of past nuclear weapons testing, also stressing the disproportionate impact of nuclear weapons on women and girls as well as indigenous peoples. Equally for the first time, a treaty obliges states to both assist nuclear victims and to engage in environmental remediation in contaminated areas.

These innovations signal that within but also beyond the TPNW, nuclear justice is no longer seen as an issue solely concerning states and perceived double standards imposed on them, but is increasingly understood as also concerning individuals, non-state groups and the question of how to deal with historical harm caused by nuclear weapons. The TPNW itself does not mention the word 'justice'. Yet, its articles on assistance and remediation, as well as the demands of victims groups and transnational activists that led up to the inclusion of these provisions in the treaty (Bolton and Minor, 2020), are anchored in ideas and principles that are very familiar to scholars and practitioners of transitional justice (TJ).

TJ, as defined by UN guidelines (United Nations, 2018), refers to the 'full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'. For several reasons, the concept of TJ is useful to both analyze and guide efforts to come to terms with the nuclear past.

First, under current international law, the use of nuclear weapons would constitute a war crime in most cases (International Court of Justice, 1996), and nuclear weapons testing has resulted in large scale human rights violations that can potentially constitute crimes against humanity (Ware, 2018).

Second, TJ is based on the assumption that certain acts are hard to deal with through normal legal processes as they constitute 'systemic wrongdoing': they

were viewed as legal and legitimate in the eyes of perpetrators but judged as morally wrong by later generations (or contemporaries outside the repressive system). A similar challenge exists with regard to past uses and tests of nuclear weapons.

Third, discussions about the nuclear past – both in the TPNW context and outside of it – revolve around the same collective responses (and related individual rights) that form the different pillars of transitional justice (United Nations, 2018): criminal liability (right to justice), redress for victims (right to reparations), truth-telling and apologies (right to truth), as well as legal reforms (guarantees of non-recurrence/duty of prevention).

And finally, by viewing and discussing the task of coming to terms with the nuclear past explicitly as a question of justice, it is clearly framed as a responsibility shared by the whole community of states, but by nuclear weapon states and nuclear "umbrella" states in particular. Redress, truth-telling, and legal reforms, the framing makes clear, are not voluntary acts of charity but moral and legal duties.

It follows from these arguments that the new dimension of nuclear justice (Baldus, Fehl and Hach, 2021) deserves to be taken seriously not only in the context of the TPNW but also by nuclear weapon states and their allies who have thus far shunned the ban treaty and the entire diplomatic process leading up to its conclusion. The increasing risk of nuclear escalation associated with the Ukraine war highlights the significance of addressing the consequences of the use of nuclear weapons and thus issues

closely related to nuclear justice. In particular, the question of how to deal with the historical damage caused by nuclear weapons must be brought to the fore in order to avoid future nuclear injustice.

Coming to terms with the nuclear past is, however, not only the right thing to do and morally owed to nuclear victims, but also smart policy in the context of the NPT. The NPT Review Conference faces the task of reconciling different positions on the TPNW and enabling a constructive approach to the new treaty, so that the rifts in the NPT are not deepened further. The issue of nuclear justice – that is, the question of how to deal with the past use and testing of nuclear weapons so as to do justice both to the victims of these nuclear acts and to the states or individuals that are (co-)responsible for them – offers such an opportunity for bridgebuilding (Sakar, 2021) and thus for stabilizing the non-proliferation regime in the long term. Dedicating concrete action to nuclear justice can help strengthen the entire nuclear disarmament and arms control architecture. It could become a key to dovetailing the NPT process and the TPNW and to finding constructive approaches to leverage the arms control policy potential and synergies of the two regimes. This could prove particularly important as the global disarmament agenda is coming under increasing strain due to the looming threat of nuclear escalation in the Ukraine war and the resulting calls for nuclear (re-)armament and reaffirmation of nuclear deterrence.

But how exactly can the nuclear justice agenda that is emerging in and beyond the TPNW be put in practice? As set out

below, the most promising strategy is to focus initially on one pillar of nuclear justice, the question of redress for victims. Focusing on redress makes good sense for ethical and pragmatic reasons: this is the area where many nuclear weapons states have been willing to engage to some extent, but where large gaps still exist. It also opens up potential for umbrella states to participate and thus assume responsibility. Within this pillar, a particularly helpful step would consist in the establishment of a Victim Assistance and Environmental Remediation Fund (VAERF) that both TPNW members and non-members can and should contribute to.

The case for redress

When it comes to the question of criminal liability, dealing with the nuclear past has long proven to be difficult, if not impossible. For either it was (and is) difficult to prove individual criminal liability for the consequences of the use and testing of nuclear weapons, or these were not considered crimes in the past due to a lack of an international legal framework clearly prohibiting the use or testing of nuclear weapons. The nuclear justice agenda has also made little progress in the area of truth-telling and apologies. Although apologies alone are not enough to bring justice to the victims of nuclear weapons, they nevertheless have a high symbolic value. To this day, however, nuclear weapon states and those participating in nuclear deterrence do not fully acknowledge their responsibility. Often, responsible states systematically deny the consequences of nuclear weapons tests and their use.

In the TPNW negotiations, however, two other aspects of transitional justice were central: a guarantee of non-recurrence, which is at the heart of the very idea of a nuclear ban, and the question of redress embodied in the TPNW's Articles 6 and 7. Article 6 contains so-called positive obligations for states affected by nuclear use and testing to engage in victim assistance and environmental remediation on their own territories. Article 7 obliges other state parties 'in a position to do so' to assist affected states, and – in a provision most clearly reflecting the notion of redress – ascribes to state parties having used or tested nuclear weapons a 'responsibility to provide adequate assistance to affected States Parties'.

The implementation of positive obligations will likely be high on the agenda on the first meeting of TPNW states parties (Docherty, 2020). In addition, a focus of nuclear justice advocacy on redress could also build bridges to NPT members not party to the TPNW, including nuclear weapon and umbrella states. Japan has long provided assistance to the Hibakusha, the victims of the Hiroshima and Nagasaki bombings. With regard to nuclear weapon states, the fact that several have set up compensation programs for victims of nuclear tests suggests that there is at least a partial recognition of the responsibility emphasized in the TPNW. At the same time, national redress efforts vary enormously and remain patchy, suggesting there is much room for improvement through a coordinated international effort.

While the NPT nuclear weapon states have all granted some form of compensation and/or enhanced health services to their own nuclear veterans, this has often been accompanied by prolonged political and legal struggles. In most cases, payments are still only directed towards military personnel – local service people that worked at testing sites, let alone local population present at the time of nuclear testing, are often excluded from compensational claims. Given this context, it is not surprising that some affected states have taken steps to establish their own national compensation programs (e.g. Fiji in 2015). However, whether at the national or bilateral level, existing compensation programs remain often deficient and underfunded (Van Duzer and Sanders-Zakre, 2021). They usually provide only health care subsidies, rather than genuine compensation that would also include psychological trauma, social ostracism, and cultural and environmental damage. In addition, the programs usually set very strict and narrow criteria for compensational claims, so that many victims are excluded from redress to begin with.

The struggle before national courts has played a crucial role in promoting redress and achieving the establishment of compensation programs. Japan's comparatively generous national compensation program for the Hibakusha was only possible because victim organizations used political pressure and strategic litigation to press for more comprehensive aid legislation. In the context of nuclear weapons tests, many compensation programs, their application or extension, had to be enforced first by

national courts (this, however, mainly refers to France, Great Britain and the USA); on the international level, however, there have not been such rulings so far. Thus, it is uncertain whether much more can be achieved in this way. In addition, the prevailing liability and compensation models often do not meet all the needs of victims, but may instead lead to event-related psychological stress, as highlighted in literature on environmental litigation (Marshall et al. 2004). This underlines the importance of seeking a political settlement of dispute outside of courts, and the adoption of the TPNW constitutes an important step in this direction, as the treaty recognizes the nuclear weapon states' and the international community's responsibility for redress (TPNW, Art.7). However, the specification of international cooperation and the positive obligations in the treaty still needs improvement – especially beyond national obligations. From the perspective of states and communities affected by nuclear weapons, leaving responsibility for implementing the positive obligations to TPNW members alone would risk shifting “the primary burden from the states which have undertaken such testing, to the host nation where such testing occurred” (Doulatram, 2022).

A Victim Assistance and Environmental Remediation Fund (VAERF)

To begin implementing the TPNW's positive obligations, member states of the treaty should take a number of steps (Docherty, 2020) including the designation of national contact points and national assessments of human and environmental harm and financial needs.

But more needs to be done to fill the gaps in redress and recovery and meet the needs of victims. A particularly important step would consist in the creation of an international fund that could be used to finance support for nuclear victims as well as environmental clean-up. In a working paper that is currently being drafted for the first Meeting of TPNW States Parties under the direction of Kazakhstan and Kiribati (Draft Consultation Paper, 2022), the creation of a “trust fund for affected states” is contained as a proposal to be “considered” by a future intersessional working group, who would be in charge of developing concrete “guidelines”. To kickstart this process, we suggest conceptualizing and planning the fund as a Victim Assistance and Environmental Remediation Fund (VAERF) that should be open to contributions from TPNW member and non-members and would serve several important functions. First, it would prioritize and operationalize the TPNW's provisions on international cooperation under Article 7. Second, it would channel funds into environmental clean up (Rapaport and Nikolic Hughes, 2021), a dimension of nuclear justice that has thus far received even less attention (Collin and Bouveret, 2020) than aid to individual victims. Third, by inviting TPNW non-members to participate in preparatory discussions on the fund to make financial contributions to it, the VAERF could constitute a focal point for bridgebuilding between the TPNW and NPT treaty communities: it would offer TPNW members the chance to involve the states most responsible for nuclear harm into aid and remediation efforts, and it would provide nuclear weapon states and their allies an opportunity to demonstrate

serious engagement with the TPNW and its proponents.

In their draft working paper, Kazakhstan and Kiribati suggest that the intersessional working group tasked with designing the fund should “examine, as part of its work, relevant precedents for such a trust fund, such as those from humanitarian, disarmament, and arms control treaties” (Draft Consultation Paper, 2022: 5). While disarmament treaties do set important precedents for the TPNW as a humanitarian disarmament treaty, we propose to broaden the rationale for setting up a VAERF and look beyond these immediately adjacent bodies of international law both in making the case for the creation of a fund, and in deciding on the principles on which it should operate. Specifically, human rights, international criminal justice and environmental governance are fields which not only overlap with the nuclear justice agenda, but in which questions of responsibility, redress and compensation play central roles. In each field, different models for dealing with past harm have been discussed or implemented that vary with regard to two key questions.

First, what type of harm is compensated? Whereas international criminal justice and international human rights law are mainly centered on redressing the suffering of individual victims, international environmental law focuses on the prevention and remediation of harm that affects communities – in the case of climate policy, the community of all humans. Nuclear justice contains both dimensions, suggesting that a VAERF should finance both payments to

individuals and communal programs to remediate social and environmental consequences of nuclear weapons use and testing. One option would be to model communal programs after the Green Climate Fund, which supports climate related mitigation and adaptation projects. A VAERF could provide funding for specific remediation projects, which would be decided by a board composed of state representatives, civil society including victims organizations, academia, and, where appropriate, the private sector. In addition, a VAERF should draw on the expertise of established international organizations, such as the International Atomic Energy Agency (IAEA), the World Health Organization (WHO) and the Comprehensive Nuclear Test-Ban Treaty Organization (CTBTO) – for example, in terms of scientific knowledge about the medical effects of nuclear radiation or the measurement of radiation.

Second, who pays for compensation? Adjacent policy areas offer four different models: (1) Responsible individuals pay. For instance, the International Criminal Court (ICC) can order convicted persons to contribute financially (International Criminal Court, 2017) to the compensation of their victims. (2) Responsible states pay. For instance, the European Court of Human Rights can order states to pay damages (European Court of Human Rights - Press Service, 2019) to individual victims; the Helsinki Convention on Transboundary Water Courses (United Nations Economic Commission for Europe, 2013) obliges responsible states to pay for cleaning up any pollution they have caused under the ‘polluter pays principle’; the Rio

Declaration (United Nations Conference on Environment and Development, 1992) sets out the principle of 'common but differentiated responsibilities' based on states' different historical contributions to environmental degradation. (3) Wealthy states pay. For instance, the UN Framework Convention on Climate Change (United Nations, 1992) commits states to protect the climate in accordance with their CBDR and their 'respective capabilities and their social and economic conditions'; the notion that 'developed country parties should take the lead' also underlies the contemporary system of climate finance, including the Green Climate Fund. (4) The international community pays. For instance, the ICC's Trust Fund for Victims (International Criminal Court, no date) is funded by ICC member states' voluntary donations.

For pragmatic reasons, a VAERF should be based mainly on the 'community pays' principle in accepting voluntary donations from all states. However, it should also find ways to highlight and prioritize contributions from responsible and financially able donors – that is, the group of nuclear weapon and umbrella states, on the one hand, and the (overlapping) group of developed states, on the other. Various creative solutions can be imagined to realize these principles. For instance, the fund could accept donations into distinct baskets: the nuclear weapon states' basket, other developed countries basket, and the international community basket. A special solution would need to be created for the so called umbrella states. By profiting (or having profited) indirectly from nuclear tests and nuclear deterrence, these states also bear a

special responsibility in the sense of the 'Responsible States Pay' principle.

Similarly to climate finance, existing national and bilateral programs could be counted toward national contributions to the respective VAERF baskets provided that they 'adequately provide age- and gender sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for [the] social and economic inclusion of victims' (TPNW, Art. 6). Programs that do not meet these standards would have to be amplified. Alternatively, the fund could organize donor conferences at which nuclear weapon states and developed countries would be invited to collectively match donations by poorer countries according to a formula that would need to be agreed at the first conference.

Prospects for a VAERF

Although the nuclear weapon states and many umbrella states remain critical of the TPNW, the nuclear justice agenda that is emerging in the context of the new treaty could facilitate cooperation and common action to address the increased nuclear threat in the context of the Ukraine war, particularly through bridge-building efforts within the NPT and beyond. As the proposal of a VAERF demonstrates, promoting nuclear justice is not necessarily linked to joining the TPNW. Indeed, a productive synergy of both treaties is possible, and effective cooperation between those states that have used or tested nuclear weapons or benefit from nuclear deterrence and those that are affected by the consequences is not only ethically

desirable but also in both sides' interest. In this respect, an illuminating precedent was set by the Ottawa Convention banning anti-personnel landmines: Although the US is not part of this treaty, it is nonetheless the largest contributor to cooperation and assistance in mine destruction and clearing (Landmine and Cluster Munition Monitor, 2021), which is a central element of the treaty (Articles 5 and 6). Since the US' involvement has contributed significantly to enhancing its reputation (Wexler, 2003), a similar incentive would also exist with regard to a VAERF. As the nuclear weapon states have to deal with a poor reputation within the nuclear regimes, a commitment to international cooperation and assistance with regard to redress would provide an opportunity to restore at faith in their intentions and goodwill. The same is true for umbrella states that have long been torn between loyalty to their nuclear allies and sympathy for disarmament. Furthermore, incorporating existing or past national and bilateral programs in the respective baskets of a VAERF would make the fund particularly attractive to the United States and France, which have the most extensive compensation programs among the nuclear weapon states. Ideally, such a fund would create a pull and contribute to more comprehensive nuclear justice.

Finally, nuclear weapon states and umbrella states concerned about the growing nuclear threat associated with the Ukraine war and seeking joint action should see (and use) the TPNW as a means to ensuring non-recurrence of nuclear weapons use and threats. To that end, they should raise the issue of nuclear justice credibly and prominently at the

NPT Review Conference. This could include supporting the initiative to establish a VAERF compensation fund as a joint NPT-TPNW cooperative framework and making a substantial contribution to it.

Dr. Caroline Fehl is a Senior Researcher at the Peace Research Institute Frankfurt (PRIF). She has worked and published widely on multilateral (nuclear) arms control regimes and negotiations, with a focus on the role of power inequalities and justice concerns. In addition, she has conducted research on international criminal justice, and has recently been interested in intersections between accountability and arms control norms. Caroline's research has been published, inter alia, by Oxford University Press, in academic journals such as the European Journal of International Relations, Review of International Studies, or Global Governance, as well as global affairs blogs such as Global Policy Opinion & Analysis or PRIFblog.

Jana Baldus is a Doctoral Researcher at the Peace Research Institute Frankfurt (PRIF). In her dissertation, she studies the increasing polarization within the NPT, focusing on different conceptions of the nuclear norms and structural differences within the NPT regime. In a forthcoming article in the German Journal for Peace and Conflict Research, she and her co-authors analyze the crisis of the global nuclear order and outline ideas for re-

stabilizing the regime. Jana is a member of the Young Nuclear Network, which brings together young professionals from Germany working in the nuclear field.

Sascha Hach is a Doctoral Researcher at the Peace Research Institute Frankfurt (PRIF) and teaches at the Bundeswehr University in Munich. He worked for several years in the German Bundestag as a Research Associate in the field of defense and disarmament policy and was co-founder and Executive Director of the German branch of the International Campaign to Abolish Nuclear Weapons (ICAN). In the Research Department 'International Security' at PRIF, he feeds this practical experience into his research, focusing on disarmament and arms control policy issues, the United Nations, and German foreign policy. He has published in WeltTrends, Wissenschaft & Frieden, the IPG-Journal, Süddeutsche Zeitung and PRIFblog, among others.

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