

## Assistance to cluster munition victims: a major step toward humanitarian disarmament

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As the first week of the Dublin Diplomatic Conference on Cluster Munitions came to an end numerous delegations hailed the provision on victim assistance as “ground-breaking” and “historic”.<sup>1</sup> The agreed provision relating to victim assistance, which later would become Article 5 of the Convention on Cluster Munitions (CCM), was the result not only of 18 months of intensive negotiation and awareness-raising efforts, but was directly linked to experience gained and lessons learned in the context of other international treaties, most notably the 1997 Mine Ban Treaty and the 2006 Convention on the Rights of Persons with Disabilities.

Indeed, the new provision—in fact even better, the new package of provisions—on victim assistance is remarkable in many respects: it is the first time a disarmament treaty creates a direct link to human rights by stipulating that states parties shall adequately provide assistance to cluster munition victims in accordance with international human rights law; the new provision contains a strong legal obligation to assist the victims of a certain weapon without using the famous qualifier “states in a position to do so”; and it clearly sets forth who has to do what for whom and how. In doing so, the Convention contains a realistic definition of the term “cluster munition victim”. It also commits states parties to provide international cooperation and assistance to states with victims under their jurisdiction or control.<sup>2</sup>

During its short existence as a legal text the CCM victim assistance package has started to gain the status of reference point and model for victim assistance efforts in related fields. Most notably, under the guidance of the coordinator Michael Schoiswohl from Austria, the states parties to Protocol V of the Convention on Certain Conventional Weapons (CCW) have agreed on an Action Plan on Victim Assistance that draws heavily on the relevant provisions of the CCM. Likewise, the Cartagena Action Plan, adopted at the Second Review Conference of the Mine Ban Treaty in December 2009, built on the progress made through the CCM, which provided some of the main building-blocks of the document. In a sense, the CCM “model” for victim assistance provides considerable “re-fertilization” to a treaty that pioneered the issue and remains the first ever international disarmament agreement to address the suffering caused by the weapons it bans.

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Yet, any legal text—to start with—is a mere legal text, as much as any action plan is a declaration of political intent: they are first steps in a larger process to improve the situation on the ground. The real value of these documents is established not through the language they employ, but through the advances they induce: for victim assistance the primary measurement of progress is the improvement in the victims' situations. Despite considerable efforts by the international community, progress often eludes us. A recent study carried out by Handicap International, *Voices from the Ground*, undertook to interview hundreds of individual survivors of mines, cluster munitions and explosive remnants of war (ERW) in 26 affected countries and reached some quite sobering conclusions.<sup>3</sup>

But already through placing human beings and communities at the centre of such an international agreement and by establishing a link to international humanitarian and human rights law, a major step toward a new humanitarian form of disarmament has been taken. This article aims to provide an overview of the content of the CCM victim assistance package as well as some thoughts on its implementation.

## The CCM victim assistance package

Victim assistance as contained in the CCM is more than Article 5. It is a package of intertwined provisions contained in various parts of the Convention: in the preamble, in the first term to be defined in the definitions Article 2, in Article 5 itself, in Article 6 on International Cooperation and Assistance and finally in Article 7 on Transparency Measures. Including the obligation to provide assistance to the victims of cluster munitions in Articles 6 and 7 of the Convention as well as among the definitions ensures that victim assistance constitutes an obligation of the same legal relevance and value as the Convention's other major obligations, such as the prohibition of the use of cluster munitions and the requirements to destroy stocks and to clear contaminated areas. The Convention ensures that victim assistance is not a mere humanitarian after-thought: victim assistance figures centre stage as one of the core elements of this Convention.

### *For whom: definition of cluster munition victims*

The first key feature of the CCM victim assistance package is the definition of the term "cluster munition victims", which covers "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." The definition goes further by clarifying that "[t]hey [victims] include those persons directly impacted by cluster munitions as well as their affected families and communities" (Article 2(1)).

The definition is intentionally broad and gives a realistic view of the factors defining how a person can become a victim, thereby setting the stage for the Convention's special victim assistance provision. It is fitting that in a treaty banning a weapon characterized by its wide

scope of contamination, which may endanger whole communities, the definition of victim mirrors those very characteristics and goes beyond injury to the individual. Moreover, appropriately for a treaty that embodies a human rights-based approach to victim assistance, the definition enumerates harm that is beyond the physical, and includes psychological injury, economic loss, social marginalization and impairment of the realization of rights.

The Oslo Declaration of February 2007 already committed participating states to the establishment of “a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities”.<sup>4</sup> The drafters of the Vienna Discussion Text of December 2007—while not introducing a definition of cluster munition victims—wished to highlight a broad understanding of victims by including a preambular paragraph referring to “victims of cluster munitions, which inter alia include the persons directly affected, their families and communities.”<sup>5</sup> This formulation reflected discussions on victim assistance that had previously taken place during the international process on cluster munitions at the conferences in Lima, Belgrade and Brussels: the rapporteur of the Brussels Conference’s victim assistance session reported that:

there was a general understanding that victim assistance is a broad and comprehensive concept, which should use as a starting point, but also as a constant reference point the needs and rights of victims. ... Already the term *victim* as such is to be understood broadly, i.e. encompassing the survivor as such – the victim of the direct impact, but also other victimized persons, including family and affected communities. [italics in original]<sup>6</sup>

This principled approach was essentially supported during the Vienna Conference and formed part of what the president of the Vienna Conference, Austrian Ambassador Wolfgang Petritsch called the “Vienna consensus on victim assistance”, which reinforced the endeavours to establish victim assistance as “a key legal obligation of the same quality as the other main building blocks of the future treaty”<sup>7</sup> and hence work toward a definition of the term cluster munition victims.

For the first time, the Draft Convention on Cluster Munitions presented to the Wellington Conference in January 2008 included a draft definition of cluster munition victims.<sup>8</sup> The draft definition was basically designed as a mirror image of the provisions in Article 5 and essentially followed the assumption that any victim assistance provision would have to use the needs and rights of the victims as a starting and constant reference point. Whereas the definition highlights the injury or loss incurred by a victim of cluster munitions, Article 5 concentrates on how best to respond to the needs arising from such injury or loss. The draft definition intended to paint a realistic picture of victimization by portraying the defining factors that lead to the assumption that a particular person in fact has become a victim of the weapon.

The draft definition also built on two further documents. First, the description of the term “mine victim” as contained in the Review Document adopted at the 2004 Nairobi Summit on

a Mine-Free World, which states: “It is now generally accepted that victims include those who either individually or collectively have suffered physical or psychological injury, economic loss or substantial impairment of their fundamental rights through acts or omissions related to mine utilization”.<sup>9</sup> Second, the definition contained in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: “For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”<sup>10</sup>

The Wellington Draft Convention signified two major developments as compared to the texts mentioned above: in addition to the concepts of physical and psychological injury, economic loss or substantial impairment of the realization of rights, the Wellington text also includes the concept of social marginalization as a form of victimization of a person. Second, the text further develops the idea contained in the phrase “either individually or collectively have suffered” by introducing a specific reference to the families and communities of persons directly impacted by cluster munitions.

In the final treaty negotiations, some clarifications to the definition were made: as regards families and communities, the term “affected” has been introduced to reflect that only affected families and communities could fall under the ambit of the definition. The definition also makes clear that the (legal) status of a person is irrelevant for the question of whether the person is a victim: the final version states that “all persons” that fulfil the criteria listed in the definition—be they migrants, internally displaced persons, non-combatants, combatants—would count as victims:

Cluster munition victims means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities.<sup>11</sup>

This formulation lists the defining elements of victimization, including the more obvious as well as other less obvious, yet serious elements. The use of the term “or” between the defining elements makes clear that it is sufficient that only one of the elements applies in a given case—as long as its occurrence is caused by the use of cluster munitions—in order for a person to fall under the scope of the definition.

### *Who bears the responsibility for victim assistance?*

As compared to the victim assistance provision of the Mine Ban Treaty, Article 5 of the CCM represents a major step forward in clarifying who bears the responsibility for assisting the victims of cluster munitions. Whether it should be the state on whose territory the victims are, or the state who had used the munitions that should bear the primary responsibility for victim assistance had been asked repeatedly. The approach taken by the Mine Ban Treaty glossed over this question by committing each state in a position to do so to provide assistance to victims. In practice, this means that the Mine Ban Treaty combines the commitments by affected states and those of possible donor states to provide assistance for the care, rehabilitation, and social and economic reintegration of mine victims, and for mine awareness programmes. Although the historical significance and enormous ongoing importance of the Mine Ban Treaty's victim assistance provisions cannot be overstated, the approach taken has the disadvantage of qualifying the commitments of both possible donors and affected states with the phrase "in a position to do so". Article 5 of the CCM sets forth a much clearer conceptual framework and embodies a substantially more stringent legal obligation.<sup>12</sup> It identifies clearly who bears the responsibility vis-à-vis cluster munition victims: "Each State Party with respect to cluster munition victims in areas under its jurisdiction or control" shall provide the assistance required. It is important to note that it is either jurisdiction or control that is necessary, not the occurrence of both elements at the same time. In this context it is also important to note that Article 5 does not create any rights for individuals (as a human rights instrument would do); rather it creates a responsibility under international law on the side of states.

It is fair to say that those states with victims on their territories have undertaken substantial commitments for their well-being. Typically these are countries that have experienced or are still experiencing considerable unrest, security threats, military action, etc. and therefore are often facing severe economic difficulties. Many of these countries, such as the Lao People's Democratic Republic (PDR), belong to the poorer nations of the world. Naturally, Article 5 places quite a burden on these states, which needs to be cushioned by serious commitments on the side of the international community and those states that are in a position to assist.

During the 2007 Belgrade Conference of States Affected by Cluster Munitions, participating states unanimously accepted their responsibility for providing assistance to victims on their territories. This was done first because of the general responsibility of each state for the well-being of persons on its territory, and second because of clear commitments on the side of possible donor states to support their victim assistance efforts. These commitments have since been included in Article 6(7) of the CCM.

### *Human rights and humanitarian law*

Victim assistance is all about human beings. It was hence all but natural to try and establish a link between a treaty that was designed as a humanitarian and disarmament treaty and the

realm of human rights. Yet, this was not so obvious when the negotiations started. Essentially, the victim assistance provision had very humble beginnings: the text presented for discussion at the Lima conference in May 2007 merely included a provision where states would endeavour to carry out some assistance to victims; it did not contain a link to human rights at all. The timely adoption of the Convention on the Rights of Persons with Disabilities (December 2006) helped in the development of the CCM.

The CCM negotiations showed overwhelming support for the establishment of the link between disarmament and human rights and consequently the Convention refers to human rights in three places: first, the preamble expresses states parties' determination to ensure the full realization of the rights of all cluster munition victims and recognizes their inherent dignity; second, the preamble bears in mind the Convention on the Rights of Persons with Disabilities; and third—and perhaps most important—Article 5 stipulates that victim assistance shall be provided “in accordance with applicable international humanitarian and human rights law”. The CCM has thus chosen to uphold and promote the human rights of survivors and other victims. The Convention embodies a rights-based approach to victim assistance, i.e. an approach that takes as a reference point not only the needs of victims, but also their rights.

### *What*

Under Article 5, states are obliged to “adequately provide age- and gender-sensitive assistance”, including medical care, rehabilitation and psychological support as well as the social and economic inclusion of victims. The terms used are important: “adequately” ensures a level of flexibility in the actual provision of victim assistance—setting assistance in relation to prevailing circumstances, needs and capacities. The term age- and gender-sensitive sets an important marker, highlighting the need for assistance to take age and gender into account. And finally, Article 5(1) lists the constituent elements of victim assistance: medical care (which encompasses emergency and ongoing medical care), rehabilitation, psychological support (the importance of and need for which is often underestimated), and finally the elements of reintegration or inclusion of a victim in social and economic life.

All this makes very clear that victim assistance is not a short-term endeavour, but a long-lasting and quite complex commitment for the well-being of fellow human beings.

### *How*

Article 5 concludes by setting out a non-exhaustive list of elements that provide the modalities for the implementation of victim assistance. The text was intended to provide sufficient guidance to states while at the same time avoiding being overly prescriptive. One of the issues discussed most intensively during the cluster munition treaty process was the question of non-discrimination:<sup>13</sup> in drafting the overall victim assistance provision it was of utmost importance

that the language ensured the best possible assistance to cluster munition victims without this being at the expense of victims of, say, landmines or ERW. In other words, the new provision was to be crafted in a way that would not allow it to be construed as creating a new category of victims enjoying “preferential” treatment at the expense of others. In response, Article 5(2)(e) prohibits discrimination against and among cluster munition victims as well as between cluster munition victims and those who have suffered injuries or disabilities from other causes. This again seemed a rather wide clause, which could potentially have been interpreted as an excuse for inactivity following the maxim that as long as everyone is treated in the same insufficient manner, no discrimination occurs. To avoid this, the second sentence specifies that differences in treatment should be related only to the actual need of the cluster munition victim.

### **Fulfilling the promise: implementing the victim assistance package**

It is first and foremost affected states that bear the responsibility for implementing the victim assistance package. Two factors will be decisive for successfully implementing these obligations: their will and their capacity to comply with their obligations. Both elements are indispensable for proper implementation.<sup>14</sup> The structure of the victim assistance package takes this into account by defining the obligations of states to provide victim assistance and by providing for international cooperation and assistance for victim assistance. The transparency measures contained in Article 7 function to keep these obligations at the forefront of decision-makers’ minds and hence foster the will to comply.

A number of key elements will help to determine the will and capacity for implementation: national ownership, international cooperation and assistance, and prudent use of limited resources, which requires the best possible use of existing structures and frameworks and the seeking of synergies and cooperation.

#### *National ownership*

National ownership figures centre stage in all implementation efforts: without the ownership of the concerned states, implementation does not seem practicable. It is the concerned state that is best placed to shape the laws, plans, programmes and budgets that are necessary for implementation and to tailor them to its specific situation. Planning and programming will differ widely between a country like Albania, with some 300 ERW survivors primarily concentrated in one specific region, and Lao PDR, with tens of thousands of survivors all over its territory.

The country concerned is best placed to determine where existing structures and frameworks (medical and social system, human rights frameworks, etc) can be used, or where the development of new approaches is warranted—the CCM victim assistance package does not require the reinvention of the wheel by establishing a raft of new mechanisms, it simply requires the work to be done.

National ownership is also crucial for attracting the support of the donor community. Bodies like the European Union have moved away from thematic budget lines in their development cooperation and have adopted country-specific approaches. Hence, it is often up to the individual countries to define their priorities and communicate them to potential donors.

### *International cooperation and assistance*

International cooperation and assistance have played a prominent role in the negotiation of the victim assistance package of the CCM and have proven essential in the actual implementation of any victim assistance work undertaken so far. The promise by possible donor states to states with victims on their territory has been an important factor for the latter to agree to the obligations contained in Article 5 of the Convention. Experience gained in the implementation of the Mine Ban Treaty shows that donor states in a position to do so do seriously endeavour to live up to their commitments for victim assistance. The provisions contained in Article 6 clearly highlight the need for cooperation and assistance in respect to victim assistance.

### *Prudent use of scarce resources: use existing structures, seek synergies, cooperate*

Victim assistance efforts do not usually have to start from scratch. In most affected states, medical infrastructures and services, and facilities to assist psychological as well as social and economic inclusion already exist, either run directly by government entities, or by communities, international institutions or non-governmental organizations (NGOs). Most of the states concerned have at least some relevant legal and policy frameworks at hand, perhaps regarding disability or human rights. It is paramount to use those infrastructures, frameworks, plans and structures and to make them work for assisting cluster munition victims appropriately. The CCM does not require the establishment of new laws or plans for assisting cluster munition victims separately from victims of landmines, other ERW, small arms and light weapons or other persons with medical and other needs. The package requires that cluster munition victims are adequately provided with the necessary assistance.

International cooperation and assistance activities can also take advantage of existing mechanisms. Many donor countries already support the establishment of medical infrastructure and services in developing countries; in so far as such support also benefits cluster munition victims they are victim assistance projects. Projects for overall poverty reduction in areas affected by cluster munitions, support for the creation of economic opportunities in affected rural areas, the provision of microcredit to victims are all possible ways of supporting victim assistance efforts with means that are already in use by a number of donors. It is important to employ those mechanisms with a focus on victim assistance.

Global victim assistance efforts benefit from a multitude of actors: affected states, donor states, international institutions such as the World Health Organization, United

Nations Children's Fund, United Nations Mine Action Service, United Nations Development Programme, United Nations Office for Project Services, International Labour Organization, the International Committee of the Red Cross and an even greater number of NGOs active on various levels such as Survivor Corps (formerly known as Landmine Survivors Network), Handicap International, Licht für die Welt and Médecins Sans Frontières. The better these entities work together, the more efficiently resources can be used in order to ensure that every euro spent brings about improvements for the victims. Ensuring that level of coordination is the joint responsibility of all.

Despite occasional appearances to the contrary, each of the increasing number of international conventions and fora dealing with victim assistance—including the Mine Ban Treaty, the CCM and the CCW—has a specific role to fulfil and, wherever possible, synergies should be sought: synergies in the proper meaning of the ancient Greek word *syn-ergos*—working together! This may not always be possible, or easy, but it is necessary if the international community is serious about assisting victims of all types of mines, cluster munitions and ERW wherever they are.

## Concluding remarks

The CCM victim assistance package is significant in more than one respect. Being a package in itself establishes victim assistance as one of the main pillars of the Convention, of the same legal (and political) importance as the other core issues such as the prohibition of the use of cluster munitions, the obligation to destroy stocks and to clear contaminated areas. In addition to Article 5, provisions relevant to victim assistance have been included in the preamble, the definitions, reporting requirements and the article on international cooperation and assistance. Victim assistance also falls under the ambit of the Convention's provision on compliance (Article 8).

The victim assistance package is not a radically new invention. On the contrary, the package is the (initial) culmination of efforts: it can be seen as the logical consequence—if not codification—of the work undertaken and lessons learned in implementing the victim assistance provision of the Mine Ban Treaty. The package in the CCM has itself become a reference point for victim assistance endeavours in other conventions, most notably Protocol V to the CCW. Would it be too daring to think that other treaties would be able to take similar steps?

The CCM has innovated in building coordination for victim assistance into its provisions: the preamble expresses “the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons”.<sup>15</sup> This formulation has been drafted in the knowledge that the resources that states and the international community make available for victim assistance are finite, therefore the use of these resources must be optimized in order to achieve the best possible results on the ground. Consequently, this preambular paragraph also expresses a responsibility for the states party to the CCM, relevant

international organizations and civil society to seek synergies where possible and coordinate their efforts.

Finally, the victim assistance package establishes the CCM as a unique international instrument: an international agreement that focuses on the suffering caused by a weapon and tries to address this suffering comprehensively not only through measures of disarmament or clearance, but also through holistically attempting to improve the lives of those who have fallen victim to that weapon by enabling them to participate as full and productive members in the social and economic life of their communities. In doing so, the CCM places central importance on the human and humanitarian aspects related to a particular weapon. It not only addresses the technical and military side of the weapon's use, but also the human cost associated with it, and thereby has become a model for a new kind of treaty, which could be labelled "humanitarian disarmament".

The CCM is now entering its most crucial phase: implementation! Through the victim assistance package in the Convention on Cluster Munitions we have laid the groundwork for bringing about better lives for cluster munition victims. Now we have to live up to these promises.

## Notes

1. The statements made are available at the conference web site, <[www.clustermunitionsdublin.ie](http://www.clustermunitionsdublin.ie)>.
2. It is here, in relation to providing assistance for victim assistance, that the qualifier "in a position to do so" is used, rather than in relation to victim assistance per se.
3. Handicap International, 2009, *Voices from the Ground: Landmine and Explosive Remnants of War Survivors Speak Out on Victim Assistance*.
4. See Declaration of the Oslo Conference on Cluster Munitions, 23 February 2007, paragraph 1(b).
5. See Vienna Discussion Text, Vienna Conference on Cluster Munitions, 5–7 December 2007, first preambular paragraph.
6. Markus Reiterer (rapporteur), *Summary on the Victim Assistance Discussion*, European Regional Conference on Cluster Munitions, Brussels, 31 October 2007, at <[www.diplomatie.be/en/pdf/reiter.pdf](http://www.diplomatie.be/en/pdf/reiter.pdf)>.
7. Closing remarks by Ambassador Wolfgang Petritsch at the end of the Vienna Conference. See also Katherine Harrison, 2008, *Report from the Vienna Conference on Cluster Munitions, 5–7 December 2007*, Women's International League for Peace and Freedom, January.
8. The draft definition reads as follows: "Cluster munition victims' means persons who have 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 families and communities" Article 2, Draft Cluster Munitions Convention, agreed at Wellington, 21 January 2008, at <[www.mfat.govt.nz/clustermunitionswellington](http://www.mfat.govt.nz/clustermunitionswellington)>.
9. First Review Conference of the Mine Ban Treaty (Nairobi Summit on a Mine-Free World), *Final Report*, document APLC/CONF/2004/5, 9 February 2005, paragraph 64.
10. See UN General Assembly resolution 60/147 of 16 December 2005, UN document A/RES/60/147, 21 March 2006, Annex, paragraph 8.
11. Convention on Cluster Munitions, signed at Oslo, 2–4 December 2008, Article 2(1).
12. See Statement by Markus Reiterer, Friend of the President on Victim Assistance, delivered to the 2008 inter-sessional meeting of the Mine Ban Treaty's Committee on Victim Assistance, one week after the adoption

of the Convention, at <[www.apminebanconvention.org/fileadmin/pdf/mbc/IWP/SC\\_june08/Speeches-VA/SCVA-OtherMatters-6June08-Austria-en.pdf](http://www.apminebanconvention.org/fileadmin/pdf/mbc/IWP/SC_june08/Speeches-VA/SCVA-OtherMatters-6June08-Austria-en.pdf)>.

13. It was particularly the delegation of the International Committee for the Red Cross that advocated a stringent provision on non-discrimination.
14. For a wider discussion of compliance with international obligations see M.A. Reiterer, 2008, "Some Thoughts on Compliance with International Obligations", in Isabelle Buffard et al. (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, Brill, pp. 943–958.
15. See preambular paragraph 10.

