



# THE OBLIGATION TO ASSIST VICTIMS AND REMEDIATE THE ENVIRONMENT WITHIN A FRAMEWORK OF SHARED RESPONSIBILITY UNDER THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

## 1. INTRODUCTION

The 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) entered into force on 22 January 2021 as the first international legally binding instrument aimed at prohibiting nuclear weapons and mitigating the catastrophic humanitarian consequences of their use. In addition to setting out a comprehensive list of prohibitions for states parties, the Treaty foresees a set of remedial measures, also known as positive obligations. These require states parties to take positive action in order to assist victims and remediate the natural environment affected by the use or testing of nuclear weapons (Article 6). The TPNW establishes a framework of shared responsibility between states parties for the effective implementation of its provisions, including the positive obligations (Article 7).<sup>1</sup>

Articles 6 and 7 are key to achieving the Treaty's humanitarian objectives.<sup>2</sup> They establish measures for alleviating the harm caused by nuclear weapons, which can be implemented in a cooperative manner by states party to the Treaty even before the adherence of nuclear-weapon possessor states. The TPNW is the first multilateral treaty to establish such obligations for weapons of mass destruction.<sup>3</sup>

---

<sup>1</sup> Cf *Implementing Articles 6 and 7 on victim assistance, environmental remediation and international cooperation and assistance*, Working paper submitted by Article 36 to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/17, para. 3; TPNW/MSP/2022/NGO/22, para. 20.

<sup>2</sup> Cf Vienna Action Plan, TPNW/MSP/2022/6, Annex II, para. 9.

<sup>3</sup> *Idem*.

Positive obligations, including victim assistance and environmental remediation, constitute integral normative tenets of humanitarian disarmament instruments.<sup>4</sup> The TPNW is a humanitarian disarmament treaty, as it is based on principles and rules of international humanitarian law (IHL) and aims to prevent and mitigate the “catastrophic humanitarian consequences” of nuclear weapons<sup>5</sup> by means of a people-centred approach.<sup>6</sup>

This is relevant for the interpretation of its positive obligations in two ways: first, similar provisions in other humanitarian disarmament instruments – such as the 1997 Anti-Personnel Mine Ban Convention (APMBC), the 2008 Convention on Cluster Munitions (CCM) and Protocol V on Explosive Remnants of War to the Convention on Certain Conventional Weapons (2003) – can assist in the interpretation of the corresponding provisions under the TPNW; and second, because the TPNW is a humanitarian disarmament treaty, the implementation of its positive obligations must be guided by certain principles that are cardinal to the people-centred approach of humanitarian disarmament, most notably non-discrimination, inclusivity, accessibility and transparency.<sup>7</sup>

This paper outlines the views of the International Committee of the Red Cross (ICRC) on the scope and interpretation of Articles 6 and 7 of the TPNW, as well as some of the implications of these provisions for states parties.<sup>8</sup> In accordance with customary international law rules on the interpretation of treaties,<sup>9</sup> the starting point is the “ordinary meaning” of the terms of the TPNW in their context and in light of the Treaty’s object and purpose. When the terms of the Treaty are unclear, the analysis relies, among other sources, on the records and other documents of the diplomatic conference that negotiated and adopted the TPNW (the “*travaux préparatoires*”) and of the first Meeting of States Parties, in order to gain insight into states’ understanding of Articles 6 and 7.

## 2. ARTICLE 6: VICTIM ASSISTANCE AND ENVIRONMENTAL REMEDIATION

### 2.1. ARTICLE 6(1)

Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.

<sup>4</sup> Humanitarian disarmament is understood as a people-centered approach to arms regulations, which seeks to prevent and remediate the suffering inflicted on humans and the harm caused to the environment by certain weapons; see ‘About’ in *Humanitarian Disarmament*, available at <https://humanitariandisarmament.org/about/>.

<sup>5</sup> Preamble, para. 2.

<sup>6</sup> B. Docherty, “The Legal Content and Impact of the Treaty on Nuclear Weapons”, Speech delivered at a legal seminar held on the occasion of the 2017 Nobel Peace Prize and organized by the Legal Education Center, Norwegian Red Cross, and No to Nuclear Weapons, 11 Dec. 2017, Oslo, p. 4.

<sup>7</sup> B. Docherty, “A Singular Opportunity: Setting Standards for Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons”, *Global Policy*, Vol. 2, Issue 1, February 2021, p. 128. Not all of these principles are analysed in the present note.

<sup>8</sup> See also, summarily, *Nuclear disarmament as a humanitarian and legal imperative*, Working paper submitted by the International Committee of the Red Cross to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/WP.4, paras 17–20.

<sup>9</sup> Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are generally recognized as codifying these customary principles.

Victim assistance developed as the logical corollary of a humanitarian approach to disarmament. Despite the term's charitable overtones, victim assistance is actually centred around the recognition of the agency and entitlements of the victim and is geared towards their full and effective participation in society.<sup>10</sup> International human rights principles are central to the interpretation and practical application of victim assistance.

### 2.1.1. The primary responsibility of affected states

Under Article 6(1), each state party has an obligation to provide assistance to affected individuals under its jurisdiction. The word “shall”, and the absence of the qualifier “in a position to do so” (which appeared in an earlier draft but was removed during the diplomatic conference), indicate that the nature of the obligation is both absolute and unqualified. The ICRC, among others, had recommended that the Treaty establish an unqualified obligation on affected states to further a needs-based, humanitarian approach to victim assistance.<sup>11</sup> On this point, the TPNW copies verbatim Article 5 of the CCM,<sup>12</sup> which marked a progressive evolution in the understanding of victim assistance from an issue concerning international cooperation only, to an obligation that primarily lies with each affected state.<sup>13</sup>

The phrase “under its jurisdiction” should be understood in light of the ordinary meaning of the term “jurisdiction”, namely as anyone within the power or effective control of a state.<sup>14</sup> States that have persons affected by nuclear weapon use or testing under their jurisdiction are hereafter referred to as “affected states” and have primary responsibility for providing victim assistance. In most cases this obligation will lie principally with the state in whose territory victims are located. The affected state is better suited to assist victims because it is presumed to have a better understanding of the problem than other states, as well as easier access to its own population. This approach also respects state sovereignty by allowing a state to be the primary arbiter of issues occurring within its national borders.<sup>15</sup>

During the negotiations, concerns were expressed over the feasibility and burden of placing the primary responsibility for victim assistance on affected states.<sup>16</sup> To address such legitimate concerns, the Treaty establishes a framework of international cooperation and assistance among states parties, which is aimed at spreading the burden of the Treaty's positive obligations and at ensuring that the needs of victims are effectively met (see Section 3 on Article 7 below).

### 2.1.2. Who qualifies as a “victim” of nuclear weapon use or testing?

The term “victim” appears in the title of the provision but not in the subsequent text, which refers to “individuals ... affected”. The recipients of assistance are defined broadly as individuals “affected by the use or testing of nuclear weapons”. This raises the question of *who* can be considered as so “affected” and, consequently, as a “victim” for the purposes of the TPNW.

<sup>10</sup> International Human Rights Clinic, *Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons*, Harvard Law School, April 2018, p. 1.

<sup>11</sup> [A-CONF.229-2017-CRP.2-ICRC-second-paper.pdf](#), p. 5.

<sup>12</sup> See CCM, Art. 5(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.’

<sup>13</sup> M. Reiterer and T. Leibowitz, “Art. 5: Victim Assistance”, in G. Nystuen and S. Casey – Maslen (eds), *Convention on Cluster Munitions: Commentary*, OUP, 2010, p. 356; See, for example on the contrary, APMBC, Art. 6(3): ‘Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs.’; Convention on Certain Conventional Weapons (CCW), Protocol V, Art. 8 (2): ‘Each High Contracting Party in a position to do so shall provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war.’

<sup>14</sup> See Human Rights Committee, General Comment No. 31: ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10.

<sup>15</sup> International Human Rights Clinic, above n. 10, p. 2.

<sup>16</sup> Article 36, ‘Victim Assistance’ in *international agreements on civilian protection and weapons policy: Understanding the value to past, present and future instruments*, Discussion Paper, October 2019, p. 3.

The Treaty does not contain a definition of these terms. However, during the negotiations there was broad agreement that the terms should be understood as broadly as possible and in line with the definition included in the CCM. This is indicated by the explanation, given by the President of the conference, that much of Article 6 was based on the provisions of existing disarmament treaties, and by the absence of discussion on such a definition.<sup>17</sup> This interpretation is supported by the ordinary meaning of the terms, in light of the Treaty's object and purpose. Most working papers submitted at the first Meeting of States Parties equally endorse such a broad interpretation.<sup>18</sup>

The ordinary meaning of the term "affect" is "to produce an effect upon", "to act on and cause a change in", "to cause illness, symptoms, etc." and "to produce an emotional response".<sup>19</sup> As such, an "affected" individual is someone upon whom an effect is produced, in whom a change, illness or symptom is caused, or in whom an emotional response is produced.

The ordinary meaning of the term "victim" is someone who is "acted on and usually adversely affected by a force or agent".<sup>20</sup> In addition, the context in which the term is being employed, namely humanitarian disarmament law, also affects its interpretation. Under other humanitarian disarmament treaties, the term "victim" is given a broad definition. Article 5(2) of the CCM defines cluster munition victims as "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."<sup>21</sup>

In the view of the ICRC, a broad understanding of who qualifies as a victim (or an "individual affected") under the TPNW is appropriate in light of the people-centric nature of humanitarian disarmament. Such an interpretation would align with the object and purpose of the TPNW while also ensuring normative consistency in the sphere of humanitarian disarmament law. The definition of the term "victim" would thus include all persons – whether civilians or combatants – who have been killed or who have suffered physical or psychological injury, economic loss, social marginalization or substantial impairment of the realization of their rights caused in whole or in part, directly or indirectly, by the detonation of nuclear weapons, as well as their families and communities, provided they were so affected.<sup>22</sup> This is particularly relevant in light of the potential intergenerational impact of radiation exposure and the – at least partly – hereditary nature of some diseases it causes (such as certain types of cancers or malformations). While there is no temporal limitation to the concept of "victim" (or "affected person"), in practice the difficulty of demonstrating the effect of nuclear weapons on people or a community in some cases increases with the passing of time from the moment of detonation (see section 2.1.3).

The inclusion of "substantial impairment of the realization of their rights" is particularly important because, often, the problem for victims is not the impairment of the right *per se* but, rather, the impediment to the actual realization of the right caused by the effects of a nuclear detonation on the life of the individual.<sup>23</sup> In this sense, for example, a victim of nuclear weapon use or testing could be

17 See <https://reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/reports/NBD2.5.pdf>, p.5.

18 See, e.g., [https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP\\_.2022.NGO\\_.17.pdf](https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP_.2022.NGO_.17.pdf); [https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP\\_.2022.NGO\\_.22.pdf](https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP_.2022.NGO_.22.pdf); [https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP\\_.2022.NGO\\_.27.pdf](https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP_.2022.NGO_.27.pdf); and [https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP\\_.2022.NGO\\_.4.pdf](https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP_.2022.NGO_.4.pdf).

19 Merriam-Webster Dictionary, 'Affect', available at <https://www.merriam-webster.com/dictionary/affect#h1>.

20 Merriam-Webster Dictionary, 'Victim', available at <https://www.merriam-webster.com/dictionary/victim>.

21 Cf First Conference of the States Parties to the Convention on the Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *Draft Review of the Operation and Status of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on their Destruction: 1999-2004*, APLC/CONF/2004/L.3, 6 September 2004, para. 65.

22 E. Hunt, "Victim Assistance Provisions: Addressing Humanitarian Harm", *The Nuclear Daily*, Vol. 1, No. 4, 30 March 2017, p. 8.

23 See B. Docherty, L. Maresca, R. Moyes and M. Reiterer, "Art.2: Definitions" in G. Nystuen and S. Casey-Maslen (eds), *The Convention on Cluster Munitions: a Commentary*, OUP, 2010, p. 159.

an individual who, owing in whole or in part to exposure to ionizing radiation, can no longer bear children and is thus incapable of realizing their social right to establish a family.<sup>24</sup>

### 2.1.3. How to establish a causal link between nuclear weapon use or testing and harm

Identifying who is a victim of nuclear weapon use or testing under the above broad definition is not always straightforward. A significant difficulty lies in the notion of causation, in particular as regards harm caused by radiation and by toxic or radiological remnants resulting from nuclear weapon use and testing. Radiation and toxic or radiological remnants may be invisible to the naked eye, may migrate and spread over large areas, and may increase the risk of health impacts without being the sole source, while their effects can be slow to manifest (and have been proven to transcend generations). In such cases, the chain of causality and scope of effects can be harder to establish than, for example, the impact of conventional weapons on the human body. In turn, this can generate some complexities when it comes to operationalizing victim assistance, owing to uncertainty as to whether harm has been caused and, if so, what harm should be addressed to begin with.<sup>25</sup>

In providing health care and financial compensation to individuals affected by nuclear weapons use and testing (outside of the TPNW), states have adopted varying approaches in order to overcome these challenges.<sup>26</sup> Based on some of these precedents, some commentators have argued in favour of a presumption of causation “where a certain amount and duration of exposure to a toxic or radiological substance is strongly associated with a particular harm”.<sup>27</sup> In the view of the ICRC, such a presumption could be a useful tool in the implementation of the positive obligation to provide victim assistance.

An additional challenge stems from the increasing difficulty of measuring radiation and exposure doses as time passes from the use or testing of nuclear weapons.<sup>28</sup> This is compounded by the fact that radiation has, in certain cases, been proven to have an intergenerational impact, meaning that first- or even second-generation descendants of people exposed may also qualify as “affected” by the use or testing of nuclear weapons.<sup>29</sup> In any case, it is important not to place an undue burden of proof upon, or to create unnecessary administrative hassle for, the affected individuals, as this would result in an unjustifiable contraction of the circle of people who could qualify as beneficiaries of assistance.<sup>30</sup>

<sup>24</sup> See International Covenant on Social, Economic and Cultural Rights (ICESCR), Art. 10(1).

<sup>25</sup> Article 36, above n. 16, p. 6.

<sup>26</sup> *Ibid.*

<sup>27</sup> Harvard Law School International Human Rights Clinic and Conflict and Environment Observatory, *Confronting Conflict Pollution Report: Principles for Assisting Victims of Toxic Remnants of War*, p. 16.

<sup>28</sup> *Policy Proposal for providing support to radiation victims in accordance with the Treaty on the Prohibition of Nuclear Weapons (TPNW)*, Working paper submitted by the Research Center for Nuclear Weapons Abolition, Nagasaki University, to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/34, p. 3.

<sup>29</sup> See, e.g., *Youth Perspectives on the Treaty on the Prohibition of Nuclear Weapons*, Working paper submitted by the Nuclear Age Peace Foundation (NAPF) and International Campaign to Abolish Nuclear Weapons (ICAN) on behalf of member organization Reverse The Trend: Save Our People, Save Our Planet (RTT) to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/37, para. 5. However, studies have so far provided conflicting results in this respect, leading some governments to exclude second generation survivors from the category of beneficiaries of victim assistance; see Information on the Situations of Second-Generation Atomic Bomb Survivors in Japan and Proposals on “Victim Assistance” mentioned in Article 6 of the Working paper submitted by Japanese Liaison Council of Second-Generation Atomic Bomb Survivors (JLCSGABS) to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/36, paras 3–11. Whether there should be a presumption in favour of causation in cases of second- and third-generation survivors of nuclear weapons use and testing therefore remains an open question.

<sup>30</sup> For example, the enabling statute of France’s assistance program includes a presumption of causation; however, it also stated that radiation exposure must cause more than a “negligible risk.” As a result, claim approval rates were initially less than ten per cent. In 2017, the law was amended to remove the “negligible risk” language and instead establish a fixed threshold of radiation exposure above which the presumption of causality applied. Initial data shows that, following this amendment, claim acceptance rates rose above 50 per cent in 2018. See ICAN, *Around the World, Victim Assistance Comes Up Short* at [https://www.icanw.org/around\\_the\\_world\\_victim\\_assistance\\_comes\\_up\\_short](https://www.icanw.org/around_the_world_victim_assistance_comes_up_short).

It is important to note that, absent any contrary indication in the TPNW, an individual would qualify as “affected” for the purposes of victim assistance irrespective of whether the use or testing of nuclear weapons was conducted by a state party to the TPNW or not, and whether it occurred on the territory or under the jurisdiction of a state party.

#### **2.1.4. Victims of the use or testing of other nuclear explosive devices**

Article 6(1) refers to individuals affected by the use or testing of nuclear weapons, but not of “other nuclear explosive devices”. Both a systematic and a teleological interpretation point to the fact that the TPNW addresses both nuclear weapons and nuclear explosive devices without distinction and that the obligation under Article 6(1) extends to victims of the use or testing of all nuclear explosive devices.

While these terms are not defined in the TPNW, in the context of nuclear disarmament, a nuclear explosive device is understood to mean “any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used.”<sup>31</sup> A “nuclear weapon” is therefore a sub-category of “nuclear explosive device”. In the TPNW, the terms “nuclear weapons” and “other nuclear explosive devices” usually appear conjunctively (see Articles 1, 2, 4, 6(2) and 7). The Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the Comprehensive Nuclear-Test-Ban Treaty, the nuclear-weapon-free zone treaties and the Joint Comprehensive Plan of Action agreed between Iran on the one hand and the permanent members of the UN Security Council, Germany and the European Union on the other, also refer to the terms conjunctively, or to nuclear explosive devices only. The only treaty that distinguishes between them is the Treaty of Tlatelolco, which prohibits nuclear weapons but allows the use of nuclear explosive devices for “peaceful purposes” under certain conditions. The distinction has decreased in significance since the 1995 NPT Review and Extension Conference, at which states parties reached an understanding that the potential benefits of the peaceful applications of nuclear explosions have not been demonstrated and that serious concerns have been expressed as to the risks they pose.

Against this backdrop, occasional omissions of the category “other nuclear explosive devices” in the TPNW are not to be considered as restricting the scope of the provisions to nuclear weapons only. This is particularly clear with regard to Article 6(1), considering that Article 7(4), which establishes the obligation of international cooperation with regard to victim assistance, expressly refers to victims of the use or testing of nuclear weapons or other nuclear explosive devices. This is in line with the Treaty’s protective scope and its object and purpose, as well as with the intention of the drafters not to depart from accepted understandings and definitions of the terms “nuclear weapon” and “nuclear explosive device”, a reason for which it was decided not to include a definition of these terms in the TPNW.

#### **2.1.5. Victim assistance in accordance with international humanitarian law and human rights law**

Article 6(1) stipulates that victim assistance should be provided “in accordance with applicable international humanitarian law and human rights law”.

The reference to IHL reflects the broad duty of belligerents to care for the wounded and sick during an armed conflict.<sup>32</sup> This obligation will continue to apply after the armed conflict has ended, for as long as the protected persons benefiting from such medical care and humane treatment continue to be in the power of the belligerent (as is the case with prisoners of war, civilians deprived of their

<sup>31</sup> Comprehensive Nuclear-Test-Ban Treaty Website, *Glossary: Nuclear Explosive Device*, available at <https://www.ctbto.org/glossary/?letter=n&chash=e9063b15fe>.

<sup>32</sup> See, in particular, Protocol I Additional to the Geneva Conventions, Article 10, prescribing the general obligation to protect and care for the wounded and sick. Additional provisions regarding combatants and civilians can be found in the Four Geneva Conventions, in particular Art. 12, First and Second Conventions, and Art. 16, para. 1, Fourth Convention. “The reference to IHL [also] may also reflect the requirement that a State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused, to the extent applicable in a given case: CIHL Rule 150.”



liberty and persons arrested, detained or interned for reasons related to the armed conflict, persons incapacitated by wounds or sickness, or persons still being cared for in medical facilities).<sup>33</sup>

In particular, IHL imposes on parties to a conflict the obligation to treat the wounded and sick humanely in all circumstances, and to provide them, to the fullest extent practicable and with the least possible delay, with the medical care and attention required by their condition, with no distinction founded on any grounds other than medical ones.<sup>34</sup> Humane treatment does not refer only to medical treatment; it applies to all aspects of human existence. The obligation imposes a minimum standard, namely a duty to respect the inherent human dignity of the wounded and sick and their inviolable quality as human beings. The obligation thus pervades all aspects of treatment. In order to ensure humane treatment, it is important to understand and take into account the ways in which gender, economic, cultural and political factors shape social structures and affect men, women, boys and girls differently. The requirement of humane treatment imposes an obligation of result. Thus, any treatment that falls below the standard of humane treatment violates the obligation.<sup>35</sup>

On the other hand, the obligation to provide them with medical care is an obligation of means. As such, it is commensurate to the material possibilities existing in the place and at the time that the wounded person is cared for.<sup>36</sup> It is an obligation that must be carried out with due diligence. The exact content of this obligation depends on what kind of medical care can reasonably be expected under the specific circumstances of each case.<sup>37</sup> The qualifier “to the fullest extent practicable” is a recognition of the fact that not all states have the same resources. Nevertheless, the requirement to provide care “to the fullest extent practicable” means that it is not sufficient for a party to the conflict to do only the minimum necessary for a person’s survival; rather, it must do *everything it reasonably can* to care for that person.<sup>38</sup>

If nuclear weapons were ever to be used again, this would either occur in the context of an ongoing armed conflict or be the event that triggers the application of IHL; either way, IHL would apply (although the same does not hold true for nuclear testing). Considering the large numbers of people who would be wounded by, or fall sick as a result of, nuclear weapon use, the care of whom would also be regulated by IHL, it stands to reason that the TPNW acknowledges the need to align its victim assistance obligations with the applicable IHL framework.

The *renvoi* to international human rights law acknowledges that the impact of nuclear weapon use or testing on victims’ lives extends beyond the place and time of detonation, and that persons affected might be under the jurisdiction of non-belligerent states or, in the case of testing, that there may be no armed conflict. It also underlines that victim assistance measures must go beyond urgent medical treatment and must aim to enable the victims’ realization of their rights and their full and equal participation in society.<sup>39</sup>

Under human rights law, the Committee on Economic, Social and Cultural Rights has stated that the right to health “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”<sup>40</sup> There is today a wide recognition of the close inter-relation between the right to health and other economic, social and cultural rights, such as

<sup>33</sup> Cf Art. 5 of Geneva Convention III and 2016 ICRC Commentary; Art. 3 and 75(6) API.

<sup>34</sup> Art. 10(2) API.

<sup>35</sup> Cf ICRC Commentary to Geneva Convention II (2017), para. 1418.

<sup>36</sup> Cf ICRC Commentary to API, paras 449 and 451, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=91B951C221CAA23EC12563CD00430633>.

<sup>37</sup> ICRC Commentary to Geneva Convention II (2017), paras 1425–1426.

<sup>38</sup> *Idem*, para. 1428.

<sup>39</sup> Reiterer and Leibowitz, above n. 13, p. 358.

<sup>40</sup> Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, para. 4. See also World Health Assembly Res 74.16 on Social Determinants of Health, 2021; WHO, Political Declaration on Social Determinants of Health, 2011.

the right to an adequate standard of living<sup>41</sup> and the right to a clean, healthy and sustainable environment.<sup>42</sup> As such, “the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health”.<sup>43</sup> Indeed, in the case of nuclear weapon use or testing, the injuries sustained are of a nature that will typically require the long-term provision of medical care.

Under human rights law, states have an obligation to take measures for the prevention and reduction of the population’s exposure to harmful substances such as radiation.<sup>44</sup> In addition, health-care facilities, goods and services must be made accessible to persons affected by nuclear weapon use or testing without discrimination. This means, *inter alia*, that treatment of radiation-induced illnesses and conditions must be affordable, and that affected persons must have access to information regarding such treatment, as well as to information regarding the health issues affecting them (principle of accessibility).<sup>45</sup>

In addition, states have a specific and continuing obligation of means to move as expeditiously and effectively as possible towards the full realization of the right to health, and must take deliberate, concrete and targeted steps to this end.<sup>46</sup>

### 2.1.6. What constitutes “adequate” victim assistance?

The assistance to victims must be provided “adequately”. This qualifier, also found in Article 5(1) of the CCM, serves a dual purpose: it establishes a standard of quality and responsiveness to the needs and rights of victims, while also allowing states parties a margin of flexibility to calibrate victim assistance to the national context and capacities.<sup>47</sup> In the context of the TPNW, “adequate” assistance should be seen as connoting a standard of assistance that is sufficient to address the needs of the victims (including, for example, specialized training of health-care providers),<sup>48</sup> while also conforming to considerations of feasibility, in line with the IHL standard of the “fullest extent practicable” discussed above. The Treaty should not be construed as imposing upon states parties unrealistic standards, in particular when it comes to realizing the economic, social and cultural rights of victims of nuclear weapons. For example, it is known that nuclear testing in the 1950s greatly impacted indigenous communities and their cultural continuity. A state party may not be able to recreate the conditions under which such communities were able to fully enjoy their culture, but should do everything it reasonably can, i.e. at the very least, take all adequate measures to preserve the community’s cultural memory, as well as to create appropriate conditions enabling the affected community to rebuild their culture to the maximum extent feasible.

When determining what measures are adequate to address the needs of victims, cultural and social factors must also be taken into consideration. For example, in communities where, owing to gender roles, women are viewed as bearing the primary responsibility for successful procreation and are thus stigmatized if they are unable to bear children owing to the effects of ionizing radiation, providing assistance solely in the form of health care for such women would not be adequate; rather, states parties would also have to take measures addressing the discrimination experienced by these women for their inability to conceive.

<sup>41</sup> UN General Assembly (UNGA) Res on Global Health and Foreign Policy, A/Res/74/20 (2020), PP8.

<sup>42</sup> Human Rights Council, A/HRC/Res/48/13, PP7; UNGA Res A/76/L.75 (2022), PP8.

<sup>43</sup> CESCR General Comment No. 14, para. 9. See also P. Hunt and G. Backmann, “Health systems and the right to the highest attainable standard of health”, *Health and Human Rights Journal*, vol. 10 (2013), no. 1, pp. 81–92.

<sup>44</sup> CESCR General Comment No. 14, para. 15.

<sup>45</sup> *Ibid.*, para. 12.

<sup>46</sup> *Ibid.*, paras 30–31.

<sup>47</sup> Reiterer and Leibowitz, above n. 13, p. 360.

<sup>48</sup> *Policy Proposal for providing support to radiation victims in accordance with the Treaty on the Prohibition of Nuclear Weapons (TPNW)*, Working paper submitted by the Research Center for Nuclear Weapons Abolition, Nagasaki University, to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/34, p. 6.



### 2.1.7. Forms of victim assistance

Victim assistance under Article 6(1) is holistic. The forms of assistance listed, including medical care, rehabilitation and psychological support, are not exhaustive (“including”). Financial or material (e.g. land) compensation and other benefits would, for example, also constitute victim assistance. Assistance can take many more forms and, therefore, it is difficult to envisage a scenario under which a state party would be unable to provide *any* form of assistance.

As regards medical and health care in particular, victim assistance should go beyond the treatment of injuries caused by the detonation. Rather, victims should have access to preventive screening for cancer and other radiation-related illnesses, and care should be available even when an illness attributable to nuclear weapons presents itself several years after the detonation.<sup>49</sup> Similarly, rehabilitation and psychosocial support should be provided to affected persons throughout their lives and for as long as their needs remain. Rehabilitation should be understood broadly as encompassing not only physical rehabilitation, but also attaining and maintaining “maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life”, in line with the Convention on the Rights of Persons with Disabilities.<sup>50</sup> Psychological support should be equally broad and encompass, as appropriate, psychiatric care, professional psychological services and psychosocial support. The aim of such support is to assist survivors as well as their family members in coping both with the effects of radiation exposure on their health and the impact of such exposure on all aspects of their lives, including by helping them overcome the trauma of their experience and promoting independence, social well-being and self-reliance.

The TPNW also requires the provision of victim assistance in the form of social and economic inclusion. This is particularly important since harm to victims of nuclear weapon use or testing often manifests itself in the form of social stigma and marginalization. In order to address such harm, victim assistance could, for example, take the form of educational campaigns aimed at informing the population about the effects of ionizing radiation and how it cannot be transmitted by people present during a nuclear detonation once they have changed out of their clothes and been cleaned.<sup>51</sup> Other forms of social and economic inclusion could involve vocational training courses or programmes as well as, in this context, specific measures such as developing specific economic conversion programmes for survivors of nuclear weapon use or testing, or the hiring of survivors of nuclear weapon use or testing to work in government-sponsored programmes, such as those relating to the dissemination of information on the effects of ionizing radiation.<sup>52</sup> Financial disbursements could also constitute a form of assistance, although it must be underlined that victim assistance, as a concept, goes far beyond financial compensation.<sup>53</sup>

### 2.1.8. Other principles guiding the provision of victim assistance

Victim assistance must be age- and gender-sensitive and must be provided without discrimination.<sup>54</sup> With respect to non-discrimination, Article 5(2)(e) of the CCM foresees that states parties implementing their victim assistance obligations must not “discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes”. A similar understanding of the non-discrimination clause would seem

<sup>49</sup> Docherty, above n. 7, p. 127; *Policy Proposal for providing support to radiation victims in accordance with the Treaty on the Prohibition of Nuclear Weapons (TPNW)*, Working paper submitted by the Research Center for Nuclear Weapons Abolition, Nagasaki University, to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/34, p.4.

<sup>50</sup> Art. 26 CRPD.

<sup>51</sup> Cf CDC, *Radiation Emergencies: Contamination v. Exposure*, available at <https://www.cdc.gov/nceh/radiation/emergencies/contamination.htm>.

<sup>52</sup> In the Vienna Action Plan (Action 19), TPNW states parties committed to closely consulting with, actively involving, and disseminating information to, affected communities at all stages of the victim assistance and environmental remediation process. See also TPNW/MSP/2022/NGO/37, para. 17.

<sup>53</sup> See, e.g., *Article 6 TPNW: Who is a “victim” of nuclear weapons’ testing and use and what could “adequate assistance” look like? Taking inspiration from the European Court of Human Rights*, Working paper submitted by International Association of Lawyers Against Nuclear Arms to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/4, paras 20–26.

<sup>54</sup> Cf International Covenant on Civil and Political Rights (ICCPR), Art. 2(1). Cf Vienna Action Plan, Action 25.

appropriate in the TPNW. This would be in line with IHL, which provides that medical assistance must be afforded to the wounded and sick without any adverse distinction founded on sex, race, nationality, religion, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.<sup>55</sup> Non-adverse distinctions necessary for providing equal treatment and care are not prohibited, but are instead important to fulfil the obligation without discrimination. This might include taking steps to ensure that all recipients of assistance are able to seek and receive equal care when their social, economic, cultural or political situation or status might otherwise deter them from doing so.<sup>56</sup> Only distinction made on medical grounds is permissible, as obviously different medical conditions require different forms of medical treatment.

Similarly, this interpretation is in line with the non-discrimination principle that is fundamental in international human rights law and is understood in a very similar way as the principle under IHL.<sup>57</sup> As such, victim assistance provided under Article 6(1) must not discriminate against or among victims of nuclear detonations, or between people suffering health effects from a nuclear detonation and people suffering similar health effects from other causes (e.g. individuals suffering from cancer as a result of exposure to ionizing radiation, or from cancer due to other, possibly natural, causes), except on medical grounds and where such distinction is not considered “adverse”.<sup>58</sup>

The TPNW recognizes, in its preamble, the disproportionate impact that ionizing radiation can have on women and girls. This differentiated impact may be due to biological differences as well as differences in social or cultural roles.<sup>59</sup> Article 6(1) builds on this acknowledgement by obligating states to operationalize victim assistance in a way that considers age and gender. Age must also factor into victim-assistance measures. In particular, children will be affected in a different way than adults, largely owing to their body still being in the process of developing.<sup>60</sup> Similarly, older persons may be affected differently, given their state of health and stage of biological development. These considerations apply throughout the entire lifecycle of assistance, from medical care through to rehabilitation, as well as in relation to efforts to promote socio-economic inclusion.<sup>61</sup>

Lastly, victim assistance should be provided with the full participation of affected individuals and their communities in the development and implementation of relevant frameworks and measures.<sup>62</sup> Regular consultations at all stages are very important in this respect.<sup>63</sup>

## 2.2. ARTICLE 6(2)

**Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated.**

<sup>55</sup> See indicatively Art. 12(2) Geneva Convention II and Art. 9 API.

<sup>56</sup> Cf ICRC Commentary on Geneva Convention II, para. 1440.

<sup>57</sup> Cf Art. 2(1) ICCPR and Human Rights Committee General Comment 18: ‘Non-discrimination’, 1989, para. 7

<sup>58</sup> Cf Art. 5(2)(e) CCM.

<sup>59</sup> See Nuclear Weapons Ban Monitor, *The Obligation to Assist Victims*, available at <https://banmonitor.org/positive-obligations-1/the-obligation-to-assist-victims>; A. G. Dimmen, *Gendered Impacts: The humanitarian impacts of nuclear weapons from a gender perspective*, International Law and Policy Institute, Vienna, 2014.

<sup>60</sup> Art. 36 and International Human Rights Clinic, *Victim Assistance in the Nuclear Weapon Ban Treaty: A Comprehensive and Detailed Approach*, June 2017, p. 3.

<sup>61</sup> S. Casey – Maslen, *The Treaty on the Prohibition of Nuclear Weapons: a Commentary*, OUP, 2019, p. 214.

<sup>62</sup> Cf TPNW/MSP/2022/NGO/17, para. 5.

<sup>63</sup> Cf *Implementing Victim Assistance and Environmental Remediation under the Treaty on the Prohibition of Nuclear Weapons*, Working paper submitted by ICAN on behalf of member organization Harvard Law School International Human Rights Clinic to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/22, para. 15; *Recommendations from Japanese Civil Society on Articles 6 and 7 of the Treaty on the Prohibition of Nuclear Weapons*, Working paper submitted by the Japan NGO Network for Nuclear Weapons Abolition to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/27, para. 24.

Positive obligations aimed at remediating the harm caused to the natural environment by certain weapons are an important feature of humanitarian disarmament. The APMBC (Article 5), Protocol V of the Convention on Certain Conventional Weapons (CCW) (Article 3), and the CCM (Article 4) all contain such provisions on the clearance of mines, explosive remnants of war and cluster munitions respectively. The TPNW builds upon these precedents and establishes a similar obligation for nuclear weapon use and testing.

### 2.2.1 What constitutes environmental remediation?

The ordinary meaning of the term “remediation” is “the act or process of remedying”, i.e. of “providing or serving as a remedy”, namely “a medicine or treatment that relieves pain or cures” or “a way of solving or correcting a problem”.<sup>64</sup> According to the International Atomic Energy Agency’s (IAEA) *Safety Glossary*, “remediation” connotes “any measures that may be carried out to reduce the radiation exposure from existing contamination of land areas through actions applied to the contamination itself (the source) or to the exposure pathways to humans.”<sup>65</sup> The glossary explains that “remediation” can be equated with the more informal word “cleanup”. The IAEA advises against the use of the terms “rehabilitation” or “restoration” for such measures, since they imply that the conditions that prevailed before the contamination occurred could be achieved again, which is not realistically the case.<sup>66</sup> This is not to say that environmental remediation does not include measures towards restoring environmental health that go beyond decontamination, even though it may not be possible to restore the environment to its pre-contamination state.<sup>67</sup>

It should thus be understood that “environmental remediation” amounts to the undertaking of cleanup measures to reduce the radiation exposure from existing contamination of the environment, including measures geared towards protecting humans from radiation exposure, ranging from limitations and restrictions on contaminated food, water and animal products, to the pumping and treatment of contaminated water, the removal of contaminated soil and plants and alternative crop production.<sup>68</sup> The obligation lies with the state under whose “jurisdiction or control” there are affected areas. As such, primary responsibility to execute environmental remediation lies with the territorial state (hereafter referred to as “the affected state”), in line with the ICRC’s recommendation.<sup>69</sup>

### 2.2.2. Geographic and material scope of the obligation

The often transborder nature of environmental contamination from nuclear weapons use and testing can have far-reaching implications for the geographical scope of Article 6(2). Indeed, fallout from nuclear detonations can continue for years after an explosion and can carry radioactive isotopes far beyond the site of detonation, potentially extending for thousands of square kilometres, depending on the type of nuclear device used and the prevailing weather patterns.<sup>70</sup> As a result, various states can be rendered “affected” by the detonation in question, triggering their legal obligation under the TPNW to work towards environmental remediation. For example, fallout from nuclear testing by the Soviet Union in Nova Zemlaya was observed in Canada, Norway and Sweden.<sup>71</sup>

<sup>64</sup> Merriam-Webster Dictionary, ‘Remedy’, available at <https://www.merriam-webster.com/dictionary/remedy>.

<sup>65</sup> IAEA, *Safety Glossary: Terminology Used in Nuclear Safety and Radiation Protection*, 2007, available at [https://www-pub.iaea.org/MTCD/publications/PDF/Pub1290\\_web.pdf](https://www-pub.iaea.org/MTCD/publications/PDF/Pub1290_web.pdf), p. 166.

<sup>66</sup> *Ibid.*

<sup>67</sup> Regarding the notion of remedial measures for environmental damage, see International Law Commission, *Principles on the Protection of the Environment in Relation to Armed Conflict*, Draft Principle 2 on purpose, Commentary para. 3; Draft Principle 25 on post-armed conflict environmental assessments and remedial measures, Commentary para. 6; Draft Principle 26 on relief and assistance, Commentary para. 4.

<sup>68</sup> STIPUB1904 (iaea.org), p. 10.

<sup>69</sup> <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/06/A-CONF.229-2017-CRP.2-ICRC-second-paper.pdf>, p. 6.

<sup>70</sup> International Human Rights Clinic, *Environmental Remediation under the Treaty on the Prohibition of Nuclear Weapons*, Harvard Law School, April 2018, p. 4.

<sup>71</sup> M. Bolton, “The Case for Positive Obligations in the Nuclear Weapon Ban Treaty”, *Nuclear Ban Daily*, Reaching Critical Will, Vol. 1, No. 4, 30 March 2017, pp. 25 – 26.

In relation to the material scope of the obligation, Article 6(2) clarifies that states parties “shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated”. The word “shall” indicates, once again, that the nature of the obligation in question is absolute.

The TPNW establishes that the measures should be taken “towards” the goal of environmental remediation. The Treaty thus calibrates its prescriptions to the particularities of nuclear weapons. On this point, it diverges from the humanitarian disarmament treaties that regulate conventional weapons, such as the APMBC and the CCM, which both stipulate deadlines within which environmental cleanup actions must be completed.<sup>72</sup> The TPNW does not foresee a similar deadline for states parties. This is logical, because the scale of a nuclear detonation’s impact on the environment is such that it would render any deadline to conclude cleanup measures impracticable. Therefore, the rider “towards” serves to make the legal obligation realistic and implementable, while simultaneously evincing that environmental remediation should be viewed as a long-term effort and an ongoing process, to be executed as long as there is scientific data attesting to the presence of radioactive contamination in the territory of the state party in question. Remediation may be required for many years after contamination occurs, depending on the soil types and agricultural production characteristics of the contaminated area. As an example, some remediation measures are still being applied 35 years after the Chernobyl nuclear accident.<sup>73</sup>

### 2.2.3. What constitutes “necessary” and “appropriate” remediation measures?

The environmental remediation measures adopted must be “necessary and appropriate”.<sup>74</sup> The notion of necessity refers to the decontamination of affected areas and the restoration of environmental health, which is the object and purpose of this provision. Thus, the measures adopted must be pertinent and effective, if not to achieve in and of themselves environmental remediation, then at least to contribute towards achieving it. Considerations of necessity may dictate that the measures be kept in place as long as needed in order to decontaminate, to the maximum extent possible, the soil and water from radioactive substances, to protect human beings and the environment from further contamination, and to restore environmental health. For example, the decontamination of agricultural land may require prolonged or repetitive treatment with certain products, as well as ploughing, reseeded and additional fertilization. Preventing contamination spread through the food chain may require prolonged restrictions on the collection or harvest of water, food or firewood, or on the consumption of contaminated animal products.<sup>75</sup>

The qualifier “appropriate” means that the measures must be “fit for purpose”, i.e. capable of contributing to environmental remediation, but at the same time tailored to the capabilities of each state party and the exigencies of the situation, absent a blanket standard. Indeed, cleanup operations can be exceedingly costly for the affected state, which may not necessarily be the same state as the one which has used or tested a nuclear weapon.<sup>76</sup> As such, it may be “appropriate” for a state with plentiful resources to set up a highly effective cleanup operation, while a state with fewer means might have to start by closing off the area to humans pending a more effective solution, which may also come through international cooperation and assistance. The absence of “the” or “all” in this phrase (which one might expect to read “shall take all/the necessary and appropriate measures”) appears to reinforce this conclusion, namely that the drafters did not intend to stipulate an overly prescriptive or unrealistic obligation, cognizant of the immense difficulties in responding to the massive humanitarian needs caused by a nuclear detonation.

<sup>72</sup> See APMBC, Art. 5 (1) and CCM, Art. 4(1)(a).

<sup>73</sup> IAEA, p. 28–29.

<sup>74</sup> This wording follows the recommendation of the ICRC, see <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/06/A-CONF.229-2017-CRP.2-ICRC-second-paper.pdf>, p. 6.

<sup>75</sup> IAEA, pp. 27–28.

<sup>76</sup> While linked to radioactive contamination that was not the result of the use or testing of nuclear weapons, a clean-up operation in Greenland, following a 1968 accident involving a US B-52 bomber carrying four nuclear bombs, involved the removal of more than 500,000 gallons of contaminated water, at a cost of almost ten million USD; see Bolton, above n. 71, p. 8.

In addition, it would appear that “appropriate” is a slightly different standard to “adequately”, which is found in Article 6(1) in relation to victim assistance. While the latter connotes actions sufficient to address the needs of the victims (provided they are feasible), “appropriate” refers to measures capable of contributing to environmental remediation, even if such measures are not in themselves sufficient to achieve decontamination. The reason for this difference is that Article 6(2) stipulates an obligation to work “towards” environmental remediation, rather than an obligation to achieve it.

“Appropriate” also indicates that not all possible remediation measures would be suitable to each case of contamination, because of potential adverse consequences. For example, the early removal of contaminated soil and plants is a very effective remediation measure. However, this may create large amounts of unwanted soil and biomass and may therefore not be appropriate in all situations. Similarly, alternative crop production is also a remediation measure, but it may force communities to alter or abandon their traditional way of life.<sup>77</sup> What is appropriate will depend on the soil type, the agricultural production type, the environmental context, and social and cultural perspectives.<sup>78</sup> It has been suggested that principles of international environmental law are relevant in this regard and should guide the design and implementation of environmental remediation measures.<sup>79</sup>

In the Vienna Action Plan, affected states party to the TPNW undertake “to assess the effects of nuclear weapons use and testing with respect to areas under their jurisdiction or control, including, in particular, the needs of victims and contamination of the environment, as well as national capacities to address them. Initial assessments could focus on gathering existing knowledge about ongoing and expected effects, and current and planned responses to date, and determining what additional information is needed. These initial assessments should be completed by and shared with the second Meeting of States Parties.”<sup>80</sup>

They further undertake “to develop national plans for implementation of their victim assistance and environmental remediation obligations, which include budgets and time frames. Such plans could be integrated into existing frameworks to increase efficiency, and international cooperation and assistance should be provided where needed to reduce the burden on affected states parties. Affected States parties should share their progress with the second Meeting of States Parties.”<sup>81</sup>

### 2.3. ARTICLE 6(3)

**The obligations under paragraphs 1 and 2 above shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements.**

Article 6(3) introduces the equivalent of a saving clause into the TPNW regime of positive obligations. Essentially, Article 6(3) pre-empts the concern that the positive obligations under the Treaty may displace third states’ obligations towards affected states parties that derive from other sources. By “any other” state, the provision refers to any state other than the affected state, upon which there is a primary obligation with regard to victim assistance and environmental remediation. The fact that the article refers to “any other States” and not to “any other States Parties” clarifies that the provision refers to obligations of other states under international law or bilateral agreements regardless of whether or not they are a party to the TPNW. An example comes in the form of the obligations the United States undertook vis-à-vis the Marshall Islands under the Compact of Free Association, including the provision of medical care for individuals affected by nuclear tests

<sup>77</sup> <https://www-pub.iaea.org/MTCD/Publications/PDF/PUB1904web.pdf>, p. 10.

<sup>78</sup> *Ibid.*, p. 29.

<sup>79</sup> *The role of International Environmental Law principles during the implementation of environmental remediation under Article 6(2)*, Working paper submitted by ICAN on behalf of member organization University of Auckland, Law School1, to the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/NGO/3.

<sup>80</sup> Vienna Action Plan, Action 30.

<sup>81</sup> *Ibid.*, Action 31.

conducted by the United States on Marshallese territory and the establishment of a compensation trust fund for those affected.<sup>82</sup> More generally, the law on state responsibility, as well as environmental law, may further stipulate obligations related to reparation or restitution.

Article 6(3) should be understood as serving a dual legal function: first, the implementation by an affected state party of its obligations under the TPNW to provide victim assistance and to remediate the environment does not affect in any way the obligation of other states towards that affected state party under international law or bilateral agreements, even if such obligations overlap in their objectives with those of the positive obligations under the TPNW; and second, should any of these third states opt to become a party to the TPNW, their obligations stemming from international law or bilateral agreements would not be nullified. The reference to “other States” includes states parties with an obligation to provide assistance to affected states parties under Article 7(6), as discussed below.

### 3. ARTICLE 7: INTERNATIONAL COOPERATION AND ASSISTANCE

1. Each State Party shall cooperate with other States Parties to facilitate the implementation of this Treaty.
2. In fulfilling its obligations under this Treaty, each State Party shall have the right to seek and receive assistance, where feasible, from other States Parties.
3. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by nuclear-weapons use or testing, to further the implementation of this Treaty.
4. Each State Party in a position to do so shall provide assistance for the victims of the use or testing of nuclear weapons or other nuclear explosive devices.
5. Assistance under this Article may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, non-governmental organizations or institutions, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, or national Red Cross and Red Crescent Societies, or on a bilateral basis.
6. Without prejudice to any other duty or obligation that it may have under international law, a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation.

The positive obligations enshrined under Article 6 of the TPNW must be read in tandem with the obligations of international cooperation and assistance, established under Article 7 of the Treaty. The framework of shared responsibility stipulated under Article 7 is of great importance for the successful implementation of the Treaty’s positive obligations, as it spreads the burden, as well as reflecting the shared commitment of all states parties to addressing the harm caused by nuclear weapon use or testing. This mechanism of international cooperation and assistance renders the Treaty’s positive obligations practicable by ensuring that the affected states parties, which bear the

<sup>82</sup> See <https://www.atomicheritage.org/location/marshall-islands>. Note, however, that the scope of these obligations as regards their recipients is significantly limited, as these only include those Marshallese residents present during the testing period in the four atolls considered as affected. Notably, “this definition does not take into account the long lasting effects of radiation, the frequent movement of the Marshallese between various atolls, or those who did not live on the Marshall Islands during the testing period, who were affected.”



primary responsibility to implement the Treaty's positive obligations, are entitled to support from the international community. At the first Meeting of States Parties, states parties committed to strengthening international cooperation among states parties to advance the implementation of the positive obligations of the Treaty.<sup>83</sup> It is worth underlining that lack of or insufficient cooperation and assistance by other states parties, which would be regrettable and may constitute a violation of the TPNW, would not modify the affected states' obligations under Article 6.<sup>84</sup>

### 3.1. ARTICLE 7(1) AND (2)

Article 7(1) establishes a duty of cooperation among states parties to facilitate the Treaty's implementation. This obligation is broad, and the provision does not specify how it should be implemented. Cooperation can thus take many forms and facilitate the implementation of any of the Treaty's obligations, although cooperation to facilitate the implementation of TPNW obligations other than the positive obligations stipulated in Article 6 falls outside the scope of this note. It has been submitted that Article 7(1) can be viewed as reiterating a general principle according to which states parties must cooperate with each other in order to ensure the viability of a treaty.<sup>85</sup>

Article 7(2) enshrines the right of states parties to seek and receive assistance from other states parties in fulfilling their treaty obligations, including the positive obligations stipulated in Article 6. The TPNW adopts a somewhat different formulation of the right to seek and receive assistance than the one used in the CCM by qualifying it with the terms "where feasible", in a similar manner to the corresponding provision of the APMBC.<sup>86</sup> In practice, this means that a state party may always exercise its right to *seek* assistance when fulfilling its obligations under the TPNW, and it may always receive it if provided. However, the state party from which assistance is being sought retains the latitude to determine whether it is feasible for it to provide the assistance that is being requested. The feasibility qualifier serves to acknowledge that resources for assistance are finite. This appears all the more necessary as the provision does not specify the type of assistance that can be sought. The fact that the provision only mentions other states parties does not mean that states parties do not have a right, under the TPNW, to seek assistance from states not party to the Treaty, from international organizations, or from other relevant institutions or organizations (see following section).

### 3.2. ARTICLE 7(3) TO (5)

Article 7(3) to (5) regulates the obligation to provide assistance under the TPNW within the framework of international cooperation and assistance.

#### 3.2.1. Assistance for the purpose of furthering the implementation of the TPNW

Article 7(3) establishes the obligation of states parties to provide technical, material and financial assistance to states parties affected by the use or testing of nuclear weapons. The language mirrors that of Article 6(2) of the CCM, in line with ICRC's recommendation.<sup>87</sup> This obligation ("shall") arises as soon as the state party in question possesses the capacity to provide the assistance in question ("in a position to do so").

The assistance shall be provided "to further the implementation" of the TPNW. "To further" means "to help the progress or development of (something)".<sup>88</sup> This refers to the implementation of the TPNW overall, i.e. the assistance is not limited to the implementation of the positive obligations stipulated in Article 6. However, the recipients of assistance are the affected states, which indicates that this provision was primarily intended to complement the responsibility of affected states in terms of victim assistance and environmental remediation under Article 6. In any case, the mate-

<sup>83</sup> Declaration of the first Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, TPNW/MSP/2022/6, Annex I, para. 10.

<sup>84</sup> See notably 1969 Vienna Convention on the Law of Treaties, Art. 60(5).

<sup>85</sup> Casey – Maslen, above n. 61, p. 222.

<sup>86</sup> See APMBC, Art. 6(1): 'In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.'

<sup>87</sup> <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/06/A-CONF.229-2017-CRP.2-ICRC-second-paper.pdf>, p. 6.

<sup>88</sup> Oxford Dictionary, 'Further', available at [FURTHER | Meaning & Definition for UK English | Lexico.comer](https://www.lexico.com/meaning/further).

rial scope of Article 7(3) encompasses the positive obligations enshrined under Article 6, which are among the main TPNW obligations for which affected states parties will require assistance.

Article 7(3) refers to technical, material and financial assistance, showing the breadth of the obligation. The wording mirrors that of the CCM, which has been understood as encompassing a variety of forms of assistance that “need not only be a preserve of wealthy States Parties”.<sup>89</sup> This assistance is of particular relevance in furthering the implementation of Article 6 including, among others, the provision of medical care, rehabilitation and psychological support, as well as the social and economic inclusion of victims (see Article 6(1)), and the taking of measures towards the environmental remediation of contaminated areas (see Article 6(2)). While such assistance will often take the form of financial assistance to affected states, it can also include, for example, the deployment of technical or medical personnel to affected states, the contribution to the collection of data for the better understanding and remediation of harm caused by nuclear weapons and to relevant scientific research, the provision to affected states parties of the scientific information needed to allow them to execute their positive obligations, or the donation of necessary equipment (e.g. for pumping and treatment of contaminated water, or radiation detectors or other equipment enabling the identification of contaminated areas and levels of radiation exposure).

As with Article 6(1), the absence of the terms “or other nuclear device” should not be understood as limiting the scope of Article 7(3), which extends to assistance to states affected by nuclear explosions other than the use or testing of nuclear weapons.<sup>90</sup>

In the Vienna Action Plan, states party to the TPNW undertook to “coordinate and develop mechanisms, where needed, to facilitate the provision, by States parties in a position to do so, of the international cooperation and technical, material and financial assistance that affected States parties may require to implement the Treaty’s victim assistance and environmental remediation provisions. Mechanisms should match needs, which may arise at any stage of implementing article 6, with offers of assistance.”<sup>91</sup>

They further undertook to “act upon their obligation under article 7 (3) to assist those States parties with clearly demonstrated needs for external support, by contributing to the mobilization of resources and the provision of technical, material and financial assistance to States parties affected by nuclear weapon use or testing, to further the implementation of this Treaty”.<sup>92</sup>

Lastly, they agreed to discuss the feasibility of establishing an international trust fund for states that have been affected by the use or testing of nuclear weapons, for the purpose of, *inter alia*, providing aid to assist survivors and to support measures toward environmental remediation.<sup>93</sup>

### 3.2.2. Assistance for the victims of nuclear weapon use or testing

Article 7(4) specifically foresees the obligation of states parties to provide assistance for the victims of the use or testing of nuclear weapons or other nuclear explosive devices. This obligation complements that of Article 6(1). While Article 6(1) is addressed to affected states, Article 7(4) is addressed to all states parties, regardless of whether there are victims of nuclear weapon use or testing living under their jurisdiction.

The obligation under Article 7(4) is formulated in a more rudimentary way, lacking most of the prescriptions found in Article 6(1) regarding how assistance should be provided. However, a systematic interpretation dictates that victim assistance under this provision be understood in light of the specifications of Article 6(1). States parties under this provision are under an obligation to provide assistance *for* the victims. It is unclear whether this refers to assistance provided directly to the victims, or to the affected state party for the purposes of victim assistance. Given that the latter

<sup>89</sup> G. Nystuen and S. Casey-Maslen, *The Convention on Cluster Munitions: A Commentary*, p. 394.

<sup>90</sup> See above text under 6.1.

<sup>91</sup> Vienna Action Plan, Action 23.

<sup>92</sup> *Ibid.*, Action 32.

<sup>93</sup> *Ibid.*, Action 29.

form of assistance is already covered by Article 7(3), Article 7(4) arguably stipulates an obligation to provide victim assistance either directly to victims, by means of a third state or organization, or by way of a Victim Trust Fund, an option that was envisaged during the Treaty negotiations<sup>94</sup> as well as during the first Meeting of States Parties, and that is currently being considered during the Treaty's intersessional process.

As discussed in relation to Article 6(1), assistance for victims can take various forms, including providing medical care, rehabilitation and psychological support, as well as the social and economic inclusion of victims (see Article 6.1),<sup>95</sup> donating money to trust funds for victims of nuclear weapons, offering to sponsor scholarships in their own national educational institutions for victims or their children, hosting awareness-raising events in schools regarding the devastating consequences of nuclear weapons, or dedicating a memorial to victims of nuclear weapon use or testing, or, if the state is not in a position to do anything else, at least making public acknowledgements of the harm suffered by victims of nuclear weapon use or testing.

### 3.2.3. The role of the International Red Cross and Red Crescent Movement, and of other international and non-governmental organizations

Article 7(5) foresees various channels through which international assistance can be offered. As such, it can serve as a useful guide for states parties to understand how, when providing international assistance, they can benefit from the expertise of other institutions or organizations, including the ICRC and the broader International Red Cross and Red Crescent Movement, which may be well-positioned to support the implementation of assistance-oriented measures. For example, the ICRC and the Japanese Red Cross Society were among the organizations present on the ground after the bombings of Hiroshima and Nagasaki.<sup>96</sup> The Japanese Red Cross Society has been running hospitals for nuclear-bomb survivors in Hiroshima since 1956 and in Nagasaki since 1969, where it still treats patients suffering from the long-term effects of exposure to ionizing radiation.<sup>97</sup> Separately, regarding environmental remediation, the United Nations Environment Programme has provided technical assistance and training to states in order to address environmental contamination resulting from armed conflict.<sup>98</sup> States parties can benefit from such expertise by fostering partnerships with such organizations in order to facilitate the successful execution of assistance-oriented measures.

In the Vienna Action Plan, states party to the TPNW undertook to cooperate with such organizations not only in the provision of assistance but also in the development of their domestic frameworks for the implementation of the Treaty's positive obligations.<sup>99</sup>

## 3.3. ARTICLE 7(6)

Article 7(6) underscores the responsibility of states parties that have used or tested nuclear weapons or other nuclear explosive devices (hereafter referred to as "the user/tester state(s)") to provide "adequate assistance" to affected states parties in relation to the positive obligations enshrined under the TPNW, namely victim assistance and environmental remediation. While not expressly

<sup>94</sup> See, for example, "Strengthening the Positive Obligations on Victim Assistance, Environmental Remediation and Norm Promotion in the Draft Convention for the Prohibition of Nuclear Weapons", Working Paper submitted by Pace University, para. 3.

<sup>95</sup> For instance, Art. 6(3) APMBC expressly indicates, among others, that "[e]ach State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs." As noted above, the TPNW often built upon the achievement of previous weapons treaties with regard to victim assistance.

<sup>96</sup> ICRC, *Humanitarian Impacts and Risks of Use of Nuclear Weapons*, 29 August 2020, available at <https://www.icrc.org/en/document/humanitarian-impacts-and-risks-use-nuclear-weapons>.

<sup>97</sup> ICRC, *70 Years on Red Cross Hospitals still Treat Thousands of Atomic Bomb Survivors*, 4 August 2015, available at <https://www.icrc.org/en/document/70-years-red-cross-hospitals-still-treat-thousands-atomic-bomb-survivors>.

<sup>98</sup> Harvard Law School International Human Rights Clinic and Conflict and Environment Observatory, *Confronting Conflict Pollution Report: Principles for Assisting Victims of Toxic Remnants of War*, p. 26. The International Law Commission Principles on the Protection of the Environment in Relation to Armed Conflicts.

<sup>99</sup> Vienna Action Plan, Action 24.

stated, it seems reasonable to interpret the provision as referring to the states parties affected by the use or testing conducted by the user/tester state party in question.

It is noteworthy that the provision is drafted more like a recognition of responsibility (“shall have a responsibility to provide adequate assistance”) than as stipulating an obligation (e.g. “shall provide adequate assistance”). The term “shall” connotes that this responsibility is legally binding, and Article 7(6) imposes it without the qualifiers found in Article 7(2) (“where feasible”) or in Article 7(3) and (4) (“in a position to do so”). Moreover, the assistance to be provided should be “adequate”. The meaning of the term “adequate” for the purpose of the TPNW has been analysed above in relation to Article 6(1) and can equally be applied to Article 7(6). The obligation under Article 7(6) is not prejudicial to any other duty or obligation that states that have used or tested nuclear weapons may have under international law. This mirrors Article 6(3) and serves the same purpose.<sup>100</sup>

### 3.3.1. Scope of the obligation

Article 7(6) was the result of difficult negotiations. There were divergent views among participating states in relation to the article’s temporal scope, namely whether or not it would apply to use or testing conducted by a state party before the entry into force of the Treaty for that state, as well as to the nature of the responsibility stipulated therein, which some considered to be legal while others considered to be moral.<sup>101</sup>

For some states, it was of critical importance that the TPNW acknowledge the responsibility of the user/tester state for past use and testing of nuclear weapons, and even stipulate a primary responsibility for such states, as opposed to imposing obligations of victim assistance and environmental remediation to states parties that bore no responsibility for such use or testing.<sup>102</sup> Other states cautioned against creating legal obligations for third parties (i.e. not states party to the Treaty), doubted the necessity of highlighting such user/tester states parties when an obligation of providing assistance applied to all states parties under other paragraphs of Article 7, or doubted the value of doing so as they deemed it unlikely that user/tester states would join the TPNW in the near future. There were also strong views arguing that establishing a standalone responsibility of user/tester states parties would not be advisable as it would provide an additional disincentive to nuclear possessor states to ever join the Treaty. Concerns were expressed that such a provision might impair existing bilateral assistance and remuneration schemes already in place.<sup>103</sup>

An understanding was ultimately reached that Article 7(6) would extend to past use and testing. This interpretation is supported by the text of the provision, which uses the past tense (“has used”) to situate the use or testing of nuclear weapons in the past, as opposed to the entry into force of the TPNW for the responsible state. This is also the more reasonable interpretation, since the opposite would mean that the TPNW envisages the possibility of its cardinal prohibitions on the use or testing of nuclear weapons being violated by a state that continues to be a party to the Treaty. The application of Article 7(6) to past use and testing is legally permissible, since the non-retroactivity principle, codified in Article 28 of the Vienna Convention on the Law of Treaties, does not apply to acts, facts or situations that occurred prior to the entry into force of the Treaty but that continue to exist after the Treaty is in force, such as harm to individuals affected and the environment contaminated by nuclear weapon use or testing.<sup>104</sup>

<sup>100</sup> See section 2.3. Indeed, to the extent that nuclear weapon use or testing could be seen as constituting an internationally wrongful act, the user states parties would already be under an international law obligation to make full reparation for the injury caused by this act.

<sup>101</sup> Casey – Maslen, above n. 61, p. 224.

<sup>102</sup> See e.g. the compilation of States’ proposed amendments to the 22 May draft TPNW text, pp. 39, 41 and 45, available at [https://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/documents/compilation\\_20June.pdf](https://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/documents/compilation_20June.pdf). Cf also Remarks of Algeria, Brazil and Thailand in plenary, 27 June 2017; and remarks of Cuba, as well as Sweden, supported by Cuba, Thailand, Venezuela and Viet Nam in plenary, 28 June 2017.

<sup>103</sup> Cf Casey–Maslen, section 6.06.

<sup>104</sup> See ILC, *Draft Articles on the Law of Treaties with Commentaries*, 1966, p. 212.

### 3.3.2. Nature of the obligation

However, no agreement was reached on whether the provision would establish a standalone, separate legal obligation for such user/tester states parties. The language finally adopted indicates the intention of the drafters to highlight the particular responsibility of user/tester states parties for redressing the harm caused by their actions, but without clearly establishing a standalone, legally binding obligation on them. Thus, while the facilitator (Chile) proposed a reference to “a primary/the fundamental responsibility” of a user/tester state party to provide assistance to affected states parties,<sup>105</sup> this was initially not included in the final draft, owing to lack of agreement. Following intensive consultations until the very last moment, the language proposed by the facilitator was ultimately replaced with the more abstract and somewhat ambiguous “shall have a responsibility”.<sup>106</sup>

In the view of the ICRC, this does not mean that the responsibility mentioned in Article 7(6) is of an exclusively moral or political, non-legally binding nature. The use of the word “shall” generally connotes a legal obligation and is employed in this sense in Article 6 and the other provisions of Article 7, as well as in the *travaux préparatoires* of the Treaty (during which there was general agreement on the “polluter pays” principle), pointing to an obligation. This is confirmed by a systematic analysis of Article 7: a user/tester state party in a position to do so already has an obligation, like any other state party in a position to do so, to provide assistance to affected states to further the implementation of the Treaty in general. Article 7(6) focuses on the user/tester states specifically with regard to assistance to affected states parties for the purpose of victim assistance and environment remediation, and is not caveated by the condition “in a position to do so”. Article 7(6), in conjunction with Article 7(3) and Article 6(3), can therefore only be read as highlighting that user/tester states parties have an additional, heightened responsibility, compared to other states parties, to help affected states parties in meeting their victim assistance and environmental remediation obligations. While state practice will help clarify the interpretation of this provision, based on a systematic reading of Articles 6 and 7, it appears unlikely that a user/tester state party could benefit from the qualifier “in a position to do so”, which circumscribes the assistance obligation incumbent upon other states parties.

Finally, Article 7(6) should not be read as simply recalling existing duties, obligations and responsibilities of the user/tester state under international law, as such an interpretation is excluded by the first clause of this paragraph (“without prejudice to”).

In the Vienna Action Plan, states party to the TPNW agreed to “engage and promote information exchange with States not party to the Treaty that have used or tested nuclear weapons, or any other nuclear explosive devices, on their provision of assistance to affected States parties for the purpose of victim assistance and environmental remediation.”<sup>107</sup>

## 4. CONCLUSION

Victim assistance and environmental remediation play a key role in the TPNW regime. To ensure that its objective of mitigating the humanitarian consequences of nuclear weapon use and testing is achieved, the Treaty establishes a set of positive obligations, as well as a detailed framework of international cooperation and assistance to facilitate their effective implementation.

In this regime, responsibility for measures related to victim assistance and environmental remediation differs according to whether a state party is affected, user/tester or neither of the two. Thus, the

<sup>105</sup> See United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons Leading Towards their Total Elimination, *Papers by the facilitators*: Art. 6 – 8, 30 June 2017, available at <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/06/Articles-6-8-30-June-30.pdf>.

<sup>106</sup> Cf Casey-Maslen, section 7.06.

<sup>107</sup> Vienna Action Plan, Action 20. See also TPNW/MSP/2022/NGO/17, para. 8.

primary responsibility lies with the affected state party, the user/tester state party has a heightened responsibility to assist the affected state party, and other states parties also have the obligation to assist affected states parties and victims to the extent of their capacity. While the wording used in various paragraphs at times differs slightly, a combination of textual, systematic and teleological interpretation shows that these differences may not always be semantically relevant and that these articles ultimately create a comprehensive architecture.

Compared to existing conventions that prohibit weapons of mass destruction (the Biological Weapons Convention and the Chemical Weapons Conventions more specifically), the TPNW is ground-breaking. It is not limited to addressing the weapons concerned, and activities related to them, but also gives a prominent place to the human element, i.e. the victims of the prohibited weapons' effects. In this respect, it follows the tradition of recent humanitarian disarmament treaties in the field of conventional weapons, namely Protocol V to the CCW, the APMBC and the CCM. While building upon these, it does deviate from them where necessary in light of the specificities of nuclear weapons and of the harm they cause – by expanding the protective scope of the positive obligations to fully address the tremendous needs and challenges generated by the use and testing of nuclear weapons in an effective and realistic manner.

The Treaty itself is a testament to the importance of “human security”, a concept encompassing individual and collective health and well-being, but also the environment, food security and climate, and, ultimately, the very future of the planet and of humanity as a whole, which is gravely threatened by the continued existence of nuclear weapons.

The first Meeting of States Parties adopted an ambitious Action Plan with concrete measures to begin implementing the Treaty's positive obligations. It further established an informal working group on victim assistance, environmental remediation and international cooperation and assistance, as part of the Treaty's intersessional structure.<sup>108</sup> The purpose of the working group is “to coordinate efforts regarding the implementation of the Treaty and decisions and actions agreed by the Meeting of States Parties, to exchange information and to develop recommendations to be considered at future Meetings of States Parties and Review Conferences”.<sup>109</sup>

It is hoped that the practice of states parties will further clarify and solidify the scope and practical implications of the positive obligations under the TPNW, and ensure that these provisions are understood in a coherent, comprehensive, people-centric manner, in order to fully achieve the Treaty's object and purpose.

<sup>108</sup> TPNW/MSP/2022/6, Decision 4.

<sup>109</sup> *Idem*.

## MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.