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ADDRESSING NUCLEAR HARM: PRIORITISATION FOR THE FIRST MEETING OF STATES PARTIES OF THE TPNW

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KEY MESSAGES

- × Addressing the ongoing harm to people and places from the past use and testing of nuclear weapons will be a long-term commitment under the TPNW. It is a key part of its humanitarian character and practical role
- × The TPNW creates a framework of solidarity to support affected states parties in addressing humanitarian and environmental harm, and working towards the full enjoyment of individuals' rights where these are affected by nuclear weapons
- × Given the complexity of the issues, and the resources available to the TPNW, prioritising and sequencing work will be crucial as states approach the first Meeting of States Parties

KEY RECOMMENDATIONS

- × For the first Meeting of States Parties states should focus on developing a positive culture of work and agreeing practical time-bound steps
- × States should agree steps they can take with the knowledge they have now, and identify challenging issues that can be addressed as work develops
- × Initial actions could focus on states parties with populations identifying themselves as affected. The inclusion and centring of affected people should be prioritised

Articles 6 and 7 of the Treaty on the Prohibition of Nuclear Weapons (TPNW) – on victim assistance, environmental remediation, and international cooperation and assistance – provide the first international framework for addressing the ongoing humanitarian, human rights, and environmental consequences of the past use and testing of nuclear weapons.

This short paper aims to give food for thought on how states parties might commence their approach to implementation in the runup to the First Meeting of States Parties (1MSP). It briefly outlines the significance and potential of these obligations, and some of the factors and approaches states parties may wish to consider in starting work in this area. The implementation of Articles 6 and 7 should be considered a long-term commitment, and the complexities of addressing nuclear harm as well as the resources available to TPNW states parties will be significant in planning how to undertake it. Prioritisation and sequencing will be crucial in order to manage this.

THE SIGNIFICANCE OF THE TPNW'S OBLIGATIONS TO ADDRESS NUCLEAR HARM

Articles 6 and 7 of the TPNW give states parties an opportunity to respond collectively – and in solidarity with affected states and people – to the current and ongoing harms from past nuclear weapon use and testing, as a community of countries focused on the humanitarian and environmental consequences of nuclear weapons.

This area of the treaty is significant:

- × **For affected people and states:** it creates an opportunity to better address affected communities' rights and needs as well as environmental contamination
- × **For the TPNW:** states parties can commence substantial work under Articles 6 and 7 – even without the participation of nuclear-armed or endorsing states – and make a practical impact. Implementation has potential significance both for affected communities, and for establishing and consolidating the role of the TPNW as an active and meaningful instrument within the global nuclear non-proliferation and disarmament framework

- × **For norm building within and beyond the TPNW:** addressing nuclear harm under the TPNW will contribute to building an international norm of addressing the human and environmental effects of past nuclear weapons use and testing, and recognising and responding to the rights of individuals and communities affected by nuclear weapons. It will also contribute to states' continued consideration of and focus on the unacceptable humanitarian and environmental consequences of nuclear weapons as the key facts for international nuclear policymaking

Putting in place a plan and framework for the implementation of the TPNW's obligations on victim assistance, environmental remediation and international cooperation and assistance for the coming years will be an important task for the TPNW's First Meeting of States Parties (1MSP) – and is already recognised as such.¹ Some states parties, including affected states, are already organising work, and developing plans in this area. It is also an area with various political, policymaking, and technical complexities.

There will be a need for prioritisation in the plans adopted by the 1MSP itself, given the time and resourcing currently available to the TPNW and its first meeting. Plans could therefore focus on laying strong foundations of goals, principles and initial actions, and a sense of sequencing for future work. As the TPNW's victim assistance and particularly its environmental remediation obligations are not extensively elaborated in the treaty, creating conference outcome documents to describe how work will proceed in the coming years would be beneficial (for example a Final Report, Declaration and Action Plan).²

One approach could be to concentrate on:

- × Firstly, developing: **a positive vision of the goals for work** under Article 6 and 7; a constructive and supportive mode and culture of working including a sense of the roles that different states could take; and key principles for implementation (such as inclusivity, accessibility, non-discrimination and transparency). Much of this could potentially be articulated in a Declaration from the 1MSP
- × Secondly, adopting **clear, manageable and time-bound steps** covering Articles 6 and 7 in a 1MSP Action Plan document. These could have a sense of prioritisation – for example, concentrating first on work amongst and with states parties who have populations that identify themselves as affected, and committing to steps such as undertaking assessments and reviewing capacities and existing work and standards in the areas of victim assistance, environmental remediation and international cooperation and assistance
- × Thirdly, **identifying themes that could, practically, be addressed later** and/or involve issues of complexity or sensitivity that it might not be productive to focus on resolving at the early stage of agreeing an initial programme of work. These could be sequenced to be dealt with as work under the TPNW develops (or recognised as issues that the TPNW will not address at all). Some such issues could potentially be acknowledged in 1MSP conference outcome documents (such as a Final Report or Action Plan)

THE STRUCTURE OF OBLIGATION IN ARTICLES 6 AND 7: BUILDING FROM PREVIOUS TREATIES

In their negotiation, Articles 6 and 7 of the TPNW drew on the approaches, legal standards and practice on victim assistance, land clearance, and the framework of shared responsibility of states parties for these activities developed under the Anti-Personnel Mine Ban Convention (APMBC) and the Convention on Cluster Munitions (CCM) (as well as the Convention on Certain Conventional Weapons Protocol V).³ The lessons from these frameworks can give a helpful starting point to TPNW parties, for example regarding principles for implementation and developing a positive culture of work. Experiences from these treaties can also be helpful for developing shared understandings of some key concepts under the TPNW. There will also be differences from these treaties – and the opportunity for making developments – in building the TPNW's approach to addressing ongoing harm from nuclear use and testing.

The obligations in Articles 6 and 7 provide a framework that can support states parties who have populations or areas that are still experiencing harm from nuclear weapons use and testing to take further practical action towards addressing these issues.

The framework of responsibility established by the TPNW, like those developed under the APMBC and CCM, places the primary responsibility for the implementation of victim assistance and environmental remediation with states parties that have affected populations or areas. This is because of these states' sovereignty and existing responsibilities. Affected states can however do this work with the support of other parties to the TPNW and the wider international community, through Article 7 on international cooperation and assistance. The intention is therefore not to place a further burden on affected states, but to provide a framework of inter-state solidarity and a focus for practical action to better address communities' rights and needs in the near term.

The framework of responsibility emphasises states parties to the TPNW taking collective responsibility for addressing the harms caused by nuclear weapons. The obligations do not address or involve states currently outside the Treaty (including those that may have caused harm⁴). They are, rather, an area where substantial, meaningful work can be undertaken by parties that are within the treaty now – without needing to wait for others to respond or take responsibility.

Similarly to the TPNW as a whole, the emphasis in the implementation of Articles 6 and 7 could therefore be on: a positive vision of collective empowerment amongst those willing to address these challenging humanitarian issues; supporting affected countries and communities; and focusing on what can be done now to create change.

Developing collective understanding of the framework of responsibility will be important to the effective implementation of Articles 6 and 7. States' main focus will likely be on building up work within the treaty framework amongst states parties. As part of universalisation activity, affected states that are currently not party to the TPNW (including those that have used or tested nuclear weapons) might be encouraged to join the TPNW for the benefits and fulfilment of responsibility this would bring to their and other affected populations⁵. As part of seeking the constructive engagement of all those outside the TPNW with the framework, states may also aim to engage with non-parties on specific

matters relevant to addressing nuclear harm where they have expertise, and to generally encourage action to address nuclear harm.

Regarding one concept developed under the APMBC and CCM, 'victim assistance' is now understood as grounded in the obligations of states to ensure the full enjoyment of individuals' rights – and to address where this is affected by the ongoing effects of prohibited weapons. In implementation under the APMBC and CCM it has focused more on needs and practical remedies than, for example, financial compensation.

Carrying over this concept to the TPNW, there is an opportunity to support work to address a broad range of rights affected by nuclear weapons use and testing and the harms arising from these activities. These might include cultural harms, the collective rights of indigenous peoples, and the right to information (which might implicate processes of acknowledgement), for example, as well as health, psychological and socio-economic harms affecting communities. More broadly, there is an opportunity to link Articles 6 and 7 to sustainable development and the 2030 Agenda, which may be beneficial in considering international cooperation and assistance. In developing the concept and implementation of victim assistance under the TPNW beyond the starting point given by previous treaties, it will be important to consider the inter-generational nature of the health, socio-economic and cultural harms caused by nuclear weapons; the disproportionate impact on indigenous communities and the age- and gendered impacts of radiation (acknowledged in the TPNW's preamble); and also the close linkage between environmental damage and harm to people and their rights in the case of nuclear weapons.⁶

The TPNW could also take a role, as the APMBC and CCM have done, in creating a space for the development of a community of practice on victim assistance and environmental remediation, and the review, discussion and promotion of high standards of practice.

PRIORITISING INITIAL WORK

There are currently four states parties to the TPNW and one signatory state with populations that have identified themselves as having been affected by past nuclear use or testing. These are: Algeria, Kazakhstan and Kiribati, whose present-day territories were subjected to nuclear weapons testing; and Fiji and New Zealand, some of whose military veterans were present in the vicinity of tests or in the aftermath of the atomic bombings of Japan. In all these countries, there are organisations or associations of survivors, and/or individuals who consider themselves affected by nuclear weapons testing/use, who have advocated for different types of response or remedy to various harms.

Assistance to affected people and for the remediation of affected environments under the TPNW flows via states parties with individuals affected or contaminated areas under their jurisdiction or control. A starting point for activity under Articles 6 and 7 could therefore be to focus first on developing actions in relation to those states parties with self-identifying affected populations, and those with areas where nuclear weapons have been tested – where these states have assessed and determined that further work to address harm is needed under Article 6. On victim assistance, actions could include steps such as assessing ongoing harm and responses so far, working out from the knowledge

and advocacy of affected communities, and creating plans for further action in different areas where these are needed.⁷

On environmental remediation (for states parties where nuclear weapons were tested), initial steps could similarly focus on: establishing what is currently known about contamination and what responses have been undertaken (and to what standards); whether practical steps need to be taken for the immediate protection of communities; and what research and assessments are needed towards establishing the further action to be undertaken towards remediation.⁸

Affected states could undertake these actions themselves or with assistance from other TPNW parties, and other agencies, if relevant. States parties could also agree on other action points in relation to international cooperation and assistance.⁹ For example, states parties could assess what technical expertise they might be able to contribute to support affected states, what practice they might be able to share (for example from the civilian nuclear sphere, or approaches from the implementation of previous treaties including on survivor inclusion), or whether they may be in a position to offer thematic leadership for implementation discussions on different aspects of Articles 6 and 7.

In general, the knowledge and advocacy of affected communities should be centred in developing responses, and parties should, as a key principle, work to meaningfully include affected people in building approaches to implementation. Developing this inclusion – such that affected people are not talked about by others but are central participants to the conversation where they wish to participate – should be a key early task for the TPNW community. Initial steps could include funding outreach and attendance at meetings and the work of survivor-led organisations, including their advocacy and research. Assistance could also be provided through UN agencies and the International Committee of the Red Cross, or support to non-government organisations and associations.

Globally, there are around 16 present-day states or territories that were subject to previous nuclear weapons use or testing. There is also a range of other countries whose nationals were present in the vicinity of use or testing.¹⁰ This means that there are several states currently not party to the TPNW with self-identifying affected populations or areas that were subject to tests. The approach taken in the TPNW towards norms of recognition and response to nuclear harm should seek to influence practice and activity in affected states beyond the TPNW. This includes those that may join the TPNW soon, as well as other affected/user states that might not join in the near term. Finding ways to include the perspectives of affected people from non-TPNW countries, where they wish to be involved, should therefore also be considered important to developing the broad approach to the goals and implementation of Articles 6 and 7.

DEALING WITH POTENTIALLY COMPLEX OR CONTROVERSIAL THEMES

Understanding the ongoing harm caused by nuclear weapons and how to respond to it is not a straightforward task. This is because of the nature of nuclear weapons, and the ways they have been developed and used. For example: understanding and describing the nature and extent of the health effects of radiation exposure from nuclear weapons and how these reach across generations is complex and contested; nuclear testing caused fallout to be dispersed across national boundaries, with impacts that may not have been fully assessed; and the secrecy surrounding testing means that states do not necessarily have access to full information about what took place on their territories.

The TPNW will need to tackle some of these complexities in the implementation of Articles 6 and 7 as work develops. The nature of the harm created by nuclear weapons means this will take some time. However, it may be important to identify early on what the TPNW's international framework can and cannot aim to do; and, which issues that do need to be addressed by states parties should be sequenced for attention beyond the 1MSP. Some potential issues of complexity or sensitivity that states may wish to consider their orientation to – many of which refer to definitions and boundaries – are outlined below.

APPROACHING STATES' SELF-ASSESSMENT OF ARTICLE 6 OBLIGATIONS

This paper has suggested that commencing actions for implementation by focusing on states parties with self-identifying affected populations, or where testing has taken place, could give a starting point to work out from. This would centre the views of affected populations. It would also be consistent with a concept of victim assistance and environmental remediation that concentrates on providing practical remedies to people whose rights are being affected now by the impact of prohibited weapons.

Beyond this, there are, for example, other countries that are party to the TPNW that fallout from tests reached or may have reached. Other party countries may also have small populations of individuals that were affected by being in the vicinity of past nuclear explosions.¹¹

It would be a positive step for all TPNW states parties to investigate whether their populations or environments may have been affected by use or testing because of factors such as these – and for states parties to assess whether there are therefore any ongoing impacts they need to address under Article 6.

This is also a sensitive and potentially complex task – and states may not currently have all the tools to do it. How such assessments might usefully be done could be a subject for states to collectively discuss within the TPNW framework, with input from various types of experts. This is not a topic that can necessarily be resolved swiftly, and will need careful examination. States could consider how it could be approached in a way that parties would find useful and supportive, and how discussion on it could be phased as the TPNW develops. Such an approach could be preferable to seeking to resolve the issue early (such as at the 1MSP).

ISSUES OF DEFINITION AND BOUNDARIES

The question of the thresholds at which radiation exposure causes harm to physical health is relevant to considering standards for environmental remediation, and potentially to implementing victim assistance. States parties are likely to wish to discuss these issues – but it may not be productive to seek to resolve these questions immediately, particularly at the 1MSP. These questions also do not have one, external technical answer: the standards any state may adopt or implement, or that TPNW parties may choose to encourage, are ultimately a question of policy.

As suggested above, an initial structure of steps to commence work in the area of environmental remediation could be relatively straightforward to agree (e.g. action to establish what has already been done/is known about contamination in affected countries, whether immediate steps to protect people from exposure are needed). Beyond this, what constitutes an acceptable or 'safe' level of environmental remediation or contamination is a question to which different answers could be given (and again remains a policy decision in affected countries). The TPNW as an international framework may wish to review and assess different standards that have been applied as work moves forward – and states parties will need to decide what role they wish to take in relation to promoting certain approaches.

Regarding victim assistance, a precautionary or rights-based orientation – and the principle of non-discrimination enshrined in Article 6 – should mean that establishing the boundary of when harm to health is generated from radiation exposure may not be necessary for many forms of assistance – including those for physical health conditions. For example, improving standards of healthcare in affected countries for medical conditions known to be associated with radiation exposure should (using the interpretation of 'without discrimination' that has been used under the CCM) benefit people suffering such conditions from any cause. It should not require individuals to 'prove' their health conditions arose from radiation from nuclear weapons use or testing (as is the case for many existing compensation programmes in the boundaries they draw¹²). Some forms of response to harm may of course require more engagement with these boundaries, however.

A rights-based approach to victim assistance would also require looking at harms beyond those to physical health. Collectively considering who might be included in the category of people who are affected (including directly affected individuals, their families, and communities) will be an important task to guide states' work. This itself will take time, as it has complexities, of which understanding the physical health impacts of ionising radiation is one. The overall task could be approached by first examining the broad parameters of which harms and rights activity under Article 6 might address, and what the range of responses might be. This should consider expertise beyond the scientific and medical, such as the lived experiences of affected communities and indigenous knowledge.

In general, states parties may wish to decide at some point what the TPNW's orientation will be to standard setting: whether, for example, parties will link the TPNW to a formal standard-setting process, or serve more as a forum for promoting strong responses.

CONCLUSION

The TPNW should aim to build a community of practice that seeks to promote the highest standards of victim assistance and environmental remediation. This should be a community that supports affected states to serve affected communities through strong international cooperation and assistance, and which centres affected people. The implementation of Articles 6 and 7 of the TPNW provides an opportunity to improve global responses to ongoing harm from past nuclear weapons use and testing – but this will be a complex and long-term task. Making a positive start at the TPNW's 1MSP through focusing on practical steps that states can take with the information they have now, and developing a positive culture of work, will be key.

ENDNOTES

- 1 See Bonnie Docherty (2020), 'From Obligation to Action: Advancing Victim Assistance and Environmental Remediation at the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons,' *Journal for Peace and Nuclear Disarmament* <https://doi.org/10.1080/25751654.2020.1842657>
- 2 For more detailed recommendations on how actions and principles could be structured in outcome documents to the 1MSP refer to *ibid*.
- 3 See for example Bonnie Docherty (2018) A 'light for all humanity': the treaty on the prohibition of nuclear weapons and the progress of humanitarian disarmament, *Global Change, Peace & Security*, 30:2, 163-186, <https://doi.org/10.1080/14781158.2018.1472075>
- 4 A responsibility on the part of states that previously used or tested nuclear weapons that join the TPNW to assist affected states parties is noted in Article 7.6 of the TPNW. Article 6.3 notes that affected states' obligations on victim assistance and environmental remediation also "shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements"
- 5 For recommendations to NATO members - but applicable more broadly - see 'Chapter 4: Benefits of Joining the Ban,' in ICAN (2021), 'A Non-Nuclear Alliance: Why NATO members should join the UN ban on nuclear weapons,' https://www.icanw.org/report_why_nato_members_should_join_the_un_nuclear_weapon_ban
- 6 See International Human Rights Clinic at Harvard Law School (2018) Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Victim-assistance-short-4-8-18-final.pdf>
- 7 On principles for the implementation of victim assistance see also Harvard IHRC and CEOBS (2020) Confronting Conflict Pollution <http://hrp.law.harvard.edu/wp-content/uploads/2020/09/Confronting-Conflict-Pollution.pdf>
- 8 For brief discussion see International Human Rights Clinic at Harvard Law School (2018) Environmental Remediation under the Treaty on the Prohibition of Nuclear Weapons <http://hrp.law.harvard.edu/wp-content/uploads/2018/04/Environmental-Remediation-short-5-17-18-final.pdf>
- 9 For more detailed suggestions see Bonnie Docherty (2020) above note 1
- 10 For a general overview of available information on the places where nuclear weapons have been detonated, countries whose citizens were in the vicinity of these see Matthew Bolton and Elizabeth Minor (2021), 'Addressing the Ongoing Humanitarian and Environmental Consequences of Nuclear Weapons: An Introductory Review,' *Global Policy*, <https://doi.org/10.1111/1758-5899.12892>
- 11 For some remarks on locations potentially affected by fallout, see also *ibid*.
- 12 For an overview of some of these programmes, see Nate Van Duzer and Alicia Sanders-Zakre (2021), 'Policy Approaches Addressing the Ongoing Humanitarian and Environmental Consequences of Nuclear Weapons: A Commentary,' *Global Policy*, <https://doi.org/10.1111/1758-5899.12870>

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