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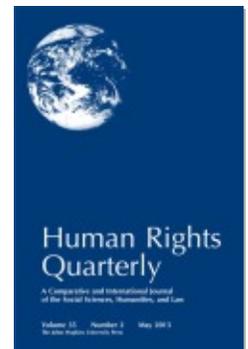
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## Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law

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# Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law

Bonnie Docherty\*

## ABSTRACT

The 2008 Convention on Cluster Munitions comprehensively bans a weapon that causes civilian casualties both during and after attacks. The convention also sets legal precedent in three ways. First, the convention expands the scope of past treaties by, for example, covering munitions that function properly and those that do not. Secondly, it creates groundbreaking humanitarian obligations, most notably those related to victim assistance. Thirdly, it anticipates future concerns by recognizing the threats posed by non-state armed groups. This comparative analysis of the convention shows how it breaks new ground for future weapons treaties and illuminates the process by which international humanitarian law can be advanced.

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## I. INTRODUCTION

On 3 December 2008, almost half the world's states formally declared their support for a groundbreaking treaty that advances international humanitarian law (IHL). In a ceremony in Oslo, ninety-four countries signed and four ratified the Convention on Cluster Munitions, which is the most significant weapons treaty in a decade.<sup>1</sup> By 28 September 2009, six more states had become signatories and seventeen more had submitted instruments of ratification.<sup>2</sup> Both a humanitarian and disarmament instrument, the convention bans the use, production, transfer, and stockpiling of cluster munitions and establishes post-conflict remedial measures designed to minimize harm to civilians. After decades of cluster munition use and widespread civilian casualties, the new convention has the potential to eliminate deaths and injuries from this type of weapon in the future.

The treaty is important not only for the effect it will have on the conduct of armed conflict but also for the legal precedent it sets. First, the Convention on Cluster Munitions builds on previous instruments to apply to a wider range of weapons. It expands coverage to include both munitions that function properly and those that do not. It also broadens the definition of weapons to be banned by narrowing exclusions with specific and cumulative technical criteria. Second, the Convention on Cluster Munitions introduces provisions that increase the humanitarian impact of the treaty. It revolutionizes victim assistance with added requirements, especially for affected states, and it imposes responsibility on user states to assist with clearance of weapons contamination that predates the treaty. It also mandates that states parties promote the norms of the treaty in their relations with states not party. Finally, the convention paves the way for future weapons treaties to address the threats posed by entities not party to the treaty. It is the first weapons treaty to identify non-state armed groups (NSAGs) as potential users and suggests, in its preamble, that states parties have a duty to prevent them from acting contrary to the convention. With this three-pronged approach of extending past treaties, creating new obligations, and anticipating future concerns, the convention establishes broad-based precedent.

Part II of this paper introduces cluster munitions and the Convention on Cluster Munitions. The next three parts analyze the precedents the convention sets with particular emphasis on its humanitarian advancements. Part III explains how it adapts previous models to expand the convention's cover-

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1. Convention on Cluster Munitions, *adopted* 30 May 2008, Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, *available at* <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf>.
  2. See Cluster Munition Coalition (CMC), 9 Ratifications Needed Until Entry into Force!, *available at* <http://www.stopclustermunitions.org/treatystatus/>.

age and definition. Part IV examines how it creates new obligations related to victim assistance, retroactive user state responsibility for clearance, and universalization of the convention. Part V discusses how the treaty paves the way for dealing with NSAGs. The paper concludes that the Convention on Cluster Munitions' comprehensive and forward-looking character will enable it to reduce civilian casualties from these particular weapons while breaking new ground for future weapons treaties.

## II. BACKGROUND ON THE WEAPON AND THE CONVENTION

During the Vietnam War, the United States introduced cluster munitions in their modern form with devastating results.<sup>3</sup> Cluster munitions proved to have a two-fold humanitarian impact; from Laos to Lebanon, they have caused civilian casualties both at the time of attack and afterwards. After years of failed attempts to regulate the weapons, negotiations to create a treaty to ban them began in earnest in 2007. An independent, expedited process, which involved both states and civil society, produced a comprehensive weapons treaty that combines humanitarian and disarmament elements.<sup>4</sup> The

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3. HUMAN RIGHTS WATCH, TIMELINE OF CLUSTER MUNITION USE FACT SHEET (June 2009), available at <http://www.hrw.org/en/news/2009/06/04/cluster-munition-information-chart>. German and Soviet forces dropped early forms of cluster munitions, including "butterfly bombs," during World War II, but most people accept the Vietnam War as the first major use. See *id.*; Stephen D. Goose, *Cluster Munitions in the Crosshairs: In Pursuit of a Prohibition*, in BANNING LANDMINES: DISARMAMENT, CITIZEN DIPLOMACY, AND HUMAN SECURITY 217, 220 (Jody Williams, Stephen D. Goose & Mary Wareham eds., 2008).
  4. The Convention on Cluster Munitions is the latest in a series of modern weapons treaties that date back to the 1868 St. Petersburg Declaration, which prohibits use of a certain type of projectile. Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, St. Petersburg, adopted 11 Dec. 1868, reprinted in 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297 (entered into force 11 Dec. 1868) [hereinafter St. Petersburg Declaration]. These treaties all seek to regulate or ban weapons that the international community has found problematic for some reason.

Weapons treaties can be divided into two categories, which sometimes overlap. Humanitarian treaties are a subset of IHL, which "aims to mitigate the human suffering caused by war, or, as it is sometimes put, to 'humanise' war." FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 12 (2001). Early treaties strived to reduce superfluous injury to soldiers while later ones focused on minimizing the suffering of civilians. Whether safeguarding soldiers or civilians, humanitarian weapons treaties are concerned with the effects of weapons' use and the protection of individuals.

Disarmament treaties aim to control the number and types of weapons states possess. Scholars define disarmament as "the traditional term for the elimination, as well as the limitation or reduction (through negotiation of an international agreement) of the means by which nations wage war." John Borrie, *Tackling Disarmament Challenges*, in BANNING LANDMINES, *supra* note 3, at 263, 266 (quoting Robert J. Mathews & Timothy L.H. McCormack, *The Influence of Humanitarian Principles in the Negotiation of Arms Control*

Convention on Cluster Munitions addresses all aspects of cluster munitions and their civilian harm.

## A. Cluster Munitions

Cluster munitions are large weapons that spread dozens or hundreds of smaller munitions, called submunitions, over a wide area.<sup>5</sup> They can be launched from the ground or dropped from the air and are valued by armed forces for two reasons. The area effected by cluster munitions make them useful for both broad targets, such as airfields, and moving targets, such as tanks and troops. The individual submunitions are also frequently multipurpose in design having antipersonnel, anti-armor, and sometimes incendiary capabilities. The weapons were developed for Cold War-era conflicts in which armed forces faced the threat of large formations of armored vehicles or soldiers. Their utility has arguably declined in recent years as warfare has become more urban in nature.<sup>6</sup>

The humanitarian harm caused by cluster munitions far outweighs their military advantages.<sup>7</sup> First, their area effect virtually guarantees civilian ca-

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*Treaties*, 81 INT'L REV. RED CROSS 331, 333 (1999)). These treaties became increasingly common during the Cold War when the world feared the results of the arms race. While nuclear weapons treaties are classic disarmament conventions, the latter sometimes cover conventional weapons. In general, disarmament treaties emphasize international security, more than individual protection.

After the end of the Cold War, states began to negotiate weapons treaties that contained humanitarian and disarmament provisions in the same instrument. The Convention on Cluster Munitions follows the lead of the Chemical Weapons Convention and Mine Ban Treaty by combining elements of both. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *adopted* 3 Sept. 1992, 1994 U.N.T.S. 45 (*entered into force* 29 Apr. 1997) [hereinafter Chemical Weapons Convention]; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *adopted* 18 Sept. 1997, 2056 U.N.T.S. 211 (*entered into force* 1 Mar. 1999), *reprinted in* 36 I.L.M. 1507 (1997) [hereinafter Mine Ban Treaty]. The humanitarian nature of the Convention on Cluster Munitions is evident from, for example, its preamble; Article 1, which bans use; and Articles 4 and 5 on clearance and victim assistance. The convention also contains elements of a disarmament convention in Article 3 on stockpile destruction. While the Convention on Cluster Munitions combines humanitarian and disarmament provisions, this paper will focus on the precedents it sets in the former area.

5. This section borrows in part from Bonnie Docherty, *The Time Is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 61–63 (2007).
6. *Id.* at 66–69.
7. Human Rights Watch has been a leader in documenting the harm caused by cluster munitions. For more information about cluster munitions and their humanitarian problems, see, e.g., HUMAN RIGHTS WATCH, *FATALLY FLAWED: CLUSTER BOMBS AND THEIR USE BY THE UNITED STATES IN AFGHANISTAN*, vol. 14, no. 7(G) (Dec. 2002), *available at* <http://www.hrw.org/reports/2002/us-afghanistan/>; HUMAN RIGHTS WATCH, *OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ* (Dec. 2003), *available at* <http://www.hrw.org/reports/2003/>

sualties when they are used in or near populated areas where soldiers and civilians commingle. Over the past decade, all recent major conflicts in which the weapons have been used have included cluster munition strikes on towns and villages.<sup>8</sup> Second, many of the submunitions fail to explode on impact as designed, becoming explosive duds that kill and maim civilians, particularly children, for years to come. Both at the time of attack and afterwards, cluster munitions cause death and horrible injuries, such as lost eyes and limbs. The duds also contaminate farms and fields, interfering with livelihoods and causing socioeconomic devastation.

The use and proliferation of cluster munitions has been extensive. To date, at least fifteen states have used cluster munitions in thirty-two countries and disputed territories around the world. At least seventy-seven countries stockpile cluster munitions, and at least thirty-four have produced more than 210 types. At least thirteen countries have transferred to at least sixty states more than fifty types of cluster munitions. Non-state armed groups have also deployed cluster munitions.<sup>9</sup> Cluster munitions have been used, stored, or manufactured on five continents.

## B. The Convention on Cluster Munitions

The international community has recognized the need for a cluster munitions convention for decades.<sup>10</sup> In 1974, seven states proposed a legally binding instrument to ban the weapons.<sup>11</sup> Their call was reiterated by thirteen states two years later,<sup>12</sup> but afterwards the initiative went nowhere. Well-documented use in a series of recent conflicts—Kosovo, Afghanistan, and Iraq—led to renewed action. In 2001, sympathetic states and nongovernmental organizations (NGOs) started discussions in the meetings of states parties to the Convention on Conventional Weapons (CCW) (1980), a treaty that prohibits or restricts weapons that are “excessively injurious” or have “indiscriminate

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usa1203/; HUMAN RIGHTS WATCH, FLOODING SOUTH LEBANON: ISRAEL'S USE OF CLUSTER MUNITIONS IN LEBANON IN JULY AND AUGUST 2006, vol. 20, no. 2(E) (Feb. 2008), available at <http://www.hrw.org/reports/2008/lebanon0208/>; HUMAN RIGHTS WATCH, A DYING PRACTICE: USE OF CLUSTER MUNITIONS BY RUSSIA AND GEORGIA IN AUGUST 2008 (Apr. 2009), available at <http://www.hrw.org/node/82158>.

8. Use in populated areas has been documented, for example, in Afghanistan (2001), Iraq (2003), Lebanon (2006), and Georgia (2008). See Human Rights Watch reports listed in *supra* note 7.
9. HUMAN RIGHTS WATCH, A DYING PRACTICE, *supra* note 7, at 20.
10. For an overview of the history of cluster munition treaty negotiations, see Goose, *Cluster Munitions in the Crosshairs*, *supra* note 3, at 220–29.
11. See *Working Paper Submitted by Egypt, Mexico, Norway, Sudan, Sweden, Switzerland, and Yugoslavia*, at 8–9, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, CDDH/DT/2 (21 Feb. 1974).
12. See INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), CONFERENCE OF THE GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS 198–99 (1976).

effects.”<sup>13</sup> These groups wanted to add a protocol to the CCW specifically covering cluster munitions. Proponents of the weapons argued that existing IHL was adequate, but field research showed that cluster munitions continued to cause humanitarian harm.<sup>14</sup> In 2003, CCW states parties adopted Protocol V on Explosive Remnants of War (ERW).<sup>15</sup> While unexploded submunitions are a form of ERW and thus covered by the protocol, the instrument fell short because it was relatively weak and only addressed cluster munition duds. The slow nature of the CCW process and the requirement that actions be consensual hampered progress towards further reducing the danger of cluster munitions.

Two events in 2006 broke the diplomatic deadlock. An egregious example of cluster munition use called international attention to the weapons. During a five-week conflict in July and August, Israel blanketed south Lebanon with four million submunitions, leaving about one million duds, according to UN estimates. It launched most of the submunitions during the last seventy-two hours of the war when it knew a ceasefire was imminent.<sup>16</sup> Unexploded submunitions killed or injured more than 150 civilians in the first six months after the end of the conflict.<sup>17</sup> The attacks elicited widespread outrage and condemnation.<sup>18</sup>

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13. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), *adopted* 10 Oct. 1980, 1342 U.N.T.S. 137 (*entered into force* 12 Dec. 1983), *reprinted in* 19 I.L.M. 1523 (1980).
  14. This information comes from the author’s attendance at these meetings over the span of seven years. For official documents from these meetings, see UN Office at Geneva, Disarmament: The Convention on Certain Conventional Weapons, *available at* [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument). In 2009, states parties to the CCW have continued to try to negotiate a protocol on cluster munitions. As currently proposed, such an instrument would be much weaker than the Convention on Cluster Munitions, but it might garner the support of states that have not signed the convention, such as the United States and Russia. The CMC and some signatories of the Convention on Cluster Munitions have criticized the current CCW protocol draft because it would create a regulatory alternative to the absolute convention, water down the convention’s legal precedent, and potentially decrease the treaty’s stigma. For the April 2009 draft of the proposed protocol, see *Procedural Report*, CCW Group of Governmental Experts, 2d Sess., at 4–16, U.N. Doc. CCW/GGE/2009-II/2 (22 Apr. 2009).
  15. Protocol on Explosive Remnants of War (CCW Protocol V), *adopted* 28 Nov. 2003, U.N. Doc. CCW/MSP/2003/2 (2003) (*entered into force* 12 Nov. 2006).
  16. See generally HUMAN RIGHTS WATCH, FLOODING SOUTH LEBANON, *supra* note 7. Although UN officials initially estimated that Israel’s cluster munition attacks left about one million unexploded submunitions, deminers later revised that figure, cutting it in half. *Lebanon: Funding Shortfall Threatens Cluster Bomb Demining*, IRIN, 14 May 2009, *available at* <http://www.irinnews.org/Report.aspx?ReportId=84384>.
  17. By 1 January 2009, 320 civilians and deminers had been killed or injured by cluster munition duds. UN Mine Action Coordination Center–South Lebanon, Civilian Cluster Bomb Victims Graph since 14 August 2006 up to 01 January 2009, *available at* <http://www.maccsl.org/reports/Victims/Victims.pdf>.
  18. For example, the UN humanitarian chief, Jan Egeland, described the attacks as “shocking and completely immoral.” The UN humanitarian coordinator for Lebanon, David Shearer, said, “For a humanitarian person, it defies belief that this would happen.” *UN Denounces Israel Cluster Bombs*, BBC NEWS, 30 Aug. 2006, *available at* <http://>

In the months that followed, the CCW stalemate became evident. In November, states parties to the CCW met for a review conference that would determine their work plan for the next five years. At that meeting, nearly thirty states, joined by the Cluster Munition Coalition (CMC), a group that now consists of about 300 NGOs;<sup>19</sup> the International Committee of the Red Cross (ICRC);<sup>20</sup> and the UN Secretary-General<sup>21</sup> called for a mandate to negotiate a protocol.<sup>22</sup> States parties could not reach consensus, however, and agreed only to continue discussions about the “application and implementation of existing [IHL] . . . with particular focus on cluster munitions.”<sup>23</sup> Spurred on by the situation in Lebanon and the failure of the review conference to respond, Norway pledged to initiate a treaty process outside the CCW to ban all cluster munitions “that have unacceptable humanitarian consequences.”<sup>24</sup>

The Oslo Process that resulted accomplished in fifteen months what other initiatives had been unable to do in more than thirty years. In February 2007, forty-six states adopted the Oslo Declaration that called for a prohibition, by the end of 2008, on “the use, production, transfer, and stockpiling of cluster munitions that cause unacceptable harm to civilians” as well as measures on stockpile destruction, clearance, victim assistance, and risk education.<sup>25</sup> International diplomatic conferences in Lima, Peru; Vienna, Austria; Wellington, New Zealand; and Dublin, Ireland followed the Oslo

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news.bbc.co.uk/2/hi/middle\_east/5299938.stm; *Israel Pressed on Cluster Targets*, BBC NEWS, 19 Sept. 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/5360150.stm](http://news.bbc.co.uk/2/hi/middle_east/5360150.stm). See also HUMAN RIGHTS WATCH, FLOODING SOUTH LEBANON, *supra* note 7, at 100–03 (discussing UN and US investigations of Israel’s use of cluster munitions).

19. Statement of the CMC, to the Third Review Conference of the CCW (7 Nov. 2006), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7C7CB9BF595CBC7FC1257289003C94F4/\\$file/061108+CMC.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7C7CB9BF595CBC7FC1257289003C94F4/$file/061108+CMC.pdf). For more information on the CMC, see <http://www.stopclustermunitions.org>.
20. Statement of Dr. Philip Spoerri, Director for International Law and Cooperation within the Movement, ICRC, to the Third Review Conference of the CCW (7 Nov. 2006), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/3AE6F898E57895B1C125722000482BB7/\\$file/29+ICRC.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/3AE6F898E57895B1C125722000482BB7/$file/29+ICRC.pdf).
21. Message of the UN Secretary-General, to the Third Review Conference of the CCW (7 Nov. 2006), available at [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument).
22. *Proposal for a Mandate to Negotiate a Legally-Binding Instrument that Addresses the Humanitarian Concerns Posed by Cluster Munitions*, Third Review Conference of the CCW, U.N. Doc. CCW/CONF.III/WP.1 (25 Oct. 2006); *Declaration on Cluster Munitions*, adopted 17 Nov. 2006, Third Review Conference of the CCW, U.N. Doc. CCW/CONF.III/WP.18 (2006).
23. *Final Document, Part II: Final Declaration*, Third Review Conference of the CCW, at 6, U.N. Doc. CCW/CONF.III/11 (pt. II) (17 Nov. 2006).
24. Press Release, Norwegian Ministry of Foreign Affairs, Norway Takes the Initiative for a Ban on Cluster Munitions (17 Nov. 2006).
25. Declaration, signed 23 Feb. 2007, Oslo Conference on Cluster Munitions, available at [http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20\(final\)%2023%20February%202007.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20(final)%2023%20February%202007.pdf); Press Release, CMC, Civil Society Organisations Hail Historic Agreement on Cluster Bombs (23 Feb. 2007), available at <http://www.stopclustermunitions.org/media/press-releases/?id=1642>.

meeting. At the first three conferences, states discussed major issues and developed a draft treaty text; in Dublin, they negotiated final language. The conference host countries plus the Holy See and Mexico joined Norway as the core group that guided deliberations.<sup>26</sup> The CMC played a critical role by highlighting humanitarian concerns and applying constant pressure on diplomats. More than two-thirds of the users, producers, and stockpilers of cluster munitions also participated in at least some of the meetings, which gave the process authority. In May 2008, less than a year and a half after the negotiations began, 107 participating states, with no dissenters, agreed to a groundbreaking treaty, which was opened for signature in Oslo in December 2008.<sup>27</sup> As of 28 September 2009, one hundred states had signed, and twenty-one—Albania, Austria, Burundi, Croatia, France, Germany, the Holy See, Ireland, Japan, Laos, Luxembourg, Malta, Mexico, Norway, Niger, San Marino, Sierra Leone, Slovenia, Spain, Uruguay, and Zambia—had ratified.<sup>28</sup> The convention will enter into force six months after its thirtieth ratification.<sup>29</sup>

The Oslo Process followed the pioneering example of the Mine Ban Treaty (1997) negotiations. In 1996, frustrated with the weakness of a recently concluded CCW protocol,<sup>30</sup> countries interested in banning antipersonnel landmines called for an alternative approach. A group of likeminded states, led by Canada, took it upon themselves to initiate the Ottawa Process. They went outside the CCW to create a forum that did not require consensus. Representatives of civil society, in that case the International Campaign to Ban Landmines (ICBL), collaborated with the core group and organized extensive grassroots support for the treaty. The Oslo Process borrowed from that model with its core group, independent conferences, and contributions from the CMC. The major difference was that the CMC became more directly involved in the deliberations, sending hundreds of campaigners to meetings and participating actively in the negotiating room. The Oslo Process showed that the Mine Ban Treaty's approach was not an exception, but a model that could be adapted to develop new international law, especially in the weapons context.<sup>31</sup>

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26. See Convention on Cluster Munitions, The Oslo Process, available at [http://www.clusterconvention.org/pages/pages\\_vi/vib\\_osloprocess.html](http://www.clusterconvention.org/pages/pages_vi/vib_osloprocess.html).

27. For a list of the 107 participating countries, all of whom adopted the convention, see *List of Delegates*, Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/INF/1, 30 May 2008, available at <http://www.clustermunition-sdublin.ie/pdf/CMWebNewListOfDelegates.pdf>.

28. For a list of the states that have signed and ratified the Convention on Cluster Munitions, see CMC, *9 Ratifications Needed Until Entry into Force!*, *supra* note 2.

29. Convention on Cluster Munitions, *supra* note 1, art. 17.

30. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, at 14, U.N. Doc CCW/CONF.I/16 (Part 1) (1996) entered into force 3 Dec. 1998, reprinted in 35 I.L.M. 1206 (1996) [hereinafter CCW Amended Protocol II].

31. Interview with Steve Goose, Director, Arms Division, Human Rights Watch, and Co-Chair, CMC, in Washington, D.C. (24 July 2008) ("The way the treaty came about is

As envisioned in the Oslo Declaration, the Convention on Cluster Munitions consists of two types of obligations. The negative obligations, brief but the basis for the whole instrument, are laid out in Article 1. It requires states “never under any circumstances” to use or “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions” or to assist anyone with these prohibited acts.<sup>32</sup> Subsequent articles detail the positive obligations. This part of the treaty establishes requirements for stockpile destruction, clearance and risk education, victim assistance, international cooperation and assistance, transparency, compliance, and national implementation measures.<sup>33</sup> The text also includes the procedural articles found in most conventions and prohibits any reservations.<sup>34</sup> The Convention on Cluster Munitions establishes higher standards than previous instruments, such as the Mine Ban Treaty and CCW Protocol V. The most notable precedents it sets will be discussed below, but it also raised the bar in several other areas, including clearance, international cooperation and assistance, and transparency.<sup>35</sup> Together, its provisions create a treaty that comprehensively addresses the humanitarian concerns posed by the weapons.

### III. EXTENDING PAST TREATIES: COVERAGE AND DEFINITION

The Convention on Cluster Munitions builds on existing international law to increase the comprehensiveness of weapons treaties. It adapts the Mine Ban Treaty’s model of combining preventive and remedial measures to cover the entire life cycle of a munition. It also takes a previously used structure for a definition a step further by requiring, under a chapeau highlighting the need to avoid the negative effects of the weapons, very specific and cumulative technical criteria for exclusions. These precedent-setting changes create the expanded coverage and categorical definition necessary for this and future treaties to accomplish their goals.

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almost as important as the treaty itself. . . . It shows it is possible and desirable to lay down new [IHL] rules that apply to specific weapons and circumstances.”). See also Goose, *Cluster Munitions in the Crosshairs*, *supra* note 3.

32. Convention on Cluster Munitions, *supra* note 1, art. 1(1).

33. *Id.* arts. 3–9.

34. *Id.* arts. 10–20, 22–23.

35. For example, Article 4(2) of the Convention on Cluster Munitions includes more detailed clearance obligations, such as mandating that states parties “assess and prioritise” civilian needs, develop national plans for clearance, and conduct risk reduction education. Article 6 obligates states parties to provide assistance for emergencies and economic and social recovery. Article 7 requires states parties to report on stockpiles found after other stockpiles have been destroyed; the amount of resources devoted to stockpile destruction, clearance, and victim assistance; and the “amounts, types and destinations of international cooperation and assistance.” Compare *id.* arts. 4(2), 6(6), 6(8), 7(1), with Mine Ban Treaty, *supra* note 4, arts. 5(2), 6, 7(1), and CCW Protocol V, *supra* note 15, arts. 3(3), 8. CCW Protocol V does not have an article on transparency.

## A. Coverage

The Convention on Cluster Munitions expands the coverage of weapons treaties to deal with munitions both when they function properly and when they do not. Its preamble says that states parties are “[d]etermined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.”<sup>36</sup> The convention’s preventive measures appear in Article 1, which prohibits use, production, stockpiling, and transfer of cluster munitions as well as assistance with those activities.<sup>37</sup> This article seeks to end the harm of cluster munitions by preventing future use. The treaty also contains remedial measures that deal primarily with the effects of cluster munitions that have been used and failed. They include clearance of unexploded submunitions, risk education about the dangers of these submunitions, assistance for victims hurt not only at the time of attack but also from duds, and international cooperation and assistance for affected states.<sup>38</sup> Together the two prongs cover the humanitarian threats posed by cluster munitions at the time of attack and afterwards, which for these weapons generally coincides with whether they worked as designed or not.

Past weapons treaties have addressed the effects of either use or malfunctioning, but not both. Many conventions prohibit the former. The St. Petersburg Declaration started this trend when it called for an end to the use of certain projectiles.<sup>39</sup> Other treaties with similar preventive obligations that represent absolute bans include: The Hague Declarations on projectiles from balloons (1899 and 1907),<sup>40</sup> asphyxiating gases (1899),<sup>41</sup> and “dum dum” bullets (1899),<sup>42</sup> and the 1925 Geneva Protocol on Gases.<sup>43</sup> More recently,

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36. Convention on Cluster Munitions, *supra* note 1, pmb1.

37. *Id.* art. 1(1).

38. *Id.* arts. 4–6.

39. St. Petersburg Declaration, *supra* note 4.

40. Hague Declaration (IV, 1) to Prohibit for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, *adopted* 29 July 1899, 26 Martens Nouveau Recueil (ser. 2) 994, 187 Consol. T.S. 456 (*entered into force* 4 Sept. 1900); Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, *adopted* 18 Oct. 1907, 3 Martens Nouveau Recueil (ser. 3) 745, 205 Consol. T.S. 403 (*entered into force* 27 Nov. 1909). These declarations have since expired.

41. Hague Declaration (IV, II) Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, *adopted* 29 July 1899, 26 Martens Nouveau Recueil (ser. 2) 998, 187 Consol. T.S. 453 (*entered into force* 4 Sept. 1900).

42. Hague Declaration (IV, III) Concerning the Prohibition of the Use of Expanding Bullets, *signed* 29 July 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459 (*entered into force* 4 Sept. 1900). “Dum dum bullets flatten or expand on impact, creating a larger wound.” Docherty, *The Time is Now*, *supra* note 5, at 56, n.18.

43. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *adopted* 17 June 1925, 94 L.N.T.S. 65 (*entered into force* 8 Feb. 1928).

CCW Protocols I on Non-Detectable Fragments (1980)<sup>44</sup> and IV on Blinding Lasers (1995),<sup>45</sup> the Chemical Weapons Convention (1993)<sup>46</sup> and the Mine Ban Treaty<sup>47</sup> also prohibit use under all circumstances. Such provisions are essential for preventing the direct harm caused by employment of specific weapons.

CCW Protocol V, by contrast, applies to ERW, which encompass weapons that malfunction. The definition of ERW includes unexploded ordnance, which means ordnance that “may have been fired, dropped, launched or projected and should have exploded but failed to do so.”<sup>48</sup> To reduce the harm caused by ERW, Protocol V has remedial articles on clearance, recording and exchange of information on use, and risk education.<sup>49</sup> It is a comparatively weak instrument, however, because many of its provisions are qualified with phrases such as “as soon as feasible,”<sup>50</sup> “as far as practicable,”<sup>51</sup> and “in a position to do so.”<sup>52</sup> Furthermore, its preventive measures are designed to prevent weapons from becoming ERW, not from being used, and are only voluntary.<sup>53</sup> Protocol V is the only previous weapons convention to cover the effects of failed weapons, but unlike the Convention on Cluster Munitions, it contains no obligations that prohibit the use of weapons.

The Convention on Cluster Munitions builds on its most important predecessor, the Mine Ban Treaty, by merging preventive and remedial measures, and in the process it covers weapons that have functioned properly or failed.<sup>54</sup> The Mine Ban Treaty prohibits use of antipersonnel mines while simultaneously requiring, for example, clearance, victim assistance, and mine risk education.<sup>55</sup> The Convention on Cluster Munitions adopts com-

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44. Protocol on Non-Detectable Fragments (CCW Protocol I), *adopted* 10 Oct. 1980, 1342 U.N.T.S. 168 (*entered into force* 2 Dec. 1983), *reprinted in* 19 I.L.M. 1529 (1980).
  45. Protocol on Blinding Laser Weapons (CCW Protocol IV), *adopted* 13 Oct. 1995, at 13, art. 1, U.N. Doc. CCW/CONF.I.16 (Part 1) (2006) (*entered into force* 30 July 1998).
  46. Chemical Weapons Convention, *supra* note 4, art. 1(1)(b).
  47. Mine Ban Treaty, *supra* note 4, art. 1(1)(a).
  48. CCW Protocol V, *supra* note 15, art. 2(2). ERW also includes abandoned explosive ordnance, ordnance that was not used but “has been left behind or dumped by a party to an armed conflict.” *Id.* art. 2(3). ERW does not cover mines. *Id.* art. 2(1).
  49. *Id.* arts. 3–5.
  50. *Id.* art. 3(2), (3).
  51. *Id.* art. 4(2).
  52. *Id.* arts. 7(2), 8(1)–(3).
  53. *Id.* art. 9.
  54. The weaker CCW Amended Protocol II on Mines, Booby-Traps and Other Devices, which led to the Mine Ban Treaty, also bans use of certain kinds of mines and requires clearance. See CCW Amended Protocol II, *supra* note 30.
  55. Mine Ban Treaty, *supra* note 4, arts. 1(1)(a), 5, 6(3). The much earlier Hague Sea Mines Convention follows a similar model of preventive and remedial measures, banning some use and requiring clearance. It does not have an absolute prohibition on use, however, covering only sea mines that do not “become harmless one hour at most after the person who laid them ceases to control them.” Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, arts. 1, 3, 5, *adopted* 18 Oct. 1907, 3 Martens Nouveau Recueil (ser. 3) 580, 205 Consol. T.S. 331 (*entered into force* 26 Jan. 1910).

parable provisions, but cluster munitions are fundamentally different from mines. When antipersonnel mines explode after a conflict, they may harm unintended victims but are still technically functioning as designed, that is, human contact detonated them. Submunitions, by contrast, are designed to explode on impact not on contact. When they explode after a strike, it is because they failed to function. The Convention on Cluster Munitions for the first time includes both preventive and remedial measures for munitions beyond those designed to be victim activated. In doing so, it expands the coverage of weapons treaties to govern munitions both as active instruments and remnants of war.

A treaty that covers the dual impact of cluster munitions is essential for addressing the humanitarian problems of these weapons. As explained above, the international community condemns cluster munitions because they kill and injure civilians both during strikes and after. The convention's prohibition on future use of cluster munitions will minimize casualties from the weapons' deadly area effect during strikes. Remedial requirements, including clearance of existing unexploded submunitions, will reduce the harm from weapons prone to failure.

The Convention on Cluster Munitions draws on the preventive/remedial model to push IHL in a new direction. Future treaties can use this precedent to address the humanitarian harm caused by weapons not only when they function but also when they fail. As states are on notice that the law could apply to both aspects of weapons, the Convention on Cluster Munitions may deter them from designing ones likely to fail. The convention's coverage could also be applied, by analogy, to other munitions that require cleanup after use. Just as cluster munition duds contaminate villages and farms, the byproducts of some weapons contaminate the environment. Treaties governing the latter could now more easily require remediation as well as prohibition of use. Whatever the type of weapon, this new coverage is a step forward for humanitarian law, which seeks to eliminate civilian casualties whenever and however they occur.

## B. Definition

The convention's definition also builds on the precedent of past weapons treaties. It adapts an existing structure to create a broader definition of a weapon and highlights area effect as a problem. Article 2(2) begins with an overarching definition of cluster munition based on its technical characteristics. It says, "'Cluster munition' means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions."<sup>56</sup> The

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56. Convention on Cluster Munitions, *supra* note 1, art. 2(2).

rest of Article 2(2) adds to the definition by enumerating weapons that are not cluster munitions. Paragraphs 2(a) and (b) list munitions that do not fall under the definition, including those designed to dispense flares or smoke or to have air defense capacities or electrical effects.<sup>57</sup> Paragraph 2(c) specifies with technical criteria which other munitions that carry submunitions are excluded from the definition.<sup>58</sup> The definition of cluster munition contains exclusions, that is, categories of weapons that are not encompassed by the definition, but no exemptions, that is, exceptions that would make some types of cluster munitions acceptable. As a result, the ban on cluster munitions is complete as well as absolute.

While other weapons treaties have definitions with exclusions,<sup>59</sup> the Convention on Cluster Munitions raises the bar for a categorical definition. The narrowness of the exclusion under Article 2(2)(c) affirms the comprehensive nature of the definition. The provision says, in full, that cluster munition

does not mean . . .

- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
- (i) Each munition contains fewer than ten explosive submunitions;
  - (ii) Each explosive submunition weighs more than four kilograms;
  - (iii) Each explosive submunition is designed to detect and engage a single target object;
  - (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
  - (v) Each explosive submunition is equipped with an electronic self-deactivating feature.<sup>60</sup>

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57. *Id.* art. 2(2)(a), (b) (excluding munitions “designed to dispense flares, smoke, pyrotechnics or chaff,” “designed exclusively for an air defence role,” or “designed to produce electrical or electronic effects”).

58. *Id.* art. 2(2)(c).

59. CCW Protocol III on Incendiary Weapons, for example, explains first what is regulated: “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.” It then has a list of munitions that are excluded from the definition, such as tracers and smoke systems that have “incidental incendiary effects.” Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (CCW Protocol III), *adopted* 10 Oct. 1980, art 1(1), 1342 U.N.T.S. 171 (*entered into force* 12 Feb. 1983). Other treaties, including the Chemical Weapons Convention and Mine Ban Treaty, adopt this model of definition with exclusions. Chemical Weapons Convention, *supra* note 4, art. II(1); Mine Ban Treaty, *supra* note 4, art. 2(1). The exclusions in these treaties are not as detailed and narrow as those in the Convention on Cluster Munitions.

60. Convention on Cluster Munitions, *supra* note 1, art. 2(2)(c).

Both the effects of cluster munitions and their technical characteristics inform the exclusion and thus the definition.

The chapeau of Article 2(2)(c) states the purpose of the exclusion in terms of the effects of cluster munitions. It addresses the harm caused by the weapons both at the time of attack and afterwards. The chapeau states that excluded munitions must meet certain criteria "in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions."<sup>61</sup> It indicates that, to be excluded, weapons should "avoid" the humanitarian dangers of cluster munitions. The effects-based chapeau strengthens the definition by pushing states parties to consider the impact of weapons instead of only their technical qualities when determining if they fall under the exclusion.

The next five subparagraphs lay out binding requirements for exclusion based on technological criteria. Like the chapeau, they address the dual effects of cluster munitions. Subparagraphs i, ii, and iii, on the number of submunitions, their size, and their precision, pertain to the weapons' area effect.<sup>62</sup> Subparagraphs iv and v, requiring redundant mechanisms designed to be fail safe, deal with duds. The individual criteria are highly detailed and therefore restrictive. They are also cumulative; the provision stipulates that excluded munitions must have "all of the following characteristics."<sup>63</sup> Although having no exclusions would make for a stronger instrument, the convention's specific and cumulative technical criteria for exclusion, placed in the context of the weapons' effects, create a sweeping definition of cluster munition.

The Convention on Cluster Munitions takes a step forward not only by broadening the definition but also by specifically condemning a weapon's area effect.<sup>64</sup> The chapeau of Article 2(2)(c) expresses the need to "avoid indiscriminate area effects."<sup>65</sup> The third criteria below the chapeau requires weapons excluded by the treaty to "detect and engage a single target object," in other words not to have a broad area effect.<sup>66</sup> The second paragraph of the treaty's preamble supports these definitional provisions when it refers to the suffering "caused by cluster munitions at the time of their use," suffering that emanates from the weapon's broad dispersal of submunitions that kills civilians as well as soldiers.<sup>67</sup> CCW Protocol III on Incendiary Weapons also

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61. *Id.*

62. The size of the submunitions matters for area effect because it prevents "miniaturisation" of the weapons, which would allow an individual cluster munition container to carry and thus spread more of them. See RICHARD MOYES, IMPLICATIONS OF THE CONVENTION ON CLUSTER MUNITIONS FOR DEVELOPING A NORM AGAINST AREA-EFFECT USE OF EXPLOSIVE WEAPONS 3 (July 2008), available at <http://www.landmineaction.org/resources/resource.asp?resID=1103>.

63. Convention on Cluster Munitions, *supra* note 1, art. 2(2)(c) (emphasis added).

64. Telephone Interview with Richard Moyes, Policy and Researcher Director, Landmine Action, and Co-Chair, CMC, in Exeter, UK (26 June 2008). For more information on this argument, see also MOYES, *supra* note 62.

65. Convention on Cluster Munitions, *supra* note 1, art. 2(2)(c).

66. *Id.* art. 2(2)(c)(iii).

67. *Id.* pmb1.

deals with weapons that have an area effect, but the Convention on Cluster Munitions more explicitly makes clear that this characteristic underlies the prohibition on cluster munitions.

The convention's definition of cluster munition with its narrow exclusions seeks to render obsolete weapons that have been causing humanitarian harm for decades. Because it has no exceptions, the convention bans all cluster munitions that have been used in conflict.<sup>68</sup> Furthermore, very few existing munitions that resemble cluster munitions—only the German SMARt-155, the French and Swedish BONUS, and the now discontinued US SADARM, which all have just two submunitions—fall under the exclusion in Article 2(2)(c).<sup>69</sup> Of these, only SADARM has been used in combat—by the United States in Iraq in 2003.<sup>70</sup> The definition even bans the high-tech US Sensor Fuzed Weapon, which was also used in Iraq and is similar to SADARM except that it has more submunitions.<sup>71</sup> By prohibiting a wide range of weapons, the definition will broaden the stigmatization of cluster munitions.

The Convention on Cluster Munitions could also affect how future weapons treaties define what weapons they cover. Article 2(2)(c) could serve as a model for limiting exclusions by establishing specific and cumulative technical criteria, such as size, precision, and the protection against failure, and joining them with effects-based language. Furthermore, according to Richard Moyes, co-chair of the CMC and its lead advocate on definitions in Dublin, the definition's emphasis on area effect is a "huge benchmark in our ability to engage and analyze other types of unitary weapons that create the same area effect in practice."<sup>72</sup> In both its narrow exclusions and condemnation of area effects, the convention's definition of cluster munitions strengthens precedent for more civilian protections in future weapons treaties.

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68. Steve Goose, Director, Arms Division, Human Rights Watch, and Co-Chair, CMC, Opening Remarks in the Closing Press Conference of the Dublin Diplomatic Conference on Cluster Munitions (30 May 2008), available at <http://www.hrw.org/en/news/2008/05/30/opening-remarks-closing-press-conference-dublin-diplomatic-conference-cluster-munitions>.

69. CMC, CMC BRIEFING PAPER ON THE CONVENTION ON CLUSTER MUNITIONS 3, available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/08/cmc-briefing-paper-on-ccm-english-long.pdf>.

70. For information on SADARM, see HUMAN RIGHTS WATCH, OFF TARGET, *supra* note 7, at 82, 84–85.

71. For information on the Sensor Fuzed Weapon, see *id.* at 56, 60–61.

72. Telephone Interview with Richard Moyes, *supra* note 64. Some artillery shells, for example, spread shrapnel over a large footprint; a 155mm shell shoots about 2,000 metal fragments over an area with a radius of up to 300 meters and thus is an inappropriate weapon for populated areas. HUMAN RIGHTS WATCH, INDISCRIMINATE FIRE: PALESTINIAN ROCKET ATTACKS ON ISRAEL AND ISRAELI ARTILLERY SHELLING IN THE GAZA STRIP, vol. 19, no. 1(E), at 51 (July 2007), available at <http://hrw.org/reports/2007/iptables>. Even if a certain type of area effect weapon is not a current candidate for a complete prohibition, its use in populated areas should be banned.

#### IV. CREATING NEW OBLIGATIONS: VICTIM ASSISTANCE, USER STATE RESPONSIBILITY FOR CLEARANCE, AND RELATIONS WITH STATES NOT PARTY TO THE CONVENTION

The Convention on Cluster Munitions dramatically advances international law in several ways. It greatly expands and strengthens victim assistance obligations, which are designed to help those impacted by cluster munitions. It adds a provision establishing user state responsibility for assisting clearance of duds, regardless of when they were left. It also creates a positive obligation to promote universalization of the convention and its principles, although in the same article it raises questions about what assistance to states not party is prohibited. These provisions break new legal ground, and with one ambiguous exception, they increase humanitarian assistance and protection.

##### A. Victim Assistance

The most groundbreaking achievement of the Convention on Cluster Munitions occurred in the sphere of victim assistance. Several related provisions, spread throughout the treaty, offer support for victims. The preamble devotes five paragraphs to victim assistance, laying out states parties' intention to care for those harmed by cluster munition strikes and duds. The first of these paragraphs says that states are "[d]etermined also to ensure the full realization of the rights of all cluster munition victims and *recognis[e]* their inherent dignity."<sup>73</sup> The paragraphs that follow express commitment to provide physical and psychological assistance, acknowledge age and gender needs, refer to the principles of the Convention on the Rights of Persons with Disabilities, and resolve to avoid discrimination.<sup>74</sup>

Binding victim assistance provisions appear in four articles of the convention. The first term defined in Article 2 is "cluster munition victims," which broadly encompasses killed and injured individuals as well as families and communities.<sup>75</sup> Article 5, devoted exclusively to victim assistance, articulates the core obligations for affected states. Paragraph 1 requires that states parties, for victims within their jurisdiction, "adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion." Paragraph 2 outlines how states parties must fulfill these obligations.<sup>76</sup> Article 6 on international cooperation and assistance requires all

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73. Convention on Cluster Munitions, *supra* note 1, pmb1.

74. *Id.*

75. *Id.* art. 2(1).

76. *Id.* art. 5.

states parties—affected or not—“in a position to do so” to assist with the implementation of Article 5.<sup>77</sup> Finally, Article 7 on transparency obligates affected states parties to report on the “status and progress of implementation” and to collect data concerning cluster munition victims.<sup>78</sup>

Previous weapons treaties do not include such extensive provisions for meeting victims’ needs. Only two mention victim assistance: the Mine Ban Treaty and CCW Protocol V. The former was the first weapons treaty to provide for assistance for victims although it does so briefly. In its preamble, states parties say they wish “to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims.”<sup>79</sup> The Mine Ban Treaty’s Article 6(3) on international cooperation and assistance turns that aspiration into an obligation, saying, “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.”<sup>80</sup> Protocol V essentially replicates the latter provision of the Mine Ban Treaty in its Article 8(2) on cooperation and assistance.<sup>81</sup>

The Convention on Cluster Munitions moves beyond its predecessors in five major ways. First, in Article 2(1), it includes a definition of cluster munition victims where there was none before. It says that:

“Cluster munition victims” means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalization or substantial impairment of the realization 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>82</sup>

The definition of cluster munition victim receives prominence in the treaty, appearing even before the definition of cluster munition. It encompasses a wide range of people affected by the weapons, all of whom are entitled to receive assistance.

Second, the Convention on Cluster Munitions devotes an entire article, Article 5, to victim assistance. States’ decision to structure the treaty this way demonstrates their commitment to the issue and allows for new and much more detailed obligations than previously established. The article requires affected states parties to care for the victims in their jurisdiction.<sup>83</sup> In past

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77. *Id.* art. 6(7).

78. *Id.* art. 7(1)(k).

79. Mine Ban Treaty, *supra* note 4, pmb1.

80. *Id.* art. 6(3).

81. CCW Protocol V, *supra* note 15, art. 8(2). Besides applying to ERW rather than mines, this article differs from the Mine Ban Treaty only in that it removes the reference to awareness programs.

82. Convention on Cluster Munitions, *supra* note 1, art. 2(1).

83. *Id.* art. 5(1).

treaties, states parties “in a position to do so” generally bore the burden, which meant that affected states parties could avoid their responsibility by saying they were not in a position to provide help.<sup>84</sup> The article also adds requirements for “age- and gender-specific assistance” and “psychological support” that do not appear in earlier treaties.<sup>85</sup> Additional enumerated obligations include developing a national implementation plan and budget with timeline, consulting and thus empowering victims, and following “good practices” of assistance.<sup>86</sup> Article 5 is precedent-setting because it is both separate and detailed.

Third, the Convention on Cluster Munitions creates new reporting requirements in Article 7(1)(k). It requires affected states parties to report to the UN Secretary-General about their implementation of Article 5.<sup>87</sup> This obligation is not present in earlier conventions. Although the Mine Ban Treaty has transparency provisions related to other obligations, such as stockpile destruction and national implementation, it does not require such information for victim assistance.<sup>88</sup> Article 7(1)(k) will help states and organizations monitor affected states parties’ progress and enforce Article 5.

Fourth, the Convention on Cluster Munitions makes all of the victim assistance provisions in its body legal obligations by using the word “shall.” The word appears in both paragraphs of Article 5 and in Articles 6(7) and 7(1)(k).<sup>89</sup> “Shall” is qualified in Article 6(7) on international cooperation and assistance with the phrase “in a position to do so,” but that approach to cooperation has precedent in the Mine Ban Treaty.<sup>90</sup> The other provisions are not qualified and set binding obligations for affected states parties.

Finally, the Convention on Cluster Munitions applies human rights law as well as IHL to victim assistance. It uses the language of victims’ rights in the preamble and definition and says in Article 5 that states parties shall provide assistance “in accordance with applicable international humanitarian law and human rights law.”<sup>91</sup> The mention of rights fits with the assignment of primary responsibility to affected states parties because human rights law generally places a duty on states to care for their own people. The Convention on the Rights of People with Disabilities (CRPD), which came into force in May 2008, is particularly timely and relevant to survivors of cluster munitions who are often disabled. The CRPD sets standards for “promot[ing], protect[ing] and ensur[ing] the full and equal enjoyment of

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84. Mine Ban Treaty, *supra* note 4, art. 6(3); CCW Protocol V, *supra* note 15, art. 8(2).

85. Convention on Cluster Munitions, *supra* note 1, art. 5(1).

86. *Id.* art. 5(2).

87. *Id.* art. 7(1)(k).

88. Mine Ban Treaty, *supra* note 4, art. 7.

89. Convention on Cluster Munitions, *supra* note 1, arts. 5, 6(7), 7(1)(k).

90. *Id.* art. 6(7); Mine Ban Treaty, *supra* note 4, art. 6(3).

91. Convention on Cluster Munitions, *supra* note 1, pmb., arts. 2(1), 5(1).

all human rights and fundamental freedoms by all persons with disabilities, and . . . promot[ing] respect for their inherent dignity.”<sup>92</sup> The repeated references to rights in the Convention on Cluster Munitions will help ensure that victims of cluster munitions are treated in ways that meet current standards for people with disabilities.

These new provisions revolutionize how IHL deals with victim assistance and represent a huge achievement for survivor advocates. There are thousands of cluster munition survivors who have lost limbs or suffered other serious injuries. Most live in developing countries where good medical care is hard to come by. Their families and communities have also been affected. In addition to the psychological trauma of having loved ones killed or maimed, these victims bear an undue socioeconomic burden, having to support themselves with fewer family members and often on farms contaminated with submunition duds. The Convention on Cluster Munitions, and in particular Article 5, will improve and facilitate care of victims, defined broadly, and help reintegrate them into society.

The expansive, detailed, and rights-based obligations also provide models for other weapons instruments. The Mine Ban Treaty’s Article 6(3), which requires states parties “in a position to do so” to provide assistance to victims, led to the inclusion of almost identical language in CCW Protocol V. Now the baseline will be the stronger provisions of the Convention on Cluster Munitions. Kenneth Rutherford, co-founder of Survivor Corps and leader of CMC’s victim assistance advocacy, said, “This is a huge positive development that set the bar so high. . . . Whatever treaties address in the future, if there is any victim assistance component, the standard will be the Convention on Cluster Munitions.”<sup>93</sup> The convention establishes precedent for how to assist victims of cluster munitions and other weapons and has the potential to enhance the humanitarian character of new weapons treaties.

## B. User State Responsibility for Clearance

The Convention on Cluster Munitions is the first weapons treaty to place special responsibility for clearance of ERW on states parties that have used weapons, regardless of when the use occurred.<sup>94</sup> Article 4(4) applies to duds

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92. Convention on the Rights of Persons with Disabilities, *adopted* 13 Dec. 2006, G.A. Res. A/61/106, U.N. GAOR, 61st Sess., art. 1, U.N. Doc. A/RES/61/106 (2007) (*entered into force* 3 May 2008).

93. Telephone Interview with Kenneth R. Rutherford, Co-Founder, Survivor Corps, and Associate Professor, Political Science, Missouri State University (24 June 2008).

94. This section borrows in part from *User State Responsibility for Cluster Munition Clearance*, Memorandum from Human Rights Watch to Delegates of the Wellington Conference on Cluster Munitions (19 Feb. 2008), *available at* <http://hrw.org/backgrounder/arms/arms0208/arms0208.pdf> (co-written and supervised by the author). *See also Intervention*

left by a state party prior to the entry into force of the treaty. Article 4(4) (a) says that once the treaty enters into force for both the user and affected states, the former is “strongly encouraged” to provide clearance assistance to the latter. This assistance can come in a variety of forms, including “technical, financial, material or human resources,” and be delivered directly or through a third party.<sup>95</sup> Article 4(4)(b) requires user states that give clearance assistance to provide affected states with information on types, quantities, and locations of cluster munitions used.<sup>96</sup>

No past weapons treaty imposes retroactive responsibility on user states to assist with clearance of failed weapons. CCW Amended Protocol II on Mines, Booby-Traps, and Other Devices requires states parties that laid antipersonnel mines to provide clearance assistance to affected states,<sup>97</sup> but as explained above, mines differ from cluster munitions in that their post-conflict presence is not due to failure. Because mines are still functioning as designed, their use is arguably ongoing so the clearance obligation is not retroactive. Furthermore, the Mine Ban Treaty, the stronger and more widely accepted instrument that followed CCW Amended Protocol II, did not adopt this provision.

CCW Protocol V has the provisions closest to Article 4(4) of the Convention on Cluster Munitions, but it does not go as far. In Article 7(2), Protocol V requires all states parties “in a position to do so” to “provide assistance in dealing with the problems posed by existing explosive remnants of war.”<sup>98</sup> While this provision applies to ERW that predate the treaty, it does not place a special obligation on user states. Protocol V also requires, in Article 3(1), that user states “after the cessation of active hostilities, provide where feasible, *inter alia*, financial, material or human resources assistance . . . to facilitate the marking and clearance, removal or destruction of such explosive remnants of war.”<sup>99</sup> While placing a special obligation on user

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*on Clearance and User State Responsibility (Article 4)*, Statement of Bonnie Docherty, Researcher, Arms Division, Human Rights Watch, on behalf of Human Rights Watch and the CMC, to the Wellington Conference on Cluster Munitions (20 Feb. 2008), available at <http://hrw.org/english/docs/2008/02/20/global18330.htm>; *Intervention on International Cooperation and Assistance*, Statement of Bonnie Docherty, Researcher, Arms Division, Human Rights Watch, on behalf of Human Rights Watch and the CMC, to the Vienna Conference on Cluster Munitions (7 Dec. 2007), available at <http://www.hrw.org/en/news/2007/12/07/statement-vienna-conference-cluster-munitions-international-cooperation-and-assistan>.

95. Convention on Cluster Munitions, *supra* note 1, art. 4(4)(a).

96. *Id.* art. 4(4)(b). Article 4(4) was vigorously debated throughout the negotiation process. Although the responsibility was weakened from “shall” to “is strongly encouraged,” the fact that states decided to keep it after extensive analysis shows the willingness of even initial opponents to accept some responsibility.

97. CCW Amended Protocol II, *supra* note 30, art. 10(3).

98. CCW Protocol V, *supra* note 15, art. 7(2).

99. *Id.* art. 3(1).

states, this provision does not apply to ERW left before the treaty took effect. Article 4(4) of the Convention on Cluster Munitions extends Protocol V by combining the two principles—responsibility for user states and clearance of ERW that predate a treaty.

Before the Convention on Cluster Munitions, there was precedent in different areas of law for holding states that committed past violations of new law responsible for remediation. Several international bodies, including the Human Rights Committee and the European Court of Human Rights, have held that states can be made responsible for rectifying past actions that cause present harm.<sup>100</sup> Environmental law, such as the US Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), has established the principle that polluters should clean up foreseeable contamination even if it predates the relevant legal instrument.<sup>101</sup> The Convention on Cluster Munitions adapts these legal antecedents to the weapons context.

Basic treaty law allows for the inclusion of such a provision in weapons treaties. Under the Vienna Convention on the Law of Treaties, states can agree to accept responsibility for past actions, including those that predate a treaty. While a treaty is not normally retroactive, it can be if “a different intention appears from the treaty or is otherwise established.”<sup>102</sup> Similarly, the International Law Commission’s Draft Articles on State Responsibility say, “A State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State.”<sup>103</sup> The solid legal backing for the new precedent of the Convention on Cluster Munitions will strengthen its influence beyond the current instrument.

Article 4(4) is critical to achieving the goal of the new convention. As made clear in the preamble, states intended the treaty to minimize civilian harm from cluster munitions. Because unexploded submunitions still kill civilians every year, states needed to draft a convention that ensures clearance of existing duds. User states’ assistance with clearance will help affected states meet their requirement to clear all duds in their territory. In particular the call to provide information on quantities, types, and locations of cluster

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100. *User State Responsibility for Cluster Munition Clearance*, *supra* note 94, at 6–7 (discussing Case C-1/03, *Belgium v. Van De Walle*, 2004 E.C.R. I-07613 and *Lovelace v. Canada*, Communication No. 24/1977, *adopted* 30 July 1981, U.N. GAOR, Hum. Rts. Comm., 13th Sess., ¶¶ 7.3, 13.1, 19, U.N. Doc. CCPR/C/13/D/24/1977 (1981)).

101. *Id.* (discussing US Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 103 (1980)).

102. Vienna Convention on the Law of Treaties, *adopted* 23 May 1969, art. 28, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (*entered into force* 27 Jan. 1980).

103. International Law Commission, *Draft Articles on Responsibility for States for Internationally Wrongful Acts, with Commentary*, 2(2) Y.B. INT’L L. COMM’N Cmt. to Art. 13, ¶ 6 (2001) (cited in *User State Responsibility for Cluster Munition Clearance*, *supra* note 94, at 6–7).

munitions will facilitate efficient clearance because it directs deminers to problem areas and helps them prepare for the task at hand. By contributing to the reduction of civilian casualties from previous strikes, Article 4(4) advances the humanitarian ends of the Convention on Cluster Munitions.

Article 4(4) may also change the way weapons treaties conceive of the responsibility of user states. It shows a new willingness to hold those who cause harm accountable, and the argument can now be made that there is a legal as well as a moral precedent to require user states to take responsibility for their actions. The provision's retroactive element is especially important because in a weapons ban treaty, pre-existing contamination, not future use, is the primary ongoing threat. Finally, Article 4(4) could be a model for assigning responsibility for other post-conflict remedial measures, such as victim assistance.<sup>104</sup> Retroactive user state responsibility advances the goal of civilian protection and moves weapons treaties further in the direction of humanitarian conventions.

### C. Relations with States Not Party to the Convention

Towards the end of the treaty, the Convention on Cluster Munitions introduces another original article, which is devoted exclusively to “[r]elations with States not party to [the] Convention.” Article 21 was inserted during final negotiations in Dublin and was hotly contested. While it establishes new precedent, it also raises questions of interpretation. The first two paragraphs of Article 21 strongly support the spirit of the treaty and advance its humanitarian goals. The last two, more controversial paragraphs do not strengthen the convention and, depending on how they are interpreted, have the potential to contradict obligations laid out elsewhere in the treaty.

In a positive step, Article 21(1) and (2) create legal obligations to promote acceptance of the treaty and its norms. Paragraph 1 on universalization says, “Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.”<sup>105</sup> Paragraph 2 requires states parties to make allies aware of their commitments under the treaty and to press other states to abide by, if not accede to, it. It says, “Each State Party shall notify the governments of all States not party to this Convention, [and involved with joint operations with the State Party], of its obligations under

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104. During negotiations in Dublin, some states called for including a provision establishing user state responsibility for victim assistance. See, e.g., *Summary Record of Second Session of the Committee of the Whole*, 20 May 2008, Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, at 10–11, CCM/CW/SR/2 (2008). Their proposal was not included in the final Convention on Cluster Munitions.

105. Convention on Cluster Munitions, *supra* note 1, art. 21(1).

this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.”<sup>106</sup> Previous treaties make passing reference to encouraging other states to join. The Mine Ban Treaty, for example, “[e]mphasiz[es] the desirability of attracting the adherence of all States to this Convention” in its preamble.<sup>107</sup> The Convention on Cluster Munitions, however, is the first weapons treaty to establish binding obligations on this subject. These provisions both strengthen the convention and set legal precedent.

The implications of Article 21(3) and (4) are more ambiguous. These paragraphs must be considered in the context of Article 1(1)(c). The latter states, “Each State Party undertakes never under any circumstances to: . . . (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”<sup>108</sup> In other words, states parties cannot help states not party to the treaty to use, produce, stockpile, or transfer cluster munitions, the activities prohibited under Article 1(1)(a) and (b).<sup>109</sup> There is extensive legal precedent for this prohibition on assistance. At least six treaties—the Nuclear Non-Proliferation Treaty (1968),<sup>110</sup> the Seabed Arms Control Treaty (1971),<sup>111</sup> the Biological Weapons Convention (1972),<sup>112</sup> the Environmental Modification Convention (1977),<sup>113</sup> the Comprehensive Nuclear Test Ban Treaty,<sup>114</sup> the Chemical Weapons Convention,<sup>115</sup> and the Mine Ban Treaty<sup>116</sup>—include a provision similar to Article 1(1)(c). The last two have virtually identical language, except that they also contain the phrase “in any way.” None of these weapons conventions, however, has an article parallel to Article 21.

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106. *Id.* art. 21(2).

107. Mine Ban Treaty, *supra* note 4, pmb1.

108. Convention on Cluster Munitions, *supra* note 1, art. 1(1)(c).

109. *Id.* art. 1(1)(a), (b).

110. Treaty on the Non-Proliferation of Nuclear Weapons, *adopted* 1 July 1968, art. 1, 729 U.N.T.S. 161 (*entered into force* 5 Mar. 1970).

111. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof (Sea-bed Arms Control Treaty), *signed* 11 Feb. 1971, art. 1(3), 955 U.N.T.S. 115, 23 U.S.T. 701 (*entered into force* 18 May 1972), *reprinted in* 10 I.L.M. 146 (1971).

112. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *adopted* 10 Apr. 1972, G.A. Res. 48/65, U.N. GAOR, 48th Sess., at 68, art. 3, U.N. Doc. A/48/49 (1993), 1015 U.N.T.S. 163 (*entered into force* 26 Mar. 1975).

113. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Treaty), *adopted* 2 Sep. 1976, art. 1(2), 1108 U.N.T.S. 152 (*entered into force* 5 Oct. 1978), *reprinted in* 16 I.L.M. 88 (1977).

114. Comprehensive Nuclear Test Ban Treaty, *adopted* 10 Sept. 1996, G.A. Res. 50/245, U.N. GAOR, 50th Sess., at 14, art. 1(2), U.N. Doc. A/50/49 (1996), *reprinted in* 35 I.L.M. 1439.

115. Chemical Weapons Convention, *supra* note 4, art. 1(1)(d).

116. Mine Ban Treaty, *supra* note 4, art. 1(1)(c).

Article 21(3) and (4) determine how the convention applies during situations of joint military operations. Paragraph 3 states that “[n]otwithstanding the provisions of Article 1,” states parties “may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.”<sup>117</sup> Paragraph 4 qualifies the preceding paragraph. It says:

Nothing in paragraph 3 of this Article shall authorise a State Party:

- (a) To develop, produce or otherwise acquire cluster munitions;
- (b) To itself stockpile or transfer cluster munitions;
- (c) To itself use cluster munitions; or
- (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.<sup>118</sup>

Unlike the prohibition on assistance, these provisions have no antecedents in earlier weapons treaties.

The novelty of Article 21(3) and (4) is undisputed, but the meaning of the paragraphs is unsettled.<sup>119</sup> Some states argue that the phrase “[n]otwithstanding the provisions of Article 1” signifies that paragraph 3 permits assistance with prohibited activities during joint operations. Others counter that the notwithstanding clause merely clarifies that states parties may engage in operations with states not party to the Convention on Cluster Munitions, something even most advocates for a strong treaty do not dispute. Paragraph 4 seems more in keeping with other provisions in the convention, but its only partial overlap with Article 1(1)(a) and (b) could be read as compromising the absoluteness of those prohibitions. States seeking to allow assistance during joint operations argue that the list is exhaustive and thus any activity not explicitly mentioned is permitted during such operations. For example, although under paragraph 4 states parties cannot “expressly request the use of cluster munitions” when the choice is under their “exclusive control,” some states read it as implying that they can assist with use in other ways.<sup>120</sup>

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117. Convention on Cluster Munitions, *supra* note 1, art. 21(3).

118. *Id.* art. 21(4).

119. For a discussion of different understandings of Article 21 and Human Rights Watch’s position on the subject, see HUMAN RIGHTS WATCH, *STAYING TRUE TO THE BAN ON CLUSTER MUNITIONS: UNDERSTANDING THE PROHIBITION ON ASSISTANCE IN THE CONVENTION ON CLUSTER MUNITIONS* (June 2009), available at <http://www.hrw.org/en/news/2009/06/22/staying-true-ban-cluster-munitions>.

120. Convention on Cluster Munitions, *supra* note 1, art. 21(4). States might also claim that they can host foreign stockpiles on their soil, which counters the intent of Article 3 calling for destruction of all stockpiles. *Id.* art. 3. The relevant phrase in Article 21(4)(b) prohibits the state party only from “itself” stockpiling or transferring cluster munitions. It does not mention the stockpiles of states not party to the convention on its soil. *Id.* art. 21(4)(b).

Supporters of a stronger convention, by contrast, argue that paragraph 4 reinforces Article 1(1) and that its list is illustrative and non-exhaustive; any activity prohibited under Article 1(1)(c) is prohibited under Article 21, even during joint operations. This understanding of the provision is consistent with the goal of the convention, which is to rid the world of cluster munitions and the harm they cause. It is also necessary to avoid contradicting Article 21(2); the same article cannot logically both require states parties to discourage use of cluster munitions and allow them to assist with use.<sup>121</sup>

States parties must keep the purpose of the Convention on Cluster Munitions in mind as they determine their positions. The Vienna Convention on the Law of Treaties states, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>122</sup> The object and purpose of the Convention on Cluster Munitions, as demonstrated in its preamble and text, are to minimize humanitarian harm. The interpretation of Article 21 must be in accordance with them.

In practice, Article 21 should advance and not interfere much with the treaty's aim to eliminate cluster munitions. As explained above, the first half of the article requires states parties to promote the norms of the convention, thus spreading its humanitarian influence. With regard to the second half, the international support for the Convention on Cluster Munitions and the stigma it brings to the weapons will make future use politically difficult and assistance with use less likely. During negotiations, US allies, including Australia, Canada, and the United Kingdom, were the ones most concerned about the treaty's effect on joint military operations.<sup>123</sup> History shows, however, that although not party to the Mine Ban Treaty, the United States has not laid any new mines since its adoption because it effectively stigmatized the weapons.<sup>124</sup> US allies' support for the Convention on Cluster Munitions and the obligation it places on states parties to discourage use by others may similarly end US use of cluster munitions and thus make much of the debate about assistance moot.

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121. See HUMAN RIGHTS WATCH, *STAYING TRUE TO THE BAN ON CLUSTER MUNITIONS*, *supra* note 119, at 10–13.

122. Vienna Convention on the Law of Treaties, *supra* note 102, art. 31(1).

123. Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations, Discussion paper distributed at the Wellington Conference on Cluster Munitions by Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, and the United Kingdom (Feb. 2008), *available at* <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Discussion-paper-Au-et-al.pdf>.

124. According to the *Landmine Monitor*, the United States has not used mines since the 1991 Gulf War. INTERNATIONAL CAMPAIGN TO BAN LANDMINES, *LANDMINE MONITOR REPORT 2008: TOWARD A MINE-FREE WORLD 1042* (2008).

The legal impact of Article 21 on the development of IHL remains unclear because, given its controversial history, it is uncertain what approach states will adopt in the next weapons treaty. Since paragraphs 1 and 2 strengthen and call for the spread of IHL, they have the potential positively to influence future treaties. With regards to assistance, states could choose to follow the dominant precedent of having only an Article 1(1)(c), which obligates states parties not to assist states not party to the convention with prohibited acts. This choice would ensure an absolute prohibition on assistance and the strongest stigmatization of the weapons being addressed. Alternatively, states could adopt the precedent of including something akin to the second part of Article 21. The significance of the latter approach ultimately depends on how Article 21 is understood. Therefore national interpretive statements and implementation legislation could affect the legal impact of Article 21 on future weapons treaties as well as on the Convention on Cluster Munitions itself.<sup>125</sup>

## V. ANTICIPATING FUTURE CONCERNS: NON-STATE ARMED GROUPS

Like all treaties, the Convention on Cluster Munitions is only binding on states parties. Nevertheless, in its preamble, it identifies non-state armed groups as forces states parties should prevent from acting contrary to the treaty. In doing so, it creates model language on NSAGs for weapons treaties. It also paves the way for more stringent control of these groups in the future.

The Convention on Cluster Munitions takes a legal step forward with its explicit reference to NSAGs. The preamble says that states parties are “[r]esolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention.”<sup>126</sup> While only a statement of resolve, this clause has rhetorical force in that it uses the word “shall,” the strongest language of obligation under the law. NSAGs cannot legally join the convention, but the clause implies that states parties have a duty to prevent them from violating its provisions.

The convention’s articles do not include any specific mention of state obligations with regard to NSAGs. There are three binding provisions that relate indirectly, however. First, states parties shall not transfer, within or across their borders, cluster munitions “to anyone,” which would include

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125. For a discussion of Article 21 and early national interpretive statements and implementation legislation, see HUMAN RIGHTS WATCH, *STAYING TRUE TO THE BAN ON CLUSTER MUNITIONS*, *supra* note 119, at 14–19.

126. Convention on Cluster Munitions, *supra* note 1, pmb1.

NSAGs.<sup>127</sup> Second, states parties shall similarly not assist “anyone” with activities prohibited by the convention.<sup>128</sup> Third, they must establish national implementation measures “to prevent and suppress” prohibited activities “undertaken by persons or on territory under its jurisdiction or control.”<sup>129</sup> Those measures would apply to NSAGs and their actions. Some treaties, including the Chemical Weapons Convention and the Mine Ban Treaty, have similar provisions that indirectly implicate NSAGs.<sup>130</sup> With its preamble, however, the Convention on Cluster Munitions becomes the first weapons treaty to refer to armed groups by name.

Other humanitarian instruments deal with NSAGs more directly. While most provisions of the Geneva Conventions (1949) apply to international armed conflicts, Common Article 3 establishes minimum protections for civilians during non-international armed conflicts, such as civil wars, to which NSAGs are parties. It binds “each Party to the conflict” not to commit violence against civilians, take hostages, offend personal dignity, or pass sentences without due process.<sup>131</sup> It thus regulates the conduct of NSAGs themselves. The ICRC commentary on Common Article 3 notes that the imposition of obligations on NSAGs was new but clear. It explains, “Until recently it would have been considered impossible in law for an international Convention to bind a non-signatory Party—a Party, moreover, which was not yet in existence and which need not even represent a legal entity capable of undertaking international obligations. The obligation is absolute for each of the Parties.”<sup>132</sup> The commentary goes on to discuss the rationale behind and effect of this rule:

[I]f the responsible authority at their [the NSAG’s] head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country. . . . If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain. If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right.<sup>133</sup>

CCW Amended Protocol II adopts the approach of Common Article 3. It does not name NSAGs, but it seems to refer to them when it states that

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127. *Id.* art. 1(1)(b).

128. *Id.* art. 1(1)(c).

129. *Id.* art. 9.

130. Chemical Weapons Convention, *supra* note 4, arts. I(1)(a), (d), vii; Mine Ban Treaty, *supra* note 4, arts. 1(1)(b), (c), 9.

131. Common Article 3 appears in all four 1949 Geneva Conventions. See, e.g., Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *adopted* 12 Aug. 1949, art. 3, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950).

132. IV INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 37 (1958).

133. *Id.*

“each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol” during non-international armed conflicts in a state party’s territory.<sup>134</sup>

Protocol II to the Geneva Conventions, which applies exclusively to non-international armed conflicts, expands the protections of Common Article 3. Its coverage explicitly encompasses conflicts between a state party’s armed forces and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>135</sup> The concluding phrase of this provision implies that NSAGs have a responsibility to uphold the Protocol’s obligations.

The more recent Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002) addresses the actions specifically of NSAGs in multiple ways. Like the Convention on Cluster Munitions, the Child Soldiers Protocol mentions NSAGs in its preamble, condemning their “recruitment, training and use” of child soldiers and “recognizing the[ir] responsibility” for these actions.<sup>136</sup> Article 4(1) places a duty on NSAGs to cease abuse of children in wartime. It says, “Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”<sup>137</sup> Article 4(2) imposes an obligation on states parties to rein in the behavior of NSAGs, saying “States Parties shall take all feasible measures to prevent such recruitment and use.” Such measures can include national laws that “prohibit and criminalize such practices.”<sup>138</sup> With these provisions, the Child Soldiers Protocol creates international law to govern NSAGs as well as states parties.

The attention of the Convention on Cluster Munitions to NSAGs is important because such groups have used the weapons. Most recently, Hezbollah launched 118 cluster munitions into Israel during the war in summer 2006. It was the first confirmed use of the Chinese-made MZD-2 submunition. While Israel’s use of cluster munitions in south Lebanon dwarfed that of Hezbollah, the strikes showed the danger of the proliferation of these weap-

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134. CCW Amended Protocol II, *supra* note 30, art. 1(3).

135. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* 8 June 1977, art. 1(1), 1125 U.N.T.S. 609 (*entered into force* 7 Dec. 1978), *reprinted in* 16 I.L.M. 1442 (1977).

136. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, *pmb.*, *adopted* 25 May 2000, G.A. Res. 54/263, U.N. GAOR, 54th Sess., at 7, U.N. Doc. A/54/49 (Vol. III) (2000) (*entered into force* 12 Feb. 2002) [hereinafter *Child Soldiers Protocol*].

137. *Id.* art. 4(1).

138. *Id.* art. 4(2).

ons beyond state arsenals.<sup>139</sup> Other NSAGs have used cluster munitions in Bosnia between 1992 and 1995, Croatia in 1995, and possibly Tajikistan between 1992 and 1997.<sup>140</sup> As the specific mention of the problem of NSAGs in the preamble makes clear, the intent of the Convention on Cluster Munitions is that states parties should seek to prevent NSAGs from taking actions prohibited by the treaty.

With its explicit reference to NSAGs, the convention also lays the groundwork for weapons treaties to address the behavior of more parties. Instead of merely relying on indirect clauses related to proliferation and use, it names NSAGs and suggests that the states in which they operate have a duty to limit their activities. By moving in the direction of more stringent IHL instruments, the Convention on Cluster Munitions could inspire future weapons treaties to go even further. Ultimately such treaties could impose both binding obligations on states parties to regulate NSAGs and responsibility on the groups themselves to control their own conduct.

## VI. CONCLUSION

The Convention on Cluster Munitions is a major victory for states, NGOs, and others committed to ending the harm caused by cluster munitions. In closing statements at the adoption ceremony in Dublin, speakers repeatedly referred to it as a “groundbreaking” instrument and a “milestone.”<sup>141</sup> These characterizations apply not only to the treaty’s practical achievements but also to the legal precedent it sets. It builds on existing models to extend coverage to weapons that function properly and those that do not and to broaden the definition of weapons banned. It creates new obligations by establishing victim assistance requirements, retroactive user state responsibility

139. HUMAN RIGHTS WATCH, CIVILIANS UNDER ASSAULT: HEZBOLLAH’S ROCKET ATTACKS ON ISRAEL IN THE 2006 WAR 33, 44, vol. 19, no. 3(E) (Aug. 2007).

140. HUMAN RIGHTS WATCH, TIMELINE OF CLUSTER MUNITION USE, *supra* note 3. In the *Martić* case, the International Criminal Tribunal for the Former Yugoslavia found Milan Martić President of the non-state Republic of Serbian Krajina (RKS), guilty of war crimes for launching indiscriminate M-87 Orkan cluster munitions on Zagreb, Croatia. Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 461–63 (12 June 2007).

141. Statement of New Zealand, to the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions (28 May 2008) (calling the Convention on Cluster Munitions “groundbreaking”); Statements of Australia and the CMC, to the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions (30 May 2008) (calling the Convention on Cluster Munitions “groundbreaking”); Statement of Morocco, to the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions (28 May 2008) (calling the Convention on Cluster Munitions a “milestone”); Statements of Austria, Ecuador, Germany, Kenya, and Mexico, to the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions (30 May 2008) (calling the Convention on Cluster Munitions a “milestone”) (all notes on file with author).

for clearance, and a duty to promote the aims of the convention in dealings with states not party to it. Finally it paves the way to future binding controls on NSAGs. The next step is for governments to sign, ratify, and implement the convention in order to accomplish its immediate goals. In the long run, states and civil society will be able to use its precedent-setting provisions to create more comprehensive and effective weapons treaties. Only then will the Convention on Cluster Munitions maximize its contribution to international law and fulfill its humanitarian potential.