

## VICTIM ASSISTANCE IN THE NUCLEAR WEAPON BAN TREATY<sup>1</sup> A Comprehensive and Detailed Approach

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Reflecting the nuclear weapon ban treaty’s humanitarian goals, the President’s draft text of May 22, 2017 includes welcome steps to ensure that the victims of nuclear weapons use or testing receive assistance to recover from or live with the effects of a nuclear explosion. Victim assistance focuses on victims’ needs—particularly their long-term needs—and embodies the enduring commitment of states parties where victims live (“affected states”) to work towards victims’ full and effective participation in society through the realization of their human rights. In the draft text, preambular clauses recognize the humanitarian consequences and suffering that result from nuclear weapons use or testing, and the first paragraph of draft Article 6, which addresses the topic of assistance more broadly, requires affected states parties that are in a position to do so to provide appropriate assistance to individuals affected by nuclear weapons use or testing. These elements offer a solid foundation for negotiating states to build on, to strengthen the treaty’s victim assistance obligations.

The treaty, however, should address states parties’ obligations on victim assistance in a more comprehensive and detailed manner. In the treaty’s operative text, draft Article 6(1) should be supplemented by a detailed elaboration of affected states parties’ victim assistance obligations. It should also be complemented by an expanded international cooperation and assistance article (draft Article 8), which, among other elements, explicitly requires states parties to assist affected states parties to implement their victim assistance obligations.

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In Part I, this paper describes the importance of victim assistance, exploring the harm nuclear weapons cause and the concept of victim assistance. In Part II, the paper explains the need for comprehensive and detailed treatment of victim assistance in the treaty. Such treatment would further the treaty's humanitarian goal; set a clear legal standard for states parties; establish an international standard and influence states not party to the treaty; and advance international law. In Part III, the paper outlines what comprehensive and detailed treatment of victim assistance would entail for the treaty's operative text. An annex contains relevant articles from the 2008 Convention on Cluster Munitions that negotiating states could draw from in developing the nuclear weapon ban treaty's victim assistance obligations.<sup>2</sup> This paper uses "nuclear weapons" as shorthand for the prohibited objects the draft text concerns, namely nuclear weapons and other nuclear explosive devices.

## I. The Importance of Victim Assistance

As many states highlighted in the March 2017 negotiations and as the draft preamble notes, the humanitarian consequences of nuclear weapons are devastating. The suffering of victims of nuclear weapons has been significant and includes physical as well as non-physical harms, such as psychological and socioeconomic harms. Victim assistance responds to the physical and non-physical harms victims experience and requires affected states to dismantle barriers and put in place measures to ensure victims' full and effective participation in society. In this paper, "victims of nuclear weapons" refers to groups and individuals who have been harmed by the use or testing of nuclear weapons; existing victims are those who suffered harm from the Hiroshima or Nagasaki bombings, or nuclear weapons testing.<sup>3</sup>

### **The Harm Caused by Nuclear Weapons Use or Testing**

A nuclear explosion releases immense heat and energy, as well as massive amounts of radiation, causing catastrophic physical harm to those nearby.<sup>4</sup> Victims who are exposed directly or

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<sup>2</sup> Convention on Cluster Munitions, adopted May 30, 2008, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, entered into force August 1, 2010.

<sup>3</sup> See discussion in Part III of the paper on the concept of a victim in the nuclear weapon ban treaty text.

<sup>4</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice (ICJ), ICJ

indirectly to a nuclear explosion suffer a wide range of well-recognized adverse health effects. Immediate injuries from direct exposure include severe burns, trauma wounds, and instant radiation poisoning.<sup>5</sup> Long-term adverse health effects include cancer at rates higher than the general population,<sup>6</sup> and women and children (especially girls) face a particularly high risk of developing and dying from cancer due to radiation exposure.<sup>7</sup> Affected women may also have miscarriages or give birth to children with increased rates of physical and intellectual disabilities.<sup>8</sup> Seventy years after the Hiroshima and Nagasaki bombings, victims continue to suffer from higher rates of cancer, blood diseases, and birth defects in their children and grandchildren than the general population.<sup>9</sup> Local populations in nuclear weapons testing areas have reported similar long-term physical effects. The population living near a Soviet nuclear weapons test site in the Ural Mountains, for example, has a death rate that is almost double that in similar areas, as well as high rates of infant mortality and physical impairment in children.<sup>10</sup>

Use or testing of nuclear weapons can also cause non-physical harm. Evidence suggests that victims experience psychological issues, such as high levels of stress, anxiety, and other related mental and emotional issues following a nuclear explosion.<sup>11</sup> Use or testing can also cause grave socioeconomic and cultural harm, including through the destruction of homes or other property, or displacement from an individual or group's homeland. For example, in the Marshall Islands, four atolls were at various times evacuated and resettled to allow the United States to carry out

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Reports (1996) 226, 243, July 8, 1996, <http://www.icj-cij.org/docket/files/95/7495.pdf> (accessed June 1, 2017), para. 35.

<sup>5</sup> "Destructive Effects: Health Effects: Counting the Dead," AtomicBombMuseum.org, [http://atomicbombmuseum.org/3\\_health.shtml](http://atomicbombmuseum.org/3_health.shtml) (accessed May 29, 2017).

<sup>6</sup> "Hiroshima and Nagasaki Bombings," International Campaign to Abolish Nuclear Weapons (ICAN), <http://www.icanw.org/the-facts/catastrophic-harm/hiroshima-and-nagasaki-bombings/> (accessed May 29, 2017).

<sup>7</sup> Anne Guro Dimmen, "Gendered Impacts: The Humanitarian Impacts of Nuclear Weapons from a Gender Perspective," International Law and Policy Institute-United Nations Institute for Disarmament Research (ILPI-UNIDIR) Vienna Conference Series, December 2014, <http://nwp.ilpi.org/wp-content/uploads/2014/12/No-5-Gendered-impacts.pdf> (accessed May 29, 2017).

<sup>8</sup> "Hiroshima and Nagasaki Bombings," ICAN.

<sup>9</sup> See, for example, "Destructive Effects: Health Effects: Counting the Dead," AtomicBombMuseum.org; "Hiroshima and Nagasaki Bombings," ICAN.

<sup>10</sup> "The Soviet Union's Nuclear Testing Programme," Comprehensive Nuclear Test Ban Treaty Organization (CTBTO) Preparatory Commission, <https://www.ctbto.org/nuclear-testing/the-effects-of-nuclear-testing/the-soviet-unionsnuclear-testing-programme/> (accessed May 29, 2017).

<sup>11</sup> "Psychological Effects," Radiation Effects Research Foundation, [http://www.rerf.jp/radefx/late\\_e/psycholo.html](http://www.rerf.jp/radefx/late_e/psycholo.html) (accessed May 29, 2017).

nuclear weapons tests, generating cultural, social, and economic consequences for those who were displaced, as well as for the broader population of the Marshall Islands.<sup>12</sup> A United Nations expert concluded that this displacement in the Marshall Islands “has created nomads who are disconnected from their lands and their cultural and indigenous way of life.”<sup>13</sup> Victims of nuclear weapons may additionally face social ostracization and discrimination: misinformation regarding radiation sickness and the ways in which people may contract radiation-related illnesses led to widespread discrimination against victims of nuclear weapons in Japan, for instance.<sup>14</sup>

### **The Concept of Victim Assistance**

Rather than being a type of charity, the concept of victim assistance focuses on the realization of victims’ human rights and ensures victims’ needs are met through measures tailored to the harm they suffered because of a weapon’s use. A rights-based approach recognizes that each affected state should respect, protect, and ensure the right of all people in its territory to participate in society,<sup>15</sup> including by dismantling economic, social, or physical barriers that inhibit enjoyment of a person or group’s human rights.<sup>16</sup> In essence, this approach requires affected states to put in

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<sup>12</sup> Dan Zak, “A Ground Zero Forgotten: The Marshall Islands, Once a U.S. Nuclear Test Site, Face Oblivion Again,” *The Washington Post*, November 27, 2015, [http://www.washingtonpost.com/sf/national/2015/11/27/a-ground-zero-forgotten/?utm\\_term=.a707a6a9b087](http://www.washingtonpost.com/sf/national/2015/11/27/a-ground-zero-forgotten/?utm_term=.a707a6a9b087) (accessed May 29, 2017).

<sup>13</sup> UN Commission on Human Rights, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu, Mission to the Marshall Islands (March 27-30, 2012) and the United States of America (April 24-27, 2012), A/HRC/21/48/Add.1, September 3, 2012, para 33. For more information on nuclear testing and health effects in the Pacific Islands, see ICAN, “Prohibiting Nuclear Weapons: A Pacific Islands Priority,” March 2017, <http://www.icanw.org/wp-content/uploads/2017/03/Pacific.pdf> (accessed May 29, 2017), pp. 6-7, 11-15.

<sup>14</sup> Tetsuo Shintomi, “Nagasaki Hibakusha Recalls Struggle to Dodge Discrimination,” *The Japan Times*, March 16, 2015, <http://www.japantimes.co.jp/news/2015/03/16/national/nagasaki-hibakusha-recalls-struggle-to-dodge-discrimination/#.WN2E0FKZPR0> (accessed May 30, 2017); “Who Are the Hibakusha?” Hibakusha Stories, <http://www.hibakushastories.org/who-are-the-hibakusha/> (accessed May 30, 2017).

<sup>15</sup> The concept of a right to participate in society draws from a variety of international human rights obligations contained in: the International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976; and the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976. Participatory rights include (but are not limited to) the right to take part in the conduct of public affairs, vote, and be elected at periodic elections, and to have access to public service positions on an equal basis (ICCPR, art. 25); the right to education (ICESCR, art. 13); the right to the highest attainable standard of physical and mental health (ICESCR, art. 13); the right to an adequate standard of living (ICESCR, art. 11); and the right to freedom of expression (ICCPR, art. 19).

<sup>16</sup> See “Guiding Principles for Victim Assistance,” International Campaign to Ban Landmines (ICBL), <http://www.icbl.org/media/919871/VA-Guiding-Principles.pdf> (accessed May 30, 2017). See also Anti-Personnel Mine Ban Convention Implementation Support Unit: Geneva International Centre for Humanitarian Demining,

place measures to ensure that victims do not experience barriers to the enjoyment of their human rights *because* they are victims. A rights-based approach complements and reinforces the 2006 Convention on the Rights of Persons with Disabilities, although not all victims of problematic weapons are persons with disabilities.<sup>17</sup> In practice, victim assistance measures can range from medical care and psychosocial support for individual victims to poverty reduction strategies in affected communities.<sup>18</sup>

The inclusion of victim assistance in humanitarian disarmament treaties has proven to have practical benefits for victims. It obliges states parties to establish victim assistance programs or improve the provision of assistance to victims through existing programs, as well as collect better data concerning victims. Research conducted by the *Cluster Munition Monitor* has determined that victim assistance programs stemming from obligations in humanitarian disarmament treaties have “contributed to making more resources available to survivors, as well as to people with similar needs.”<sup>19</sup> Additionally, following the adoption of the Convention on Cluster Munitions (which contains comprehensive and detailed victim assistance obligations), reporting on the number of cluster munitions victims has become more accurate, allowing for better planning of victim assistance activities.<sup>20</sup> Victim assistance obligations can also help to stimulate the creation of forums—nationally and internationally—for continued discussions on how to improve victim assistance programs to better meet the needs of victims.<sup>21</sup>

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“Chapter 5—A Holistic and Integrated Approach to Addressing the Rights and Needs of Victims and Survivors: Good Practice,” in *Assisting Landmine and other ERW Survivors in the Context of Disarmament, Disability and Development* (2011), <https://www.apminebanconvention.org/publications-about-the-convention/assisting-landmine-and-other-erw-survivors/> (accessed June 1, 2017).

<sup>17</sup> Convention on the Rights of Persons with Disabilities, adopted January 24, 2007, G.A. res. 61/106, 61 U.N. GAOR Supp. (No. 49) at 2, U.N. Doc. A/RES/61/106/Annex II, entered into force May 3, 2008; see also “Guiding Principles for Victim Assistance,” ICBL; Handicap International, “The Way Forward on Victim Assistance: A Consideration of the Various Aspects at Play When Integrating Assistance to Survivors into Disability-Inclusive Development,” June 2014, [http://www.handicap-international.org/wp-content/uploads/2016/09/DOC21\\_ENG.pdf](http://www.handicap-international.org/wp-content/uploads/2016/09/DOC21_ENG.pdf) (accessed May 30, 2017).

<sup>18</sup> Handicap International, “The Way Forward on Victim Assistance.”

<sup>19</sup> International Campaign to Ban Landmines–Cluster Munition Coalition (ICBL-CMC), *Cluster Munition Monitor 2016* (August 2016), <http://www.the-monitor.org/media/2394895/Cluster-Munition-Monitor-2016-Web.pdf> (accessed May 30, 2017), p. 105. The Cluster Munition Monitor further notes, “Since it requires a non-discriminatory approach to providing all forms of assistance and services, victim assistance often contributes to addressing some of the rights of other persons with disabilities in the same communities.” *Ibid.*

<sup>20</sup> *Ibid.*, p. 100.

<sup>21</sup> See, for example, Dubrovnik Action Plan, adopted September 11, 2015, at First Review Conference of the Convention on Cluster Munitions, <http://www.stopclustermunitions.org/media/2333184/dubrovnik-action-plan.pdf>

## **II. The Need for Comprehensive and Detailed Treatment of Victim Assistance in the Nuclear Weapon Ban Treaty**

Treating victim assistance in a comprehensive and detailed manner in the nuclear weapon ban treaty would further the humanitarian goal of the treaty; set a clear legal standard for states parties; establish an international standard and influence states not party to the treaty; and advance international law. The nuclear weapons ban treaty should follow the model of the Convention on Cluster Munitions, whose treatment of victim assistance exemplifies the rights-based approach and sets a standard for future humanitarian disarmament treaties.<sup>22</sup>

### **Furthering the Humanitarian Goal of the Nuclear Weapon Ban Treaty**

Comprehensive and detailed treatment of victim assistance would respect and further the treaty's humanitarian goal—to eliminate or reduce human suffering from the use or testing of nuclear weapons. In its preamble, the draft text notes states parties' deep concern about "the catastrophic humanitarian consequences that would result from any use of nuclear weapons" and adds that those consequences "pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and for the health of future generations." The United Nations General Assembly resolution initiating the nuclear weapon ban treaty negotiations likewise highlighted states' "[d]eep[] concern[] about the catastrophic humanitarian consequences of any use of nuclear weapons."<sup>23</sup> To further its goal of addressing the humanitarian harm of nuclear weapons, the treaty should provide meaningful mechanisms for assisting those who have suffered harm.

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(accessed May 30, 2017), action 4.

<sup>22</sup> For a discussion on humanitarian disarmament law and its components, see Bonnie Docherty, "Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law," *Austrian Review of International and European Law*, vol. 15 (2010), [http://hrp.law.harvard.edu/wp-content/uploads/2013/08/04\\_docherty\\_neu-FINAL.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2013/08/04_docherty_neu-FINAL.pdf) (accessed June 1, 2017), p. 7.

<sup>23</sup> UN General Assembly, "Resolution adopted by the General Assembly on 23 December 2016: Taking Forward Multilateral Nuclear Disarmament Negotiations," G.A. Res. 71/258, U.N. Doc. A/RES/71/258, January 11, 2017, [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/71/258](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/71/258) (accessed May 30, 2017).

Victim assistance obligations would also complement obligations on environmental remediation that are linked to the treaty's humanitarian goal.<sup>24</sup> The draft text recognizes the link between damage to the environment and harm to people in its preamble. For example, it notes the implications of nuclear weapons for “the health of future generations,” which can be threatened by long-term environmental contamination. It also notes the international humanitarian law prohibition on “use of methods or means of warfare which are intended or may be expected to cause [widespread, long term and severe] damage to the natural environment and to thereby prejudice the health or survival of the population.” Requiring affected states parties to provide victim assistance and remove or contain contaminated materials is necessary to effectively address and limit the humanitarian consequences of the use or testing of nuclear weapons.

### **Establishing a Clear Legal Standard for States Parties**

Comprehensive and detailed treatment of victim assistance in a nuclear weapon ban treaty would provide states parties with clear guidance about their legal obligations. In so doing, it would make it easier for states parties to understand and meet their obligations. It would also provide a standard against which state implementation could be measured, while leaving room for individual states parties to develop their own tailored implementation measures. Including a detailed elaboration of obligations on victim assistance—such as a list of actions for affected states parties to take or principles to respect, as discussed in Part III of this paper—would give civil society and other actors criteria they could use to scrutinize and monitor individual states parties' implementation.

Clear and precise obligations would also help states parties to develop best practices on victim assistance implementation by offering a shared starting point on which states parties could build. These best practices could be socialized among states parties, as they strive to meet the common standard outlined in the treaty. States parties to the Convention on Cluster Munitions, for example, have collectively produced action plans that have included guidance on how affected states parties can continue to improve the implementation of their victim assistance obligations.<sup>25</sup>

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<sup>24</sup> See International Human Rights Clinic at Harvard Law School and Article 36, “Environmental Remediation and the Nuclear Weapon Ban Treaty: A Comprehensive and Detailed Approach,” June 2017.

<sup>25</sup> See, for example, Dubrovnik Action Plan; Vientiane Action Plan, adopted November 12, 2010, at First Meeting of

### **Setting an International Standard and Influencing States Not Party to the Treaty**

Comprehensive and detailed treatment of victim assistance could influence the behavior of states not party to the nuclear weapon ban treaty by establishing an international standard that carries normative value. While the obligations would be binding only on states parties, states not party might look to the new treaty's standards for guidance in addressing the humanitarian consequences of nuclear weapons. As the number of states parties to the treaty grows, the obligations elaborated in the treaty will likely become an accepted standard over time and states not party might feel international pressure to carry out comparable victim assistance activities.

### **Advancing International Law**

Comprehensive and detailed treatment of victim assistance would build upon the precedent set by the 1997 Mine Ban Treaty, 2003 Protocol V to the 1980 Convention on Conventional Weapons (CCW), and the Convention on Cluster Munitions, and would continue to advance international law in this area.<sup>26</sup> Successive disarmament treaties have progressively included more structured and robust obligations on assisting the victims of problematic weapons. While the Mine Ban Treaty and CCW Protocol V included victim assistance only under the umbrella of international cooperation and assistance, the Convention on Cluster Munitions comprehensively addressed victim assistance through an article that set out detailed obligations for affected states parties and was supported by other elements of the treaty, including international cooperation and assistance obligations.<sup>27</sup> Comprehensive and detailed treatment of victim assistance in the nuclear weapon ban treaty would reinforce and continue this trend. It would also ensure that the same rules apply for victims of nuclear weapons as for other recently banned weapons. The Convention on Cluster Munitions has set a standard for victim assistance that states have applied to victims not only of cluster munitions but also of conventional weapons addressed in earlier treaties, particularly landmines.<sup>28</sup>

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States Parties of the Convention on Cluster Munitions,

<http://www.clusterconvention.org/files/2011/01/VIENTIANE-ACTION-PLAN-Final2.pdf> (accessed May 30, 2017).

<sup>26</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction (Mine Ban Treaty), adopted September 18, 1997, entered into force March 1, 1999; Convention on Conventional Weapons (CCW) Protocol V on Explosive Remnants of War, adopted November 28, 2003, U.N. Doc. CCW/MSP/2003/2, entered into force November 12, 2006.

<sup>27</sup> Convention on Cluster Munitions, arts. 5 and 6.

<sup>28</sup> See Convention on Cluster Munitions Coordinators for 2016 and 2017 on Victim Assistance and Cooperation and



In addition to being in line with prior treaty precedent, this approach would also represent an advance in international law in two ways. First, while victim assistance obligations under existing treaties already encompass victims of landmines and explosive remnants of war, notably cluster munitions, the inclusion of comparable obligations in the nuclear weapon ban treaty would extend assistance to victims of certain toxic remnants of war. Nuclear weapons use and testing are one source of toxic remnants of war, which are toxic or radiological substances used in or resulting from military activities that form a hazard to humans or ecosystems.<sup>29</sup> Second, comprehensive and detailed treatment of victim assistance would mark the first time that victim assistance would be required for victims of a weapon of mass destruction, as the biological and chemical weapons conventions preceded the development of victim assistance principles in international law.

A comprehensive and detailed approach to victim assistance in the nuclear ban treaty would also reinforce the rights of persons with disabilities, as expressed in the Convention on the Rights of Persons with Disabilities. States and civil society organizations have emphasized the links between victim assistance programs and broader programs supporting the rights of persons with disabilities, and action plans developed under existing humanitarian disarmament treaties have encouraged further integration and coordination between the two areas.<sup>30</sup>

### **III. Victim Assistance Elements in the Nuclear Weapon Ban Treaty**

To address victim assistance in a comprehensive and detailed manner, states negotiating the nuclear weapon ban treaty should build on existing elements in the draft text: language relevant to victim assistance appears in the preamble, draft Article 6, and draft Article 8. In the preamble,

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Assistance, “Guidance on an Integrated Approach to Victim Assistance: By States for States,” November 2016, <http://www.clusterconvention.org/wp-content/uploads/2016/11/here.pdf> (accessed May 30, 2017).

<sup>29</sup> See Doug Weir, “Pollution Politics: Power, Accountability and Toxic Remnants of War,” post to Toxic Remnants of War Project (blog), July 3, 2014, <http://www.toxicremnantsofwar.info/report-pollution-politics/> accessed May 30, 2017.

<sup>30</sup> In the Convention on Cluster Munitions context, see the Dubrovnik Action Plan, action 4.1(c) and the Vientiane Action Plan, actions 33-50. In the Mine Ban Treaty context, see Maputo Action Plan, adopted June 27, 2014 at the Third Review Conference of the Mine Ban Treaty, <http://www.maputoreviewconference.org/fileadmin/APMBC-RC3/3RC-Maputo-action-plan-adopted-27Jun2014.pdf> (accessed May 30, 2017), part IV; Cartagena Action Plan 2010-2014: Ending the Suffering Caused by Anti-Personnel Mines,” adopted 2009 at the Second Review Conference of the Mine Ban Treaty, <http://www.cartagenasummit.org/fileadmin/APMBC-RC2/2RC-ActionPlanFINAL-UNOFFICIAL-11Dec2009.pdf> (accessed May 30, 2017), paras. 12-16.

the draft text recognizes the suffering experienced by victims of nuclear weapons, as well as the catastrophic humanitarian consequences that would result from nuclear weapons use. In the draft text's operative part, Article 6(1) addresses assistance to individuals affected by nuclear weapons use or testing and provides a firm base on which to build detailed victim assistance obligations. Draft Article 8 mandates international cooperation to help states parties fulfill their obligations under the treaty and provides that states parties have a right to seek and receive assistance.

Detailed victim assistance obligations could appear either as additional paragraphs (or subparagraphs) in Article 6, or Article 6(1) could form the basis of a new standalone article on victim assistance that includes a number of paragraphs and/or subparagraphs. In either event, the detailed obligations on victim assistance articulated in the operative text should: include a broad concept of a victim; place primary responsibility for victim assistance on affected states parties; require affected states parties to provide a wide range of assistance; and not exclude any affected states parties from the responsibility to provide victim assistance. In new paragraphs or subparagraphs, the operative text should also outline methods and principles for providing victim assistance and give guidance on steps to implement victim assistance obligations, as well as require states parties to report on their implementation of these obligations. In addition, draft Article 8 should be expanded to incorporate a requirement on all states parties to assist affected states parties to implement their victim assistance obligations, alongside other new elements on international cooperation and assistance.

While this paper focuses on the treaty's operative text and does not analyze the draft preamble, negotiating states could consider strengthening and expanding the preamble to encompass additional elements related to victims and victim assistance. Negotiating states could look to the Convention on Cluster Munitions' preamble for guidance on possible preambular language.

## **Victim Assistance Obligations**

### *The Concept of Victim Should be Broad*

Draft Article 6(1) requires each state party "in a position to do so" to provide assistance to "individuals affected by the use or testing of nuclear weapons in areas under [that state party's]

jurisdiction or control.” This formulation arguably captures within its scope a broad range of people who have been harmed by nuclear weapons use or testing. However, although this formulation could encompass large numbers of people, it would not make the victim assistance obligations unmanageable because affected states parties would owe assistance only to a subset of those people: because victim assistance responds to harms people suffer as a result of nuclear weapons use or testing, if an individual suffers no harm, no obligation to provide that individual with assistance would arise under the treaty. In recognition of the collective harm nuclear weapons use or testing causes, the formulation could also explicitly refer to affected families and communities, groups that are covered by the victim assistance obligations of the Convention on Cluster Munitions.<sup>31</sup> Additionally, the phrase “nuclear weapons or other nuclear explosive devices” should appear in draft Article 6(1)’s formulation to cover victims of all the prohibited objects the draft text concerns.

As an alternative to the formulation the text adopts, the text could instead use and define the term “victim of nuclear weapons use or testing” in a paragraph or subparagraph to the article where the victim assistance operative text appears. Doing so would provide additional clarity and specificity to the text without narrowing the breadth of the formulation the draft text adopts. Like the definition of “cluster munition victims” in the Convention on Cluster Munitions, the definition could explicitly include persons who have suffered physical harm or non-physical harm such as psychological trauma, economic loss and social marginalization, and state that the families and communities of those directly affected would fall within the definition.<sup>32</sup> The definitional language could also accommodate harm characteristic to nuclear weapons use, such as the intergenerational effects of radiation exposure.

*Primary Responsibility to Provide Victim Assistance Should Lie with the Affected State Party*

In draft Article 6(1), the text appropriately assigns primary responsibility for providing victim assistance to affected states parties. This responsibility flows from the rights-based approach to victim assistance. The requirement to provide victim assistance falls within a state’s general

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<sup>31</sup> Convention on Cluster Munitions, art. 2(1). See this paper’s annex for the text of relevant provisions of the Convention on Cluster Munitions relating to victim assistance.

<sup>32</sup> See Convention on Cluster Munitions, art. 2(1).

obligations under international human rights law to ensure that the rights of all people in its territory are respected, protected, and fulfilled and to take steps to eliminate barriers people face to fully and effectively participating in society.<sup>33</sup>

It also makes sense at a practical level for affected states parties to be primarily responsible for providing victim assistance. An affected state is better able to assess the needs of affected individuals within its territory and provide them with necessary support than a foreign state. Additionally, this allocation of responsibility respects the sovereignty of affected states parties, as affected states set priorities and determine and coordinate plans for victim assistance within their territories.

However, an affected state party should not face the task of providing victim assistance alone. As this paper explains in more detail below, the international community should be obliged through an expanded version of the treaty's international cooperation provision (draft Article 8) to support each affected state party in its victim assistance efforts. This framework of responsibility for victim assistance—primary responsibility on the affected state, supported by other states parties through international cooperation and assistance obligations—is also present in the Convention on Cluster Munitions.<sup>34</sup>

Affected state responsibility has not deterred countries with large numbers of victims from becoming parties to other weapons ban treaties that contain victim assistance obligations. For example, Afghanistan joined the Mine Ban Treaty and the Convention on Cluster Munitions despite having an estimated 52,000-60,000 survivors of landmines or explosive remnants of war—particularly cluster munitions—in its territory in 2006.<sup>35</sup> Other severely affected countries, including Lao PDR and Lebanon have also joined the Convention on Cluster Munitions.<sup>36</sup>

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<sup>33</sup> See discussion in Part I of one of this paper. See also “Guiding Principles for Victim Assistance,” ICBL; Geneva International Centre for Humanitarian Demining, “A Holistic and Integrated Approach to Addressing the Rights and Needs of Victims and Survivors: Good Practice.”

<sup>34</sup> Convention on Cluster Munitions, arts. 5(1) and 6(7).

<sup>35</sup> “Afghanistan: Casualties and Victim Assistance,” Landmine & Cluster Muniton Monitor, August 18, 2015, <http://www.the-monitor.org/en-gb/reports/2017/afghanistan/casualties-and-victim-assistance.aspx> (accessed June 6, 2017).

<sup>36</sup> “Who’s Joined the Convention on Cluster Munitions?” Cluster Muniton Coalition, May 23, 2017,

Judging by this experience, the importance of delegitimizing nuclear weapons and the prospect of international cooperation and assistance would likely attract states affected by nuclear weapons use or testing to the new treaty, even with a positive obligation to provide victim assistance.

*Affected States Parties Should Provide a Wide Range of Assistance to Victims*

As draft Article 6(1) recognizes, the assistance provided by affected states parties should be wide in nature and delivered in accordance with applicable international humanitarian and human rights law. The draft text requires affected states parties to “adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.” This formulation should be retained as it anticipates the need for assistance that responds to the needs of victims and acknowledges that these extend beyond the medical realm. The Convention on Cluster Munitions and Mine Ban Treaty likewise refer to providing for victims’ social and economic inclusion or reintegration.<sup>37</sup>

*Each Affected State Party Should Provide Victim Assistance*

Draft Article 6(1) requires affected states parties “in a position to do so” to provide assistance to affected individuals: this qualifier could allow an affected state party to argue that it was not in a position to provide some or any victim assistance, an outcome that would be inconsistent with a rights-based approach that places responsibility for victim assistance on each affected state, consistent with its general human rights obligations. The phrase should be removed to align the text with the rights-based approach to victim assistance, which represents the standard in this area.

The qualifier “in a position to do so” is also contrary to the precedent for victim assistance obligations in the Convention on Cluster Munitions. That treaty’s detailed article laying out the responsibilities of affected states parties includes no such qualifier.<sup>38</sup> As a result, all affected

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<http://www.stopclustermunitions.org/media/2260731/who-has-joined-the-convention-on-cluster-munitions-english-23-may-2017.pdf> (accessed May 31, 2017).

<sup>37</sup> Convention on Cluster Munitions, art. 5(1); Mine Ban Treaty, art. 6(3).

<sup>38</sup> See Convention on Cluster Munitions, art. 5(1).

states parties are required to provide assistance to victims in areas under their jurisdiction or control. The inclusion of the phrase “in a position to do so” in the victim assistance obligations of the nuclear weapon ban treaty would mark an unwelcome regression from the standard set in the Convention on Cluster Munitions.

*The Operative Text Should Outline Methods and Principles for Providing Victim Assistance*

In new paragraphs or subparagraphs, the operative text should outline the methods and principles in accordance with which victim assistance should be provided, drawing on Article 5(2) of the Convention on Cluster Munitions. These methods and principles fall into three main groups: assistance tailored to victims’ needs; involvement of victims of nuclear weapons in decision making; and non-discrimination.

Assistance tailored to victims’ needs

Victim assistance is not one-size-fits-all, as the draft text’s requirement that affected states parties provide “age- and gender-sensitive assistance” recognizes. Rather, assistance should be tailored to meet the particular needs of victims. To provide tailored assistance, affected states parties should be required to assess victims’ needs, and make every effort to collect reliable relevant data regarding victims.<sup>39</sup>

Involvement of victims of nuclear weapons in decision making

Affected states parties should be obliged to closely consult with victims and actively involve them in decision-making processes.<sup>40</sup> This obligation reflects the basic principle, also expressed in the Convention on the Rights of Persons with Disabilities, that people should be included in decision making that affects their lives.<sup>41</sup> Consultation and involvement with victims of nuclear weapons and their representative organizations would also assist affected states parties to provide assistance that meets the specific needs of nuclear weapon victims.

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<sup>39</sup> See *ibid.*, arts. 5(1)-(2)(a).

<sup>40</sup> See *ibid.*, art. 5(2)(f).

<sup>41</sup> Convention on the Rights of Persons with Disabilities, art. 4(3) (“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations”).

### Non-discrimination

Non-discrimination is a fundamental principle of human rights law. In the victim assistance context, it means that affected states parties must not give preferential treatment to a group of individuals, to the exclusion of others who have similar needs and face similar barriers. The operative text should therefore make clear that affected states parties must not discriminate among nuclear weapon victims, or between nuclear weapon victims and people who have suffered injuries or have disabilities from other causes. Any differences in treatment must be justified on the basis of medical, rehabilitative, psychological, or socio-economic needs.<sup>42</sup> The principle of non-discrimination should also be respected through incorporating victim assistance activities within existing disability, development, healthcare, and human rights frameworks.<sup>43</sup>

### *The Operative Text Should Contain Guidance on Steps to Implement Victim Assistance Obligations and Should Require Reporting on Implementation*

In new paragraphs or subparagraphs, the operative text should detail the implementation steps that affected states parties would be required to take in relation to victim assistance. Affected states parties should be required to develop, implement, and enforce any necessary national laws and policies, as well as strive to incorporate relevant guidelines and good practices in the delivery of victim assistance.<sup>44</sup> They should be obliged to develop a national plan and budget for victim assistance activities, with a view to incorporating the activities within the state's existing disability, development, healthcare, and human rights frameworks and mechanisms, in addition to designating a focal point to coordinate the implementation of all the treaty's victim assistance obligations.<sup>45</sup> To ensure that resources are available for assistance activities, affected states parties should also be required to take steps to mobilize national and international resources.<sup>46</sup>

The operative text should also require affected states parties to report on the status and progress of their implementation of their victim assistance obligations within a certain amount of time

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<sup>42</sup> See Convention on Cluster Munitions, art. 5(2)(e).

<sup>43</sup> See *ibid.*, art. 5(2)(c). For guidance on what such an integrated approach would require, see discussion in Convention on Cluster Munitions Coordinators, "Guidance on an Integrated Approach to Victim Assistance."

<sup>44</sup> See Convention on Cluster Munitions, art. 5(2)(b), (h).

<sup>45</sup> See *ibid.*, art. 5(2)(c), (g).

<sup>46</sup> See *ibid.*, art. 5(2)(d).

after the treaty comes into force and to update that information annually. Regular reporting on a range of matters serves at least three roles. First, it provides a picture of the issues a state party may be facing in implementing a treaty and helps other states parties adapt their international assistance in response. Second, it gives states parties an opportunity to learn lessons about the effects of implementation methods from other states parties. Third, reporting allows civil society groups, international organizations, and other states parties to monitor a state party's progress in meeting its treaty obligations.<sup>47</sup> Transparency through reporting is a common element of disarmament treaties.<sup>48</sup> Article 7 of the Convention on Cluster Munitions contains an extensive list of elements states parties must report on, including the implementation of victim assistance obligations, and could serve as a model for the nuclear weapon ban treaty.<sup>49</sup>

### **International Cooperation and Assistance Obligations**

The provision of international cooperation and assistance takes on particular importance in the context of the nuclear weapon ban treaty: the scale of the effects of nuclear weapons use or testing could make it difficult for affected states parties to manage them alone. The inclusion of clear and robust international cooperation and assistance obligations in the nuclear ban treaty would promote the treaty's humanitarian goal by ensuring the availability of resources to deal with the humanitarian consequences of a nuclear weapons explosion. It would also encourage affected states to join the treaty, in the knowledge that they would be entitled to assistance to implement their obligations. Such international cooperation and assistance obligations have appeared in the Mine Ban Treaty, CCW Protocol V, and the Convention on Cluster Munitions.<sup>50</sup>

Draft Article 8(2) provides that states parties have "the right to seek and receive assistance," but does not give further guidance on states parties' obligations around assistance. Draft Article 8 should be strengthened to make clear that states parties are required to provide assistance as well

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<sup>47</sup> Bonnie Docherty, "Article 7," in Gro Nystuen and Stuart Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary* (Oxford: Oxford University Press, 2010), paras. 7.2 and 7.3.

<sup>48</sup> See, for example, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), adopted January 13, 1993, 23 I.L.M. 800, entered into force April 29, 1997, art. 3.

<sup>49</sup> Convention on Cluster Munitions, art. 7(1)(k).

<sup>50</sup> Mine Ban Treaty, art. 6; CCW Protocol V, art. 8; Convention on Cluster Munitions, art. 6.



as cooperation. It should elaborate on the types of assistance states parties should provide, such as technical, material, and financial, and how they are to be provided. It should also enumerate areas, including victim assistance, for which international cooperation and assistance is required. Such specificity would help ensure affected states parties receive the outside assistance they need. In drafting these elements, negotiating states can take inspiration from the detailed international cooperation and assistance obligations contained in Article 6 of the Convention on Cluster Munitions.

A new paragraph or subparagraph should explicitly require states parties to support affected states parties to fulfill their victim assistance obligations. The provision could draw on precedent from the Mine Ban Treaty, CCW Protocol V, and the Convention on Cluster Munitions.<sup>51</sup> In light of the mutually reinforcing nature of obligations on victim assistance and environmental remediation, a similar requirement should also be included on environmental remediation.

Negotiating states should additionally include an element within the international cooperation and assistance article directed specifically to the sharing of information. The treaty should place an obligation—analogue to that found in Article 4(4) of the Convention on Cluster Munitions—on states parties that have used or tested nuclear weapons (“user states”) to provide information on the weapon that was used. However, whereas Article 4(4) of the Convention on Cluster Munitions “strongly encourages” user states parties to provide information to facilitate clearance activities, the obligation in the nuclear weapon ban treaty should be broader and support the affected state’s victim assistance efforts, as well as its environmental remediation activities. The user state party is likely to be in possession of information related to the manufacture and testing of the weapon that would assist the affected state party in providing effective healthcare to victims, for example. The user state party should be obliged to provide that information to the affected state party for those purposes. More generally, following the precedent set by Article 6(4) of the Convention on Cluster Munitions, states parties should provide “information concerning various means and technologies” related to the remediation of sites contaminated by

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<sup>51</sup> Mine Ban Treaty, art. 6(3); CCW Protocol V, art. 8(2); Convention on Cluster Munitions, art. 6(7).

a nuclear explosion, thereby helping states to carry out effective remediation activities to improve environmental and human health.

The treaty's international cooperation and assistance article should also include a requirement for states parties urgently to provide emergency assistance after any use of nuclear weapons. There is precedent for recognizing the need for emergency international assistance in the wake of prohibited weapons use in both the Convention on Cluster Munitions and the 1993 Chemical Weapons Convention.<sup>52</sup> It is arguably especially important to emphasize international cooperation and assistance for emergency responses in the context of nuclear weapons. The devastating impact of nuclear weapon use would likely severely damage or destroy existing infrastructure and the affected state's institutions would quickly be overwhelmed and unable to respond effectively to the urgent needs of victims.

### **Conclusion**

The draft text acknowledges the catastrophic humanitarian consequences of nuclear weapons and the suffering of victims of nuclear weapons; it appropriately requires victim assistance to address harms and outlines the right of states parties to seek and receive assistance to implement their obligations under the treaty. These welcome components can form the building blocks of strong and effective victim assistance obligations in the nuclear weapon ban treaty. To fulfill the humanitarian purpose of the treaty, negotiating states should ensure the text addresses victim assistance in a comprehensive and detailed manner. They should strengthen draft Article 6 by elaborating detailed obligations on victim assistance and bolster the international cooperation and assistance framework in Article 8. Negotiating states can look to previous disarmament treaties as precedent for such comprehensive and detailed treatment.

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<sup>52</sup> Convention on Cluster Munitions, art. 6(6); Chemical Weapons Convention, arts. X(9),(10) (outlining the steps to be taken to dispatch emergency assistance following use of chemical weapons.)

## ANNEX

Victim Assistance in the 2008 Convention on Cluster Munitions**Preamble**

...

*Determined* also to ensure the full realisation of the rights of all cluster munition victims and *recognising* their inherent dignity,

*Resolved* to do their utmost in providing assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion,

*Recognising* the need to provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups,

*Bearing in mind* the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to that Convention undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability,

*Mindful* of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and *resolved* to avoid discrimination among victims of various types of weapons,

...

*Reaffirming* the Declaration of the Oslo Conference on Cluster Munitions, by which, *inter alia*, States recognised the grave consequences caused by the use of cluster munitions and committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and would establish a framework for cooperation **and assistance that ensures adequate provision of care and rehabilitation for victims**, clearance of contaminated areas, risk reduction education and destruction of stockpiles, (*emphasis added*)...

**Article 2***Definitions*

For purposes of this Convention:

1. “**Cluster munition victims**” means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the

realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;...

## **Article 5**

### *Victim assistance*

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:

- (a) Assess the needs of cluster munition victims;
- (b) Develop, implement and enforce any necessary national laws and policies;
- (c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
- (d) Take steps to mobilise national and international resources;
- (e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
- (f) Closely consult with and actively involve cluster munition victims and their representative organisations;
- (g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
- (h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

## **Article 6**

### *International cooperation and assistance*

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.

2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.

...

6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall urgently provide emergency assistance to the affected State Party.

7. Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.

...

11. Each State Party may, with the purpose of developing a national action plan, request the United Nations system, regional organisations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, inter alia:

...

(e) Assistance to cluster munition victims;...

## **Article 7**

### *Transparency measures*

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party, on:

...

(k) The status and progress of implementation of its obligations under Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims and to collect reliable relevant data with respect to cluster munition victims;

...

(m) The amount of national resources, including financial, material or in kind, allocated to the implementation of Articles 3, 4 and 5 of this Convention; ...

2. The information provided in accordance with paragraph 1 of this Article shall be updated by the States Parties annually, covering the previous calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.