
United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination

31 March 2017

English only

New York, 27-31 March 2017 and 15 June-7 July 2017

Victim Rights and Victim Assistance in a Treaty Prohibiting Nuclear Weapons: A Humanitarian Imperative

Submitted by International Campaign to Abolish Nuclear Weapons (ICAN)¹

Introduction

1. As the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination opens with discussions on the principles and objectives of a ban treaty, the rights of victims² should be recognized and legal provisions for assistance to the existing victims of nuclear detonations as well as potential future victims should feature in the discussions.

2. Survivors and victims of historical detonations have yet to see their rights fulfilled and it is those survivors who would benefit from the inclusion of victim assistance in the treaty. The Humanitarian Pledge recognized “that the rights and needs of victims have not yet been adequately addressed.”³ The final report from the Open-Ended Working Group on Taking Forward Multilateral Nuclear Disarmament (OEWG) went further and listed “recognition of the rights of victims of the use and testing of nuclear weapons and a commitment to provide assistance to victims” as a possible element of a new legal instrument prohibiting nuclear weapons.⁴

¹ By Erin Hunt, an ICAN campaigner and Program Coordinator at Mines Action Canada. The views expressed in this paper do not necessarily reflect the views of all ICAN partners.

² This paper will apply the Convention on Cluster Munitions’ definition of victim “Cluster munition victim 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” to nuclear weapons.

³ Humanitarian Pledge,
http://www.bmeja.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14vienna_Pledge_Document.pdf

⁴ Report from the Chair of the Open Ended Working Group on Taking forward multilateral nuclear disarmament negotiations,
https://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/371&referer=https://www.un.org/disarmament/ptnw/&Lang=E, para 35.

3. During the OEWG at least ten states⁵ called for the inclusion of victim assistance provisions in a ban treaty. In a joint Working Paper submitted to the OEWG, Fiji, Nauru, Palau, Samoa, and Tuvalu called for the inclusion of obligations towards the fulfilment of victims' rights in a ban treaty.⁶

4. All of those statements recognize that a treaty grounded in the humanitarian approach to nuclear weapons should logically include victim assistance provisions. The overall goal of these negotiations and the preceding Humanitarian Initiative meetings is simple - no future victims of nuclear weapons; however, the rights and needs of existing victims need to be addressed. Typically, conversations about victims of nuclear weapons focus on Japan but testing in or near Algeria, Australia, China, French Polynesia, India, Kazakhstan, Kiribati, the Marshall Islands, North Korea, Pakistan, Russia, Turkmenistan, Ukraine, the USA and Uzbekistan have resulted in victims of nuclear weapons detonations around the world.⁷ Including rights-based victim assistance in the operational paragraphs of the new treaty would acknowledge the rights of those affected by past nuclear detonations and put the humanitarian into humanitarian disarmament. Recognizing the rights and needs of victims and including provisions regarding victim assistance is a way to address the harm caused by use of an inhumane weapon in accordance with the principle of acknowledgement of rights violations. Similarly, a ban treaty in its entirety would embody the related principle of non-repetition of rights violations.

5. Legal provisions to assist victims and to ensure the fulfilment of their rights should not be viewed as requiring an admission of wrongdoing by states responsible for use of nuclear weapons, nuclear tests or accidents involving nuclear weapons. Instead, provisions to assist victims are a way to reaffirm the humanitarian focus of the treaty and attempt to mitigate the impact of these indiscriminate weapons.

International Precedent on Victim Assistance

6. Conventional weapons disarmament instruments contain strong precedent for recognition of victim rights and the inclusion of victim assistance provisions in legal instruments. To understand successful legal provisions to assist victims and ensure the fulfilment of their rights, we can look to the Ottawa Treaty banning landmines and the Convention on Cluster Munitions (CCM). The Ottawa Treaty set a new precedent and a course for establishing a norm for the protection of the rights and needs of victims. These victim assistance obligations have been clarified and strengthened through Action Plans drafted at Review Conferences in Nairobi (2004),⁸ Cartagena (2009)⁹ and Maputo (2014)¹⁰ which each contained specific actions states parties agreed to take in order to assist the victims.

⁵ Austria, Fiji, Ireland, Kazakhstan, Nauru, Palau, Samoa, Sweden, Thailand and Tuvalu.

⁶ Fiji, Nauru, Palau, Tuvalu and Samoa, *A/AC.286/WP.14 Elements for a treaty banning nuclear weapons* <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/WP14.pdf>

⁷ Article 36, "*'Victim assistance' in a treaty banning nuclear weapons,*" <http://www.article36.org/wp-content/uploads/2015/01/victims-nuclear-weapons.pdf>.

⁸ *Nairobi Action Plan 2004-2009*, <http://icbl.org/media/933290/Nairobi-Action-Plan-2005.pdf>

⁹ *Cartagena Action Plan 2010-2014*, <http://www.cartagenasummit.org/fileadmin/APMBC-RC2/2RC-ActionPlanFINAL-UNOFFICIAL-11Dec2009.pdf>.

¹⁰ *Maputo Action Plan 2014-2019*, <http://www.maputoreviewconference.org/fileadmin/APMBC-RC3/3RC-Maputo-action-plan-adopted-27Jun2014.pdf>.

7. The CCM built on the Ottawa Treaty's language with a specific formal definition of victim and more explicit victim assistance obligations. The CCM codified what was called the 'new emerging norm' of comprehensive rights-based victim assistance. Under both treaties, victim assistance includes (but is not limited to) emergency care, ongoing medical care, physical rehabilitation, psychological or social support and economic integration, all of which aim to support victims' full participation in society and realization of their rights. Together these two treaties indicate the victim assistance norm is progressing.

8. Experts at the three Humanitarian Impact Conferences outlined links between nuclear weapons use or testing and acquired impairments from injuries during the blast and from the long-term effects of radiation exposure and genetic damage. Due to the high rate of disability among victims of nuclear weapons, the Convention on the Rights of Persons with Disabilities (CRPD) can help form the basis for victim assistance under a human rights based approach. The CRPD has a number of relevant provisions such as the right to the highest attainable standard of health without discrimination on the basis of disability or Article 26 in which states agree "to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life through improved comprehensive habilitation and rehabilitation services."¹¹ Since its adoption in 2006, the CRPD has strengthened the provision of victim assistance under the Ottawa Treaty and the CCM and based on current evidence it should be a consideration in discussions on victim assistance and nuclear weapons.

9. All states participating in these negotiations are states parties or signatories to one or more of the three conventions discussed above¹² indicating that they have already accepted the basic responsibilities which would underpin victim assistance provisions in a nuclear ban treaty.

Victim Assistance Principles

10. Victim assistance has grown as a norm in humanitarian disarmament since its emergence in the late 1990s and that increasing recognition continues to this day. Civil society has identified a number of principles that have developed and these principles could inform discussions about how victim assistance would be implemented in the context of a nuclear ban treaty.

- *Human rights based approach to international humanitarian law.* A rights based approach to victim assistance takes into account human rights law and principles in its implementation. It seeks to address the needs of victims and alter the physical, legal and social environment that prevents the full realization of their human rights. Victim assistance can contribute to mitigating barriers to the full realization of human rights. Without the recognition that victims have specific rights, it will be difficult to ensure those rights are realized.

¹¹ United Nations Convention on the Rights of Persons with Disabilities, <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

¹² There are seven states which are neither signatories nor states parties to the Convention on the Rights of Persons with Disabilities, however all seven are either states parties or signatories to the Ottawa Treaty or the Convention on Cluster Munitions.

- *Participation, inclusion and close consultation.* Victims' views should be heard and considered at all levels of decision-making from the international to the local. Victims are experts on their needs and the fulfilment of their rights.
- *Age and gender sensitive.* Assistance to victims should be sensitive to diversity among victims and meet the needs of individuals. Men, women, girls and boys have different experiences, different physical, social, economic and cultural needs and face different challenges. A one-size fits all approach will not be effective.
- *Non-discrimination.* Victim assistance programs should not discriminate against or between victims for any reason. Differences in services or treatment should only be based on the medical, psychological and socio-economic needs of victims. The principle of non-discrimination also applies to persons who have suffered injuries or disabilities from other causes but who require services similar to those of victims.¹³

11. These principles of victim assistance clearly show that victim assistance is not focused on compensation, but it does not preclude it. A rights-based approach to victim assistance is about taking measures to reduce the barriers to full participation in society that result from exposure to nuclear detonations. When barriers to full participation in society are removed for one part of a society, others can benefit as well.

12. Victim assistance, as it is currently understood, is not charity; instead it is a humanitarian obligation in line with the protection of civilians agenda and principles of international humanitarian law. It is also a tool for reinforcing rights and improving services or policies such as increased accessibility of public buildings, improved health services and greater integration of marginalized populations into the community to the benefit all citizens. The inclusion of rights-based victim assistance provisions in a legal instrument prohibiting nuclear weapons benefits all.

Specific issues to consider for nuclear weapons

13. Existing International Humanitarian Law including the Ottawa Treaty and the Convention on Cluster Munitions and international human rights conventions such as the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child create undeniable precedent for including victim assistance under a nuclear ban treaty. There are some specific areas of assistance that apply to victims of nuclear weapons particularly.

14. The extensive environmental contamination caused by nuclear detonations impedes the realization of rights in affected communities. In this regard, International Humanitarian Law, International Environmental Law and International Human Rights Law can contribute to discussions about how to most effectively recognize the rights of victims of nuclear weapons in a legal instrument prohibiting nuclear weapons.

15. Additionally, states could consider including provisions regarding community assistance activities to address the breadth of humanitarian impacts especially in regards to

¹³ ICBL, Guiding Principles for Victim Assistance, <http://icbl.org/media/919871/VA-Guiding-Principles.pdf>

nuclear weapons tests. Such activities could include health assistance provision, as well as adequate support for lost livelihoods due to contaminated land.¹⁴

16. The damage caused by nuclear weapons is not limited to one lifetime. Stigma against the children and grandchildren of survivors has been reported in many nuclear affected communities. The mutagenic and tetragenic effects of nuclear weapons do not have a parallel in conventional weapons; however, the impact of these effects on a person's ability to fully realize their human rights is similar. Therefore, the precedents in conventional weapons treaties are applicable. Thus, those long term humanitarian impacts likely will require a reaffirmation of the definition of victim as all persons "who have suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights".

17. Nuclear weapons testing took place disproportionately on indigenous land raising a new dimension to victim rights and assistance. Forced displacement of indigenous communities and contamination of traditional lands may impede indigenous communities' freedom of religion, right to freedom of movement, right to food and perhaps indigenous treaty rights. Testimony in Vienna detailed the cultural and social impacts of long term displacement of Australian Aboriginal communities following nuclear testing in that country.¹⁵ In addition to Australia, indigenous communities in North America, Central Asia, the Pacific and North Africa have suffered as a result of nuclear weapons detonations. Any discussion of victim rights and victim assistance in a nuclear weapons context will need to consider how to recognize the specific rights of indigenous communities as outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

Conclusion and Recommendations

18. Nuclear weapons are one of the most regulated categories of weapons in the world with two test ban treaties, multiple nuclear weapons free zone treaties and a non-proliferation treaty and yet there is still a substantial legal gap. It is high time to finally address the devastating effects these weapons have on individuals, families and communities in an international legal instrument.

19. It is recommended that:

- **States take steps to ensure the participation of victims and survivors in the negotiations and in the implementation of the treaty.** Victims should have a say in policies, laws and programs that impact their lives including the negotiations and the implementation of the treaty.
- **Victim assistance provisions in a treaty banning nuclear weapons should build on the existing understandings of victim rights and the guiding principles of victim assistance.** The most successful humanitarian disarmament treaties, the Ottawa Treaty and the Convention on Cluster Munitions, have set a precedent that should be followed.

¹⁴ Toxic Remnants of War Project, Environmental Mechanics: Re-Imagining Post-Conflict Environmental Assistance, p. 61, <http://www.toxicremnantsofwar.info/report-environmental-mechanics/>

- **The treaty include a rights-based definition of nuclear weapons victim.** With the diverse, diffuse and long term humanitarian impacts of nuclear weapons, a rights-based definition is most practical.
- **The operational paragraph on victim assistance should outline aspects of victim assistance.** These aspects should include data collection, medical care, physical rehabilitation, psychological support and social integration, economic reintegration and relevant laws and public policies. However, the treaty should not prescribe how these aspects would be implemented in states parties.
- **The rights of indigenous people be recognized in the treaty's Preamble.** Indigenous communities have been disproportionately affected by nuclear weapons' detonations making the recognition of their unique rights and needs necessary. Recognition of indigenous rights in the preamble will highlight its relevance to the implementation.

¹⁵ Coleman-Haseldine, Sue, *Statement in Vienna*, 9 December 2014, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/8Dec_Coleman.pdf.