Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament Law

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I. Introduction

Humanitarian disarmament, a groundbreaking approach to disarmament that makes ending civilian suffering its core objective, has reshaped the field of weapons law over the past fifteen years. Earlier in the modern disarmament era, which began in the 1970s, maintaining security was the dominant goal. Treaties prioritized state interests because 'the traditional unit of security' was the state.[1] The end of the Cold War made possible the development of a new kind of disarmament law with a humanitarian focus. Its purpose is to protect individual civilians from the suffering caused by armed conflict. Two treaties - the Mine Ban Treaty and Convention on Cluster Munitions - have embodied humanitarian disarmament. They seek to eliminate the civilian harm caused by problematic weapons. To achieve this goal, they adopted comprehensive and unqualified obligations that reflect a heightened commitment to reducing the negative effects of war.

Three kinds of provisions characterize humanitarian disarmament treaties. First, these instruments establish absolute bans on the use, production,

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[1] J. Borrie, 'Rethinking Multilateral Negotiations: Disarmament as Humanitarian Action', in J. Borrie/V.M. Randin (eds.), Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action (2005) 8.

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transfer, and stockpiling of specific weapons to prevent harm in the future. Second, they supplement such obligations with requirements for remedial measures that reduce the effects of past use, such as victim assistance and clearance of mines and unexploded ordnance. Third, they espouse a cooperative approach to implementation that maximizes states parties' potential to fulfill the treaties' humanitarian goals. These provisions have antecedents in earlier disarmament law, but humanitarian disarmament treaties combine and strengthen them to create a distinctive and uncompromising legal regime.

To place humanitarian disarmament in historical context and to illuminate its distinguishing characteristics, this article identifies three types of disarmament treaties - security, hybrid, and humanitarian - which originated in that order. These types have coexisted, and the lines between them sometimes blur. For example, a treaty with a primarily security objective can have humanitarian benefits, and *vice versa*. Nevertheless, this article highlights how the purposes and provisions of the disarmament treaty types have generally moved from being driven by security interests to being focused on humanitarian concerns.

The humanitarian disarmament movement has gained momentum over the last fifteen years. It was born with the Mine Ban Treaty of 1997.[2] In both purpose and provisions, this treaty broke with the traditions of earlier disarmament instruments, but it was unclear at the time whether it was an aberration. The adoption of the Convention on Cluster Munitions in 2008 by 107 states proved that it was not. At an international cluster munition conference in Chile in 2010, a Norwegian delegate described the convention's underlying humanitarian objective, saying:

> This Convention bans a weapon, but it is first and foremost about people. It is about preventing people becoming victims of cluster munitions. And it is about securing proper assistance to those who have already become victims of this indiscriminate weapon.[3]

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[2] 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty), adopted 18 September 1997, 2056 UNTS 211, entered into force 1 March 1999.

[3] Statement by State Secretary Mina Gerhardsen, Office of the Prime Minister, Norway, at the Chile Conference on the Convention on Cluster Munitions, 7 June 2010.

The Convention on Cluster Munitions solidified humanitarian disarmament's position as an accepted form of international law and built on the precedent set by the Mine Ban Treaty by strengthening numerous provisions.[4]

Through a comparative study of disarmament treaties, this article explores the evolution of the types of disarmament law and how they have progressed in response to heightened concerns for innocent victims of war. Part II defines security, hybrid, and humanitarian disarmament and highlights exemplars of each that serve as case studies for the next two parts. Part III examines the purposes of these types, showing how their objectives have moved from maintaining security to protecting civilians. Part IV analyzes three categories of provisions that are characteristic of a humanitarian disarmament treaty: absolute preventive obligations, civilian-centered remedial measures, and cooperative approaches to implementation. Part V discusses the influence of the Mine Ban Treaty in the new millennium and concludes that this humanitarian approach to controlling weapons has become an established international legal practice.

II. Types of Disarmament Treaties

The treaties governing weapons are associated with two bodies of law, which are conventionally distinguished by their provisions. Disarmament law, narrowly defined, seeks a 'reduction in arms' often through controls on production, transfer, and stockpiling.[5] International humanitarian law, also called the laws of war, applies to the conduct of armed conflict, and it regulates, *inter alia*, the use of weapons. Some weapons treaties fit under both legal frameworks. This article deals with weapons treaties that govern use, many of which also contain limits on quantity and proliferation.[6]

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[4] 2008 Convention on Cluster Munitions, adopted 30 May 2008, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, entered into force 1 August 2010. For an analysis of precedent set by the Convention on Cluster Munitions, see B. Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', 31 Human Rights Quarterly (2009) 934.

[5] C. Greenwood, 'The Law of Weaponry at the Start of the New Millennium', in M.N. Schmitt/L.C. Green (eds.), The Law of Armed Conflict: Into the Next Millennium (International Law Studies Series No. 71) (1998) 185, at 191.

[6] This article does not deal with weapons treaties that only regulate the numbers of weapons. Most notably, it sets aside those related to nuclear weapons. It also does not address similar treaties on conventional weapons, such as the 1990

In analyzing the evolution of these treaties, this article addresses purposes as well as provisions, which complicates the use of familiar terminology. Viewed in their entirety, international humanitarian law treaties may include provisions on use of weapons without invoking principles of international humanitarian law or being primarily humanitarian in purpose. For simplicity and clarity, this article employs the more neutral term disarmament to describe all the treaties within its scope. It argues that the key factor for distinguishing treaty types is not whether they fall under a certain body of law, but how security and/or humanitarian interests shape their underlying purposes and textual provisions.

A. History of Disarmament Law

Modern disarmament law, using the term broadly, originated almost 150 years ago with the St. Petersburg Declaration of 1868. This declaration prohibited the use of small, explosive projectiles because they caused unnecessary suffering to victims and were not considered a military necessity.[7] The 1899 and 1907 Hague Declarations and Conventions banned or restricted the use of other weapons,[8] and the 1925 Geneva Protocol prohibited the use of

Treaty on Conventional Armed Forces in Europe, which primarily establishes limits on quantities of military equipment and conventional weapons.

[7] Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, adopted and entered into force 11 December 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297.

[8] The weapons governed by these instruments were: balloon-launched explosives, asphyxiating gases, expanding (or 'dum-dum') bullets, and sea mines. 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 19 July 1899, 26 Martens Nouveau Recueil (ser. 2) 994, 187 Consol. T.S. 456, entered into force 4 September 1900; Hague Declaration (IV, 2) 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 September 1900; Hague Declaration (IV, 3) Concerning the Prohibition of the Use of Expanding Bullets, adopted 29 July 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459, entered into force 4 September 1900; Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, adopted 18 October 1907, 3 Martens Nouveau Recueil (ser. 3) 745, 205 Consol. T.S. 403, entered into force 27 November 1909; Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines (Hague Sea Mines Convention), adopted 18 October 1807, 3 Martens Nouveau Recueil (ser. 3) 580, 205 Consol. T.S. 331, entered into force 26 January 1910.

'asphyxiating, poisonous or other gases' and of 'bacteriological methods of warfare'[9] following their horrifying effects on troops in World War I. The primary concern of these treaties was to reduce the suffering of wounded soldiers.[10]

A decades-long hiatus in disarmament law followed the 1925 Geneva Protocol, but new instruments of international law that would influence the character of future disarmament treaties came into being after World War II. In 1945, states signed the UN Charter, the founding document of the United Nations. According to the Charter, the United Nations' primary purpose was to preserve 'international peace and security', in other words, to prevent wars between states.[11] A few years later, international humanitarian law made critical advances with the four Geneva Conventions of 1949. These conventions expanded safeguards for soldiers and established new protections for civilians.[12] In 1977, two additional protocols supplemented these provisions with added protections, especially for civilians. Notably Protocol I codified the rule of distinction, which requires parties to a conflict to distinguish between soldiers and civilians during attacks and prohibits attacks that fail to do so.[13] While the UN Charter aims to prevent war to make states more secure, international humanitarian law seeks to control the conduct of war to reduce the human suffering it causes.

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9 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925 Geneva Protocol), adopted 17 June 1925, 94 LNTS 65, entered into force 8 February 1928.

10 The 1907 Hague Sea Mines Convention represented an exception to this rule because it regulated the use of sea mines primarily to protect civilian commerce.

11 Art. 1(1), 1945 Charter of the United Nations, adopted 26 June 1945, 1 UNTS 26, entered into force 24 October 1945; see P. d'Argent/N. Susani, 'United Nations, Purposes and Principles', in R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available at www.mpepil.com (last visited 1 February 2011), at para. 4.

12 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, all adopted 12 August 1949 and entered into force 21 October 1950.

13 Arts. 48, 51, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3; see also 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of

This article will focus on the most recent wave of disarmament law that began forty years ago. In response to historical circumstances, treaties have covered weapons of mass destruction or conventional weapons, imposed bans or regulations, and moved from an emphasis on maintaining security to minimizing human suffering. The UN Charter and/or international humanitarian law have served as foundations for these various instruments. While the treaties overlap in purposes and provisions to a degree, they can be divided into the categories of security disarmament, hybrid disarmament, and humanitarian disarmament.[14]

B. Security Disarmament

Security disarmament treaties focus on the elimination of certain weapons of war. They can provide humanitarian benefits but do so primarily for security reasons. They impose absolute bans on activities involving arms, such as use, production, transfer, and stockpiling. Security disarmament treaties also require destruction of existing stockpiles to decrease the threat of future use. Two treaties - the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention - exemplify security disarmament.[15] Both govern weapons of mass destruction, weapons 'capable of a high order of destruction or causing mass casualties'.[16]

Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 UNTS 609, both adopted 8 June 1977 and entered into force 7 December 1978.

[14] Patrick McCarthy draws similar categories although bases them on the treaties' negotiating processes. See P. McCarthy, 'Deconstructing Disarmament: The Challenge of Making the Disarmament and Arms Control Machinery Responsive to the Humanitarian Imperative', in J. Borrie/V.M. Randin (eds.), Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action (2005) 51, at 62-63.

[15] 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention), opened for signature 10 April 1972, 1015 UNTS 163, entered into force 26 March 1975; 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention), adopted 13 January 1993, 1974 UNTS 45, entered into force 29 April 1997. Both conventions prohibit production, transfer, and stockpiling and assistance with those activities. The Chemical Weapons Convention also bans use, something the Biological Weapons Convention does not presumably because the 1925 Geneva Protocol already does.

[16] 'Weapons of Mass Destruction', US Department of Defense Dictionary of Military and Associated Terms, available at http://www.dtic.mil/doctrine/dod_dictionary/

The Biological and Chemical Weapons Conventions were born at the height of the Cold War and were motivated largely by states' interest in removing the security threat the weapons posed. A movement emerged in 1968 to revisit the issues of biological and chemical weapons, dealt with earlier by the 1925 Geneva Protocol. The international community decided to deal with biological weapons first because they raised fewer political challenges. In 1969, the United States advanced the process by agreeing to join the Geneva Protocol, pledging not to use biological weapons, and beginning to destroy its stocks of them. The convention was adopted less than three years later and entered into force in 1975.[17]

Urged on by the Biological Weapons Convention's call to work toward a convention on chemical weapons,[18] states began to advance proposals in the 1970s. Discussions proceeded on two tracks - bilaterally between the United States and the Soviet Union, and multilaterally as several states presented draft texts. Formal UN negotiations began in 1984 in the Conference on Disarmament.[19] States only reached a final agreement, however, after *glasnost* and the end of the Cold War. They adopted the Chemical Weapons Convention in 1993, and it entered into force in 1997.

C. Hybrid Disarmament

Hybrid disarmament instruments also place restrictions on weapons, but their underlying purpose combines concerns for protecting security and minimizing the suffering of individuals. As a result, they represent a blend of elements characteristic of security disarmament and humanitarian disarmament, while moving increasingly toward the latter. Hybrid disarmament instruments regulate and occasionally prohibit the use of specific weapons. They also include provisions that are primarily humanitarian in nature, such as prohibiting attacks in populated areas and requiring clearance

(last visited 21 February 2011).

[17] See J.P. Robinson, 'The Negotiations on the Chemical Weapons Convention: A Historical Overview', in M. Bothe/N. Ronzitti/A. Rosas (eds.), The New Chemical Weapons Convention: Implementation and Prospects (1998) 17, at 22-23; D.A. Koplow, 'Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention', 15 The Yale Journal of International Law (1990) 1, at 18-19.

[18] Art. 9, Biological Weapons Convention, *supra* note 15.

[19] Robinson, 'The Negotiations on the Chemical Weapons Convention', *supra* note 17, at 24-25; W. Krutzsch/R. Trapp, A Commentary on the Chemical Weapons Convention (1994) 2.

of munitions left after a conflict. The 1980 Convention on Conventional Weapons (CCW) and its protocols are the classic instruments of hybrid disarmament. Indeed, official documents and delegates to meetings of states parties frequently refer to 'striking a balance between military and humanitarian considerations'.[20] As its name suggests, the CCW applies only to conventional weapons.

The Convention on Conventional Weapons itself is a framework treaty that lays out general rules ofjurisdiction and procedure, such as those related to scope of application, ratification and entry into force, and the process for amendment.[21] Attached protocols establish obligations pertaining to specific weapons. In 1980, states adopted the framework convention and its first three protocols: Protocol I on weapons with fragments not detectable by X-ray; Protocol II on landmines, booby traps, and other devices; and Protocol III on incendiary weapons.[22] States parties amended Protocol II in 1996 in an effort to strengthen its provisions although the result left civil society and many states unsatisfied.[23] States parties added Protocol IV on blinding laser weapons in 1995 and, in 2001, extended the scope of the framework convention to encompass non-international as well as international armed

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[20] See, *e.g.*, Meeting of States Parties to the CCW, 'Final Report', CCW/MSP/2010/5, 10 February 2011, at 7, available at http://daccess-dds-ny.un.org/doc/UND0C/GEN/G11/602/00/PDF/G1160200.pdf?0penElement (last visited 22 July 2011).

[21] 1980 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 October 1980, 1342 UNTS 137, entered into force 2 December 1983.

[22] 1980 CCW Protocol on Non-Detectable Fragments (Protocol I), 1342 UNTS 137; 1980 CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1342 UNTS 168; 1980 CCW Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1342 UNTS 171, all adopted 10 October 1980 and entered into force 2 December 1983.

[23] 1996 Amended CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), adopted 3 May 1996, 1125 UNTS 609, entered into force 3 December 1998; R.J. Mathews, 'The 1980 Convention on Certain Conventional Weapons: A Useful Framework Despite Earlier Disappointments', 83 (No. 844) International Review of the Red Cross (2001) 991, at 1000-1001, http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JRLL (last visited 31 October 2010).

conflicts.[24] In 2003, states parties adopted Protocol V on explosive remnants of war, in which they shifted their focus to remedial measures, reflecting a growing interest in civilian protection.[25]

Within the broadly defined category of disarmament, the CCW falls primarily under the framework of international humanitarian law, which governs the conduct of war. While restricting use, its protocols, unlike the other two types of weapons treaties, generally do not also impose obligations on the number and proliferation of arms. The most notable exception is Amended Protocol II, which includes provisions regulating transfer and production of anti-personnel mines.[26] The purpose of international humanitarian law is to preserve 'certain core humanitarian values during hostilities'.[27] A treaty's explicit invocation of that body of law suggests a humanitarian nature. A treaty that regulates use, however, need not have an exclusively, or even primarily, humanitarian purpose. The Chemical Weapons Convention emphasizes a security objective, and the CCW addresses both security and humanitarian concerns.

Like the security disarmament treaties discussed above, the 1980 CCW and its first three protocols in large part embodied the international tensions of the Cold War. During the 1970s, some states had advocated for absolute bans on certain weapons, including landmines and incendiary weapons,[28] but major military powers would not agree to such restrictions, which threatened to close down options on conventional warfare.[29] The

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[24] 1995 CCW Protocol on Blinding Lasers (Protocol IV), adopted 13 October 1995, 35 ILM 1218, UN Doc. CCW/CONF.I/16, Annex A, entered into force 30 July 1998; 2001 CCW Amendment to Article 1, adopted 21 December 2001, UN Doc. CCW/CONF.II/2.

[25] 2003 CCW Protocol on Explosive Remnants of War (Protocol V), adopted 28 November 2003, UN Doc. CCW/MSP/2003/2, entered into force 12 November 2006.

[26] Art. 8 and technical annex, parts 2 and 3, CCW Amended Protocol II. CCW Protocol V includes generic preventive measures that address production and transfer, but these measures are voluntary. Art. 9 and technical annex, part 3, CCW Protocol V.

[27] Greenwood, 'The Law of Weaponry at the Start of the New Millennium', *supra* note 5, at 189.

[28] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), 21 February 1974, Doc. CDDH/DT/2.

[29] Mathews, 'The 1980 Convention on Certain Conventional Weapons', *supra* note 23, at 994-995.

CCW negotiations required consensus, so these powers were able to block proposals for absolute prohibitions.[30] The two 1977 Additional Protocols to the Geneva Convention were adopted shortly before the original CCW instruments, however, and likely influenced the inclusion of humanitarian elements. In fact, the meetings that produced the CCW emerged from an *ad hoc* Committee on Conventional Weapons established by the diplomatic conference convened to negotiate the additional protocols.[31] The later CCW protocols and amendments, added after the end of the Cold War, exhibit an even greater concern for humanitarian measures.

D. Humanitarian Disarmament

Humanitarian disarmament, the newest type of disarmament, produces multi-faceted legal instruments designed to reduce the suffering of individuals in times of war. These instruments contain preventive measures, including absolute prohibitions on not only the use but also the production, transfer, and stockpiling of certain weapons, that hark back to those of the security disarmament instruments. They also establish remedial obligations, including to clear unexploded weapons and provide assistance to victims, that are generally stronger than the humanitarian obligations in hybrid disarmament instruments. Finally, they adopt a cooperative approach to implementation. To date, humanitarian disarmament - embodied in the 1997 Mine Ban Treaty and the 2008 Convention on Cluster Munitions - has dealt exclusively with conventional weapons.

The post-Cold War era saw a changed perception of armed conflict that influenced the development of humanitarian disarmament treaties. With the fall of the Soviet Union, the threat of mass casualties from a single attack with a weapon of mass destruction diminished. Real-life suffering of individual civilians caused by conventional weapons, such as that documented in the Balkans, Afghanistan, and Iraq, came increasingly into public view. The attention of the international community, therefore, turned to controlling conventional weapons.

Negotiations for the humanitarian disarmament treaties also began in a very different political climate and adopted a more independent and inclusive process than those of the security and hybrid disarmament conventions. While the earlier disarmament treaties all originated during the Cold War, the constraints of that era had diminished by the time of the Ottawa Process, the

[30] *Ibid.*, at 996, n. 13.

[31] *Ibid.*, at 994-995.

culmination of the global movement to ban anti-personnel landmines. Like-minded states, unsatisfied with the amendments to CCW Protocol II, left the CCW forum to produce a strong and comprehensive treaty on anti-personnel landmines in less than two years. Civil society, led by the International Campaign to Ban Landmines (ICBL), was the driving force behind the treaty and pushed states hard to include its humanitarian elements. Negotiations of the Convention on Cluster Munitions followed a similar pattern during the 2007-2008 Oslo Process.[32] Working outside of the consensual process of UN negotiations made it easier to address humanitarian problems.

E. A Convergence of Types

While the treaties discussed above span almost four decades, the three types of disarmament converged in new legal instruments between 1993 and 1997. During that period, states adopted exemplars of each type. The fall of communism opened the door to the adoption of the Chemical Weapons Convention in 1993, although at its core, it reflected the Cold War's security disarmament approach. CCW Amended Protocol II, a hybrid disarmament instrument completed in 1996, responded in part to the new era's humanitarian concern for individual suffering in armed conflict but remained constrained by the security interests of major military powers. The Mine Ban Treaty, both initiated and adopted in the mid-1990s, produced a sea change in international law, becoming the first humanitarian disarmament treaty. The next two parts of this article focus on these three instruments as case studies for larger trends in disarmament law.

III. From Security to Civilian Protection: The Underlying Purposes of Disarmament

Since the 1970s, disarmament has had different purposes, and the three conventions of the 1990s illustrate that development. Although not binding law, the treaties' preambles offer important windows onto the intent of their negotiators and reveal a general shift from security objectives to those

[32] Efforts to address the cluster munition problem in the CCW framework similarly failed, states and civil society turned to an independent process (the Oslo Process), and negotiators reached an agreement in 2008 after only 16 months. See Human Rights Watch, Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions (2010) 120-138.

of civilian protection. The Chemical Weapons Convention, the earliest of the three case studies, focuses on security, which is conceived in terms of relations among nations. CCW Amended Protocol II, which came next, adopts a hybrid approach combining security and humanitarian aims. More recently, the Mine Ban Treaty articulates an aspiration to reduce individual civilian suffering from the conduct of war. The negotiating histories of each of these treaties support this categorization. Together, text and context show that humanitarian concerns have become a powerful motivation for the creation of new disarmament law.

A. Security Interests: The Chemical Weapons Convention

Security constitutes the major purpose of security disarmament treaties, as exemplified by the Chemical Weapons Convention.[33] That convention's preamble expresses a desire to 'contribute to the realization of the purposes and principles' of the UN Charter. While the Charter lists four purposes, its first, which has been described as 'the paramount purpose of the UN',[34] is '[t]o maintain international peace and security'.[35] In another preambular paragraph, the Chemical Weapons Convention states that it seeks to 'achiev[e] effective progress towards general and complete disarmament'.[36] General and complete disarmament requires eliminating weapons of mass destruction and limiting conventional weapons 'to levels sufficient to maintain domestic order and to sustain contributions to international peace support operations'.[37] Its end goal, like that of the UN Charter, is to ensure that 'war is no longer an instrument for settling international problems'.[38] The Chemical Weapons Convention defines its security objective in terms of preserving peace.

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[33] The US Department of Defense has defined security as '[a] condition that results from the establishment and maintenance of protective measures that ensure a state of inviolability from hostile acts or influences.' 'Security', US Department of Defense Dictionary of Military and Associated Terms, *supra* note 16.

[34] D'Argent/Susani, 'United Nations, Purposes and Principles', *supra* note 11, at para. 4. The International Court of Justice found that the provision's 'primary place [_] is natural, since the fulfillment of the other purposes will be dependent on the attainment of that basic condition'. *Ibid*.

[35] Art. 1(1), UN Charter.

[36] Preambular para. 1, Chemical Weapons Convention, *supra* note 15.

[37] R. Rydell, 'Nuclear Disarmament and General and Complete Disarmament', in D. Krieger (ed.), The Challenge of Abolishing Nuclear Weapons (2009) 227.

[38] Art. 1, McCloy-Zorin Accords, signed 20 September 1961, available at http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/arms-control-

With its references to the UN Charter and general and complete disarmament, the preamble of the Chemical Weapons Convention indicates that its purpose is inextricably linked to the concerns of nation states. 'Security thinking in [.] disarmament has, at least until lately, been dominated by security concepts focusing on external threats to states and, in particular, threats posed by other states', writes John Borrie of the UN Institute for Disarmament Research (UNIDIR).[39] The Charter lists two additional purposes of the United Nations - developing 'friendly relations among nations' and 'harmonizing the actions of nations' - that illustrate its emphasis on states.[40] With regard to general and complete disarmament, in 1961 the UN General Assembly welcomed a US-USSR accord that similarly connects peace, security, and the protection of state interests. Such disarmament

> should be balanced so that at no stage of the implementation of the treaty could any State or group of States gain military advantage and that security is ensured equally for all.[41]

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disarmamentZmccloy-zorin-accords_1961-09-20.htm (last visited 31 August 2011).

[39] Borrie, 'Rethinking Multilateral Negotiations', *supra* note 1, at 7. The Charter prefaces the phrase 'peace and security' with the word 'international' to clarify that it refers to peace among, not within, nations. D'ArgentZSusani, 'United Nations, Purposes and Principles', *supra* note 11, at para. 7. Its failure to deal with internal armed conflicts serves as evidence that it weighs states' interests more heavily than civilian protection. While, unlike the Charter, the Chemical Weapons Convention applies also to internal armed conflicts, its focus of security remains on states.

[40] The second and fourth purposes are:

- 'To develop friendly relations among nations [. . .] and to take other appropriate measures to strengthen universal peace';
- 'To be a centre for harmonizing the actions of nations in the attainment of these ends.'

Art. 1(2) and (4), UN Charter. Only one of the four enumerated purposes expresses concern for humanitarian problems and human rights:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encourage respect for human rights and for fundamental freedoms for all [...]

Art. 1(3), UN Charter. The International Court of Justice found that the first purpose 'takes precedence over all the other purposes, as it is the one without which none of the others can be achieved'. *Certain Expenses of the United Nations* , Advisory Opinion, 1962 ICJ Rep. 151, 168.

[41] Art. 5, McCloy-Zorin Accords, *supra* note 38; see also UNGA - Res. 1722 (XVI), Question of Disarmament, 20 December 1961, UN Doc. AZRESZ1722(XVI).

While peace and security can of course benefit civilians, national interests underlie these goals of the Chemical Weapons Convention.

The preamble to the Chemical Weapons Convention refers to humanitarian purposes in a general way. The convention notes that states parties are '[d]etermined *for the sake of all mankind*, to exclude completely the possibility of the use of chemical weapons'.[42] This phrase appears in the sixth of ten preambular paragraphs. While it indicates concern for humanity as an abstract concept, it does not address the suffering of individual victims.

The negotiating history of the Chemical Weapons Convention confirms that preserving security is the primary purpose of the instrument. Originally humanitarian concerns motivated efforts to regulate chemical weapons. In 1918, the International Committee of the Red Cross referred to the weapons as 'a barbaric innovation' and their use as 'criminal'.[43] According to Joachim Krause, early chemical disarmament efforts in the 1920s and 1930s stemmed from a desire 'to ban a new kind of warfare that was generally deemed to be inhumane and insidious and to cause unnecessary suffering'.[44] By the time informal negotiations of the Chemical Weapons Convention began in the 1970s, however, that motive had changed. Major military powers no longer needed chemical weapons because they had developed less weather-dependent alternatives, but they saw proliferation to other countries as a growing threat to their security. Robert Mathews and Timothy McCormack write:

> The principal motivation for concluding the Convention had less to do with the deleterious consequences of the weapons from a humanitarian point of view, and more to do with other strategic security factors—most importantly the growing concerns about horizontal proliferation of chemical weapons and the recognition by both the USA and Russia that they did not need to retain their chemical weapons stockpiles following the Cold War.[45]

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[42] Preambular para. 6, Chemical Weapons Convention, *supra* note 15 (emphasis added).

[43] R.J. Mathews/T.L.H. McCormack, 'The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties', 81 (No. 834) International Review of the Red Cross (1999) 331.

[44] J. Krause, 'The Changing International System and Chemical Disarmament', in B. Roberts (ed.) Chemical Disarmament and U.S. Security (1992) 21, at 22.

[45] Mathews/McCormack, 'The Influence of Humanitarian Principles', *supra* note 43.

New security interests, not humanitarian concerns, drove the negotiations of the Chemical Weapons Convention.

B. A Dual Purpose: The CCW and its Amended Protocol II

While the CCW's Amended Protocol II itself has no preamble, that of its framework convention reveals a two-pronged purpose. This hybrid disarmament convention and its protocols share with the Chemical Weapons Convention a concern for security. The CCW's first preambular paragraph defines its goals with reference to the Charter of the United Nations, which, as discussed above, strives foremost to maintain international peace and security. The paragraph notes that

> every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State.

The preservation of security thus correlates closely with the protection of state interests and ignores the internal affairs of states.

Other preambular paragraphs reinforce that security objectives underlie the CCW. States parties recognize the importance of 'progress towards general and complete disarmament', which was also highlighted in the Chemical Weapons Convention's preamble discussed above. In addition, states parties express their desire

> to contribute to *détente*, the ending of the arms race and the building of confidence among States, and hence to the realization of the aspiration of all peoples to live in peace.

Détente, ending the arms race, and confidence-building all require preserving good relations among nations, and the paragraph ties the peace that states parties seek to those state-based goals.[46] These paragraphs highlight that the convention seeks to prevent armed conflict that threatens states, regardless of its effects on individual civilians.

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[46] According to UNIDIR, 'Confidence- and security-building measures (CSBMs) are military provisions adopted by States to dispel mistrust that might otherwise lead to armed conflict.' S. Tulliu/T. Schmalberger, Coming to Terms with Security: A Lexicon for Arms Control, Disarmament and Confidence-Building (2003), 135.

The CCW, like the Chemical Weapons Convention, strives to promote peace and security; however, it also highlights some humanitarian objectives in its preamble. Its second preambular paragraph '"recall[s]" the general principle of the protection of the civilian population against the effects of hostilities'. In the next paragraph, it refers, although not by name, to basic rules of international humanitarian law. In particular it mentions that the right to 'choose methods or means of warfare is not unlimited' and that the law prohibits weapons that cause 'superfluous injury or unnecessary suffering'. While these rules date back to the nineteenth century,[47] the CCW uses the language of Additional Protocol I to the Geneva Conventions, which codified them just three years before the adoption of the framework convention.[48] The CCW also includes the Martens Clause, which states that in the absence of treaty law, civilians and combatants are protected by 'custom, [...] the principles of humanity and [.] the dictates of public conscience'.[49] These paragraphs in the CCW's preamble show that hybrid disarmament involves a balance of security and humanitarian purposes.

These purposes and the tensions between them were evident in the negotiations of Amended Protocol II. With the end of the Cold War, the threat of nuclear holocaust diminished while awareness of the egregious suffering caused by landmines grew exponentially. Urged on by civil society, states began to take heed of the weapons' civilian harm, and in 1993 the UN General Assembly adopted a French resolution calling for a CCW review conference to review the original Protocol II on landmines.[50] Humanitarian concerns led to the convening of the conference, but security interests determined its outcome. While by the end of the review conference forty states endorsed a complete ban, major military powers, who claimed to need landmines, blocked an absolute prohibition, an outcome made possible by the CCW's requirement for consensual decision making.[51] In its final form, Amended

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[47] See, *e.g.*, Arts. 22, 23, Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, adopted 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, entered into force 26 January 1910.

[48] Art. 35(1) and (2), Additional Protocol I, *supra* note 13.

[49] Preambular para. 5, CCW, *supra* note 21.

[50] K.R. Rutherford, Disarming States: The International Movement to Ban Landmines (2011), 20, 39-40, 47-48.

[51] Mathews, 'The 1980 Convention on Certain Conventional Weapons', *supra* note 23, at 1000.

Protocol II reflected a shift in disarmament toward humanitarian concerns yet showed that security interests still held them in check.

C. A Humanitarian Imperative: The Mine Ban Treaty

The Mine Ban Treaty, the first humanitarian disarmament instrument, took a dramatic step by defining its purpose primarily in terms of humanitarian concerns. Its preamble opens with a strong paragraph that highlights the extent of civilian suffering from landmines:

> States Parties [are determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement.

This paragraph paints a vivid picture of the problem with references to numbers (mines cause hundreds of casualties per week), descriptions of effects (death and maiming), and the characterization of civilians as 'innocent and defenceless'. Civilian victims of war are the primary focus of the convention.

In that same paragraph, the Mine Ban Treaty takes a stronger stance against humanitarian harm than the CCW does. According to the CCW's preamble, states parties merely 'recall', *i.e.*, bear in mind, the principle of civilian protection, without pledging to take any related actions. States parties to the Mine Ban Treaty declare they are 'determined to put an end to' civilian suffering caused by a specific type of weapon.

Two other preambular paragraphs underscore the humanitarian orientation of the Mine Ban Treaty. One paragraph highlights the importance of victim assistance, noting that states parties wish 'to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims'. This concern for victims, most of whom are civilians, has no precedent in security or hybrid disarmament. The other paragraph 'stress[es] the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines'. It links the treaty's absolute ban to the principles of humanity.

While the security and hybrid disarmament treaties discussed above hark back to the UN Charter, the Mine Ban Treaty includes no reference to it. Instead it is based on international humanitarian law. Like the humanitarian

clauses in the CCW's preamble, it refers to the limitations on means and methods of war and the prohibition of superfluous injury and unnecessary suffering. These rules can benefit civilians, although they were originally designed to protect soldiers.[52] The Mine Ban Treaty clarifies its reasons for relying on international humanitarian law by adding a reference to the rule of distinction. Distinction is concerned specifically with minimizing civilian harm.

The negotiation history of the Mine Ban Treaty further demonstrates that humanitarian concerns were the driving force behind the convention. Key documents express the humanitarian motives of the Ottawa Process. The Ottawa Declaration of October 1996, which states agreed to at the first meeting of the process and which set the goals of the negotiations, listed as its first concern:

> a recognition that the extreme humanitarian and socio-economic costs associated with the use of anti-personnel mines require urgent action on the part of the international community to ban and eliminate this type of weapon.[53]

The declaration of the June 1997 Brussels Conference, the last conference before formal negotiations in Oslo, explained that states met 'to pursue an enduring solution to the urgent humanitarian crisis caused by anti-personnel landmines.'[54] The nature of the Ottawa Process facilitated the realization of these objectives in the final treaty. The process took place outside of a traditional UN forum, and thus it did not have to prioritize peace and security. In addition, civil society, primarily through the ICBL, played an essential role in the process. It successfully pressured states to stay focused on a humanitarian agenda through participation in negotiations, behind-the-scenes advocacy, and public awareness raising.

The Mine Ban Treaty exemplifies the concept of human security, which was introduced in 1994 and refers to the security of people rather than states.[55]

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[52] See, *e.g.*, Arts. 22, 23, Hague Convention (IV), *supra* note 47.

[53] 'Declaration of the Ottawa Conference', 3-5 October 1996, reproduced in S. Maslen, Commentaries on Arms Control Treaties, Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction (2005), at 381.

[54] 'Declaration of the Brussels Conference on Anti-Personnel Landmines', 24-27 June 1997, in Maslen, *ibid.*, at 397.

[55] See, *e.g.*, Borrie, 'Rethinking Multilateral Negotiations', *supra* note 1, 23-24; J. Williams, 'New Approaches in a Changing World: The Human Security

While the traditional use of the term security, as in the UN Charter, focuses on relations between states, human security considers how states relate to individuals. It is an important humanitarian principle because, according to the *Human Security Report 2005*,

> secure states do not automatically mean secure peoples. [...] Indeed, during the last 100 years far more people have been killed by their own governments than by foreign armies.[56]

The Mine Ban Treaty was not widely discussed in terms of human security at the time of its creation,[57] but consistent with the innovative concept, the treaty strives to minimize civilian suffering under all circumstances. Although national and human security are not mutually exclusive, the latter dominated in the case of the Mine Ban Treaty's preamble and negotiations. For the first time in a disarmament treaty, humanitarian concerns supplanted, not merely supplemented, states' interests in security.

IV. Comprehensive and Unqualified: The Provisions of a Humanitarian Disarmament Treaty

The development of disarmament law's provisions has advanced in a similar direction as its purposes. As a comparison of the 1990s case studies shows, the Mine Ban Treaty draws in part from both the Chemical Weapons Convention and CCW Amended Protocol II. The Mine Ban Treaty, however, not only adapts, merges, and strengthens precedent but also adds new obligations to realize its aim of ending civilian suffering from anti-personnel mines. In so doing, it establishes three types of provisions characteristic of disarmament instruments with a primarily humanitarian purpose: absolute preventive obligations; civilian-centered remedial measures; and cooperative approaches to implementation. By adopting such comprehensive and unqualified provisions, humanitarian disarmament has increased the ability of international law to limit the harmful effects of weapons.

Agenda', in J. Williams/S.D. Goose/M. Wareham (eds.), Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security (2008) 281, at 284-286, 289.

[56] Human Security Centre, Human Security Report 2005: War and Peace in the 21st Century (2005), viii.

[57] Borrie, 'Rethinking Multilateral Negotiations', *supra* note 1, at 24.

A. Absolute Preventive Obligations

Humanitarian disarmament treaties contain absolute preventive measures, which seek to prevent civilian harm by eliminating specific weapons. Article 1 of the Mine Ban Treaty categorically bans use, production, transfer, and stockpiling of anti-personnel landmines as well as assistance with any of those activities.[58] States parties may 'never under any circumstances' engage in these activities. The phrase 'under any circumstances' covers international and non-international armed conflicts as well as situations that do not rise to the level of armed conflict. Article 1(1)(b) prohibits production, transfer, and stockpiling that is either 'direct or indirect'. The bans on transfer and assistance apply to 'anyone'; in other words, states parties may not transfer to or assist other states parties, states not party, or non-state actors such as corporations or non-state armed groups.

The Mine Ban Treaty also requires destruction of stockpiles, which further advances the goal of eliminating anti-personnel landmines. Article 1(2) places destruction of all mines on the list of general obligations that includes the prohibitions.[59] Article 4 obliges each state party to 'destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control'. The state party must do so 'as soon as possible but not later than four years' after the treaty enters into force for the party.

The Mine Ban Treaty implicitly requires elimination of production facilities, another preventive measure. Although the treaty does not include a specific article dedicated to the topic, the prohibition on production can be interpreted to necessitate destruction of the facilities that produce. Article 7 on Transparency Measures supports this understanding because it mandates that states parties report on 'the status of programs for the conversion or de-commissioning of anti-personnel mine production facilities'. It thus suggests an obligation to convert or decommission.[60]

The Mine Ban Treaty modeled its provisions related to prevention on those in the Chemical Weapons Convention.[61] The latter convention's

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[58] For detailed analysis of all provisions of the Mine Ban Treaty, see generally Maslen, Commentaries on Arms Control Treaties, *supra* note 53.

[59] Destruction in this article refers to both stockpile destruction and destruction of emplaced mines. *Ibid.*, at 106.

[60] Art. 7(1)(e), Mine Ban Treaty, *supra* note 2; Maslen, Commentaries on Arms Control Treaties, *supra* note 53, at 215.

[61] Maslen, Commentaries on Arms Control Treaties, *supra* note 53, at 73.

Article 1 on General Obligations uses almost identical language in layingout absolute prohibitions on use, production, transfer, and stockpiling. It too employs the phrase 'never under any circumstances' and bans direct and indirect transfer 'to anyone'.[62] The Chemical Weapons Convention providedthe exact wording for the Mine Ban Treaty's provision on assistance. It also includes among its general obligations a requirement to destroy stockpiled and abandoned chemical weapons and production facilities. While the Chemical Weapons Convention and the Mine Ban Treaty were conceived for security and humanitarian purposes, respectively, they share absolute preventive provisions.

CCW Amended Protocol II adopts a more complicated, qualified, and narrow approach to prevention of civilian harm. It establishes elaborate regulations for anti-personnel mines, booby-traps, and other devices, but it does not ban them as a class. It generally prohibits use of these devices when it causes superfluous injury or unnecessary suffering, targets civilians, or fits the definition of indiscriminate.[63] Specific technical distinctions serve as the basis for the rest of Amended Protocol II's restrictions. While the protocol prohibits use of mines with anti-handling devices and those that are not detectable,[64] it merely limits the use of other types of mines. For example, the protocol allows non-remotely delivered anti-personnel mines even without self-destruct and self-deactivation devices if they are placed in a perimeter-marked and monitored area that is cleared before abandonment.[65] Remotely delivered anti-personnel mines must have self-destruct and self-deactivation devices but do not require marking.[66] Furthermore, while Amended Protocol II's regulations address use, production, and transfer, they do not deal with stockpiling. These partial regulations weaken the impact of the protocol.

Amended Protocol II combined humanitarian and security purposes, but in the end they were at odds. Amended Protocol II exhibits some concern for civilians in its regulations. For example, the requirement to perimeter

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[62] The Chemical Weapons Convention has a somewhat narrower scope than the Mine Ban Treaty because, due to a slight wording difference, the Chemical Weapons Convention's use of direct and indirect applies only to transfer, not to all of the activities.

[63] Art. 3(3), (7), and (8), CCW Amended Protocol II, *supra* note 23. These prohibitions reiterate existing rules of international humanitarian law.

[64] Art. 3(5)-(6), *ibid.* An anti-handling device is designed to protect a mine by activating when someone attempts to tamper with the mine. See Art. 2(14), *ibid*.

[65] Art. 5(2), *ibid.*

[66] Art. 6(2), *ibid.*

mark and monitor certain non-remotely delivered mines when they are laid is 'to ensure the effective exclusion of civilians from the area'.[67] Negotiating states' interests in their own security, however, ultimately rendered impossible the absolute ban required for a comprehensive humanitarian response. Major military powers did not view landmines, which are defensive weapons, as a threat to their security; by contrast, they argued they needed mines to protect their interests and blocked efforts to produce a stronger instrument.[68]

The Mine Ban Treaty elevated concern for protecting civilians to a level previously reserved for maintaining security. When faced with the extensive suffering anti-personnel landmines cause, it imposed an absolute ban on use, production, transfer, and stockpiling. The Mine Ban Treaty responded to the harm inflicted by conventional weapons in the same way that security disarmament conventions had approached the threat of weapons of mass destruction, a narrower category of arms. In so doing, it opened the door to more rigorous controls of a wider class of weapons.

B. Civilian-Centered Remedial Measures

While the measures just discussed serve as tools to prevent harm caused by future use of weapons, remedial measures seek to minimize the effects of past use. Civilians are the most frequent victims of weapons, such as landmines, that linger after a conflict because they remain in or return to areas abandoned by troops. The Mine Ban Treaty's inclusion of remedial measures therefore advances its humanitarian objective.

The Mine Ban Treaty requires clearance of landmines already laid as its primary remedial obligation. Under Article 5, each state party affected by landmines must 'destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control'. It must complete clearance 'as soon as possible but not later than ten years' after the convention enters into force for the state party. While working on clearance, the state party must as soon as possible identify mined areas and perimeter mark, fence, and monitor them. The goal of such interim measures is a humanitarian one: 'to ensure the effective exclusion of civilians.' Article 5 allows for a ten-year extension to the clearance deadline in rare circumstances, but to receive an extension, a state party must complete a detailed request that includes

[67] Art. 5(2)(a), *ibid.*

[68] See, *e.g.*, Rutherford, Disarming States, *supra* note 50, at 74; Arms Project of Human Rights Watch and Physicians for Human Rights, Landmines: A Deadly Legacy (1993) 334.

information on the 'humanitarian, social, economic, and environmental implications of the extension'.

In addition to requiring humanitarian action by affected states, the Mine Ban Treaty obliges all states parties to contribute to efforts to minimize the suffering of civilians. According to Article 6 on International Cooperation and Assistance, each state party 'in a position to do so' shall provide assistance for victims in the form of 'care and rehabilitation, and social and economic reintegration'. Each state party must also support mine awareness programs, which reduce the risks to civilians by teaching them about the dangers of landmines. Because support for victim assistance and mine awareness can come in a variety of forms, including financial, material, and technical, every state should be 'in a position' to provide it.

The humanitarian aspects of CCW Amended Protocol II provided precedent for the Mine Ban Treaty's remedial measures. The protocol requires states parties to 'clear, remove, destroy or maintain' landmines within its control.[69] Clearance must take place '[w]ithout delay after the cessation of active hostilities.' If a user state no longer has control of the mined area, it must provide the affected state 'technical and material assistance'.[70] The Mine Ban Treaty is generally stronger than Amended Protocol II. It establishes a strict deadline for clearance and requires marking, fencing, and monitoring until clearance is completed. Nevertheless, the parallel provisions reflect the shared humanitarian purpose of the two treaties. In this case, Amended Protocol II's security aims did not present an obstacle because remedial measures involve actions primarily on behalf of individual civilians and pose little threat to state-to-state security.

Since it does not prioritize humanitarian objectives, the Chemical Weapons Convention, a security disarmament treaty, focuses on preventive obligations and ignores remedial measures.[71] The emphasis on prevention addresses states parties' desire to protect states and avoid armed conflict. Security disarmament generally does not deal with the suffering of individual civilians after armed conflict.

Humanitarian disarmament law, as embodied in the Mine Ban Treaty, extends the scope of disarmament by joining absolute prohibitions and

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[69] Art. 3(2), CCW Amended Protocol II, *supra* note 23.

[70] Art. 10(1) and (3), *ibid*.

[71] The convention's sole exception on remedial measures is the obligation of the international community, not the affected state, to provide emergency assistance in the case of future use; it will be discussed further in the section on international cooperation and assistance below.

remedial obligations. It borrows security disarmament's bans on use, production, transfer, and stockpiling, instead of hybrid disarmament's complex and diluted regulations. It combines them with hybrid disarmament's post-conflict measures, notably on clearance, while strengthening them in ways that increase their humanitarian effect. Together these provisions limit a broader range of weapons' deleterious effects. They reduce civilian suffering by both preventing future harm and mitigating the effects of harm lingering from the past.

C. Cooperative Approaches to Implementation

Disarmament treaties often include provisions designed to promote implementation, in other words, what states parties must do to ensure the above obligations become a reality. For humanitarian disarmament, as exemplified by the Mine Ban Treaty, provisions on two topics stand out as especially characteristic: international cooperation and assistance, and compliance. The former refers to assistance that states parties must provide to another state party to help it meet its obligations under the treaty; the latter addresses how states parties handle questions and concerns about the treaty's interpretation and implementation. In both cases, the Mine Ban Treaty adopts a cooperative approach, which

> assumes goodwill on the part of all States Parties and emphasizes resolution of issues in a nonconfrontational manner and assistance to help States Parties meet their obligations rather than criticism for failing to do so.[72]

That approach has precedent particularly in hybrid disarmament and aligns with the Mine Ban Treaty's humanitarian objective.

1. International Cooperation and Assistance

The Mine Ban Treaty seeks to ensure full implementation of its humanitarian provisions by including detailed international cooperation and assistance obligations. Article 6 establishes for each state party 'the right to seek and receive assistance'. States parties 'in a position to do so' must in turn support victim assistance and mine awareness, mine clearance, and

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[72] S.D. Goose, 'Goodwill Yields Good Results: Cooperative Compliance and the Mine Ban Treaty', in J. Williams/S.D. Goose/M. Wareham (eds.), Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security (2008) 105, at 106.

stockpile destruction. States parties must also 'facilitate and [...] have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information' related to implementation. Article 6's last paragraph reads,

> Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

It treats cooperation as critical to achievement of the Mine Ban Treaty's goals.

The Mine Ban Treaty borrows the principle of international assistance from CCW Amended Protocol II. The protocol similarly stipulates that each state party in a position to do so must provide assistance for clearance, and that affected states may request such assistance.[73] Amended Protocol II also includes comparable provisions on, *inter alia*, the exchange of equipment and information.[74] The Mine Ban Treaty goes further, however, by requiring international support for victim assistance, mine awareness, and stockpile destruction, topics that Amended Protocol II does not address.

Amended Protocol II's and the Mine Ban Treaty's provisions on international assistance fit their humanitarian purposes. They facilitate comprehensive implementation of the instruments by states parties with limited resources, which in turn helps protect civilians. The provisions also highlight a characteristic common in instruments with a humanitarian aim: states parties seek to work together, across state boundaries, for a shared purpose.[75] The security objective underlying Amended Protocol II did not hinder the inclusion of international assistance obligations because they apply primarily to remedial measures.

The Chemical Weapons Convention, by contrast, does not require a state party to help another state party meet its obligations under the convention.

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[73] Art. 11(3) and (4), CCW Amended Protocol II, *supra* note 23.

[74] Art. 11(1), *ibid.*

[75] Cooperation is not the exclusive domain of instruments with a humanitarian purpose. The UN Charter, for example, requires member states to 'take joint and separate action in co-operation with the [UN] Organization' to achieve a range of economic and social goals. The Charter requires such joint efforts

> with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

The provision serves state interests by promoting stability and the 'peaceful and friendly relations among nations'. The cooperation is largely humanitarian in

In particular, unlike the Mine Ban Treaty, it does not include provisions on international assistance for destruction of stockpiles or production facilities even though those are priorities of the convention. The Chemical Weapons Convention mandates assistance only when a state party requests, through a special process, 'protection against chemical weapons' because it faces the use or threat of use of chemical weapons.[76]

The Chemical Weapons Convention's approach to assistance is consistent with the objective of security disarmament. The UN Charter includes seven principles that guide how states should fulfill the purposes of the organization, and the first says that the United Nations is 'based on the principle of the sovereign equality of all its Members'.[77] This principle clarifies that maintaining security, the primary purpose of the United Nations, requires respecting sovereignty. Taking a broad view of sovereignty, the Chemical Weapons Convention does not mandate international assistance, which facilitates one state's involvement in another's affairs. Instead it places the burden for implementing the convention exclusively on the state that has the preventive obligation. The convention's sole exception - when a state party seeks help to deal with the use or threat of use of a chemical weapon against it - involves a situation in which a state party's sovereignty has already been violated.[78]

The Mine Ban Treaty's inclusion of international assistance provisions exemplifies how humanitarian disarmament tends to approach implementation cooperatively. These provisions require states parties to work together to improve the welfare of individual civilians, regardless of national boundaries. In so doing, they help ensure the treaty fulfills its potential by increasing the chance that states can fully implement its preventive and remedial measures. An obligation for nations to assist each other strengthens humanitarian disarmament's efforts to end civilian suffering from specific classes of weapons.

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nature, however, because it seeks to benefit people through, *inter alia*, 'higher standards of living', 'economic and social progress', and respect for human rights. Arts. 55, 56, UN Charter.

[76] Art. 10, Chemical Weapons Convention, *supra* note 15.

[77] Art. 2(1), UN Charter.

[78] Art. 10, Chemical Weapons Convention, *supra* note 15.

2. Cooperative Compliance

The Mine Ban Treaty also adopts a cooperative approach to compliance.[79] Article 8 opens:

> States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of the Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

While most other Mine Ban Treaty provisions say a state party 'shall' act, in Article 8 states parties 'agree' to act. They consent to 'consult and cooperate' and to 'work together in a spirit of cooperation'.[80] States are committed to trying to resolve differences bilaterally before turning to the next step of the compliance process.

In cases when bilateral discussions fall short, the Mine Ban Treaty lays out an elaborate process for handling 'requests for clarification' of compliance matters. A state party may request information, through the UN Secretary-General, and the requested state must reply. If the latter fails to reply or does so unsatisfactorily, the requesting state may take the matter to a regular or specially called meeting of states parties. The meeting of states parties, striving to make decisions by consensus, shall decide whether or not to take on the matter and what recommendations it chooses to make for resolving it. If the meeting of states parties seeks additional information, it may authorize a fact-finding mission, the requirements of which the treaty outlines in depth. While based on states parties' mutual respect and good will, the compliance mechanism provides 'a convenient, coordinated, and systematic method to clarify potentially contentious issues that inevitably arise'.[81]

The Mine Ban Treaty's model of compliance merges elements of both of its 1990s predecessors. In Article 14, Amended Protocol II obliges states parties

> to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate

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[79] Goose, 'Goodwill Yields Good Results', *supra* note 72, at 106.

[80] For a similar analysis of comparable language in the Convention on Cluster Munitions, see B. Docherty, 'Article 8: Facilitation and Clarification of Compliance', in G. Nystuen/S. Casey-Maslen (eds.), The Convention on Cluster Munitions: A Commentary (2010) 454, at 465.

[81] Goose, 'Goodwill Yields Good Results', *supra* note 72, at 108.

> international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

This paragraph resembles Article 8(1) of the Mine Ban Treaty although the latter treaty uses language that increases the emphasis on cooperation (*e.g.*, 'agree' and 'in a spirit of cooperation'). The Mine Ban Treaty also builds on Amended Protocol II's rules by establishing a process to follow should bilateral discussions fail. The cooperative approach to compliance, like international assistance, is consistent with the humanitarian objectives of these two instruments because it prioritizes working together for civilian protection.[82]

The Chemical Weapons Convention takes a different approach by establishing a rigorous verification regime to enforce compliance with its obligations.[83] States parties must first 'make every effort' to resolve differences through bilateral consultations or a request for clarification process similar to that in the Mine Ban Treaty.[84] If that process fails, however, any state party has the right to request an 'on-site challenge inspection' of relevant facilities or locations in another state party's territory.[85] When a state party does not redress a situation of non-compliance, the Conference of States Parties may 'restrict or suspend the State Party's rights and privileges under this Convention', and

> [i]n cases where serious damage to the object and purpose of this Convention may result [_] , the Conference may recommend collective measures by States Parties in conformity with international law.

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[82] Despite having a security objective too, Amended Protocol II did not establish requirements to verify compliance, like those in the Chemical Weapons Convention described below. This omission reflects not only the protocol's humanitarian purpose but also the fact that it deals largely with restrictions on use.

[83] Verification plays a major role in the Chemical Weapons Convention, and related provisions are woven throughout the text. While also a security disarmament treaty, the Biological Weapons Convention does not establish a rigorous verification regime. Given that these two conventions have similar goals and in all other ways fit in the same category of disarmament, the absence of verification in the Biological Weapons Convention has been described as a 'mistake'. Koplow, 'Long Arms and Chemical Arms', *supra* note 17, at 19, n. 66.

[84] Art. 9(2), Chemical Weapons Convention, *supra* note 15.

[85] Art. 9(8)-(25), *ibid*. As detailed in Article 9, the inspection team appointed by the director-general of the Organization for the Prohibition of Chemical Weapons must begin its work 'without delay', and the inspected state is obliged to permit the inspection, unless three-quarters of the Executive Council considers it frivolous.

The Conference may refer the matter to the UN General Assembly and Security Council 'in cases of particular gravity'.[86]

The rigid verification regime fits with the Chemical Weapons Convention's security goal. Maintaining security requires preserving a balance of power among states. As expressed in the principle of general and complete disarmament discussed earlier, measures 'should be balanced' so that no state 'gain[s] military advantage and that security is ensured equally for all'.[87] Verification in the Chemical Weapons Convention protects this balance by giving every state an equal opportunity through challenge inspections to make sure other parties are not gaining advantage by failing to comply.

The Mine Ban Treaty draws in part on the verification approach of the Chemical Weapons Convention but makes it a collaborative process. While the Mine Ban Treaty allows for fact-finding missions in cases where further clarification of compliance matters is needed, the call for an investigation comes not from an individual state's unilateral demands, but from the decision of a majority of states at a meeting of states parties. The missions themselves differ from on-site challenge inspections, which can occur with little notice and must be accepted.[88] Rather than establish sanctions for cases of non-compliance, the Mine Ban Treaty promotes compliance through political pressure on deliberate violators or offers of international assistance to those unable to meet their obligations.

The Mine Ban Treaty both encourages states to cooperate to ensure they fully comply and establishes safeguards in case they refuse to do so. In essence, it promotes compliance through open exchanges and multilateral monitoring. This approach has been very successful. According to *Landmine Monitor 2010*,

> In general, States Parties' implementation of and compliance with the Mine Ban Treaty has been excellent. The core obligations have been respected and when ambiguities have arisen, they have usually been dealt with in a satisfactory matter.[89]

Demonstrating the value states parties place on cooperation, they have to date never formally invoked their right to request clarifications, and the

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[86] Art. 12, *ibid.*

[87] Art. 5, McCloy-Zorin Accords, *supra* note 38.

[88] Compare Art. 8, Mine Ban Treaty with Art. 9, Chemical Weapons Convention.

[89] International Campaign to Ban Landmines, Landmine Monitor 2010 (Mines Action Canada, 2010), at 3.

meeting of states parties has never authorized a fact-finding mission.[90] Steve Goose writes,

> Cooperative compliance has worked for the Mine Ban Treaty in large part because of the sustained 'like-mindedness' of States Parties and their shared commitment to the humanitarian goals of the treaty.[91]

The Mine Ban Treaty's compliance approach has proven to be highly effective and appropriate for a type of disarmament that emphasizes working together for the disempowered rather than maintaining a balance of power among nations.

V. Humanitarian Disarmament's Influence in the New Millennium

While the Mine Ban Treaty was heralded as a groundbreaking achievement, at the close of the twentieth century, it was unclear whether it was an aberration or the beginning of a new chapter in disarmament law. The first decade of the twenty-first century has proved it is the latter. CCW Protocol V on Explosive Remnants of War shows that the Mine Ban Treaty has helped to elevate humanitarian concerns in international law. The Convention on Cluster Munitions, a true humanitarian disarmament instrument, demonstrates that this type of treaty is both established and growing stronger.

A. CCW Protocol V on Explosive Remnants of War

While not possessing all the elements of a humanitarian disarmament instrument, CCW Protocol V, adopted in 2003, exemplifies the growing influence of humanitarian concerns about the use of weapons. It seeks to reduce the impact explosive remnants of war (ERW) have on civilians and reflects a humanitarian shift in the CCW regime. ERW encompass unexploded

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[90] *Ibid*. Steve Goose writes,

> For better or worse, it appears that States Parties have decided that invoking the article would go against the aura of good feeling that surrounds the Mine Ban Treaty and its work program, and there is a reluctance to threaten that unique nature of the enterprise.

Goose, 'Goodwill Yields Good Results', *supra* note 72, at 108.

[91] Goose, 'Goodwill Yields Good Results', *supra* note 72, at 122.

ordnance (weapons that have been used and failed to explode) and abandoned ordnance (weapons 'left behind or dumped'), both of which linger after a conflict and thus threaten the civilian population.[92] Like Amended Protocol II, Protocol V falls under the preamble of the CCW's framework convention, but unlike any other CCW protocol, it adds its own. The first paragraph of the short preamble recognizes 'the serious post-conflict humanitarian problems caused by explosive remnants of war'. Its primacy of place and the absence of competing expressed concerns within the preamble suggest that, in Protocol V, minimizing civilian harm has a greater role than it did in earlier CCW instruments.[93]

The provisions of Protocol V accord with its increased humanitarian purpose. They are almost all remedial in nature, which, as discussed above, means that they contribute to the protection of civilians, the most frequent victims of weapons remaining after an armed conflict. Article 3 lays out detailed requirements for clearing and destroying ERW and prioritizes contaminated areas that pose 'a serious humanitarian risk'. Article 5 requires states parties to 'take all feasible precautions [_] to protect the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war'. Such precautions include warnings, risk education, marking, fencing, and monitoring. Amended Protocol II similarly requires clearance, but Protocol V expands and deepens the obligations. Although it does not copy Mine Ban Treaty language verbatim, this change suggests the influence of humanitarian disarmament.

Protocol V's implementation-related provisions are also consistent with the humanitarian nature of the instrument. Like the comparable article in Amended Protocol II, Article 8 of Protocol V obliges states parties 'in a position to do so' to provide assistance for clearance. Drawing from the Mine Ban Treaty, the article further requires international support for victim assistance and risk education, activities with the exclusive purpose of reducing civilian suffering. The protocol's compliance provision copies that in Amended Protocol II and adopts a cooperative approach to ensuring states parties meet their obligations.[94]

Despite its humanitarian purpose and provisions, Protocol V does not have all the characteristics typical of a humanitarian disarmament treaty. First, Protocol V contains no obligations designed to prevent weapons from

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[92] Art. 2, CCW Protocol V, *supra* note 25.

[93] Nevertheless, like other hybrid disarmament treaties, Protocol V references both the UN Charter and international humanitarian law in Article 1.

[94] Art. 11(2), CCW Protocol V, *supra* note 25.

becoming ERW that threaten civilians. Instead it 'encourage[s]' states to take voluntary preventive measures, laid out in a technical annex of best practices, and those measures are 'generic' ones that do not address specific problematic weapons.[95] Absolute prohibitions on all weapons that produce ERW would have been unreasonable, but the protocol could have placed mandatory restrictions on weapons prone to producing ERW, such as cluster munitions, and/or made its best practices on prevention binding and more specific. Second, qualifications weaken the power of many of Protocol V's provisions to protect civilians. The provisions are often modified with phrases such as 'to the extent possible', 'as far as practicable', and 'as far as feasible'. The Mine Ban Treaty, by contrast, establishes comprehensive and unqualified prohibitions to prevent civilian harm and requires strong remedial measures to minimize harm from past use.

Even with these differences, however, Protocol V illustrates the growing importance of humanitarian concerns in disarmament law. Although CCW's consensus process and security interests interfered with negotiation of an even stronger instrument, in Protocol V states chose to confront a problem, *i.e.*, ERW, that is humanitarian in nature and crafted a legal instrument with provisions intended to reduce civilian suffering. The humanitarian disarmament movement, born with the Mine Ban Treaty, likely contributed to this development.

B. Convention on Cluster Munitions

Humanitarian disarmament gained strength with the Convention on Cluster Munitions. Cluster munitions are large weapons containing dozens or hundreds of smaller submunitions. They cause civilian casualties both during strikes because of their broad area effect and afterwards because many submunitions do not explode on impact and become de facto landmines.[96] The Convention on Cluster Munitions follows the approach of the Mine Ban Treaty and demonstrates that the newest type of disarmament is not an

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[95] Art. 9, *ibid.* Technical Annex 3 lays out voluntary best practices on preventive measures relating to munitions manufacturing management, munitions management, training, transfer, and future production.

[96] Unexploded submunitions are one type of ERW and are thus covered by Protocol V. That protocol, however, does not address the problems of cluster munitions at the time of attack, and many states and civil society members found its provisions too weak and general to be adequate. Therefore a movement emerged to develop a cluster munition-specific instrument. Human Rights Watch, Meeting the Challenge, *supra* note 32, at 107-108.

aberration. In its preamble, the convention makes clear that ending civilian suffering is its primary objective. Through a combination of prohibitions, remedial measures, and cooperative implementation provisions, it seeks to eliminate the humanitarian problems of cluster munitions during and after conflict. The convention, which was adopted in May 2008 and entered into force on 1 August 2010, addresses both types of harm. As of 5 March 2012, it had 108 signatories and 68 states parties.[97]

The Convention on Cluster Munitions states its humanitarian purpose unequivocally at the outset. Its preamble opens by expressing concern that 'civilian populations and individual civilians continue to bear the brunt of armed conflict'. Tying that concern to specific weapons, the next paragraph establishes the objective of the treaty: 'to put an end for all time to the suffering and casualties caused by cluster munitions.' The third paragraph highlights the humanitarian nature of the problem and describes the civilian suffering the weapons cause. It explains that

> cluster munition remnants kill or maim civilians, including women and children, obstruct economic and social development, [_] can negatively impact on national and international peace-building and humanitarian assistance efforts, and have other severe consequences that can persist for many years after use.

The latter paragraph mentions peace-building, but this concept differs from the way peace is used in security and hybrid disarmament treaties. The Convention on Cluster Munitions acknowledges the existence of armed conflict and seeks to minimize cluster munitions' impact on efforts to restore peace. The Chemical Weapons Convention and the CCW, by contrast, strive to prevent war in the first place and link peace with security, a state-based interest.

Like the Mine Ban Treaty, the Convention on Cluster Munitions invokes international humanitarian law in its preamble. It bases its provisions on

[97] For a detailed analysis of the harm caused by cluster munitions, the process to ban them, and the next steps for the Convention on Cluster Munitions, see generally Human Rights Watch, Meeting the Challenge, *supra* note 32; for a legal analysis of the convention, see Nystuen/Casey-Maslen (eds.), The Convention on Cluster Munitions: A Commentary (2010), *supra* note 80. For a current list of signatories and states parties, see United Nations Office at Geneva, 'Convention on Cluster Munitions: Signatories and Ratifying States', available at http://www.

'the principles and rules of international humanitarian law' and focuses on the legal protections for civilians rather than soldiers. In addition to noting the limitations on means and methods of warfare, it underscores the requirements to distinguish civilians and combatants and to take 'constant care' to spare civilians as well as the principle that 'individual civilians enjoy general protection against dangers arising from military operations'. It also includes a version of the Martens Clause that provides protections for both civilians and combatants. In contrast to the Chemical Weapons Convention and the CCW, the Convention on Cluster Munitions makes no mention of the UN Charter.

While strengthening it in certain areas, the Convention on Cluster Munitions adopts the Mine Ban Treaty's general structure. With regard to preventive measures, it establishes absolute prohibitions comparable to the Mine Ban Treaty (and the Chemical Weapons Convention). It bans 'under any circumstances' use, production, transfer, and stockpiling of cluster munitions as well as assistance with any of those activities.[98] The Convention on Cluster Munitions also requires stockpile destruction as soon as possible but not later than eight years after entry into force for the state party.[99] By controlling both the use and proliferation of weapons, it seeks elimination of all cluster munitions, a prerequisite for ending the civilian suffering the weapons cause.

The multiple remedial measures of the convention draw from and often go beyond those in the Mine Ban Treaty.[100] In Article 4, it requires states

unog.ch/80256EE600585943/(httpPages)/67DC5063EB530E02C12574F8002E9E49?OpenDocument (last visited 5 March 2012).

[98] Art. 1, Convention on Cluster Munitions, *supra* note 4. The prohibition on assistance is the primary place where the Convention on Cluster Munitions appears to take a step back from the Mine Ban Treaty. Some have argued that controversial Article 21 on Relations with States not Party to this Convention qualifies Article 1 and allows certain forms of assistance during joint military operations. Others have said that Article 21 should be read not as a qualification but as a clarification that mere participation in joint operations is allowed, although not if it involves activities that violate the convention. For further analysis, see generally T.R. Arntsen, 'Article 21: Relations With States not Party to This Convention', in G. Nystuen/S. Casey-Maslen (eds.), The Convention on Cluster Munitions: A Commentary (2010) 541, and Human Rights Watch, Staying True to the Ban on Cluster Munitions, June 2009, available at http://www.hrw.org/node/83975 (last visited 21 February 2011).

[99] Art. 3, Convention on Cluster Munitions, *supra* note 4.

[100] For further discussion of the precedent set by the Convention on Cluster Munitions, see Docherty, 'Breaking New Ground', *supra* note 4.

parties to clear within ten years all cluster munition remnants, *i.e.*, cluster munitions and submunitions abandoned or left after a strike.[101] Article 4(4) adds a precedent-setting provision on retroactive user state responsibility. It 'strongly encourage[s]' a state party that has used cluster munitions in another state party's territory to provide assistance with clearance, even if the use took place before the convention entered into force. Because thatassistance can come in a variety of forms, including 'technical, financial, material or human resources', any user state should be able to provide some assistance. A user state that chooses to assist with clearance must provide information on the types, numbers, and locations of cluster munitions used. Such information can greatly facilitate and expedite clearance, which is a humanitarian imperative.

The most dramatic achievement of the Convention on Cluster Munitions is its victim assistance provisions, which are key means of reducing civilian suffering. It is the first disarmament treaty to define victim; this definition encompasses not only individuals who have experienced physical, psychological, or socioeconomic harm, but also their families and communities.[102] While the Mine Ban Treaty requires the international community to provide support for victims, the Convention on Cluster Munitions supplements that assistance by placing obligations on affected states. According to a detailed stand-alone article, affected states must provide 'age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion'.[103] With these provisions as well as five victim assistance paragraphs in the preamble, the Convention on Cluster Munitions prioritizes care for civilians harmed by the weapons instead of the security interests of states.

The comprehensive and cooperative implementation measures of the Convention on Cluster Munitions build on the third pillar of the Mine Ban Treaty. The new convention borrows from its predecessor several international cooperation and assistance provisions. Article 6 of the Convention on Cluster Munitions, however, strengthens a state party's right to seek and receive assistance by removing the phrases 'where feasible' and 'to the extent possible'. It also adds obligations to provide assistance for emergency situations and economic and social recovery, inserts a reference to user state responsibility for clearance, and includes more details on other forms

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[101] For the definition of cluster munition remnants, see Art. 2(7), Convention on Cluster Munitions, *supra* note 4.

[102] Art. 2(1), *ibid.*

[103] Art. 5(1), *ibid.* In Article 5(2), the convention enumerates steps affected states must take to meet its victim assistance obligations.

of assistance. Each of these additions increases states parties' duties to cooperate on measures to meet the obligations of the convention and reduce civilian suffering.

Article 8 on Facilitation and Clarification of Compliance adopts an even more cooperative approach than the Mine Ban Treaty. Its process for requests for clarification is very similar, but it removes the option for the meeting of states parties to authorize a fact-finding mission. One could argue this change weakens the compliance regime of the later treaty. The MineBan Treaty's states parties, however, have never invoked the fact-finding mission provision. The cooperative approach has proven to work very well in the Mine Ban Treaty context without the verification element that draws from security disarmament. The Convention on Cluster Munitions includes a provision allowing the meeting of states parties to adopt other 'general procedures or specific mechanisms' related to compliance if it chooses to do so in the future. This paragraph provides a safeguard in case the more cooperative method falls short.

Two novel implementation-related provisions advance the humanitarian objective of this form of disarmament. Like the Mine Ban Treaty, the Convention on Cluster Munitions requires state parties to take national measures to implement the convention. The Convention on Cluster Munitions goes further, however, by mandating implementation of the whole convention, not just its negative obligations.[104] This addition enhances the humanitarian power of the convention because its positive obligations include remedial measures designed to protect civilians.

Article 21(1) and (2) also moves humanitarian disarmament forward. The unprecedented paragraphs require states parties to work to universalize the convention, promote the convention's norms, and discourage use of cluster munitions. This set of obligations seeks to expand the legal reach of the convention and strengthen the stigma it imposes on the use of cluster munitions. Both, of course, can benefit civilians.

Not all states have endorsed the strong humanitarian elements of the Convention on Cluster Munitions, but its supporters defended it against a potentially grave challenge in the CCW forum. Responding to the initiation of the Oslo Process in 2007, major military powers led by the United States pushed for a competing, weaker protocol on cluster munitions.[105] The final

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[104] Art. 9, Convention on Cluster Munitions, *supra* note 4; L. Maresca, 'Article 9: National Implementation Measures', in G. Nystuen/S. Casey-Maslen (eds.), The Convention on Cluster Munitions: A Commentary (2010) 473.

[105] Human Rights Watch, Meeting the Challenge, *supra* note 32, at 154.

draft text from November 2011 included some provisions in keeping with humanitarian disarmament, such as victim assistance and international cooperation and assistance. Security interests, however, dictated the content of key articles. Most notably, the proposed protocol would have banned only certain categories of cluster munitions; it would have legitimized the use of other models for 12 years and still other ones in perpetuity.[106]

Adoption of this protocol could have had serious negative repercussions for civilian protection. It had the potential to reduce the stigmatization of cluster munitions created by the prohibitions of the Convention on Cluster Munitions. It would also have given states the option ofjoining an instrument with lower standards. Finally, it would have set bad legal precedent by following a strong treaty with a weaker one for the first time in the history of international humanitarian law.[107]

At the 2011 CCW Review Conference, states that supported the Convention on Cluster Munitions rejected the proposed protocol and brought an end to the negotiations. A group of 50 countries, almost all of whom had joined the convention, stood up to the major military powers and declared there was no consensus on the final draft text. In a joint statement, they cited humanitarian concerns as a reason for refusing to adopt the proposal. They stated that it 'offer[ed] no added humanitarian value' and explained, 'In our view, the present text does not adequately respond to the problems caused by cluster munitions.'[108] The defeat of the weaker CCW instrument represented a victory not only for the ban on cluster munitions but also for humanitarian disarmament in general.

While critics had been skeptical that the international community could repeat the success of the Mine Ban Treaty, the Convention on Cluster Munitions proved them wrong. The Vientiane Declaration, which the convention's First Meeting of States Parties agreed to in November 2010, described the Oslo Process as 'a testament to the importance of

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[106] Fourth Review Conference of States Parties to the CCW, 'Revised Draft: Protocol on Cluster Munitions', CCW/CONF.IV/9/Rev.1, 24 November 2011.

[107] See, *e.g.*, Human Rights Watch and Harvard Law School International Human Rights Clinic, 'From Good to Bad: The Threat Posed to International Law by the Draft CCW Protocol on Cluster Munitions', November 2011, available at http://www.hrw.org/news/2011/11/13/good-bad (last visited 14 December 2011).

[108] Joint Statement Delivered by Costa Rica on Behalf of 50 States to the Fourth Review Conference of the CCW, 25 November 2011, afternoon session.

humanitarian disarmament in global affairs.'[109] Both the content and the adoption of the convention, as well as the rejection of the CCW alternative, show that humanitarian disarmament has become an established means of governing weapons. Diplomats and members of civil society are currently talking about applying this model to other subjects, such as explosive weapons in populated areas, incendiary munitions, and even nuclear arms. These discussions show that humanitarian disarmament constitutes a living approach to ending civilian suffering that can be adapted to new weapons and evolve over time.

[109] 'No Cluster Munitions; From Vision to Action: The 2010 Vientiane Action Plan', para. 11, available at http://www.clusterconvention.org/files/2011/01/V-declaration.pdf (last visited 23 March 2011).