



Meeting the Challenge

Protecting Civilians through the Convention
on Cluster Munitions

HUMAN
RIGHTS
WATCH



Meeting the Challenge

**Protecting Civilians through the Convention
on Cluster Munitions**

Copyright © 2010 Human Rights Watch
All rights reserved.
Printed in the United States of America
ISBN: 1-56432-711-6
Cover design by Rafael Jimenez

Human Rights Watch
350 Fifth Avenue, 34th floor
New York, NY 10118-3299 USA
Tel: +1 212 290 4700, Fax: +1 212 736 1300
hrwnyc@hrw.org

Poststraße 4-5
10178 Berlin, Germany
Tel: +49 30 2593 06-10, Fax: +49 30 2593 0629
berlin@hrw.org

Avenue des Gaulois, 7
1040 Brussels, Belgium
Tel: + 32 (2) 732 2009, Fax: + 32 (2) 732 0471
hrwbe@hrw.org

64-66 Rue de Lausanne
1202 Geneva, Switzerland
Tel: +41 22 738 0481, Fax: +41 22 738 1791
hrwgva@hrw.org

2-12 Pentonville Road, 2nd Floor
London N1 9HF, UK
Tel: +44 20 7713 1995, Fax: +44 20 7713 1800
hrwuk@hrw.org

27 Rue de Lisbonne
75008 Paris, France
Tel: +33 (1)43 59 55 35, Fax: +33 (1) 43 59 55 22
paris@hrw.org

1630 Connecticut Avenue, N.W., Suite 500
Washington, DC 20009 USA
Tel: +1 202 612 4321, Fax: +1 202 612 4333
hrwdc@hrw.org

Web Site Address: <http://www.hrw.org>



November 2010

ISBN: 1-56432-711-6

Meeting the Challenge

Protecting Civilians through the Convention on Cluster Munitions

Table of Acronyms	i
Introduction	1
Cluster Munitions and their Human Toll	2
The Convention on Cluster Munitions	3
Overview of the Book	3
Part I: Recognizing the Problems	
I. The Technological Evolution and Early Proliferation and Use of Cluster Munitions	5
Early Development and Use	5
Southeast Asia	6
Early Proliferation of Cluster Munitions: 1970s and 1980s	8
A Spike in Use: 1990s	11
The Gulf War of 1991.....	11
Other Conflicts in the 1990s	13
Modern Technological Developments.....	14
Conclusion	18
II. A Decade of Cluster Munition Use: Recent Case Studies Documented by Human Rights Watch	19
Methodology	20
The NATO Air Campaign in the former Yugoslavia	20
Cluster Munition Strikes	21
Aftereffects	22
Afghanistan.....	23
Cluster Munition Strikes	24
Aftereffects	25
Iraq	26
Cluster Munition Strikes in the Iraq Ground War.....	28
Cluster Munition Strikes in the Iraq Air War.....	30
Aftereffects	31
Lebanon/Israel	33
Israel's Use in Lebanon	33
Hezbollah's Use in Israel	38
Georgia.....	39
Russian Use	40
Georgian Use	42
Conclusion	45

III. Production, Transfer, and Stockpiling	46
Production.....	46
Transfer	48
Stockpiling	53
Case Studies	57
China	57
Israel	58
Russia.....	60
United Kingdom	61
United States	62
Conclusion	66
IV. The Need for Post-Conflict Measures: Clearance, Risk Education, and Victim Assistance	67
Contamination and Casualties	67
Clearance	70
Professional Clearance Organizations.....	70
Methods of Clearance	71
Obstacles to Clearance.....	73
Community Clearance	77
Risk Education.....	79
Victim Assistance	81
Components and Implementation of Victim Assistance.....	81
Victim Assistance Challenges	83
Conclusion	85
Part II: Developing a Process	
V. Initial International Efforts to Govern Cluster Munitions.....	99
Existing International Humanitarian Law	99
Early Attempts to Ban Cluster Munitions	101
The Origin and Early Years of the Convention on Conventional Weapons	102
Protocol V on Explosive Remnants of War.....	104
The Birth of the Cluster Munition Coalition	107
Cluster Munition Discussions after Protocol V	108
The Tide Turns: 2006	110
Conclusion	113
VI. From Regulation to Ban: National Measures to Govern Cluster Munitions.....	114
National Regulations of Cluster Munitions.....	114
National Bans on Cluster Munitions	116
Conclusion	119

VII. The Oslo Process	120
Participants in the Process.....	121
States	121
Civil Society	122
International Organizations.....	124
The Forum and the Ground Rules	125
The Oslo Process Conferences	127
Oslo Conference on Cluster Munitions.....	127
Regional Conferences.....	128
Lima Conference on Cluster Munitions.....	128
The Lingering CCW Alternative	129
Vienna Conference on Cluster Munitions	130
Wellington Conference on Cluster Munitions	132
Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions.....	134
Oslo Signing Conference	137
Conclusion	138

Part III: Fulfilling the Promise

VIII. The Convention on Cluster Munitions.....	139
Underlying Purpose (Preamble).....	139
Definitions (Article 2)	140
Prohibitions.....	142
Absolute Prohibitions (Article 1)	142
The Prohibitions and Joint Military Operations with States Not Party (Article 21)	144
Positive Disarmament Obligations	145
Stockpile Destruction (Article 3)	145
Other Disarmament Obligations (Article 7).....	146
Positive Humanitarian Obligations.....	146
Clearance and Risk Reduction Education (Article 4)	146
Victim Assistance (Articles 2 and 5)	147
Provisions to Facilitate Full Implementation of the Convention	148
International Cooperation and Assistance (Article 6).....	149
Transparency Measures (Article 7)	149
Clarification of Compliance and Settlement of Disputes (Articles 8 and 10)	150
National Implementation Measures (Article 9)	151
Promoting the Convention (Article 21).....	152
Procedural Provisions	152
Meetings of States Parties and Review Conferences (Articles 11 and 12)	152
Closing Provisions (Articles 13-20, 22-23)	153
Conclusion	153

IX. Resistance to a Cluster Munition Ban	154
The CCW and Cluster Munitions	154
National Regulatory Measures	157
Conclusion	160
X. Final Steps: Universalization, Implementation, and Interpretation	161
Universalization.....	161
Implementation	163
Early Implementation	163
National Implementation Legislation	165
Interpretation	173
The Prohibition on Assistance	174
Interoperability	175
Transit	179
Hosting of Foreign Stockpiles	180
Investment.....	181
Retention of Cluster Munitions	182
Conclusion	183
Appendix I: The Path to an Absolute Ban on Cluster Munitions	185
Appendix II: Quick Reference Guide to the Major Cluster Munitions and Submunitions Used since 1999	189
Appendix III: State Practice Regarding Cluster Munitions	201
Appendix IV: The Convention on Cluster Munitions	203
Appendix V: Key Elements of Effective National Legislation to Implement the Convention on Cluster Munitions	221
Acknowledgments	224

Table of Acronyms

ANZCMC	Aotearoa New Zealand Cluster Munition Coalition
ATACMS	Army Tactical Missile System
CCW	Convention on Conventional Weapons
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts
CEP	Circular error probable
CIS	Commonwealth of Independent States
CMC	Cluster Munition Coalition
DAFA	Demining Agency for Afghanistan
DoD	US Department of Defense
DPICM	Dual-Purpose Improved Conventional Munition
ERW	Explosive remnants of war
FY	Fiscal Year
GGE	Group of Governmental Experts
GMLRS	Guided Multiple Launch Rocket System
GWAPS	Gulf War Air Power Survey
ICBL	International Campaign to Ban Landmines
ICRC	International Committee of the Red Cross
IDF	Israel Defense Forces
IMI	Israel Military Industries
JSOW-A	Joint Standoff Weapon-A
MACC SL	UN Mine Action Coordination Center–South Lebanon
MLRS	Multiple Launch Rocket System
NGO	Nongovernmental organization
OMAR	Organization for Mine Awareness and Afghan Rehabilitation
RSK	Republic of Serbian Krajina
SADARM	Sense and Destroy Armor Munition
TLAM-D	Tomahawk Land Attack Missile-D
UN MACC	UN Mine Action Coordination Center
UNDP	UN Development Program
UNIFIL	UN Interim Force in Lebanon
UNMIK	United Nations Mission in Kosovo
UXO	Unexploded ordnance
WCMD	Wind Corrected Munitions Dispenser
WILPF	Women’s International League for Peace and Freedom
WRSA	War Reserve Stocks for Allies

Introduction

For half a century, cluster munitions have inflicted suffering on civilians. Bystanders to armed conflicts have lost limbs, livelihoods, and even their lives. Cluster munitions are deadly both at the time of attack and afterwards. During strikes, they blanket areas the size of football fields with submunitions that spray high-velocity fragments in all directions. Many of these submunitions fail to explode on impact and linger for months or even years, able to be accidentally detonated by the unsuspecting farmer or child. The impact of these weapons has been felt around the globe.

While the threat persists, the international community has taken a strong stand against cluster munitions. After traditional disarmament approaches fell short, a group of like-minded states, in collaboration with civil society, moved discussions to an independent forum. The Oslo Process, a series of diplomatic conferences to develop and negotiate a treaty on cluster munitions, produced a comprehensive ban in just 15 months.

Ninety-four states signed the Convention on Cluster Munitions in Oslo on December 3, 2008, and 14 more would later add their signatures. In opening remarks at the signing conference, the minister of foreign affairs from Laos, one of the countries most affected by cluster munitions, referred to the event as a “historic moment of our humankind,” and his counterpart from Lebanon, a nation recently victimized by cluster munitions, described it as “a remarkable and exceptional moment for the world.” The convention has established a powerful and essential legal framework for eliminating the scourge of cluster munitions.

The convention became binding law on states parties when it entered into force on August 1, 2010, but much work must be done to fulfill its promise. A minister from Ireland cautioned at the signing conference, “We must not rest on our laurels.” States and civil society should continue their efforts to bring more countries on board, thereby extending the convention’s reach and increasing stigmatization of the weapons. They should demand comprehensive implementation measures at both national and international levels to meet the convention’s aims and take early action on stockpile destruction, clearance, and victim assistance to make an immediate difference on the ground. They should also push for strong interpretations of the convention’s provisions consistent with its overarching purpose.

This book seeks to build on the momentum of entry into force of the convention and advance ongoing efforts to achieve a world free of cluster munitions. It describes the dangers of cluster munitions and explains why those threats will continue as long as the weapons exist.

It charts the development of the treaty process, examining which approaches fell short and which produced positive change. Finally, the book analyzes the elements of the new international convention and provides guidance on the remaining actions needed to implement it fully.

Cluster Munitions and their Human Toll

Cluster munitions are large munitions that contain dozens and often hundreds of smaller submunitions. Either air dropped or surface launched, cluster munitions are area effect weapons that spread their submunitions over a large field, or footprint. They are designed to be effective against targets that move or do not have precise locations, such as enemy troops or vehicles, and to destroy targets that cover broad areas, such as airfields and surface-to-air missile sites. Early submunitions were primarily antipersonnel, but many of today's models have multiple effects. Scored shells are intended to maim or kill people by breaking into fragments, while anti-armor devices serve to damage vehicles and materiel. Militaries value cluster munitions because of their wide footprint and versatile submunitions.

The military benefits of cluster munitions, however, do not justify the harm they cause to civilians. The weapons present two grave humanitarian problems. First, civilians all too often fall victim to cluster munitions during strikes. The large number of submunitions is widely dispersed, which creates a footprint deadly to all inside. Within that space, no submunition has the capability to distinguish between soldiers and civilians. In addition, the cluster munition canisters that carry the submunitions are usually unguided, so they can miss their mark and hit non-military objects. The inherent risks to civilian life and property are nearly unavoidable when cluster munitions are used in or near populated areas, a common occurrence in modern armed conflict. If cluster munitions are used in an area where combatants and civilians commingle, civilian casualties are almost assured. In every conflict involving cluster munition use that Human Rights Watch has investigated, the weapons have been used in areas where both combatants and civilians are present, resulting in loss of civilian life.

Second, cluster munitions leave unexploded submunitions, or duds, that continue to kill or injure people after a conflict ends. The quantity of submunitions in each cluster munition, combined with design characteristics and environmental factors, means that some will always fail and become de facto landmines that can be set off later by unwitting civilians. Children are particularly common victims. The shape and sometimes color of submunitions attracts them because they are curious and believe the weapons are toys. Some models resemble balls while others have a ribbon, which makes a convenient handle for carrying or twirling.

Unexploded submunitions also frequently cause casualties among farmers, who do not see them hidden in their fields and hit them with their plows. The duds have socioeconomic costs because they contaminate agricultural land, making it unfit for planting or harvesting.

The Convention on Cluster Munitions

The Convention on Cluster Munitions aims to protect civilians by eliminating the weapons and the harm they cause. Its preamble states that its purpose is “to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.” To accomplish this goal, the convention prohibits states parties “under any circumstances” from using, producing, transferring, or stockpiling cluster munitions. It also prohibits states parties from assisting anyone with any of those activities.

In addition to laying out what states must not do, the convention imposes a set of positive obligations. To achieve its disarmament goal, it requires states parties to destroy stockpiles within eight years. To ensure establishment of remedial humanitarian measures, it obliges affected countries to clear cluster munition remnants within 10 years and provide a range of types of assistance to victims. The convention also includes provisions that will help advance effective implementation by all parties. States parties must provide cooperation and assistance to help other states parties meet their obligations, fulfill detailed reporting requirements which facilitate both implementation and monitoring, take legal and other measures to implement the convention at the national level, and promote the norms of the convention.

Overview of the Book

This book has three main parts. Part I: Recognizing the Problems traces the humanitarian costs of cluster munitions from their origins to the present and details the threats they will continue to pose if left unchecked in the future. When the United States blanketed Southeast Asia with cluster munitions during the Vietnam War, it represented the first widespread use of a munition that would become a staple of arsenals around the world and left millions of unexploded submunitions that still kill and maim civilians. More recent use of cluster munitions in five conflicts over the past decade has shown that improvements in technology and targeting do not eliminate the civilian casualties that occur during strikes and afterwards. Production, transfer, and stockpiling of cluster munitions, which are prerequisites to use, are both widespread and ongoing. Minimizing human suffering post-conflict presents additional challenges. It requires effective clearance, a time-consuming, expensive, and sometimes deadly endeavor; it also demands extensive risk education and a

variety of forms of victim assistance. This examination of the range of problems demonstrates why a separate treaty that bans the weapon is the only solution.

Part II: Developing a Process explores the evolution of efforts to address the problems of cluster munitions and examines why they culminated in success. It also identifies key elements that can serve as models for similar campaigns in the future. For many years, international attempts to deal with cluster munitions fell short, demonstrating that traditional diplomacy could not deal with the growing crisis. During that time, many states began to take national measures that both demonstrated opposition to cluster munitions and increased restrictions on the weapons. A majority of the initiatives were partial regulations, however, and the ad hoc nature even of domestic bans highlighted that a global problem needed a global solution. Drawing on the example of the Mine Ban Treaty negotiations, the Oslo Process adopted a bold, forward-looking approach that was broadly representative, independent, and expedient. This type of humanitarian disarmament process was essential to achieving an absolute and comprehensive ban.

Part III: Fulfilling the Promise analyzes the content of the Convention on Cluster Munitions and provides direction for how to realize its potential. This groundbreaking convention, which categorically bans cluster munitions and establishes rigorous disarmament and humanitarian duties, addresses all of the problems of cluster munitions while pushing international law in new directions. Some major military powers have shown resistance to the convention by advocating for alternatives that merely regulate the weapons. The international community must counter such efforts to undermine the convention and complete the process begun in Oslo by bringing on additional parties, implementing all of its obligations, and agreeing to strong interpretations of the convention's provisions. Only when these goals are reached will the world succeed in eliminating the lingering threat posed by these inhumane weapons.

Part I: Recognizing the Problems

I. The Technological Evolution and Early Proliferation and Use of Cluster Munitions

A half-century ago, cluster munitions were a little known instrument of warfare. They have since become common—if controversial—weapons for most modern militaries. Cluster munitions gained preferential status through a combination of technological innovations, changing combat needs, industrial interests, permissive laws, and lack of public awareness or debate. These factors produced an area effect munition that exacts a lethal and predictable, even if unintentional, toll on civilians.

From their first major use, the civilian harm inflicted by cluster munitions has outweighed their military benefits. During the Vietnam War, the United States blanketed Southeast Asia with the weapons, causing civilian casualties at the time of attack and leaving millions of unexploded submunitions that continue to kill and maim decades later. Since then, cluster munitions have proliferated widely and been used in almost every region of the world. While the design of cluster munitions has evolved in ways that theoretically could reduce humanitarian harm, technological fixes have failed to eliminate the weapons' negative effects. The history of development, use, and proliferation illuminates the major problems of cluster munitions and foreshadows the impact they still have today.

Early Development and Use

The technology that produced the earliest cluster munitions also gave rise to their devastating effects. Through experiments conducted in the early twentieth century, scientists determined that small, high-velocity projectiles were the most effective means of maximizing injury.¹ Equipped with this insight, weapons designers worked to develop the controlled fragmentation of explosive devices by using certain metals and pre-fragmented materials.² While increased and more predictable fragmentation ensured the lethality of individual submunitions, new fuze technology made their wide dispersal possible. In

¹ For a discussion of the science of wound ballistics, see Eric Prokosch, *The Technology of Killing* (London: Zed Books, 1995), pp. 10-27.

² For a discussion of early developments in controlled fragmentation, see *ibid.*, pp. 37-39. The US Army defined controlled fragmentation as "the technique of design and fabrication of a projectile, mine, grenade or bomb to cause a predetermined size, shape, density, velocity and pattern of the fragments upon detonation." *Ibid.*, p. 49 n. 22.

particular, mechanical time fuzes installed on the large container that carried submunitions released submunitions after the passage of a certain period of time, allowing them to spread over a wide footprint and hit a large number of targets.³ While the design of cluster munitions would continue to evolve, developments in fragmentation and fuze technology created a deadly weapon with a broad area effect.

Modern cluster munitions date back to the First World War, when Britain had the idea of dropping a group of munitions for incendiary bombing.⁴ Cluster-type weapons were also used during World War II, but at the time, military officials did not consider cluster munitions very effective because they were unable to control dispersal patterns.⁵ Although cluster munitions were not used during the Korean War, it sparked technological innovations that would make submunitions less expensive and more effective, and therefore more widespread. The United States sought weapons with maximum antipersonnel impact to offset the disadvantage of being outnumbered by enemy troops. Controlled fragmentation munitions, with their ability to incapacitate through debilitating wounds, offered a solution.⁶

Southeast Asia

The Vietnam War made cluster munitions a staple of military operations, and a weapons expert described it as “a proving ground” for the weapons.⁷ Faced with Cold War insurgencies in the late 1950s and early 1960s, the US government pursued the development of conventional weapons that could combat guerilla enemies, who were often difficult for US soldiers to locate.⁸ The United States also wanted weapons that could attack

³ Ibid., p. 103.

⁴ Ibid., p. 82. The first known use of a weapon resembling the cluster munition appears to have occurred during the 1840s, when the Swedish military fired a cluster of grenades from a mortar. Rae McGrath, *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions* (London: UK Working Group on Landmines, 2000), http://www.landmineaction.org/resources/Cluster_Bombs.pdf (accessed September 17, 2010), p. 11.

⁵ In 1943, Soviet forces employed cluster munitions against German armor while the German military used SD-2 butterfly bombs, antipersonnel devices resembling cluster munitions, against Britain. The United States dropped cluster-like munitions in its incendiary bombing of Tokyo, carpeting the city with groups of six-pound napalm explosives in an operation that killed tens of thousands. International Campaign to Ban Landmines (ICBL), *Cluster Munition Monitor 2010* (Ottawa: Mines Action Canada, 2010), p. 240, www.the-monitor.org (accessed November 1, 2010) [hereinafter *Cluster Munition Monitor 2010*]; Eric Prokosch, *Cluster Weapons* (Colchester: Human Rights Centre, University of Essex, 1995), p. 1; Prokosch, *The Technology of Killing*, p. 82; Major Thomas J. Herthel, “On the Chopping Block: Cluster Munitions and the Law of War,” *Air Force Law Review*, vol. 51 (2001), p. 236.

⁶ Prokosch, *The Technology of Killing*, pp. 32-33; Stockholm International Peace Research Institute, *Anti-personnel Weapons* (London: Taylor & Francis Ltd, 1978), p. 161. Early submunition models were primarily antipersonnel weapons because they had been designed to counter waves of enemy troops of the kind encountered in the Korean War. Later models, particularly those designed to attack Soviet armor, usually had dual purposes.

⁷ Prokosch, *The Technology of Killing*, p. 7.

⁸ Ibid., p. 81.

anti-aircraft artillery and surface-to-air missions when their locations could not be pinpointed.⁹ Officials, therefore, pushed forward arms research on fragmentation, dispersal, and detonation. For example, new dispensers were designed to hold more submunitions and disperse these submunitions more widely.¹⁰ A mechanical device that would trigger submunition detonation based on the submunition's spin rate was invented to prevent submunitions from exploding until they had penetrated the forest canopy (thus slowing the spin rate).¹¹ By the time US troops began their major buildup in Southeast Asia, these branches of research had converged to enable the production of area effect cluster munitions that were affordable and ready for use in battle.

The United States made widespread use of a variety of cluster munitions during the Vietnam War. According to an analysis of bombing data by Handicap International, over the course of the conflict, US forces dropped approximately 80,000 cluster munitions (containing 26 million submunitions) on Cambodia, more than 296,000 cluster munitions (containing nearly 97 million submunitions) on Vietnam, and more than 414,000 cluster munitions (containing at least 260 million submunitions) on Laos.¹² While the most common models were antipersonnel, some could also attack vehicles, a multi-effects trend which continues today.¹³ The area over which Vietnam War-era cluster munitions could spread submunitions ranged from 10,000 to 200,000 square meters.¹⁴

US cluster munition attacks wrought tremendous harm against civilians in Indochina, and continue to do so. Michael Krepon, later founder of the Henry L. Stimson Center in Washington, DC, called cluster munitions "the most indiscriminate antipersonnel weapon used in the Vietnam War."¹⁵ Much of the harm resulted from munitions that failed to explode

⁹ Herthel, "On the Chopping Block," *Air Force Law Review*, p. 237.

¹⁰ Prokosch, *The Technology of Killing*, p. 82.

¹¹ *Ibid.*, p. 104.

¹² *Cluster Munition Monitor 2010*, p. 13.

¹³ The most common cluster munition used was the CBU-24, or Sadeye, a cigar-shaped dispenser containing nearly 700 one-pound spherical BLU-26 submunitions, each of which was filled with 300 steel ball bearings. Although Air Force officials claimed the Sadeye was designed for suppressing enemy anti-aircraft installations, a secretary of the Navy characterized it as a "large area antipersonnel weapon." Vietnamese civilians called the BLU-26 submunitions "guavas." In addition to the CBU-24, US forces made extensive use of CBU-2/A and CBU-14 cluster munitions, containing the antipersonnel BLU-3 submunition, which dispersed 255 steel balls and which the Vietnamese civilians dubbed the "pineapple." The submunitions in a Rockeye targeted armored vehicles with a shaped charge but also had antipersonnel effects when the submunitions' metal case fragmented. The largest US cluster munition employed during the Southeast Asia conflict was the Hayes dispenser, a boxlike aluminum device capable of holding 12,744 BLU-26 or 38,520 M40 submunitions. Michael Krepon, "Weapons Potentially Inhumane: The Case of Cluster Bombs," *Foreign Affairs*, vol. 52 (1974), p. 597; Prokosch, *The Technology of Killing*, pp. 81, 85, 98-99, 101-102, 105; Prokosch, *Cluster Weapons*, p. 4.

¹⁴ Stockholm International Peace Research Institute, *Anti-personnel Weapons*, p. 29.

¹⁵ Krepon, "Weapons Potentially Inhumane," *Foreign Affairs*, p. 595.

when originally released but were later triggered by civilian passersby. Assuming a conservative dud rate of 5 percent and relying on Handicap International's estimated number of total submunitions used, cluster munitions would have left more than 19 million unexploded submunitions. According to the International Committee of the Red Cross (ICRC), unexploded submunitions have killed or injured some 11,000 people in Laos, more than 30 percent of whom have been children.¹⁶ Civilians continue to this day to be killed and injured by unexploded submunitions in all three countries.¹⁷ There is no credible estimate of the amount of land still contaminated, but it will likely take decades to clear.

The use of cluster munitions provoked increasing public opposition to the Vietnam War in the United States and elsewhere. Though napalm was the weapon antiwar protesters targeted most, cluster munitions had a mobilizing effect as well. Opponents criticized the manufacturers of cluster munition components,¹⁸ and peace activists and antiwar journalists visiting North Vietnam discovered and reported on the humanitarian impact of the weapons.¹⁹ Serious doubts also existed as to whether the weapon on balance helped US military efforts.²⁰ The uncoordinated and unsustained opposition to cluster munitions, along with a deliberate government policy of secrecy and lack of debate,²¹ precluded successful international initiatives to regulate or ban cluster munitions at this stage.

Early Proliferation of Cluster Munitions: 1970s and 1980s

The conflict in Southeast Asia significantly raised the profile of cluster munitions and transformed them from a military experiment into a mainstream weapon. By 1973, for

¹⁶ ICRC, "Explosive Remnants of War: The Lethal Legacy of Modern Armed Conflict," July 2003, [www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0828/\\$File/ICRC_002_0828.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0828/$File/ICRC_002_0828.PDF!Open) (accessed September 18, 2010), p. 6.

¹⁷ Unexploded submunitions killed or injured 33 people in Laos in 2009. Landmine and Cluster Munition Monitor, "Lao PDR: Casualties," October 13, 2010, http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/330#_ftnref11 (accessed November 1, 2010).

¹⁸ Prokosch, *The Technology of Killing*, pp. 134-135.

¹⁹ In 1967, British philosopher Bertrand Russell and a group of writers, scientists, and civic leaders organized a panel to investigate the US military conduct in Vietnam. The panel, which called itself an International War Crimes Tribunal despite having no formal legal power or state sponsorship, sent field investigators to Indochina to report on cluster munition attacks and visit cluster munition victims. Two sets of hearings were held, one in Stockholm and one in Copenhagen. The US government, however, declined to attend the Tribunal's hearings, and ultimately the Russell-led initiative received little coverage in the world media. Prokosch, *The Technology of Killing*, p. 93.

²⁰ Certainly, the weapons succeeded in destroying many anti-aircraft installations and their crews. "Guavas," however, became important propaganda tools for the North Vietnamese, who would present the submunitions to visitors as symbols of US brutality. As information about the weapons spread, cluster munitions thus fueled opposition to the war both domestically and abroad. Krepon, "Weapons Potentially Inhumane," *Foreign Affairs*, pp. 603-604; Prokosch, *The Technology of Killing*, pp. 112-114 (discussing Chief Warrant Officer Swearington, *Staff Study on Pernicious Characteristics of US Explosive Ordnance* (Washington: US Marine Corps, 1969)).

²¹ With regard to US secrecy, see Prokosch, *Technology of Killing*, p. 90; Krepon, "Weapons Potentially Inhumane," *Foreign Affairs*, p. 600.

example, cluster munitions comprised 29 percent of the US Air Force's entire ordnance procurement budget.²² The weapons also quickly proliferated.

Use in the 1970s and 1980s extended to Africa, the Americas, the Middle East, and South Asia. In Africa, unknown forces left cluster munition remnants in Zambia (1970s), Morocco used cluster munitions against a non-state armed group in Western Sahara and Mauritania (1975-1991), the United States attacked Libyan ships (1986), and France and Libya launched attacks in Chad (1986-1987). In the Americas, the United Kingdom dropped 107 cluster munitions on the Falkland Islands/Malvinas (1982), and the United States dropped 21 in Grenada (1983).²³ In the Middle East, Israel used cluster munitions in Syria in 1973 and in Lebanon in 1978 and 1982.²⁴ The United States used cluster munitions against Syrian units in Lebanon in 1983 and Iranian ships in 1988, and Iraq used cluster munitions in its war with Iran beginning in 1984. Finally, the Soviet Union, which would become another major user, used cluster munitions during its invasion of Afghanistan from 1979 to 1989, primarily to attack *mujahiddeen* strongholds and exposed fighters.²⁵

²² Krepon, "Weapons Potentially Inhumane," *Foreign Affairs*, p. 604. Krepon's analysis includes the following models: CBU-25, CBU-55, CBU-58, MK-20 (Rockeye), and BLU-32.

²³ For a complete list of cluster munition use, see timeline reprinted in this chapter from *Cluster Munition Monitor 2010*, pp. 13-14.

²⁴ Israel's use may have violated an agreement not to use US-supplied cluster munitions in populated areas. The United States imposed a moratorium on exports of cluster munitions to Israel in July 1982 but quietly lifted it in November 1988. For more information, see Human Rights Watch, *Flooding South Lebanon: Israel's Use of Cluster Munitions in Lebanon in July and August 2006*, vol. 20, no. 2(E), February 2008, <http://www.hrw.org/reports/2008/lebanon0208/>, pp. 102-103.

²⁵ *Cluster Munition Monitor 2010*, p. 13.

Timeline of Cluster Munition Use²⁶

Date	Location	Known Details
1939–1945	Italy, Libya, Malta, USSR, United Kingdom, possibly other locations	Munitions similar in function to modern cluster munitions were used by Germany and the Soviet Union, and possibly other belligerent parties, during World War II.
1965–1975	Cambodia, Lao PDR, Vietnam	According to an analysis of US bombing data by Handicap International, approximately 80,000 cluster munitions, containing 26 million submunitions, were dropped on Cambodia between 1969 and 1973; over 414,000 cluster bombs, containing at least 260 million submunitions, were dropped on Lao PDR between 1965 and 1973; and over 296,000 cluster munitions, containing nearly 97 million submunitions, were dropped in Vietnam between 1965 and 1975.
1970s	Zambia	Remnants of cluster munitions, including unexploded submunitions from air-dropped bombs, have been found at Chikumbi and Shang'ombo.
1973	Syria	Israel used air-dropped cluster munitions against NSAG training camps near Damascus.
1975–1991	Western Sahara, Mauritania	Moroccan forces used artillery-fired and air-dropped cluster munitions against an NSAG in Western Sahara. The same types of cluster munition remnants have been found in Mauritania.
1978	Lebanon	Israel used cluster munitions in south Lebanon.
1979–1989	Afghanistan	Soviet forces used air-dropped and rocket-delivered cluster munitions. NSAGs also used rocket-delivered cluster munitions on a smaller scale.
1982	Lebanon	Israel used cluster munitions against Syrian forces and NSAGs in Lebanon.
1982	Falkland Islands/ Malvinas	UK forces dropped 107 BL-755 cluster bombs containing a total of 15,729 submunitions.
1983	Grenada	US Navy aircraft dropped 21 Rockeye bombs during close air support operations.
1983	Lebanon	US Navy aircraft dropped 12 CBU-59 and 28 Rockeye bombs against Syrian air defense units near Beirut in Lebanon.
1984–1988	Iran, Iraq	It has been reported that Iraq first used air-dropped cluster bombs in 1984.
1986	Libya	US Navy aircraft attacked Libyan ships using Mk-20 Rockeye cluster bombs in the Gulf of Sidra on March 25. On 14–15 April, US Navy aircraft dropped 60 Rockeye bombs on Benina Airfield.
1986–1987	Chad	French aircraft dropped cluster munitions on a Libyan airfield at Wadi Doum. Libyan forces also used AO-15Ch and PTAB-2.5 submunitions at various locations.
1988	Iran	US Navy aircraft attacked Iranian Revolutionary Guard speedboats and an Iranian Navy ship using Mk.-20 Rockeye bombs during Operation Praying Mantis.
1991	Saudi Arabia	Saudi Arabian and US forces used artillery-delivered and air-dropped cluster munitions against Iraqi forces during the battle of Khafji.
1991	Iraq, Kuwait	The US, France, and the UK dropped 61,000 cluster bombs containing some 20 million submunitions. The number of cluster munitions delivered by surface-launched artillery and rocket systems is not known, but an estimated 30 million or more dual purpose improved conventional munition (DPICM) submunitions were used in the conflict.
1992–1994	Angola	Deminers have found dud Soviet-made PTAB submunitions in various locations.
1992–1994	Nagorno-Karabakh, Azerbaijan	Submunition contamination has been identified in at least 162 locations in Nagorno-Karabakh. There are also reports of contamination in other parts of occupied Azerbaijan, adjacent to Nagorno-Karabakh.

²⁶ *Cluster Munition Monitor 2010*, pp. 13-14.

1992–1995	BiH	Yugoslav forces and NSAGs used cluster munitions during civil war. NATO aircraft dropped two CBU-87 bombs.
1992–1997	Tajikistan	ShOAB and AO-2.5RT submunitions have been found in the town of Gharm in the Rasht Valley, used by unknown forces in civil war.
1994–1996	Chechnya	Russian forces used cluster munitions against NSAGs.
1995	Croatia	On 2–3 May 1995, an NSAG used Orkan M-87 multiple rocket launchers to conduct attacks in the city of Zagreb. The Croatian government claims that Serb forces used BL-755 bombs in Sisak, Kutina, and along the Kupa river.
1996–1999	Sudan	Sudanese government forces used air-dropped cluster munitions in southern Sudan, including Chilean-made PM-1 submunitions.
1997	Sierra Leone	Sierra Leone has said that Nigerian ECOMOG peacekeepers used BLG-66 Belouga bombs on the eastern town of Kenema. ECOMOG denied these reports.
1998	Afghanistan/Sudan	In August, US ships and submarines fired 66 TLAM-D Block 3 cruise missiles, each containing 166 BLU-97 submunitions, at a factory target in Khartoum, Sudan, and at NSAG training camps in Afghanistan.
1998	Ethiopia, Eritrea	Ethiopia and Eritrea exchanged aerial cluster munition strikes. Ethiopia attacked Asmara airport, and Eritrea attacked Mekele airport. Ethiopia also dropped BL-755 bombs in Gash-Barka province in Eritrea.
1998–1999	Albania	Yugoslav forces used rocket-delivered cluster munitions in disputed border areas, and NATO forces carried out six aerial cluster munition strikes.
1998–2003	DRC	Deminers have found BL-755 bombs and dud submunitions in the villages of Kasu, Katelwa, and Est Agrico in Kabalo territory.
1999	Federal Republic of Yugoslavia	The US, the UK, and the Netherlands dropped 1,765 cluster bombs containing 295,000 submunitions in now-Kosovo, Montenegro, and Serbia.
2001–2002	Afghanistan	The US dropped 1,228 cluster bombs containing 248,056 submunitions.
Unknown	Uganda	RBK-250/275 bombs and AO-1SCh submunitions have been found in the northern district of Gulu.
2003	Iraq	The US and the UK used nearly 13,000 cluster munitions, containing an estimated 1.8 to 2 million submunitions, in the three weeks of major combat.
2006	Lebanon	Israeli forces used surface-launched and air-dropped cluster munitions against Hezbollah. The UN estimates that Israel used up to 4 million submunitions.
2006	Israel	Hezbollah fired more than 100 Chinese-produced Type-81 122mm cluster munition rockets into northern Israel.
2008	Georgia	Russian and Georgian forces both used cluster munitions during the August 2008 conflict. Submunitions found by deminers include the air-dropped AO-2.5 RTM and the rocket-delivered 9N210 and M85.
2009	Yemen	Amnesty International reported that the US apparently used at least one TLAM-D cruise missile with 166 BLU-97 submunitions to attack an alleged terrorist training camp in al-Ma'jalah on 17 December 2009.

A Spike in Use: 1990s

The Gulf War of 1991

The United States and its allied coalition opened the 1990s with the most extensive use of cluster munitions since the Vietnam War. Cluster munitions accounted for about one-quarter

of the bombs dropped on Iraq and Kuwait during the Gulf War of 1991.²⁷ Between January 17 and February 28, 1991, the United States, France, the United Kingdom, and to a limited extent Saudi Arabia dropped about 61,000 cluster bombs, releasing twenty million submunitions, only about 15 percent of which were new models.²⁸ They used an additional estimated 30 million surface-launched submunitions.²⁹ Coalition armed forces notably targeted mobile SCUD missiles and Iraqi tank and vehicle columns retreating from Kuwait.³⁰ As a result, unexploded submunitions littered roads, culverts, and bridges. Coalition forces also used cluster munitions in urban areas, leading to attacks on infrastructure and dual use targets frequented by civilians during and after the war.³¹ Exacerbating the humanitarian threat, use of low-altitude cluster munitions at medium to high altitudes decreased the accuracy of strikes and increased the dispersal pattern of the submunitions.³²

While the lack of precision exacerbated the risk to civilians during strikes, duds caused most of the civilian cluster munition casualties in the Gulf War. As of February 1993, unexploded submunitions had killed 1,600 civilians and injured 2,500 more.³³ Post-war research revealed an “excessively high dud rate” due to the high altitude from which they were dropped and the sand and water on which they landed.³⁴ The large quantity of cluster munitions added to the problem; even a 5 percent dud rate would have left more than 2 million unexploded submunitions. The plethora of duds on major roads put both refugees

²⁷ Human Rights Watch, *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan*, vol. 14, no. 7(G), December 2002, <http://www.hrw.org/reports/2002/us-afghanistan/>, p. 40. For more information on cluster bomb use in the Gulf War, see Human Rights Watch, *Ticking Time Bombs: NATO's Use of Cluster Munitions in Yugoslavia*, vol. 11, no. 6(D), June 1999, <http://www.hrw.org/reports/1999/nato2/index.htm#TopOfPage>, pp. 8-12; Human Rights Watch, *Cluster Bombs in Afghanistan*, October 2001, <http://www.hrw.org/en/reports/2001/10/31/cluster-bombs-afghanistan>, pp. 5-6.

²⁸ *Cluster Munition Monitor 2010*, p. 13; Human Rights Watch, *Fatally Flawed*, p. 40. The new model was the CBU-87 cluster munition; other, less reliable Vietnam War-era types included the Rockeye and CBU-52, CBU-58, and CBU-71.

²⁹ Colin King, commissioned by the ICRC, *Explosive Remnants of War: A Study on Submunitions and Other Unexploded Ordnance*, August 2000, p. 16 (citing Donald Kennedy and William Kincheloe, “Steel Rain: Submunitions,” *U.S. Army Journal*, (January 1993)).

³⁰ U.S. Air Force, *Gulf War Air Power Survey*, vol. IV, pt. I (1993), pp. 290, 231 [hereinafter GWAPS] (cited in Human Rights Watch, *Fatally Flawed*, p. 40).

³¹ *Ibid.*, pp. 43, 48 (cited in Human Rights Watch, *Fatally Flawed*, p. 40).

³² Pilots also had more experience with delivery of cluster munitions closer to the ground. *Ibid.*, vol. II, pt. II, pp. 162-63 (cited in Human Rights Watch, *Fatally Flawed*, p. 40). The new CBU-87 fared better because of its radar proximity fuze and a spin mechanism that controlled dispersal, but it still had a lower accuracy rate than designed. Murray Hamrick, “Aerial Views: USAF Air-to-Air Combat,” *International Defense Review* (July 1991), p. 743 (cited in Human Rights Watch, *Fatally Flawed*, p. 40).

³³ Human Rights Watch, *Fatally Flawed*, p. 40.

³⁴ GWAPS, vol. II, pt. I, p. 261 (cited in Human Rights Watch, *Fatally Flawed*, p. 40).

and foreign relief groups at risk.³⁵ The duds particularly endangered children; 60 percent of the victims were under the age of fifteen.³⁶

Unexploded submunitions caused other significant side effects. First, they slowed economic recovery because duds needed to be cleared before people could restore industrial plants, communication facilities, and neighborhoods³⁷ and extinguish the oil fires in Kuwait.³⁸ Second, during and after the war, unexploded ordnance (UXO), including submunitions, represented the “greatest threat” to US troops.³⁹ Submunitions killed or injured more than 100 US soldiers and killed an additional 100 clearance workers.⁴⁰

Other Conflicts in the 1990s

Over the course of the rest of the decade, militaries used cluster munitions in armed conflicts in Africa, Central Asia, and Europe. In Africa, both Eritrea and Ethiopia used the weapons in their 1998 territorial dispute over the Badme border area, causing hundreds of civilian casualties.⁴¹ Other cluster munition attacks in Africa affected Angola, Sudan, Sierra Leone, and the Democratic Republic of the Congo during this time period.⁴²

The use of cluster munitions also accompanied the breakup of the Soviet Union. Cluster munition remnants were found from conflicts in Nagorno-Karabakh and Azerbaijan (1992-

³⁵ Human Rights Watch, *Fatally Flawed*, pp. 40-41.

³⁶ In addition to being less cautious in battlefield areas, children were attracted by the colorful submunitions, which one reporter described as resembling “white lawn darts, green baseballs, [and] orange-striped soda cans.” James Vincent Brady, “Kuwaitis Dying from Old Menace: Unexploded Bombs,” *Fort Worth Star-Telegram*, January 12, 1992, p. 1 (quoted in Human Rights Watch, *Fatally Flawed*, p. 41).

³⁷ Iraqi authorities said that they removed tens of thousands of submunitions from such areas. Human Rights Watch, *Fatally Flawed*, p. 41.

³⁸ *Ibid.*

³⁹ The General Accounting Office reported, that in some cases, “ground movement came to a halt because units were afraid of encountering unexploded ordnance.” US General Accounting Office, “Operation Desert Storm: Casualties Caused by Improper Handling of Unexploded U.S. Submunitions,” GAO/NSIAD-93-212, August 1993, p. 9 (cited in Human Rights Watch, *Fatally Flawed*, p. 41).

⁴⁰ Patrick J. Sloyan, “U.S. Bomblets Killed 14 Americans in Gulf War,” *Newsday*, September 19, 1991, p. 4; Brady, “Kuwaitis Dying from Old Menace,” *Fort Worth Star-Telegram*, p. 1 (both cited in Human Rights Watch, *Fatally Flawed*, p. 41).

⁴¹ The Eritrea Ethiopia Claims Commission found Eritrea liable for two strikes in Mekele, including one on a school, on the grounds that it failed to take all feasible precautions to minimize civilian casualties. Virgil Wiebe, “For Whom the Little Bells Toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions,” University of St. Thomas School of Law, Legal Studies Research Paper No. 07-23 (2007), pp. 11-12. For more information on the use of cluster munitions by Ethiopia and Eritrea, see also McGrath, *Cluster Bombs*, p. 41; Handicap International, *Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities* (Brussels: Handicap International, 2007), http://en.handicapinternational.be/Circle-of-Impact--report-on-the-human-impact-of-cluster-bombs_a467.html (accessed October 30, 2010), pp. 50-51.

⁴² *Cluster Munition Monitor 2010*, pp. 13-14.

1994) and Tajikistan (1992-1997).⁴³ The Russian government used cluster munitions extensively in Chechnya between 1994 and 1996 and again in 1999. The attacks culminated in at least 636 casualties, including 301 deaths.⁴⁴ Russia directed many, if not most, of its cluster munition attacks, including the 1999 attack on the Grozny market, at civilian areas.⁴⁵ According to one estimate, the Grozny attack killed 137 people.⁴⁶

Conflict in the Balkans led to use of cluster munitions in Europe, which became the decade's most affected region. Internal and NATO forces used cluster munitions in Bosnia and Herzegovina between 1992 and 1995, reportedly causing at least 92 casualties, of which 13 individuals were killed and 79 injured.⁴⁷ Armed forces of the self-proclaimed Republic of Serbian Krajina (RSK) used cluster munitions in Croatia in 1995, causing 221 known casualties (7 individuals killed and 214 injured) at the time of attack alone. The International Criminal Tribunal for the Former Yugoslavia ultimately found RSK President Milan Martić guilty of crimes against humanity for cluster munition attacks that landed on Zagreb's commercial center in May of that year.⁴⁸ During the 1999 conflict in Yugoslavia, which will be discussed in detail in the next chapter, NATO forces launched an extensive air campaign that used cluster munitions, and both NATO and Yugoslav armed forces used cluster munitions in Albania, which was not party to the fighting.⁴⁹ Overall, cluster munitions were likely used more extensively during the 1990s than in the previous two decades combined.

Modern Technological Developments

After the Vietnam War, as use of cluster munitions spread, the technology of cluster munitions continued to evolve. A trio of developments has attempted to improve cluster munitions' accuracy and reliability, primarily for military reasons but also to decrease humanitarian harm. None, however, has succeeded in eliminating the inherent problems of the weapons.

⁴³ Ibid.

⁴⁴ All but 24 of the documented casualties came during strikes, not afterwards. Many post-conflict casualties, however, may not have been reported. Handicap International, *Circle of Impact*, p. 85.

⁴⁵ For information on other incidents in Chechnya, see Mennonite Central Committee, "Clusters of Death: Global Report on Cluster Bomb Production and Use," 2000, <http://clusterbombs.mcc.org/clusterbombs/resources/research/death/> (accessed October 30, 2010), chap. 3.

⁴⁶ HALO Trust, a UK-based demining organization, estimated that 137 people were killed while Chechen President Aslan Maskhadov alleged that 282 died in the attack. Ibid.

⁴⁷ Yugoslav forces and a non-state armed group used cluster munitions. NATO aircraft dropped two CBU-87 cluster bombs due to an apparent "operational miscommunication" in violation of its own regulations. Handicap International, *Circle of Impact*, pp. 60-61.

⁴⁸ *Prosecutor v. Milan Martić*, International Tribunal for the Former Yugoslavia, Case No. IT-95-11-T, Judgment (Trial Chamber I), June 12, 2007, <http://www.icty.org/x/cases/martic/tjug/en/070612.pdf> (accessed September 9, 2010), paras. 456-463, 470-471, 518.

⁴⁹ *Cluster Munition Monitor 2010*, p. 14.

Perhaps the most important technological change was the addition of devices designed to reduce dud rates, including self-destruct, self-neutralization, and self-deactivating mechanisms. In theory such devices would minimize the number of civilian casualties, but as exemplified by the use of M85 submunitions with self-destruct devices, they failed to do so. British ground forces used M85s for the first time in combat during major hostilities in Iraq in 2003.⁵⁰ One British officer told Human Rights Watch that his troops were more careless about using the M85 in populated areas because they assumed the self-destruct mechanism had eliminated the humanitarian impact and they neglected to consider the danger of cluster munitions during strikes.⁵¹ The true test of M85s came when Israel, which produces the submunitions, used them extensively in south Lebanon in 2006. Many military experts at that time consider it to be the most reliable submunition model produced because it had a 1.3 to 2.3 percent dud rate in tests.⁵² Clearance groups in Lebanon found numerous unexploded M85 submunitions with self-destruct mechanisms, however, indicating that the M85's self-destruct component did not always work as designed.⁵³ In an in-depth study of strike locations where these submunitions landed, C. King Associates, the Norwegian Defence Research Establishment, and Norwegian People's Aid concluded that the failure rate of such submunitions in Lebanon was in fact around 10 percent.⁵⁴ The UN Mine Action Coordination Center–South Lebanon (MACC SL) echoed this finding.⁵⁵ In both Iraq and Lebanon, a touted “technological fix” had failed to eliminate the humanitarian problems of cluster munitions.

Modern cluster munition technology has also sought to increase the accuracy of the container itself. More precision would improve the chances of hitting the intended target, which would have military and humanitarian benefits. During its bombing of Afghanistan in 2001, the United States used for the first time in combat the CBU-103, regarded as a technical

⁵⁰ These M85 submunitions were delivered in L20A1 artillery projectiles, carrying 49 M85s each. Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003), <http://www.hrw.org/reports/2003/usa1203/>, p. 85.

⁵¹ Human Rights Watch telephone interview with Col. Gil Baldwin, commanding officer, First Queen's Dragoon Guards, Cardiff, Wales, July 2, 2003.

⁵² Military experts from numerous countries that stockpile the M85 or variants of it have made this claim in discussions with Human Rights Watch during meetings related to the Convention on Conventional Weapons (CCW) in recent years. For a discussion of the tests that produced these failure rates, see Human Rights Watch, *Flooding South Lebanon*, pp. 30-31.

⁵³ Email communication from Dalya Farran, media and post clearance officer, Mine Action Coordination Center–South Lebanon (MACC SL) to Human Rights Watch, January 15, 2008.

⁵⁴ C King Associates, Norwegian Defence Research Establishment, and Norwegian People's Aid, *M85: An Analysis of Reliability* (Norway: Norwegian People's Aid, 2007), <http://www.npaid.org/?module=Articles;action=Article.publicShow;ID=5662> (accessed September 18, 2010), pp. 6, 15.

⁵⁵ Chris Clark, program manager, MACC SL, “Unexploded Cluster Bombs and Submunitions in South Lebanon: Reliability from a Field Perspective,” paper presented at ICRC Expert Meeting, Montreux, Switzerland, April 18-20, 2007.

improvement over the CBU-87 used in the Gulf War.⁵⁶ It was outfitted with a Wind Corrected Munitions Dispenser (WCMD) designed to improve accuracy by compensating for wind encountered during its fall and narrowing the pattern of submunition dispersal.⁵⁷ Despite pronouncements by the US Air Force that the CBU-103 was “highly successful,”⁵⁸ Human Rights Watch did not find evidence during field missions in Afghanistan and Iraq to conclude that the modification provided a technological fix to the humanitarian problems caused by cluster munitions. In particular this model still released 202 submunitions, many of which did not explode on impact as designed, and was vulnerable to poor targeting. Other more precise munitions, such as the Joint Standoff Weapon-A (JSOW-A) and BGM-109D Tomahawk Land Attack Missile (TLAM-D), have been equipped with submunitions but used much more rarely.⁵⁹

Cluster munitions that have guided submunitions with fail-safe mechanisms, often called sensor fuzed weapons after a US model, are the most cutting-edge types in existence. The United States introduced its air-delivered Sensor Fuzed Weapon, or CBU-105, when it dropped 88 of them in Iraq in 2003.⁶⁰ Equipped with a WCMD to direct the canister, it contains 10 BLU-108 submunitions that each include four hockey puck-sized “skeet” warheads. Infrared and laser sensor guidance systems on the skeets are designed to direct them to targets with high heat sources, such as armored tanks, parked airplanes, and

⁵⁶ Human Rights Watch, *Fatally Flawed*, p. 6.

⁵⁷ The accuracy of air-launched munitions is measured by “circular error probable” (CEP), which is “the radius of a circle within which half of a missile’s projectiles are expected to fall.” US Department of Defense, “Dictionary of Military Terms,” http://www.dtic.mil/doctrine/dod_dictionary/ (accessed September 18, 2010). The WCMD is designed to have a CEP of 85 feet (26 meters), according to manufacturer specifications. Robert Hewson, ed., *Jane’s Air-Launched Weapons*, Issue 44 (Surrey, UK: Jane’s Information Group Limited, 2004), pp. 544-545; Directory of US Military Rockets and Missiles, “WCMD,” <http://www.designation-systems.net/dusrm/app5/wcmd.html> (accessed September 18, 2010).

⁵⁸ Frank Wolfe, “Air Force Employing WCMD, Flex Targeting on B-52s, Linking Predator and AC-130s,” *Defense Daily*, November 28, 2001 (cited in Human Rights Watch, *Fatally Flawed*, p. 6).

⁵⁹ In Afghanistan, for example, the US Navy used a small number of Joint Standoff Weapon-A (JSOW-A) cluster munitions, also known as AGM-154 cluster munitions, which carried 145 BLU-97 submunitions. Human Rights Watch, *Fatally Flawed*, p. 1. US forces used a small but uncounted number of JSOW cluster munitions and precision-guided BGM-109D Tomahawk Land Attack Missiles-D (TLAM-Ds) containing 145 and 166 BLU-97 submunitions, respectively, in Iraq in 2003. Lt. Gen. T. Michael Moseley, US Air Force, “Operation Iraqi Freedom: By the Numbers,” April 30, 2003, http://www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf (accessed September 18, 2010), p. 11.

⁶⁰ Human Rights Watch, *Off Target*, pp. 60-61. CBU-105 cluster munitions without the WCMD are referred to as CBU-97 cluster munitions. In Iraq, the United States also used 121 artillery shells with Sense and Destroy Armor Munitions (SADARMs), which are similar to CBU-105s but have only two submunitions. For details on these weapons types, see Human Rights Watch, *Off Target*, pp. 82, 84. SADARMs are not considered cluster munitions under the definition established by the 2008 Convention on Cluster Munitions. See Convention on Cluster Munitions, adopted May 30, 2008, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, entered into force August 1, 2010, art. 2(2), <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> (accessed October 6, 2010); Human Rights Watch, *Twelve Facts and Fallacies about the Convention on Cluster Munitions*, April 2009, <http://www.hrw.org/en/news/2009/04/14/twelve-facts-and-fallacies-about-convention-cluster-munitions>, p. 3.

vehicles.⁶¹ If they fail to find such a target, one of a trio of fail-safe mechanisms is supposed to activate.⁶² The manufacturer, Textron Defense Systems, claims that these redundant mechanisms “are key elements that distinguish [Sensor Fuzed Weapons] from traditional munitions, preventing hazardous unexploded ordnance and ensuring a clean battlefield for follow-on troop movement and civilian habitation of the area.”⁶³ Not enough evidence is available, however, to determine what kind of humanitarian impact sensor fuzed weapons would have in the field, or whether they would function as designed under battle conditions.

Despite these multiple technological developments, states have also continued to use Vietnam War-era cluster munitions. The United States used updated versions of the Rockeye, containing 247 dart-shaped dual-purpose Mk-118 submunitions that are known to leave behind a high number of unexploded duds, in Yugoslavia in 1999, Afghanistan in 2001 and 2002, and Iraq in 2003.⁶⁴ In Yugoslavia and Iraq, the United Kingdom used variants of the air-dropped BL-755, modeled after another Vietnam War-era cluster munition containing 147 submunitions.⁶⁵ In Lebanon in 2006, Israel used US-manufactured and -supplied air-dropped CBU-58B cluster munitions containing 650 BLU-63 antipersonnel submunitions each.⁶⁶ Deminers after that conflict discovered CBU-58B canisters marked with a September 1973 load-date that suffered catastrophic failures, meaning that they failed even to dispense their submunitions.⁶⁷

⁶¹ Textron Defense Systems, “BLU-108 Submunition: Sensor Fuzed Submunition with Clean Battlefield Protection,” 2008, p. 2, http://www.textrondefense.com/pdfs/datasheets/blu108_datasheet.pdf (accessed October 28, 2010); “CBU-97/B Sensor Fuzed Weapon System (SFW) (with BLU-108),” in Duncan Lennox, ed., *Jane’s Air Launched Weapons* (Surrey, UK: Jane’s Information Group Limited, 1999).

⁶² According to the manufacturer, Textron Defense Systems, “The first two modes enable the Skeet to self destruct after eight seconds from launch or within a 50-foot altitude above the ground. The Skeet’s third feature is a time-out device that will yield the warhead inert within minutes of hitting the ground.” Textron Defense Systems, “Delivering Confidence: Sensor Fuzed Weapon,” 2010, http://www.textrondefense.com/pdfs/datasheets/sfw_datasheet.pdf (accessed October 28, 2010), p. 1. See also Textron Defense Systems, “BLU-108 Submunition,” p. 1.

⁶³ Textron Defense Systems, “Delivering Confidence,” p. 1.

⁶⁴ Landmine Action, *Cluster Munitions in Kosovo: Analysis of Use, Contamination and Casualties* (London: Landmine Action, 2007), <http://www.landmineaction.org/resources/Cluster%20Munitions%20in%20Kosovo.pdf> (accessed September 18, 2010), p. 9 (citing data provided by NATO to the UN Mission in Kosovo (UNMIK)); Human Rights Watch, *Fatally Flawed*, p. 1; Moseley, “Operation Iraqi Freedom—By the Numbers,” p. 11.

⁶⁵ ⁶⁵ Human Rights Watch, *Memorandum to Delegates to the April Prepcom for the 2001 Review Conference for the Convention on Conventional Weapons*, April 2, 2001, <http://www.hrw.org/press/2001/04/clusterbombs0402.htm>; Landmine Action, *Cluster Munitions in Kosovo*, p. 9 (citing data provided by NATO to UNMIK); Human Rights Watch, *Off Target*, p. 61; UK Ministry of Defence, “Operations in Iraq: First Reflections,” July 2003, http://www.globalsecurity.org/military/library/report/2003/iraq2003operations_ukmod_july03.pdf (accessed September 18, 2010), p. 24.

⁶⁶ Email communication from Dalya Farran, media and post clearance officer, MACC SL, to Human Rights Watch, January 18, 2008.

⁶⁷ Human Rights Watch interview with Allan Poston, chief technical advisor, National Demining Office, UN Development Program (UNDP), Beirut, November 29, 2006; Presentation by Chris Clark, program manager, MACC SL, to CCW Delegates, Geneva, August 30, 2006, notes by Human Rights Watch.

Conclusion

Over the past five decades, militaries increasingly have come to choose cluster munitions as an important element of their arsenals. At least 86 countries acquired stockpiles of the weapons and their use spread to Africa, Asia, Europe, Latin America, and the Middle East. Newer, more technologically advanced submunitions have been developed but have failed to solve humanitarian problems. At the same time, models from the 1970s continue to be used. While the Vietnam War may have been the most egregious case of civilian harm from cluster munitions, it was only the beginning.

II. A Decade of Cluster Munition Use: Recent Case Studies Documented by Human Rights Watch

The suffering caused by cluster munitions is not merely a historical problem. In the past 11 years, cluster munition use has resulted in disproportionate civilian harm in five major conflicts: Yugoslavia (1999), Afghanistan (2001-2002), Iraq (2003), Lebanon and Israel (2006), and Georgia (2008). In each, cluster munitions have had devastating effects on individuals and communities. They have killed and maimed civilians during strikes with explosions that sent shards of steel in every direction. Unexploded submunitions have lingered on the battlefield, endangering civilians, clearance professionals, and even friendly soldiers fighting through the areas where they were used. By contaminating fields and farms, cluster munitions have also interfered with livelihoods.

The five recent conflicts documented by Human Rights Watch illustrate varied types of cluster munition use and the dangers associated with them. The NATO air campaign in the former Yugoslavia showed the risks of using air-dropped models in urban areas, while the US bombing of Afghanistan demonstrated that use even in small villages or near populated areas can cause civilian casualties. The US-led Coalition's invasion of Iraq exemplified the humanitarian problems of ground-launched cluster munitions and the failure to learn from past mistakes. Israel's blanketing of south Lebanon proved that new technology can neither prevent the long-term danger of submunitions nor eliminate the risk of excessive use; Hezbollah's attacks on Israel in the same conflict revealed that non-state armed groups have access to these weapons. Finally, use by Russia and Georgia in the conflict over South Ossetia highlighted that different kinds of players—from major users, producers, and stockpilers to first-time users who import their cluster munitions—turn to the weapons, and that cluster munitions often do not work as intended.

Over the course of these conflicts, some of the armed forces have tried strategies to decrease the harm to civilians of cluster munition attacks, including new technology, changes in targeting, and vetting processes. None have resolved the weapons' problems. The results of Human Rights Watch field investigations, summarized below, illustrate that regardless of the specifics of an attack or the nature of the safeguards taken, cluster munitions always have predictable and unavoidable humanitarian consequences. The evidence calls for an absolute ban on the weapons.⁶⁸

⁶⁸ For more information on the cluster munitions used during these conflicts, see Appendix II.

Methodology

Human Rights Watch field research on cluster munitions has developed over the years, but the essential components have remained consistent. As soon as the security situation allows, Human Rights Watch researchers conduct on-the-ground investigations to understand how and why civilians were killed or injured. Increasingly Human Rights Watch researchers are on the ground during the armed conflict or immediately after ceasefire, as was the case in Lebanon in 2006 and Georgia in 2008.

Research teams investigate the villages, towns, and general area surrounding cluster munition strikes. At each site Human Rights Watch researchers interview civilians directly affected by the attacks, visit hospitals to interview doctors and collect casualty statistics, meet with demining and aid organizations and military personnel, examine physical evidence of the strikes such as weapons debris and structural damage, and take documentary photographs. Human Rights Watch also employs GPS receivers and mapping programs in order to locate strikes and map data.

After an initial mission, Human Rights Watch continues to conduct follow-up interviews with civilians, deminers, medical experts, and military officials and often sends inquiries to the parties responsible for cluster munition use before compiling and analyzing all of the information gathered. In some cases, it returns to the site of the conflict to assess the long-term effects on civilians. The results of its findings are then made public in a full-length report with recommendations.

The NATO Air Campaign in the former Yugoslavia⁶⁹

From March to June 1999, the United States, the United Kingdom, and the Netherlands dropped at least 1,765 cluster munitions containing about 295,000 submunitions as part of Operation Allied Force, the NATO air campaign in the former Yugoslavia.⁷⁰ From the beginning, NATO and allied government and military officials stressed their intent to minimize civilian casualties, but despite reported precautions, their cluster munitions killed

⁶⁹ The information in this section is drawn largely from Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, vol. 12, no. 1(D), February 2000, <http://www.hrw.org/reports/2000/nato/>; Human Rights Watch, *Ticking Time Bombs*. For additional information, see Norwegian People's Aid, "Yellow Killers: The Impact of Cluster Munitions in Serbia and Montenegro," May 4, 2007, <http://www.npaid.org/filestore/YellowKillersNPA.pdf> (accessed September 18, 2010); Norwegian People's Aid, "Report on the Impact of Unexploded Cluster Munitions in Serbia," January 2009, http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/04/reportontheimpactofunexplodedclustersubmunitionsinserbia_smallest.pdf (accessed September 18, 2010).

⁷⁰ NATO used primarily CBU-87 air-dropped cluster munitions, containing 202 anti-armor, antipersonnel, and incendiary submunitions resembling yellow soda cans. It also used Rockeyes and variants of the BL-755, which were modeled on Vietnam War-era weapons. The area in which NATO dropped the cluster munitions is now Serbia, Montenegro, and Kosovo.

and injured at least 240 civilians at the time of attack and afterward. NATO could not overcome the threats posed by the inherent nature of cluster munitions.

This lesson emerged even as NATO's bombing campaign was still in progress. Widespread reports of civilian casualties from cluster munitions and international criticism of these weapons as potentially indiscriminate became so apparent that, in mid-May 1999, President Clinton temporarily suspended US use of cluster bombs in this campaign. The order came just days after the NATO strike on Nis, which was particularly noteworthy for the civilian casualties that it caused.⁷¹ It has been reported that the Netherlands may have also suspended its use of cluster munitions while the bombing campaign was still ongoing, due to humanitarian concerns, but it is unclear exactly when this policy change may have occurred.⁷² The UK Royal Air Force, by contrast, continued to use the weapons through June 4, 1999.⁷³ This divergence of ad hoc policies underlined the need for universal, not national, norms regarding the weapons' use in order to prevent, rather than merely react to, the civilian harm that these weapons cause.

Cluster Munition Strikes

According to Human Rights Watch's research, cluster munition strikes killed 90 to 150 civilians and injured many more.⁷⁴ These figures represent 18 to 30 percent of the total civilian deaths Human Rights Watch documented in the conflict, even though cluster munitions amounted to a much smaller portion of the total number of bombs dropped.⁷⁵

The most notable case of civilian deaths from cluster munitions occurred in Nis, when submunitions fell on an urban area, killing 14 civilians and wounding 28. On May 7, 1999, a US aircraft dropped CBU-87 cluster munitions, intending to destroy Serbian aircraft located at the Nis airfield. The cluster munitions misfired and fell from 1.5 to 6 kilometers off target in three populated civilian areas. Submunitions landed near the Nis Medical School in southeast Nis, in the town center including the area of the central city market place, and near a car dealership and parking lot. According to media reports, unexploded submunitions on several city streets and throughout the city center endangered civilians after the strike.⁷⁶

⁷¹ Human Rights Watch discussions with US Air Force and Joint Chiefs of Staff officers, October 1999.

⁷² Landmine Action, *Cluster Munitions in Kosovo*, p. 11 (citing an October 2000 letter from the Dutch Ministry of Defense).

⁷³ UK Royal Air Force, "Royal Air Force Campaign Histories: Operation Allied Force 1999," updated January 22, 2009, http://www.raf.mod.uk/history_old/kosovo6.html (accessed September 18, 2010).

⁷⁴ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, p. 27.

⁷⁵ Human Rights Watch, *Fatally Flawed*, p. 41.

⁷⁶ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, Appendix A, Incident 48.

NATO officials immediately described the incident as an accident. NATO Maj. Gen. Walter Jertz speculated that the cluster munitions may have gone astray due to “a technical malfunction or they could have been inadvertently released.”⁷⁷ According to US Air Force sources, the CBU-87 cluster munition container opened immediately after the plane released it, spreading submunitions over populated sites, instead of opening over the airfield it was intended to target.⁷⁸ Nis illustrated the danger of using cluster munitions in or near populated areas. Even when the weapons are intended for military targets, technical failure can occur at the expense of civilian lives.

Aftereffects

According to the ICRC, explosive submunition duds in Kosovo killed at least 50 civilians and injured at least 101 from June 1999 to May 2000.⁷⁹ The UN Mine Action Coordination Center (UN MACC) reported that fatal incidents involving cluster munition duds “generally involved groups of younger people, often with very tragic results.”⁸⁰ UN MACC estimated a dud rate between 7 and 11 percent, depending on the submunition model, and reported that more than 20,000 unexploded submunitions remained after the war.⁸¹

One incident occurred in Kosovo in August 1999, three months after the end of the NATO air strikes. Adnan, 6, was swimming with his family when he picked up a small yellow object and showed it to his family. Adnan’s older brother, Gazmend, 17, accidentally dropped the object, a submunition, causing it to explode. Gazmend and the boys’ father were killed, and Adnan suffered injuries to his left arm and leg. After the initial incident, Adnan’s sister, Sanije, 14, returned to the site to retrieve the family’s belongings. While she was there, Sanije stepped on a second submunition and was killed.⁸² Events like this show how cluster munition duds can make even ordinary activities dangerous for civilian populations.

⁷⁷ At the same news conference, NATO Secretary-General Javier Solana confirmed that cluster munitions intended for the Nis airfield missed their target and landed in populated areas resulting in civilian casualties. Secretary-General Solana stated that “civilian casualties were never intended and NATO regrets the loss of life and injuries inflicted.” Transcript of news conference given by the NATO Secretary General, Javier Solana, Brussels, May 8, 1999 (including Major General Jertz).

⁷⁸ Human Rights Watch correspondence with US Air Force officer, November 1999.

⁷⁹ ICRC, “Explosive Remnants of War: Cluster Bombs and Landmines in Kosovo,” June 2001, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/explosive-remnants-of-war-brochure-311201/\\$File/ICRC_002_0780.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/explosive-remnants-of-war-brochure-311201/$File/ICRC_002_0780.pdf) (accessed September 18, 2010), p. 10. Many of the victims were children. *Ibid.*, p. 11; Norwegian People’s Aid, “Yellow Killers,” p. 33.

⁸⁰ UNMIK Mine Action Coordination Center, Quarterly Report, June 1-September 30, 2000, p. 4.

⁸¹ ICBL, *Landmine Monitor Report 2001* (Washington: Human Rights Watch, 2001), p. 952; “U.N. Mine Clearance Center Expects to Finish Kosovo Mine Clearance by End of 2001,” Agence France-Press, July 11, 2001.

⁸² Handicap International, “Fatal Footprint: The Global Human Impact of Cluster Munitions,” November 2006, http://en.handicapinternational.be/Fatal-Footprint-98-civilians-casualties_a409.html (accessed October 30, 2010), p. 25.

In addition to causing deaths and injuries, unexploded cluster munitions also disrupted civilians' lives, interfered with the return of refugees, and slowed agricultural and economic recovery. The farming village of Bogdanovac, in southeast Serbia, for example, was littered with BL-755 submunitions, impeding the villagers' ability to collect firewood. One villager explained, "When the weather turns cold, we pray to God, and then enter the woods."⁸³ Unexploded submunitions have endangered and killed deminers and military clearance specialists,⁸⁴ and submunition clearance in the former Yugoslavia is ongoing, slow, difficult, and deadly.⁸⁵ Spurred by the horrific effects of cluster munitions during and after this armed conflict, Human Rights Watch in December 1999 became the first group to call for a global moratorium on the weapons.⁸⁶

Afghanistan⁸⁷

In 232 strikes, the United States dropped at least 1,228 cluster munitions containing 248,056 submunitions in Afghanistan between October 2001 and March 2002.⁸⁸ Cluster munitions represented about 5 percent of the US bombs dropped, a slightly smaller percentage than was used in Yugoslavia. In this conflict, the United States heeded some lessons from past use of cluster munitions, but the weapons continued to raise the same issues. Improvements in targeting did not eliminate the civilian harm caused by the use of cluster munitions in or near populated areas, and improvements in technology did not adequately overcome the fundamental, and fatal, flaws of the weapon. Unexploded US submunitions also endangered US troops, in several cases hindering their movements and slowing down operations.

In particular, the bombing of Afghanistan demonstrated the danger cluster munitions pose—during strikes and after—even in a less urban and industrialized setting. Unlike in some previous conflicts, the United States did not target roads or bridges in Afghanistan with either unitary or cluster munitions, but it did drop cluster munitions on and near inhabited

⁸³ Norwegian People's Aid, "Yellow Killers," p. 44.

⁸⁴ Handicap International, *Circle of Impact*, p. 69; Norwegian People's Aid, "Yellow Killers," p. 33.

⁸⁵ For example, see HALO Trust, "Kosovo: Requirement for Continued Clearance," undated, http://www.halotrust.org/operational_areas/caucasus_balkans/kosovo/requirements.aspx (accessed September 18, 2010).

⁸⁶ ⁸⁶ Human Rights Watch, *Memorandum to Delegates to the April Prepcom for the 2001 Review Conference for the Convention on Conventional Weapons* (stating "In December 1999, Human Rights Watch first called for a global moratorium on the use of cluster bombs until humanitarian concerns can be adequately addressed.").

⁸⁷ The information in this section is drawn largely from Human Rights Watch, *Fatally Flawed*.

⁸⁸ US Department of Defense, "Probable UXO [Unexploded Ordnance] Locations," March 2002. The United States used primarily CBU-87 cluster munitions and CBU-103 cluster munitions, which had the WCMD described in Chapter 1. The US Navy also deployed a small number of CBU-99 and CBU-100 Rockeye and JSOW-A cluster munitions, but these munitions are not included in the total number listed above.

villages. While Afghan villages are smaller than Yugoslavian cities, such targets accounted for many, if not most, of the more than 150 civilian casualties documented by Human Rights Watch from cluster munitions during this conflict. The reports of civilian casualties from US cluster munitions drew criticism from nongovernmental organizations (NGOs), intergovernmental organizations, and some governments, leading to calls for an immediate moratorium until an international agreement could be reached.⁸⁹

Cluster Munition Strikes

In a limited sampling of the three locations, Human Rights Watch confirmed that at least 25 civilians died and many more were injured during cluster munition strikes in or near populated areas. These casualty figures do not represent the total for the country because some deaths and injuries went unreported and because Human Rights Watch did not attempt to identify every civilian casualty caused by cluster munitions. The incident in the village of Ishaq Suleiman, northwest of Herat, exemplifies the danger of using these weapons in or near populated areas.⁹⁰

Over the course of six days, beginning on October 31, 2001, the United States hit Ishaq Suleiman with five cluster munitions containing 1,010 submunitions. At least eight civilians died during the attacks, and four more died later from duds.⁹¹ According to US officials, the United States did not intentionally target Ishaq Suleiman. US Air Force mission reports, and intelligence documents indicate that the strikes were intended for the nearby Fourth Armored Brigade Headquarters.⁹² The five cluster munitions that landed in Ishaq Suleiman over the course of six days were fatal accidents. Instead of using the more technologically advanced CBU-103, the United States chose to use the less accurate CBU-87. US Air Force

⁸⁹ The European Parliament, for example, called for such a moratorium in a December 2001 resolution. European Parliament, "Resolution on Cluster Bombs," RSP/2001/2636, December 13, 2001. Meanwhile, UN officials asked the US military for information on the "nature, timing and targets of daily bombing runs so that innocent civilians would not be needlessly injured" and for technical advice and assistance with clearance of submunitions. US officials defended the US use of cluster munitions and responded that the US military does not assume responsibility for clearing UXO. See, for example, US Department of Defense transcript of General Myers interview with Al Jazeera, October 31, 2001; Michael Zielenziger, "Cluster Bomb Traps Villagers Inside Homes," Knight Ridder News Service, October 25, 2001; Brian Toohey, "U.S. Strategy in Afghanistan May Have Missed Its Target," *Australian Financial Review*, October 27, 2001.

⁹⁰ The United States also hit the village of Ainger, east of Kunduz near Khanabad, with four cluster bombs containing 808 submunitions on November 17, 2001, killing five civilians, including three children, and wounding several more. On October 22, 2001, a single errant US cluster munition fell on Qala Shater, a neighborhood in the northeast of Herat, killing between 11 and 13 civilians and injuring 14 others. Qala Shater's location less than a mile from Firqa #17, a heavily attacked military facility, suggests that the firqa was the intended target. For further details on these incidents, see Human Rights Watch, *Fatally Flawed*, pp. 21, 23.

⁹¹ These numbers come from Human Rights Watch research in Ishaq Suleiman. The Organization for Mine Awareness and Afghan Rehabilitation (OMAR) reported 12 deaths (not separated by strikes and duds), including four not on the Human Rights Watch list, and 16 injuries. OMAR Sub Office Herat, "List of Killed and Injured People and Lost Their Properties at Ishaq Suliman (sic)."

⁹² Human Rights Watch interviews with US Air Force officials, Washington, DC, June 29-30, 2002.

sources also revealed that the choice to fly toward, rather than away from, Ishaq Suleiman resulted in submunitions falling on the village. The use of CBU-87 cluster munitions so near a civilian population was clearly the wrong choice of weapon, but a strike on such a location with any type of cluster munition is unacceptably dangerous to civilians.

Aftereffects

Using a conservative estimate of a 5 percent dud rate, the cluster munitions dropped by the United States in Afghanistan likely left more than 12,400 explosive duds.⁹³ According to the ICRC, from October 2001 to November 2002, submunition duds killed or injured at least 127 civilians as well as two deminers.⁹⁴ These figures are not complete as they fail to take into account civilians who suffered slight injury or those casualties after November 2002. All but 12 of the victims were male, presumably because women have less freedom of movement in Afghanistan, and 68 percent of victims were children under the age of 18.⁹⁵

Shepherds, farmers, and children were frequent victims of submunitions in Afghanistan.⁹⁶ For example, in Ishaq Suleiman, a dud killed Abdul Raziq, 43, and Ghouse-u-din, 37, four days after the bombing while they were grazing sheep near an ancient shrine. One month later deminers were finally able to clear the site of BLU-97 submunitions.⁹⁷ Submunitions that sunk into soft soil or hid in furrows presented risks for farmers. On December 21, 2001, Arbrabrahim, 52, died while plowing a field in Jebrael near Herat.⁹⁸ Submunitions made gathering wood, an occupation of many children, dangerous. Three children from Nawabad died while collecting wood at the Firqa #17 military base in Herat.⁹⁹ Duds also harmed

⁹³ Human Rights Watch, *Fatally Flawed*, p. 1.

⁹⁴ ICRC, "Mine Victims Report: October 6, 2001 to date," unpublished document given by ICRC to Human Rights Watch, November 22, 2002. This document lists only cluster munition casualties. A list from June 2002 reported 87 casualties, including 13 deaths, from unexploded cluster bomblets. ICRC, "Number of Cluster Munition Victims Recorded Since October 2001 to June 2002," June 22, 2002. An earlier list in March 2002 reported 59 casualties, including nine deaths. ICRC, "All Afghanistan Cluster Ammunition Casualties: October 2001-March 2002."

⁹⁵ ICRC, "Mine Victims Report: October 6, 2001 to date," November 22, 2002.

⁹⁶ The ICRC's November 22, 2002 list of cluster bomb casualties corroborates the trends Human Rights Watch identified during its mission to Afghanistan. Of the victims the ICRC reported, 20 percent were tending animals, 16 percent were farming, and 10 percent were gathering wood when injured. The list breaks down the victims' activities at the time of incident as follows: tending animals, 25 victims; farming, 20; traveling on foot, 19; playing/recreation, 15; collecting wood, 13; incidental passing, 13; tampering with item, 9; traveling in vehicle, 2; military activities, 2; other, 7; unknown, 2.

⁹⁷ Human Rights Watch interview with Abdul Basir and Shames-u-din, Ishaq Suleiman, Afghanistan, March 29, 2002. Abdul Basir, 37, was the brother-in-law of Abdul Raziq. Shames-u-din, 31, was the cousin of Ghouse-u-din.

⁹⁸ Human Rights Watch interview with Khalil Ahmad, Ishaq Suleiman, Afghanistan, March 29, 2002.

⁹⁹ Human Rights Watch interview with Maidin, Nawabad, Afghanistan, March, 29, 2002. Maidin, 18, said he knew of two additional local civilians injured by submunitions on the firqa.

livelihoods, spreading over fields, vineyards, and gardens and hindering the ability of civilians to return to or use their land.

Unexploded submunitions even interfered with the US military's conduct of the war, endangering its own soldiers and slowing down operations. The United States used cluster bombs extensively in the cave regions, only to discover later that the duds posed a threat to ground troops. "We really have to watch where we're ... walking. We limited our night movement because of the unexploded ordnance up on ... this ridge," a soldier told a CBS reporter during Operation Anaconda.¹⁰⁰ US soldiers usually prefer to fight at night when they have the technological advantage of night vision. The danger of stepping on submunitions forced them to cut back on such operations, reducing their advantage.

Iraq¹⁰¹

The United States and the United Kingdom used nearly 13,000 cluster munitions, containing an estimated 1.8 to 2 million submunitions, during the three weeks of major hostilities in Iraq in March and April 2003.¹⁰² Use of cluster munitions in Iraq highlighted the dangers of ground-launched models. Unlike in Yugoslavia and Afghanistan, where the United States and its allies only used air-dropped cluster munitions, Coalition forces used far more ground-launched cluster munitions than air-dropped ones. Ground-launched cluster munitions were less accurate than the newer, air-dropped models used by the US Air Force and caused excessive civilian casualties around the country during and after the conflict. The heavy use of these cluster munitions in populated areas where both soldiers and civilians were present exacerbated the problem and produced the majority of casualties.

The use of cluster munitions in Iraq, like that in Afghanistan, also exemplified states' attempts to mitigate the widespread humanitarian harm caused by cluster munitions and their inability adequately to prevent it. In Iraq, US and UK forces established procedures to vet ground-launched cluster munition strikes, but such precautions failed to protect civilians. The targeting of residential neighborhoods, which were not classified as no-strike sites, caused hundreds of civilian deaths and injuries. Human Rights Watch estimated that cluster munitions caused more civilian casualties than any Coalition weapons other than small

¹⁰⁰ Transcript of CBS Evening News, March 18, 2002. According to another report, "The soldiers described the area as being littered with U.S. cluster bombs and unexploded ordnance, adding to the dangers faced by troops as they searched the peak." Stephen Coates, "Al-Qaeda Cave Stronghold Was Like a Castle, Say U.S. Troops," Agence France-Presse, March 16, 2001.

¹⁰¹ The information in this section is drawn largely from Human Rights Watch, *Off Target*.

¹⁰² For a breakdown of these numbers, see *ibid.*, p. 6.

arms. In addition, as in Afghanistan, cluster munition duds endangered the Coalition's own soldiers and interfered with military operations.

Coalition ground forces launched some 11,600 surface-delivered cluster munitions containing at least 1.6 million submunitions, most of which represented pre-existing technology.¹⁰³ The majority of the US ground-launched cluster munitions delivered contained Dual-Purpose Improved Conventional Munitions (DPICMs).¹⁰⁴ These submunitions resemble gray light sockets in size and shape and have a loop of ribbon at the top to stabilize and arm them. Each one consists of a scored, antipersonnel, steel fragmentation case with an armor-piercing shaped charge inside and can be launched by artillery or rocket.¹⁰⁵ According to US government sources, these cluster munitions have dud rates ranging from 3 to 23 percent.¹⁰⁶ The United Kingdom, as noted earlier, used the L20A1 artillery projectile, containing 49 M85 submunitions with self-destruct devices.

Coalition air forces also relied primarily on technology that had fallen short in the past when they dropped at least 1,276 cluster munitions containing more than 245,000 submunitions.¹⁰⁷ The bulk of the Coalition's air-dropped cluster munitions were CBU-103s with WCMDs, containing the same BLU-97 submunitions used in Yugoslavia and

¹⁰³ CENTCOM reported using 10,782 surface-launched and air-dropped cluster munitions. About 1,200 of those were air-dropped models. UK forces used an additional 2,100 surface-launched submunitions. These numbers lead to an estimate of 11,600 cluster munitions launched by Coalition ground forces. See *ibid.*, pp. 80, 82.

¹⁰⁴ US ground forces also used limited numbers of missile- and helicopter-launched submunitions, including Army Tactical Missile System (ATACMS) missiles and Hydra M261 rockets. Additionally, the United States used 121 artillery shells with SADARMs. For details on all of these weapons types, see *ibid.*, p. 82, 84.

¹⁰⁵ A shaped charge is a concave copper cone that upon detonation melts into a metal slug that can pierce armor. A 155mm artillery projectile contains either 72 or 88 M42 and M46 DPICMs, depending on the model; the Multiple Launch Rocket System (MLRS) fires 12 rockets, each with 644 M77 DPICMs. See Human Rights Watch, *Cluster Munitions a Foreseeable Hazard in Iraq*, March 2003, <http://www.hrw.org/background/arms/cluster031803.htm>.

¹⁰⁶ A 3 percent failure rate was reported for artillery and a 5 percent rate for MLRS rockets in US Department of Defense, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), "Report to Congress: Cluster Munitions," October 2004, <http://www.cdi.org/clusters/Report%20to%20Congress.pdf> (accessed September 18, 2010) [hereinafter US Department of Defense, "2004 Report to Congress"]. A 14 percent rate was reported for artillery and a 16 percent rate for MLRS in US Army Defense Ammunition Center, Technical Center for Explosives Safety, "Study of Ammunition Dud and Low Order Detonation Rates," July 2000, p. 9, and Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, "Unexploded Ordnance Report," table 2-3, p. 5, transmitted to the US Congress on February 29, 2000. A 23 percent failure rate for some newly produced lots was reported in US General Accounting Office, "OPERATION DESERT STORM: Casualties Caused by Improper Handling of Unexploded US Submunitions," GAO/NSIAD-92-212, August 1993, pp. 5-6.

¹⁰⁷ Moseley, "Operation Iraqi Freedom: By the Numbers," p. 11; UK Ministry of Defence, "Operations in Iraq: First Reflections," p. 24. The British dropped seventy RBL-755 bombs containing 10,290 bomblets. UK Ministry of Defence, "Operations in Iraq—First Reflections," July 2003, p. 24, (cited in Human Rights Watch, *Off Target*, p. 56).

Afghanistan.¹⁰⁸ As discussed in Chapter 1, the United States also used for the first time in combat the CBU-105, a sensor fuzed weapon.

Cluster Munition Strikes in the Iraq Ground War

Coalition ground forces did not learn the lessons of past wars, and their cluster munitions killed or wounded hundreds of civilians in populated areas. The United States did not reveal full details about the ground-launched cluster munitions they used,¹⁰⁹ but based on available information, Coalition cluster munition strikes left many tens of thousands of submunition duds.¹¹⁰ The United Kingdom reported it used 2,100 ground-launched L20A1 cluster munitions, dropping 102,900 submunitions on Iraq.¹¹¹ Human Rights Watch found widespread use of cluster munitions in most of the cities it visited.¹¹²

Coalition ground forces used cluster munitions primarily as a counter-battery tool designed either to respond to or to prevent incoming fire from Iraqi forces. The targets of such strikes—enemy mortars, artillery, and troops—were legitimate, but the use of cluster munitions was inappropriate because of the weapon’s large footprint combined with the fact that the targets were in or near populated areas.¹¹³ A unitary weapon would have been a preferable response to Iraqi fire from urban areas; however, officers of the Third Infantry Division complained that if they needed long-range rocket artillery, the Multiple Launch Rocket System (MLRS) with submunitions was the only option they had. Therefore, they said, they often had to use cluster munitions for counter-battery fire when a unitary warhead would have sufficed.¹¹⁴ The standard volley of six rockets from the MLRS would release approximately 4,000 submunitions, with a 5 to 23 percent dud rate, over an area with a

¹⁰⁸ In addition, the United States used CBU-87 and CBU-99 (Rockeye) cluster munitions, while the United Kingdom employed the same BL-755 cluster munitions as in Yugoslavia. Moseley, “Operation Iraqi Freedom: By the Numbers,” p. 11; UK Ministry of Defence, “Operations in Iraq: First Reflections,” p. 24.

¹⁰⁹ “Iraq: Clusters Info Needed from U.S., U.K.,” Human Rights Watch news release, April 29, 2003, <http://www.hrw.org/en/news/2003/04/29/iraq-clusters-info-needed-us-uk>.

¹¹⁰ Based on US Central Command’s reported 10,782 cluster munitions, US forces alone probably used at least 1.8 million submunitions. An average dud rate of 5 percent would leave about 90,000 duds. For an explanation of how these numbers were calculated, see Human Rights Watch, *Off Target*, pp. 80, 104.

¹¹¹ Ann Treneman, “Mapped: The Lethal Legacy of Cluster Bombs,” *Times* (London), September 11, 2003.

¹¹² These cities included Baghdad, Basra, al-Hilla, Karbala’, and al-Najaf.

¹¹³ At several strike sites, Human Rights Watch saw tanks and artillery positions located in surrounding areas, indicating that Coalition strikes had been at least sometimes directed at legitimate military targets. The targets were in or near populated areas, however, and cluster munitions were a poor weapons choice.

¹¹⁴ Human Rights Watch interview with Maj. Jim Barren, Second Brigade, Third Infantry Division, US Army, Baghdad, Iraq, May 23, 2003; Human Rights Watch interview with Lt. Col. Eric Wesley, executive officer, Second Brigade, Third Infantry Division, US Army, Baghdad, Iraq, May 23, 2003; Human Rights Watch interview with Col. David Perkins, commanding officer, Second Brigade, Third Infantry Division, US Army, Baghdad, Iraq, May 23, 2003.

radius of one kilometer.¹¹⁵ The wide footprint and high number of duds resulted in civilian casualties during and after strikes.

The US and UK militaries employed procedures to vet these ground-launched cluster munition strikes. US forces screened ground-launched cluster attacks through computer and human vetting systems. The computer contained a no-strike list of more than 12,700 sites including schools and hospitals. Strikes were supposed to be kept at least 500 meters away from these sites, and visual confirmation of a clear military target was required.¹¹⁶ The Third Infantry Division also required lawyers in the field to review proposed strikes and weigh military necessity against potential harm to civilians.¹¹⁷ British ground forces had a no-strike list, and while they did not have a legal review of each strike, they were required to confirm visually that no civilians were present.¹¹⁸

These precautions failed to protect civilians, however, because Coalition ground forces still used cluster munitions in residential neighborhoods. As a result, ground-launched cluster munition attacks, even those on legitimate military targets, were one of the major causes of civilian casualties during the war. The accounts detailed below of al-Hilla and Basra exemplify the civilian casualties of ground-launched cluster munition strikes in populated areas.

Al-Hilla

Al-Hilla and its surrounding neighborhoods and villages suffered the most from ground-launched cluster munitions. In Nadir, a poor neighborhood on the south side of the city, for example, every household Human Rights Watch visited had experienced personal injury or property damage from a March 31, 2003 attack by the US Army. That day, the al-Hilla General Teaching Hospital treated 109 injured civilians, including 30 children.¹¹⁹ According to local elders, the cluster munition strike and its resulting duds had killed 38 civilians and injured

¹¹⁵ While the MLRS can launch 12 rockets, the Third Infantry Division often used volleys of six rockets in Iraq. The footprints overlapped to make a larger footprint with .6-mile radius (one kilometer). Human Rights Watch telephone interview with Col. Lyle Cayce, staff judge advocate, Third Infantry Division, US Army, Washington, DC, October 17, 2003. For failure rates, see US Department of Defense, "2004 Report to Congress," pp. 2-4 (reporting 5 percent dud rate); US General Accounting Office, "OPERATION DESERT STORM: Casualties Caused by Improper Handling of Unexploded US Submunitions," pp. 5-6 (reporting a 23 percent dud rate for some new lots).

¹¹⁶ Human Rights Watch interview with Lt. Col. Eric Wesley, executive officer, Second Brigade, Third Infantry Division, US Army, Baghdad, Iraq, May 23, 2003.

¹¹⁷ Human Rights Watch interview with Col. David Perkins, commanding officer, Second Brigade, Third Infantry Division, US Army, Baghdad, Iraq, May 23, 2003.

¹¹⁸ Human Rights Watch telephone interview with Col. Gil Baldwin, commanding officer, First Queen's Dragoon Guards, Cardiff, Wales, July 2, 2003.

¹¹⁹ Of the 109 civilians, 28 were women (including 11 girls) and 81 were male (including 19 boys). Al-Hilla General Teaching Hospital, War-Related Casualty Records, unpublished document obtained by Human Rights Watch in al-Hilla, May 20, 2003.

156 more by September 2003.¹²⁰ Ambulances could not enter certain areas at night to evacuate civilians wounded during the attack because their drivers feared running over unexploded submunitions in the dark; the next morning additional injured civilians were taken to the hospital.¹²¹

Basra

Three neighborhoods in the southern section of Basra suffered dozens of civilian casualties as a result of UK ground-launched cluster munitions. A March 23, 2003 strike on Hay al-Muhandissin al-Kabru wounded `Abbas Kadim, 13, while he was throwing out the trash. `Abbas suffered injuries to his bowel and liver, and a piece of shrapnel remained lodged near his heart.¹²² Later that same day about 2.5 kilometers northeast, in the neighborhood of al-Mishraq al-Jadid, submunitions from an attack killed Iyad Jassim Ibrahim, 26, while he was sleeping in the front room of his home. Ten relatives sleeping throughout the home also suffered injuries.¹²³ Two days later, on March 25, the United Kingdom launched a cluster munition strike on the neighborhood of Hay al-Zaitun, east of al-Mishraq al-Jadid. Jamal Kamil Sabin, 25, was crossing a bridge with his family when a submunition exploded, and he lost his leg. Zainab Nasir `Abbas, Jamal's pregnant wife, and Jabal Kamil, Jamal's nephew, both sustained shrapnel injuries to their legs.¹²⁴

Cluster Munition Strikes in the Iraq Air War

In three weeks from March 20 to April 9, 2003, US and UK air forces dropped more cluster munitions in Iraq than they did in Afghanistan in six months. The number of air-dropped cluster munitions used during this period represented 4 percent of the total number of air-delivered weapons used by Coalition forces. In targeting and technology, the US Air Force demonstrated that it had learned many of the lessons from Yugoslavia and Afghanistan, but its track record was far from perfect.

The US Air Force dropped fewer cluster munitions in or near populated areas, and Human Rights Watch found only isolated cases of air-dropped cluster munitions in Iraqi cities. As a

¹²⁰ The neighborhood elders did not separate casualties that occurred during the strike from those caused by duds after the fact. Their casualty records list 144 men, 37 women, and 17 whose sex could not be determined from the records. Shakir `Abadi `Ubaid al-Khafaji, Kadhim Karim `Ali al-Jaburi, and Hassan Jum`a Sayyid, Nadir Casualty Records, unpublished document obtained by Human Rights Watch in al-Hilla, September 2003. The *New York Times* reported 33 civilians died during the strike on Nadir. Tyler Hicks and John F. Burns, "Iraq Shows Casualties in Hospital," *New York Times*, April 3, 2003.

¹²¹ Human Rights Watch interview with Hussain Jabir, director, Civil Defense, al-Hilla, Iraq, May 21, 2003.

¹²² Human Rights Watch interview with `Abbas Kadhim, Basra, Iraq, May 4, 2003.

¹²³ Human Rights Watch interview with Iyad Jassim Ibrahim, Basra, Iraq, May 5, 2003.

¹²⁴ Human Rights Watch interview with Jamal Kamil Sabir, Basra, Iraq, May 1, 2003.

result, civilian casualties from such weapons were limited. When the US Air Force did not take care to avoid populated areas, however, cluster munitions caused casualties. In April, it dropped a CBU-103 on a girls' primary school in al-Hilla, killing the school guard, Hussam Hussain, 65, and neighbor Hamid Hamza, 45, and injuring 13 others.¹²⁵

The US Air Force also strove to reduce the threat to civilians from cluster munition strikes through improved technology. The guided CBU-103 with WCMD represented 68 percent of the total number of reported air-dropped cluster munitions used by the United States and probably contributed to the low number of civilian casualties in urban strikes. The Air Force also dropped 88 of the new CBU-105, a sensor fuzed weapon. Despite this progress, the US Air Force continued to deploy outdated cluster munitions, including the Vietnam-era CBU-99 Rockeyes, while the United Kingdom dropped variants of the BL-755s.¹²⁶ Furthermore, the CBU-103 is not a precision-guided weapon and has a broad area effect, so, like all cluster munitions, it is not safe for use in or near populated areas.

Aftereffects

Iraq was no exception to the predictable aftereffects of cluster munition use. Months after major fighting ended, submunitions continued to maim and kill civilians. US estimates of dud rates for the various types of submunitions used in the conflict range from 2 percent to as high as 23 percent, depending on the type of submunition and test conditions.¹²⁷ Ground-launched submunitions were the overwhelming cause of post-conflict civilian casualties.

Al-Hilla, subjected to intense US cluster munition strikes during major combat operations, exemplified the lasting effect of submunition duds. Dr. Sa'ad al-Falluji of the al-Hilla General Teaching Hospital recorded 221 injuries from duds in April 2003 and another 32 from May through August 2003.¹²⁸ Even during major hostilities, civilians were at risk from unexploded submunitions. On March 26 in the village of al-Kifl, south of al-Hilla, 13-year-old Falah Hassan lost his right hand and suffered full-body shrapnel wounds from an unexploded

¹²⁵ Human Rights Watch interview with Ibtisam Ibrahim Jassim, manager, al-Hadaf school, al-Hilla, Iraq, May 20, 2003; Human Rights Watch interview with Hamid Mahdi, al-Hilla, Iraq, May 20, 2003.

¹²⁶ See Moseley, "Operation Iraqi Freedom: By the Numbers," p. 11.

¹²⁷ For example, a 2 percent dud rate for the M74 submunition used in ATACMS missiles was reported in Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, "Unexploded Ordnance Report," table 2-3, p. 5. A 23 percent dud rate was reported for some lots of MLRS M77 submunitions in US General Accounting Office, "OPERATION DESERT STORM: Casualties Caused by Improper Handling of Unexploded US Submunitions," pp. 5-6.

¹²⁸ Human Rights Watch interview with Dr. Sa'ad al-Falluji, director and chief surgeon, al-Hilla General Teaching Hospital, al-Hilla, Iraq, May 19, 2003; Al-Hilla General Teaching Hospital, War-Related Casualty Records.

DPICM.¹²⁹ Falah's mother suffered injuries to her abdomen, uterus, and intestines as a result of the explosion.¹³⁰ The situation caused by UK submunitions in Basra and the surrounding areas was similar to that in al-Hilla. Duds from a strike landed on civilian roofs in the Kam Sabil district of Basra. One 9-year-old girl picked up a submunition that exploded and killed her and injured her pregnant mother and 18-month-old brother.¹³¹

Air-dropped cluster munition also contributed to post-conflict civilian deaths and injuries. The US Air Force dropped cluster munitions on a date farm in Hay Tunis, Baghdad, that was used to hide military vehicles, a legitimate military target. Across the street from the farm, however, were densely populated civilian areas. Days after the April attack, Hussam Jasmi, 13, and Muhammad Mun'im Muhammad, 14, cousins who lived near the date farm, stepped on a BLU-97 submunition that ripped off their legs. Both boys ultimately died from their injuries.¹³² While the US military cleared the area on May 13, Human Rights Watch still found submunitions later that same week.

As was the case in Afghanistan, submunitions disrupted agricultural activity. Human Rights Watch found contaminated fields in villages around al-Hilla, al-Najaf, al-Falluja, and Agargouf. The civilian casualties and socioeconomic harm caused by cluster munitions in Iraq were a foreseeable result of the known flaws of cluster munitions.

Coalition soldiers found themselves in a dangerous position when they encountered submunitions during military operations. On the first night of the war, a convoy of UK military vehicles unwittingly entered a cluster munition field near the Kuwait border and spent half an hour trying to escape the area safely.¹³³ Members of that convoy sustained no injuries from the field of duds, but by May 2004 unexploded submunitions had killed at least five Coalition members. Several US military officers interviewed by Human Rights Watch said they felt uncomfortable using weapons that produced so many unexploded submunitions. Commanding officer Col. David Perkins commented, "We had concerns about unexploded

¹²⁹ Human Rights Watch interview with Falah Hassan, al-Hilla, Iraq, May 19, 2003. The explosion injured three relatives, including his mother.

¹³⁰ Human Rights Watch interview with Dr. Sa'ad al-Falluji, director and chief surgeon, al-Hilla General Teaching Hospital, al-Hilla, Iraq, May 19, 2003.

¹³¹ Human Rights Watch interview with international aid worker #2, Basra, Iraq, May 1, 2003.

¹³² Human Rights Watch interview with Muhammad 'Abd Mamon, Baghdad, Iraq, May 17, 2003. 'Abd Mamon, 32, was the uncle of the two boys.

¹³³ Human Rights Watch telephone interview with Col. Gil Baldwin, commanding officer, First Queen's Dragoon Guards, Cardiff, Wales, July 2, 2003.

ordnance.... It's a constant consideration. What are the second or third effects?"¹³⁴ An after action report by the Third Infantry Division asked if the DPICM was a "Cold War relic" and described submunitions as "losers."¹³⁵ Submunitions do not differentiate between civilians and military personnel and, therefore, are a risk to both groups.

Lebanon/Israel

Both Israel and Hezbollah used cluster munitions in their conflict in 2006. Israel's use dwarfed that of Hezbollah and shocked the world, due to the number of cluster munitions fired, the timing of attacks, and the location of strikes. It also showed that high-tech cluster munitions could not prevent the humanitarian effects inherent to the weapons. Hezbollah's use of cluster munitions was much more limited, but it highlighted that, even in limited numbers, cluster munitions are deadly to civilians and that the spread of such weapons to non-state armed groups is dangerous.

*Israel's Use in Lebanon*¹³⁶

Over the course of its 34-day war with Hezbollah in July and August 2006, Israel fired cluster munitions containing an estimated 4.6 million submunitions into south Lebanon, more submunitions than were used in any conflict after the 1991 Gulf War.¹³⁷ The total represented about 13 times what NATO dropped on the former Yugoslavia, more than 15 times what the United States used in Afghanistan in 2001 and 2002, and more than twice the number used by Coalition forces in Iraq in 2003. The level and density of unexploded submunition contamination was also far worse than anything found after those wars, and unexploded submunitions caused more than 200 civilian casualties.¹³⁸

¹³⁴ Human Rights Watch interview with Col. David Perkins, commanding officer, Second Brigade, Third Infantry Division, US Army, Baghdad, Iraq, May 23, 2003. Lt. Col. Stephen Baer, operations officer for the Third Infantry Division, expressed the need for alternative weapons, "We have to demand giving commanders better options." Human Rights Watch interview with Lt. Col. Stephen Baer, operations officer, Third Infantry Division, US Army, Baghdad, Iraq, May 20, 2003.

¹³⁵ Third Infantry Division, "Fires in the Close Fight: OIF [Operation Iraqi Freedom] Lessons Learned," undated, <http://www.globalsecurity.org/military/library/report/2003/3id-art-y-oif.pdf> (accessed September 18, 2010).

¹³⁶ The information in this section was drawn largely from Human Rights Watch, *Flooding South Lebanon*.

¹³⁷ MACC SL estimated as of January 15, 2008, that Israel had fired as many as four million submunitions. According to information provided to Human Rights Watch by Israeli soldiers who resupplied MLRS units with cluster munitions, the number used could have been as high as 4.6 million. Email communication from Dalya Farran, media and post clearance officer, MACC SL, to Human Rights Watch, January 15, 2008; Human Rights Watch interviews with IDF reservists (names withheld), Tel Aviv and Jerusalem, Israel, October 2006. See also Human Rights Watch, *Flooding South Lebanon*, p. 3. Deminers later revised their estimates of unexploded submunitions from one million to around 500,000. It is unclear if that change altered the estimate of total submunitions used. See, for example, "Lebanon: Funding Shortfall Threatens Cluster Bomb Demining," *IRIN*, May 14, 2009, <http://www.irinnews.org/report.aspx?ReportID=84384> (accessed September 23, 2010).

¹³⁸ According to MACC SL, as of May 31, 2009, explosive duds had killed at least 21 civilians and injured at least 203 others since the ceasefire on August 14, 2006. UN MACC SL, "June 2009 Report of the United Nations Mine Action Co-ordination Centre," July 8, 2009, <http://www.mineaction.org/downloads/1/Monthly%20Report%20June%202009.pdf> (accessed

During the 2006 war, Israel seemed to ignore the lessons of previous conflicts and demonstrated that the risk of large-scale, indiscriminate use of cluster munitions remained. Its use of the weapon in south Lebanon was notable not only because of its scale but also because of the timing and location of strikes. Furthermore, advanced technology did not mitigate the threat to victims.

Israel carried out about 90 percent of its cluster munition strikes after the UN Security Council passed a ceasefire resolution on August 11, but before it took effect at 8 a.m. on August 14.¹³⁹ A witness said, “it started raining cluster bombs” over the last days of the war,¹⁴⁰ and one Israel Defense Forces (IDF) soldier commented that “in the last 72 hours we fired all the munitions we had, all at the same spot, we didn’t even alter the direction of the gun.”¹⁴¹ These attacks suggest a disregard for civilian life because the military advantage of using so many cluster munitions at such a late date is limited.

Another disturbing feature of the war was the IDF’s widespread use of cluster munitions in populated areas. Israeli forces dropped cluster munitions in the middle of towns and villages, contaminating at least 4.3 million square meters of “urban” areas.¹⁴² In the first week after the conflict, Human Rights Watch visited 30 population centers, each littered with unexploded submunitions. In October 2006, Human Rights Watch returned to Lebanon, revisiting some villages and visiting 12 new ones. Again, each was littered with submunition duds.

The IDF acknowledged the use of cluster munitions in “built-up areas” but said use was only made “against military targets where rocket launches against Israel were identified ... after taking steps to warn the civilian populations.”¹⁴³ The scope of the cluster munition strikes, however, begs the question of whether there were discrete military objectives for each cluster munition strike. The United Nations has estimated that the total area in Lebanon contaminated

September 18, 2010), p. 2. The Landmine and Cluster Munition Monitor reported 15 civilian casualties from submunitions in 2009. Landmine and Cluster Munition Monitor, “Lebanon: Casualties,” July 21, 2010, http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/330#_ftnref11 (accessed October 30, 2010).

¹³⁹ UN officials citing this statistic include UN Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs Jan Egeland; the UN’s humanitarian coordinator in Lebanon, David Shearer; and the program manager of MACC SL, Chris Clark. See UN Office for the Coordination of Humanitarian Affairs, “Lebanon: Cluster Bomb Fact Sheet,” September 19, 2006; “UN denounces Israel Cluster Bombs,” *BBC News*, August 30, 2006.

¹⁴⁰ Human Rights Watch interview with `Ali Moughnieh, head of Tair Debbe municipality, Tair Debbe, Lebanon, October 21, 2006.

¹⁴¹ Meron Rapoport, “What Lies Beneath,” *Ha’aretz*, September 8, 2006.

¹⁴² UNDP, “CBU Contamination by Land Use, current as of November 29, 2006.”

¹⁴³ Nir Hasson and Meron Rapoport, “IDF Admits Targeting Civilian Areas in Lebanon with Cluster Bombs,” *Ha’aretz*, November 19, 2006, <http://www.haaretz.com/hasen/spages/789876.html> (accessed September 18, 2010).

with cluster munition remnants was about 49 million square meters.¹⁴⁴ Furthermore, individual Israeli soldiers contradicted the claim that the IDF took care to avoid civilian harm; at least one soldier reported that they were directed to “flood” areas with cluster munitions.¹⁴⁵ The IDF’s blanket use of cluster munitions in and near population centers again suggests that the IDF did not take sufficient care to avoid the loss of civilian life.

The IDF used five main types of ground-launched and air-dropped submunitions, but the most notable was the widely touted M85 with a self-destruct device.¹⁴⁶ As discussed in Chapter 1, the submunition reportedly had a 1.3 to 2.3 failure rate in testing conditions, which led many military experts to view it as the solution to the problems of cluster munitions. Deminers and independent researchers, however, documented a failure rate around 10 percent, showing that the technical preventative measure had failed.¹⁴⁷

The scale and nature of Israel’s cluster munition use in Lebanon led to international outcry and multiple investigations. In reports based on two missions to Lebanon, the United Nations criticized Israel’s use as “inconsistent with principles of distinction and proportionality.”¹⁴⁸ The United States halted a transfer of M26 cluster munition rockets to Israel and found Israel may have violated classified agreements in its use of US-manufactured cluster munitions in populated areas.¹⁴⁹

Israel initially defended its actions stating that the IDF “does not deliberately attack civilians and takes steps to minimize any incidental collateral harm by warning them in advance of an

¹⁴⁴ UN Mine Action Service, UNDP, and UNICEF, “Portfolio of Mine Action Projects 2010,” <http://www.mineaction.org/downloads/1/PortfolioMAP2010.pdf> (accessed September 18, 2010), p. 219.

¹⁴⁵ Meron Rapoport, “When Rockets and Phosphorous Cluster,” *Ha’aretz*, September 13, 2006, <http://www.haaretz.com/hasen/spages/761910.html> (accessed September 18, 2010).

¹⁴⁶ The five main models of submunitions were the M42, M46, M77, M85 (with and without self-destruct devices), and BLU-63. M42 and M46 submunitions are delivered by 155mm artillery projectiles, while M77 submunitions are delivered by MLRS rockets; US forces had used all three DPICMs extensively in Iraq. As Chapter 1 discussed, the ground-launched M85 with a self-destruct device was a technological innovation that failed to solve the problems of unexploded submunitions. The IDF also used Vietnam War-era air-dropped CBU-58B cluster munitions containing 650 BLU-63 antipersonnel submunitions.

¹⁴⁷ C King Associates, Norwegian Defence Research Establishment, and Norwegian People’s Aid, *M85: An Analysis of Reliability*, pp. 14-22; Clark, “Unexploded Cluster Bombs and Submunitions in South Lebanon.”

¹⁴⁸ Report of the UN special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the UN special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the UN secretary-general on human rights of internally displaced persons, Walter Kälin; and the UN special rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, to UN Human Rights Council, “Mission to Lebanon and Israel,” A/HRC/2/7, October 2, 2006, para. 56.

¹⁴⁹ David S. Cloud, “Inquiry Opened Into Israeli Use of U.S. Bombs,” *New York Times*, August 25, 2006, <http://www.nytimes.com/2006/08/25/world/middleeast/25cluster.html> (accessed September 18, 2010); David S. Cloud and Greg Myre, “Israel May Have Violated Arms Pact, U.S. Says,” *New York Times*, January 28, 2007, <http://www.nytimes.com/2007/01/28/world/middleeast/28cluster.html> (accessed September 18, 2010).

action, even at the expense of losing the element of surprise.”¹⁵⁰ Shortly thereafter, however, an IDF operational inquiry revealed that cluster munitions were not always used in accordance with IDF regulations permitting use only in open and unpopulated areas.¹⁵¹ In a report released in 2008, Israel’s Commission to Investigate the Lebanon Campaign in 2006, also known as the “Winograd Commission,” determined that “[t]he cluster bomb is inaccurate, it consists of bomblets that are dispersed over a large area, and some of the bomblets do not explode [on impact] and can cause damage for a long period afterward.” The Commission recommended that non-military officials help assess future use of cluster munitions under international law.¹⁵²

Cluster Munition Strikes

Blida was the best documented case of casualties during a cluster strike. On July 19, 2006, at around 3 p.m, the IDF fired artillery-launched cluster munitions on the town in south Lebanon. A strike killed Maryam Ibrahim, 60, inside her home. Submunitions also entered Ibrahim’s basement, which was being used as a shelter by two families, and injured 12 civilians, including seven children.¹⁵³

The total number of civilians killed or injured at the time of attack is not known. Hospitals were too busy during the war to record the causes of casualties. Civilians returning after the war found dead bodies of family members, friends, and neighbors but could not determine the cause of death. Fortunately, many civilians had fled their homes before the barrage of cluster munitions on the final three days of the war, which reduced the number of casualties during strikes.

¹⁵⁰ Israel Ministry of Foreign Affairs, “Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Bombs,” September 5, 2006, <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Legal+and+operational+aspects+of+the+use+of+cluster+bombs+5-Sep-2006.htm> (accessed September 18, 2010).

¹⁵¹ Nir Hasson and Meron Rapoport, “IDF Admits Targeting Civilian Areas in Lebanon with Cluster Bombs,” *Ha’aretz*, November 19, 2006, <http://www.haaretz.com/hasen/spages/789876.html> (accessed September 18, 2010). The operational inquiry acknowledged that instead of using cluster munitions against particular targets, the IDF used rockets to deliver submunitions over large areas. Tim Butcher, “Israel Admits Breaching Own Rules on Cluster Munitions,” *The Daily Telegraph* (London), November 21, 2006, <http://www.telegraph.co.uk/news/worldnews/1534797/Israel-admits-breaching-own-rules-on-cluster-munitions.html> (accessed September 18, 2010). Nevertheless, the report stated that civilian populations were warned to leave and that cluster munitions were directed only at legitimate military targets identified as sites of Hezbollah rocket fire. Israel Ministry of Foreign Affairs, “IDF to Probe Use of Cluster Munitions in Lebanon War,” November 21, 2006, <http://www.mfa.gov.il/MFA/Government/Communiques/2006/IDF%20to%20probe%20use%20of%20cluster%20munitions%20in%20Lebanon%20War%2021-Nov-2006> (accessed September 18, 2010).

¹⁵² Yuval Yoaz and Associated Press, “Winograd: Current Use of Cluster Bombs Not in Line with Int’l Law,” *Ha’aretz*, January 31, 2008, <http://www.haaretz.com/hasen/spages/949975.html> (accessed September 14, 2010).

¹⁵³ Human Rights Watch broke the news of IDF use of cluster munitions in Lebanon when it reported this attack. “Israeli Cluster Munitions Hit Civilians in Lebanon,” Human Rights Watch news release, July 24, 2006, <http://www.hrw.org/en/news/2006/07/24/israeli-cluster-munitions-hit-civilians-lebanon>.

After the Ceasefire

The fact that so many civilians fled led to a relatively small number of strike casualties, but there was a great number of post-conflict deaths and injuries. Deminers estimated an average failure rate of 25 percent, with up to 70 percent in some locations.¹⁵⁴ These exceptionally high failure rates and the large number of cluster munitions used left south Lebanon saturated with duds. Returning after the ceasefire, civilians found their villages, homes, and fields littered with unexploded submunitions.

Civilians first became post-conflict casualties of the war while trying to rebuild their lives and homes after the ceasefire. Salimah Barakat, a 65-year-old tobacco farmer in Yohmor, remained in her home during the war to take care of her two disabled children. She reported hearing cluster munitions fall during the night on the last days of the war. On August 14, the day of the ceasefire, while moving a large rock blocking the stairs to her home, Barakat set off a submunition that lodged shrapnel into her chest, lower abdomen, and right arm. In October 2006, after recovering from her wounds, Barakat returned to her tobacco fields and olive grove to harvest the crops, but even her backyard remained littered with submunitions.¹⁵⁵

As in previous conflicts where cluster munitions were used, children became frequent victims of the small, curious, and deadly submunitions littering Lebanon. On October 22 in the village of Halta, Rami `Ali Hassan Shebli, 12, died from a submunition explosion. Rami's 14-year-old brother, Khodr, was throwing pinecones at Rami in play. When Rami picked something up to throw back at his brother, a neighbor boy noticed Rami was holding a submunition and yelled at him to put it down. Rami was reaching behind his head to throw the submunition away when it exploded in his hand killing him and wounding Khodr.¹⁵⁶ Human Rights Watch arrived at the scene shortly after the incident, and during the hour it visited the site, it observed the Lebanese Army clear 15 unexploded submunitions from the family's yard.

Resuming agricultural activities became one of the most dangerous activities in post-conflict Lebanon since fields and groves ready for harvest were littered with duds. By the anniversary of the conflict, submunitions had injured at least 50 civilians and killed at least 5 others engaged in agricultural activities.¹⁵⁷ About 70 percent of household incomes in south

¹⁵⁴ Presentation by Chris Clark, program manager, MACC SL, to CCW Delegates, Geneva, August 30, 2006 (notes by Human Rights Watch).

¹⁵⁵ Human Rights Watch interview with Salimah Barakat, Yohmor, Lebanon, October 26, 2006.

¹⁵⁶ Human Rights Watch interview with witness (name withheld), Halta, Lebanon, October 22, 2006.

¹⁵⁷ Landmines Resource Center, "List of Detailed Data by Place of Injury (after War 2006)," July 26, 2007.

Lebanon come from agriculture,¹⁵⁸ and those who decided not to risk farming the contaminated fields protected their lives but lost their livelihoods.

Economic need drove some civilians to put themselves even more directly at risk from cluster munitions. Certain civilians decided they were unable to wait for professional clearance teams and began the dangerous process of clearing submunitions themselves. Many were injured.¹⁵⁹ Gathering scrap metal for sale also led to civilian casualties.¹⁶⁰ The aftereffects of cluster munitions in Lebanon followed the pattern established in previous conflicts: after a war is finished, cluster munitions continue killing children and other civilians carrying out the activities of daily life.

Tebnine Hospital

One of the more startling strikes of the war did not result in any civilian casualties. On August 13, 2006, IDF cluster munitions struck the Tebnine Hospital, a facility protected by international humanitarian law. Taking refuge inside the hospital were approximately 375 civilians and military non-combatants including medical staff and patients. Outside, submunitions covered the streets surrounding the hospital, the roof of the hospital, and the receiving area for ambulances. The threat trapped people inside the hospital until a bulldozer cleared the area.¹⁶¹

*Hezbollah's Use in Israel*¹⁶²

Israel was not alone in launching cluster munitions during the 2006 conflict. Hezbollah fired at least 118 Chinese-made Type-81 cluster munitions into northern Israel.¹⁶³ While Hezbollah's

¹⁵⁸ "Lebanon: Damage to Agriculture, Fisheries and Forestry Estimated at around \$280 Million," UN Food and Agriculture Organization news release, November 27, 2006, <http://www.fao.org/newsroom/en/news/2006/1000445/index.html> (accessed September 18, 2010).

¹⁵⁹ See, for example, Human Rights Watch interview with Shadi Sa'id Aoun, Hammoud Hospital, Saida, Lebanon, September 22, 2006. Chapter 4 discusses his injuries.

¹⁶⁰ See, for example, Human Rights Watch interview with 'Ali Muhammad Jawad, al-Hallousiyyeh, Lebanon, October 21, 2006. 'Ali Muhammad Jawad was injured and his cousin Hamdid killed while they were collecting scrap metal.

¹⁶¹ Human Rights Watch interview with Dr. Ahmed Hussein Dbouk, Tebnine Hospital, Tebnine, Lebanon, October 24, 2006.

¹⁶² The information in this section is drawn largely from Human Rights Watch, *Civilians under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War*, vol. 19, no. 3(E), August 2007, <http://www.hrw.org/en/reports/2007/08/28/civilians-under-assault>, pp. 44-48, 81-84.

¹⁶³ Data sheet, dated October 3, 2006, provided by the Israel National Police to Human Rights Watch, and updated from 113 to 118 in an email communication from Michael Cardash, deputy head of the police's bomb disposal unit, to Human Rights Watch, June 21, 2007. Deminers also found submunitions from these weapons in south Lebanon, but Israel is not known to have them in their arsenal. Therefore it is most likely that those submunitions belonged to Hezbollah and either misfired, fell short, or were ejected by Israeli strikes on the weapons. Human Rights Watch interview with Andy Gleeson, program manager and technical operations manager, Mines Advisory Group, Kfar Joz, Lebanon, October 25, 2006.

use of cluster munitions did not compare to Israeli use in scale, it demonstrated that even when used in limited numbers, cluster munitions are too dangerous to civilians to warrant their use. It also highlighted the risks of allowing proliferation to non-state armed groups.

Type-81 122mm cluster munition rockets carry 39 Type-90 (also known as MZD-2) submunitions. Each submunition resembles a DPICM and shoots out hundreds of steel spheres with deadly force. It was the first time use of this type of cluster munition had been documented.¹⁶⁴

Israeli police officials reported that Hezbollah's cluster munitions caused one death and 12 injuries in all.¹⁶⁵ Jihad Ghanem, a 43-year-old factory manager, told Human Rights Watch that on July 25, 2006, a cluster munition landed among three homes belonging to his family in the western part of Mghar. The attack injured his son Rami, 8; his brother Ziad, 35; and his sister Suha, 33. Other villagers reported that the rocket that hit the Ghanem's property was part of a volley of some 10 to 12 rockets that landed in or near Mghar that afternoon.¹⁶⁶

Georgia¹⁶⁷

During their August 2008 conflict over the breakaway region of South Ossetia, Russia and Georgia each used cluster munitions. As in past conflicts, cluster munitions were used in or near many populated areas, and they caused at least 70 civilian casualties during and after the war. The international community widely criticized Russia and Georgia. Each state criticized the other's use of cluster munitions as "inhuman" or "inhumane," while still defending its own right to use the weapon.¹⁶⁸

¹⁶⁴ Human Rights Watch broke the story of Hezbollah's cluster munition use on October 19, 2006. See "Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions during Conflict," Human Rights Watch news release, October 18, 2006, <http://www.hrw.org/english/docs/2006/10/18/lebano14412.htm>.

¹⁶⁵ Human Rights Watch interview with Nissim Levy, head of the Bomb Disposal Division of the Israel Police, Ramle, Israel, October 17, 2006.

¹⁶⁶ Human Rights Watch, *Civilians under Assault*, pp. 46, 83-84.

¹⁶⁷ The information in this section is drawn largely from Human Rights Watch, *A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008*, April 2009, <http://www.hrw.org/en/reports/2009/04/14/dying-practice-0>.

¹⁶⁸ Georgian President Mikheil Saakashvili described cluster munitions as "an inhuman weapon." Transcript of Preconference of President of Georgia Mikheil Saakashvili and US State Secretary Condoleezza Rice, August 15, 2008, http://www.president.gov.ge/index.php?lang_id=ENG&sec_id=227&info_id=2450 (accessed September 18, 2010). The Georgian Ministry of Foreign Affairs also characterized use of the weapon against a civilian population as "especially cynical next to the background of the efforts applied by the international community to restrict and even ban such types of weaponry." "Different Types of Heavy Conventional Weapons Have Been Indiscriminately Used against Civilian Population and Infrastructure of Georgia by Russian Armed Forces," Government of Georgia news release, August 15, 2008, http://www.smr.gov.ge/en/tskhinvali_region?paging=2 (accessed September 18, 2010). In a statement marking the one-year anniversary of the war, the Russian Ministry of Foreign Affairs referred to cluster munitions as one of the "inhumane types of weapons" used by Georgia. Statement by the Russian Ministry of Foreign Affairs, August 2, 2009. While Russia has repeatedly denied using cluster munitions in Georgia, it has since defended use of the weapon in general, referring to cluster munitions

This instance of cluster munition use occurred against the backdrop of an international movement to ban the weapon. Less than three months earlier, 107 states had agreed to adopt the Convention on Cluster Munitions. Neither Russia nor Georgia took part in the process leading to the new treaty, but their use provided a fresh example of the humanitarian harm caused by the weapons and of how such use was becoming increasingly at odds with the strong, emerging international consensus that cluster munitions should be categorically prohibited.

Use of cluster munitions during the conflict over South Ossetia also exemplified how problems with the weapons occur regardless of the parties involved. Russia, a producer, stockpiler, exporter, and past user of cluster munitions, is thought to possess hundreds of millions of submunitions of various types. In this case, it used both air-dropped and ground-launched models delivered from bombs, rockets, and missiles. Georgia, neither a producer of cluster munitions nor a known past user, has what is thought to be a small stockpile. During this conflict, it used a ground-launched model imported from Israel, which it claimed was the only active type of cluster munition it possessed. Despite their contrasting military profiles and different histories with the weapon, Russia and Georgia produced the same results with their use of the weapons: civilian casualties at the time of attack and afterwards. The August 2008 conflict showed that whoever the user, and whatever the type used, cluster munitions pose unacceptable risks to civilians and must be eliminated.

Finally, the effects of the apparent failure of Georgia's cluster munitions to reach their target served as a reminder of the harm that cluster munitions can cause when they do not work properly.

Russian Use

Russia used cluster munitions in or near nine towns and villages in the Gori-Tskhinvali corridor south of the South Ossetian administrative border.¹⁶⁹ Although Russia repeatedly denied using cluster munitions in this conflict,¹⁷⁰ Human Rights Watch concluded based on physical and testimonial evidence found in the field that the incidents described below were attributable to

as "lawful weapons that play a significant role in serving the defense interests of our nation." Letter from Sergey Ryabkov, deputy minister of Foreign Affairs of Russia, to Human Rights Watch, March 20, 2009.

¹⁶⁹ Human Rights Watch gathered evidence of Russian cluster munitions in Akhaldaba, Dzlevijvari, Gori, Pkhvenisi, Ruisi, Variani, and Varianis Meurneoba. In early 2009, deminers from Norwegian People's Aid found evidence of Russian submunitions from the conflict in two additional villages: Kvemo Khviti and Zemo Nikozi. Email communications from Jonathon Guthrie, program manager, Norwegian People's Aid, to Human Rights Watch, March 10 and March 27, 2009.

¹⁷⁰ Col. Gen. Anatoly Nogovitsyn, deputy head of the Russian General Staff, stated, for example, "We did not use cluster bombs, and what's more there was absolutely no necessity to do so." "Russia Denies Use of Cluster Bombs in Georgia," *RIA Novosti*, August 15, 2008, <http://en.rian.ru/world/20080815/116065270.html> (accessed September 18, 2010).

the actions of Russian forces.¹⁷¹ Russia caused 58 civilian casualties with three types of cluster munitions: RBK series bombs carrying either 60 or 108 AO-2.5 RTM submunitions, 200mm surface-to-surface Uragan rockets carrying 30 9N210 submunitions, and the surface-to-surface Iskander (or SS-26) missile that carries an unknown model of submunition.¹⁷²

Cluster Munition Strikes

Human Rights Watch found that Russian forces fired many of their cluster munitions into populated areas of Georgia, killing at least 12 civilians and injuring 46 in attacks on Gori, Ruisi, and Variani.¹⁷³ Many witnesses said Georgian troops or vehicles, the most likely cluster munition targets, were not in the immediate area at the time of the strikes, and in no case did Human Rights Watch find evidence of enemy units at the site of the attack.

The incident in the city of Gori exemplifies the nature of Russia's use of cluster munitions and the human suffering it caused. According to an investigation initiated by the Dutch Ministry of Foreign Affairs, Russia attacked Gori with an Iskander missile containing cluster munitions on August 12, 2008.¹⁷⁴ The attack hit the main square of the city as a crowd of locals and journalists was gathering. Among those killed in the strike was Dutch RTL cameraman Stan Storimans. The Dutch government investigation into the circumstances surrounding Storimans's death determined that Georgian troops had fled Gori by August 12, calling into question whether the attack was targeted at a specific military objective. Human Rights Watch's research, which focused on this incident from the perspective of Georgian civilians, independently reached the same conclusions as the Dutch investigation. Ketiv Javakhshvili, 24, was walking to a neighbor's house for bread when the attack came.¹⁷⁵ Her doctor told Human Rights Watch that she suffered massive injuries to her liver, stomach, and

¹⁷¹ According to witnesses, the targets of these strikes appeared to be Georgian troops, not Russian ones. Although Georgian troops were usually not in the immediate vicinity of a strike, they were often in the general area, and Russian troops were not. Additionally, Russia is known to have produced and to stockpile the types of cluster munitions used in these attacks. Georgia is thought to possess only one of the types, the RBK-500 bomb, its stocks of which are reportedly expired and slated for destruction. International deminers conducting clearance operations in the region, who are cluster munition experts, told Human Rights Watch that they believed the submunitions from these strikes to be Russian. For a more detailed discussion of how Human Rights Watch reached its conclusion, see Human Rights Watch, *A Dying Practice*, pp. 40-41.

¹⁷² For more information on these weapons, see "RBK-500 AO-2.5 RTM Cluster Bomb," in Hewson, ed., *Jane's Air-Launched Weapons*, p. 425; "220 mm Uragan Rockets," in Leland S. Ness and Anthony G. Williams, eds., *Jane's Ammunition Handbook 2007-2008* (Surrey, UK: Jane's Information Group Limited, 2007), p. 716; Dutch Ministry of Foreign Affairs, "Report of the Storimans Investigative Mission," October 20, 2008, <http://www.minbuza.nl/dsresource?objectid=buzabeheer:32226&type=pdf> (accessed October 31, 2010), p. 6. Both the RBK series bombs and Uragan rockets carry antipersonnel and anti-materiel submunitions.

¹⁷³ The attack on Ruisi on August 12, 2008 killed three civilians and wounded six others. Two attacks on Variani, on August 8 and 12, 2008, killed three additional civilians and wounded 16, ranging in age from eight years to 70. For more information on these incidents, see Human Rights Watch, *A Dying Practice*, pp. 43-50.

¹⁷⁴ See Dutch Ministry of Foreign Affairs, "Report of the Storimans Investigative Mission."

¹⁷⁵ Human Rights Watch interview with Ketiv Javakhshvili, Gudushauri National Medical Center, Tbilisi, Georgia, August 13, 2008.

intestines as well as hemorrhagic shock. He said it would require multiple procedures to repair all the damage and months to convalesce.¹⁷⁶ GorMed Hospital, the civilian hospital in Gori, reported that the attack killed six civilians and injured 24.¹⁷⁷

Aftereffects

Human Rights Watch did not document any casualties from Russian duds after the time of attack, but it found many unexploded submunitions, which indicated that the potential for future injuries remained. At one site Human Rights Watch visited in Ruisi, a Norwegian People's Aid deminer leading a clearance team estimated the 9N210 submunitions in his 200,000 square meter area of operation had a 35 percent dud rate.¹⁷⁸ In Variani, Norwegian People's Aid cleared 107 submunitions.¹⁷⁹

The presence of Russian duds also caused significant socioeconomic harm after the conflict. The economy in the region relies heavily upon agriculture, and unexploded submunitions impeded many Georgians' ability to tend their farms and livestock and earn a living. Nukri Stepanishvili, a 44-year-old farmer in Variani who found unexploded submunitions in his home and cabbage patch, said, "I haven't harvested. I won't until there is some clearance." He explained that he had already lost some of his crops and feared losing many more.¹⁸⁰ While some of the Russian strikes on fields outside of populated areas may have been aimed at Georgian military targets, the Russian forces' decision to use cluster munitions with high dud rates led to significant post-conflict challenges for civilians.

Georgian Use

Although Georgia initially denounced Russia's use of cluster munitions while failing to admit its own,¹⁸¹ on September 1, 2008, it publicly acknowledged that from August 8 to 11 it used cluster munitions "against Russian military equipment and armament marching from Rocki [sic] tunnel to Dzara road." It insisted that its cluster munitions "were never used against

¹⁷⁶ Human Rights Watch interview with Dr. Merab Kiladze, Gudushauri National Medical Center, Tbilisi, Georgia, August 13, 2008.

¹⁷⁷ Human Rights Watch telephone interview with Paata Kharabadze, chief doctor of GorMed Hospital, Gori, Georgia, November 5, 2008.

¹⁷⁸ Human Rights Watch interview with Amir Musanovic, technical advisor, Norwegian People's Aid, Ruisi, Georgia, October 15, 2008.

¹⁷⁹ "Mission Completed," Norwegian People's Aid news release, June 24, 2010, <http://www.npaid.org/?module=Articles;action=Article.publicShow;ID=9498> (accessed September 18, 2010).

¹⁸⁰ Human Rights Watch interview with Nukri Stepanishvili, Variani, Georgia, October 18, 2008.

¹⁸¹ See, for example, Transcript of Preconference of President of Georgia Mikheil Saakashvili and US State Secretary Condoleezza Rice, August 15, 2008.

civilians, civilian targets and civilian populated or nearby areas.”¹⁸² Human Rights Watch, as well as Georgian military deminers and international demining organizations, however, found Georgian submunitions farther south in a number of populated areas. Human Rights Watch researchers gathered evidence of Georgian submunitions in or near a band of nine villages in the north of the Gori district.¹⁸³

Georgia used ground-launched M85 submunitions carried by 160mm Mk.-4 rockets, which it said it had purchased from Israel.¹⁸⁴ M85 submunitions were also used by the United Kingdom in Iraq and especially Israel in Lebanon in 2006, where they were found to have unacceptably high dud rates.¹⁸⁵

Several factors suggest that Georgia’s submunitions landed on villages south of the South Ossetian administrative border because of a massive failure. Human Rights Watch found evidence inconsistent with typical use. The rockets fell short of their minimum range, and there were more M85 duds than M85 submunitions that exploded on impact. Many of these duds were in an unarmed state, and witnesses did not report Russian troops in the area of the Georgian strikes.¹⁸⁶ In February 2009, the Georgian Ministry of Defense wrote to Human Rights Watch that the M85s may have landed in the Gori District because of a “failure of the weapons system” and that it was investigating the possibility.¹⁸⁷

Georgia was also investigating the type of cluster munition that failed so widely. M85 submunitions come in two models, with and without self-destruct devices. While Georgian military deminers and Human Rights Watch found primarily non-self-destruct models, in October 2008, then-First Deputy Minister of Defense Kutelia claimed that Georgia’s contract for the submunitions was for self-destruct models. He said the Ministry of Defense, with the

¹⁸² “Georgian Ministry of Defence’s Response to the Human Rights Watch Inquire [sic] about the Usage of M85 Bomblets,” Georgian Ministry of Defense press release, September 1, 2008.

¹⁸³ These towns and villagers were Brotsleti, Ditsi, Kvemo Khviti, Meghvrekisi, Pkhvenisi, Shindisi, Tirdznisi, Zemo Khviti, and Zemo Nikozi. Human Rights Watch researchers found unexploded submunitions, ribbons from detonated submunitions, and Mk.-4 160mm rockets.

¹⁸⁴ The submunitions were launched in GRADLAR (Mk.-4) rockets. Responding to a Human Rights Watch inquiry, the Georgian Ministry of Defense said forces launched 24 volleys of 13 of these rockets each. While the rockets can have unitary warheads as well, if they all were cluster munitions, they would have carried 32,448 M85 submunitions. “Some Facts,” attachment to email communication from David Nardaia, head of Analytical Department, Ministry of Defense of Georgia, to Human Rights Watch, November 18, 2008.

¹⁸⁵ In the Lebanon war, weapons experts and UN deminers estimated that self-destruct M85 submunitions had an actual failure rate of 5 to 10 percent, more than the 1.3 to 2.3 percent failure rate reported in testing. For further information on the use and failure of M85s in Lebanon, see Human Rights Watch, *Flooding South Lebanon*, pp. 30-32, 45-48.

¹⁸⁶ For a more detailed explanation, see Human Rights Watch, *A Dying Practice*, pp. 63-67.

¹⁸⁷ Response of Georgian Ministry of Defense to Human Rights Watch Questions, February 12, 2009.

manufacturer's help, would look into the issue.¹⁸⁸ The government reported that the investigation into the type of weapon used and the possibility of a massive failure was still going on as of February 2009, and no report on the subject has been made public since then.¹⁸⁹

Human Rights Watch documented fewer civilian casualties from Georgian cluster munitions than from their Russian counterparts, but the weapons still resulted in harm: Georgian submunitions killed at least four civilians and injured at least eight at the time of attack or after. The effects of these cluster munitions is a reminder that even if a state claims to employ careful targeting and technological safeguards, there is always a significant room for error at the expense of civilian lives.

Cluster Munition Strikes

Georgian cluster munitions killed at least one civilian and wounded at least two more when they landed on or near the towns of Tirdznisi and Shindisi on August 9, 2008. Alexandre Zerekidze, a driver and farmer who was injured by an M85 just outside of his home in Tirdznisi, recalled, "I heard screams and came out to see if someone was wounded. As soon as I came out, something exploded. I turned back, and shrapnel hit my back, stomach, and leg. I started bleeding. My kids were inside of the house. I tried to cover them."¹⁹⁰ Zerekidze showed Human Rights Watch an M85 fragmentation ring from the incident and three small craters consistent with an M85 explosion. Witnesses interviewed by Human Rights Watch in both towns reported that Georgian, but not Russian, troops and tanks were in the area at the time of the incidents, suggesting they landed in the area in error.

Aftereffects

Human Rights Watch documented that Georgian M85 duds killed at least three civilians and wounded six when they were disturbed after attacks in Brotsleti, Pkhvenisi, and Shindisi.¹⁹¹ The experience of Alika Kikilashvili, a 48-year-old farmer in Brotsleti, illustrates the dangers of civilians handling unexploded submunitions. On his way to tend his cows, Kikilashvili met Tero Surameli, 46, who was holding in his hands two small objects that someone had

¹⁸⁸ Human Rights Watch interview with Batu Kutelia, then Georgian first deputy minister of defense, Tbilisi, Georgia, October 21, 2008.

¹⁸⁹ Response of Georgian Ministry of Defense to Human Rights Watch Questions, February 12, 2009.

¹⁹⁰ Human Rights Watch interview with Alexandre Zerekidze, Tirdznisi, Georgia, October 17, 2008.

¹⁹¹ An explosive remnant of war also caused an injury in Tirdznisi. It may have been caused by an unexploded submunition, but since Human Rights Watch could not definitively determine that, the casualty is not included in the total number. Human Rights Watch also documented two incidents where civilians handled dangerous unexploded submunitions in Ditsi, although no casualties occurred. See Human Rights Watch, *A Dying Practice*, pp. 59, 62.

brought from the fields. To Kikilashvili, they looked like light sockets. Kikilashvili recalled, “I had my phone in my hand, and it vibrated. I was five steps away [from Tero], and as soon as I answered it there was a big explosion. I felt a kind of wave of wind hit me.” After recovering from shock, Kikilashvili realized he had shrapnel in his stomach, both arms, and both legs. Much of that shrapnel remained in his body when Human Rights Watch interviewed him in October 2008. According to Kikilashvili, “Tero’s face was completely damaged. There were a lot of open wounds. He was alive for about an hour and then died. There was no treatment or medicine.”¹⁹²

Georgian cluster munition duds also interfered with livelihoods. Local civilians, who in the Gori District depend heavily on agriculture, were forced to choose between going to their farms and risking injury or death from an unexploded dud, and staying at home and having little with which to feed their families. Sergo Nikolaishvili, 34, told Human Rights Watch that “unless they do some clearance, people are afraid to harvest. They have not been able to collect their food.”¹⁹³

Conclusion

Collectively, recent conflicts reveal that, regardless of the profile of the user, the nature of the conflict, or the type of munition, harm from these weapons is foreseeable and unavoidable. The stories of cluster munition victims from these five conflicts are remarkably similar; in each, cluster munitions killed and injured civilians at the time of attacks, and they have continued to claim even more lives and limbs long after. Unexploded submunitions have also disrupted economic activity, hindering post-conflict reconstruction, and in some cases interfered with military operations.

In the past decade, ad hoc efforts to mitigate the humanitarian impact of cluster munitions have proven unsuccessful. Technical advances, more careful targeting, and procedural precautions have not been—and will not be—able fully to obviate the inherent dangers posed by these weapons’ character. On the contrary, each conflict has demonstrated anew the pressing need for an absolute ban on cluster munitions.

¹⁹² Human Rights Watch interview with Aliko Kikilashvili, farmer, Brotsleti, Georgia, October 16, 2008.

¹⁹³ Human Rights Watch interview with Sergo Nikolaishvili, Brotsleti, Georgia, October 16, 2008.

III. Production, Transfer, and Stockpiling

Production, transfer, and stockpiling of cluster munitions underlie the civilian suffering the weapons cause. Thirty-four countries have produced more than 200 types of cluster munitions.¹⁹⁴ At least 15 countries have transferred more than 50 of those types to at least 60 countries.¹⁹⁵ Eighty-six states have stockpiled them,¹⁹⁶ and the global inventory of weapons likely consists of billions of submunitions.¹⁹⁷ This proliferation of cluster munitions has enabled 18 government forces, plus some non-state armed groups, to use them in 35 countries and four disputed territories.¹⁹⁸ While most states have renounced production, transfer, and stockpiling due to growing international condemnation of the weapon, the potential for future use will remain until the world completely eliminates these practices.

Production

The problem of cluster munitions begins with their production, an enterprise that has spread around the globe. While half of the 34 countries that have produced cluster munitions have renounced production, as of September 2010, 17 countries had not.¹⁹⁹ Major arms manufacturers, including China, Russia, and the United States, are not surprisingly on the list of cluster munition producers, but there are currently producing states in almost every part of the world. There are six such states in Europe: Greece, Poland, Romania, Slovakia,

¹⁹⁴ These statistics contained reflect the best publicly available information known to the Landmine and Cluster Munition Monitor and will be updated as it receives more evidence. *Cluster Munition Monitor 2010*, p. 14.

¹⁹⁵ *Ibid.*, p. 15.

¹⁹⁶ Information regarding the complete composition of any country's stockpile of cluster munitions is generally not publicly available. The information set forth in this report is therefore likely incomplete, particularly regarding non-Western weapon systems, which are not well accounted for in standard international reference publications. In some cases, the *Cluster Munition Monitor* has excluded certain weapons and countries from this report because of this uncertainty. Since 2009, the *Monitor* has added Afghanistan, Cambodia, and the Republic of Congo as past or current stockpilers and removed Mali and Sri Lanka. *Cluster Munition Monitor 2010*, p. 16.

¹⁹⁷ Human Rights Watch and Landmine Action, *Banning Cluster Munitions: Government Policy and Practice* (Ottawa: Mines Action Canada, 2009), p. 20 [hereinafter *Banning Cluster Munitions*].

¹⁹⁸ Since World War II, cluster munitions have been used in the following countries: Afghanistan, Albania, Angola, Azerbaijan, Bosnia and Herzegovina, Cambodia, Chad, Colombia, Croatia, Democratic Republic of Congo, Eritrea, Ethiopia, Georgia, Grenada, Iran, Iraq, Israel, Kuwait, Lao PDR, Lebanon, Libya, Mauritania, Montenegro, Mozambique, Russia (Chechnya), Saudi Arabia, Serbia, Sierra Leone, Sudan, Syria, Tajikistan, Uganda, Vietnam, Yemen, and Zambia. They have also been used in the following disputed territories: the Falklands/Malvinas, Kosovo, Nagorno-Karabakh, and Western Sahara. The countries that used them are: Colombia, Eritrea, Ethiopia, France, Georgia, Iraq, Israel, Libya, Morocco, the Netherlands, Nigeria, Russia, Saudi Arabia, South Africa, Sudan, the United Kingdom, the United States, and the former Yugoslavia. *Cluster Munition Monitor 2010*, pp. 11-12.

¹⁹⁹ *Ibid.*, p. 14.

and Turkey.²⁰⁰ There are another six in South and East Asia: China, India, North Korea, South Korea, Pakistan, and Singapore. Egypt, Iran, and Israel continue to produce cluster munitions in the Middle East, while Brazil and the United States are the producers from the Americas. There are no known producers in sub-Saharan Africa.

Countries that Have Developed or Produced Cluster Munitions²⁰¹

Former producing countries that have renounced production (17)	Countries that continue to produce cluster munitions (17)
*Argentina, Australia, Belgium, Bosnia-Herzegovina, Chile, France, Germany, Iraq, Italy, Japan, the Netherlands, *Serbia, South Africa, Spain, Sweden, Switzerland, United Kingdom	Brazil, China, Egypt, Greece, India, Iran, Israel, North Korea, South Korea, Pakistan, Poland, Romania, Russia, Singapore, Slovakia, Turkey, ²⁰² United States

*Argentina and Serbia are the only two former producing states that have not signed the Convention on Cluster Munitions.

In some cases, companies in different states have collaborated to produce cluster munitions. For example, Israel Military Industries (IMI) has shared its M85 technology under license with companies in Argentina, Germany, India, Romania, Switzerland, Turkey, and the United States.²⁰³ The United Kingdom's BAE Systems Royal Ordnance previously manufactured close to 60,000 L20A1 projectiles with submunitions under license from IMI.²⁰⁴ The Romanian company Romarm has produced the GAA-001 submunition, which is described as identical to the Israeli M85, in a joint venture with IMI.²⁰⁵ IMI's deals are not the only examples of collaborative production. South Korean Poongsan joined Pakistan Ordnance Factories in November 2004 to co-produce artillery-launched DPICMs. While most of the munitions have been intended for Pakistan's army, the firms have also planned to market the projectiles for export.²⁰⁶ Iraq and Yugoslavia jointly developed the M87 Orkan (known in

²⁰⁰ In June 2010, a Turkish official informed the Landmine and Cluster Munition Monitor, however, that Turkey does not produce cluster munitions. It is not known whether this statement means that Turkey does not currently produce cluster munitions, or whether it has decided never to produce cluster munitions in the future. Ibid., p. 15.

²⁰¹ In these listings, the loading, assembling and packaging of submunitions and carrier munitions into a condition suitable for storage or use in combat is considered production of cluster munitions. Modifying the original manufacturers' delivery configuration for improved combat performance is also considered a form of production. Ibid.

²⁰² As explained in an earlier footnote in this chapter, Turkey's status as a current producer is unclear.

²⁰³ *Banning Cluster Munitions*, p. 215.

²⁰⁴ Adam Ingram, written answers, November 17, 2003, *Parliamentary Debates*, Commons, vol. 413 (2002-2003), col. 498W, http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo031117/text/31117w08.htm#31117w08.html_spnw0 (accessed November 4, 2010), (cited in *Cluster Munition Monitor 2010*, p. 112).

²⁰⁵ Terry J. Gander and Charles O. Cutshaw, eds., *Jane's Ammunition Handbook 2001-2002*, (Surrey, UK: Jane's Information Group Limited, 2001), p. 322 (cited in *Banning Cluster Munitions*, p. 230).

²⁰⁶ "Pakistan Ordnance Factory, S. Korean Firms Sign Ammunition Pact," *Asia Pulse* (Karachi), November 24, 2006 (cited in *Banning Cluster Munitions*, p. 225).

Iraq as Ababil).²⁰⁷ Such joint efforts have spread production technology and increased the number of cluster munitions.

Several producers, notably the United States and Israel, have used cluster munitions extensively. Half of the 18 states that have used cluster munitions were or are producers. The other half of the users acquired them through transfers.

As indicated in Chapter 1, the trend in production has been toward higher tech cluster munitions. Submunitions with self-destruct devices designed to decrease failure rates, notably the M85, have been increasingly common, as have submunitions with guidance systems, such as sensor fuzed weapons. Regardless of these technological developments, such weapons have proven a threat to civilians, and therefore their production, like that of all cluster munitions, should be banned.

Transfer

Through the transfer of cluster munitions, weapons produced by a relatively small number of states have proliferated around the globe. At least 60 states have imported the weapons from 15 states to establish or supplement stockpiles,²⁰⁸ and at least nine of the non-producing countries subsequently used cluster munitions in combat.²⁰⁹ For example, cluster munitions of Soviet/Russian origin have been reported to be in the stockpiles of 34 countries.²¹⁰ In addition, 16 countries have imported or otherwise acquired BL-755 cluster bombs produced in the United Kingdom.²¹¹ In both cases, these cluster munitions have spread to Africa, Asia, Europe, and the Middle East. There have been more than two-and-a-half times as many stockpilers as producers and as many non-producing users as producing users. Without transfers, there would still be a large number of cluster munitions, but the problem would be more contained.

²⁰⁷ Gander and Cutshaw, eds., *Jane's Ammunition Handbook 2001-2002*, p. 641 (cited in *Banning Cluster Munitions*, p. 211).

²⁰⁸ At least five signatories to the Convention on Cluster Munitions exported cluster munitions in the past (Chile, France, Germany, Moldova, and the United Kingdom), as did at least 10 non-signatories (Brazil, China, Egypt, Israel, Russia, Slovakia, South Korea, Turkey, the United States, and the former Yugoslavia). *Cluster Munition Monitor 2010*, p. 15.

²⁰⁹ Colombia, Eritrea, Ethiopia, Georgia, Libya, Morocco, Nigeria, Saudi Arabia, and Sudan. Serbia, a producer, used cluster munitions as part of the former Yugoslavia. *Ibid.*, pp. 12, 15.

²¹⁰ Cluster munitions of Russian/Soviet origin have been reported to be in the stockpiles of Algeria, Angola, Azerbaijan, Belarus, Bulgaria, Republic of the Congo, Croatia, Cuba, the Czech Republic, Egypt, Georgia, Guinea, Guinea-Bissau, Hungary, India, Iran, Iraq, Kazakhstan, Kuwait, Libya, Moldova, Mongolia, North Korea, Peru, Poland, Romania, Slovakia, Sudan, Syria, Turkmenistan, Uganda, Ukraine, Uzbekistan, and Yemen. *Ibid.*, p. 241.

²¹¹ BL-755 cluster bombs have been stockpiled by Belgium, Ethiopia, Germany, India, Iran, Italy, Montenegro, the Netherlands, Nigeria, Oman, Pakistan, Saudi Arabia, Switzerland, Thailand, the United Arab Emirates, and the former Yugoslavia. *Ibid.*, p. 111. Belgium, Germany, Montenegro, the Netherlands, Switzerland, and most recently the United Kingdom have subsequently disposed of or are in the process of disposing of some or all the weapons. *Ibid.*, pp. 18-19.

Examples of Known Transfers of Cluster Munitions²¹²

Producer	Munition Type	Recipients
Brazil	ASTROS rocket	Iran, Iraq, Saudi Arabia
Chile	CB-500 bomb	Eritrea, Ethiopia, Iraq, Sudan
Egypt	SAKR rocket	Iraq
France	Beluga bomb	Argentina, Greece, India, Nigeria
Germany	DPICM projectile	Austria, Denmark, Finland, Greece, Italy, Norway
	SMArt-155 projectile	Greece, Switzerland, United States
Israel	DPICM projectile	Germany, India, Romania, Switzerland, Turkey, United Kingdom, United States
South Korea	DPICM projectile	Pakistan
Moldova	Uragan rocket	Guinea, Yemen
Russia (including USSR)	RBK bomb	Bulgaria, Croatia, Cuba, Czech Republic, Guinea-Bissau, Hungary, India, Iraq, North Korea, Libya, Peru, Poland, Romania, Slovakia, Syria, Uganda
	KMG-U dispenser	Algeria, Angola, Cuba, Czech Republic, Hungary, India, Iran, Iraq, North Korea, Libya, Mongolia, Poland, Romania, Slovakia, Sudan, Syria, Yemen
	Smerch, Uragan rockets	Algeria, Egypt, India, Kazakhstan, North Korea, Kuwait
South Africa	CB-470 bomb	Iraq, Peru, Zimbabwe
Spain	MAT-120 mortar	Finland
	BME bomb	Peru
Sweden and France	BONUS projectile	United States

²¹² ICBL, "Transfers of Cluster Munitions," May 2008.

Producer	Munition Type	Recipients
United Kingdom	BL-755 bomb	Belgium, Eritrea, Germany, India, Iran, Italy, Netherlands, Nigeria, Oman, Pakistan, Portugal, Saudi Arabia, Switzerland, Thailand, United Arab Emirates, Yugoslavia
United States	DPICM projectile	Bahrain, Belgium, Canada, Greece, Israel, Japan, Jordan, South Korea, Morocco, Netherlands, Pakistan, Turkey, United Kingdom
	CBU-58 bomb	Israel, Morocco, Saudi Arabia
	CBU-87 bomb	Egypt, Greece, Japan, South Korea, Netherlands, Oman, Poland, Saudi Arabia, Turkey, United Arab Emirates
	Rockeye bomb	Argentina, Australia, Canada, Egypt, Greece, Honduras, Indonesia, Israel, South Korea, Morocco, Norway, Oman, Pakistan, Thailand, Turkey
	M26 MLRS rocket	Bahrain, Egypt, France, Germany, Greece, Israel, Italy, Japan, South Korea, Netherlands, Turkey, United Kingdom
	ATACMS missile	Bahrain, Greece, South Korea, Turkey
Former Yugoslavia	Orkan rocket	Iraq

The number of transfers seems to have decreased since the 2008 adoption of the Convention on Cluster Munitions. *Cluster Munition Monitor 2010* reported that it was unaware of any new transfers in 2009 or the first half of 2010, other than inert components from South Korea to Pakistan.²¹³ Amnesty International obtained documents indicating April 2009 and February 2010 shipments of inert components for cluster munition artillery projectiles from South Korea's Poongsan Corporation to Pakistan. According to Amnesty, UK-flagged vessels transported both shipments.²¹⁴ The potential for transfers will continue as long as stockpiles exist, and the spread of cluster munitions from past transfers continues to pose threats to civilians.

²¹³ *Ibid.*, p. 2.

²¹⁴ Amnesty International, "Deadly Movements: Transportation Controls in the Arms Trade Treaty," July 2010, <http://www.amnesty.org/en/library/asset/ACT30/015/2010/en/7898d591-f17a-4d8b-9836-17c3b9a11df3/act300152010en.pdf> (accessed September 19, 2010), pp. 10-11.

Most transfers have come from sales or defense assistance packages. They have been too numerous to detail, but a few cases exemplify the pattern. Although it has had a ban on the transfer of nearly all cluster munitions since March 2009,²¹⁵ the United States previously transferred cluster munitions to at least 29 states,²¹⁶ including Israel and Egypt, its two biggest recipients of military aid.²¹⁷ The United States exported to Israel M26 rockets with 644 DPICMs each for Israel's MLRS launchers. It also sent to Israel M483A1 155mm artillery projectiles with 88 DPICMs each, Rockeye cluster bombs with 247 Mk 118 submunitions each, and CBU-58B cluster bombs with 650 BLU-63 submunitions each.²¹⁸ The United States has had a similarly long history of exporting cluster munitions to Egypt. In November 2001, the United States awarded a \$36 million contract to Lockheed Martin Corporation to produce 485 extended range MLRS rockets for Egypt.²¹⁹ The United States sold 760 CBU-87 cluster bombs to Egypt in the early 1990s and, between 1970 and 1995, supplied Egypt with 1,300 Rockeye cluster bombs.²²⁰ As a result of deals signed in 2007 and 2008, the United States intends to sell 780 M30 Guided MLRS (GMLRS) rockets with DPICM submunitions to the United Arab Emirates and 510 CBU-105 Sensor Fuzed Weapons to India.²²¹

Russia is another major exporter. For example, in February 2006, it sold to India 28 launch units for the 300mm *Smerch* multiple launch rocket system fitted with dual-purpose and sensor-fuzed submunitions.²²² Russia had been exporting this weapon since 1995.²²³

²¹⁵ US Omnibus Appropriations Act, 2009, 123 Stat. 895, Public Law 111-8, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ008.111.pdf (accessed September 19, 2010), sec. 7056(b).

²¹⁶ Those states are: Argentina, Australia, Bahrain, Belgium, Canada, Egypt, Denmark, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Jordan, South Korea, Morocco, the Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Thailand, Turkey, the United Arab Emirates, and the United Kingdom. *Cluster Munitions Monitor 2010*, p. 264.

²¹⁷ In the budget category of Foreign Military Financing, Israel received \$2.55 billion in fiscal year 2009, Egypt received \$1.3 billion, and the next two largest recipients were Jordan (\$355 million) and Pakistan (\$300 million). See US Department of State, "Executive Budget Summary: Function 150 & Other International Programs," February 1, 2010, <http://www.state.gov/documents/organization/135888.pdf> (accessed September 19, 2010), pp. 127-129.

²¹⁸ The details of the transfers are not known. Human Rights Watch, *Flooding South Lebanon*, p. 28.

²¹⁹ "Contract Announcement: DAAH01-00-C-0044," US Department of Defense press release, November 9, 2001, <http://www.defense.gov/contracts/contract.aspx?contractid=2141> (accessed September 19, 2010).

²²⁰ Egypt reportedly purchased 160 CBU-87 cluster bombs in 1991. "Dozen + Mideast Nations Bought Weapons since Gulf War," *Aerospace Daily*, December 10, 1991. Egypt reportedly purchased an additional 600 CBU-87 cluster bombs in 1992. Barbara Starr, "Apache Buy Will Keep Israeli Edge," *Jane's Defence Weekly*, October 1, 1992. For information on Rockeye transfers, see US Defense Security Assistance Agency, Department of Defense, "Cluster Bomb Exports under FMS, FY1970-FY1995," November 15, 1995, obtained by Human Rights Watch in a Freedom of Information Act request, November 28, 1995. All sources cited in *Banning Cluster Munitions*, pp. 198-199.

²²¹ Kate Brannen, "Army Will Complete 2007 DPICM Sale Despite New Law from Congress," *Inside the Army*, March 23, 2009 (cited in *Banning Cluster Munitions*, p. 258); "India: CBU-105 Sensor Fuzed Weapons," US Defense Security Cooperation Agency news release, Transmittal No. 08-105, September 30, 2008, http://www.dsca.mil/Press_Releases/36-b/2008/India_08-105.pdf (accessed September 23, 2010).

²²² "India, Russia Sign \$500 MN Rocket Systems Deal," Indo-Asian News Service, February 9, 2006 (cited in Human Rights Watch, *Survey of Cluster Munition Policy and Practice*, no. 1, February 2007, <http://www.hrw.org/backgrounder/arms/cluster0207/>, p. 32).

Not all transfers have come from large producers like the United States and Russia, however. In 2007, for example, Slovakia reported the export of 380 cluster munition rockets to Turkey.²²⁴ Turkey sold more than 3,000 of a different type of cluster munition rocket to the United Arab Emirate in 2006-2007.²²⁵ A Brazilian company has sold ASTROS rockets to Iran, Iraq, and Saudi Arabia.²²⁶

Cluster munitions have also changed hands when new states have inherited cluster munitions from dismantled states. The breakup of the Soviet Union led to the spread of cluster munitions to a number of newly born states, including Azerbaijan, Belarus, Georgia, Kazakhstan, Moldova, Turkmenistan, Ukraine, and Uzbekistan.²²⁷ The dissolution of Yugoslavia produced new holders of cluster munitions, including Bosnia and Herzegovina, Croatia, Montenegro, and Serbia.²²⁸ Serbia, which used cluster munitions in the 1998-1999 conflict in Kosovo, likely inherited Yugoslavia's production capabilities as well.²²⁹ While transfers through state dissolution do not increase the number of weapons in stockpiles, they do increase the number of actors that may use the weapons.

In some cases, third countries have received cluster munitions from intermediary ones. In 2000, for example, Moldova reported the transfer to Guinea of 860 9M27K presumably Russian rockets, each of which contained 30 high explosive submunitions, for the 220mm *Uragan* multiple launch rocket system.²³⁰ Eritrea inherited Chilean-manufactured CB-500 cluster bombs when it achieved independence from Ethiopia; it subsequently used these weapons on the Mekele airport in Ethiopia in 1998.²³¹

Transfers of outdated cluster munitions have been particularly worrisome. The United States transferred 30,000 artillery projectiles (M509A1, M449A1, M483) containing 5.06 million

²²³ "Kuwait to Get Smart Submunitions for Smerch MRL," *Jane's Defence Weekly*, April 21, 1995 (cited in Human Rights Watch, *Survey of Cluster Munition Policy and Practice*, p. 38).

²²⁴ Slovakia, UN Register of Conventional Arms, Submission for Calendar Year 2007, June 12, 2008 (cited in *Banning Cluster Munitions*, p. 23).

²²⁵ Turkey, UN Register of Conventional Arms, Submission for Calendar Year 2006, March 22, 2007, and Submission for Calendar Year 2007, July 7, 2008 (cited in *Banning Cluster Munitions*, p. 23).

²²⁶ Gander and Cutshaw, eds., *Jane's Ammunition Handbook 2001-2002*; Jonathan Beaty and S.C. Gwynne, "Scandals: Not Just a Bank," *Time Magazine*, September 2, 1991 (both cited in *Banning Cluster Munitions*, p. 192).

²²⁷ *Cluster Munition Monitor 2010*, p. 241.

²²⁸ *Ibid.*, pp. 53 (Bosnia and Herzegovina), 58 (Croatia), 93 (Montenegro), 244 (Serbia).

²²⁹ *Banning Cluster Munitions*, p. 238.

²³⁰ Republic of Moldova, UN Register of Conventional Arms, Submission for Calendar Year 2000, May 30, 2001 (cited in *Cluster Munition Monitor 2010*, p. 90).

²³¹ *Banning Cluster Munitions*, p. 199.

DPICM submunitions to Bahrain between 1995 and 2001, as this type of ammunition was being phased out of the US inventory.²³² The United States transferred 31,704 M509A1 and M483 cluster munitions, containing more than three million DPICM submunitions, to Jordan in 1995.²³³ Outdated weapons are the most volatile and dangerous units, and therefore these transfers involve increased potential for causing humanitarian harm.

Many of the transfers, including transfers related to state dissolution, have correlated with use by the state receiving the munitions. Most recently, Georgia used M85 submunitions imported from Israel during its 2008 conflict with Russia.²³⁴ In addition, although it also produces its own cluster munitions, Israel made extensive use of US-made models in south Lebanon during its 2006 war with Hezbollah.²³⁵ Brazil sold ASTROS multiple launch rocket systems to Saudi Arabia, which used them against Iraqi forces in the Battle of Khafji in January 1991, leaving behind significant numbers of unexploded submunitions.²³⁶ Such use would not have been possible without transfers.

Stockpiling

Stockpiles of cluster munitions abound in Africa, Asia, Europe, the Middle East, and North and South America. At least 86 countries are known to have stockpiled cluster munitions at some point in time, and at least 74 countries are believed to still possess the weapons.²³⁷ Some individual stockpiles are enormous. In November 2009, a US State Department official reported that the United States stockpiles about 700 million submunitions,²³⁸ stockpiles in Russia and China are probably comparable in scale. Many stockpiles consist of millions to

²³² US Defense Security Cooperation Agency, Department of Defense, "Excess Defense Articles," online database, <http://www.dsca.mil/programs/eda/search.asp> (accessed September 19, 2010) (cited in *Cluster Munition Monitor 2010*, p. 196).

²³³ *Ibid.* (cited in *Cluster Munition Monitor 2010*, p. 220).

²³⁴ Human Rights Watch, *A Dying Practice*, p. 56.

²³⁵ Israel used every type of cluster munition that it imported from the United States in Lebanon, except for the Rockeye. Human Rights Watch, *Flooding South Lebanon*, p. 28.

²³⁶ Gander and Cutshaw, eds., *Jane's Ammunition Handbook 2001-2002*, p. 630; Human Rights Watch interviews with former explosive ordnance disposal personnel from a Western commercial clearance firm and a Saudi military officer with first-hand experience in clearing the dud dual-purpose submunitions from ASTROS rockets and Rockeye cluster bombs (names withheld), Geneva, Switzerland, 2001-2003 (both cited in *Banning Cluster Munitions*, p. 192).

²³⁷ *Cluster Munition Monitor 2010*, p. 1. These figures have changed over recent years due to the availability of new information and clarifications from governments about whether they do or did stockpile cluster munitions.

²³⁸ Statement by Harold Hongju Koh, legal adviser, US Department of State, to the Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War, November 9, 2009, <http://geneva.usmission.gov/2009/11/09/erw/> (accessed September 9, 2010). See also US Department of Defense, "2004 Report to Congress." The report lists 626,824,422 submunitions in the "Active Inventory" and 728,477,489 in the "Total Inventory." Active inventory denotes serviceable ammunition items that can be safely used in training or combat. Total inventory may include damaged, suspended, or unserviceable ammunition that is awaiting disposal or repair.

tens of millions of submunitions, the vast majority of which may be DPICMs.²³⁹ Both large and small stockpilers have used cluster munitions in conflict.²⁴⁰

The best information on stockpiles comes from signatories to the Convention on Cluster Munitions. Seventeen countries that are either states parties or signatories to the convention have reported that, before any destruction activities, they possessed at least 1.1 million cluster munitions containing more than 146 million submunitions.²⁴¹ This number will likely grow as states parties submit reports on stockpiles under the convention's transparency provision. Known stockpiles of submunitions for these states, prior to recent destruction efforts, include (in approximate figures): Germany (50 million), the United Kingdom (38.8 million), the Netherlands (26 million), France (15 million), Belgium (10.3 million), Norway (3.3 million), Denmark (2.6 million), Austria (800,000), Spain (250,000), Slovenia (53,000), Montenegro (52,000), Moldova (27,000), Colombia (11,000), Angola (7,000), the Czech Republic (5,000), Portugal (3,000), and Afghanistan (113,000 "items containing 29,559 kilograms").²⁴²

Many signatory states and stockpiling states that are not signatories to the convention, however, have failed to disclose detailed information on the quantities and types of cluster munitions they possess. (The United States is a notable exception.) As a result, it is not currently possible to make an accurate or precise estimate of the total number of submunitions stockpiled around the globe.²⁴³

²³⁹ *Banning Cluster Munitions*, p. 20; Human Rights Watch, *Survey of Cluster Munitions Produced and Stockpiled: Briefing Paper Prepared for the ICRC Experts Meeting on Cluster Munitions*, April 2007, http://www.hrw.org/legacy/backgrounders/arms/cluster0407/index.htm#_Toc165269835.

²⁴⁰ Users with large stockpiles include Russia and the United States while users with small stockpiles include Eritrea, Ethiopia, and Georgia.

²⁴¹ *Cluster Munition Monitor 2010*, p. 18.

²⁴² *Ibid.*

²⁴³ *Ibid.*, pp. 16-18.

Countries that Have Stockpiled Cluster Munitions²⁴⁴

States Parties	Signatories	Non-Signatories to the Convention on Cluster Munitions	
Austria	<i>Afghanistan</i>	Algeria	Mongolia
<i>Belgium</i>	<i>Angola</i>	<i>Argentina</i>	Morocco
Bosnia and Herzegovina	<i>Australia</i>	Azerbaijan	Oman
Croatia	Bulgaria	Bahrain	Pakistan
Denmark	Canada	Belarus	Poland
France	Chile	Brazil	Qatar
Germany	<i>Colombia</i>	Cambodia	Romania
Japan	Congo, Republic of	China	Russia
<i>Moldova</i>	Czech Republic	Cuba	Saudi Arabia
Montenegro	Guinea	Egypt	Serbia
<i>Norway</i>	Guinea-Bissau	Eritrea	Singapore
Slovenia	<i>Honduras</i>	Estonia	Slovakia
<i>Spain</i>	Hungary	Ethiopia	Sudan
United Kingdom	Indonesia	Finland	Syria
	Iraq	Georgia	Thailand
	Italy	Greece	Turkey
	Netherlands	India	Turkmenistan
	Nigeria	Iran	Ukraine
	Peru	Israel	United Arab Emirates
	<i>Portugal</i>	Jordan	United States
	South Africa	Kazakhstan	Uzbekistan
	Sweden	North Korea	Yemen
	Switzerland	South Korea	Zimbabwe
	<i>Uganda</i>	Kuwait	
		Libya	
14 (10 current)	24 (17 current)	48 (47 current)	

Note: Italics indicate states that no longer possess stocks.

Regardless of the limited information, even existing figures are disturbing not only because every stockpiler is a potential user, but also because cluster munitions become increasingly hazardous with age. Many stockpiled cluster munitions, some of which date to the Vietnam War era, are nearing or beyond the end of their storage lives and will become dangerous to use. Outdated cluster munitions create more unexploded submunitions because their fuze

²⁴⁴ Ibid., p. 17.

mechanisms have degraded.²⁴⁵ These outdated cluster munitions will thus cause even more humanitarian harm than newer models.

Although to a much lesser degree than states, non-state armed groups have stockpiled and used cluster munitions. Such groups used stocks of cluster munitions during the 1992-1995 civil war in Bosnia and Herzegovina.²⁴⁶ In 1995, another non-state armed group, the Republic of Serbian Krajina, launched Orkan M87 rockets on civilians in Zagreb, Croatia, causing at least 221 casualties.²⁴⁷ In 2006, Hezbollah launched at least 118 Type-81 cluster munition rockets, containing 39 Type-90 (also called MZD-2) submunitions each, into Israel, killing one person and injuring 12. It was the first confirmed use of these Chinese-made 122mm rockets.²⁴⁸ The delivery platforms for cluster munitions, which include aircraft, rocket launchers, and artillery pieces, are often too expensive and high tech for non-state armed groups to use, but these incidents illustrate the danger of any actor gaining possession of cluster munitions.

Some states have contended that they cannot destroy their stockpiles of cluster munitions because the process is too complicated and costly; however, such an argument is flawed.²⁴⁹ Destruction of cluster munitions—although more technically demanding than the destruction of most landmines—is feasible for all states, no matter what their level of industrial development. There is already a solid body of knowledge and practical experience from which to draw. It is a routine part of the destruction and demilitarization of old munitions in many countries. No longer having to pay for continued storage and maintenance of the cluster munition stocks can lead to some savings. Other savings can come from resource recovery and recycling during the destruction process. Every state will have to bear costs to destroy its unused cluster munition stocks at some point in the future, after the weapons exceeded their shelf-life.²⁵⁰

²⁴⁵ Human Rights Watch, "Survey of Cluster Munitions Produced and Stockpiled: Briefing Paper Prepared for the ICRC Experts Meeting on Cluster Munitions," April 2007, http://www.hrw.org/legacy/background/arms/cluster0407/index.htm#_Toc165269835.

²⁴⁶ *Cluster Munition Monitor 2010*, p. 53.

²⁴⁷ *Prosecutor v. Milan Martić*, International Tribunal for the Former Yugoslavia, paras. 456-463, 470-471, 518.

²⁴⁸ For a detailed discussion of Hezbollah's use of cluster munitions in Israel, see Chapter 2 of this book. See also Human Rights Watch, *Civilians under Assault*, pp. 44-46; "Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict," Human Rights Watch news release.

²⁴⁹ For more details on the feasibility of stockpile destruction, see Cluster Munition Coalition (CMC), *CMC Policy Papers on the Convention on Cluster Munitions*, May 2010, pp. 11-12, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2010/06/3a-cmc-policy-papers.pdf> (accessed September 12, 2010).

²⁵⁰ *Ibid.*, pp. 11-12.

The method of destruction can vary. For some states, established industrial destruction facilities, which are mainly located in Europe, are the best recourse. For other states, particularly those with small stockpiles of cluster munitions, it may be preferable to develop, with expert advice, small-scale national destruction programs that are affordable, safe, practical, and environmentally friendly. States, for example, can collect stored submunitions and explode them under controlled circumstances. Whether transfer to an industrial facility or development of a national program is the best solution depends on a range of factors, including the complexity, size, condition, and location of the stockpiles, as well as the situation of the specific country.²⁵¹ From 2009 to August 2010, six states—Spain, Norway, Moldova, Colombia, Portugal, and Belgium—destroyed their stockpiles, demonstrating that destruction of varying sizes of stockpiles is possible.²⁵²

Case Studies

The following case studies discuss the production, transfer, and stockpiling activities of five major players: China, Israel, Russia, the United Kingdom, and the United States. Of the five, only the United Kingdom has signed and ratified the Convention on Cluster Munitions. These cases exemplify the problem of proliferation and, as at least four are users, the humanitarian threat posed by ongoing production, transfer, and stockpiling.

China

The case of China shows the inherent risks production, transfer, and stockpiling by even non-users pose. There is no evidence that China has used cluster munitions, and in 2010, the government stated that “China has never used cluster munitions outside its territories.”²⁵³ At least two Chinese companies, however, produce cluster munitions: China Northern Industries and Sichuan Aerospace Industry Corporation.²⁵⁴ In total, China produces 22 varieties of cluster munitions, including seven projectile models, seven bomb models, and eight rocket models.²⁵⁵

²⁵¹ Ibid.

²⁵² Spain destroyed 4,724 cluster munitions with 223,261 submunitions. Norway destroyed 53,745 cluster munitions with about 3.3 million submunitions. Moldova destroyed 1,385 cluster munitions with 27,330 submunitions. Colombia destroyed 72 cluster munitions with 10,832 submunitions. Portugal destroyed 22 cluster munitions with 3,234 submunitions. Belgium destroyed 115,975 cluster munitions with 10,250,935 submunitions. *Cluster Munition Monitor 2010*, p. 18.

²⁵³ Statement by Ambassador Wang Qun, head of the Chinese delegation, to the Meeting of the Group of Governmental Experts to the CCW, Geneva, April 12, 2010 (cited in *Cluster Munition Monitor 2010*, p. 204).

²⁵⁴ *Cluster Munition Monitor 2010*, p. 204.

²⁵⁵ The primary sources for information on China’s cluster munitions are Hewson, ed., *Jane’s Air-Launched Weapons*, p. 837, and Ness and Williams, eds., *Jane’s Ammunition Handbook 2007–2008*. This information is supplemented with information from US Defense Intelligence Agency, Department of Defense, “Improved Conventional Munitions and Selected Controlled-

China's exports are not well-documented, but remnants of Chinese submunitions have been found in Iraq, Israel, Lebanon, and Sudan. US deminers identified a Type-81 submunition in Iraq in 2003, and the US military explosive ordnance demining guide states that the Chinese Type-2 dispenser has also been found in Iraq.²⁵⁶ The non-state armed group Hezbollah fired more than 100 Chinese Type-81 122mm rockets, containing Type-90 DPICMs (also called MZD-2 submunitions),²⁵⁷ into northern Israel in July and August 2006. After the same conflict, clearance professionals also found unexploded MZD-2s in south Lebanon, but some of these deminers told Human Rights Watch that the submunitions were Hezbollah munitions hit by Israeli fire and scattered.²⁵⁸ Finally, Landmine Action photographed a Rockeye-type cluster bomb with Chinese-language external markings in Yei, Sudan in 2006.²⁵⁹

The size of China's stockpile is likely comparable to that of the United States, which totals more than 700 million submunitions.²⁶⁰

Israel

Israel has participated in the full range of activities involving cluster munitions, that is, production, transfer, stockpiling, and use. Two companies have taken the lead in production. The Rafael Corporation produces five types of air-dropped cluster munitions as well as the BARAD Helicopter Submunition Dispenser.²⁶¹ IMI produces, license-produces, and exports 11 types of cluster munitions: seven artillery projectiles, one mortar, and three rockets.²⁶² IMI's most notable product is the M85 submunition equipped with a self-destruct fuze and contained in artillery projectiles or rockets. IMI has reportedly produced more than 60

Fragmentation Munitions (Current and Projected) DST-1160S-020-90," June 8, 1990, partially declassified and made available to Human Rights Watch under a Freedom of Information Act request (cited in *Cluster Munition Monitor 2010*, p. 204).

²⁵⁶ Colin King, ed., *Jane's Explosive Ordnance Disposal 2007-2008*, CD-edition, January 15, 2008 (Surrey, UK: Jane's Information Group Limited, 2008); US Navy Explosive Ordnance Disposal Technical Division, "Iraq Ordnance Identification Guide, Dispenser, Cluster and Launcher-2" (cited in *Cluster Munition Monitor 2010*, p. 205).

²⁵⁷ The nomenclature Type-81 has been used for both a Chinese submunition (of the type found in Iraq) and a Chinese rocket (of the type Hezbollah used in Israel).

²⁵⁸ Human Rights Watch interview with Andy Gleeson, program manager and technical operations manager, Mines Advisory Group, Kfar Joz, Lebanon, October 25, 2006; Human Rights Watch interview with BACTEC deminer, Tyre, Lebanon, October 25, 2006. For a detailed discussion of Hezbollah's use of cluster munitions in Israel, see Chapter 2 of this book and Human Rights Watch, *Civilians under Assault*, pp. 44-46.

²⁵⁹ *Cluster Munition Monitor 2010*, p. 251.

²⁶⁰ *Banning Cluster Munitions*, p. 20.

²⁶¹ Hewson, ed., *Jane's Air Launched Weapons*, pp. 370-380 (cited in *Cluster Munition Monitor 2010*, p. 219).

²⁶² *Cluster Munition Monitor 2010*, p. 219. Information on surface-launched cluster munitions produced and possessed by Israel is taken primarily from the IMI corporate website, <http://www.imi-israel.com/> (accessed September 19, 2010). It has been supplemented with information from Ness and Williams, *Jane's Ammunition Handbook 2007-2008*, and US Defense Intelligence Agency, "Improved Conventional Munitions and Selected Controlled-Fragmentation Munitions (Current and Projected) DST-1160S-020-90."

million M85 submunitions.²⁶³ Israel sold four GRADLAR 122mm/160mm rocket launcher units to Georgia in 2007,²⁶⁴ and Georgia acknowledged using the launchers with M85 submunitions during its 2008 conflict with Russia.²⁶⁵ In addition, Israeli companies have transferred the weapon abroad through technology transfer. IMI has concluded licensing agreements for the M85 with companies in Argentina, Germany, India, Romania, Switzerland, Turkey, the United Kingdom, and the United States.²⁶⁶

Despite its domestic production capacity, Israel has imported large numbers of cluster munitions from the United States. It has imported M26 rockets with 644 DPICMs each for its MLRS launchers.²⁶⁷ Experienced Israeli non-commissioned officers leading platoons with an MLRS unit told Human Rights Watch that prior to the 2006 conflict between Israel and Hezbollah, the IDF's stockpile of M26 rockets totaled approximately 18,000, containing about 11.6 million submunitions.²⁶⁸ Israel has also imported from the United States M483A1 155mm artillery projectiles with 88 DPICM submunitions each, Rockeye cluster bombs with 247 Mk 118 submunitions each, and CBU-58B cluster bombs with 650 BLU-63 submunitions each.²⁶⁹ All of these US-produced cluster munitions, except the Rockeye bombs, were used by Israel in Lebanon.²⁷⁰

Some of these weapons may have been purchased with Israeli state funds. Many of the weapons, however, were likely purchased with US money provided to Israel for the purpose of purchasing US-made weapons.²⁷¹ Israel used US-made cluster munitions during its 2006 war in Lebanon in ways that allegedly violated US-Israeli bilateral agreements. Investigations by

²⁶³ Mike Hiebel, Alliant TechSystems, and Ilan Glickman, Israel Military Industries, "Self-Destruct Fuze for M864 Projectiles/MLRS Rockets," Presentation to the 48th Annual Fuze Conference, Charlotte, North Carolina, April 27-28, 2004, www.dtic.mil/ndia/2004fuze/hiebel.pdf, (accessed September 9, 2010), slide 9.

²⁶⁴ The transfer of the GRADLAR launchers was reported in: Submission of Georgia, UN Register of Conventional Arms, Report for Calendar Year 2007, July 7, 2008. See *Cluster Munition Monitor 2010*, p. 219.

²⁶⁵ The Georgian Ministry of Defense on September 1, 2008 admitted on its website to using Mk.-4 rockets against Russian forces. "Georgian Ministry of Defence's Response to the Human Rights Watch Inquire [sic] about the Usage of M85 Bomblets," Georgian Ministry of Defense press release.

²⁶⁶ *Banning Cluster Munitions*, p. 215. Colombia reportedly also had cluster munitions of Israeli origin in its stockpiles before they were destroyed. *Cluster Munition Monitor*, p. 135.

²⁶⁷ Human Rights Watch, *Flooding South Lebanon*, p. 28.

²⁶⁸ Human Rights Watch interviews with IDF reservists (names withheld), Tel Aviv and Jerusalem, Israel, October 2006.

²⁶⁹ The details of the transfers are not known. Human Rights Watch, *Flooding South Lebanon*, p. 28.

²⁷⁰ *Ibid.* Israel has also captured Grad 122mm surface-to-surface rocket launchers, but it is not known if the ammunition for these weapons includes versions with submunition payloads. *Cluster Munition Monitor 2010*, p. 219.

²⁷¹ Israel received \$2.55 billion in Foreign Military Financing in fiscal year 2009. See US Department of State, "Executive Budget Summary: Function 150 & Other International Programs," February 1, 2010, <http://www.state.gov/documents/organization/135888.pdf> (accessed September 19, 2010), p. 128.

Israel and US authorities did not result in sanctions,²⁷² but Israel decided in 2008 to purchase M85 submunitions exclusively from Israeli producers in order to avoid further scrutiny.²⁷³

The size and composition of Israel's current stockpile of cluster munitions is not known.²⁷⁴ It has used cluster munitions in Lebanon and Syria.²⁷⁵

Russia

Following the footsteps of the USSR, Russia is a major producer, exporter, and stockpiler of cluster munitions as well as a user. The primary manufacturers are Bazalt State Research and Production Enterprise, Mechanical Engineering Research Institute, and Splav State Research and Production Enterprise Rocket.²⁷⁶ Thirty-four states possess Russian or Soviet-made cluster munitions.²⁷⁷ Eight of these states inherited their stocks when the Soviet Union dissolved. Russia itself stockpiles significant numbers of submunitions, perhaps comparable to the US stocks of more than 700 million submunitions, but details are not known.²⁷⁸ While Russia has not published the quantity and types of cluster munitions in its arsenal, open sources indicate that its stockpiles include three types of projectiles, 16 bombs, and six rockets. In addition, Russia is reported to have at least two ballistic missile systems that carry submunitions payloads.²⁷⁹ Since World War II, Russia (or the Soviet Union) has used cluster munitions in Afghanistan,²⁸⁰ Chechnya,²⁸¹ and Georgia.²⁸²

²⁷² For more information on the investigations, see Jeremy M. Sharp, Congressional Research Service, "U.S. Foreign Aid to Israel," December 4, 2009, <http://www.fas.org/sgp/crs/mideast/RL33222.pdf> (accessed September 9, 2010), p.11; Human Rights Watch, *Flooding South Lebanon*, pp. 102-103.

²⁷³ Sharp, "U.S. Foreign Aid to Israel," pp.11-12.

²⁷⁴ *Cluster Munition Monitor 2010*, p. 219.

²⁷⁵ *Ibid.*, pp. 13-14.

²⁷⁶ The main sources for information on Russian companies that produce cluster munitions are Hewson, ed., *Jane's Air-Launched Weapons*, and Ness and Williams, eds., *Jane's Ammunition Handbook 2007-2008*. State Research and Production Enterprise details the numerous types of rockets it produced on its corporate website: www.splav.org. See also *Banning Cluster Munitions*, p. 233; *Cluster Munition Monitor 2010*, p. 241.

²⁷⁷ *Cluster Munition Monitor 2010*, p. 241.

²⁷⁸ *Banning Cluster Munitions*, p. 20.

²⁷⁹ The missiles are the R-65/70 Luna M (FROG-7) and Iskander (SS-26). Duncan Lennox, *Jane's Strategic Weapons Systems*, 46 (Surrey, UK: Jane's Information Group Limited, January 2007), pp. 123-124, 139-141 (cited in *Banning Cluster Munitions*, p. 234).

²⁸⁰ Mennonite Central Committee, "Drop Today, Kill Tomorrow: Cluster Munitions as Inhumane and Indiscriminate Weapons," June 1999, http://www.mineaction.org/downloads/1/MCC_drop%20today%20kill%20tomorrow.pdf (accessed September 9, 2010), p. 5. Cluster munitions were also used by various forces in several conflicts that resulted from the breakup of the USSR in Azerbaijan, Nagorno-Karabakh, and Tajikistan. The degree of involvement of Russian forces in the use of cluster munitions is not known but cannot be discounted. *Cluster Munition Monitor*, p. 240.

²⁸¹ Mennonite Central Committee, "Clusters of Death," 2000, <http://clusterbombs.mcc.org/clusterbombs/resources/research/death/> (accessed September 9, 2010), chap. 3.

United Kingdom

Before the adoption of the Convention on Cluster Munitions, the United Kingdom was deeply involved in cluster munition production, transfer, and stockpiling: it produced, exported, and imported cluster munitions; participated in technology transfer; stockpiled its own cluster munitions; and allowed other states to stockpile cluster munitions in its territory. It also used cluster munitions in the Falkland Islands/Malvinas, Iraq (in 1991 and 2003), Kuwait, and the former Yugoslavia (Kosovo, Montenegro, Serbia).²⁸³ In 2010, however, the United Kingdom passed legislation implementing the Convention on Cluster Munitions in which it bans the production, acquisition, transfer, stockpiling, and use of cluster munitions and explosive bomblets.²⁸⁴

The United Kingdom produced BL-755 cluster bombs, which carry 147 submunitions, and two variants of those weapons, and exported them directly and indirectly to 16 states.²⁸⁵ In an example of technology transfer, the UK company BAE Systems Royal Ordnance produced L20A1 artillery projectiles that are capable of carrying 49 M85 submunitions under license from IMI and sold the weapons to the UK government.²⁸⁶ According to Amnesty International, in a recent case in which the United Kingdom was a third party in the transfer of cluster munitions, UK-flagged ships carried inert cluster munitions components between Pakistan and South Korea.²⁸⁷

The United Kingdom's production and purchase of cluster munitions resulted in a stockpile of 190,549 cluster munitions, of five different types, containing 38,757,267 submunitions.²⁸⁸

²⁸² Human Rights Watch, *A Dying Practice*, pp. 40-55.

²⁸³ *Cluster Munition Monitor 2010*, p. 111.

²⁸⁴ UK Cluster Munitions (Prohibitions) Act 2010, Chapter 11, http://www.opsi.gov.uk/acts/acts2010/ukpga_20100011_en_1 (accessed September 19, 2010), sec. 2.

²⁸⁵ BL-755 cluster bombs have been exported to, or been eventually possessed by: Belgium, Ethiopia, Germany, India, Iran, Italy, Montenegro, the Netherlands, Nigeria, Oman, Pakistan, Saudi Arabia, Switzerland, Thailand, the United Arab Emirates, and the former Federal Republic of Yugoslavia. Hewson, ed., *Jane's Air-Launched Weapons*, pp. 468-470; King, ed., *Jane's Explosive Ordnance Disposal 2007-2008*, entries for Germany (December 14, 2007), Iran (January 10, 2008), Italy (January 10, 2008), Netherlands (January 10, 2008), Oman (January 10, 2008), Pakistan (January 10, 2008), Saudi Arabia (December 3, 2007), Thailand (January 10, 2008), and the United Arab Emirates (January 10, 2008); Landmine Action, *Explosive Remnants of War: Unexploded Ordnance and Post-Conflict Communities* (London: Landmine Action, 2002), <http://www.landmineaction.org/resources/ERW%20-%20UXO%20and%20post-conflict%20communities.pdf> (accessed September 19, 2010). During the Berlin Conference on the Destruction of Cluster Munitions, Montenegro confirmed that it had 353 BL-755 in its stockpiles from the former JNA army. Statement by Montenegro to the Berlin Conference on the Destruction of Cluster Munitions, June 25, 2009. See also *Cluster Munition Monitor 2010*, p. 111.

²⁸⁶ Adam Ingram, written answers, November 17, 2003, *Parliamentary Debates*, Commons, vol. 413 (2002-2003), col. 498W, http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo031117/text/31117w08.htm#31117w08.html_spnew0 (accessed November 4, 2010) (cited in *Cluster Munition Monitor 2010*, p. 112).

²⁸⁷ Amnesty International, "Deadly Movements: Transportation Controls in the Arms Trade Treaty."

²⁸⁸ *Cluster Munition Monitor 2010*, p. 112.

In addition to producing its own cluster munitions, the United Kingdom imported several cluster munitions from the United States: M483 155mm artillery projectiles; M26 rockets for tMLRS; M261 submunitions in 70mm rockets for CRV-7 air-to-surface launcher; and CBU-87 cluster bombs.²⁸⁹ The United Kingdom has removed all of its units from service and either destroyed them or arranged for their destruction.²⁹⁰ As of March 2010, the United Kingdom had destroyed 14 million submunitions of its original stockpile of almost 39 million submunitions and had placed contracts for the destruction of the remainder of the stockpile.²⁹¹ At that point, it expected to complete stockpile destruction by 2013.²⁹²

The United Kingdom's practices concerning the stockpiling of cluster munitions are complicated by the fact that US forces have been stockpiling their weapons on UK soil. The United Kingdom argues that the Convention on Cluster Munitions does not require states parties to remove the stockpiles of foreign forces in its territory. Nevertheless, in 2008, the United Kingdom committed itself to seek removal of all foreign stockpiles from NATO bases in the United Kingdom within the convention's eight-year window for stockpile destruction.²⁹³ Subsequently, the UK government informed parliamentarians that the United States had identified the cluster munitions stockpiled on UK territory as "exceeding operational planning requirements"²⁹⁴ and that they would be "gone from the UK itself by the end of [2010]" and "gone from other UK territories, including Diego Garcia, by the end of 2013."²⁹⁵

United States

The United States has been one of, if not the, largest producer, exporter, stockpile, and user of cluster munitions. Major defense companies that have produced cluster munitions include Aerojet, Alliant TechSystems, American Ordnance, Day and Zimmerman, Ferranti International, General Dynamics, L-3 Communications, Lockheed Martin, Northrop Grumman,

²⁸⁹ *Ibid.*, p. 112.

²⁹⁰ Chris Bryant, statement, March 23, 2010, *Parliamentary Debates*, Commons, vol. 508 (2009-2010), col. 187, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100323/debtext/100323-0013.htm#100323101000957> (accessed November 4, 2010), (cited in *Cluster Munition Monitor 2010*, p. 112).

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ Lord Malloch-Brown, statement, June 3, 2008, *Parliamentary Debates*, Lords, vol. 476 (2007-2008), col. 80, http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80603-0002.htm#80603-0002.htm_spnew10 (accessed September 19, 2010).

²⁹⁴ Baroness Kinnock of Holyhead, statement, December 8, 2009, *Parliamentary Debates*, Lords, vol. 706 (2008-2009), col. 1020, <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/91208-0006.htm#091208100000001> (accessed November 4, 2010).

²⁹⁵ Chris Bryant, statement, March 17, 2010, *Parliamentary Debates*, Commons, vol. 507 (2009-2010), col. 925, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100317/debtext/100317-0011.htm#10031743002726> (accessed November 4, 2010).

Olin Ordnance, Primex Technologies, Raytheon, and Textron Defense Systems.²⁹⁶ In 2001, Secretary of Defense William Cohen issued a policy memorandum that, beginning in fiscal year 2005, required all US-produced cluster munitions to have a tested dud rate of less than 1 percent.²⁹⁷ US manufacturers have had difficulties meeting that reliability requirement within budgetary constraints. It appears that since 2005 the only cluster munitions that have been produced in the United States are the P31 variant of the Sensor Fuzed Weapon, which reportedly meets the 1 percent standard, and M30 GMLRS rockets with DPICM submunitions.²⁹⁸ The latter munitions does not meet the Cohen policy standard, but they received a waiver.²⁹⁹ The last purchase of Sensor Fuzed Weapons occurred under the fiscal year 2007 budget for delivery beginning in January 2008.³⁰⁰ The last deliveries of M30 rockets from Lockheed Martin Corporation were completed during summer 2009.³⁰¹

US transfers have followed a similar pattern with respect to increased regulation in recent years. The United States has exported cluster munitions to at least 29 other states: Argentina, Australia, Bahrain, Belgium, Canada, Egypt, Denmark, France, Germany, Greece, Honduras, India, Indonesia, Israel, Italy, Japan, Jordan, South Korea, Morocco, the Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Thailand, Turkey, the United Arab Emirates, and the United Kingdom.³⁰² It reportedly intends to make new transfers of cluster munitions to India and the United Arab Emirates.³⁰³ Recent US legislation, however, has restricted cluster munition exports. On March 11, 2009, President Obama signed into law a ban on nearly all

²⁹⁶ Human Rights Watch, *Survey of Cluster Munition Policy and Practice*, p. 65.

²⁹⁷ US Secretary of Defense William Cohen, "Memorandum for the Secretaries of the Military Departments, Subject: DoD Policy on Submunition Reliability (U)," January 10, 2001.

²⁹⁸ *Cluster Munition Monitor 2010*, p. 263.

²⁹⁹ It appears that subsequent to the Cohen policy, a waiver was granted in an Operational Requirements Document approved by the Pentagon's Joint Requirements Oversight Committee that established a new, higher, hazardous dud requirement for M30 GMLRS rocket DPICM submunitions. This higher dud rate requirement sets a "less than 2% dud rate between ranges of 20-60 kilometers" and "less than 4% dud rate under 20 kilometers and over 60 kilometers." See Office of the US Army Product Manager, Precision Fires Rocket and Missile Systems, "Briefing on Precision Guided Missiles and Rockets: Self Destruct Fuze Efforts," February 2007, Slide 2 (cited in *Cluster Munition Monitor*, p. 263).

³⁰⁰ *Cluster Munition Monitor 2010*, p. 263.

³⁰¹ *Ibid.*

³⁰² *Ibid.*, p. 264. The methods of export include Foreign Military Sales, Direct Commercial Sales, and Excess Defense Article programs. Foreign governments negotiate Foreign Military Sales directly with the US government under a program that allows the United States to sell either current defense stocks or yet-to-be-produced items. Alternatively, potential purchasers can pursue Direct Commercial Sales with private US companies and then apply for an export license from the State Department's Office of Defense Trade Controls. Under the Excess Defense Articles program, the US Department of Defense gives away older equipment that it no longer uses at little or no cost. Some of the sales are de facto donations by the US government: foreign states can sometimes purchase weapons using funds given to them under the US government's Foreign Military Financing program for that express purpose. Human Rights Watch, *Dangerous Dealings: Changes to U.S. Military Assistance After September 11*, vol. 14, no. 1(G), February 2003, <http://www.hrw.org/reports/2002/usmil/>, pp. 2-3.

³⁰³ *Cluster Munition Monitor 2010*, p. 264.

cluster munition exports by the United States. Under the law, the United States can only export cluster munitions that leave behind less than 1 percent of their submunitions as duds. The legislation also requires the receiving country to agree that cluster munitions “will not be used where civilians are known to be present” and that the munitions will “only be used against clearly defined military targets.”³⁰⁴ A one-year US export ban was first enacted in an appropriations act in December 2007 and extended the following year.³⁰⁵

US-supplied cluster munitions have been used in combat by Israel in Lebanon and Syria, Morocco in the Western Sahara and possibly Mauritania, by the Netherlands and the United Kingdom in the former Yugoslavia, and by the United Kingdom in Iraq.³⁰⁶ Israel’s use of US cluster munitions exemplifies the difficulties of controlling the use of exported weapons. In 1982, the Reagan Administration found that Israel had launched US-supplied cluster munitions against civilian targets during the siege of Beirut, in possible violation of the 1952 Mutual Defense Assistance Agreement between the United States and Israel, and it consequently banned all exports of cluster munitions to Israel for the next six years.³⁰⁷ Similar allegations arose concerning the use of US-supplied cluster munitions by Israel in the 2006 war in Lebanon. Investigations by the State Department found that there “were likely violations” of a confidential agreement between the United States and Israel governing Israel’s use of US-supplied cluster munitions.³⁰⁸ No sanctions resulted from the investigation, however. Efforts to limit the effects of cluster munitions by trying to dictate the practices of recipient states are not enough: once a cluster munition is transferred it remains at risk of being used and therefore will always pose a threat to civilians.

In addition to producing cluster munitions for export, the United States has retained hundreds of millions of submunitions for itself. It has perhaps the world’s largest stockpile of cluster munitions and is the only stockpiler that has released significant details about its holdings. An October 2004 report to Congress from the US Department of Defense declared a stockpile of

³⁰⁴ US Omnibus Appropriations Act, 2009, sec. 7056(b).

³⁰⁵ US Consolidated Appropriations Act, 2008, 121 Stat. 1844, Public Law 110-161, December 26, 2007, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ161.110.pdf (accessed September 19, 2010), sec. 646(b). In September 2008, Congress passed a continuing resolution to extend the Consolidated Appropriations Act, and thus the moratorium, through March 6, 2009. US Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, 121 Stat. 3574, Public Law 110-329, September 30, 2008, <http://www.gpo.gov/fdsys/pkg/PLAW-110publ329/html/PLAW-110publ329.htm> (accessed September 19, 2010), sec. 101.

³⁰⁶ *Cluster Munition Monitor 2010*, p. 264.

³⁰⁷ Sharp, “U.S. Foreign Aid to Israel,” p. 10.

³⁰⁸ *Ibid.*, pp. 10-11. For a more detailed discussion of these agreements and their potential violation, see also Human Rights Watch, *Flooding South Lebanon*, pp. 102-103.

5.5 million cluster munitions containing about 728.5 million submunitions.³⁰⁹ In 2009, US State Department Legal Advisor Harold Hongju Koh confirmed that the United States still possessed about 700 million submunitions.³¹⁰ The tally does not include cluster munitions that are part of the War Reserve Stocks for Allies (WRSA). Under this program, munitions are stored in foreign countries but kept under US title and control and then made available to United States and allied forces in the event of hostilities. Human Rights Watch has previously estimated that the US inventory, including WRSA, totaled about one billion submunitions.³¹¹

Cluster munitions are particularly ubiquitous in the stores of US ground forces. According to the 2004 Report to Congress, the US Army has about 638.3 million cluster submunitions (more than 88 percent of the total US cluster munition inventory) and the Marine Corps has about 53.3 million (7 percent). The report states, "Cannon and rocket artillery cluster munitions comprise over 80 percent of Army fire support capability," and they "comprise the bulk of the Marine Corps artillery munitions."³¹² The US Air Force stockpiles about 22.2 million air-delivered cluster bombs (3 percent of the total US cluster munition inventory) and the Navy stockpiles about 14.7 million (2 percent).

Of the approximately 728 million submunitions, only 30,990 have self-destruct devices (.00004 percent).³¹³ The 2004 Report to Congress cites failure rates of 2 percent to 6 percent for all but one of the submunitions listed in the report, based on lot acceptance testing and stockpile reliability testing.³¹⁴ Previous US Department of Defense documents have indicated much higher failure rates for the most common submunitions.³¹⁵ Organizations involved in clearance of unexploded US submunitions in various countries also cite higher failure

³⁰⁹ See generally US Department of Defense, "2004 Report to Congress."

³¹⁰ Koh said that the US stockpile amounted to "5 million cluster munitions with 700 million submunitions." Statement by Harold Hongju Koh, legal adviser, US Department of State, to the Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War.

³¹¹ Human Rights Watch, *Cluster Munitions a Foreseeable Hazard in Iraq*. The one billion submunitions figure is mostly drawn from US Army Material Systems Analysis Activity, "Unexploded Ordnance (UXO) Study," April 1996. The United States may have removed from inventory and destroyed a significant number of expired cluster munitions since that 1996 study. The 2004 Report to Congress does not include an unknown number of TLAM cruise missiles with conventional submunitions and more than 400,000 scatterable mine systems.

³¹² US Department of Defense, "2004 Report to Congress," pp. 2-3.

³¹³ See generally *ibid.* The cluster munitions with self-destruct devices are CBU-97 and CBU-105 Sensor Fuzed Weapons held by the US Air Force and Navy. The 2004 Report to Congress does not include the US Army's SADARMs, which are similar to Sensor Fuzed Weapons. SADARMs, however, do not fall under the definition of cluster munitions in the Convention on Cluster Munitions and are no longer produced. ICBL, "Convention on Cluster Munitions: Terms that Need Clarification," [http://www.icbl.org/index.php/icbl/Work/CCM/Disarmament/Terms-that-Need-Clarification/\(language\)/eng-US](http://www.icbl.org/index.php/icbl/Work/CCM/Disarmament/Terms-that-Need-Clarification/(language)/eng-US) (accessed September 19, 2010).

³¹⁴ See generally US Department of Defense, "2004 Report to Congress."

³¹⁵ See, for example, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), Department of Defense, "Unexploded Ordnance Report," undated, table 2-3, p. 5.

rates.³¹⁶ Even using the very conservative dud rates of the 2004 Report to Congress, however, the submunition inventory, if employed, would leave behind more than 27 million hazardous duds.³¹⁷

The US stockpile presents special problems because it is not all located on US territory. As mentioned above, the United Kingdom has acknowledged that US cluster stockpiles are located at NATO installations on British territory and has committed to having them removed within the eight-year deadline imposed by the Convention on Cluster Munitions.³¹⁸ The United States has pledged to remove its cluster munitions from the United Kingdom itself by the end of 2010 and from other UK territories by 2013.³¹⁹ The extent of US overseas stockpiles is not known but it may include stockpiles at military installations in Europe, Japan, and South Korea.

Since World War II, the United States has used its stockpiles of cluster munitions in Afghanistan, Bosnia and Herzegovina, Cambodia, Grenada, Iran, Iraq, Kuwait, Laos, Lebanon, Libya, Saudi Arabia, Sudan, Vietnam, the former Yugoslavia (Kosovo, Montenegro, Serbia), and possibly Yemen.³²⁰

Conclusion

Production, transfer, and stockpiling have led to the global proliferation of cluster munitions, and this proliferation has touched, in some way, six continents, developed and developing states, and even non-state armed groups. Despite prohibitions in some quarters, these activities continue in many countries today. Without the production, transfer, and stockpiling described above, use of cluster munitions would not be possible. To eliminate fully the humanitarian problems of these weapons, the prerequisites to use must also be banned.

³¹⁶ For example, HALO Trust estimated dud rates ranging from 15 percent to 22 percent after the 2001-2002 US cluster bombing of Afghanistan. The UN Mine Action Coordination Center found BLU-97 submunitions used in the former Yugoslavia had a failure rate of about 7 percent. Human Rights Watch, *Fatally Flawed*, p. 25.

³¹⁷ Human Rights Watch, *Survey of Cluster Munition Policy and Practice*, p. 64.

³¹⁸ Lord Malloch-Brown, statement, June 3, 2008, *Parliamentary Debates*, Lords, vol. 702 (2007-2008), col. 79, http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80603-0002.htm#80603-0002.htm_spnew10 (accessed November 4, 2010).

³¹⁹ Baroness Kinnock of Holyhead, statement, December 8, 2009, *Parliamentary Debates*, Lords, vol. 706 (2008-2009), col. 1020, <http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/91208-0006.htm#091208100000001> (accessed November 4, 2010); Chris Bryant, statement, March 17, 2010, *Parliamentary Debates*, Commons, vol. 507 (2009-2010), col. 925, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100317/debtext/100317-0011.htm#10031743002726> (accessed November 4, 2010) (cited in *Cluster Munition Monitor 2010*, p.110).

³²⁰ *Cluster Munition Monitor 2010*, pp. 13-14.

IV. The Need for Post-Conflict Measures: Clearance, Risk Education, and Victim Assistance

Apart from the almost unavoidable civilian casualties, a huge cost of the use of cluster munitions is the need for post-conflict remedial measures. The lingering threat of unexploded submunitions makes timely and thorough clearance of duds essential. This process is a slow, complicated, and often deadly endeavor. Risk education for affected populations is required to minimize civilian casualties before the completion of clearance. Victim assistance to mitigate the suffering of individuals, families, and communities harmed by cluster munitions is also needed and is a long-term, indeed life-long, undertaking. Clearance, risk education, and victim assistance are crucial humanitarian efforts, but they are also challenging and expensive. If the international community brought an end to cluster munition use, it could ultimately eliminate the necessity of all three of these measures.

Contamination and Casualties

The contamination and casualties caused by cluster munition use demand remedial actions. Contamination consists of four types of cluster munition remnants: unexploded submunitions, failed cluster munitions, abandoned cluster munitions, and unexploded bomblets.³²¹ According to *Cluster Munition Monitor 2010*, as of September 1, 2010, these remnants affected at least 23 states and three disputed areas.³²² The *Monitor* reported that unexploded submunitions may residually contaminate 13 other states.³²³ Five other states, which were once contaminated, are believed to have completed clearance.³²⁴ Contamination affects countries around the world. Southeast Asia is by far the region most contaminated by cluster munitions, and Europe/Commonwealth of Independent States (CIS) comes in second. According to *Cluster Munition Monitor 2010*, in 2009 deminers cleared at least 38 square kilometers of cluster munition contaminated land, destroying more than 55,000 submunitions in 14 states and three other areas.³²⁵

³²¹ Convention on Cluster Munitions, art. 2(7).

³²² The contamination in the Republic of Congo and Guinea-Bissau likely comes from explosions at ammunition storage areas, not use during armed conflict. *Cluster Munition Monitor 2010*, p. 25.

³²³ The 13 states are: Colombia, Eritrea, Grenada, Iran, Israel, Kuwait, Libya, Malta, Mozambique, Saudi Arabia, and Yemen, as well as Chile and Jordan, which may have contamination from firing ranges. *Ibid.*

³²⁴ The five states are: Albania, Ethiopia, Sierra Leone, Uganda, and Zambia. *Ibid.*, p. 26.

³²⁵ *Ibid.*, p. 29.

States and Other Areas Contaminated with Cluster Munition Remnants³²⁶

Africa	Americas	Asia-Pacific	Europe/CIS	Middle East/ North Africa
Angola	Argentina*	Afghanistan	Azerbaijan	Iraq
Chad		Cambodia	Bosnia and Herzegovina	Lebanon
Democratic Republic of the Congo		Lao PDR	Croatia	Syria
Republic of the Congo		Vietnam	Georgia (South Ossetia)	<i>Western Sahara</i>
Guinea-Bissau			Montenegro	
Mauritania			Russia	
Sudan			Serbia	
			Tajikistan	
			United Kingdom*	
			<i>Kosovo</i>	
			<i>Nagorno-Karabakh</i>	

Note: Other areas are indicated by italics.

* Argentina and the United Kingdom both claim sovereignty over the Falkland Islands/Malvinas, which still contain areas with unexploded submunitions.

With regard to casualties, at least 27 states and three other areas affected by cluster munitions have reported deaths and injuries, and casualties in other states cannot be ruled out.³²⁷ Some military and civilian casualties came from states other than the ones in which they were killed or injured; deminers and peacekeepers were common victims in this category.³²⁸ As with contamination, states with casualties come from many regions: Africa, Asia, Europe/CIS, and the Middle East/North Africa.

³²⁶ Ibid., p. 30.

³²⁷ There was a credible, but as yet unconfirmed, report of a cluster munition strike in Yemen in December 2009 that caused many casualties. It is possible that there are also cluster munition casualties that have gone unrecorded in other countries in which cluster munitions were used in the past. Such states would include Azerbaijan, Colombia, Grenada, Iran, Libya, Mauritania, Saudi Arabia, and Zambia, as well as the Falkland Islands/Malvinas. Ibid., p. 31.

³²⁸ Ibid.

Affected States and Other Areas with Cluster Munition Casualties³²⁹

Africa	Asia-Pacific	Europe/CIS	Middle East/North Africa
Angola	Afghanistan	Albania	Iraq
Chad	Cambodia	Bosnia and Herzegovina	Israel
Democratic Republic of the Congo	Lao PDR	Croatia	Kuwait
Eritrea	Vietnam	Georgia	Lebanon
Ethiopia		Montenegro	Syria
Guinea-Bissau		Russia	<i>Western Sahara</i>
Mozambique		Serbia	
Sierra Leone		Tajikistan	
Sudan		<i>Kosovo</i>	
Uganda		<i>Nagorno-Karabakh</i>	

Note: Other areas are indicated by italics.

The lack of complete statistics makes it impossible to determine a precise number of cluster munition casualties around the world. Casualties often go underreported and are not distinguished by their military or civilian status or by whether they occurred during an attack or after. According to *Cluster Munition Monitor 2010*, at least 16,816 cluster munition casualties have been confirmed through the end of 2009. About 14,700 came from unexploded submunitions, and about 2,000 from strikes. Estimated totals, however, are considered much higher, and according to the *Monitor*, "are likely a better indicator of the true numbers." Estimates for a global total range from 58,000 to 85,000.³³⁰ Almost all reported cluster munition casualties have been civilians, in large part because of the unwillingness of militaries to provide information. The majority of casualties are male, and a significant percentage are children.³³¹ In 2009, unexploded submunitions caused at least 100 recorded casualties (64 injured, 22 killed, and 14 undetermined) in nine countries and one area.³³² The actual number is likely to be higher.

³²⁹ Ibid.

³³⁰ Ibid., p. 32.

³³¹ Handicap International, *Circle of Impact*, p. 31.

³³² The countries with the most casualties during 2009 were Laos, with 33, and Lebanon, with 17. The other countries and areas that suffered casualties in 2009 were: Sudan (14 casualties), Cambodia (10), the Democratic Republic of the Congo (10), Vietnam (7), Afghanistan (3), Bosnia and Herzegovina (3), Kosovo (2), and Iraq (1), *Cluster Munition Monitor 2010*, p. 33.

Clearance

Clearance of unexploded submunitions is critical to minimizing post-conflict casualties. It requires a combination of international and national contributions and must overcome a range of obstacles to be successful. Cluster munition clearance efforts should be done in conjunction with those for landmines and other forms of explosive remnants of war (ERW). Programs for each type of weapon usually depend on the same people and organizations and similar equipment.

Professional Clearance Organizations

States affected by cluster munition contamination rely heavily on the international community for clearance.³³³ UN agencies often take the lead in providing “a planning, coordination and quality assurance capability” and serving as clearinghouses of information for clearance organizations, researchers, and journalists.³³⁴ Their mandate covers destruction of cluster munitions along with that of landmines and other types of ERW. On occasion, UN entities engage in clearance themselves. For example, although the UN Interim Force in Lebanon (UNIFIL) traditionally focused on force protection, the extent of the problem in Lebanon led it to do humanitarian clearance as well.³³⁵

NGOs do the bulk of the actual clearance. For example, with respect to the most recent widespread use of cluster munitions, HALO Trust had teams in Georgia’s breakaway region of Abkhazia before the 2008 conflict in Georgia and started surveying, marking, and clearing elsewhere in the country immediately after the war’s end.³³⁶ At the end of September 2008, Norwegian People’s Aid sent additional deminers to Georgia.³³⁷ Although many of the NGOs, such as the Mines Advisory Group, HALO Trust, Handicap International, and Norwegian

³³³ According to the *Cluster Munition Monitor 2010*, almost all states and other areas contaminated by cluster munitions had active international or national mine action programs from 2009 to 2010. Actual clearance or surveying of cluster munition remnants, however, only took place in 14 states and three other areas. In many cases, these activities were very limited. *Ibid.*, p. 26.

³³⁴ The mission statement of MACC SL, a typical UN mine action agency that operated in south Lebanon, stated, “The role of MACC SL is to provide a planning, coordination and quality assurance capability that ensures landmine and unexploded ordnance clearance undertaken within the mandated area is done in the most effective, safe and time efficient manner, and in accordance with National Technical Standards and Guidelines, developed from International Mine Action Standards.” MACC SL, “May 2007 Report of the Mine Action Co-ordination Centre, South Lebanon,” June 5, 2007, pp. 4-5.

³³⁵ Email communication from Julia Goehsing, program officer, MACC SL, to Human Rights Watch, May 14, 2007.

³³⁶ “HALO Emergency Response in Georgia,” HALO Trust press release, undated, http://www.halotrust.org/news_press/news/georgia_emergency.aspx (accessed October 7, 2010).

³³⁷ Human Rights Watch interview with Joseph Huber, then program manager, Norwegian People’s Aid, Tbilisi, Georgia, October 14, 2008. Norwegian People’s Aid completed its clearance work in Georgia on June 22, 2010. “Mission Completed,” Norwegian People’s Aid news release.

People's Aid are international, some local groups contribute to clearance.³³⁸ Private clearance companies supplement NGO efforts.³³⁹

In some circumstances, security forces and armed forces assist in the clearance of cluster munitions. In Iraq in 2003, civil defense forces were the first to respond to calls about unexploded duds endangering civilians. They rushed to provide assistance while Coalition forces were still fighting the war. Once international demining help arrived, the civil defense forces coordinated with them. The record of military clearance is mixed. In Afghanistan, US troops only did clearance for force protection.³⁴⁰ In Iraq, by contrast, they played an active role, and in the weeks following the major hostilities of 2003 cleared thousands of duds, including around schools, mosques, and hospitals.³⁴¹

Together international, nongovernmental, private, and governmental organizations have cleared hundreds of thousands, if not millions, of submunitions around the world. Some projects are relatively small. For example, Chad's National High Commission for Demining reported in 2006 destruction of 157 submunitions in its country.³⁴² Other efforts, however, are large and long-term. Deminers destroyed almost one thousand times that number in south Lebanon during just the first year after the conflict.³⁴³ In 2002, eleven years after the end of the 1991 Gulf War, mine clearance teams still found 2,400 submunitions in Kuwait.³⁴⁴ While the numbers cleared reflect the admirable cooperation of diverse groups for humanitarian ends, they are also a reminder of why cluster munitions with their unreliable submunitions should never be used.

Methods of Clearance

Clearance of cluster munitions can be a massive undertaking. In 2007, Landmine Action conducted an analysis of clearance in Kosovo based on 217 survey reports. It found that, for

³³⁸ For example, OMAR ran extensive risk education programs and, in some parts of Afghanistan, cleared cluster munitions in 2001-2002. Human Rights Watch, *Fatally Flawed*, pp. 32-36.

³³⁹ In Lebanon, for example, BACTEC and Armour Group together cleared almost six million meters by the end of May 2007. MACC SL, "May 2007 Report of the Mine Action Co-ordination Centre, South Lebanon," June 5, 2007, pp. 4-5.

³⁴⁰ Zielenziger, "Cluster Bomb Traps Villagers inside Home," Knight Ridder News Service (cited in Human Rights Watch, *Fatally Flawed*, p. 17).

³⁴¹ Human Rights Watch interview with Staff Sgt. Cecilio Berrios, al-Hilla, Iraq, May 20, 2003. The US Marines in Karbala' alone destroyed 4,000 submunitions in less than a month. Human Rights Watch interview with Gunnery Sgt. Tracey Jones, explosive ordnance disposal team leader, Brigade Service Support Group 1, U.S. Marine Corps, Karbala', Iraq, May 25, 2003.

³⁴² Handicap International, "Fatal Footprint," p. 17.

³⁴³ MACC SL, "May 2007 Report of the Mine Action Coordination Center South Lebanon," June 5, 2007.

³⁴⁴ "Persian Gulf: U.S. Cluster Bomb Duds a Threat," Human Rights Watch news release, March 18, 2003, <http://www.hrw.org/en/news/2003/03/18/persian-gulf-us-cluster-bomb-duds-threat>.

each submunition, deminers needed to clear an average of 4,179 square meters (more than half a football field) and work an average of 18 hours.³⁴⁵ The total area cleared for these sites was about 25 million square meters, and the total time, for those reports that listed hours spent, was 78,557 hours (an equivalent of almost nine years).³⁴⁶

This complicated and dangerous process generally proceeds in two steps—surface and subsurface clearance. Sometimes the same organization does both,³⁴⁷ but other times different groups do it, with careful subsurface work following emergency surface clearance.³⁴⁸ Soft ground can dramatically increase the likelihood of submunitions penetrating the ground, and in some cases the majority of duds are below the surface.³⁴⁹ The difficulties such clearance entails slows down the process significantly.³⁵⁰

Deminers can either explode submunitions in situ or move them away for destruction. The former is safer and often used for especially sensitive models like the BLU-97. In Afghanistan, deminers used a simple tripod with a shaped charge that destroyed the core of the submunition without fully detonating it and spreading dangerous fragments in every direction.³⁵¹ Human Rights Watch has observed alternative methods being used to clear DPICMs, which are less sensitive. For example, in south Lebanon, the Lebanese army placed an explosive next to the submunition and ran a time fuze from that, while nearby, UNIFIL clearance experts taped up the arming device on the top of M85s and carried them to a destruction site.³⁵²

Because of the danger of submunitions, the work must be done carefully and is time- and labor-intensive. As a result, cluster munition clearance can take months or years to complete,

³⁴⁵ Landmine Action, *Cluster Munitions in Kosovo*, p. 3.

³⁴⁶ *Ibid.*, p. 40.

³⁴⁷ OMAR planned to do both surface and subsurface clearance in Herat, Afghanistan. Human Rights Watch, *Fatally Flawed*, pp. 32-33.

³⁴⁸ In Georgia and Lebanon, the military did emergency surface clearance in many places; NGOs followed with subsurface clearance. Human Rights Watch, *A Dying Practice*, pp. 69-74; Human Rights Watch, *Flooding South Lebanon*, pp. 86-87.

³⁴⁹ For example, at a site on Grebnik Hill in Kosovo, HALO Trust deminers found only 22 surface submunitions and 91 subsurface ones. Landmine Action, *Cluster Munitions in Kosovo*, pp. 41-42.

³⁵⁰ The decision whether to clear only the surface or whether to do subsurface clearance to a certain depth is debated at the national level. *Cluster Munition Monitor 2010*, p. 29.

³⁵¹ While the device was cheap and effective and safer than moving a BLU-97, it was also dangerous because the deminers had to work over the submunition for an extended period of time. Since these models are sensitive to temperature, a shadow could theoretically set it off. Human Rights Watch interview with Sean Moorhouse, Swiss Federation for Mine Action, Herat, Afghanistan, March 27, 2002.

³⁵² Human Rights Watch observed these methods during its field mission to Lebanon in October 2006. See, for example, Human Rights Watch, *Flooding South Lebanon*, p. 47.

increasing the opportunities for civilian casualties. Deminers continue to conduct clearance in Lebanon and according to the *Landmine and Cluster Munition Monitor*, as of November 2009, unexploded submunitions had killed or injured at least 670 civilians.³⁵³ Despite a pre-existing clearance infrastructure, deminers were still working on submunitions a year after major hostilities in Afghanistan ended, and the ICRC reported 127 civilian casualties, including 29 deaths as of November 2002.³⁵⁴ These cases seem small in scale compared to Laos, which exemplifies the enduring danger of cluster munition contamination and, as mentioned in Chapter 1, could take decades to clear.

Obstacles to Clearance

Danger to Deminers

Risk of bodily harm represents the most serious obstacle to clearance. Submunitions have killed or injured at least scores of mine clearance professionals. In south Lebanon duds have killed at least 25 and injured at least 22 deminers.³⁵⁵ Submunitions reportedly killed more than 100 deminers in Iraq after the 1991 Gulf War.³⁵⁶ Those that are injured often suffer debilitating wounds. When speaking at a treaty conference in Lima, Peru, in May 2007, a former Serbian military deminer, Branimir Kapetanovic, described how he lost both his arms and legs while clearing submunitions near Nis in the former Yugoslavia.³⁵⁷ The obstacles described above enhance the inherent danger of detonating or defuzing an explosive submunition. Lack of equipment, training, and information all put deminers at risk.

Lack of Information

Distribution of information about cluster munition strikes can expedite cleanup, yet user states have been slow to release such data, thus increasing both the time it takes to clear a contaminated area and the risks deminers face. John Flanagan, former program manager of the UN Mine Action Programme in Kosovo, outlined ten pieces of information that deminers need to facilitate cluster munition clearance in particular: date of bombing, target location

³⁵³ Landmine and Cluster Munition Monitor, "Lebanon: Casualties," July 21, 2010.

³⁵⁴ ICRC, "Mine Victims Report: October 6, 2001 to date," November 22, 2002.

³⁵⁵ According to MACC SL, submunition duds injured 25 and killed 17 clearance professionals by January 15, 2008. Landmine and Cluster Munition Monitor reported an additional five deminers by duds in 2009. Statistics of deminer casualties by weapon type were not available for 2008. Email communication from Dalya Farran, media and post clearance officer, MACC SL, to Human Rights Watch, January 15, 2008 (including attachment of cluster munition casualty data through January 15, 2008); Landmine and Cluster Munition Monitor, "Lebanon: Casualties," July 21, 2010 (providing data for 2009).

³⁵⁶ "Growing Death Toll in EOD [Explosive Ordnance Disposal] Operations," *Jane's Defence Weekly*, June 20, 1992, p. 1061 (cited in Handicap International, "Fatal Footprint," p. 34).

³⁵⁷ "Lima Conference on Cluster Munitions, 23-25 May 2007," Norwegian People's Aid news release, June 11, 2007, <http://www.npaid.org/?module=Articles;action=Article.publicShow;ID=5054> (accessed October 8, 2010).

(general), target description (specific), aim point, aircraft heading, bomb type/number dropped, result, hits/misses, width of impact area, and length of impact area.³⁵⁸ For ERW in general, deminers also need technical specifications of the weapon and procedures for neutralizing, disarming, and/or destroying.³⁵⁹ Such information helps deminers locate contaminated areas, determine dispersal patterns, and prepare to deal safely and efficiently with the kinds of weapons they will face. Deminers in Georgia, Lebanon, Iraq, Afghanistan, and Yugoslavia all experienced problems of lack of information.

Perhaps the biggest challenge to clearance groups in Lebanon, for example, was Israel's initial refusal to provide information about its cluster munition strikes. Israel finally provided clearance data in May 2009, but it was almost three years after the 2006 conflict, and its delay had created significant problems for earlier clearance.³⁶⁰ The head of the Lebanon Mine Action Center reportedly said, "If the Israelis had sent those maps in 2006 when we requested them we could have saved a lot of casualties."³⁶¹ While significant clearance had already been done by 2009, the Israeli data identified 282 new potential strike sites and, combined with resurveying of contaminated areas, increased the estimated area remaining to be cleared to 23 square kilometers from 16 square kilometers the previous year.³⁶² By not passing on such data in a timely fashion, the IDF not only slowed clearance but also put civilians and deminers unnecessarily at risk from remaining duds.

The United States made efforts to provide information about its cluster munition use in Afghanistan and Iraq. After its air campaign in Afghanistan in 2001-2002, the US Defense Department gave a list of cluster munition strikes to the United Nations to be passed on to clearance organizations. The list was of limited use because it existed in several different versions with sometimes contradictory or inaccurate information and not all deminers received it.³⁶³ The US Air Force provided more helpful information in Iraq in 2003 when it

³⁵⁸ "Explosive Remnants of War: Experience from Field Operations," CCW/GGE/II/WP.13, July 15, 2002, p. 5.

³⁵⁹ *Ibid.*, p. 3.

³⁶⁰ "Israel Hands over Lebanon Cluster Bomb Maps: U.N.," Reuters, May 12, 2009, <http://www.reuters.com/article/newsMaps/idUSTRE54B6VI20090512> (accessed October 8, 2010).

³⁶¹ IRIN, "Lebanon: Funding Shortfall Threatens Cluster Bomb Demining," Reuters AlertNet, May 14, 2009, <http://www.alertnet.org/thenews/newsdesk/IRIN/5c9ec33c09c42383779221199556a3eb.htm> (accessed October 8, 2010).

³⁶² In 2009, deminers had cleared 4.6 square kilometers of cluster munitions. Interview with Brig. Gen. Mohammed Fehmi, director, Lebanon Mine Action Center, Beirut, Lebanon, June 1, 2010; UN Security Council, "Eleventh Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006)," S/2009/566, November 2, 2009, <http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7XJS9M?OpenDocument> (accessed October 8, 2010), p. 11 (both cited in *Cluster Munition Monitor 2010*, p. 28).

³⁶³ Human Rights Watch, *Fatally Flawed*, p. 37.

released GPS coordinates of its cluster munition strikes.³⁶⁴ A US Marine deminer, who had been clearing thousands of submunitions, told Human Rights Watch, however, that he had not received any information about where US ground forces fired their cluster munitions.³⁶⁵ Although the United States gave incomplete and sometimes confusing data, its Air Force's provision of its highly accurate list demonstrated that supplying strike data is possible. Given today's technology, user states should be able to record the GPS coordinates of a strike when it happens and then pass that information on to clearance organizations at the appropriate time. This simple form of cooperation would expedite the removal of submunitions. Protocol V to the Convention on Conventional Weapons (CCW) on ERW requires the recording and delivery of such information for strikes that have the potential to leave ERW, and the Convention on Cluster Munitions strongly encourages user states to provide information on attacks launched before the convention entered into force.³⁶⁶

Resource Shortages

Resource shortages further slow down the process of cluster munition clearance and threaten deminers and civilians. In Afghanistan, lack of equipment and training negated some of the benefits of a pre-existing demining infrastructure. During the initial US bombing from October 2001 to early 2002, experts fled,³⁶⁷ and the Taliban stole vehicles and looted warehouses, leading to problems with staffing and equipment.³⁶⁸ The equipment that did exist was spread unevenly across the country with Kandahar and Herat facing particular shortages.³⁶⁹ Although some experts remained, they were unfamiliar with the more sensitive US submunitions and had to be trained by foreign consultants before clearance could begin.³⁷⁰ Serbia suffered similar problems after the 1999 NATO air campaign; its ad hoc demining program "operated with limited human resources and an overwhelming lack of

³⁶⁴ During its research mission, Human Rights Watch frequently relied on the US Air Force coordinates and found they led directly to the site of cluster munition attacks.

³⁶⁵ Human Rights Watch interview with Gunnery Sgt. Tracey Jones, explosive ordnance disposal team leader, Brigade Service Support Group 1, U.S. Marine Corps, Karbala', Iraq, May 25, 2003.

³⁶⁶ CCW Protocol on Explosive Remnants of War (Protocol V), adopted November 28, 2003, U.N. Doc. CCW/MSP/2003/2 entered into force November 11, 2006, art. 4; Convention on Cluster Munitions, art. 4(4).

³⁶⁷ The Kandahar Regional Mine Action Center shrank from 49 to about a dozen active teams. Human Rights Watch interview with Tim Horner, UN Regional Mine Action Center, Kandahar, Afghanistan, March 24, 2002.

³⁶⁸ The Demining Agency for Afghanistan (DAFA) reported the war cost it \$5 to \$6 million in damaged or lost equipment. ICBL, *Landmine Monitor Report 2002: Toward a Mine-Free World* (New York: Human Rights Watch, 2002), p. 600. The Georgian military similarly complained that the Russians had stolen clearance equipment during the 2008 conflict. Human Rights Watch interview with high-ranking Georgian officer of engineering brigade, Osiauri, Georgia, October 21, 2008.

³⁶⁹ For example, while deminers clearing submunitions for the UK-based HALO Trust in the Shomali Plain north of Kabul wore chest and face protectors, deminers in Herat had no such gear because the Afghan-based OMAR could not afford it. Human Rights Watch interview with Tim Horner, UN Regional Mine Action Center, Kandahar, Afghanistan, March 24, 2002; Human Rights Watch interview with Sher-Agha, Operations Officer, OMAR, Herat, Afghanistan, March 28, 2002.

³⁷⁰ Human Rights Watch interview with Sher-Agha, Operations Officer, OMAR, Herat, Afghanistan, March 28, 2002.

equipment,” and its staff had “no clear understanding” of the workings of the submunitions on the ground.³⁷¹

Cost is another major resource hurdle, and affected states are often unable to afford clearance. Donor states, therefore, contribute millions of dollars each year to clearance. For example, international assistance for mine action in Lebanon in 2009 totaled \$21.2 million, a large portion of which was earmarked for clearance of landmines and ERW, notably cluster munitions.³⁷² Even this money has not been enough, and funding shortages have led to a decrease in the number of deminers in Lebanon.³⁷³ In 2009, Laos received \$11 million in international mine action funding, and Kosovo received \$1.6 million.³⁷⁴

Environmental Factors

Environmental factors also make clearance challenging. Submunitions that land on soft ground often penetrate the surface on impact, which makes them harder to locate.³⁷⁵ Rain can cause submunitions to sink below the surface after a strike but before clearance. In fall 2008, deminers in Georgia worried about the effects of the winter because snow both hides duds and creates mud, driving them deeper underground.³⁷⁶ In February 2009, Jonathon Guthrie, program manager for Norwegian People’s Aid, said that winter had indeed proved to be “a major obstacle” and that clearance efforts had been suspended for parts of December and January.³⁷⁷

The location of unexploded submunitions can further complicate their clearance. In Georgia, trees, cornfields, and cabbage patches created difficulties because they made it more difficult to spot the duds.³⁷⁸ Similar problems occurred in Lebanon, Iraq, and Afghanistan.

³⁷¹ Norwegian People’s Aid, “Yellow Killers,” p. 47.

³⁷² ICBL, *Landmine Monitor Report 2010: Toward a Mine-Free World* (Ottawa: Mines Action Canada, 2010), www.the-monitor.org, p. 45.

³⁷³ ICBL, *Landmine Monitor Report 2009: Toward a Mine-Free World* (Ottawa: Mines Action Canada, 2009), p. 1008.

³⁷⁴ ICBL, *Landmine Monitor Report 2010*, pp. 45-46,

³⁷⁵ Human Rights Watch researchers have observed this phenomenon in multiple places, including in Agaragouf, Iraq. Human Rights Watch, *Off Target*, p. 110.

³⁷⁶ Human Rights Watch interview with Amir Musanovic, technical advisor, Norwegian People’s Aid, Ruisi, Georgia, October 15, 2008; Human Rights Watch interview with high-ranking Georgian officer of engineering brigade, Osiauri, Georgia, October 21, 2008.

³⁷⁷ Email communication from Jonathon Guthrie, then program manager, Norwegian People’s Aid, to Human Rights Watch, February 12, 2009; email communication from Mick McDonnell, operations manager, iMMAP, to Human Rights Watch, February 16, 2009.

³⁷⁸ Email communication from Jonathon Guthrie, then program manager, Norwegian People’s Aid, to Human Rights Watch, February 12, 2009.

Deminers in south Lebanon frequently found DPICM duds hanging by their ribbons from trees, where they were camouflaged.³⁷⁹ Wind blew one such submunition from a tree in an area thought to have been cleared; it landed on a group of boys, killing one and injuring five others.³⁸⁰ In Iraq, Human Rights Watch found overgrown fields contaminated with submunitions in villages around al-Hilla, al-Najaf, al-Fallujah, and Agargouf.³⁸¹ In Afghanistan, the parachutes of BLU-97s snagged on trees in orchards and on grapevines.³⁸²

Complications with Clearance of Other Unexploded Weapons

Use of cluster munitions can create complications with clearance of other unexploded weapons. While the people of Lebanon benefited greatly from having had an established mine clearance program operating for several years, the 2006 war interrupted previous pressing clearance work. In addition to leaving a vast number of new ERW, the conflict displaced existing minefields, which had to be re-surveyed and re-marked before clearance. "We were about to phase out.... Unfortunately now we are starting everything anew," said Habbouba Aoun, coordinator of the Landmines Resource Center, in October 2006.³⁸³ In Afghanistan, deminers prioritized cluster munitions because of their sensitive fuzes and international pressure. They complained, however, that cluster munition clearance was "taking resources from a long-standing mine problem."³⁸⁴ Cluster munitions thus endanger civilians by delaying clearance of other deadly ERW as well as by lingering after the conflict. Use of cluster munitions not only presents clearance challenges in and of itself but it also can slow the clearance of other deadly weapons.

Community Clearance

Because professional clearance can be time consuming, civilians often try to remove unexploded submunitions themselves. Such actions endanger both civilians involved or standing nearby and deminers who face increased challenges from poorly cleared submunitions.

³⁷⁹ Human Rights Watch, *Flooding South Lebanon*, p. 36.

³⁸⁰ Human Rights Watch interview with Ahmed Mouzamer, vice head of Sawane municipality, Sawane, Lebanon, October 26, 2006.

³⁸¹ Human Rights Watch, *Off Target*, p. 110.

³⁸² Human Rights Watch, *Fatally Flawed*, p. 28.

³⁸³ Human Rights Watch interview with Habbouba Aoun, coordinator, Landmine Resource Center, Beirut, Lebanon, October 20, 2006.

³⁸⁴ Human Rights Watch interview Sean Moorehouse, demining consultant, Swiss Federation for Mine Action, Herat, Afghanistan, March 27, 2002.

Threats to lives and livelihoods drive civilians to attempt clearance. After a BLU-97 killed a child in Takhar, Afghanistan, for example, an elderly woman began to gather submunitions. "She decided she was an old lady, and if anyone should get it, it should be her," Gerhard Zenk of HALO Trust said.³⁸⁵ Shadi Sa`id `Aoun, a 26-year-old farmer from south Lebanon who suffered injuries when he decided to clear his field himself, told Human Rights Watch, "I could not wait for the army to come and remove the ones [submunitions] from the field. It would ruin me. The orchard is my only source of income."³⁸⁶ In south Lebanon, civilians reportedly were being paid anywhere between \$1 and \$4 per dud by locals who needed their property cleared.³⁸⁷ The collection of scrap metal from cluster munitions is also a dangerously common source of income.³⁸⁸ The poor, who are most in need of income, are the civilians most likely to clear duds on their own. As Aoun of the Landmine Resource Center in Beirut noted, "Those being killed are the disadvantaged people."³⁸⁹

Civilians use a variety of highly dangerous methods to clear submunitions. Throwing them into rivers or other bodies of water or burning them are particularly popular. Other methods which Human Rights Watch has documented include poking them with sticks, throwing rocks at them, running over them with bulldozers, burying them, throwing them into an open field, and delivering them in boxes to deminers.³⁹⁰

While trying to minimize post-conflict casualties, civilians who attempt to clear submunitions themselves can cause more deaths and injuries. Describing his accident of September 13, 2006, Lebanese farmer Shadi Sa`id `Aoun, told Human Rights Watch that he had gathered 80 unexploded submunitions in a box and tried to deliver it to Lebanese Army deminers. He said, "While I was lifting the box, the bottom fell out and one or more of them exploded. My two legs are broken. The left leg went left, and the right leg went right. The

³⁸⁵ When HALO Trust heard of this story, it quickly dispatched a team to the area. Human Rights Watch interview with Gerhard Zenk, liaison officer, HALO Trust, Kunduz, Afghanistan, March 17, 2002.

³⁸⁶ Human Rights Watch interview with Shadi Sa`id `Aoun, Hammoud Hospital, Said, Lebanon, September 22, 2006.

³⁸⁷ Human Rights Watch interview with Habbouba Aoun, coordinator, Landmines Resource Center, Beirut, Lebanon, October 20, 2006; Human Rights Watch interview with Ahmed Ismael Kadre, farmer, Kfar Shufa, Lebanon, October 22, 2006; Anthony Shadid, "In Lebanon, a War's Lethal Harvest; Threat of Unexploded Bombs Paralyzes the South," *Washington Post*, September 26, 2006.

³⁸⁸ "You never find the [cluster munition] casing. It goes to market and gets used for various products, like satellite dishes," said Bob Gannon. Human Rights Watch interview with Bob Gannon, demining consultant for RONCO Consulting Corporation, Kandahar, Afghanistan, March 24, 2002. OMAR's list of cluster bomb casualties in Herat, Afghanistan included four injuries at Firqa #17 and four at the Qol-e Urdu that happened while people were "collecting scrap and tending animal[s]." OMAR Sub Office Herat, "Information about Victims." For evidence of scrap gathering despite the risks in Ishaq Suleiman, see Human Rights Watch, *Fatally Flawed*, p. 36.

³⁸⁹ Human Rights Watch interview with Habbouba Aoun, coordinator, Landmine Resource Center, Beirut, Lebanon, October 20, 2006.

³⁹⁰ Human Rights Watch, *Flooding South Lebanon*, p. 88.

bones were crushed.”³⁹¹ Self-clearance has also endangered deminers, especially when civilians have given deminers live duds. Moving unexploded submunitions to another area merely shifts the location of the danger and gathering them can cause a bigger explosion.

Civilians inadvertently complicate clearance as well as create safety hazards. According to Johan den Haan, who was working in Lebanon for BACTEC, “Self-clearance makes our job difficult. We don’t know anything about footprint, direction, and strike patterns when they are removed.”³⁹² In addition to erasing technical information, civilians move duds to places where clearance becomes a long-term problem. “They think they’re doing good. If people find munitions, they toss them in the river. But it takes it out of our hands and makes it a naval [explosive ordnance disposal] issue,” said Staff Sgt. Cecilio Berrios, who was doing clearance for the US military in Iraq.³⁹³ When burning submunitions, civilians often fail to destroy the fuzes and may deceive themselves and others into thinking the munitions are safe to pick up or work around.³⁹⁴ In south Lebanon, farmers sometimes torched their fields to destroy submunitions. Not only could the submunitions detonate unexpectedly during or after the fires, but the flames also burned the ribbons off the top of some submunitions, making it more difficult for deminers and civilians to see them on the ground.³⁹⁵ While well intended, civilian methods of submunition disposal exacerbate an already severe humanitarian situation. The root of all clearance problems, however, remains the use of cluster munitions.

Risk Education

Given the time it takes to clear professionally and the dangers of community clearance, risk education should be initiated immediately. It can be part of a campaign to raise awareness of landmines and other ERW, but the content should be adapted to cluster munitions. Among the most common forms it takes are posters and flyers. After the US bombing campaign in Afghanistan in 2001, posters from the Organization for Mine Awareness and Afghan Rehabilitation (OMAR), a clearance agency, included images warning of the deadliness of cluster munition casings and individual BLU-97s. An elaborate one included a cartoon of a refugee who spots a submunition on his way home. It instructs him to retrace

³⁹¹ Human Rights Watch interview with Shadi Sa’id `Aoun, Hammoud Hospital, Said, Lebanon, September 22, 2006.

³⁹² Human Rights Watch interview with Johan den Haan, BACTEC, Tyre, Lebanon, October 25, 2006.

³⁹³ Human Rights Watch interview with Staff Sgt. Cecilio Berrios, al-Hilla, Iraq, May 20, 2003.

³⁹⁴ Human Rights Watch interview with Bob Gannon, demining consultant for RONCO Consulting Corporation, Kandahar, Afghanistan, March 24, 2002.

³⁹⁵ Human Rights Watch interview with Andy Gleeson, program manager and technical operations manager, Mines Advisory Group, Kfar Joz, Lebanon, October 25, 2006.

his steps, mark the spot, and go for professional help.³⁹⁶ In Georgia, radio and television warning supplemented these forms of risk education.³⁹⁷ In Lebanon, UNIFIL distributed innovative UNICEF water bottles with pictures of cluster munitions and submunitions.³⁹⁸ When Human Rights Watch asked villagers to describe a submunition they had seen, they often pulled out a bottle of water and pointed to the appropriate one.

Risk education programs have particularly targeted children, who usually represent a high percentage of civilian casualties. In Lebanon, schools implemented programs to help children recognize submunitions, while various organizations distributed videos, CDs, brochures, songs, and storybooks in communities to educate children about the danger of duds.³⁹⁹ The book *Mazen and Leila in Discovery Camp* told the story of two children who find cluster submunitions while playing in a field. Games, such as a version of “Chutes and Ladders,” have also been popular methods of educating children.⁴⁰⁰ In Albania, the Victims of Mines and Weapons Association organized risk education plays by local actors and comedians.⁴⁰¹

Risk education can play a vital role in preventing civilian casualties. Human Rights Watch documented multiple cases of its success in Georgia. Tamar Eramov, a 68-year-old farmer in Variani, was looking for walnuts on her land when she discovered an unexploded Russian submunition. “I almost touched it, but then I remembered the leaflets that were given out and didn’t,” she told Human Rights Watch.⁴⁰² Omar Mindiashvili found his daughter and her cousin swinging an M85 around by its ribbon but was able to avert disaster in time. He said he knew immediately to stop them because he had seen warnings about that weapon on television.⁴⁰³ HALO Trust coordinated with UNICEF and the Georgian Ministry of Education

³⁹⁶ “Danger. Don’t touch unknown devices. They cause death,” read another poster with images of mines, cluster munition parts, and UXO. In Iraq, Human Rights Watch saw posters in hospitals and youth centers. One common one showed photographs of a DPICM and an ATACMS submunition and said, “DANGER! If you see these or other forms of UXO laying anywhere, DO NOT TOUCH THEM! Report your finding to Coalition Forces immediately so that they may be removed safely.”

³⁹⁷ Human Rights Watch interview with Mick McDonnell, operations manager, iMMAP, Tbilisi, Georgia, October 17, 2008.

³⁹⁸ Human Rights Watch interview with Lebanese Army Demining Unit official (name withheld), Beirut, Lebanon, October 20, 2006.

³⁹⁹ Human Rights Watch interview with Ahmed `Ali Hadi Suleiman, mukhtar, Zawtar al-Sharkiyeh, Lebanon, October 23, 2006.

⁴⁰⁰ Human Rights Watch, *Flooding South Lebanon*, p. 93.

⁴⁰¹ Rosy Cave, Anthea Lawson, and Andrew Sherriff, UNIDIR, “Cluster Munitions in Albania and Lao PDR: The Humanitarian and Socio-Economic Impact,” 2006, <http://www.unidir.org/pdf/ouvrages/pdf-1-92-9045-006-A-en.pdf> (accessed October 15, 2010), p. 17.

⁴⁰² Human Rights Watch interview with Tamar Eremov, farmer, Variani, Georgia, October 18, 2008.

⁴⁰³ Human Rights Watch interview with Omar Mindiashvili, Ditsi, Georgia, October 17, 2008.

and Science to provide information about the risks of cluster munitions and other UXO to 44,000 Georgians by December 2008.⁴⁰⁴

Risk education, however, is sometimes insufficient and sometimes ineffective. UNIFIL Civil Affairs Officer Ryszard Morczynski told Human Rights Watch in fall 2006, “The level of awareness [in south Lebanon] is increasing, but it is insufficient. So many people in the villages have no clue.”⁴⁰⁵ In Afghanistan in 2002, Human Rights Watch saw few awareness posters outside OMAR and UN offices, and the more common ones generally did not include submunitions. Villagers in Ishaq Suleiman at first said they did not have any pieces of the weapons because OMAR had warned them they were dangerous to pick up. After further discussion, however, the people showed the Human Rights Watch team their collections of cluster munition casings, cluster munition computer pieces, and submunition parts. A young boy even offered a researcher the “spider” (the cap of a BLU-97) that he had picked up for a toy. Desperate for scrap metal or merely curious, these villagers had ignored OMAR’s warnings. As with clearance, risk education is a praiseworthy and life-saving activity, but it would not be necessary if militaries ceased to use cluster munitions.

Victim Assistance

Even the best clearance and risk education cannot completely eliminate the casualties from cluster munitions. Some people are killed or injured by the weapons during strikes, while others suffer harm from cluster munition remnants prior to their destruction. Therefore, assistance to victims is another critical remedial measure. Victims have not only immediate, emergency needs but also long-term ones, such as medical care, physical rehabilitation, psychosocial support, and economic inclusion. Victims include both individuals harmed by cluster munitions and their families and communities.

Components and Implementation of Victim Assistance

There are six main components of victim assistance, which are the same whether the cause of the harm is a cluster munition, landmine, or other form of ERW. According to Handicap International and the International Campaign to Ban Landmines (ICBL), they are: “data collection, emergency and continuing medical care, physical rehabilitation, psychological

⁴⁰⁴ Office of the UN Resident/Humanitarian Coordinator in Georgia, Situation Report No. 38 on the Situation in Georgia, November 27-December 4, 2008, p. 1. Risk education had also been conducted in at least 180 schools by mid-November 2008. Office of the UN Resident/Humanitarian Coordinator in Georgia, Situation Report No. 36 on the Situation in Georgia, November 13-20, 2008, p. 1.

⁴⁰⁵ Human Rights Watch interview with Ryszard Morczynski, civil affairs officer, UNIFIL, al-Naqoura, Lebanon, October 27, 2006.

and social support, economic (re)integration, and disability laws and policies.”⁴⁰⁶ Gathering data about victims and their needs helps ensure that assistance is adequate and appropriate; consultations with victims themselves are an important part of this process. Medical treatment allows victims not only to survive immediate injuries but also to deal with any long-term health consequences. Rehabilitation facilitates victims’ recovery or adaptation to their injuries, such as by teaching them to use prosthetic limbs to regain mobility and independence. Psychosocial support is critical to easing the psychological suffering caused by the trauma of an injury and to preventing discrimination against and ostracism of victims by the community. Economic integration, which can come in the form of education and vocational training, gives victims the tools to support themselves and contribute to society in a way they find meaningful. Laws and policies establish a framework to implement the other components. Together these elements seek to address victims’ full range of needs.

Certain principles guide the provision of the forms of assistance. The assistance must be “physically and economically accessible,” and free information about services must be made available. Assistance must be “varied and effective.” Community-based programs should supplement more central ones in order to improve access to services. Similarly, national and local services should ultimately replace international ones. Finally, states must thoroughly and systematically report on their progress to allow careful monitoring.⁴⁰⁷

To implement victim assistance programs effectively, states should take a number of steps.⁴⁰⁸ They should designate government focal points to coordinate assistance programs. In some cases, cluster munition-affected states have appointed ministries,⁴⁰⁹ and in other cases mine action centers;⁴¹⁰ states can also rely on disability focal points in order to harmonize assistance to different disabled groups.⁴¹¹ States should mobilize national and international resources and develop a national plan and budget. As of September 2010, 12 states affected by cluster munitions had or were developing such plans.⁴¹² To determine the most important forms of assistance and how best to deliver them, states should gather data

⁴⁰⁶ Handicap International, *Circle of Impact*, p. 12. See also, for example, ICBL, *Landmine Monitor Report 2009*, pp. 67-69.

⁴⁰⁷ ICBL, *Landmine Monitor Report 2007: Toward a Mine-Free World* (Ottawa: Mines Action Canada, 2007), pp. 57-58.

⁴⁰⁸ The Convention on Cluster Munitions, which sets the gold standard for victim assistance, lays out these requirements for implementing effective assistance. Convention on Cluster Munitions, art. 5(2).

⁴⁰⁹ As of September 2010, these states included Afghanistan, Cambodia, the Democratic Republic of Congo, Eritrea, Ethiopia, Georgia, Mozambique, Serbia, and Uganda. *Cluster Munition Monitor 2010*, p. 34.

⁴¹⁰ As of September 2010, these states included Albania, Bosnia and Herzegovina, Chad, Croatia, Iraq, Laos, Lebanon, Mozambique, Tajikistan and Sudan. The latter had both a mine action center and a ministry focal point. *Ibid.*

⁴¹¹ Croatia and Mozambique were among the states with disability focal points in September 2010. *Ibid.*

⁴¹² These states included Albania, Afghanistan, Bosnia and Herzegovina, Cambodia, Croatia, Chad, the Democratic Republic of the Congo, Iraq, Laos, Sudan, Tajikistan, and Uganda. *Ibid.*

about victims and consult with the victims directly. Throughout the process, states should ensure that programs do not discriminate among cluster munition victims or between cluster munition victims and others with disabilities.

As with clearance, victim assistance usually involves multiple layers of actors. The international community provides significant financial support for programs around the world.⁴¹³ NGOs, including disabled people's organizations, usually take the lead in actual delivery of services. Affected states bear ultimate responsibility for providing victim assistance according to human rights norms, but they can rarely fulfill their duties alone.⁴¹⁴

Victim Assistance Challenges

Cluster munition victims have many needs that states have yet to address. According to *Cluster Munition Monitor 2010*, as of September 2010, few affected states had sufficient services. The *Monitor* highlighted seven states as "struggl[ing] to provide services across all key areas of victim assistance."⁴¹⁵ Other states had not provided services in one or more of the key areas, with the biggest gaps existing in psychosocial support and economic inclusion.⁴¹⁶ In addition, victims in rural areas generally had less access to assistance than victims in urban ones.⁴¹⁷ Finally, services usually focused on individuals and did little for their families or affected communities.⁴¹⁸

A variety of challenges hinder the provision of assistance to cluster munition victims. Data collection is a key component of assistance programs. As of September 2010, however, few states had obtained enough information to determine cluster munition victims' needs. Laos had completed part of a casualty survey, and Lebanon had gathered data on victims' needs. Only a small number of other states had taken steps, usually limited, to identify casualties and assess needs.⁴¹⁹ Quality as well as quantity of information is important.

⁴¹³ ICBL, *Landmine Monitor Report 2006: Toward a Mine-Free World* (Ottawa: Mines Action Canada, 2006), p. 67.

⁴¹⁴ The Convention on Cluster Munitions codified the principle that affected states bear ultimate responsibility for victim assistance. Convention on Cluster Munitions, art. 5.

⁴¹⁵ The list included Afghanistan, Chad, the Democratic Republic of Congo, Iraq, Laos, Mozambique, and Uganda. *Cluster Munition Monitor 2010*, p. 35.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*, p. 34.

Funding shortages pose another challenge to victim assistance. There is limited information on money available specifically for cluster munition victim assistance, but because most programs do not distinguish victims by the weapon that injured them, data from the *Landmine Monitor* is informative in this case. According to the *Landmine Monitor Report 2006*, while 18 states gave \$37.2 million in donations the previous year, resources for victim assistance did not meet victims' needs.⁴²⁰ Three years later, the *Landmine Monitor Report 2009* documented "persistent funding challenges."⁴²¹ The shortfalls particularly affected medical care and rehabilitation because these services often require buying foreign equipment or goods. Programs in rural areas faced greater deficiencies than those in cities.⁴²² Donor fatigue for supporting activities with no clear end date threatened to exacerbate the situation.⁴²³

While both clearance operations and victim assistance programs experience shortages of information and resources, assistance suffers more because states often do not prioritize it.⁴²⁴ During the first decade of Mine Ban Treaty implementation, assistance for landmine victims was the "smallest component of mine action funding."⁴²⁵ As a result of lack of prioritization and other factors, victim assistance "has made the least progress of all the major sectors of mine action."⁴²⁶ While the topic of victim assistance received significant attention during the Convention on Cluster Munition negotiations, before they started, Handicap International noted that victim assistance has "often not [been] seen as a priority in comparison to other emergencies, such as conflicts and HIV/AIDS; this is especially the case for cluster submunitions victim assistance."⁴²⁷

Particularly worrisome is the ongoing discrimination victims face, which can in turn affect resource allocation. In Bosnia and Herzegovina, for example, disabled military veterans have received more aid than civilian victims and other persons with disabilities. In Afghanistan,

⁴²⁰ ICBL, *Landmine Monitor Report 2006*, p. 85. The 2006 report was the last to report on victim assistance funding in detail.

⁴²¹ ICBL, *Landmine Monitor Report 2009*, p. 67.

⁴²² *Ibid.*, p. 71.

⁴²³ *Ibid.*

⁴²⁴ At least in the landmine context, prioritization has been a particular problem at the national level. While international donations and NGO services have been widely valued, advocates have argued that affected states need to take responsibility for caring for their own victims. The *Landmine Monitor* has found that victim assistance "became more effective when there was an ongoing, active involvement of national coordination bodies." Affected states, however, have often become over-dependent on foreign support, thus decreasing "ownership, interest, and room for action by those who are primarily responsible." Lack of national ownership can also reduce sustainability of efforts. *Ibid.*, pp. 75-76.

⁴²⁵ *Ibid.*, p. 71.

⁴²⁶ *Ibid.*, p. 65.

⁴²⁷ Handicap International, *Circle of Impact*, p. 13.

discrimination has prevented women and the elderly from accessing services. In general, discrimination has been based on victims' status as civilians or soldiers or their gender, age, or regional origin instead of the cause of their injury.⁴²⁸ In reflecting on a decade of victim assistance in the landmine context, the *Landmine Monitor Report 2007* noted the need to change attitudes: "Despite 10 years of advocacy and treaty implementation, survivors are still too often seen as a burden."⁴²⁹ Victims are not the burden; the use of the weapons that creates victims is.

Conclusion

Along with use and proliferation, the need for post-conflict remedial measures is one of the key problems of cluster munitions. All of these measures require significant funding, equipment, and human resources that could be devoted to other needs. They involve long-term commitments, especially for victim assistance. They demand careful coordination and systematic information sharing at the international, national, and civil society levels. They threaten the lives of professionals, particularly the deminers who conduct clearance. The world would not have to pay this price if cluster munitions use had not endangered or already injured civilians.

⁴²⁸ *Cluster Munition Monitor 2010*, p. 37.

⁴²⁹ ICBL, *Landmine Monitor Report 2007*, p. 59.



A US Air Force bomber drops cluster munitions during a training exercise.



This six-year-old boy lost his left eye after playing with a submunition he found near his home in Laos. The United States dropped nearly 97 million submunitions in Laos during the Vietnam War. © 2006 Andrew McConnell/Panos



Villagers stand around one-third of a casing of a US cluster bomb that landed on the village of Ainger, Afghanistan, on November 17, 2001 © 2002 Bonnie Docherty/Human Rights Watch



Marhama, 25, who sits in front of her surviving children, suffered a serious leg injury during a US cluster munition attack in Ainger, Afghanistan, on November 17, 2001. Her leg brace is partially visible. Marhama's husband and 10-year-old son died in the attack. © 2002 Bonnie Docherty/Human Rights Watch



Two BLU-97 submunitions lie in a field near Herat, Afghanistan. The left one is unexploded. Its shaped charge, an anti-armor concave cone, is visible at its right end, and the exterior canister has slipped to expose its antipersonnel fragmentary core. © 2002 Bonnie Docherty/Human Rights Watch



Jamal Kamil Sabir lost his right leg during a UK cluster munition strike on his home in Hay al-Zaitun in Basra, Iraq, on March 5, 2003. © 2003 Reuben E. Brigety, II/Human Rights Watch



A girl sits in the playground of the pockmarked al-Hadaf primary school in al-Hilla, Iraq. Air-dropped US submunitions killed two civilians and injured 13 when they hit the school on April 24, 2003. © 2003 Bonnie Docherty/Human Rights Watch



Falah Hassan, 13, was injured by an unexploded ground-launched US submunition on March 26, 2003, and remained in al-Hilla Teaching Hospital awaiting skin grafts on May 19. The explosion ripped off his right hand and spread shrapnel through his body. © 2003 Bonnie Docherty/Human Rights Watch



An unexploded US Dual Purpose Improved Conventional Munition (DPICM), a type of ground-launched submunition, rests in the mud of a farmer's field outside of Agargouf, Iraq, in May 2003. © 2003 Bonnie Docherty/Human Rights Watch



Two men collect the final remains of 12-year-old Rami `Ali Hassan Shebli, who was killed by an Israeli submunition in Halta, Lebanon, on October 22, 2006. Rami unwittingly picked up the submunition while playing with his brother only a couple hours before this photograph was taken. © 2006 Bonnie Docherty/Human Rights Watch



An Israeli submunition seriously injured Muhammad Abdullah Mahdi, an 18-year-old mechanic, when he tried to move a car motor at his garage in Zawtar al-Sharkeyeh, Lebanon, on October 4, 2006. Muhammad (shown here about three weeks later) hemorrhaged, lost half of his left hand, was injured in his right leg, and suffered psychological trauma. © 2006 Bonnie Docherty/Human Rights Watch



An unexploded, air-dropped BLU-63 submunition blends in to a field just outside Beit Yahoun, Lebanon, on October 24, 2006. Such US-made submunitions, used by Israel in 2006, date back to the Vietnam War. © 2006 Bonnie Docherty/Human Rights Watch



Teimuraz Khizanishvili, 70, was one of 16 casualties from a Russian cluster munition strike on Variani, Georgia, on August 8, 2008. The explosion broke both his legs and left shrapnel injuries across his body, including in his forehead, hand, legs, torso, and back. He was still confined to a wheelchair on October 18, 2008. © 2008 Bonnie Docherty/Human Rights Watch



An unexploded Russian AO-2.5 RTM submunition lies near the public square in the center of Variani, Georgia, in August 2008. © Ole Solvang/Human Rights Watch



An unexploded M85, an antipersonnel and anti-armor submunition, rests hidden under leaves in a farmer's field in Shindisi, Georgia, in October 2008. This submunition was bought from Israel and launched by Georgia. © 2008 Bonnie Docherty/Human Rights Watch



DM-602 155mm cluster munition artillery projectiles are stockpiled at a facility in Germany. The projectiles were made in Israel. © 2009 Mark Hiznay/Human Rights Watch



An unexploded MZD-2 submunition lies on the side of a road in Beit Yahoun, Lebanon, on October 24, 2006. Hezbollah launched these models into Israel, and this one is possibly from a Hezbollah cluster munition that never fired. The use of such Chinese-made weapons by a non-state armed group in the Middle East illustrates the dangers of proliferation of cluster munitions. © 2006 Bonnie Docherty/Human Rights Watch



Deminers from the Afghan Organization for Mine Awareness and Afghan Rehabilitation (OMAR) look for unexploded submunitions on the surface of this hill outside Herat, Afghanistan, in March 2002. OMAR did not have enough equipment to give every deminer a metal detector. © 2002 Bonnie Docherty/Human Rights Watch



Deminers created these piles of debris as they cleared hundreds of submunitions from a site near Herat, Afghanistan. The black objects are BLU-97 caps, or "spiders." Also visible (clockwise from upper left) are: pieces of cluster munition casings, the yellow foam that surrounds the submunitions, empty submunition canisters, and parachutes. © 2002 Bonnie Docherty/Human Rights Watch



Campaigners from the Cluster Muniton Coalition march to ban cluster munitions during the final negotiations of the Convention on Cluster Munitions in Dublin, Ireland, in May 2008. © 2008 Mary Wareham/Human Rights Watch



Soraj Ghulam Habib, 16, presents a petition to ban cluster munitions to Irish Foreign Affairs Minister Micheál Martin before the start of final negotiations of the Convention on Cluster Munitions in Dublin on May 19, 2008. Soraj, who lost both his legs to an unexploded US submunition in Afghanistan, was one of many cluster munition survivors who lobbied diplomats throughout the Oslo Process. © 2008 Mary Wareham/Human Rights Watch

Part II: Developing a Process

V. Initial International Efforts to Govern Cluster Munitions

From a humanitarian perspective, the multiple problems of cluster munitions demanded a legally binding ban on the weapons. The road to such a ban, however, was a long one. It involved international efforts within a UN forum, national measures seeking to deal with the problem on an ad hoc basis, and ultimately an independent international process. Part II of this book examines these approaches to show why only the Oslo Process that led to the Convention on Cluster Munitions could achieve an absolute and comprehensive result.⁴³⁰

The movement to restrict cluster munition use originated in the 1970s, but states did not pursue in-depth discussions of regulation until the past decade. As public awareness of the extensive humanitarian problems of cluster munitions increased, so did the calls for specific restrictions beyond the generic rules already existing in international humanitarian law. Initial international efforts centered around meetings of states parties to the Convention on Conventional Weapons. These discussions advanced the debate, but attempts to adopt a legally binding instrument met with ambivalence and resistance from users, producers, and stockpilers. In failing to produce a new protocol governing cluster munitions, the consensual CCW process helped to unite opposition to the weapons to the point where some states moved outside the CCW forum to seek a ban.

Existing International Humanitarian Law

International humanitarian law developed in the late 1970s addressed some of the concerns about cluster munitions with general provisions governing means and methods of warfare. Additional Protocol I to the Geneva Conventions, the relevant provisions of which are now considered customary international law, articulated new protections for civilians. In particular, the rule of distinction requires parties to a conflict to distinguish at all times between combatants and civilians, and attacks that fail to do so are considered indiscriminate.⁴³¹ Additional Protocol I also holds states to the proportionality test. It

⁴³⁰ For a timeline of the process to ban cluster munitions, see Appendix I.

⁴³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, art. 48. The relevant parts of Additional Protocol I are generally considered customary international law. For the ICRC study of customary international humanitarian law related to distinction, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge, UK: Cambridge University Press, 2005), pp. 3-68.

considers attacks to be disproportionate if they “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁴³²

The use of cluster munitions is prone to being both indiscriminate and disproportionate.⁴³³ The submunitions, which have a broad footprint and are almost always unguided, cannot distinguish between civilian and soldiers, and their use in or near populated areas is “a method ... of combat which cannot be directed at a specific military objective.”⁴³⁴ Cluster munition strikes in or near populated areas in particular should therefore be presumed indiscriminate. The large numbers of duds that cluster munitions frequently leave behind also make the weapons indiscriminate after an attack. When unexploded submunitions litter populated areas, they produce “effects ... [that] cannot be limited.”⁴³⁵ According to a proportionality analysis that takes the long-term effects of submunition duds into account, most cluster munitions are a disproportionate means of war because they produce foreseeable and excessive harm. For this reason, there should be a presumption that cluster munition attacks in or near populated areas—even if those areas have been evacuated—are disproportionate.⁴³⁶

While the rules of international humanitarian law provided a standard for judging the legality of cluster munition attacks, decades of armed conflict showed that these rules were unable by themselves to stop the unlawful use of the weapons, and thus the harm that resulted.⁴³⁷ As gradually recognized by states, international organizations, and civil society, the world needed law dedicated to the specific problems of cluster munitions. Such law could clarify and strengthen existing rules by creating a ban on cluster munitions that applied in all

⁴³² Additional Protocol I, art. 51(5)(b).

⁴³³ For a more detailed analysis of the use of cluster munitions and international humanitarian law, see Human Rights Watch, *A Dying Practice*, pp. 13-16.

⁴³⁴ Additional Protocol I, art. 51(4)(b).

⁴³⁵ *Ibid.*, art. 51(4)(c).

⁴³⁶ States parties to the CCW have adopted this approach to the proportionality test. The preamble of the final declaration of the CCW's Third Review Conference recognizes “the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack.” Third Review Conference of the High Contracting Parties to the CCW, “Final Document, Part II, Final Declaration,” CCW/CONF.III/11(Part II), November 7-17, 2006, p. 4. See also Human Rights Watch and Harvard Law School International Human Rights Clinic, *Cluster Munitions and the Proportionality Test: Memorandum to Delegates of the Convention on Conventional Weapons*, April 2008, <http://www.hrw.org/en/news/2008/04/07/cluster-munitions-and-proportionality-test>.

⁴³⁷ While not as strong as the categorical ban of the Convention on Cluster Munitions, the rules of international humanitarian law still apply and provide strong restrictions on the use of cluster munitions by states not party to the convention. See Human Rights Watch, *A Dying Practice*, pp. 13-16.

circumstances and addressing the weapons' post-conflict affects with remedial measures. Achieving this goal required states to develop a new treaty process.

Early Attempts to Ban Cluster Munitions

The 1970s brought the first calls for international law that specifically addressed cluster munitions. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH) established an ad hoc Committee on Conventional Weapons in 1974. The CDDH charged the committee with discussing conventional weapons having "indiscriminate" or "excessive" effects on either civilian or military targets.⁴³⁸

To support the committee's work, the ICRC convened a Conference of Government Experts on the Use of Certain Conventional Weapons in Lucerne in 1974. At that meeting, Egypt, Mexico, Norway, Sudan, Sweden, Switzerland, and Yugoslavia presented a proposal to ban cluster munitions along with incendiary weapons, flechettes, especially injurious small-calibre projectiles, and antipersonnel landmines.⁴³⁹ In a second ICRC-sponsored conference in Lugano in 1976, these seven states resubmitted their proposal, and six new supporters—Algeria, Austria, Lebanon, Mali, Mauritania and Venezuela—joined them.⁴⁴⁰

At that time, however, the push for complete prohibitions on particular weapons, including cluster munitions, failed to receive widespread support. The major military powers largely responsible for the production and use of such arms (primarily NATO and Warsaw Pact nations) opposed restrictions on high-tech weaponry they viewed as being vital to their national defense programs.⁴⁴¹ Although it had convened the conference in which states had proposed a ban, the ICRC supported restrictions that fell short of complete prohibitions because it feared that pushing for bans would hamper negotiations by alienating powerful states such as the United States and the Soviet Union.⁴⁴²

⁴³⁸ Robert J. Mathews, "The 1980 Convention on Certain Conventional Weapons: A Useful Framework despite Earlier Disappointments," *International Review of the Red Cross*, vol. 83, no. 844, December 2001, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JRLI> (accessed October 31, 2010), p. 994.

⁴³⁹ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH), Doc. CDDH/DT/2, February 21, 1974.

⁴⁴⁰ ICRC, *Conference of Government Experts on the Use of Certain Conventional Weapons* (Geneva: ICRC, 1976), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-conf-experts-1976.pdf (accessed October 31, 2010), p. 198. The 1976 proposal defined cluster munitions as "anti-personnel cluster warheads or other devices with many bomblets which act through the ejection of a great number of small-calibred fragments or pellets." *Ibid.*, p. 199.

⁴⁴¹ Mathews, "The 1980 Convention on Certain Conventional Weapons," *International Review of the Red Cross*, p. 995. These states also argued that prohibitions should be discussed under the auspices of the UN Conference on Disarmament. *Ibid.*

⁴⁴² *Ibid.*, p. 994.

While serious disagreement existed over the details of conventional weapons restrictions, a consensus emerged supporting a UN-based framework for further discussions.⁴⁴³ In a resolution passed during the final CDDH conference, states committed themselves to working toward the development of a legal mechanism capable of addressing the “indiscriminate” and “excessively injurious” effects of conventional weapons.⁴⁴⁴ The CDDH thus laid the groundwork for the Convention on Conventional Weapons.

The Origin and Early Years of the Convention on Conventional Weapons

In 1980, states adopted the CCW, whose full name is the 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, and states would subsequently consider it a possible instrument to regulate or ban cluster munitions.⁴⁴⁵ Instead of addressing the characteristics of a wide array of weapons, negotiators made the CCW a general legal framework from which protocols dealing with individual weapons could be developed.⁴⁴⁶ In so doing, they were able to generate an instrument capable of garnering widespread international support, while avoiding debates on specific weapons that could possibly undermine the production of a concrete result. Proponents of a stronger legal mechanism, however, “felt that military considerations had been given much greater priority than humanitarian concerns.”⁴⁴⁷ From the beginning, therefore, the CCW failed to serve as the catalyst for reform that many in the international community demanded.

Negotiators had hoped that the three initial protocols, which were also adopted in 1980 and entered into force in 1983, would fill the legal gaps unresolved in the CCW. Although these protocols placed significant restrictions on particular weapons, only Protocol I—on fragments undetectable by X-rays—completely banned a weapon type. Rather than prohibiting all antipersonnel landmines, Protocol II merely established regulations on their

⁴⁴³ *Ibid.*, p. 995.

⁴⁴⁴ Resolutions of the Diplomatic Conference of Geneva 1974-1977, “Resolution 22: Follow-up Regarding Prohibition or Restriction of Certain Conventional Weapons,” <http://www.icrc.org/ihl.nsf/WebART/480-770006?OpenDocument> (accessed October 24, 2010).

⁴⁴⁵ 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 October 10, 1980, 1342 U.N.T.S. 137, entered into force December 12, 1983.

⁴⁴⁶ Mathews, “The 1980 Convention on Certain Conventional Weapons,” *International Review of the Red Cross*, p. 996.

⁴⁴⁷ *Ibid.*

use, transfer, and clearance. Protocol III prohibited the use of air-delivered incendiary weapons only against civilian objects, not against all targets.⁴⁴⁸

Due to these and other flaws, the CCW became a “neglected treaty,” and states did not embrace it after its adoption.⁴⁴⁹ This initial lack of support is illustrated by that fact that after a decade, only 29 states had ratified or acceded to the treaty.⁴⁵⁰ It was not until the early 1990s, as the movement to ban landmines clamored for a formal review conference and strengthening of Protocol II, that the CCW became a centerpiece of the disarmament debate.⁴⁵¹

The 1995-1996 CCW review conference touched on the issue of cluster munitions only as an afterthought to the landmine discussions, and no debate vis-à-vis their use and production occurred. The paucity of discourse surrounding these weapons that emerged from the First Review Conference illustrates the lack of interest in restricting cluster munitions. In the approximately 570 pages making up the final document of the conference, only Mexico and one NGO delegate expressed concern over the lack of progress made in pursuit of cluster munition controls.⁴⁵²

Nonetheless, the initial CCW review process gave rise to two important developments. First, the number of states parties to the CCW had doubled by the end of the conference.⁴⁵³ This increase illustrated a positive trend towards the universalization of its core principles of diminishing the threats posed by weapons that either act indiscriminately or cause

⁴⁴⁸ Ibid. CCW Protocol on Non-Detectable Fragments (Protocol I), adopted October 10, 1980, 1342 U.N.T.S. 137, entered into force December 12, 1983; CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), adopted October 10, 1980, 1342 U.N.T.S. 168, entered into force December 2, 1983; CCW Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), adopted October 10, 1980, 1342 U.N.T.S. 171, entered into force December 2, 1983. CCW Protocol II was later amended: Amended CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), adopted May 3, 1996, 1125 U.N.T.S. 609, entered into force December 3, 1998. In 1995, states parties to the CCW adopted a new protocol banning blinding lasers. CCW Protocol on Blinding Lasers, (Protocol IV), adopted October 13, 1995, 35 I.L.M. 1218, entered into force July 30, 1998.

⁴⁴⁹ The treaty was also limited because it lacked compliance-monitoring provisions and had few implementation requirements. Mathews, “The 1980 Convention on Certain Conventional Weapons,” *International Review of the Red Cross*, p. 997.

⁴⁵⁰ ICRC, International Humanitarian Law—Treaties & Documents, <http://www.icrc.org/ihl.nsf/INTRO/500?OpenDocument> (accessed August 11, 2010).

⁴⁵¹ Faced with a mounting humanitarian crisis caused by the widespread use of antipersonnel landmines, states parties to the CCW convened a protracted review conference lasting from September 1995 to May 1996. While Protocol II was significantly amended, the failure of the review conference to produce a complete ban on antipersonnel landmines led many in the movement to begin a parallel process, which resulted in the 1997 Mine Ban Treaty. This instrument garnered much more support among states and civil society groups than did Amended Protocol II. Mathews, “The 1980 Convention on Certain Conventional Weapons,” *International Review of the Red Cross*, pp. 1000-1002.

⁴⁵² First Review Conference of the CCW, “Final Document: Part II, Documents and Summary Records of the Conference,” CCW/CONF.1/16 (Part II), 1996, pp. 309, 380.

⁴⁵³ ICRC, International Humanitarian Law—Treaties & Documents, <http://www.icrc.org/ihl.nsf/INTRO/500?OpenDocument> (accessed October 24, 2010). As of October 24, 2010, the CCW had 113 states parties.

excessive suffering. The debate surrounding landmines also forced the international community to consider a related humanitarian threat: explosive remnants of war.

Protocol V on Explosive Remnants of War

In the years following the CCW's First Review Conference, two armed conflicts brought increased attention to cluster munitions. As described in Chapter 2, in 1999 NATO dropped cluster munitions on the former Yugoslavia, killing or injuring at least 240 civilians during attacks and afterwards.⁴⁵⁴ The campaign led Human Rights Watch to become the first group to issue a call for a global moratorium on cluster munitions in December of that year.⁴⁵⁵ Two years later, the US Air Force used the weapons in Afghanistan, causing more civilian casualties.⁴⁵⁶

Although use and civilian harm had increased, states parties to the CCW were reluctant to address the controversial and complicated issue of cluster munitions directly. Instead, they turned their attention to the topic of ERW. ERW encompasses ordnance, including unexploded submunitions, that failed to explode when fired or was abandoned during a conflict.⁴⁵⁷ Some states and NGOs saw the possibility of an ERW protocol primarily as a potential way to begin dealing with the problems of cluster munitions.

Despite the shortcomings of the CCW, it seemed to many a pragmatic framework for addressing cluster munitions and ERW. Protocol II, as amended in 1996, had already codified several easily transferable, relevant principles, such as obligations regarding clearance and the dissemination of warnings to those living in contaminated areas.⁴⁵⁸ While some NGOs pressed for a specific CCW protocol on cluster munitions, the ICRC approached the issue by launching a more general initiative on ERW.⁴⁵⁹ The ICRC's idea gained popularity among CCW states parties, and the December 2001 Second Review Conference approved a

⁴⁵⁴ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, p 27.

⁴⁵⁵ Human Rights Watch, *Memorandum to Delegates to the April Prepcom for the 2001 Review Conference for the Convention on Conventional Weapons*. Human Rights Watch stated in the memo, "In December 1999, Human Rights Watch first called for a global moratorium on the use of cluster bombs until humanitarian concerns can be adequately addressed."

⁴⁵⁶ See generally Human Rights Watch, *Fatally Flawed*.

⁴⁵⁷ Protocol V on Explosive Remnants of War, which was the result of these discussions, defines ERW as "unexploded ordnance and abandoned explosive ordnance." Protocol V, art. 2(5).

⁴⁵⁸ Louis Maresca, "A New Protocol on Explosive Remnants of War: The History and Negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons," *International Review of the Red Cross*, vol. 86, no. 856, December 2004, p. 819.

⁴⁵⁹ Stephen D. Goose, "Cluster Munitions in the Crosshairs: In Pursuit of a Prohibition," in Jody Williams, Stephen D. Goose, and Mary Wareham, eds., *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security* (Lanham, MD: Rowman & Littlefield Publishers, Inc, 2008), p. 221.

mandate to discuss the issue over the next year.⁴⁶⁰ Human Rights Watch praised the new mandate as a “positive step in addressing all aspects of the problems associated with ERW.”⁴⁶¹ At the same time, it called on the CCW Group of Governmental Experts (GGE), created as a forum for the discussions, to focus on cluster munitions and said, “Human Rights Watch takes the ERW mandate as one to address the past, the current and the future problem [of cluster munitions].”⁴⁶²

The CCW’s Second Review Conference charged the GGE, which consisted of representatives of all states parties, with considering a range of factors, including: types and causes of ERW, possible technical fixes, the adequacy of existing international humanitarian law, risk education and clearance measures, and assistance and cooperation. The Review Conference also asked the GGE to recommend whether or not to proceed with the negotiation of a protocol on ERW.⁴⁶³ The only reference to cluster munitions came under the paragraph on technical fixes, which called on the GGE to consider “technical improvements and other measures for relevant types of munitions, *including sub-munitions*, which could reduce the risk of such submunitions becoming ERW.”⁴⁶⁴

The following year, the GGE took up a new mandate from the CCW’s annual Meeting of States Parties to “negotiate an instrument” on ERW. The GGE would also separately continue discussions on implementation of international humanitarian law and “possible preventive measures aimed at improving the design of certain specific types of munitions, *including sub-munitions*, with a view to minimise the humanitarian risk of these munitions becoming ERW.”⁴⁶⁵ While CCW states parties were making progress on an ERW protocol under the leadership of Dutch chair Ambassador Chris Sanders, cluster munitions in all their aspects remained a matter of discussion only.

⁴⁶⁰ Maresca, “A New Protocol on Explosive Remnants of War,” *International Review of the Red Cross*, pp. 820-821.

⁴⁶¹ Human Rights Watch, “Statement to the Second Review Conference of the Convention on Conventional Weapons,” December 21, 2001, <http://www.hrw.org/en/news/2001/12/21/statement-second-review-conference-convention-conventional-weapons>.

⁴⁶² *Ibid.*

⁴⁶³ Second Review Conference of the CCW, “Final Document,” CCW/CONF.II/2, December 11-21, 2001, pp. 12-13. Louis Maresca, “Second Review Conference of the Convention on Certain Conventional Weapons,” *International Review of the Red Cross*, no. 845, March 31, 2002, p. 259. Another notable development resulting from the Second Review Conference was the extension of the CCW and its protocols to non-international armed conflicts. This reform marked a significant shift in international humanitarian law, which generally focused on international conflicts, while failing to address the internal ones that have become the face of modern warfare. Louis Maresca, “Second Review Conference of the Convention on Certain Conventional Weapons,” *International Review of the Red Cross*, p.260.

⁴⁶⁴ Second Review Conference of the CCW, “Final Document,” p. 13 (emphasis added).

⁴⁶⁵ “Report of the Meeting of States Parties to the CCW,” CCW/MSP/2002/2, December 20, 2002, p. 4 (emphasis added).

Proposed restrictions on specific weapons, notably cluster munitions, did not receive widespread approval. Over the course of the 2002-2003 GGE meetings, Switzerland sought to single out submunitions for greater technical controls, including effective self-destruct mechanisms, and later argued for a mandate to negotiate a cluster munition protocol.⁴⁶⁶ It received support for its negotiation proposal from Austria, Belgium, Canada, Denmark, France, Ireland, Mexico, the Netherlands, New Zealand, Norway, and Sweden.⁴⁶⁷ Major cluster munitions users, producers, and stockpilers, however, balked at these ideas. China, Russia, and Pakistan refused to accept what they viewed as overly restrictive and costly measures, while Russia and the United States argued that existing international humanitarian law was adequate.⁴⁶⁸ Because the process of creating a new protocol required consensus, their opposition was enough to block a focus on cluster munitions.

Despite these disagreements, the GGE succeeded in drafting a legally binding protocol on ERW acceptable to all. It was designed to curb the humanitarian threat posed by ERW, which plagued about 80 countries around the globe.⁴⁶⁹ States parties adopted Protocol V in November 2003, and it entered into force in November 2006.

Protocol V was an important development for those seeking to eliminate the harm cluster munitions cause. The protocol recognizes in its preamble "the serious post-conflict humanitarian problems caused by explosive remnants of war."⁴⁷⁰ Its articles reflect concern for civilian protection and establish states' responsibility for minimizing the long-term effects of their weapons, including unexploded submunitions.⁴⁷¹ Notably, Protocol V obliges states parties to clear ERW from territory under their control and future users who do not control affected areas to take responsibility for the clearance of such munitions via the provision of "technical, financial, material or human resources assistance."⁴⁷² The debate that led to Protocol V also intensified opposition to cluster munitions by raising awareness of their negative humanitarian effects.

⁴⁶⁶ Maresca, "A New Protocol on Explosive Remnants of War," *International Review of the Red Cross*, p. 821; Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 223.

⁴⁶⁷ Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 223.

⁴⁶⁸ Maresca, "A New Protocol on Explosive Remnants of War," *International Review of the Red Cross*, p. 821.

⁴⁶⁹ See ICRC "Explosive Remnants of War: The Lethal Legacy of Modern Armed Conflict," p. 6.

⁴⁷⁰ Protocol V, pmb., para. 1.

⁴⁷¹ Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 223.

⁴⁷² Protocol V, art. 3.

Although Protocol V sought to address the need for post-conflict ERW cleanup, the new instrument did not resolve all the concerns regarding cluster munitions. According to Human Rights Watch, “The new protocol should be useful in reinforcing the necessity and urgency of cleaning up the detritus of war.... but it falls short of what is needed.”⁴⁷³ While its definition of ERW encompasses unexploded submunitions,⁴⁷⁴ the protocol establishes only weak obligations. In particular, the widespread use of qualifying phrases, such as “where feasible” and “to the maximum extent possible,” erodes the instrument’s effectiveness; states that use cluster munitions can simply argue that carrying out a cleanup effort is not a “feasible” endeavor due to financial, logistical, or other concerns.⁴⁷⁵ Furthermore, the protocol fails to address the danger of cluster munitions at the time of attack. Its only preventive measure, laid out in Article 9, is voluntary and merely encourages states parties “to take generic preventive measures aimed at minimizing the occurrence of explosive remnants of war.”⁴⁷⁶ The CCW had made progress but ultimately failed yet again to deal adequately with the problems of cluster munitions.

The Birth of the Cluster Munition Coalition

Civil society played a significant role in the process to create Protocol V. Ambassador Sanders, who chaired the GGE, invited NGOs into the room where CCW discussions and negotiations took place. He encouraged them to make interventions (short oral statements) and sometimes formal presentations. In addition, the NGOs and ICRC met regularly with the Netherlands and other supportive states behind the scenes and participated in a series of informal retreats “at which draft protocol language was developed, and strategies and tactics discussed.”⁴⁷⁷

In the wake of the March 2003 invasion of Iraq, which saw extensive use of cluster munitions, a group of NGOs, including Human Rights Watch, met in Ireland to create a new civil society coalition dedicated to working on cluster munitions. Although these NGOs had regularly participated in CCW meetings as individual organizations, they decided they could have more influence with a unified and proactive voice. According to Steve Goose, who represented Human Rights Watch at the meeting in Ireland:

⁴⁷³ “New International Law on Explosive Remnants of War,” Human Rights Watch news release, November 28, 2003, <http://www.hrw.org/en/news/2003/11/28/new-international-law-explosive-remnants-war>.

⁴⁷⁴ Protocol V, art. 2(4).

⁴⁷⁵ “New International Law on Explosive Remnants of War,” Human Rights Watch news release.

⁴⁷⁶ Protocol V, art. 9.

⁴⁷⁷ Goose, “Cluster Munitions in the Crosshairs,” in Williams, Goose, and Wareham, eds., *Banning Landmines*, p 222. Goose represented Human Rights Watch at many of these meetings.

NGOs ... decided that the time had come to form a new NGO coalition to carry out more effective work on cluster munitions.... [I]t had become very evident that NGOs were mostly operating in emergency response mode on cluster munitions, sounding alarm bells whenever they were used in major conflicts, but that biannual outrage would not suffice. The time had come ... to establish expanded, sustained, proactive, and coordinated NGO work on cluster munitions.⁴⁷⁸

In organizing themselves and defining their purpose, the NGOs followed the model of the Nobel Peace Laureate ICBL, which spearheaded the Mine Ban Treaty negotiations. At Human Rights Watch's suggestion, they called the new body the "Cluster Munition Coalition." The NGOs launched the Cluster Munition Coalition (CMC) in the Hague on November 13, 2003, 15 days before the adoption of Protocol V.⁴⁷⁹

The CMC took a strong stand against cluster munitions from the outset. It demanded an immediate moratorium on the use of cluster munitions, an acknowledgement of states' responsibility for the explosive remnants they produced, and a commitment to provide resources to areas affected by unexploded submunitions.⁴⁸⁰ The CMC, which now has about 350 member organizations, would play a key role in pushing states hitherto focused on the CCW process to real action.

Cluster Munition Discussions after Protocol V

The increased pressure to produce a cluster munition instrument engendered a reexamination, even within CCW meetings, of the relevance and efficacy of Protocol V and other international humanitarian law mechanisms in dealing with cluster munitions. In 2004, CCW states parties reverted to their 2003 mandate to discuss international humanitarian law and possible preventive measures, including those for submunitions. They would continue discussions through 2006.⁴⁸¹ In March 2005, the GGE distributed to CCW states parties an

⁴⁷⁸ *Ibid.*, p. 223.

⁴⁷⁹ *Ibid.*, pp. 222-223, 236 n. 14; CMC, "Chronology of the International Movement to Ban Cluster Bombs," p. 2, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/08/chronology-of-the-international-movement-to-ban-cluster-bombs.pdf> (accessed October 31, 2010).

⁴⁸⁰ Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 236 n. 14; *Banning Cluster Munitions*, p. 2.

⁴⁸¹ Its discussion mandates from 2003-2006 were almost identical. The 2005 mandate, for example, was to "continue to consider, including through the participation of legal experts, the implementation of existing principles of International Humanitarian Law and to further study, on an open-ended basis, and with particular emphasis on meetings of military and technical experts, possible preventive measures aimed at improving the design of specific types of munitions, *including submunitions*, with a view to minimise the humanitarian risk of these munitions becoming explosive remnants of war"

informative questionnaire entitled “International Humanitarian Law and Explosive Remnants of War,” which was aimed at measuring their understanding and interpretation of relevant principles of that body of law.⁴⁸² Although only 33 of the then 100 CCW states responded to the survey, this limited sample nonetheless provided valuable insight into the views of some of the leading players in the cluster munition debate.⁴⁸³

The survey posed general questions regarding international humanitarian law and ERW, “including submunitions,” and several respondents expressed concerns about cluster munitions in considerable detail. Norway, for example, made a strong argument in favor of stringent restrictions on cluster munitions. In so doing, it noted that due to the wide footprint and high failure rate that characterize cluster munitions, their use posed problems under the principles of discrimination and proportionality that serve as the foundation of international humanitarian law.⁴⁸⁴ Mexico echoed these concerns, claiming that “owing to the scale of their target and the degree of error when they explode [cluster munitions] constitute a permanent hazard ... to the civilian population.”⁴⁸⁵ Other states that raised questions about the legality of cluster munitions, at least when used in populated areas, included Brazil, Ireland, and Switzerland.⁴⁸⁶

Such condemnation of cluster munitions among CCW states was far from unanimous, however. Poland argued that the percentage of unexploded submunitions was “negligible” and that Protocol V already addressed any international humanitarian law problems arising from cluster munitions.⁴⁸⁷ Showing particular skepticism, Russia called into question the key claims of those seeking to restrict the weapons. In a working paper, Russia suggested that certain states had fabricated the humanitarian threat posed by cluster munitions for political

(emphasis added). Meeting of States Parties to the CCW, “Report of the Meeting of States Parties,” CCW/MSP/2004/2, December 13, 2004, p. 4. See also Meeting of States Parties to the CCW, “Report of the Meeting of States Parties,” CCW/MSP/2003/3, February 18, 2004, p. 37 (recording the GGE’s 2004 mandate); Third Review Conference of the CCW, “Final Document: Part I, Report of the Third Review Conference,” CCW/CONF.III/11(Part I), November 7-17, 2006, p. 6 (recording the GGE’s 2006 mandate).

⁴⁸² CCW Group of Governmental Experts, Working Group on Explosive Remnants of War, “International Humanitarian Law and ERW,” CCW/GGE/X/WG.1/WP.2, March 8, 2005.

⁴⁸³ For a complete analysis of the questionnaire responses, see Human Rights Watch, *States Parties’ Responses to ‘International Humanitarian Law and ERW’ Questionnaire*, updated March 2006, <http://hrw.org/backgrounder/arms/arms1105/arms1105.pdf>.

⁴⁸⁴ Response from Norway, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW,” CCW/GGE/XI/WP5, July 29, 2005.

⁴⁸⁵ Response from Mexico, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW,” CCW/GGE/XIII/WG.1/WP.5, February 10, 2006.

⁴⁸⁶ Human Rights Watch, *States Parties’ Responses to ‘International Humanitarian Law and ERW’ Questionnaire*, pp. 2-3.

⁴⁸⁷ Response from Poland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XI/WG.1/WP.3, July 4, 2005, pp. 1-2.

purposes and dismissed claims that these weapons are particularly harmful.⁴⁸⁸ Italy called the use of cluster munitions within the bounds of international humanitarian law a “right.”⁴⁸⁹

Other states maintained silence on the matter. For instance, in its comparatively long reply to the questionnaire, the United States did not once mention cluster munitions.⁴⁹⁰ The same was true of China, the United Kingdom, and a number of other user, producer, and stockpiler nations. These responses suggested that military powers with an interest in cluster munitions would continue to use the consensual process to impede development of a CCW protocol on the weapons.

The Tide Turns: 2006

The year 2006 marked a turning point in international determination to confront cluster munitions seriously. As will be discussed in the next chapter, several states adopted strong national measures against cluster munitions. In particular, Belgium legislatively banned the weapons, and Norway issued a moratorium on their use.⁴⁹¹ These initiatives laid the groundwork for states to take action outside the CCW forum.

The 2006 conflict between Israel and Hezbollah intensified pressure on states to act decisively to restrict cluster munitions. In July and August, Israel blanketed southern Lebanon with millions of submunitions, primarily in the final days of the war as ceasefire negotiations were underway.⁴⁹² The United Nations’ humanitarian coordinator in Lebanon, David Shearer, described the attacks as “outrageous” and said they “defied belief.”⁴⁹³ The United Nations’ then emergency relief coordinator and under-secretary-general for humanitarian affairs, Jan Egeland, called Israel’s use of cluster munitions “completely immoral.”⁴⁹⁴

⁴⁸⁸ Russia, “Cluster Weapons—A Real Humanitarian Threat, or an Imaginary One?” CCW/GGE/XIII/WG.1/WP.11, March 6-10, 2006, p. 3.

⁴⁸⁹ Response from Italy, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XIII/WG.1/WP.1, February 10, 2006, p. 1.

⁴⁹⁰ Response from the United States, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW,” CCW/GGE/XI/WG.1/WP.4, July 25, 2005.

⁴⁹¹ Loi réglant des activités économiques et individuelles avec des armes (“Law regulating economic activities and individual use of weapons”), *Le Moniteur Belge*, June 9, 2006; *Banning Cluster Munitions*, p. 135. Norway extended its initial moratorium in November 2006. “Norway to Take the Lead in Efforts to Achieve an International Ban on Cluster Munitions,” Norwegian Ministry of Foreign Affairs press release, no. 142/06, November 3, 2006, <http://www.regjeringen.no/mobil/en/dep/ud/presesenter/pressemeldinger/2006/Norway-to-take-the-lead-in-efforts-to-achieve-an-international-ban-on-cluster-munitions.html?id=424460> (accessed October 30, 2010).

⁴⁹² See generally Human Rights Watch, *Flooding South Lebanon*.

⁴⁹³ “UN Calls Israel’s use of Cluster Bombs in Lebanon ‘Outrageous,’” *Ha’aretz*, September 19, 2006.

⁴⁹⁴ “UN Slams Israel as Unexploded Cluster Bombs Discovered,” *Irish Examiner*, August 31, 2006.

In the months following the conflict, states began to advocate more strongly for an international instrument on cluster munitions. At a September CCW meeting, Sweden and Austria took the lead in introducing for consideration at the upcoming Third Review Conference a draft mandate to begin negotiations on cluster munitions.⁴⁹⁵ In October Norway responded to the tragedy in Lebanon by pledging to play a leadership role in the creation of new international law banning cluster munitions. It described the suffering caused by cluster munitions as unacceptable and explained, "This is why Norway will take the lead—together with other like-minded countries and international humanitarian actors—to put in place an international prohibition against cluster munitions."⁴⁹⁶ This statement raised for the first time the possibility of going outside the CCW forum to solve the problems of cluster munitions.⁴⁹⁷

As the CCW's Third Review Conference opened in November 2006, other voices lent their support for a legal instrument to regulate or ban the weapon. Urging states to institute a "freeze" on cluster munition use, UN Secretary-General Kofi Annan said in a message to CCW states parties:

[R]ecent events show that the atrocious, inhumane effects of these weapons—both at the time of their use and after conflict ends—must be addressed immediately, so that civilian populations can start rebuilding their lives. I urge States Parties to the CCW to make full use of this framework to devise effective norms that will reduce and ultimately eliminate the horrendous humanitarian and development impact of these weapons.⁴⁹⁸

The ICRC "called for an immediate end to the use of inaccurate and unreliable cluster munitions and renewed its call for a prohibition on the use of all cluster munitions in populated areas."⁴⁹⁹ Human Rights Watch told CCW delegates, "We should seize this moment as a matter of great urgency and vital importance. It is time to begin the process that will result in a new international instrument on cluster munitions."⁵⁰⁰

⁴⁹⁵ Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 224.

⁴⁹⁶ Minister of Foreign Affairs Jonas Gahr Støre, Norwegian Ministry of Foreign Affairs, "Minister of Foreign Affairs Reply to Olav Akselsen's (Labour Party) Question Regarding the War in Lebanon and the Use of Cluster Munitions," October 24, 2006, http://www.odin.dep.no/ud/english/news/speeches/minister_a/032171-090682/dok-bu.html (accessed October 24, 2010).

⁴⁹⁷ Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 225.

⁴⁹⁸ "Message of the UN Secretary General to the Third Review Conference of the Convention on Certain Conventional Weapons," November 7, 2006.

⁴⁹⁹ "Cluster Munitions: ICRC Calls for Urgent International Action," ICRC press release, no. 06/120, November 6, 2006.

⁵⁰⁰ Statement by Steve Goose, director of the Arms Division of Human Rights Watch and co-chair of the Cluster Munition Coalition, to the Third Review Conference of the CCW, "Convention on Conventional Weapons (CCW): Time to Begin a New International Instrument on Cluster Munitions," Geneva, November 8, 2006.

Many states parties and the CMC saw the Review Conference as an opportunity to make progress toward a legally binding instrument on cluster munitions, but major military powers continued to resist strenuously. Before the conference even started, 30 countries submitted a proposed mandate to begin negotiations on a cluster munition protocol in 2007.⁵⁰¹ When it came up for debate, however, several states, including China, Russia, the United Kingdom, and the United States, opposed it. Ronald Bettauer, the head of the US delegation, for example, emphasized his country's stance that 30 years of discussions on cluster munitions had failed to provide a "persuasive case" in favor of restricting their use. He argued that such restrictions "could well lead to more suffering and less discrimination."⁵⁰²

Because of the CCW's consensual process, efforts to address cluster munitions seriously had no chance of succeeding. At a closing press conference, Human Rights Watch said that the CCW review conference "lived down to our lowest expectations." It declared, "The tyranny of consensus doomed the proposal for future cluster munition negotiations in the CCW."⁵⁰³ Due to the refusal of certain states to confront the issue of cluster munitions decisively, the conference agreed only to continue discussions, not to start negotiations for a new protocol.⁵⁰⁴

While the Review Conference exemplified the shortcomings of the CCW, it propelled states to pursue the possibility of creating a cluster munition treaty in an independent forum. On the last day of the conference, 25 states expressed formal support for a mandate to negotiate a ban on cluster munitions. Presented by Sweden, their Declaration on Cluster Munitions called for a prohibition on use in populated areas, a prohibition on "development, production, stockpiling, transfer, and use of cluster munitions that pose serious

<http://www.hrw.org/en/news/2006/11/08/convention-conventional-weapons-ccw-time-begin-new-international-instrument-cluster->

⁵⁰¹ "Proposal for a Mandate to Negotiate a Legally-Binding Instrument that Addresses the Humanitarian Concerns Posed by Cluster Munitions," presented by Austria, Holy See, Ireland, Mexico, New Zealand, and Sweden, CCW/CONF.III/WP.1, October 6, 2006. The proposal was also formally supported by Argentina, Bosnia and Herzegovina, Chile, Costa Rica, Czech Republic, Denmark, Germany, Guatemala, Hungary, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Peru, Portugal, Serbia, Slovakia, Slovenia, and Switzerland. See Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 237 n. 23.

⁵⁰² Ronald Bettauer, head of the US Delegation, "Opening Statement to the Third Review Conference of the Convention on Certain Conventional Weapons," November 7, 2006, <http://geneva.usmission.gov/2006/11/07/opening-statement-nov07-2006/> (accessed October 30, 2010).

⁵⁰³ Steve Goose, director of the Arms Division of Human Rights Watch, "Convention on Conventional Weapons (CCW): Opening Remarks at Cluster Munition Coalition Press Conference [on Conclusion of the Third Review Conference]," November 17, 2006, <http://www.hrw.org/en/news/2006/11/17/convention-conventional-weapons-ccw-opening-remarks-cluster-munition-coalition-press>.

⁵⁰⁴ The mandate for 2007 required states parties: "To convene, as a matter of urgency, an intersessional meeting of governmental experts: To consider further the application and implementation of existing international humanitarian law, with particular focus on cluster munitions, including the factors affecting their reliability and their technical and design characteristics, with a view to minimizing the humanitarian impact of the use of these munitions." Third Review Conference of the CCW, "Final Document: Part II, Final Declaration," CCW/CONF.III/11 (Part II), November 7-17, 2006, p. 6 (emphasis added).

humanitarian hazards,” and the “destruction of stockpiles of cluster munitions that pose serious humanitarian hazards.”⁵⁰⁵

When their call went unheeded, Norway pledged to initiate an independent treaty process, akin to the Ottawa Process that had produced the Mine Ban Treaty, to develop a “ban on cluster munitions that have unacceptable humanitarian consequences.”⁵⁰⁶ Human Rights Watch described this “watershed moment” as “the only credible process for alleviating the suffering caused by cluster munitions.”⁵⁰⁷ The Oslo Process born with Norway’s statement would culminate in 2008 with the negotiation, adoption, and signing of the Convention on Cluster Munitions.

Conclusion

From 2001-2006, fitful discussions by CCW states parties failed to produce a legally binding protocol that would govern cluster munitions both during attacks and afterwards. The 2003 Protocol V contributed to the body of international humanitarian law, but its regulations were qualified and partial, addressing the aftereffects of weapons without considering targeting. Even the combination of CCW Protocol V and the Geneva Conventions’ Additional Protocol I’s restrictions on attacks did not fully address the range of problems associated with cluster munitions, particularly use, proliferation, and the need for remedial measures. Progress on these issues required alternative measures—both domestic and international—outside of the CCW process.

CCW states parties adopted a mandate to negotiate “a proposal” on cluster munitions only in November 2007, after it became clear the Convention on Cluster Munitions would become a reality. The states parties sought to dilute the power of the new convention by proposing weak regulations as an alternative. Chapter 9 of this book analyzes the recent discussions in more depth, but as the CCW’s history shows, its consensual process dominated by those who place military considerations above humanitarian concerns is ill suited to negotiate a strong and comprehensive instrument in a timely manner.

⁵⁰⁵ Third Review Conference of the CCW, “Final Document: Part III, Documents of the Third Review Conference,” CCW/CONF.III/11 (Part III), November 7-17, 2006, p. 41. The signatories to the declaration were: Austria, Belgium, Bosnia-Herzegovina, Croatia, Costa Rica, the Czech Republic, Denmark, Germany, the Holy See, Hungary, Ireland, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Sweden, and Switzerland.

⁵⁰⁶ “Norway Takes the Initiative for a Ban on Cluster Munitions,” Norwegian Ministry of Foreign Affairs press release, no. 149/06, November 17, 2006, <http://www.regjeringen.no/en/dep/ud/press/news/2006/Norway-takes-the-initiative-for-a-ban-on-cluster-munitions.html?id=436868> (accessed October 30, 2010).

⁵⁰⁷ Steve Goose, director of the Arms Division of Human Rights Watch, “Convention on Conventional Weapons (CCW): Statement during Closing Plenary [of the Third Review Conference],” November 17, 2006, <http://www.hrw.org/en/news/2006/11/17/convention-conventional-weapons-ccw-statement-during-closing-plenary>.

VI. From Regulation to Ban: National Measures to Govern Cluster Munitions

As international efforts to act on cluster munitions within the CCW forum were foundering, actions were underway at the national level. Initially, individual states started to regulate aspects of the use, production, trade, or stockpiling of cluster munitions. In so doing, they accomplished more than the CCW process had because they created laws and policies devoted specifically to cluster munitions. Regulations constituted only a partial solution, however, and states later turned their attention to a ban. These national initiatives—while a country-by-country approach to a matter of global concern—laid the foundation for progress at the international level.

National measures could not by themselves eliminate the humanitarian harm caused by cluster munitions, but they provided an important bridge from CCW discussions to the Oslo Process. They increased awareness of the civilian cost of cluster munitions. They proved that states were able to take concrete steps to govern the weapons. Most important, they shifted the terms of the debate from regulation to ban. In these respects domestic initiatives paved the way for the successful negotiations that would follow.

National Regulations of Cluster Munitions

Likely influenced by the CCW meetings on ERW, early national measures focused on cluster munitions' effects after attacks.⁵⁰⁸ The initiatives reflected recognition of the humanitarian costs of unexploded submunitions and increased after the adoption of CCW Protocol V, suggesting that states knew the protocol had limitations. Most national measures only addressed the failure rates or technical characteristics of cluster munitions. These criteria usually failed to take into account the harm from cluster munitions at the time of attack, and in any event, failure rates are poor standards for regulation because they are virtually always higher in combat than in tests. Domestic measures based on this kind of regulatory approach would therefore be unable to solve all of the problems posed by cluster munitions.

The United States, perhaps the biggest user, producer, and stockpiler of cluster munitions, adopted one of the first key regulations of the weapons even prior to the negotiation of

⁵⁰⁸ European countries, many of whom would sign the 2006 declaration calling for CCW states parties to establish a prohibition, took the lead presumably because they were among the world's users, producers, and stockpilers. Twenty-one of the 25 signatories of the declaration came from Europe. "Documents of the Third Review Conference: Final Document," CCW/CONF.III/11 (Part III), November 7-17, 2006, p. 41.

Protocol V. In 2001, in the last ten days of the Clinton Administration, then-US Secretary of Defense William Cohen issued a policy memorandum regarding cluster munition production. It stated that all US submunitions reaching a production decision in fiscal year 2005 and beyond must have a dud rate of less than 1 percent.⁵⁰⁹ This policy did not affect the hundreds of millions of submunitions exceeding this rate already in US arsenals, but it would end production of most models.⁵¹⁰ It also set the stage for future regulations based on failure rates.

Several countries followed the lead of the United States and implemented comparable policies a few years later, after the adoption of Protocol V. These states sought to reduce proliferation by regulating production and transfer, particularly of cluster munitions that left large numbers of duds. In 2004, Denmark announced a temporary ban on the use and procurement of submunitions that had a failure rate of greater than 1 percent or were not equipped with self-destruction or self-neutralization devices.⁵¹¹ Poland stated in 2005 that it required a 2.5 percent failure rate threshold as part of its cluster munition procurement policy.⁵¹² The German Bundestag called in 2006 for an end to the production, export, and stockpiling of cluster munitions with more than a 1 percent dud rate.⁵¹³ Because such measures were based on a failure rate approach, they did not guarantee an end to the spread of cluster munitions. Instead they merely sought to restrict the worst offenders.

Countries, usually under executive branch orders, also started to regulate stockpiling during these years. Some of the states removed older and more unreliable models of cluster munitions from service, and others slated munitions for destruction. These states included Canada, the Czech Republic, Denmark, Germany, the Netherlands, Norway, and the United Kingdom.⁵¹⁴ While laudable, these efforts represented only partial steps and accepted the

⁵⁰⁹ US Secretary of Defense William Cohen, "Memorandum for the Secretaries of the Military Departments, Subject: DoD Policy on Submunition Reliability (U)," January 10, 2001.

⁵¹⁰ *Banning Cluster Munitions*, p. 257.

⁵¹¹ Denmark added that at the time its procurement plans did not include cluster munitions. Communication from the Danish Ministry of Defense, Division of International Law and Security Cooperation, to Pax Christi Netherlands, February 16, 2005 (cited in *Banning Cluster Munitions*, p. 68).

⁵¹² Communication from the Polish Ministry of Defense, to Pax Christi Netherlands, February 14, 2005 (cited in Human Rights Watch, *Survey of Cluster Munition Policy and Practice*, p. 29). The information was provided to Pax Christi Netherlands with the proviso that the "content of the paper does not necessarily reflect the official position of Poland."

⁵¹³ Christian Democratic Party (CDU)/Christian Social Union (CSU), and Social Democratic Party (SDP), "Gefährliche Streumunition verbieten—Das humanitäre Völkerrecht weiterentwickeln" ("Prohibition of Dangerous Cluster Munitions—Further Development of International Humanitarian Law"), Motion, Bundestag, Sixteenth Electoral Term, September 28, 2006 (cited in *Banning Cluster Munitions*, p. 79).

⁵¹⁴ See, for example, Letter from Canadian Foreign Minister Peter MacKay, Foreign Affairs and International Trade, to Mines Action Canada, February 13, 2007; Email communication from Jakub Cimoradsky, International Law Department, Czech Republic Ministry of Defense, August 25, 2006; Communication from the Danish Ministry of Defense, Division of International Law and Security Cooperation, to Pax Christi Netherlands, February 16, 2005; Statement by Germany to the CCW GGE, "Reliability and Use of Cluster Munitions with regard to Explosive Remnants of War," Geneva, August 2, 2005, p. 3;

notion of maintaining large stocks of other types of cluster munitions known to cause excessive harm.⁵¹⁵

Some states demonstrated, through the legislative process, support for a legally binding international instrument on cluster munitions. The Danish Parliament in May 2004 encouraged its government to pursue “efforts in all international fora to establish as quickly as possible an internationally binding legal ban against all kinds of cluster munitions not equipped with self-destruction, self-deactivation, or self-neutralization devices.”⁵¹⁶ In July 2006, the Austrian Parliament passed a resolution calling on its government to support a new international treaty against cluster munitions with high failure rates.⁵¹⁷ The German Bundestag adopted a motion on the “Prohibition of Dangerous Cluster Munitions” in September 2006; it urged Germany to work toward an international treaty for “a comprehensive internationally binding and verifiable prohibition” on the production and export of all cluster munitions with failure rates over 1 percent.⁵¹⁸ Because states made these resolutions before the Oslo Process began, they likely were envisioning a regulatory CCW protocol when they called for a new instrument. The calls to action demonstrated growing pressure to achieve an international instrument. They did not, however, advance to the level of demanding an absolute ban.

National Bans on Cluster Munitions

Beginning in 2006, even before the war in Lebanon and the failed CCW Review Conference, there were domestic initiatives not just to limit cluster munitions but to ban them, in whole or in part. As opposition to the weapons grew, states focused more on the humanitarian

Communication from the Dutch Ministry of Foreign Affairs, to Pax Christi Netherlands, May 2005; Joris Janssen, “Dutch Plan to Update Cluster Weapons,” *Jane’s Defence Weekly*, October 19, 2005; Norway, “National Interpretation and Implementation of International Humanitarian Law with regard to the Risk of Explosive Remnants of War,” CCW/GGE/VI/WG.1/WP.3, November 24, 2003, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/652/97/pdf/G0365297.pdf?OpenElement> (accessed August 22, 2010); Adam Ingram, statement, February 1, 2007, *Parliamentary Debates*, Commons, vol. 456 (2006-2007), col. 503W, <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070201/text/70201w0019.htm#07020159003359> (accessed November 4, 2010); United Kingdom, “Military Utility of Cluster Munitions,” CCW/GGE/X/WG.1/WP.1, February 21, 2005, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/604/14/pdf/G0560414.pdf?OpenElement> (accessed August 22, 2010), p.3 (all cited in Human Rights Watch, *Survey of Cluster Munition Policy and Practice*, February 2007 or *Banning Cluster Munitions*). In addition, Switzerland reported destroying stockpiles between 1997 and 2000, before cluster munitions attracted significant international attention. Letter from Micheline Calmy-Rey, federal councilor, Swiss Federal Department of Foreign Affairs, to Human Rights Watch, March 5, 2009.

⁵¹⁵ States sometimes destroyed cluster munitions because the weapons were obsolete or unreliable rather than because of the risk of humanitarian harm.

⁵¹⁶ Decision of the Folketing (Danish parliament), Inquiry F 56 on Cluster Munitions, Motion V 106, May 27, 2004 (unofficial translation) (cited in *Banning Cluster Munitions*, p. 68).

⁵¹⁷ *Banning Cluster Munitions*, p. 35.

⁵¹⁸ The motion also called for national actions regarding stockpiling, production and export of such munitions and an examination of whether cluster munitions might be wholly replaced by “alternative munitions” in the foreseeable future. CDU/CSU and SPD, “Prohibition of Dangerous Cluster Munitions,” Motion, Bundestag.

problems of cluster munitions and less on their supposed military benefits. A ban better aligns with this prioritization because it eliminates cluster munitions entirely.

Belgium and Norway broke new ground by thinking in terms of prohibitions instead of partial regulations. Belgium became the first state to have a statutory prohibition of cluster munitions, banning use, production, stockpiling, and trade and setting a three-year deadline for stockpile destruction; it was adopted in March 2006 and entered into force in June 2006.⁵¹⁹ In May 2006, the Norwegian Ministry of Defense instituted a national moratorium on use of cluster munitions until it undertook further testing of its cluster munitions' failure rates.⁵²⁰ The following November, immediately before the CCW Third Review Conference and after conducting tests, Norway announced that it would extend its moratorium until the adoption of a cluster munition convention. It stated that "the Norwegian moratorium is important in itself, but it is also important in terms of giving Norway the necessary international credibility now that the Government has decided to work for a ban on cluster munitions that cause great humanitarian suffering."⁵²¹ By the end of the conference, Norway had pledged to lead an independent process to prohibit use, production, transfer, and stockpiling of cluster munitions.⁵²²

After the start of the Oslo Process in February 2007, the number of states pursuing prohibitions on cluster munitions at the national level significantly increased. With a law that entered into force in January 2008, Austria became the second country to enact comprehensive national legislation on cluster munitions. The Austrian statute prohibited use, production, transfer, and stockpiling and required stockpile destruction within three years.⁵²³

⁵¹⁹ "Law regulating economic activities and individual use of weapons, *Le Moniteur Belge*, arts. 3(1)(4) (classifying cluster munitions as prohibited weapon), 8 (banning production, transfer, and stockpiling), and 27(2) (banning use and other activities and requiring stockpile destruction). For more information on the Belgium's legislation, see *Banning Cluster Munitions*, p. 39.

⁵²⁰ Norway officially announced its moratorium at the June 2006 CCW GGE meeting. *Banning Cluster Munitions*, p. 135. Movement in this direction began in 2002 when the Ministry of Defense ordered the armed forces not to use air-dropped cluster munitions without the ministry's consent and prohibited the acquisition of cluster munitions with "high dud rates/without self-destruct mechanisms." Norway, "National Interpretation and Implementation of International Humanitarian Law with Regard to the Risk of Explosive Remnants of War," CCW/GGE/VI/WG.1/WP.3, November 24, 2003, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/652/97/pdf/G0365297.pdf?OpenElement>, (accessed August 20, 2010), p. 2. In 2003, Norway issued a decision not to use cluster munitions, specifically in connection with its military participation in Afghanistan. For more information on the evolution of Norway's position, see *Banning Cluster Munitions*, pp. 134-136.

⁵²¹ "Norway to Take the Lead in Efforts to Achieve an International Ban on Cluster Munitions," Norwegian Ministry of Foreign Affairs press release, November 3, 2006.

⁵²² Statement by Ambassador Steffen Kongstad of Norway to the Third Review Conference of the CCW, Geneva, November 17, 2006; "Norway Takes the Initiative for a Ban on Cluster Munitions," Norwegian Ministry of Foreign Affairs press release, November 17, 2006.

⁵²³ Federal Law on the Prohibition on Cluster Munitions, *Austrian Federal Law Gazette*, no. 12/2008. The law was amended after the adoption of the Convention on Cluster Munitions. Federal Law on the Prohibition on Cluster Munitions, *Austrian Federal Law Gazette*, no. 12/2008, as amended by *Austrian Federal Law Gazette* I, no. 41/2009.

Other states followed Norway's lead and announced moratoria, generally until conclusion of a new treaty on cluster munitions. Unlike their predecessors who called for a legally binding instrument in the context of CCW discussions, these states were referring to the ban convention toward which Oslo Process states were working. In May 2007, Hungary announced a moratorium prohibiting use of cluster munitions until the adoption of a legally binding instrument.⁵²⁴ The next month, the Netherlands initiated a temporary suspension of cluster munition use although it did not specify an end date.⁵²⁵ In December 2007, Croatia instituted a moratorium on use, production, and transfer.⁵²⁶ Finally in February 2008, Bosnia and Herzegovina adopted a moratorium on cluster munition use, and Bulgaria pledged to prohibit use until entry into force of a new treaty.⁵²⁷ The plethora of prohibitions showed there was support for the ban being negotiated and applied ongoing pressure to push the Oslo Process forward.

Some states and state agencies also adopted prohibitions on investment in the production of cluster munitions. In 2004, Norway's Minister of Finance classified cluster munitions as inhumane weapons, which excluded them from investment under the Norwegian Government Pension Fund's ethical guidelines.⁵²⁸ In March 2007, Belgium became the first country to pass a law making investment in companies producing cluster munitions a criminal act.⁵²⁹ Meanwhile, several pension funds, including those from Ireland, the Netherlands, and New Zealand, as well as private companies began withdrawing investments from companies involved in the production of cluster munitions.⁵³⁰ These steps

⁵²⁴ Women's International League for Peace and Freedom (WILPF), "Report from the Lima Conference on Cluster Munitions, 23-25 May 2007," <http://www.wilpfinternational.org/disarmament/clustermunitions/LIMA/limareport.html#statements> (accessed August 22, 2010).

⁵²⁵ "Netherlands Suspends Use of Cluster Munitions, but Questions Remain," CMC press release, June 27, 2007, <http://www.stopclustermunitions.org/news/?id=1638> (accessed October 30, 2010); Mike Corder, "Dutch Military Ordered to Stop Using Cluster Bombs until Further Notice," Associated Press, June 26, 2007, <http://www.wilpfinternational.org/disarmament/clustermunitions/News/June2007News/June26Netherlands2.html> (accessed October 30, 2010).

⁵²⁶ *Banning Cluster Munitions*, p. 65.

⁵²⁷ Katherine Harrison, WILPF, "Report from the Wellington Conference on Cluster Munitions," March 2008, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/05/wilpf-report-on-wellington-conference-18-22-february.pdf> (accessed October 30, 2010), p.29 [hereinafter "WILPF Report from the Wellington Conference"]; Statement by Ambassador Petko Draganov, Permanent Mission of the Republic of Bulgaria, to the United Nations in Geneva, Conference on Disarmament, Geneva, February 14, 2008 (cited in *Banning Cluster Munitions*, p. 47).

⁵²⁸ "A Further Eight Companies Excluded from the Petroleum Fund," Norwegian Ministry of Finance press release, no. 57/2005, September 2, 2005, http://www.regjeringen.no/en/archive/Bondeviks-2nd-Government/ministry-of-finance/Nyheter-og-pressemeldinger/2005/a_further_eight_companies_excluded.html?id=256695# (accessed October 30, 2010).

⁵²⁹ Loi interdisant le financement de la fabrication, de l'utilisation ou de la détention de mines antipersonnel et de sous-munitions ("Act on the prohibition of the financing of production, use and possession of antipersonnel mines and submunitions"), *Le Moniteur Belge*, April 26, 2007, www.stopexplosiveinvestments.org/legislation (accessed October 31, 2010), p. 22122.

⁵³⁰ Deaglán De Bréadún, "Pension Fund to Remove Money from Bomb Firms," *Irish Times*, March 3, 2008, <http://www.irishtimes.com/newspaper/ireland/2008/0319/1205706670488.html> (accessed August 22, 2010); Aaron Gray-

targeted proliferation by denying funds to manufacturers and demonstrated state support for an ultimate prohibition on production.⁵³¹

Conclusion

National measures played a critical role in the process of achieving a ban on cluster munitions by raising awareness of humanitarian concerns, showing that concrete action was possible, and changing the focus of discussions from regulation to ban. Ad hoc domestic initiatives alone, however, could not solve the global problems of cluster munitions. Regulations did not cover all types of cluster munitions, and bans applied only to some countries. While national measures laid the groundwork, a comprehensive solution ultimately required a new international process.

Block, "ABN Amro Shareholder Dutch Pension Fund ABP Awaits Proposed Barclays Deal Detail," *AFX News Limited*, April 12, 2007, <http://www.forbes.com/feeds/afx/2007/04/12/afx3605851.html> (accessed August 22, 2010); Toby Sterling, "Massive Dutch Pension Fund Drops Investments in Land Mines, to Disclose All Holdings," Associated Press, April 6, 2007, <http://legacy.signonsandiego.com/news/business/20070406-0931-netherlands-pensionfundethics.html> (accessed August 22, 2010); "GNZS Announce Decision on Cluster Munitions," New Zealand Superannuation Fund press release, April 4, 2008, <http://www.nzsuperfund.co.nz/news.asp?pageID=2145831983&RefId=2141736138> (accessed August 22, 2010); Hugh Wheelan, "Axa Pulls Insurance Assets From Cluster Bomb Makers, Handicap International and Amnesty International Will Work with Group to Identify Manufacturers," *Responsible Investor*, July 27, 2007, http://www.responsible-investor.com/home/article/axa_pulls_insurance_assets_from_cluster_bomb_makers/ (accessed August 22, 2010) (Axa is a French insurance company) (sources on Ireland, the Netherlands, and Axa cited in *Banning Cluster Munitions*, pp. 93, 125, 75). The Swedish pension fund AP 7 would similarly withdraw investments immediately after adoption of the Convention on Cluster Munitions; four other funds followed suit in September 2008. Malin Rising, "Swedish Pension Fund AP7 Sells All Holdings in Companies Making Cluster Bombs," Associated Press, June 1, 2008; Hugh Wheelan, "Sweden's AP Funds Sell Off Millions in Cluster Bomb Company Shares," *Responsible Investor*, September 15, 2008, <http://www.responsible-investor.com/home/article/cluster3/> (accessed August 22, 2010).

⁵³¹ States took other measures during the Oslo Process as well. For example, in October 2007, Albania announced it would not produce or trade cluster munitions, and Montenegro and Uganda announced they would destroy their stockpiles. "Survivors and States Join Forces against Cluster Bombs," CMC press release, October 4, 2007, <http://www.stopclustermunitions.org/news/?id=1635> (accessed August 22, 2010). Two states that decided not to sign the Convention on Cluster Munitions nonetheless instituted moratoria on transfer. As will be discussed in Chapter 9, the United States enacted a moratorium on exports of cluster munitions with a less than 1 percent failure rate. Although the prohibition was tied to a failure rate, it banned export of all existing US cluster munitions except for Sensor Fuzed Weapons. Shortly before the signing ceremony of the Convention on Cluster Munitions in Oslo in December 2008, Singapore imposed an indefinite moratorium on the export of cluster munitions that would take effect immediately. Singapore's Ministry of Foreign Affairs and Ministry of Defense stated, "The imposition of an indefinite export moratorium will ensure that Singapore's cluster munitions will not be transferred to other parties who might use them in an irresponsible and indiscriminate manner. Through this imposition, we help stem the proliferation of cluster munitions." US Consolidated Appropriations Act, 2008, 121 Stat. 1844, Public Law 110-161, December 26, 2007, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ161.110.pdf (accessed September 19, 2010), sec. 646(b); "Singapore Imposes a Moratorium on the Export of Cluster Munitions," Ministry of Foreign Affairs and Ministry of Defense press statement, November 26, 2008, app.mfa.gov.sg/2006/press/view_press.asp?post_id=4543 (accessed October 30, 2010).

VII. The Oslo Process

The combination of the inability of the CCW forum adequately to address cluster munitions and the momentum created by national measures convinced Norway to initiate an alternative process. In so doing, it drew inspiration from the groundbreaking Ottawa Process, which exemplified the power of collaboration between governments and civil society. In 1996, a group of states frustrated by the weakness of the CCW's new Amended Protocol II on landmines moved discussions of a new instrument outside of the UN diplomatic structure.⁵³² The ICBL, a coalition of NGOs, urged them on. The Mine Ban Treaty that resulted received praise as the first true humanitarian disarmament convention, an instrument that addressed arms control from a civilian perspective. Steve Goose of Human Rights Watch asked in a 2008 essay, "Can the phoenix rise from the ashes—again? Can lightning strike twice? Can the Oslo Process on cluster munitions replicate the Ottawa Process on antipersonnel mines?"⁵³³ The answer was a resounding yes. In fact, the Oslo Process built on the Ottawa Process to establish even more expansive legal protections for civilians in times of armed conflict.

The strength of the Convention on Cluster Munitions is a product of the inclusive, independent, and intensive nature of the Oslo Process.⁵³⁴ Forward-looking states played a leadership role, countries from around the world offered their support, and civil society and international organizations applied constant pressure. These parties convened in an independent venue that allowed for the establishment of different ground rules. By setting a deadline for completion of their work, defining clear goals at the outset, and dispensing with the constraints of consensus, states were able to keep to a strict timeline and to maintain high standards. Together, these characteristics made the Oslo Process effective and efficient. It produced not only a convention, but also one that was absolute and comprehensive.

⁵³² While not negotiated in a UN forum, the Mine Ban Treaty is integrated into UN diplomatic structures the same as any treaty. For example, the UN secretary-general serves as depository and plays a key role in the compliance mechanism, and the United Nations convenes and facilitates annual meetings and Review Conferences. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Treaty), adopted September 18, 1997, 2056 U.N.T.S. 211, entered into force March 1, 1999, arts. 8, 12, and 21.

⁵³³ Goose, "Cluster Munitions in the Crosshairs," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 217.

⁵³⁴ Much of the material about the Oslo Process in this chapter comes from *Banning Cluster Munitions*. For a detailed account of the Oslo Process, see John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (Geneva: UNIDIR, 2009). For the history of discussions and negotiations of specific articles, see Gro Nystuen and Stuart Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary* (Oxford: Oxford University Press, 2010).

Participants in the Process

Like the Ottawa Process, the success of the Oslo Process hinged on the close partnership of committed states, civil society (coordinated by the CMC), the ICRC, and UN agencies.

States

A small Core Group served as the driving force behind the Oslo Process. While Norway initiated the process in late 2006, it soon identified a key group of allies: Austria, the Holy See, Ireland, Mexico, New Zealand, and Peru. The group consisted of small to midsize powers but included three of the stockpilers of cluster munitions (Austria, Norway, and Peru).⁵³⁵ The Core Group provided leadership, especially in drafting of the text, and the resources needed to keep the process going. Austria, Ireland, New Zealand, and Peru would join Norway in hosting conferences to develop and negotiate the convention from 2007 to 2008.

An extremely impressive number and range of states participated in at least some part of the Oslo Process. The Vienna Conference attracted 138 states, the most participants for one meeting, while conferences in Wellington and Dublin were attended by more than 100 countries each.⁵³⁶ The participants represented six continents, and thanks to the UN Development Program (UNDP) sponsorship,⁵³⁷ large numbers of developing as well as developed states. More than two dozen affected states came, and most, such as Laos and Lebanon, argued for strong humanitarian provisions, including an absolute ban and user state responsibility for clearance.⁵³⁸

Providing a different perspective, over the course of the process, more than half of the world's stockpilers participated as did more than two-thirds of the users and producers, including France, the Netherlands, and the United Kingdom, one of the biggest users of

⁵³⁵ For list of countries that have stockpiled, see *Cluster Munition Monitor 2010*, p. 17.

⁵³⁶ Representatives from 106 countries came to Wellington and representatives from 107 to Dublin. See CMC, "CMC Report on the Vienna Conference on Cluster Munitions," <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/05/report-on-the-vienna-conference-5-7-december.pdf> (accessed October 20, 2010), p. 1 [hereinafter "CMC Report on the Vienna Conference"]; Aotearoa New Zealand Cluster Munition Coalition (ANZCMC), "Ban Cluster Bombs: Report on Activities, Wellington Conference on Cluster Munitions," April 2008, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/07/anzcmc-wellington-report.pdf> (accessed October 20, 2010), p. 1 [hereinafter ANZCMC, "Report on Wellington Conference"]; Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, "List of Delegates," CCM/INF/1, May 30, 2008, <http://www.clustermunitionsdublin.ie/pdf/CMWebNewListofDelegates.pdf> (accessed October 20, 2010).

⁵³⁷ Borrie, *Unacceptable Harm*, p. 164.

⁵³⁸ For example, at least 26 of 32 affected countries attended the Vienna Conference. Compare Human Rights Watch, *Cluster Munition Information Chart*, November 3, 2010, with Vienna Conference on Cluster Munitions, "Registration, as of 5 December 2007." Two more states registered after the publication of the latter list.

cluster munitions.⁵³⁹ Some of these military powers initially called for elements that would have weakened the convention, but in the end, agreed to its comprehensive prohibitions. Other states fell into none of these categories; their presence showed that this issue generated widespread international attention and priority and that a worldwide movement for a cluster munitions ban existed.

Certain large military powers did not join the Oslo Process. They included major users, producers, or stockpilers, such as China, Israel, Russia, and the United States. While their support might have increased the influence of the final convention, their absence may have led to a stronger product. All of these states had previously interfered with progress on cluster munition negotiations at CCW meetings,⁵⁴⁰ and the United States actively lobbied against some elements of the Convention on Cluster Munitions from outside.⁵⁴¹ Some critics have dismissed the convention because it does not have the support of these nations.⁵⁴² Many users, producers, and stockpilers signed the convention, however, and many are allies of the United States, which will make it politically difficult for the world's biggest cluster munition user to use the weapons in any future joint military operations. The convention's high standard so stigmatizes cluster munitions that the chance of future use is significantly diminished.

Civil Society

While states had actual decision-making power, civil society, especially the CMC, greatly influenced the choices they made in a variety of ways. The CMC, whose role in bringing about the ban is specifically mentioned in the convention, can rightfully be called the engine that drove the Oslo Process.

CMC representatives participated actively in all of the treaty conferences. In this capacity, they made frequent interventions, or statements, about the substance of the treaty, making

⁵³⁹ Compare Human Rights Watch, *Cluster Munition Information Chart*, November 3, 2010, with Vienna Conference on Cluster Munitions, "Registration, as of 5 December 2007." A comparison of these documents shows that, in Vienna alone, at least 62 of 86 stockpiling states, 11 of 16 users, and 23 of 34 producers participated.

⁵⁴⁰ See, for example, Statement by Meir Itzchaki, delegate from Israel, to the Third Review Conference of the CCW, November 7, 2006, p. 3; Statement by Anatoly I. Antonov, head of Russian delegation, to the Third Review Conference of the CCW, November 7, 2006, p. 4; Statement by Ronald Bettauer, head of US delegation, to the Third Review Conference of the CCW, November 7, 2006, pp. 2-3; "Norway Opens Way to Cluster Munition Treaty," Human Rights Watch news release, November 17, 2006, <http://www.hrw.org/en/news/2006/11/17/norway-opens-way-cluster-munition-treaty>.

⁵⁴¹ See, for example, US Department of State, "Ambassador Mull Briefs on U.S. Cluster Munitions Policy," transcript of briefing with Acting Assistant Secretary of State for Political-Military Affairs Ambassador Stephen D. Mull, Washington, DC, May 21, 2008, <http://www.america.gov/st/texttrans-english/2008/May/20080522163101eaifas0.8921015.html> (accessed October 20, 2010); "US: Efforts to Weaken Cluster Ban Treaty," Human Rights Watch news release, May 22, 2008, <http://www.hrw.org/en/news/2008/05/22/us-efforts-weaken-cluster-ban-treaty>.

⁵⁴² See, for example, "Cluster Bombs Banned ... But Not by Everyone," RFI, August 1, 2010, <http://www.english.rfi.fr/africa/20100801-cluster-bombs-banned-not-everyone> (accessed October 20, 2010).

recommendations or responding to those of others. They had a voice in the debate virtually equal to that of states, except that during final negotiations in Dublin, they could not submit formal proposals, vote, or adopt the convention.

The CMC also played a role outside of the negotiating room. CMC advocates lobbied state delegates in the hallways encouraging them to promote provisions that would have humanitarian benefits. Members of the coalition presented documentation and analysis that informed discussions. For example, Human Rights Watch regularly provided updated information on users, producers, and stockpilers and produced numerous legal papers on aspects of the draft treaty text.⁵⁴³ Between conferences, CMC representatives would, in their respective capitals, encourage governments to participate in the process and support NGO calls for a strong convention. CMC campaigners also engaged in more grassroots advocacy. At the Wellington Conference, they drew chalk outlines of volunteers in the main square to represent cluster munition victims.⁵⁴⁴ Before negotiations in Dublin, a “Ban Bus” toured Ireland to raise awareness of the issue.⁵⁴⁵ By appealing to both diplomats and the public, the CMC kept the pressure on states to create a comprehensive treaty that included humanitarian as well as disarmament obligations.

The CMC championed the meaningful participation of survivors in the Oslo Process, especially through a group called the Ban Advocates, coordinated by Handicap International. These individuals, many of whom had lost eyes or limbs to cluster munitions, humanized the issue and reminded delegates from all countries of the importance of the future convention. Branislav Kapetanovic, a former Serbian military deminer, told how he lost both legs and both arms while clearing a US submunition.⁵⁴⁶ Soraj Ghulam Habib of Afghanistan described how he was so seriously injured by an unexploded submunition at age 10 that his doctor recommended withholding treatment that would save his life.⁵⁴⁷ Organizers provided the opportunity for these activists to speak at opening and closing ceremonies of the treaty conferences as well as from the floor. Survivors not only provided heart-wrenching testimony

⁵⁴³ See, for example, Human Rights Watch, *Cluster Munition Information Chart*, June 2007, <http://www.hrw.org/en/news/2007/02/20/updated-human-rights-watch-cluster-munition-information-chart>; Human Rights Watch and Harvard Law School International Human Rights Clinic, *User State Responsibility for Cluster Munition Clearance: Memorandum to Delegates of the Wellington Conference on Cluster Munitions*, February 29, 2008, <http://www.hrw.org/en/news/2008/02/19/user-state-responsibility-cluster-munition-clearance>.

⁵⁴⁴ ANZCMC, “Report on Wellington Conference,” p. 5.

⁵⁴⁵ For information on the Ban Bus, see <http://thebanbus.org/ban-bus-ireland/> (accessed October 20, 2010).

⁵⁴⁶ For a version of Kapetanovic’s story, see Branislav Kapetanovic, “My Story,” post to Ban Advocates website (blog), November 2, 2007, <http://blog.banadvocates.org/index.php?category/Branislav> (accessed October 20, 2010).

⁵⁴⁷ “Wheelchair Warrior Fights Cluster Bombers,” *The Dominion Post*, February 18, 2008, <http://www.stuff.co.nz/dominion-post/news/wellington/275168> (accessed October 20, 2010).

that moved participants but also skillfully lobbied for and gave interventions on specific legal provisions, such as a victim assistance obligation and an absolute ban.

States and civil society did not always agree, and at one point, some states argued that NGOs should be excluded from some aspects of the final negotiations. Nevertheless, in general, government delegates praised the contributions of the CMC and the survivors. Speakers at the adoption of the convention and later at the signing ceremony repeatedly expressed their gratitude to the CMC for pressing for high standards.⁵⁴⁸ Civil society brought a humanitarian dimension to the Oslo Process that helped ensure politics and misguided military claims did not trump civilian concerns.

International Organizations

International organizations made valuable contributions to the Oslo Process. Even though the United Nations did not host the conferences that produced the Convention on Cluster Munitions, UN agencies were integral participants in the process. The UNDP was particularly crucial to its success. It took the lead in building support for the convention throughout the UN bureaucracy and developing a unified and progressive position from early on. The UNDP worked closely with Norway and other Core Group states in shaping the process and the convention. As mentioned above, the UNDP also played a key role in sponsoring participants from the developing world, thereby ensuring representation of a wider range of views and interests in discussions and negotiations. The UN Secretary-General spoke in support of the Oslo Process and many other UN agencies, including the UN Institute for Disarmament Research and the UN Mine Action Service, participated in a substantial way. UN mine action units provided technical expertise and reports from the field.⁵⁴⁹

The ICRC also greatly influenced the development of the Convention on Cluster Munitions. Like the CMC, it distributed detailed legal analyses of the draft treaty texts to conference

⁵⁴⁸ See, for example, Statement by Ambassador Steffen Kongstad of Norway, to the Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, May 30, 2008 (stating “Including civil society at the negotiation table is an efficient way of ensuring that what we do is checked against reality; the humanitarian organisations provide competence and experience as implementers of humanitarian assistance.”); Closing Statement by the United Kingdom to the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, May 30, 2008 (thanking the CMC despite the “vigorous discussions” they had had); Statement by New Zealand to the Convention on Cluster Munitions Signing Conference, Oslo, December 3, 2008 (welcoming the role of civil society and stating, “The constructive relationship we have built demonstrates what is achievable when we work together.”). An Irish delegate singled out the survivors, noting that “The indomitable spirit of the Ban Advocates, overcoming terrible injuries to bear witness to the horrors of cluster munitions, inspired us throughout.” Statement by Minister Dermot Ahern of Ireland to the Convention on Cluster Munitions Signing Conference, Oslo, December 3, 2008.

⁵⁴⁹ See, for example, Goose, “Cluster Munitions in the Crosshairs,” in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 229. For a further discussion of the UN role in the Oslo Process, see Borrie, *Unacceptable Harm*, pp. 242-248.

delegates.⁵⁵⁰ It made frequent interventions during discussions and negotiations, critiquing proposed language through a humanitarian lens and offering recommendations for amendments. It submitted proposals for new treaty language, several of which appeared in formal process documents.⁵⁵¹

States noted the contributions of these organizations as well as of the CMC during closing statements.⁵⁵² Even the convention itself recognized the role of all non-state participants. Its preamble highlights:

the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and recogni[zes] the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world.⁵⁵³

The wide range of participants represented in the Oslo Process ensured that the Convention on Cluster Munitions addressed disarmament from a humanitarian perspective and that it garnered support from around the globe.

The Forum and the Ground Rules

While the diversity of state and non-state participants in the Oslo Process helped shape its final product, the nature of the forum in which the process took place was equally important to the convention's creation. When Norway declared it would initiate a process to develop a legally binding instrument, it specified that discussions would take place in an independent venue. Foreign Minister Jonas Gahr Støre said, "Now we must pursue our efforts along

⁵⁵⁰ See, for example, ICRC, "Comments of the International Committee of the Red Cross on the Wellington Draft of a Future Cluster Munitions Convention," February 8, 2008.

⁵⁵¹ Compendium of Proposals Submitted by Delegations during the Wellington Conference, Addendum I, <http://www.clusterconvention.org/downloadablefiles/WCCM-Compendium-v2.pdf> (accessed October 20, 2010), pp. 2-3, 12, 24.

⁵⁵² See, for example, Statements by Austria, Guinea, Guinea-Bissau, the Holy See, Ireland, Lebanon, Luxembourg, New Zealand, Norway, Senegal, Sweden, Switzerland, and the United Kingdom to the Convention on Cluster Munitions Signing Conference, Oslo, Norway, December 3-4, 2008, http://www.clusterconvention.org/pages/pages_i/i_stataessigning.html; Statements by Ghana, Ireland, Norway, the United Kingdom, and Vietnam, at the Closing Ceremony, Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, May 30, 2008, <http://www.clustermunitionsdublin.ie/general-statements.asp>.

⁵⁵³ Convention on Cluster Munitions, pmbi., para. 17 (emphasis removed).

another track.”⁵⁵⁴ The Core Group brought states together outside the United Nations, and particularly the CCW, forum. Instead it organized and hosted treaty conferences in Oslo, Norway; Lima, Peru; Vienna, Austria; Wellington, New Zealand; and Dublin, Ireland. Other states organized regional conferences to increase support within a particular geographic region. Instead of being constrained by traditional diplomacy, at these meetings states could set the ground rules for participation and the method of work. As a result, unlike the CCW, the Oslo Process not only produced concrete results but also did so in only 15 months, a short period of time in the history of international law.

The rules that the Oslo states followed contributed to the efficiency of the process and the quality of the product. The February 2007 Oslo Declaration, the founding document of the process, laid the groundwork for this approach. It set a strict timeline, requiring supporting states to produce a convention by the end of 2008. It also aimed high, calling for an absolute ban on cluster munitions that cause unacceptable harm to civilians, rather than merely for regulation.⁵⁵⁵

The Core Group maintained that momentum by retaining a certain amount of control over the draft treaty texts. During UN negotiations, states often debate “bracketed” texts, which present all options, even the weakest ones, in brackets or italics.⁵⁵⁶ This method can produce endless and confusing debates on a range of often contradictory proposals. States used a different model in the Oslo Process. The Core Group presented a draft discussion text at each conference to provide a basis for dialogue. Before the next meeting, it modified the text based on formal and informal feedback from conference participants. While the drafters took critical as well as supportive comments into account, they were able to minimize dilution of the text and maintain a standard that stayed true to the purpose of the process.

Perhaps most important, the Oslo Process did not require consensus, which most often leads to weak results. In contrast to CCW states parties, the majority did not have to

⁵⁵⁴ “Norway to Take the Lead in Efforts to Achieve an International Ban on Cluster Munitions,” Norwegian Ministry of Foreign Affairs press release. See also “Norway Takes the Initiative for a Ban on Cluster Munitions,” Norwegian Ministry of Foreign Affairs press release.

⁵⁵⁵ Oslo Conference on Cluster Munitions, “Declaration,” February 22-23, 2007, http://www.clusterconvention.org/pages/pages_vi/via_oslodeclaration.html (accessed October 20, 2010) [hereinafter Oslo Declaration].

⁵⁵⁶ See, for example, Group of Governmental Experts of the CCW, “Procedural Report,” CCW/GGE/2009-1/2, March 2, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/603/17/PDF/G0960317.pdf?OpenElement> (accessed October 20, 2010), annex II. See also Draft Convention on the Prohibition of Chemical Weapons, Official Records of the General Assembly, 39th Session, Supp. No. 27, App. II (CD/540), vol. III, Doc. CD/500 (1984); Ekéus first rolling text, CD/539, Aug. 28, 1984, and Ekéus second rolling text, CD/795, Feb. 8, 1988 (cited in Michael Bothe, Natalino Ronzitti and Allan Rosas, eds., *The New Chemical Weapons Convention: Implementation and Prospects* (The Hague: Kluwer Law International, 1998), p. 26.

compromise to prevent interference from a minority. It further allowed for faster progress because no single state could stand in the way. The Rules of Procedure for the final negotiations in Dublin encouraged states to “make [their] best endeavours to ensure that the work of the Conference is accomplished by general agreement.”⁵⁵⁷ If that failed, the president of the conference could put the matter to a vote.⁵⁵⁸ Decisions on substance required a two-third majority and decisions on procedure, a simple majority.⁵⁵⁹ President of the Conference Dáithí O’Ceallaigh of Ireland never had to call for a vote, but the option provided states extra incentive to reach agreement. While any state that opposed the substance being agreed to was free to opt out, in the end none did. All 107 states participating in the Dublin Conference adopted the Convention on Cluster Munitions.⁵⁶⁰

The Oslo Process Conferences

An examination of how the Oslo Process played out illuminates the impact of the participants, forum, and ground rules discussed above. These factors shaped the process and thus the convention that emerged. They created an environment that was open to multiple points of view yet focused on a shared goal and that was not inhibited by the limits of traditional diplomacy. Together, they allowed for the development of a strong yet widely adopted convention.

Oslo Conference on Cluster Munitions

The Oslo Conference of February 22-23, 2007 laid the foundation for the process that would follow by establishing both a timeline and a goal. It committed states to concluding a “legally binding international instrument” by the end of 2008, an ambitious deadline.⁵⁶¹ It also specified that the instrument itself would have two parts. First, it would “prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians.”⁵⁶² States intentionally left the definition of cluster munitions vague because of the range of views at that point. Second, with regard to positive obligations, the future convention

⁵⁵⁷ Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, “Rules of Procedure,” May 19, 2008, CCM/52, http://www.clustermunitionsdublin.ie/pdf/CCM52_001.pdf (accessed October 20, 2010), rule 36(1).

⁵⁵⁸ *Ibid.*, rule 36(2).

⁵⁵⁹ *Ibid.*, rule 38(1) and (2).

⁵⁶⁰ Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, “Summary Record of the Fourth Session of the Plenary and Closing Ceremony of the Conference,” CCM/SR/4, May 30, 2008, http://www.clustermunitionsdublin.ie/pdf/Plenary4May30am_006.pdf (accessed October 20, 2010), p. 1.

⁵⁶¹ Oslo Declaration, para. 1. The Oslo Declaration recognized “the grave consequences caused by the use of cluster munitions and the need for immediate action.” *Ibid.*, pmbl.

⁵⁶² *Ibid.*, para. 1(i).

would “establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education and destruction of stockpiles of prohibited cluster munitions.”⁵⁶³ Of the 49 countries that attended the conference, 46 endorsed the Oslo Declaration.⁵⁶⁴

Regional Conferences

Reflecting the momentum generated by the Oslo meeting, the first of many regional conferences followed within a month. Held in March 2007 in Phnom Penh, Cambodia, it strove to increase support for the Oslo Process and to discuss certain substantive elements of the future convention. States would hold similar regional gatherings before the May 2008 negotiation and adoption of the Convention on Cluster Munitions in Costa Rica (September 2007), Serbia (for all contaminated states in October 2007), Belgium (October 2007), Zambia (March-April 2008), and Mexico (April 2008).⁵⁶⁵ Additional regional conferences took place between the adoption and the December 2008 signing conference in Bulgaria (September), Uganda (September), Laos (October), Ecuador (November), and Lebanon (November).⁵⁶⁶

Lima Conference on Cluster Munitions

At the international conference in Lima from May 23 to 25, 2007, states began to discuss the substance of the future convention. Representatives of 67 states, including 27 new to the process since Oslo, participated; there was a particular increase in the number of delegates from Africa. The Core Group presented the first discussion text that was based heavily on the Mine Ban Treaty and rested on the two pillars laid out in the Oslo Declaration. It included absolute prohibitions on the use, production, transfer, and stockpiling of cluster munitions. In addition, it established positive obligations, including deadlines for stockpile destruction and clearance as well as provisions related to international cooperation and assistance (particularly for victim assistance), and transparency. States did not debate treaty text at this point, but they reached a broad agreement on the framework and essential elements of the future convention.⁵⁶⁷

⁵⁶³ *Ibid.*, para. 1(ii). The Oslo Declaration also said that states should consider further national steps and continue discussions in “all relevant fora.” *Ibid.*, paras. 2 and 3.

⁵⁶⁴ Japan, Poland, and Romania chose not to endorse the Oslo Declaration. Japan would later join the process and adopt the Convention on Cluster Munitions in Dublin in May 2008. Borrie, *Unacceptable Harm*, pp. 155-156.

⁵⁶⁵ For more information on these regional conferences, see *Banning Cluster Munitions*, pp. 5-6, 8.

⁵⁶⁶ *Ibid.*, p. 9.

⁵⁶⁷ CMC, “CMC Report on the Lima Conference and Next Steps,” <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/05/cmc-report-on-the-lima-conference-23-25-may.pdf> (accessed October 20, 2010), p. 1 [hereinafter “CMC Report on the Lima Conference”]. Discussion centered around the Chair’s Discussion Text for Lima Conference, May 23-

Two provisions were particularly noteworthy. While adopting a categorical prohibition on cluster munitions, the Lima Discussion Text excluded from the definition of cluster munition those weapons that carried submunitions that detect and engage point targets.⁵⁶⁸ At the meeting, some states proposed exempting other large categories of submunitions, such as those with self-destruct devices or a specific reliability rate.⁵⁶⁹ Discussions of these proposals would continue until the final days of negotiations a year later. In a more progressive move, the discussion text dedicated an article specifically to victim assistance.⁵⁷⁰ At this point, the provision was essentially only an elaboration of the Mine Ban Treaty's obligation to provide international cooperation and assistance for victims,⁵⁷¹ but the stand-alone article would evolve into detailed and groundbreaking obligations for affected states to assist victims within their territory.

The Lingering CCW Alternative

Meanwhile, after another year of discussions, CCW state parties could still not reach a consensus on a mandate to negotiate a protocol on cluster munitions. Instead, in November 2007, they agreed to "negotiate a proposal to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations."⁵⁷² States opposed to the Oslo Process and its proposed ban on cluster munitions saw CCW discussions as an alternative, if only for public relations and diplomatic cover.⁵⁷³ Some Oslo states also expressed a preference for working within the CCW framework, especially during the Lima Conference.⁵⁷⁴ Nonetheless, the treaty process continued in earnest and support for it grew rapidly.

25, 2007, http://www.clusterconvention.org/pages/pages_vi/vib_opdoc_chairslima.html (accessed October 20, 2010) [hereinafter Lima Discussion Text].

⁵⁶⁸ Lima Discussion Text, art. 2. Such submunitions were essentially guided weapons that could target vehicles. In a less controversial provision, the definition also excluded submunitions that "are meant for smoke or flaring, or [whose] use is regulated or prohibited under other treaties."

⁵⁶⁹ "CMC Report on the Lima Conference," p. 3.

⁵⁷⁰ Lima Discussion Text, art. 6.

⁵⁷¹ Mine Ban Treaty, art. 6(3).

⁵⁷² Meeting of the High Contracting Parties to the CCW, "Report," CCW/MSP/2007/5, December 3, 2007, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/029247C7A309EAC2C12573CF005B93B6/\\$file/CCW+MSP+2007+5+E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/029247C7A309EAC2C12573CF005B93B6/$file/CCW+MSP+2007+5+E.pdf) (accessed October 20, 2010), p. 9.

⁵⁷³ *Banning Cluster Munitions*, p. 5.

⁵⁷⁴ "CMC Report on the Lima Conference," p. 4.

Vienna Conference on Cluster Munitions

From December 5 to 7, 2007, states convened in Vienna for the next Oslo Process diplomatic conference. Delegates from 138 states, more than twice the number in Lima, attended, demonstrating global endorsement of the Oslo Process. Representatives from 50 countries also came, demonstrating the influential role of NGOs.⁵⁷⁵ The Core Group presented a new discussion text based on input from the previous conference. During the Vienna Conference, general agreement emerged on important provisions in the future convention, including stockpile destruction, clearance, victim assistance, and international cooperation and assistance. Participants, however, also began to draw battle lines around a number of issues, particularly the definition of cluster munition, a transition period during which key obligations would not take effect, and interoperability (the implications of the convention for joint military operations with states not party).⁵⁷⁶

In its definition of cluster munition, the Vienna Discussion Text did not explicitly exclude certain munitions as had been done in the Lima text; instead it inserted a placeholder so states could make their case for specific exclusions from the prohibition on cluster munitions that they believed did not cause “unacceptable harm.”⁵⁷⁷ Some states argued that the definition should not encompass cluster munitions carrying submunitions with self-destruct mechanisms or certain failure rates while others called for a more comprehensive definition.⁵⁷⁸ This debate paralleled states’ different approaches to cluster munitions—regulations vs. bans—at the national level. In a key development, Norwegian People’s Aid, the Norwegian Defence Research Establishment, and C King Associates launched a detailed report that debunked the claims of 99 percent reliability for the M85 submunition, a self-destructing type used extensively by Israel in south Lebanon, and one identical or similar to submunitions a significant number of governments wished to see exempted from the prohibition.⁵⁷⁹ The report made it very difficult for states to defend such an exemption. It also exemplified the influence of civil society.⁵⁸⁰

⁵⁷⁵ “CMC Report on the Vienna Conference,” p. 1.

⁵⁷⁶ *Ibid.*, p. 1.

⁵⁷⁷ Vienna Discussion Text, November 17, 2007, http://www.clusterconvention.org/pages/pages_vi/vib_opdoc_chairsvienna.html (accessed October 20, 2010), art. 2.

⁵⁷⁸ “CMC Report on the Vienna Conference,” p. 2; Borrie, *Unacceptable Harm*, pp. 187-188.

⁵⁷⁹ Norwegian People’s Aid, Norwegian Defence Research Establishment, and C King Associates, *M85: An Analysis of Reliability*. The report analyzed the performance of these submunitions in both testing and in combat to demonstrate how both mechanical self-destruct mechanisms and failure rate testing regimes failed to prevent humanitarian harm. The report and its presentation also set a precedent for the level of evidence and analysis that would be expected in future arguments on the definition.

⁵⁸⁰ In his comprehensive history of the Oslo Process, John Borrie writes, “The M-85 report and its palpable impact showed how active and well-organized civil society was, coordinated by the CMC, at the Vienna Conference.” Borrie, *Unacceptable Harm*, p. 189.

Another potential weakening of the future convention's prohibition on cluster munitions involved the possibility of a transition period. Proponents insisted they needed such a period to develop alternative weapons. Opponents vehemently challenged this position, arguing that the delay in the prohibition would undermine its humanitarian benefits.⁵⁸¹

A number of states began to raise concerns about interoperability, in other words, how the proposed treaty would affect their ability to participate in military partnerships with states that continued to consider cluster munitions legitimate weapons. Alliances with the United States were at the center of this issue. Debate focused primarily on the proposed prohibition on assisting, encouraging, or inducing anyone to engage in any activity prohibited to a state party under the convention. Some argued that this prohibition, though nearly identical to one in the Mine Ban Treaty, would expose military planners and commanders to legal risks and make it impossible to conduct joint operations with states that retained cluster munitions in their arsenals. Others, including the CMC, countered that a prohibition on assistance, which was supported by Mine Ban Treaty precedent, was fundamental to the moral and practical coherence of the prohibitions and should be absolute.⁵⁸²

The Vienna Discussion Text introduced a special responsibility for past users of cluster munitions to provide assistance to states where those weapons had been used.⁵⁸³ The proposal received some opposition, especially from former users who contended that user states should not be singled out because the responsibility for clearance was a global concern. Proponents, including most notably Lebanon, countered that users bore a moral duty to minimize the suffering their actions caused.⁵⁸⁴ With some refinements at subsequent meetings, the innovation was retained in the final convention text as a politically binding

⁵⁸¹ "CMC Report on the Vienna Conference," pp. 2-3.

⁵⁸² *Ibid.*, p. 3; *Banning Cluster Munitions*, p. 5. For an elaboration of the CMC's views on transition periods and interoperability, see Steve Goose, director of the Arms Division at Human Rights Watch and co-chair of the Cluster Munition Coalition, "Statement to the Vienna Conference on Cluster Munitions: Intervention on General Obligations and Scope," December 6, 2007, <http://www.hrw.org/en/news/2007/12/06/statement-vienna-conference-cluster-munitions-intervention-general-obligations-and-s>.

⁵⁸³ Vienna Discussion Text, art. 4(4). For the CMC's position on this issue in Vienna, see Bonnie Docherty, researcher in the Arms Division of Human Rights Watch, "Statement to the Vienna Conference on Cluster Munitions: International Cooperation and Assistance," December 7, 2007, <http://www.hrw.org/en/news/2007/12/07/statement-vienna-conference-cluster-munitions-international-cooperation-and-assistan>.

⁵⁸⁴ For further discussion of the debate throughout the Oslo Process, including at the Dublin Diplomatic Conference on Cluster Munitions, see Stuart Casey-Maslen, "Article 4: Clearance and Destruction of Cluster Munition Remnants and Risk Reduction Education," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, pp. 284-285, 322-323. For an overview of the debate at the Wellington Conference on Cluster Munitions, see "WILPF Report from the Wellington Conference," pp. 21-23.

obligation.⁵⁸⁵ It reinforces state responsibility to take precautions to protect civilian populations from the unintended effects of explosive weapons.⁵⁸⁶

Wellington Conference on Cluster Munitions

From February 18 to 22, 2008, Wellington hosted the final conference prior to formal negotiations. While there were fewer states in attendance than in Vienna, it was largely due to the difficulty of reaching New Zealand. Several states new to the Oslo Process, notably nine from the Pacific region, joined the discussions, demonstrating that support was continuing to spread.⁵⁸⁷ Civil society made a strong showing with 142 individuals from 43 countries.⁵⁸⁸

The Wellington Conference was the most contentious of the Oslo Process meetings. It had the atmosphere of high-stakes negotiations as states discussed the draft convention text that had been revised again by the Core Group following the Vienna Conference. In intense plenary sessions and breakout discussions, numerous countries—notably those who called themselves the “like-minded group”⁵⁸⁹—submitted proposals to amend the Draft Cluster Munitions Convention. The CMC as well as many states and the ICRC strongly criticized most of the proposals from the like-minded group, saying they weakened the text. In particular, they opposed amendments calling for exceptions or exclusions to the definition of cluster munition (and thus to the prohibition), a transition period, and provisions to facilitate interoperability.⁵⁹⁰

The heated debate produced mixed reactions to the conference. At the end of the meeting, the like-minded group expressed dissatisfaction, asserting that their opinions and views had not been taken into account in a balanced way. Many other states spoke out strongly in favor of the draft text and the open and inclusive approach of the conference; among their ranks

⁵⁸⁵ Convention on Cluster Munitions, art. 4(4).

⁵⁸⁶ Human Rights Watch along with Lebanon and other states played an active role in preserving this provision in the convention. See, for example, Bonnie Docherty, researcher in the Arms Division of Human Rights Watch, “Statement to the Vienna Conference on Cluster Munitions: International Cooperation and Assistance,” December 7, 2007, <http://www.hrw.org/en/news/2007/12/07/statement-vienna-conference-cluster-munitions-international-cooperation-and-assistance>; Bonnie Docherty, researcher in the Arms Division of Human Rights Watch, “Statement to the Wellington Conference on Cluster Munitions: Intervention on Clearance and User Responsibility (Article 4),” February 20, 2008, <http://www.hrw.org/en/news/2008/02/20/statement-wellington-conference-cluster-munitions-intervention-clearance-and-user-re>.

⁵⁸⁷ ANZCMC, “Report on Wellington Conference,” p. 1.

⁵⁸⁸ *Ibid.*, p. 3.

⁵⁸⁹ The like-minded group began to form during the Vienna Conference. While it had no official status or membership, those supportive included Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Slovakia, Sweden, Switzerland, and the United Kingdom.

⁵⁹⁰ ANZCMC, “Report on Wellington Conference,” p. 2. For more details on the debates, see “WILPF Report from the Wellington Conference,” pp. 12-21 (on definitions), 10-12 (on transition period), and 8-10 (on interoperability).

were countries affected by cluster munitions, particularly Cambodia, Laos, and Lebanon, and others in the developing world, such as Indonesia. To maintain a high standard, the Core Group left the draft convention text unchanged, but it adopted a creative solution to ease the tensions. It forwarded the draft convention text to Dublin as the basis for negotiations and compiled the proposals into an attached "Compendium" for further consideration.⁵⁹¹

At the conclusion of the conference on February 12, 82 governments endorsed the Wellington Declaration, and that number increased as negotiations drew closer.⁵⁹² The Wellington Declaration reiterated the main goals articulated in the Oslo Declaration:

- A prohibition on the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, [and]
- A framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education, and destruction of stockpiles.⁵⁹³

It also committed states to negotiate a convention in Dublin using the Draft Cluster Munitions Convention from Wellington as a starting point.⁵⁹⁴ In order to participate fully in the negotiations, a state had to endorse the Wellington Declaration. This document showed that the Oslo Process had stayed true to its original purpose and was poised to meet the ambitious deadline set in February 2007.

In Wellington, states also considered the draft Rules of Procedure for the negotiations, which clarified the permitted participants and decision-making process. Later approved in Dublin, these rules continued the Mine Ban Treaty precedent of allowing the CMC and international organizations, such as UN agencies and the ICRC, inside the formal talks with official observer status.⁵⁹⁵ Perhaps more important, as mentioned above, the rules required any state wishing to change the draft text to have the support of a two-thirds majority of governments participating in the negotiations before a proposed amendment would be

⁵⁹¹ ANZCMC, "Report on Wellington Conference," p. 2. See also Draft Cluster Munitions Convention, January 21, 2008, http://www.clusterconvention.org/pages/pages_vi/vib_opdoc_chairswellington.html (accessed October 20, 2010); Compendium of Proposals Submitted by Delegations during the Wellington Conference, Addendum I.

⁵⁹² ANZCMC, "Report on Wellington Conference," p. 1.

⁵⁹³ Declaration of the Wellington Conference on Cluster Munitions, February 2008, http://www.clusterconvention.org/pages/pages_vi/vic_oslowellington.html (accessed October 20, 2010).

⁵⁹⁴ Ibid.

⁵⁹⁵ Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, "Rules of Procedure," rule 1(2).

accepted.⁵⁹⁶ This rule meant that it would be very difficult to secure significant changes weakening the strong draft text. While no votes were required in Dublin, the possibility that a vote could be used was a change from the consensus-bound diplomacy of the CCW. It put pressure on states to reach an agreement voluntarily and meant that a conservative minority could not block the efforts of advocates for a strong convention.

Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions

Formal negotiations, which produced the landmark Convention on Cluster Munitions, took place from May 19 to 30, 2008. Ireland hosted the Dublin Diplomatic Conference on Cluster Munitions at Croke Park Stadium, a massive Gaelic football stadium. A total of 127 states attended the formal negotiations, 107 as full participants and 20 as observers.⁵⁹⁷

Civil society continued to play a highly active role. The CMC delegation was comprised of 284 campaigners from 61 countries and included more than a dozen cluster munition and landmine survivors from Afghanistan, Cambodia, Iraq, Serbia, Tajikistan, Vietnam, and Western Sahara.⁵⁹⁸ During the conference, CMC delegates undertook intense lobbying on all of the specific provisions of the treaty, provided technical advice to the diplomats, made interventions in the formal sessions, and disseminated materials including critiques of treaty proposals. They also reached out to the media and held a wide range of public events at Croke Park and in the city of Dublin. The exemplary partnership between governments and civil society—particularly the dynamic work of cluster munition survivors—was widely heralded as underpinning the success of the negotiation process.⁵⁹⁹

The president of the conference, Ambassador Dáithí O’Ceallaigh of Ireland, opened the conference with a detailed article-by-article discussion of the draft text.⁶⁰⁰ When it was not possible to reach general agreement in the Committee of the Whole, Ambassador O’Ceallaigh appointed fellow diplomats to hold informal consultations. By the end of the

⁵⁹⁶ *Ibid.*, rule 38(1).

⁵⁹⁷ *Banning Cluster Munitions*, p. 7.

⁵⁹⁸ ANZCMC, “Report on Activities: Dublin Conference on Cluster Munitions, 19–30 May 2008,” July 2008, http://www.stopclusterbombs.org.nz/wp-content/uploads/2008/07/anzcmc_dublinreport_jul08.pdf (accessed October 20, 2010), p. 5

⁵⁹⁹ See, for example, Statement by Ambassador Steffen Kongstad of Norway to the Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, May 30, 2008; Closing Statement by the United Kingdom to the Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, May 30, 2008.

⁶⁰⁰ Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, “Summary Record of First Session of Committee of the Whole,” CCM/CW/SR/1, May 19, 2008; Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, “Summary Record of Second Session of Committee of the Whole,” CCM/CW/SR/2, May 20, 2008; Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, “Summary Record of Third Session of Committee of the Whole,” CCM/CW/SR/3, May 20, 2008.

first week, these Friends of the President were consulting on issues relating to interoperability, definitions, stockpiling, clearance, victim assistance, and compliance.⁶⁰¹

The atmosphere in Dublin from the beginning was a constructive one, with states now more prepared to find solutions than to demand concessions. Still, there were stark differences among the negotiating states on a range of issues, especially definitions, a transition period, and interoperability. Other controversial topics included the length of deadlines for stockpile destruction and clearance, the desirability of a possible extension of the deadline for stockpile destruction, whether to have a provision allowing retention of cluster munitions and submunitions for development and training purposes, the acceptability of special responsibilities for past users of cluster munitions, how far-reaching the victim assistance provisions could be, and the number of ratifications required to trigger entry into force.⁶⁰²

The positions of a substantial number of states on many of these issues shifted dramatically either just before or during the negotiations. In particular, the conference saw the evolution of the positions of nearly all of the members of the like-minded group, notably France, Germany, and the United Kingdom. The degree to which many states changed their views during the Oslo Process and the negotiations themselves is reflected in what the convention does not contain. There are no broad exceptions for cluster munitions with submunitions that self-destruct or have a certain claimed reliability rate or that are “direct fire” weapons. There is no transition period during which banned cluster munitions could still be used. During most of the Oslo Process, these demands were key for numerous countries, especially the larger military powers. In the end, all countries participating in the negotiations agreed that such provisions were unacceptable from a humanitarian perspective.⁶⁰³

The two most hotly debated issues were definitions and interoperability. States that had initially called for broad exceptions for cluster munitions with certain kinds of submunitions eventually accepted a narrow exclusion. Negotiators agreed that certain weapons that contain submunitions are not likely to have the same negative effects that make cluster munitions objectionable—that is, indiscriminate area effects and risks posed by unexploded ordnance; therefore, these weapons should not be considered cluster munitions. In order to

⁶⁰¹ The Friends of the Chair were: interoperability (Ambassador Christine Schraner of Switzerland), definitions (Ambassador Don MacKay of New Zealand), stockpiling (Ambassador Steffen Kongstad of Norway), clearance (Lt. Col. Jim Burke of Ireland), victim assistance (Markus Reiterer of Austria), and compliance (Xolisa Mabhongo of South Africa). During the second week, another Friend of the Chair was appointed for the preamble (Ambassador Caroline Millar of Australia).

⁶⁰² *Banning Cluster Munitions*, p. 7. For further analysis of discussions at the Dublin conference, see Borrie, *Unacceptable Harm*, pp. 249-308.

⁶⁰³ *Banning Cluster Munitions*, pp. 7-8.

avoid these effects, weapons excluded from the prohibition must meet five cumulative criteria. They must 1) contain a limited number of submunitions that 2) each detect and engage “a single target object,” rather than scattering across an area. They must have other safeguards relating to 3) weight and, to avoid the risk of cluster munition remnants, 4) self-destruct and 5) self-deactivating mechanisms.⁶⁰⁴ The CMC maintained that the burden of proof should on producers, stockpilers, and users to demonstrate that such weapons do not and cannot function as cluster munitions, and it asserted that such weapons should be closely monitored by humanitarian organizations in the future.⁶⁰⁵

On the contentious issue of interoperability, states agreed at the last minute to the insertion of a new Article 21 on Relations with States not Party to this Convention. It specified that participation in joint military operations with states not party is allowed, but it also left the door open to different interpretations of what that participation could entail. The CMC strongly criticized the article for being politically motivated and for leaving a degree of ambiguity about how to apply the ban on assistance with prohibited acts in joint military operations.⁶⁰⁶ The article also, however, has very desirable provisions that require states parties to encourage states not party to join the convention, to promote the convention’s norms, and to discourage use of cluster munitions by those not party.⁶⁰⁷ These positive obligations place the article in line with the object and purpose of the convention. Sections of Chapters 8 and 10 of this book analyze Article 21 in depth.

On May 28, Ambassador O’Ceallaigh introduced a Presidency Paper containing a consolidated draft treaty text, which he described as “extremely ambitious” and representing “the best balance of interests and compromise consistent with the Oslo Declaration.”⁶⁰⁸ Seventy-one states spoke in support of the draft text with varying degrees of

⁶⁰⁴ Article 2(2)(c) of the Convention on Cluster Munitions excludes munitions with submunitions if they have fewer than 10 submunitions and each submunition weighs more than four kilograms, can detect and engage a single target object, and is equipped with electronic self-destruction and self-deactivation features. Only three existing weapons are thought to meet these criteria, SADARM, BONUS, and SMArt-155. The United States stockpiles SADARMs but has stopped production. The United States used SADARMs in Iraq in 2003. Sweden, in partnership with France, produces BONUS, which has two submunitions. Germany produces SMArt-155, which also has two submunitions. Neither of the latter two weapons has been used in combat to date. The only other countries known to have the SMArt-155 are Greece and Switzerland, while Australia and the United Kingdom are in the process of procuring them. No other countries are known to possess BONUS. Human Rights Watch, *Twelve Facts and Fallacies about the Convention on Cluster Munitions*, p. 3.

⁶⁰⁵ *Banning Cluster Munitions*, p. 8.

⁶⁰⁶ Article 21 says that States Parties “may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.” It should not be understood, however, to negate a State Party’s obligations under Article 1 “never under any circumstances to ... assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.” Convention on Cluster Munitions, arts. 1(1)(c) and 21(3).

⁶⁰⁷ Convention on Cluster Munitions, art. 21(1) and (2).

⁶⁰⁸ Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, “Summary Record of the Fifteenth Session of the Committee of the Whole,” CCM/CW/SR/15, May 28, 2008,

enthusiasm, but with none indicating they could not adopt it. The CMC described the text as “extraordinary” and said it was “certain to save thousands and thousands of civilian lives for decades to come, and to provide both immediate and long-term relief and assistance to those already affected by the weapon.”⁶⁰⁹ On May 30, 2008, all 107 states that were participants in the negotiations formally adopted the 2008 Convention on Cluster Munitions by acclamation.⁶¹⁰ The final text, analyzed in Chapter 8 of this book, was a strong mix of humanitarian and disarmament law that included both prohibitions and positive obligations and required both preventive and remedial measures.

Oslo Signing Conference

The Oslo Process concluded with the Convention on Cluster Munitions Signing Conference in Oslo from December 3 to 4, 2008. Ministers and senior officials from 94 governments signed the convention at Oslo City Hall, applauded by a CMC delegation comprised of 250 campaigners from 75 countries. Four nations signed and ratified at the same time: Core Group members Norway, Ireland, and the Holy See as well as Sierra Leone. The list of signatories included users, producers, stockpilers, and affected states. Afghanistan’s last minute decision to sign, despite US pressure not to, received particular acclaim.⁶¹¹ Another 28 countries attended as observers but did not sign; they participated in the historic event to indicate their concern with the problems of cluster munitions, and a large number voiced the hope that they would soon be in a position to join the convention.⁶¹²

<http://www.clustermunitionsdublin.ie/pdf/CoW15May28am.pdf> (accessed October 20, 2010), p. 4; CMC, “Day 8—Convention!!!—Dublin Diplomatic Conference,” May 28, 2008, <http://www.stopclustermunitions.org/calendar/?id=551> (accessed October 20, 2010).

⁶⁰⁹ Steve Goose, director of the Arms Division of Human Rights Watch and co-chair of the Cluster Munition Coalition, “Cluster Munition Coalition Statement to the Committee of the Whole on the Agreement to Adopt the Cluster Munitions Convention,” May 28, 2008, <http://www.hrw.org/en/news/2008/05/28/cluster-munition-coalition-statement-committee-whole-agreement-adopt-cluster-munitio>. Goose said that the CMC believed that “if the text had been opened up [for further negotiation], it would have gotten stronger and not weaker,” but the CMC respected the judgment of the president and many states that opening the text was not the best way forward.

⁶¹⁰ Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, “Summary Record of the Fourth Session of the Plenary and Closing Ceremony of the Conference,” CCM/SR/4, May 30, 2008, http://www.clustermunitionsdublin.ie/pdf/Plenary4May30am_006.pdf (accessed October 20, 2010), p. 1.

⁶¹¹ CMC, “Convention on Cluster Munitions Signing Conference Update,” December 3, 2008, p. 1, <http://www.stopclustermunitions.org/news/?id=1053> (accessed October 20, 2010).

⁶¹² “Historic Treaty Bans Cluster Bombs and Stigmatizes Use,” CMC press release, December 4, 2008, <http://www.stopclustermunitions.org/media/press-releases/?id=1068> (accessed October 20, 2010); and CMC, “Convention on Cluster Munitions Signing Conference,” <http://www.stopclustermunitions.org/calendar/?id=697> (accessed October 20, 2010). See also *Banning Cluster Munitions*, p. 9. A total of 122 states attended the conference according to the final list of delegates, and 94 of those signed the convention. Convention on Cluster Munitions Signing Conference, Oslo, “Final List of Delegates,” December 2-4, 2008, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/12/list-of-participants.pdf> (accessed October 31, 2010).

At the signing conference, many countries made strong statements praising the convention not only for its high level of civilian protection, but also for the bold and dynamic way in which it had been achieved. “The value of this treaty goes far beyond its provisions alone,” New Zealand’s delegate said. “It is proof that the international community can work together to take decisive action in the face of humanitarian suffering. It is proof that bold new steps are possible in the disarmament arena.”⁶¹³ The collaboration of governments, international organizations, and civil society, and the direct and determined work of cluster munition survivors, demonstrated that, as in the case of the Mine Ban Treaty, groundbreaking humanitarian achievements were possible.

Conclusion

The nature of the Oslo Process was essential to the creation of the Convention on Cluster Munitions. It ensured the conclusion of a ground-breaking treaty in a timely manner. No other process could have produced this result, which addresses all the problems of cluster munitions, and no alternative—especially the CCW—will be able to equal its success in the future. An understanding of the Oslo Process illuminates why the international community should focus on universalizing, implementing, and interpreting the existing strong convention rather than trying to create other options. The process also provides a model for negotiations of future instruments that seek to bring a humanitarian emphasis to disarmament.

⁶¹³ Statement by New Zealand to the Convention on Cluster Munitions Signing Conference, Oslo, December 3, 2008.

Part III: Fulfilling the Promise

VIII. The Convention on Cluster Munitions

The Convention on Cluster Munitions addresses every problem associated with cluster munitions. It bans use, the root cause of all harm attributable to the weapons. It further prohibits production, transfer, and stockpiling and requires stockpile destruction, which can stop proliferation and decrease the number of cluster munitions available for use. The convention requires states to deal with existing threats and injuries through clearance, risk education, and victim assistance. It also mandates international cooperation and assistance to help ensure that states parties can fulfill their challenging and sometimes costly obligations. Only this comprehensive convention has the potential to eradicate cluster munitions and put an end to the human suffering they cause.

The product of four decades of international and national initiatives and 15 months of intense discussions and negotiations, the Convention on Cluster Munitions is a carefully structured instrument. It contains disarmament and humanitarian elements, exemplifying a new trend in weapons law that was born with the Mine Ban Treaty. To ensure a broad scope, the convention includes both preventive measures designed to eliminate the chance of future harm from cluster munitions and remedial measures intended to minimize the pain generated by past use. The convention's 23 articles can also be divided into negative obligations, which prohibit certain types of conduct, and positive obligations, which require a state party to perform a range of actions.

Underlying Purpose (Preamble)

The Convention on Cluster Munitions reveals its humanitarian character from the start. The preamble opens by expressing concern that civilians “bear the brunt of armed conflict.”⁶¹⁴ It then articulates the convention's object and purpose—to eliminate cluster munitions and the harm they cause—noting states parties' determination “to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.”⁶¹⁵ The preamble later explains that the harm the convention addresses includes not only deaths and injuries but also adverse

⁶¹⁴ Convention on Cluster Munitions, pmbi., para. 1.

⁶¹⁵ Ibid., pmbi., para. 2.

socioeconomic impacts, such as loss of livelihoods and interference with post-conflict reconstruction.⁶¹⁶

The preamble also underscores the importance of key obligations of the convention. In particular, it emphasizes states parties' commitments to stockpile destruction, clearance, and victim assistance.⁶¹⁷ The preamble devotes five paragraphs to victim assistance, demonstrating states parties' particularly strong commitment to that issue. The language of the preamble does not itself impose obligations, but by clarifying the goals of the convention, it provides a lens through which to interpret other provisions.

The preamble also exemplifies drafters' intent for the Convention on Cluster Munitions to apply broadly. The convention is directed at states, but the preamble, for the first time in a weapons convention, explicitly names non-state armed groups as forces whose actions must also be addressed. It declares that such groups "shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention."⁶¹⁸ Thus, the preamble places a burden on states parties to prevent non-state armed groups, which cannot join the convention, from acting contrary to the standards it sets.⁶¹⁹

Definitions (Article 2)

The definition of cluster munition adopted by the convention is essential to its comprehensive nature and encompasses all of the weapons whose use this book has discussed. While Article 2 defines 15 terms, "cluster munition" is especially critical because it determines to what the instrument applies. Article 2(2) begins with an objective, technical characterization, stating that a cluster munition is "a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions."⁶²⁰ It then specifies exclusions to the definition. Article 2(2)(a) and (b) excludes flares, smoke, pyrotechnics, chaff, and weapons designed to produce electrical or electronic

⁶¹⁶ Ibid., pmb., para. 3.

⁶¹⁷ Ibid., pmb., paras. 4-10.

⁶¹⁸ Ibid., pmb., para. 12.

⁶¹⁹ For a detailed discussion of the precedent set by the Convention on Cluster Munitions, see generally Bonnie Docherty, "Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law," *Human Rights Quarterly*, vol. 31, pp. 934-963 (2009). With regard to this paragraph, Docherty notes that CCW Amended Protocol II "does not name [non-state armed groups], but it seems to refer to them when it states that 'each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol' during non-international armed conflicts in a state party's territory." Ibid., pp. 960-961.

⁶²⁰ Convention on Cluster Munitions, art. 2(2). The upper weight limit of 20 kilograms ensures that the definition does not encompass multiple bombs delivered from the same bomb rack on an aircraft.

effects because they are not intended to cause personal injury or property destruction.⁶²¹ Article 2(2)(a) also does not cover munitions “designed exclusively for an air defense role” because these surface-to-air weapons are intended to produce effects in the air, not on the ground.⁶²² Article 2(2)(c) describes a small category of weapons that carry explosive submunitions but are not considered cluster munitions because they do not have the negative effects associated with cluster munitions. Although the convention has “exclusions,” that is, related weapons that do not fall under the definition, it has no “exemptions,” that is, exceptions that would make some types of cluster munitions acceptable. The convention thus defines and bans cluster munitions entirely and without exceptions.

Article 2(2)(c) enumerates detailed and cumulative criteria that narrow the exclusions to a minimum. The criteria address area effect by requiring excluded weapons to contain fewer than ten submunitions, and each submunition must be guided and weigh more than four kilograms.⁶²³ The limit on the number of submunitions reduces the saturation of an area. The weight restriction makes it more difficult to carry small submunitions that can be delivered in greater quantities. Guidance systems decrease the chance of indiscriminate attacks that kill or injure civilians. The criteria also minimize the danger of duds by mandating that the submunitions have both self-destruct and self-deactivating features to back up the primary fuze.⁶²⁴ The resulting definition encompasses all but three weapons carrying explosive submunitions that have ever been produced—the German SMArt-155, French and Swedish BONUS, and now out-of-production US SADARM.⁶²⁵ Of these three, only the SADARM has been used in conflict.⁶²⁶

The “chapeau” or preface to Article 2(2)(c) clarifies that the purpose of this high standard is to prevent humanitarian harm from both strikes and duds. Before listing the five cumulative characteristics just discussed, it reads: “A munition that, *in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions*, has the following

⁶²¹ Ibid., art. 2(2)(a) and (b). According to Article 1(3), the convention also does not apply to mines, which are defined in the same terms as in the Mine Ban Treaty. Ibid., arts. 1(3) and 2(12).

⁶²² Ibid., art. 2(2)(a).

⁶²³ Ibid., art. 2(2)(c)(i)-(iii).

⁶²⁴ Ibid., art. 2(2)(c)(iv) and (v). Self-destruction mechanism is defined as “an incorporated automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated.” Self-deactivating means “automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition.” Ibid., art. 2(9) and (10).

⁶²⁵ Docherty, “Breaking New Ground,” *Human Rights Quarterly*, p. 948. Each of these three weapons carries only two submunitions.

⁶²⁶ The United States used the ground-launched SADARM for the first and only time in Iraq in 2003. Human Rights Watch, *Off Target*, pp. 84-85.

characteristics.”⁶²⁷ The phrase introduced with the words “in order to” explains the intent of the provision but does not itself represent a characteristic required for exclusion. Nevertheless, the phrase indicates that states parties should not develop new munitions with submunitions if these weapons have area effects and dangerous failure rates. The narrowness of the exclusions, with clear technical and effects-based language, makes for a sweeping definition of cluster munition and ensures a categorical ban.

The term cluster munition remnants, defined in Article 2(7), also reflects the breadth of the convention. Such remnants encompass:

- failed cluster munitions, that is, cluster munitions that have been delivered but failed to release their submunitions;
- abandoned cluster munitions, that is, cluster munitions or explosive submunitions left behind or dumped;
- unexploded submunitions, that is, explosive submunitions that have been dispersed but failed to explode; and
- unexploded bomblets, that is, explosive bomblets that were released from a dispenser affixed to an aircraft and failed to explode.⁶²⁸

The term extends the application of many provisions, such as those on clearance and transparency, beyond unexploded submunitions.

Prohibitions

Absolute Prohibitions (Article 1)

The prohibitions of Article 1, the convention’s core preventive measures, are designed to eliminate future humanitarian problems from cluster munitions. The most obvious prohibition is that on use because use itself is what kills and injures civilians.⁶²⁹ To stop the global proliferation that is a necessary precursor to use, states parties must also never “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone directly or indirectly, cluster munitions.”⁶³⁰ The prohibitions are absolute and broad in scope.

⁶²⁷ Convention on Cluster Munitions, art. 2(2)(c) (emphasis added).

⁶²⁸ *Ibid.*, art. 2(4)-(7) and (15).

⁶²⁹ *Ibid.*, art. 1(1)(a).

⁶³⁰ *Ibid.*, art. 1(1)(b).

The phrase “never under any circumstances” prefaces the prohibitions, meaning states parties may not perform any of these activities during international or non-international armed conflicts or in situations that do not rise to the level of armed conflict, such as training exercises.⁶³¹ In addition, the prohibitions on production, transfer, and stockpiling cover direct and indirect action, and the ban on transfer applies to “anyone,” which includes states not parties and non-state actors, such as corporations and non-state armed groups.⁶³²

As a further preventive measure, Article 1(1)(c), which follows the lead of at least a half dozen previous weapons treaties,⁶³³ proscribes states parties from assisting others with prohibited activities. It states that they may not “assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”⁶³⁴ Like the other prohibitions, this one applies “under any circumstances,” and similar to the ban on transfer, it refers to assistance to “anyone.”

The prohibition on assistance should be understood to ban a range of activities, such as permitting the transit of cluster munitions through a state party’s territory, allowing foreign stockpiles on a state party’s territory, and investing in cluster munition production. Other forms of prohibited assistance should be understood to include, but not be limited to:

- securing , storing, or transporting cluster munitions that belong to a state not party;
- agreeing to rules of engagement that allow cluster munition use by a state not party;
- following orders from a state not party to use cluster munitions;
- requesting a state not party to use cluster munitions;
- participating in planning for use of cluster munitions by a state not party; and
- training others to use cluster munitions.⁶³⁵

⁶³¹ *Ibid.*, art. 1(1).

⁶³² *Ibid.*, art. 1(1)(b)

⁶³³ For articles in other treaties prohibiting assistance, see Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (Seabed Arms Control Treaty), opened for signature February 11, 1971, 23 U.S.T. 701, T.I.A.S. No 7337, entered into force May 18, 1972, art. 1; 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 April 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, entered into force March 26, 1975, art. 3; Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Treaty), opened for signature May 18, 1977, 1108 U.N.T.S. 152, entered into force October 5, 1978, art. 1(2); Comprehensive Nuclear Test Ban Treaty, opened for signature September 24, 1996, 35 I.L.M. 1439, (draft text as contained in U.N. Doc. A/50/1027 was adopted by the U.N. General Assembly in Res. 50/245), art. 1(2); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), opened for signature January 13, 1993, 32 I.L.M. 800, entered into force April 29, 1997, art. 1(1); Mine Ban Treaty, art. 1(1)(c).

⁶³⁴ Convention on Cluster Munitions, art. 1(1)(c).

⁶³⁵ These are activities that, after years of discussion, most states parties to the Mine Ban Treaty, which has a nearly identical provision on assistance, have agreed are banned. Human Rights Watch and Harvard Law School International Human Rights

As a whole, the prohibitions of Article 1 are unambiguous and represent a complete ban on cluster munitions.

Article 1(2) states that the prohibitions above apply equally to explosive bomblets.⁶³⁶ These weapons are similar to submunitions, including in their effects, except that they are dispersed by a dispenser affixed to an aircraft instead of by a cluster munition.⁶³⁷ It is not explicit that the rest of the convention applies to explosive bomblets because Article 1(2) mentions only Article 1's prohibitions. The provision on explosive bomblets, however, was added at the end of formal negotiations, and its omission elsewhere was likely an oversight, not an intended exclusion.⁶³⁸ States parties may choose to clarify that all provisions of the convention apply to explosive bomblets at a future meeting of states parties.

The Prohibitions and Joint Military Operations with States Not Party (Article 21)

The convention's prohibitions, especially the prohibition on assistance, must be read in conjunction with Article 21, Relations with States not Party to this Convention. Paragraphs 3 and 4 explain states parties' duties under the convention during joint military operations. Article 21(3) allows states parties to participate in operations with states not party "that might engage in activities prohibited to a State Party"; Article 21(4) enumerates certain activities that remain prohibited in these situations.⁶³⁹ Paragraph 3 begins with the phrase "[n]otwithstanding the provisions of Article 1," which has led some to argue that during joint operations Article 21 overrides the convention's absolute prohibitions. Others, including Human Rights Watch, counter that the paragraphs are a clarification that mere participation is allowed, not a qualification of Article 1.⁶⁴⁰ The next chapter analyzes in more depth the debate surrounding these provisions, which are open to interpretation because they have never appeared in a weapons treaty. Regardless, the article may be less problematic in practice because stigma will make it difficult for a state not party to use cluster munitions, especially if its allies are bound by the convention's ban.

Clinic, Fulfilling the Ban: Guidelines for Effective National Legislation to Implement the Convention on Cluster Munitions, June 2010, <http://www.hrw.org/node/90721>, pp. 8-9

⁶³⁶ Convention on Cluster Munitions, art. 1(2).

⁶³⁷ *Ibid.*, art. 2(13) and (14).

⁶³⁸ For the negotiating history of this provision, see Virgil Wiebe, Declan Smyth, and Christophe Lanord, "Article 1: General Obligations and Scope of Application," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, pp. 138-141.

⁶³⁹ Convention on Cluster Munitions, art. 21(3) and (4).

⁶⁴⁰ See Human Rights Watch, *Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions*, June 2009, <http://www.hrw.org/node/83975>, pp. 10-13.

Positive Disarmament Obligations

In addition to striving for disarmament through the prohibitions of Article 1, the Convention on Cluster Munitions establishes positive disarmament obligations. The primary provision is Article 3 requiring stockpile destruction, and two obligations made more explicit in Article 7 supplement it. Cluster munitions will remain a threat as long as states continue to possess them. These measures will help prevent use by eliminating the availability of weapons to be used in the future.

Stockpile Destruction (Article 3)

Achieving disarmament demands not only prevention of new production but also elimination of current stockpiles. The treaty's first positive obligation, Article 3, requires that a state party destroy its stockpiles as soon as possible, but no later than eight years from entry into force for that state.⁶⁴¹ The article is designed to remove the ability of states parties ever to use any of the millions of existing submunitions. It will also remove the chance of transfer of outdated and unreliable stockpiles of cluster munitions to other armed forces that could use such weapons in war. The preamble states that disarmament is one of the goals of the Convention on Cluster Munitions. States parties are "[d]eeply concerned also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and determined to ensure their rapid destruction."⁶⁴² Article 3 turns that concern into an obligation.

States parties may request a four-year extension to the destruction deadline, but to do so, they must provide detailed information to a Meeting of States Parties. They must include an explanation for the reason behind the request, a plan for stockpile destruction, and the quantity and type of cluster munitions destroyed and to be destroyed.⁶⁴³ None of the countries that have so far signed and/or ratified the convention should need more than eight years. Indeed, those with the largest stocks, such as Germany, the Netherlands, and the United Kingdom have all stated they intend to finish well in advance.⁶⁴⁴ Extensions should be the rare exception and not the rule. The Mine Ban Treaty does not allow for stockpile destruction extensions.

⁶⁴¹ Convention on Cluster Munitions, art. 3(2).

⁶⁴² *Ibid.*, pmb., para. 4 (emphasis removed).

⁶⁴³ *Ibid.*, art. 3(3)-(5).

⁶⁴⁴ *Cluster Munition Monitor 2010*, pp. 72 (Germany), 169 (the Netherlands), and 109 (the United Kingdom).

Other Disarmament Obligations (Article 7)

Two provisions in Article 7 highlight additional disarmament obligations. Article 7(1)(g) requires states parties to report on stockpiles discovered after the destruction of known stockpiles and on plans for their destruction.⁶⁴⁵ Article 3 does not explicitly mention newly discovered stockpiles, but once they are discovered, they, like all stockpiles, must be destroyed as soon as possible. The Article 7 provision underlines the existence of this obligation.

Article 7(1)(d) obliges states parties to submit information on “the status and progress of programmes for the conversion or decommissioning of production facilities for cluster munitions.”⁶⁴⁶ The convention does not specify that there is a duty to convert or decommission production facilities. Its ban on production, however, leaves states parties no option other than to eliminate their production facilities. Article 7(1)(d) reinforces that understanding of the prohibition on production.

Positive Humanitarian Obligations

As discussed in Chapter 4, minimizing the harm of cluster munitions already used requires extensive remedial measures. The Convention on Cluster Munitions, therefore, supplements its prohibitions and disarmament provisions with positive humanitarian obligations related to clearance, risk reduction education, and victim assistance.

Clearance and Risk Reduction Education (Article 4)

Civilians will not truly be safe from the threat of cluster munitions as long as cluster munition remnants remain to be cleared. Article 4, the first remedial measure of the Convention on Cluster Munitions, therefore requires states parties to clear cluster munition remnants in areas under “their jurisdiction or control” as soon as possible, but no later than 10 years after entry into force.⁶⁴⁷ The article lays out a mandatory process for states parties that includes:

- surveying, assessing, and recording the threat;
- assessing and prioritizing civilian protection needs;
- developing a national plan and mobilizing resources;
- marking and fencing contaminated areas; and
- clearing and destroying all remnants.⁶⁴⁸

⁶⁴⁵ Convention on Cluster Munitions, art. 7(1)(g).

⁶⁴⁶ *Ibid.*, art. 7(1)(d).

⁶⁴⁷ *Ibid.*, art. 4(1).

⁶⁴⁸ *Ibid.*, art. 4(2).

States parties are also obliged to conduct risk reduction education to ensure that civilians are aware of the dangers they face.⁶⁴⁹ Such education is necessary to protect civilians until clearance is complete.

As with stockpile destruction, states parties may apply for an extension, in this case, of five years. To do so, they must submit information to a Meeting of States Parties including an explanation of the reason for the extension, the status of and plan for clearance, and the implications of the extension.⁶⁵⁰ While extensions should rarely be granted, the option makes it easier for heavily affected states, such as Laos, to join the convention.

Although affected states bear the ultimate responsibility for clearance, Article 4(4) places some responsibility on user states parties to assist with clearance of cluster munition remnants that they left behind before the convention entered into force for them. This provision says that user states are “strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance.”⁶⁵¹ Because they can assist in many ways, all users should be able to provide some aid. Those states parties that choose to assist must supply the affected state with information on the types, quantities, and locations of the cluster munitions used, information that expedites clearance.⁶⁵² This provision will help affected states meet their clearance obligations. It is also a new concept for a weapons treaty and sets important precedent for retroactive responsibility in the future.⁶⁵³

Victim Assistance (Articles 2 and 5)

The provisions on victim assistance, another remedial measure, are the most groundbreaking part of the Convention on Cluster Munitions. They lay out a comprehensive framework for alleviating the suffering of those who have already been harmed by cluster munitions. Article 2(1) provides a definition of cluster munition victims. The broad definition encompasses both those killed by cluster munitions and those who have suffered a range of injuries including “physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights.” It includes not only individual victims but also

⁶⁴⁹ *Ibid.*, art. 4(2)(e).

⁶⁵⁰ *Ibid.*, art. 4(5)-(8).

⁶⁵¹ *Ibid.*, art. 4(4)(a).

⁶⁵² *Ibid.*, art. 4(4)(b).

⁶⁵³ See Docherty, “Breaking New Ground,” *Human Rights Quarterly*, pp 952-955. For a discussion of the argument behind the provision, see generally Human Rights Watch and Harvard Law School International Human Rights Clinic, *User State Responsibility for Cluster Munition Clearance*.

affected families and communities.⁶⁵⁴ The nature of this definition means that the victim assistance obligations outlined later in the convention apply to a wide range of people.

Article 5 establishes obligations for affected states parties to provide assistance to these victims. Paragraph 1 mandates “age-and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as [provision for] ... social and economic inclusion”; it also requires states parties to gather “reliable relevant data” regarding victims.⁶⁵⁵ Paragraph 1 covers five of the six key components of victim assistance described in Chapter 4. Article 5(2) enumerates how states parties must achieve the above goals and addresses the remaining component (disability laws and policies). This paragraph’s obligations include assessing victims’ needs; developing national laws, plans, and budgets; mobilizing resources; not discriminating among aid recipients; consulting with cluster munition victims; designating a government focal point to coordinate implementation of these obligations; and following best practices.⁶⁵⁶

The Convention on Cluster Munitions advances the status of victim assistance in international law in several ways. It is the first time a weapons treaty has included not only a definition of victim but also a separate article on victim assistance, which demonstrates increased international recognition of the issue. The convention uses the word “shall,” the strongest obligation under the law. It also states such assistance must be “in accordance with applicable international humanitarian and human rights law.” The reference to human rights law ensures that states will have not only to abide by this area of the law, but also to meet the standards set by the Convention on the Rights of People with Disabilities, which entered into force in 2008. These characteristics will help ensure the care of victims and set important precedent for victim assistance in future treaties.⁶⁵⁷

Provisions to Facilitate Full Implementation of the Convention

The Convention on Cluster Munitions also includes a set of articles designed to facilitate implementation of the strong provisions just discussed. These articles, which represent additional positive obligations, govern international cooperation and assistance, transparency, compliance and dispute settlement, national implementation measures, and promotion of the convention and its norms.

⁶⁵⁴ Convention on Cluster Munitions, art. 2(1).

⁶⁵⁵ *Ibid.*, art. 5(1).

⁶⁵⁶ *Ibid.*, art. 5(2).

⁶⁵⁷ Docherty, “Breaking New Ground,” *Human Rights Quarterly*, pp. 950-952.

International Cooperation and Assistance (Article 6)

A requirement to provide international cooperation and assistance is designed to help states parties meet the obligations laid out in the previous articles. Article 6 states that “each State Party has the right to seek and receive assistance.”⁶⁵⁸ It requires states parties “in a position to do so” to assist with a variety of activities.⁶⁵⁹ Because states may give assistance in a range of forms—notably “technical, material and financial”—all states parties are in a position to contribute in some way.⁶⁶⁰ States parties must provide assistance for stockpile destruction, clearance, emergency situations if cluster munitions are used again, victim assistance, and economic and social recovery.⁶⁶¹ They have the option of contributing to a trust fund if they prefer to give assistance indirectly.⁶⁶² Obligations do not fall only on donor states. Article 6(10) requires recipient states to “facilitate the timely and effective implementation of this Convention,” by guaranteeing, for example, easy “entry and exit of personnel, materiel and equipment.”⁶⁶³ Article 6, which calls for more assistance than past treaties, increases the power of the Convention on Cluster Munitions by committing the international community to providing resources for achieving its disarmament and humanitarian goals.⁶⁶⁴

Transparency Measures (Article 7)

Transparency advances implementation in two main ways. First, it helps identify which states parties need assistance meeting their obligations and what kind of assistance would be appropriate. Second, it facilitates monitoring of progress. The requirements allow for public scrutiny of what states parties have done and not done, which provides added incentive for states parties to fulfill their duties under the convention.⁶⁶⁵

With regard to disarmament, states parties must report: the size and breakdown of stockpiles, the characteristics of cluster munitions produced in the past, the status and

⁶⁵⁸ Convention on Cluster Munitions, art. 6(1).

⁶⁵⁹ *Ibid.*, art. 6(2), (4)-(9).

⁶⁶⁰ See, for example, *ibid.*, art. 6(2).

⁶⁶¹ *Ibid.*, art. 6(4)-(8).

⁶⁶² *Ibid.*, art. 6(9).

⁶⁶³ *Ibid.*, art. 6(10).

⁶⁶⁴ See Bonnie Docherty and Richard Moyes, “Article 6: International Cooperation and Assistance,” in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, pp. 377-378. Compared to previous treaties, the convention strengthens some obligations, by, for example, listing more types of victim assistance and referencing user state responsibility for clearance. It also adds obligations to provide new types of assistance, including for emergencies and social and economic recovery. *Ibid.*

⁶⁶⁵ See Bonnie Docherty, “Article 7: Transparency Measures,” in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, pp. 422-423.

progress of converting or decommissioning production facilities, the status and progress of stockpile destruction, the types and quantities of cluster munitions destroyed, and the details of newly discovered stockpiles and plans for their destruction.⁶⁶⁶ In reporting on humanitarian measures, states parties must address: the size and location of cluster munition contaminated areas, the status and progress of clearance programs, the types and quantities of cluster munition remnants destroyed, risk reduction education measures, and victim assistance.⁶⁶⁷ Finally, states parties must report on implementation-related topics, including: national implementation measures, contact details of institutions providing information, national resources devoted to the convention's implementation, and international cooperation and assistance.⁶⁶⁸ This list of topics is significantly longer than those in past weapons treaties, which will increase its effects.⁶⁶⁹

States parties must submit an initial report on these subjects within 180 days of entry into force to the UN Secretary-General, who will pass it on to other states parties.⁶⁷⁰ They must also update it annually by April 30.⁶⁷¹ States parties or the United Nations will presumably make these reports public as they have with comparable reports under the Mine Ban Treaty.⁶⁷²

Clarification of Compliance and Settlement of Disputes (Articles 8 and 10)

Articles 8 and 10 seek to resolve cases where there are questions about interpretation or implementation of the convention. In Article 8, Facilitation and Clarification of Compliance, the Convention on Cluster Munitions adopts an approach of "cooperative compliance."⁶⁷³ First, states parties must try to address any concerns themselves. They "agree to consult and cooperate with each other regarding implementation ... and to work together in a spirit of cooperation to facilitate compliance."⁶⁷⁴ If that fails, a state party worried about another state party's compliance may submit a "request for clarification" to the UN Secretary-

⁶⁶⁶ Convention on Cluster Munitions, art. 7(1)(b)-(g).

⁶⁶⁷ *Ibid.*, art. 7(1)(h)-(k).

⁶⁶⁸ Convention on Cluster Munitions, art. 7(1)(a), (l)-(n).

⁶⁶⁹ See Docherty, "Article 7," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, pp. 423-424. In particular Article 7 of the Convention on Cluster Munitions adds obligations to report on newly discovered stockpiles, victim assistance, national points of contact, national resources, and international cooperation and assistance.

⁶⁷⁰ Convention on Cluster Munitions, art. 7(1), (3).

⁶⁷¹ *Ibid.*, art. 7(2).

⁶⁷² See Docherty, "Article 7," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, p. 453.

⁶⁷³ See Bonnie Docherty, "Article 8: Facilitation and Clarification of Compliance," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, p. 456-457. For a discussion of cooperative compliance in the Mine Ban Treaty context, see Stephen D. Goose, "Goodwill Yields Good Results: Cooperative Compliance and the Mine Ban Treaty," in Williams, Goose, and Wareham, eds., *Banning Landmines*, pp. 105-126.

⁶⁷⁴ Convention on Cluster Munitions, art. 8(1).

General.⁶⁷⁵ If the requested state does not respond satisfactorily, the inquiring state may forward its request, via the Secretary-General, to the next Meeting of States Parties.⁶⁷⁶ The Meeting of States Parties is not required to address the issue, but it may offer recommendations for ways to resolve the matter.⁶⁷⁷

Article 8's approach to compliance reflects the convention's emphasis on having the states work together to achieve their goals. Arms control treaties often have strict verification regimes to prevent adversaries from gaining military advantage.⁶⁷⁸ The compliance mechanism of the Convention on Cluster Munitions resembles more closely those of international humanitarian law and in particular the Mine Ban Treaty.⁶⁷⁹ In fact, the Convention on Cluster Munitions takes an even more cooperative approach than does the Mine Ban Treaty because negotiators decided not to copy the latter's provisions allowing for fact-finding compliance missions. States parties have never invoked this mechanism of the Mine Ban Treaty, which mostly reflects the effectiveness of cooperative compliance.⁶⁸⁰

Article 10 of the Convention on Cluster Munitions provides an alternative method for dealing with more adversarial disputes. If there is an irreconcilable disagreement among states parties, they may refer the matter directly to the Meeting of States Parties or to the International Court of Justice.⁶⁸¹ This article is designed to promote peaceful dispute resolution.

National Implementation Measures (Article 9)

While the convention itself establishes a framework of obligations, implementing it at the national level will help to ensure it achieves its potential. While flexible about the exact means adopted, Article 9 requires states parties to "take all appropriate legal, administrative and other measures to implement this Convention." The measures must include penal sections to criminalize violations of the convention's prohibitions "undertaken by persons or on territory under its jurisdiction or control."⁶⁸² These sanctions must cover

⁶⁷⁵ Ibid., art. 8(2).

⁶⁷⁶ Ibid., art. 8(3).

⁶⁷⁷ Ibid., art. 8(5). The Meetings of States Parties also have the option of creating alternative compliance mechanisms in the future. Ibid., art. 8(6).

⁶⁷⁸ See, for example, Chemical Weapons Convention, arts. 9 and 12 and annex on implementation and verification.

⁶⁷⁹ Mine Ban Treaty, art. 8. For a discussion of the distinction between compliance in arms control and international humanitarian law treaties, see Goose, "Goodwill Yields Good Results," in Williams, Goose, and Wareham, eds., *Banning Landmines*, pp. 106-107.

⁶⁸⁰ Goose, "Goodwill Yields Good Results," in Williams, Goose, and Wareham, eds., *Banning Landmines*, p. 108.

⁶⁸¹ Convention on Cluster Munitions, art. 10.

⁶⁸² Ibid., art. 9.

non-state actors, including corporations and non-state armed groups. Article 9 goes further, however, and requires states parties to implement *all* of the provisions of the convention, including both positive and negative obligations.⁶⁸³ Taking implementation a step beyond the Mine Ban Treaty, this requirement assigns equal weight to the convention's different types of provisions. Chapter 10 details what states parties should do to achieve the strongest implementation measures under this article.⁶⁸⁴

Promoting the Convention (Article 21)

Finally, Article 21(1) and (2) will help extend the convention's reach and influence by requiring states parties to work to advance it in their dealings with states not party. Article 21(1) mandates that states parties encourage others to join the convention with an eye to universalization.⁶⁸⁵ Article 21(2) obliges states parties to "promote the norms [the convention] establishes" and to discourage states not party from using cluster munitions. It also requires states parties to notify their allies in joint military operations of their obligations under the convention in order to reduce the use of cluster munitions and minimize the risk of violations of the convention in such situations.⁶⁸⁶ Such provisions set precedent because they appear for the first time in a weapons treaty.⁶⁸⁷ The other aspects of Article 21 are discussed in detail below.

Procedural Provisions

The remaining articles of the convention consist of procedural provisions. While somewhat routine in treaties, they establish mechanisms that will guide the future direction of the convention.

Meetings of States Parties and Review Conferences (Articles 11 and 12)

Articles 11 and 12 set up schedules and agendas for states parties to gather at either Meetings of States Parties or Review Conferences. The former are annual and the latter every five years or more.⁶⁸⁸ They will consider such topics as the "operation and status" of the convention,

⁶⁸³ Lou Maresca, "Article 9: National Implementation Measures," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, pp. 473-474, 477-478; Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban*, p. 2.

⁶⁸⁴ See generally Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban*.

⁶⁸⁵ Convention on Cluster Munitions, art. 21(1).

⁶⁸⁶ *Ibid.*, art. 21(2).

⁶⁸⁷ See Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, p. 10.

⁶⁸⁸ Convention on Cluster Munitions, arts. 11(2) and 12(1).

reports under the transparency article, international cooperation and assistance, requests for clarification and dispute resolution, and submissions for extensions of stockpile destruction and clearance deadlines.⁶⁸⁹ By providing for discussions and oversight, the Meetings of States Parties and Review Conferences will help ensure the convention's provisions are met.

Both articles allow states parties to grant observer status not only to states not party but also to the United Nations, international and regional organizations, notably the ICRC, and relevant NGOs.⁶⁹⁰ The involvement of such groups was key to the success of the Oslo Process, and the convention recognizes them in its preamble.⁶⁹¹ They can continue to contribute and play important roles as administrators and watchdogs now that the convention has entered into force.

Closing Provisions (Articles 13-20, 22-23)

The closing articles deal with procedural matters common to most treaties, but a few are particularly noteworthy. Under Article 13, amendments can be made if adopted by two-thirds of states parties at an amendment conference.⁶⁹² In accordance with Articles 15 and 16, states can only sign the convention until it enters into force and after that must accede.⁶⁹³ Article 17 stipulates that the convention will enter into force on the first day of the sixth month after it receives thirty ratifications,⁶⁹⁴ the convention reached this milestone on August 1, 2010. Article 19 allows for no reservations, thus strengthening the convention's obligations.⁶⁹⁵

Conclusion

The Convention on Cluster Munitions sets a gold standard for international weapons treaties. It categorically bans the use, production, transfer, and stockpiling of all cluster munitions, preventing future employment and proliferation of the weapons. It requires states parties to fulfill strict disarmament and humanitarian obligations that will reduce the suffering of civilians. It advances international law with innovative provisions, including those on victim assistance, user state responsibility for clearance, international cooperation and assistance, transparency, and universalization. In sum, the convention deals absolutely and comprehensively with the multiple problems of cluster munitions.

⁶⁸⁹ *Ibid.*, arts. 11(1) and 12(2).

⁶⁹⁰ *Ibid.*, arts. 11(3) and 12(3).

⁶⁹¹ *Ibid.*, pmb., para. 17.

⁶⁹² *Ibid.*, art. 13.

⁶⁹³ *Ibid.*, arts. 15-16.

⁶⁹⁴ *Ibid.*, art. 17.

⁶⁹⁵ *Ibid.*, art. 19.

IX. Resistance to a Cluster Munition Ban

While the Convention on Cluster Munitions successfully addresses all of the problems of cluster munitions, it has encountered resistance. At the international level, CCW states parties continue to participate in deliberations that could result in a Protocol VI regulating cluster munitions, which would be far less comprehensive than the convention. At the national level, some states that have adopted laws and policies regarding the weapons have followed the regulatory approach common before the Oslo Process began. The United States in particular has taken a series of steps to restrict activities involving cluster munitions, but it has not categorically prohibited them. Such partial efforts are fundamentally flawed and may give a false sense of being sufficient. These steps run counter to the only effective approach to ending the destruction caused by cluster munitions—the convention’s ban, which has been endorsed by more than half the world.

The CCW and Cluster Munitions

Major stockpilers of the weapon, including China, India, Israel, Pakistan, Russia, and the United States, have pushed for a regulatory approach as opposed to an absolute ban. A watered-down instrument on cluster munitions attached to the CCW represents the primary international alternative to the Convention on Cluster Munitions. Such a protocol would set an unhelpful legal precedent by establishing a standard that is less restrictive than the ban achieved in the convention. The net effect would be to compromise efforts to stigmatize use of cluster munitions; stigmatization can make it politically difficult even for states that have not joined the convention to use cluster munitions in the future. In addition, states might use the possibility of the protocol as an excuse not to join the Convention on Cluster Munitions.⁶⁹⁶ A CCW protocol should therefore not be seen as an acceptable alternative to an absolute and comprehensive convention.

The decision to continue discussions on cluster munitions in the CCW forum was itself a reaction to the Oslo Process. For four years, CCW states parties had simply repeatedly renewed a mandate to discuss cluster munitions in the context of their larger agenda without taking any further action. Not until November 2007, in the middle of the Oslo Process, did the CCW Meeting of States Parties agree to “negotiate a proposal” to address

⁶⁹⁶ Steve Goose, director of the Arms Division at Human Rights Watch and co-chair of the Cluster Munition Coalition, “Statement to the 2009 Meeting of States Parties to the Convention on Conventional Weapons,” November 13, 2009, <http://www.hrw.org/en/news/2009/11/13/statement-2009-meeting-states-parties-convention-conventional-weapons-ccw>.

the problems of cluster munitions.⁶⁹⁷ Human Rights Watch responded, “The sudden willingness of the United States and others to work on cluster munitions in the CCW can only be seen as an effort to deal with the Oslo Process, not with the humanitarian problems caused by clusters.”⁶⁹⁸ The exact meaning of negotiating a proposal, rather than a protocol, was unclear, but it reflected a shift in thinking among CCW states parties.

Since 2007, the consensual CCW process has moved at a typically slow pace. In November 2008, states parties revised their mandate somewhat to making “every effort to conclude [their] negotiations as rapidly as possible.”⁶⁹⁹ This decision occurred just weeks before the signing ceremony of the Convention on Cluster Munitions, indicating again that CCW states parties were working in competition to an absolute ban. A year and multiple draft texts later, little had changed, and states parties reissued the same mandate. At this point, in November 2009, Human Rights Watch told delegates,

[T]he CCW is undeniably bogged down, if not hopelessly deadlocked. The uncomfortable facts are that after three years, there is not even agreement if you are negotiating a protocol or a ‘proposal.’ There is not a single, solid, broadly agreed upon draft text from which to negotiate. There are no indications that we can detect that the deep differences that have prevented progress thus far have narrowed—or will narrow in the future. One can only expect that further negotiations will result in an even weaker text next year.⁷⁰⁰

This prediction came true, and as of September 2010, states parties were still debating a draft text.

The text under discussion at the CCW meetings is far weaker than the Convention on Cluster Munitions on many counts. While the September 2010 draft includes limited prohibitions on use, production, transfer, and stockpiling, they apply only to *some* cluster munitions.⁷⁰¹ Technical Annex A excludes cluster munitions that have no more than a 1 percent failure rate

⁶⁹⁷ Meeting of the High Contracting Parties to the CCW, “Report,” CCW/MSP/2007/5, December 3, 2007, p. 9.

⁶⁹⁸ “CCW: Only Oslo Process Can Deliver a Cluster Bomb Ban,” Human Rights Watch news release, November 13, 2007, <http://www.hrw.org/en/news/2007/11/13/ccw-only-oslo-process-can-deliver-cluster-bomb-ban>.

⁶⁹⁹ Meeting of States Parties to the CCW, “Report,” November 13-14, 2008, CCW/MSP/2008/4, January 23, 2009, p. 7. At the same meeting, 25 states parties issued a joint statement stating that an early draft text was unacceptable because it did not achieve humanitarian objectives. “Move by US, Others to Support Cluster Munitions Fails,” Human Rights Watch news release, November 14, 2008, <http://www.hrw.org/en/news/2008/11/14/move-us-others-support-cluster-munitions-fails>.

⁷⁰⁰ Goose, “Statement to the 2009 Meeting of States Parties to the Convention on Conventional Weapons.”

⁷⁰¹ “Draft Protocol on Cluster Munitions,” September 3, 2010, art. 4.

from all of the protocol's obligations.⁷⁰² Technical Annex B lists models that are not subject to the prohibitions, including submunitions with certain fail-safe mechanisms as well as cluster munitions designed as anti-ship, direct fire, and anti-runway weapons.⁷⁰³ Further undermining the prohibitions, the draft text allows states parties to defer compliance for an eight-year transition period, with the possibility of a four-year extension.⁷⁰⁴ The document is not only riddled with exceptions, but also difficult to interpret. Recognizing some of its flaws, a German delegate described the proposed text as a "complicated structure of exceptions, and exceptions to exceptions."⁷⁰⁵ A UK official added that it was "a very complicated text, with a kind of duplicity and contradiction ... that will surely keep our lawyers employed for [some] time to come."⁷⁰⁶

The positive obligations of the proposed protocol are less detailed and comprehensive than those of the Convention on Cluster Munitions. There is no deadline for stockpile destruction or clearance.⁷⁰⁷ In addition, user state responsibility for clearance does not apply retroactively.⁷⁰⁸ While the draft includes an article on victim assistance, it does not define cluster munition victim, which means that states might not provide assistance for families and communities as well as affected individuals.⁷⁰⁹ The draft text does not require international assistance for stockpile destruction or economic and social recovery.⁷¹⁰ It also has no article on transparency, the absence of which would interfere with monitoring.⁷¹¹

These exceptions, qualifications, and omissions may ultimately prevent agreement on the protocol because numerous supporters of the Convention on Cluster Munitions see them as far too weak. At the same time, other states, such as India, Israel, Pakistan, South Korea, and Russia, have opposed the text because they see its provisions as too far-reaching. There are still major disagreements even among those who have not joined the ban convention.

⁷⁰² Ibid., Technical Annex A.

⁷⁰³ Ibid., Technical Annex B.

⁷⁰⁴ Ibid., art. 4(3).

⁷⁰⁵ Email communication from Katherine Harrison, Action on Armed Violence, to the CMC, September 3, 2010.

⁷⁰⁶ In addition, a French representative stated, "A technician will get a headache from reading this. The more you read it the more complicated it becomes." Ibid.

⁷⁰⁷ "Draft Protocol on Cluster Munitions," September 3, 2010, art. 5 and 6.

⁷⁰⁸ Ibid., art. 6(1).

⁷⁰⁹ Ibid., arts. 2 and 9.

⁷¹⁰ Ibid., art. 10.

⁷¹¹ See generally *ibid.*

Regardless, the negotiating process diverts attention from the Convention on Cluster Munitions by holding forth the possibility that the negotiations could produce a protocol.

Despite their resistance to the Convention on Cluster Munitions, the states in favor of a CCW alternative have acknowledged that cluster munitions pose unacceptable dangers to civilians. While they argue that they do not want restrictions that interfere with military capabilities, they accept the need for new rules regarding the weapons. A 2008 US Defense Department policy, for example, describes cluster munitions as “legitimate weapons with clear military utility” yet “recognizes the need to minimize the unintended harm to civilians and civilian infrastructure associated with unexploded ordnance from cluster munitions.”⁷¹²

These states, which are not yet ready to join the Convention on Cluster Munitions, have options that are preferable to negotiating a protocol to the CCW. They could turn the draft CCW text into a politically binding agreement that would not undermine the ban convention with weaker international law.⁷¹³ They could also adopt interim national measures designed to reduce the civilian harm of cluster munitions. Such measures would represent partial steps in the right direction and should be encouraged, but the Convention on Cluster Munitions remains the only option in international law that addresses all of the problems of cluster munitions.⁷¹⁴

National Regulatory Measures

The United States, which has been pushing for the creation of a CCW protocol on cluster munitions, has been one of a handful of states concurrently pursuing a regulatory approach at home. Its 2001 policy restricting production of cluster munitions with a 1 percent or higher failure rate was progressive at the time, but it was followed by US use of cluster munitions in two armed conflicts: Afghanistan and Iraq. Only as international calls for action on cluster munitions heated up did the United States consider additional national measures. In 2006, Senators Dianne Feinstein and Patrick Leahy proposed a legislative action that would have prohibited US armed forces from using cluster munitions in or near populated civilian areas

⁷¹² US Secretary of Defense Robert M. Gates, “Memorandum for the Secretaries of the Military Departments, Subject: DOD Policy on Cluster Munitions and Unintended Harm to Civilians,” June 19, 2008, <http://www.defense.gov/news/d20080709cmpolicy.pdf> (accessed August 13, 2010) [hereinafter “US Cluster Munition Policy 2008”], p. 1. This policy is discussed in more depth below.

⁷¹³ Such an agreement would be akin to a statement of principles that would have the effect of politically obligating states that ascribe to it.

⁷¹⁴ See, for example, Mark Hiznay, senior researcher in the Arms Division of Human Rights Watch, “Statement on Cluster Munitions to the CCW Group of Governmental Experts,” April 12 2010, <http://www.hrw.org/en/news/2010/04/12/statement-cluster-munitions-convention-conventional-weapons-ccw-group-governmental-e>.

and restricted the export of cluster munitions unless the recipient nation agreed not to use them in such areas. The Senate defeated it by 70 votes to 30.⁷¹⁵

In February 2007, around the time of the Oslo Declaration, Senators Feinstein and Leahy joined by US Representative James McGovern sought to address the problems of cluster munitions more broadly. They introduced a bill that would have limited US use as well as transfer of cluster munitions to those models with a 99 percent or higher reliability rate. It would have prohibited the use of cluster munitions in areas where civilians were known to be present and transfer if the importing state would not agree to abide by that condition. In addition, it would have required the president to submit a plan to Congress for cleanup of unexploded duds if the United States used cluster munitions or if another country used US-supplied cluster munitions.⁷¹⁶ The bill received support from some legislators initially and again when resubmitted in 2009, yet it was not brought to a vote.⁷¹⁷ The bill addressed both problematic targeting and the threat of unexploded submunitions. It also effectively restricted all US cluster munitions except for Sensor Fuzed Weapons, a very tiny portion of the US cluster munition arsenal, and therefore it earned Human Rights Watch's support.⁷¹⁸ Nevertheless, it would have allowed for some use, and tied its restrictions to a failure rate, which is an unreliable predictor of performance in the field.

The United States enacted its first legislation on cluster munitions in December 2007. Congress passed an appropriations act that placed a one-year moratorium on the transfer of cluster munitions unless their submunitions had a 99 percent or higher tested reliability rate. The legislation also required that any state receiving cluster munitions from the United States must agree that those cluster munitions "will only be used against clearly defined military targets and will not be used where civilians are known to be present."⁷¹⁹ Its focus on transfer was likely influenced by Israel's deadly use of US cluster munitions in South Lebanon the year before. In September 2008, Congress extended the Consolidated

⁷¹⁵ Senate Amendment 4882 to the Fiscal Year 2007 US Defense Appropriations Bill (H.R. 5631), Roll Call Vote 232, September 6, 2006.

⁷¹⁶ Cluster Munitions Civilian Protection Act of 2007 (S. 594), 110th US Congress, 1st Session, 2007; Cluster Munitions Civilian Protection Act of 2007 (H.R. 1755), 110th US Congress, 1st Session, 2007. The bill would have allowed the president to waive the requirements if "it is vital to protect the security of the United States."

⁷¹⁷ In 2009, the sponsors submitted a slightly modified version of the bill. See Cluster Munitions Civilian Protection Act of 2009 (S. 416), 111th US Congress, 1st Session, 2009; Cluster Munitions Civilian Protection Act of 2009 (H.R. 981), 111th US Congress, 1st Session, 2009.

⁷¹⁸ "US: Enact Law to Protect Civilians from Cluster Munitions," Human Rights Watch news release, February 14, 2007, <http://www.hrw.org/en/news/2007/02/14/us-enact-law-protect-civilians-cluster-munitions>.

⁷¹⁹ US Consolidated Appropriations Act, 2008, sec. 646(b).

Appropriations Act, and thus the moratorium, through March 6, 2009.⁷²⁰ The most recent version of the prohibition took effect when President Obama signed the 2009 Omnibus Appropriations Act on March 11, 2009.⁷²¹

Other states seem to have looked to the United States for guidance on their own regulatory policies. In November 2008, for example, South Korea announced that it had issued a directive requiring that in the future it acquire (produce or import) only cluster munitions with self-destruct mechanisms and a 1 percent or lower failure rate.⁷²² An ally of the United States, South Korea left open the door to receiving cluster munitions still permitted under the US transfer regulation.⁷²³

While the US transfer legislation was a positive if partial achievement, a new Department of Defense policy was out of step with the recently concluded Oslo Process. In July 2008, the Department of Defense announced it would restrict but not absolutely prohibit US use and stockpiling of cluster munitions.⁷²⁴ It stated that after the end of 2018, the United States would no longer use cluster munitions with a failure rate of more than 1 percent.⁷²⁵ Until 2018 and effective immediately, use of cluster munitions exceeding this rate would require approval from the appropriate combatant commander.⁷²⁶ Military departments would also initiate removal from active inventories of all cluster munition stocks “that exceed operational planning requirements or for which there are no operational planning

⁷²⁰ US Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, sec. 101.

⁷²¹ US Omnibus Appropriations Act, 2009, sec. 7056(b).

⁷²² Statement by the Republic of Korea, to the Meeting of States Parties to the CCW, Geneva, November 13, 2008.

⁷²³ Five states have instituted policies regulating use of cluster munitions since the adoption of the Convention on Cluster Munitions. In November 2008, for example, an official from the Polish Ministry of National Defense said that Poland would use cluster munitions for defensive purposes only and that it does not intend to use them outside its own territory. Romania indicated in 2009 that it had restricted the use of cluster munitions “exclusively on our territory, under the national defense programme.” Estonia, Finland, and Slovakia have made similar declarations. *Cluster Munition Monitor 2010*, p. 13. These policies make little sense because states would be unlikely to use cluster munitions in their own territory due to the risk of unexploded submunitions.

⁷²⁴ US Cluster Munition Policy 2009; “Cluster Munitions Policy Released,” US Department of Defense news release, no. 577-08, July 9, 2008, <http://www.defense.gov/releases/release.aspx?releaseid=12049> (accessed August 13, 2010). For further discussion of this policy, see *Banning Cluster Munitions*, pp. 254-255.

⁷²⁵ The policy requires cluster munitions used after 2018 to meet a 1 percent failure rate not only in testing but in actual use during combat operations within the variety of operational environments in which US forces intend to use the weapon. “US Cluster Munition Policy 2008,” p. 2. The states negotiating the Convention on Cluster Munitions rejected the failure rate approach to addressing cluster munitions for a host of reasons, including that it does not deal with the indiscriminate wide area effect during strikes and that claimed failure rates are generally not achieved in actual combat.

⁷²⁶ *Ibid.*, p. 2. In the US armed forces, commandant commander is the title of a major leader of either a large geographical region or a particular military function.

requirements.”⁷²⁷ This policy, with its 10-year transition period and reliance on a failure rate, is similar to the provisions the United States has promoted in the CCW process.

The US Defense Department’s policy was an explicit challenge to the Convention on Cluster Munitions. The Department of Defense stated that the new policy was “viewed as a viable alternative to a complete ban proposal generated by the Oslo Process in Dublin, Ireland.”⁷²⁸ As extended experience with cluster munitions in recent conflicts has demonstrated, however, there is no “viable alternative” to the Convention on Cluster Munitions for addressing the humanitarian effects of the weapons.

Conclusion

More than two years after adoption of the Convention on Cluster Munitions, the United States and other major military powers continue actively to resist the convention. To this end, they have pursued international and national measures in the name of balancing military needs and humanitarian concerns. They have done little, however, to bring an end to the civilian suffering associated with cluster munitions. The CCW process continues to be deadlocked on a weak regulatory draft text. US policy is based on a questionable failure rate approach and beholden to a lengthy transition period. The Convention on Cluster Munitions is the only instrument that offers a complete solution to the range of humanitarian harms cluster munitions cause.

⁷²⁷ These excess cluster munitions would be demilitarized as soon as practicable. *Ibid.*, p. 2.

⁷²⁸ “Cluster Munitions Policy Released,” US Department of Defense news release, July 9, 2008.

X. Final Steps: Universalization, Implementation, and Interpretation

The Convention on Cluster Munitions is a landmark convention, well tailored to deal with the multiple problems of cluster munitions. Its entry into force, however, does not represent the end of the road. To complete the process begun in Oslo, states must work to universalize the convention to promote its norms and increase the stigmatization of cluster munitions. They must fully implement its obligations to ensure its potential is realized. To bolster effective implementation and preserve the legal power of the convention, they must strongly interpret certain individual provisions. Only when states have taken these final steps will the convention be able to fulfill its promise.

Universalization

Universalization, which involves convincing new states to become party to the convention, enhances the influence of the Convention on Cluster Munitions and is the only way to establish a new international norm against the weapons. Article 21(1) obliges states parties to encourage other states to join “with the goal of attracting the adherence of all States to this Convention.”⁷²⁹ When a country becomes party to the convention, it agrees to be bound by its provisions, so the greater the number of states parties, the wider the legal effect it has. The addition of new states parties also demonstrates growing support for the convention, which helps to establish its norms as the accepted standard. In the long run, having a large number of states parties could contribute to the convention becoming customary international law.⁷³⁰ Furthermore, universalization will increase the already strong stigma it sets against using cluster munitions, and as a result, states not party will find it politically more and more difficult to continue to use the weapons.⁷³¹

In the less than two years since it opened for signature, the Convention on Cluster Munitions has attracted a solid base of state supporters. States can no longer sign the convention because it has entered into force, but the final number of signatories reached 108, more than

⁷²⁹ Convention on Cluster Munitions, art. 21(1).

⁷³⁰ At the time of writing, becoming legal custom is only a long-term goal for the Convention on Cluster Munitions. A norm must meet two requirements to become customary international law: 1) state practice must follow the norm and 2) states must act in this way because they believe they are bound to under the law. The latter element is called *opinio juris*.

⁷³¹ The case of the Mine Ban Treaty exemplifies the power of stigma; very few states, even those not party to the Mine Ban Treaty, have used mines since that treaty’s adoption. Landmine Monitor has confirmed only two states—Russia and Myanmar—that have used landmines since 2007. ICBL, *Landmine Monitor Report 2009*, p. 4.

half of the world. International law requires these states to uphold the “object and purpose” of the instrument, which means they cannot, for example, use cluster munitions in the future.⁷³² As of November 1, 2010, 46 states had ratified the convention becoming states parties bound by all of its provisions, and this number will continue to grow.⁷³³ The list includes users, producers, stockpilers, and affected states. Most regions of the globe are also represented on the list: Africa has 11 states parties, the Americas seven, Asia-Pacific five, Europe 21, and Middle East/North Africa 2.⁷³⁴ Signatories can continue to ratify, and non-signatories can become states parties by acceding, which has the same legal effect as ratification.⁷³⁵

The Convention on Cluster Munitions faces several challenges to universalization. Some states may fail to ratify or accede because they are not sufficiently aware of the problems of cluster munitions. Others may believe that the convention is not important to them because they have not used, produced, stockpiled, or been affected by cluster munitions. Still others may not understand the bureaucratic process required to join. Highlighting the ongoing dangers of cluster munitions and the legal significance of having large numbers of states parties regardless of their nature can sway the first two groups. In addition, states parties and civil society can walk government officials of states not parties through the diplomatic maze of ratification or accession.

Universalization is challenged not only by lack of prioritization, but also by concerns about capacity. Affected states and major stockpilers may argue that they cannot meet their respective clearance and stockpile destruction deadlines. Joining the convention should facilitate those activities, however, because they will be entitled to international cooperation and assistance from other states parties and therefore will not have to meet their obligations alone. For affected states in particular, such assistance will help them complete clearance that that they would have had to undertake anyway in the course of exercising their fundamental duties as states toward their citizens. Although almost all states should be able to meet their deadlines, in extreme cases, affected states and stockpilers can receive extensions to the convention’s default deadlines.

Certain states may also try to use concerns about national security as an excuse not to join the convention, but these concerns, too, are unfounded. The military utility of cluster

⁷³² Vienna Convention on the Law of Treaties, adopted May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, art. 18.

⁷³³ CMC, “108 States on Board Convention on Cluster Munitions,” <http://www.stopclustermunitions.org/treatystatus/> (accessed October 17, 2010).

⁷³⁴ *Ibid.*

⁷³⁵ Convention on Cluster Munitions, art. 16.

munitions is limited in modern warfare; instead of targeting the large formations of tanks or troops common in the Cold-War era, today's combat operations often take place in urban environments, where the humanitarian harm of cluster munitions is magnified. Cluster munitions are often militarily counter-productive because they endanger friendly troops and increase civilian hostility towards the users. Many cluster munitions are reaching the end of their shelf life, which will make them unsafe to use, and alternatives, such as close air support and precision-guided munitions, are available. International condemnation will make the political cost of using cluster munitions high, while joining the convention will make it politically difficult for a state party's enemies to use cluster munitions against it.⁷³⁶

Solid arguments thus exist to counter the claims of states not party that other priorities, lack of capacity, or national security needs will prevent them from becoming party. Supporters of the Convention on Cluster Munitions should also emphasize that overcoming these obstacles will politically benefit states that join the international community in ratifying or acceding to the convention. States parties have a legal obligation under Article 21 to encourage universalization. They should make their case in a variety of fora, including informal conversations with diplomats, military-to-military dialogues, bilateral discussions, and multilateral meetings at the regional or international level. Civil society should support these efforts with education campaigns and strong advocacy. Advancing universalization will strengthen the convention and the norm against cluster munitions that it is setting.

Implementation

To fulfill its potential, the Convention on Cluster Munitions requires not only universalization, but also comprehensive implementation. Some states have pursued early measures that have given them the opportunity to showcase commitment to their treaty duties and the comprehensive ban and allowed the convention's provisions to take effect as soon as possible. As time has passed, more and more states have begun to formalize their implementation by promulgating national implementation legislation. Enacting such legislation should be a high priority for proponents of the convention because it provides a more permanent way to help ensure all of the convention's obligations are met.

Early Implementation

In an impressive show of commitment to the convention and the urgency of banning cluster munitions, a significant number of states began implementing some of the convention's provisions even before the agreement formally entered into force. The day before adoption of

⁷³⁶ Human Rights Watch, *Twelve Facts and Fallacies about the Convention on Cluster Munitions*, p. 1.

the convention, Germany renounced use of cluster munitions and pledged to destroy its stockpiles as soon as possible.⁷³⁷ In July 2008, Spain declared a unilateral moratorium on use, production, stockpiling, acquisition, and transfer of cluster munitions. The following September, Spain declared that it would provisionally apply Article 1 of the convention.⁷³⁸ In its opening statement at the December 2008 signing ceremony, Norway announced it would provisionally apply Article 1.⁷³⁹ The United Kingdom, before its ratification, issued restrictions on transfer.⁷⁴⁰

Several states have already completed or pledged to complete destruction of their stockpiles. Spain became the first signatory to complete destruction of its stockpiled cluster munitions on March 18, 2009; it deposited its ratification of the convention with the United Nations three months later.⁷⁴¹ As of November 1, 2010, Belgium, Colombia, Moldova, Norway, and Portugal had also completed stockpile destruction.⁷⁴² Austria and Montenegro expected to finish stockpile destruction in 2010. Two of the biggest stockpilers, Germany and the United Kingdom, had destroyed large portions of their stocks. At least nine other countries had begun the process.⁷⁴³

States have also started to implement their clearance and victim assistance obligations. Albania and Zambia have already announced completion of the clearance of their cluster munition remnants.⁷⁴⁴ Laos stated in February 2009, a month before its ratification, that “the Lao PDR has already implemented most of the provisions of the convention such as survey, clearance, risk education and victim assistance.”⁷⁴⁵ Other states have pursued victim

⁷³⁷ Letter from Gregor Koebel, head of Division of Conventional Arms Control, Ministry of Foreign Affairs of Germany, to Human Rights Watch, February 5, 2009.

⁷³⁸ Letter from Miguel Ángel Moratinos, minister of foreign affairs and cooperation of Spain, to Human Rights Watch, March 12, 2009, with courtesy translation provided; and Statement by Ambassador Gerardo Bugallo of Spain to the Meeting of the CCW GGE on Cluster Munitions, Geneva, September 1, 2008.

⁷³⁹ Statement by Jonas Gahr Støre, Norwegian minister of foreign affairs, at the Official Opening, Convention on Cluster Munitions Signing Conference, Oslo, December 3, 2008, http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/speeches_foreign/2008/occm_opening.html?id=541377 (accessed August 13, 2010).

⁷⁴⁰ Letter from Nick Pickard, head of Security Policy Group, International Security and Institutions Directorate, Foreign and Commonwealth Office of the United Kingdom, to Human Rights Watch, March 11, 2009.

⁷⁴¹ “España se sitúa a la cabeza de países en eliminar todo su arsenal de bombas de racimo” (“Spain is at the head of countries in eliminating its entire arsenals of cluster bombs”), Ministry of Defense press release, March 18, 2009, http://www.mde.es/gabinete/notasPrensa/2009/03/20090318_notaprensa_11976.html (accessed August 22, 2010) (cited in *Banning Cluster Munitions*, p. 159).

⁷⁴² *Cluster Munition Monitor 2010*, p. 18.

⁷⁴³ *Ibid.*, pp. 18-19.

⁷⁴⁴ *Ibid.*, pp. 44 (Albania) and 116 (Zambia).

⁷⁴⁵ Letter from Saleumxay Kommasith, director general of Department of International Organizations, Ministry of Foreign Affairs of Lao PDR, to Human Rights Watch, February 25, 2009.

assistance initiatives, particularly related to the assessment of victims' needs and the development of national plans.⁷⁴⁶

National Implementation Legislation

Article 9 of the convention requires states parties to take national implementation measures, and adopting new, convention-specific legislation is the strongest means of fulfilling this obligation.⁷⁴⁷ Such legislation enshrines the convention's provisions at the domestic level, where the process of implementation occurs. It reinforces the overall purpose of the convention while tailoring key provisions to the circumstances of individual states parties. States can supplement legislation with regulations and policies that provide more details, but national legislation is crucial to the effectiveness of the convention because it provides binding, enduring, and unequivocal rules that leave less room for interpretation.⁷⁴⁸

Legislation should cover all of the convention's core obligations, both negative and positive. To meet the requirements of Article 9, each state party must implement both types of obligation in some way.⁷⁴⁹ The negative obligations, notably the prohibitions on use, production, transfer, stockpiling, and assistance outlined in Article 1, are largely disarmament oriented and designed to prevent future harm. The positive obligations to clear cluster munition remnants and provide victim assistance further the convention's humanitarian goals and are aimed at alleviating present suffering. Other major positive obligations include disarmament measures (stockpile destruction) and measures to facilitate fulfillment of the convention's provisions (international cooperation and assistance, transparency, clarification of compliance by other states parties, and promotion of universal adherence to the convention and its norms). Finally, to ensure the legislation has broad coverage, it should define persons as both individuals and corporations, establish extra-territorial jurisdiction, and clarify that it applies to explosive bomblets as well as cluster munitions. Legislation that includes these elements (enumerated in more detail in Appendix

⁷⁴⁶ In 2009, for example, the Lebanon Mine Action Center gathered detailed information about the needs of victims injured between July 2006 and December 2009. States parties Croatia and Laos and signatories Chad, the Democratic Republic of Congo, and Iraq were developing national victim assistance plans in 2010. *Cluster Munition Monitor 2010*, p. 34.

⁷⁴⁷ Convention on Cluster Munitions, art. 9.

⁷⁴⁸ Article 9 allows for a variety of implementation measures including "legal, administrative and other measures." Ibid. The domestic law of some states requires them to pass legislation before ratification or accession; others may do so afterwards. For a detailed analysis of elements of national legislation that would fully and strongly implement the Convention on Cluster Munitions, see generally Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban*. This paper discusses each element and the precedent for it.

⁷⁴⁹ While Article 9 obliges each state party to impose penal sanctions to prevent prohibited activities, it also requires more generally that a state party "take all legal, administrative and other measures *to implement this Convention*." Convention on Cluster Munitions, art. 9 (emphasis added). "To implement this Convention" requires implementing its positive as well as negative obligations.

V) would be comprehensive and clear, uphold a state party's international legal obligations, and help ensure that the goals of the convention are met.⁷⁵⁰

Prohibitions

National legislation should encompass all of the prohibitions enumerated in the convention. It should implement the obligations neither to use nor to “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions.”⁷⁵¹ The prohibitions should apply “under any circumstances,”⁷⁵² including situations of international and non-international armed conflict as well as situations that do not rise to the level of armed conflict. Violations of these prohibitions should lead to penal sanctions, including imprisonment and/or fines.⁷⁵³ Even if a state party has not been a user, producer, or stockpiler of cluster munitions, it should still impose penal sanctions for the basic prohibitions of its legislation because there could be future violations, for example during joint military operations or peacekeeping operations with states not party. To help ensure compliance, legislation should require states parties to provide clear directives and training to military and police forces about the prohibitions of the convention.⁷⁵⁴

Legislation should also ban assistance, encouragement, and inducement. Its provision should apply to assistance given “under any circumstances” to “anyone,” including states that have not ratified or acceded to the convention and non-state actors, such as non-state armed groups or private corporations. Assistance should be understood as any act or

⁷⁵⁰ The elements outlined in this chapter draw on the language of a model law distributed by the ICRC as well as statutes implementing the Convention on Cluster Munitions and the Mine Ban Treaty. See ICRC, “Model Law Convention on Cluster Munitions: Legislation for Common Law States on the 2008 Convention on Cluster Munitions,” <http://www.icrc.org/Web/eng/siteeng0.nsf/html/cluster-munitions-model-law-010109> (accessed November 7, 2010). For a full discussion of these other sources, see generally Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban*.

⁷⁵¹ Convention on Cluster Munitions, art. 1(1)(a) and (b).

⁷⁵² *Ibid.*, art. 1(1).

⁷⁵³ Human Rights Watch recommends that in order to help ensure that the penalties are appropriately severe, they should be equal to, or greater than, the penalties for violating the Mine Ban Treaty.

⁷⁵⁴ While most of the prohibitions should be straightforward, a few details are worth noting. With the exception of use, all of the enumerated activities should be banned regardless of whether they are done directly or indirectly. The prohibition on production should be accompanied by a requirement to convert or decommission production facilities for cluster munitions. The ban should extend to transfer to anyone, including states parties, states that have not joined the convention, and non-state actors, especially non-state armed groups. Legislation should also clarify that transfer means either (1) the physical movement by air, land, or sea of cluster munitions into or from national territory, or (2) the conveyance of title to and control over cluster munitions. In the context of the Mine Ban Treaty, which defines transfer in the same way as the Convention on Cluster Munitions, many states take the position that transfer requires *either* physical movement *or* conveyance of title and control, but other states argue that it requires both. Stuart 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* (Oxford: Oxford University Press, 2005), pp. 90-93. Human Rights Watch believes that to be strong, implementation legislation should explicitly adopt the former approach.

omission that proximately contributes to anyone's engagement in an activity prohibited to a state party under the convention.⁷⁵⁵ In addition to including a general prohibition on assistance, implementation legislation should specifically prohibit transit of cluster munitions through a state party's territory, hosting of foreign stockpiles, and investment in companies that produce cluster munitions.

Cluster munitions will continue to endanger civilians if states parties allow exceptions to these absolute prohibitions. Therefore, implementation legislation should specify that the prohibitions enumerated in the convention, notably that on assistance, apply under all circumstances, even during joint military operations. In accordance with Article 21, implementation legislation should also require a state party both to notify allies of its obligations under the Convention on Cluster Munitions and to discourage states not party from using cluster munitions.⁷⁵⁶ A state party's military and political channels should reiterate this message before operations, at the planning phase, and during operations themselves. (See below for an elaboration on the interpretation of the prohibition on assistance as it relates to joint military operations, transit, foreign stockpiles, and investment.)

Stockpile Destruction

Eliminating the threat of future use of cluster munitions requires not only a prohibition on stockpiling but also the complete destruction of all existing stockpiles. Consistent with Article 3, therefore, national implementation legislation should require the separation of all cluster munitions from other weapons in a state party's arsenal and their ultimate

⁷⁵⁵ To be consistent with the strong interpretations advocated for in the section on interpretation below, legislation should explicitly ban under all circumstances a range of specific activities, such as transit of cluster munitions, hosting of foreign stockpiles, and investment in production. Legislation should also ban certain activities that could occur during joint military operations. They include but are not limited to:

- securing, storing, or transporting cluster munitions that belong to a state not party;
- agreeing to rules of engagement that allow cluster munition use by a state not party;
- accepting orders from a state not party to use cluster munitions;
- requesting a state not party to use cluster munitions;
- participating in planning for use of cluster munitions by a state not party; and
- training others to use cluster munitions.

Many states have agreed in the Mine Ban Treaty context that the prohibition on assistance prohibits such activities. For a more detailed discussion of the issue, see Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, p. 7.

⁷⁵⁶ Notification and discouragement are required under Article 21(2). Convention on Cluster Munitions, art. 21(2). If a state not party knows of the state party's obligations, the state not party is less likely to suggest a plan that involves cluster munitions because it would not want to put its ally in the uncomfortable situation of having to choose between its legal duties and the military operation. Notification should also reduce the chance of a state party's inadvertently violating its implementation legislation on the battlefield.

destruction.⁷⁵⁷ The legislation should also designate an appropriate and competent authority to guide the process and provide oversight.

With regard to a completion date, national implementation legislation should require the destruction of stockpiles as soon as possible but at least within eight years after entry into force for that state party.⁷⁵⁸ While the convention allows eight years, a state party should aim to finish it as soon as possible, taking into account national resources and stockpile levels when setting internal deadlines. Most states that have signed the convention to date have small enough stockpiles to be destroyed in one to four years. Therefore to emphasize its commitment to destruction and to promote the humanitarian aims of the Convention on Cluster Munitions, a state party should pass legislation with a deadline of less than eight years.⁷⁵⁹

The Convention on Cluster Munitions allows states parties to retain a “minimum number” of cluster munitions for training and development purposes. Implementation legislation should not include a provision permitting retention because it is unnecessary and leaves room for abuse.⁷⁶⁰ A strong understanding of the retention provision is laid out in detail below.

Clearance

The incorporation of the convention’s clearance duties into national implementation legislation plays a key role in preventing the danger to civilians of cluster munitions used in the past. In order to preserve state sovereignty, the ultimate responsibility for clearing cluster munition remnants should fall upon the affected state.⁷⁶¹ Drawing from Article 4 of the convention, its legislation should require assessment of contamination levels and clearance needs, demarcation and fencing of contaminated areas, actual clearance and destruction of any cluster munition remnants, and creation of risk reduction education programs.⁷⁶² These steps not only outline the process of clearance but also address the various ways in which a state must prevent cluster munition remnants from causing harm to civilians until clearance is completed.

⁷⁵⁷ Destruction should comply with international and environmental health standards. *Ibid.*, art. 3(1)-(2).

⁷⁵⁸ *Ibid.*, art. 3(2).

⁷⁵⁹ The convention allows for a four-year extension of the eight-year deadline. *Ibid.*, art. 3(3-5). None of the states that have signed the convention, however, should be in need of more time.

⁷⁶⁰ Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban*, p. 18.

⁷⁶¹ Convention on Cluster Munitions, art. 4(1).

⁷⁶² *Ibid.*, art. 4(2).

A state party's national implementation legislation should also include a maximum 10-year deadline for completing the clearance of cluster munition contaminated areas. Given the threat posed by cluster munitions remnants, however, the legislation should, if possible, set deadlines for the completion of clearance shorter than those required by the convention itself. This approach mirrors that outlined above for stockpile destruction deadlines.⁷⁶³

To implement the convention's user state responsibility provision, legislation of a state party responsible for previous contamination of another state should provide for clearance assistance to the affected state.⁷⁶⁴ Allowing the variety of types of assistance listed in Article 4(4) facilitates implementation by enabling any user state party, regardless of resources, to offer aid. In particular, user states should incorporate into their national legislation the requirement to provide to affected states "information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located."⁷⁶⁵ This information will not only expedite the clearance process by sending deminers directly to contaminated sites, but it will also reduce the risks facing deminers, who may properly prepare for the types of munitions they are likely to encounter.⁷⁶⁶

Victim Assistance

To mitigate the grave and ongoing harm to civilians and to advance its humanitarian objective, implementation legislation should include a provision based on the innovative victim assistance measures of the Convention on Cluster Munitions. Implementation legislation should designate a focal point in the government to organize victim assistance, in particular by ensuring development of a national plan for establishing and implementing assistance programs.⁷⁶⁷ The plan should include a budget and timeframe, and the government should incorporate it into "existing national disability, development and human rights frameworks" to make it more affordable and enduring.⁷⁶⁸ In addition, the government

⁷⁶³ While implementation legislation should set firm deadlines, the convention allows for some rare instances in which a state party cannot complete clearance in time. For example, one estimate says that about 80 million unexploded submunitions remained in Laos following the end of conflict that lasted from 1964 to 1973, which may make it difficult for Laos to meet the 10-year deadline. *Banning Cluster Munitions*, p. 103. See also Convention on Cluster Munitions, art. 4(6).

⁷⁶⁴ Convention on Cluster Munitions, art. 4(4).

⁷⁶⁵ *Ibid.*, art. 4(4)(b).

⁷⁶⁶ The possibility of providing assistance through "a mutually agreed third party, including through the United Nations system or other relevant organizations" may allow for the exchange of assistance between states still in tension following conflict. *Ibid.*, art. 4(4)(a).

⁷⁶⁷ See *ibid.*, art. 5(2)(g).

⁷⁶⁸ *Ibid.*, art. 5(2)(c).

should find national or international resources to facilitate implementation of victim assistance programs.⁷⁶⁹

Implementation legislation should require that a state party consult with cluster munition victims at all stages of the national plan.⁷⁷⁰ Legislation should also obligate a state party to collect general data on victims, such as the number of victims, types of injuries suffered, and gender and age breakdown.⁷⁷¹ Consultation and information gathering will help designers assess the needs of victims and ensure that the resulting measures meet those needs.

While victims' input will shape the details of victim assistance programs, in general implementation legislation should provide for medical, rehabilitative, and psychological care for cluster munition victims as well as for their social and economic inclusion.⁷⁷² The specifics of such assistance measures should be spelled out clearly in the legislation itself or in regulations or policies. As required by the convention, implementation legislation should ensure that such assistance measures are non-discriminatory and based only on victims' needs.⁷⁷³

International Cooperation and Assistance

To alleviate the burden on stockpiling and affected states, national implementation legislation should include a provision on international cooperation and assistance. Such a provision will contribute to and expedite the realization of the convention's objectives. It will also promote universalization. Some states might be reluctant to join the convention because they believe that they will not be able to fulfill its obligations on their own; knowing that they can receive outside assistance will encourage them to become states parties.

Where necessary or advantageous, national legislation should require a state party to create an administrative framework to implement the convention's assistance obligations, including by designating a government focal point to coordinate programs. Legislation should specify that a state party has the option to provide assistance in a variety of forms,

⁷⁶⁹ See *ibid.*, art. 5(2)(d). For more analysis of elements of strong victim assistance legislation, see Survivor Corps, "Connecting the Dots: Victim Assistance and Human Rights in the Mine Ban Treaty, Convention on Cluster Munitions, Convention on the Rights of Person with Disabilities," December 2008, revised November 2009, http://www.survivorcorps.org/PDFs/Advocacy/Connecting_the_dots.pdf, p. 41.

⁷⁷⁰ See Convention on Cluster Munitions, art. 5(2)(f).

⁷⁷¹ See *ibid.*, art. 5(1).

⁷⁷² See *ibid.*, art. 5(1).

⁷⁷³ *Ibid.*, art. 5(2)(e). For more information on how to make legislation non-discriminatory, see Survivor Corps, "Connecting the Dots," p. 35.

including technical, material, and financial,⁷⁷⁴ which would arguably allow any state party to contribute in some way. International cooperation and assistance is especially necessary to facilitate states parties' compliance with their stockpiling, clearance, and victim assistance obligations,⁷⁷⁵ but implementation legislation should also allow for and encourage assistance for emergency situations and economic and social recovery.⁷⁷⁶ In order for international assistance to be effective, legislation should obligate a recipient state party to facilitate provision of any aid from donor states.⁷⁷⁷

Transparency

Implementation legislation should require a state party to report on its efforts to meet the obligations discussed above. If a state has fallen short in any of its responsibilities, such reports can inform the international community of what kinds of assistance are required. As an added benefit, transparency allows public monitoring of state conduct at the international and national levels, which in turn encourages a state party to fulfill its obligations to the best of its ability.

Implementation legislation should require a state party to produce annual reports on each of the 14 topics enumerated in Article 7.⁷⁷⁸ With regard to stockpile destruction, a state party should convey information on the number and type of cluster munitions and submunitions it possesses, its plans for destroying them, and the progress it has made so far.⁷⁷⁹ It should provide details about the status and progress of clearance, including the size and location of cluster munition contaminated areas and the types and quantities cleared and to be cleared.⁷⁸⁰ A state party should describe the implementation of its victim assistance

⁷⁷⁴ See Convention on Cluster Munitions, art. 6(2).

⁷⁷⁵ See *ibid.*, art. 6(4), (5), and (7).

⁷⁷⁶ *Ibid.*, art. 6 (6) and (8). In addition, the legislation should obligate a state party to participate in the exchange of scientific and technological information and equipment. *Ibid.*, art. 6(3).

⁷⁷⁷ Legislation should strive to ensure, consistent with other national laws and policies, the expedient entry and exit of personnel, material, and equipment. For example, a recipient state party should not impose undue customs taxes on equipment or burdensome visa requirements on deminers or doctors. See *ibid.*, art. 6(10). Legislation could also dictate that the assistance be provided through various channels, such as the UN system and regional, national, and international organizations.

⁷⁷⁸ In addition to requiring transparency with regard to the subjects listed in Article 7, national implementation legislation should obligate a state party to submit a detailed report on any cluster munitions or explosive submunitions it retains for clearance training or development of counter-measures. Human Rights Watch believes legislation should not allow for retention. If it does, however, annual public reporting is essential to help prevent abuse.

⁷⁷⁹ Convention on Cluster Munitions, art. 7(1)(b), (e), and (f).

⁷⁸⁰ *Ibid.*, art. 7(1)(h) and (i). In a related provision that legislation should include, the convention requires a state party report on the technical characteristics of cluster munitions that it produced before the convention entered into force or that it possesses in order to facilitate clearance. *Ibid.*, art. 7(1)(c).

programs.⁷⁸¹ It should give information about its national implementation measures.⁷⁸² It should report on the amount of national resources it has allocated to implement the convention and the amount, type, and destination of any international assistance it has provided.⁷⁸³ A state party should also file updates on newly discovered stockpiles, decommissioning of production facilities, risk reduction education programs, and contact points for the reports themselves.⁷⁸⁴ Legislation should require a state party to make these reports public domestically and to pass them on to the UN secretary-general. It should identify which government unit is to compile reports and send them on to the secretary-general.⁷⁸⁵

Compliance

The Convention on Cluster Munition allows states parties who cannot resolve differences bilaterally to exchange information through the UN secretary-general in an effort amicably to clarify matters of compliance.⁷⁸⁶ Implementation legislation need not include great detail on this subject, but it should establish a mechanism to respond expeditiously to requests for clarification from other states parties.

Promotion of Universal Adherence and Norms

In accordance with Article 21(1) and (2), implementation legislation could obligate a state party to work to convince new states to join the convention and to promote the convention's norms to states not party.⁷⁸⁷ Doing so would advance the goals of universalization discussed earlier and help persuade states that have not ratified or acceded to follow the convention's key provisions. To ensure that a state party takes its obligations under Article 21 seriously and fulfills them systematically, implementation legislation could designate a government agency that will coordinate government-wide efforts to encourage adherence to the convention and its norms.

⁷⁸¹ *Ibid.*, art. 7(1)(k).

⁷⁸² *Ibid.*, art. 7(1)(a).

⁷⁸³ *Ibid.*, art. 7(1)(m) and (n).

⁷⁸⁴ *Ibid.*, art. 7(1)(g), (d), (j), and (l).

⁷⁸⁵ For example, in its legislation implementing the Convention on Cluster Munitions, Ireland appoints the Minister of Defense, in consultation with the Minister of Foreign Affairs, as overseer of these processes. Cluster Munitions and Anti-Personnel Mines Act 2008, no. 20 of 2008 (Ireland).

⁷⁸⁶ Convention on Cluster Munitions, art. 8.

⁷⁸⁷ *Ibid.*, art. 21(1) and (2).

Breadth of Coverage

In addition to implementing negative and positive obligations, national legislation should include multiple provisions to ensure that it has broad coverage. Legislation should have a definition of person that encompasses both a natural person (human being) and a legal person (corporation).⁷⁸⁸ A narrower definition of person might inadvertently allow corporations to engage in activities that are prohibited by the convention. This possibility is especially troubling in light of the fact that corporations often produce and export cluster munitions.

Because some of the acts prohibited by national implementation legislation, such as the transfer of cluster munitions, can involve cross-border activities, a state party should also establish extra-territorial jurisdiction. A state party should not allow its citizens to violate the implementing legislation simply by leaving its territory; rather, the state party should hold all its citizens to the standard it has adopted under the convention.

Finally, national legislation should specify that it applies equally to cluster munitions and explosive bomblets. As discussed in Chapter 8, explosive bomblets, munitions that are released by a dispenser affixed to an aircraft, pose the same humanitarian risks as cluster munitions because they have an area effect and are prone to failure. The convention states that its Article 1 obligations apply to these munitions although it is less explicit about the application of other obligations.⁷⁸⁹ To avoid any loopholes, implementation legislation should ensure that all of its obligations apply equally to cluster munitions and explosive bomblets.⁷⁹⁰

Interpretation

To be most effective, national implementation measures must be bolstered by strong interpretations of the convention's components. While the Convention on Cluster Munitions consists of detailed provisions, as in any legal instrument, the meanings and implications of some are open to discussion. The most contentious issue, which carries over from the Oslo Process, is interoperability and its relationship to the prohibitions in Article 1. Other topics include transit of cluster munitions, hosting of foreign stockpiles, investment in production, and retention of cluster munitions. States can clarify their understandings of these subjects through laws, policies, or public statements. Regardless, they should interpret their

⁷⁸⁸ While legislation should adopt the definitions of the convention to avoid confusion, where appropriate, it should supplement or clarify the convention's definitions.

⁷⁸⁹ Convention on Cluster Munitions, art. 1(2). The convention does not specify that other articles, such as those on victim assistance and international cooperation and assistance, apply to explosive bomblets.

⁷⁹⁰ A state party could do that by including a blanket clarification of broad coverage, adding a new definition of an overarching term, or repeatedly referring to both cluster munitions and explosive bomblets.

obligations in a manner consistent with the object and purpose of the convention so that it maintains its legal power and stays true to its goal.

The Prohibition on Assistance

Several of these interpretive issues relate to the prohibition on assistance so a full understanding of this provision is necessary.⁷⁹¹ The relevant provision states:

1. Each State Party undertakes never under any circumstances to:...
 - (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.⁷⁹²

The convention gives the prohibition on assistance prominence as one of the “general obligations” in the first article of the convention. It puts it on the same level as other core provisions, including the bans on use, production, transfer, and stockpiling of cluster munitions. The placement of the provision in Article 1 and its equation with other banned activities make clear that the prohibition on assistance was intended as a foundation of the convention from which no derivation should be permitted.

The Vienna Convention on the Law of Treaties provides guidelines for understanding the prohibition on assistance. Article 31 of the Vienna Convention, which articulates customary international law, states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁷⁹³ The context of the treaty includes its text and preamble.⁷⁹⁴ In the case of the Convention on Cluster Munitions, this rule of interpretation supports understanding that the prohibition on assistance is broad.

A textual analysis of Article 1 reveals that the language of the prohibition on assistance is unqualified and expansive. Article 1(1)(c) places no limits on the types of assistance.⁷⁹⁵ For example, it does not specify that assistance must be direct or indirect. Nor does it indicate that the level of contribution required to count as unlawful assistance must be active or passive. The provision also adopts the language of a categorical prohibition. Article 1(1)(c)

⁷⁹¹ For a fuller discussion of the prohibition on assistance, see Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 4-8.

⁷⁹² Convention on Cluster Munitions, art. 1(1)(c).

⁷⁹³ Vienna Convention on the Law of Treaties, art. 31(1).

⁷⁹⁴ *Ibid.*, art. 31(2).

⁷⁹⁵ Convention on Cluster Munitions, art. 1(1)(c).

states that states parties must “never under any circumstances” assist “anyone” with “any activity” involving cluster munitions.⁷⁹⁶ The content of Article 1 thus makes clear that the prohibition on assistance is designed to extend to every situation.

The object and purpose of the Convention on Cluster Munitions, discussed above, further support a broad understanding of the ban on assistance. The preamble describes the goal of the convention, declaring that states are “determined to put an end for all time to the suffering and casualties caused by cluster munitions” during and after attacks.⁷⁹⁷ The preamble also emphasizes the importance of achieving adherence of all states and says that states parties are determined to “work strenuously” towards universalization and implementation.⁷⁹⁸ Extending the convention’s scope even further, it calls on states parties not to permit non-state armed groups, “under any circumstances,” to counter prohibitions of the Convention on Cluster Munitions.⁷⁹⁹ To eliminate the harm of cluster munitions completely, the prohibition on assistance must apply to all circumstances and all forces.

Given the convention’s context and purpose, assistance should be understood as any act or omission that proximately contributes to anyone’s engagement in an activity prohibited to a state party under the convention. Human Rights Watch believes the understanding of the act of assistance should encompass direct assistance, that is, a link in a chain of events that leads straight to a prohibited activity, and indirect assistance, an action that is more removed from, but proximately facilitates, such a chain of events. It should also encompass active assistance, a form of participation that advances an activity prohibited by the convention, and passive assistance, an abdication of responsibility for matters under the state’s control that allows others to engage in a prohibited activity.⁸⁰⁰

Interoperability

The complicated and hotly debated issue of interoperability, which deals with conduct during joint military operations with states not party, is closely linked to the prohibition on assistance. Because assistance with a prohibited act would most likely involve states that are not party to the Convention on Cluster Munitions, Article 1(1)(c) must be read in conjunction with Article 21 on Relations with States not Party to this Convention. Some

⁷⁹⁶ Ibid. As discussed in Chapter 8, “anyone” includes states parties, non-states parties, and non-state actors such as armed rebel groups, private companies, and individuals

⁷⁹⁷ Ibid., pmb., para. 2 (emphasis removed).

⁷⁹⁸ Ibid., pmb., para. 19.

⁷⁹⁹ Ibid., pmb., para. 12.

⁸⁰⁰ Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 5-6.

states have argued that Article 21 suspends the ban on assistance during joint military operations. This controversial article, however, should be understood as a clarification and not a limitation of Article 1(1)(c). It authorizes joint military operations only to the extent that the ban on assistance with prohibited acts is maintained.⁸⁰¹

Paragraphs 3 and 4 of Article 21 expand on relations with states not party in the specific context of “military cooperation and operations.” They state:

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

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

- a. To develop, produce or otherwise acquire cluster munitions;
- b. To itself stockpile or transfer cluster munitions;
- c. To itself use cluster munitions; or
- d. To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.⁸⁰²

Paragraph 3 clarifies that participation in joint operations is allowed. The permissibility of “mere participation” is a widely accepted principle on which states and civil society have agreed.⁸⁰³ Paragraph 4 identifies some of the activities not permitted during these operations. When read in light of their context and the general purpose of Article 21 and the convention, these provisions are consistent with a strong prohibition on assistance.

⁸⁰¹ For a more detailed discussion of the debate surrounding the interpretation of Article 21, see Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 9-13.

⁸⁰² Convention on Cluster Munitions, art. 21(3) and (4).

⁸⁰³ For a discussion of mere participation in the Convention on Cluster Munitions context, see, for example, Proposition No. 7 (2008-2009) to the Odelsting, in Excerpts from Proposition No. 7 (2008-2009) to the Odelsting on a Bill Relating to the Implementation of the Convention on Cluster Munitions in Norwegian Law, and Proposition No. 4 (2008-2009) to the Storting on Consent to Ratification of the Convention on Cluster Munitions,” <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/02/norwegian-national-legislation-on-cluster-munitions.pdf> (accessed October 15, 2010) [hereinafter Norwegian Legislation and Commentary], p. 9; Statement by the CMC to the Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, “Intervention to the Committee of the Whole on Interoperability,” May 19, 2008, <http://www.hrw.org/en/news/2008/05/19/dublin-diplomatic-conference-cluster-munitions-intervention-committee-whole-interope> (accessed October 10, 2010). For a discussion of mere participation in the Mine Ban Treaty context, see Maslen, *Commentaries on Arms Control Treaties: Volume 1*, pp. 100-102.

While clearly permitting participation in joint military operations, paragraph 3 should not be understood as encompassing military cooperation that involves assistance with prohibited acts. The paragraph does not say that states parties may participate by using, producing, transferring, or stockpiling cluster munitions, or by assisting with any of the above. Paragraph 3 requires engagement in joint operations to be “in accordance with international law,” which includes the Vienna Convention and its customary rules of treaty interpretation. The purpose of the convention is to eliminate cluster munitions and to end the suffering of cluster munition victims “for all time.”⁸⁰⁴ It would be inconsistent with that purpose to understand paragraph 3 as waiving the obligations of Article 1, including the prohibition on assistance, during joint operations. On the adoption of the text of the convention, Iceland noted that paragraph 3 “should not be read as entitling States Parties to avoid their specific obligations under the Convention for this limited purpose,” that is, for joint military operations.⁸⁰⁵

Paragraph 4, which specifies some activities not allowed during joint operations,⁸⁰⁶ should be understood as an illustrative, rather than a comprehensive, list that reinforces the general prohibitions of the convention. Such a reading would accord with the intention to eliminate cluster munitions and their harm. If the list were considered exhaustive, by contrast, states parties could arguably participate in many acts of assistance that run directly counter to the convention’s purpose. They could participate in planning an attack in which a state not party used cluster munitions, host foreign stockpiles, provide security for stores of the weapons, refuel vehicles transporting cluster munitions, provide transportation of cluster munitions to the battlefield, identify the targets for cluster munition attacks, or even call in the strikes. They could, in essence, load the gun so long as they did not pull the trigger.

Interpreted as exhaustive, Article 21(4) would also directly contradict Article 21(2)’s various requirements that states parties advocate for the convention’s purpose. Given that that paragraph obligates states parties to use “best efforts” to discourage use by others,⁸⁰⁷ paragraph 4 should not be read to permit some forms of assistance with that use. The notion that it is an exhaustive list is even more problematic if encouragement and inducement, actions prohibited along with assistance in Article 1(1)(c) and also not included in paragraph 4, are taken into account. An article, which should have a unified and coherent purpose, cannot logically require discouragement of use in one paragraph and then by implication

⁸⁰⁴ Convention on Cluster Munitions, pmbi, para. 2.

⁸⁰⁵ “Statement by the Government of Iceland upon the Adoption of the Convention on Cluster Munitions,” Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, CCM/CRP/2, May 30, 2008, http://www.clustermunitionsdublin.ie/pdf/CCMCRP2.Icelandicstatementpdf_000.pdf (accessed October 15, 2010).

⁸⁰⁶ Convention on Cluster Munitions, art. 21(4).

⁸⁰⁷ *Ibid.*, art. 21(2).

allow encouragement of that use in another. Paragraph 4 should therefore be understood as supporting Article 1's prohibitions, rather than excluding some of them by omission.

Several states have read paragraph 4 as an illustrative list. Ireland, which served as the host and provided the president of the negotiations, has stated that the activities "expressly enumerated in Article 21(4)" are not the only acts prohibited.⁸⁰⁸ Upon the adoption of the text of the convention in Dublin, Iceland said that "listing some examples in paragraph 4 cannot therefore be interpreted to allow departures in other respects."⁸⁰⁹ Also at the adoption, Norway specifically stated that Article 21 "does not create loopholes."⁸¹⁰ In an explanatory annex to its implementing legislation, Norway explained that "the exemption for military cooperation does not authorize states parties to engage in activities prohibited by the convention."⁸¹¹

Some of the states that pressed for Article 21 during the Oslo Process have expressed informally to Human Rights Watch the view that assistance—even intentional or deliberate assistance—with the use, transfer, and stockpiling of cluster munitions is allowed during joint operations.⁸¹² They contend that "notwithstanding the provisions of Article 1" means that paragraph 3 overrides the prohibitions laid out in the convention's first article, except for those instances listed in paragraph 4. They also consider paragraph 4 to be an exhaustive list of activities prohibited during joint operations, which would permit states parties to engage in a wide range of other actions. As described above, such an

⁸⁰⁸ Department of Foreign Affairs of Ireland, "Note on the Measures Taken by Ireland to Implement Article 21 of the Convention on Cluster Munitions," March 11, 2009, p. 1, attached to Letter from Dáithí O'Ceallaigh, ambassador, Permanent Mission of Ireland to the United Nations in Geneva, to Thomas Nash, coordinator, CMC, March 16, 2009.

⁸⁰⁹ "Statement by the Government of Iceland upon the Adoption of the Convention on Cluster Munitions."

⁸¹⁰ Statement by Ambassador Steffen Kongstad of Norway to the Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, May 30, 2008.

⁸¹¹ Excerpt from Proposition No. 4 (2008-2009) to the Storting, Norwegian Legislation and Commentary, p. 23.

⁸¹² Article 21 was one of the most controversial articles during the final negotiations of the convention in Dublin. Many states and the CMC argued for following the model of previous treaties, such as the Mine Ban Treaty, by including just Article 1(1)(c). They said national declarations would be sufficient to address concerns about joint operations, as they had been in the case of the Mine Ban Treaty and five other weapons instruments. See, for example, Statement by the CMC to the Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, May 19, 2008. See also statements opposing inclusion of Article 21 by Argentina, Mexico, and Venezuela in Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, "Summary Record of Tenth Session of the Committee of the Whole," CCM/CW/SR/10, May 26, 2008. Other states, primarily US allies, said that cluster munitions posed different problems than landmines because they were more likely to be used by states not party. See, for example, Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Sweden, Switzerland, and the United Kingdom, "Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations," discussion paper distributed at the Wellington Conference on Cluster Munitions, February 18-22, 2008. Some of these states claimed to need Article 21 to continue joint operations and to protect their troops from unfair prosecution for accidental assistance. See, for example, Dublin Diplomatic Conference for the Adoption of a Cluster Munitions Convention, "Summary Record of Ninth Session of the Committee of the Whole," CCM/CW/SR/9, May 23, 2008. Regardless of the motivation for the article's inclusion, states should interpret it so that it does not undercut the humanitarian purpose of the treaty. Information on the negotiations comes from Human Rights Watch notes on the May 2008 Dublin Diplomatic Conference on Cluster Munitions, as well as the sources cited.

interpretation would make Article 21 internally inconsistent and be incompatible with the convention's overarching purpose. In accordance with international rules of treaty interpretation, Article 21(3) and (4) should not be understood to permit states parties to assist with any action prohibited by Article 1.⁸¹³

Transit

While interoperability attracts the most attention among the interpretive issues, states should take a strong public stand on several others. States parties should interpret the convention to prohibit transit of cluster munitions, that is, the movement of cluster munitions across, above, or through the territory and/or territorial waters of a state party.⁸¹⁴ They should understand transit as an activity banned under the prohibition on assistance because it can facilitate use, transfer, and stockpiling. For example, a state party could enable a cluster munition attack by allowing the air force of a state not party to fly through its airspace on the way to drop cluster munitions. Alternatively, states parties can treat transit as a form of transfer, which is also banned by the convention.⁸¹⁵ Regardless of the approach taken, bringing an end to transit will help achieve the convention's underlying goal of eliminating the harm caused by cluster munitions.

Several states parties and signatories have already clarified that they believe the convention does not permit transit. Austria and Germany ban transit in their implementation legislation.⁸¹⁶ In response to written queries from Human Rights Watch and Landmine and Cluster Munition Monitor, and in other fora, Austria, Bulgaria, Burkina Faso, Colombia, Ecuador, Ghana, Guatemala, Lebanon, FYR Macedonia, Malawi, Malta, Mexico, Slovenia, and Zambia have all stated that they interpret the convention to proscribe transit.⁸¹⁷ In addition, Madagascar wrote that allowing transit would weaken the convention, while South

⁸¹³ States that have expressed views on this issue similar to those of Human Rights Watch include Colombia, Ecuador, Ghana, Guatemala, Iceland, Ireland, Lebanon, Madagascar, Malawi, Mexico, Norway, and Slovenia. See *Cluster Munition Monitor 2010*, p. 2.

⁸¹⁴ See Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban*, pp. 6, 8, 15.

⁸¹⁵ The definition of transfer is broad enough to be understood to encompass transit. Convention on Cluster Munitions, art. 2(8).

⁸¹⁶ Federal Law on the Prohibition on Cluster Munitions, *Austrian Federal Law Gazette*, sec. 2; and Ausführungsgesetz zu Artikel 26 Abs. 2 des Deutschen Grundgesetzes (Gesetz über die Kontrolle von Kriegswaffen) (Act Implementing Article 26(2) of the Basic Law (War Weapons Control Act)), 1961, as amended 2009, <http://www.gesetze-im-internet.de/krwaffkontrg/BJNR004440961.html#BJNR004440961BJNG000404160> (accessed June 1, 2010), sec. 18(a) (Germany). An unofficial English translation of Austria's law specifically uses the word transit, while Germany bans transit by declaring it is prohibited to "transport [cluster munitions] through or otherwise bring them into or out of a federal territory."

⁸¹⁷ See *Cluster Munition Monitor 2010*, p. 2.

Africa said it was likely to interpret the convention as prohibiting transit.⁸¹⁸ Human Rights Watch is aware of only one state that has gone on record arguing that transit of cluster munitions was not prohibited: the Netherlands.⁸¹⁹ Thus more support exists than not for this strong understanding of the convention.

Hosting of Foreign Stockpiles

States should similarly read the provision on assistance to prohibit states parties from allowing states not party to store stockpiles of cluster munitions on their territory. This practice assists with stockpiling and potentially with use, both activities banned under Article 1, and runs counter to the goal of eliminating cluster munitions. Article 3 of the convention prohibits a state party from having any stockpiles, including foreign ones, under its "jurisdiction and control." Foreign stockpiles under a state party's jurisdiction *or* control should also be considered prohibited.⁸²⁰ Early discussion texts and the Draft Cluster Munitions Convention forwarded to the negotiating conference mandated destruction of stockpiles under the state party's "jurisdiction *or* control," thus suggesting that drafters intended states parties to have an obligation to ensure destruction foreign stockpiles. The final convention changed the language to "jurisdiction *and* control," but the change seems to have been the result of a clerical error that was never changed back.⁸²¹ A few states parties do not consider foreign stockpiles to be under their jurisdiction or control. In these cases, states parties may run afoul of the ban on assistance and should insist that foreign states remove the stockpiles to be consistent with the object and purpose of the convention.

In a 2008 statement, the United Kingdom announced that although it did not consider itself legally obligated, 'in keeping with our commitment to uphold the norms of the treaty, we will be discussing with the US the longer-term status of its stockpiles on UK territory.'⁸²² In response to letters from Human Rights Watch and in statements in other fora, several states

⁸¹⁸ Statement by Gen. Marcel Ranjeva, minister of foreign affairs of Madagascar, to the Convention on Cluster Munitions Signing Conference, Oslo, December 4, 2008; Letter from Xolisa Mabhongo, chief director, UN (Political), Department of Foreign Affairs of South Africa, to Human Rights Watch, March 12, 2009.

⁸¹⁹ Letter from Henk Swarttouw, Dutch Ministry of Foreign Affairs, to Human Rights Watch, February 26, 2009.

⁸²⁰ Lima Discussion Text; Vienna Discussion Text; Draft Cluster Munitions Convention, January 21, 2008, <http://www.clusterconvention.org/downloadablefiles/draft-cluster-convention-english-version.pdf> (accessed October 15, 2010), art. 3(2). The phrase "jurisdiction *or* control" was also used in informal texts discussed during the negotiations in Dublin. Declan Smyth, "Article 3: Storage and Stockpile Destruction," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, p. 256 n. 35.

⁸²¹ For an explanation of the genesis of the clerical error and why it was not corrected, see Smyth, "Article 3," in Nystuen and Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary*, p. 256 n. 35.

⁸²² B. Ainsworth, statement, June 5, 2008, *Parliamentary Debates*, Commons, vol. 476 (2007-2008), col. 1061W, http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080605/text/80605w0003.htm#column_1061 (accessed November 4, 2010).

that do not have foreign stockpiles—Bulgaria, Madagascar, Malta, and Mexico—said that they believe the Convention on Cluster Munitions prohibits states parties from allowing foreign stockpiles on their territory.⁸²³

Investment

States should also interpret the Convention on Cluster Munitions to ban investment in companies that manufacture cluster munitions or components intended for use in cluster munitions.⁸²⁴ Investment represents a form of assistance with production. Production cannot be curtailed if a state party allows financial support to these companies. Because private investors often provide important financial support to such companies, the ban should extend to public and private funds.⁸²⁵

Several states have prohibited investment in their implementation legislation. In 2007, Belgium became the first state to adopt a law prohibiting financial institutions, whether public or private, from investing in companies producing cluster munitions.⁸²⁶ In their legislation implementing the convention, Luxembourg and New Zealand criminalized investment by public or private entities in companies that produce cluster munitions, and Ireland banned investment of public money.⁸²⁷ France has said that its national implementation law's prohibition on assistance bans both direct and indirect financing of

⁸²³ Letter from Dr. Petio Petev, Bulgarian Ministry of Foreign Affairs, to Human Rights Watch, February 25, 2009; Statement by Gen. Marcel Ranjeva, minister of foreign affairs of Madagascar, to the Convention on Cluster Munitions Signing Conference, Oslo, December 4, 2008; Letter from Ambassador Saviour F. Borg, Permanent Mission of the Republic of Malta to the UN in New York, to Human Rights Watch, March 2, 2009; Letter from Ambassador Juan Manuel Gómez Robledo, Secretariat of Foreign Relations of Mexico, to March 4, 2009.

⁸²⁴ For more detailed discussion of investment issues, see IKV Pax Christi and Netwerk Vlaanderen, "Worldwide Investments in Cluster Munitions: A Shared Responsibility," October 2009, <http://www.netwerkvlaanderen.be/nl/files/documenten/campagnes/bankenwapens/Full%20Report.pdf> (accessed October 15, 2010).

⁸²⁵ Similar calls for bans on private as well as public investment have been made in the context of the Mine Ban Treaty. For example, in 2005, the European Parliament passed a resolution that stated that the parliament:

21. Calls on the EU and its Member States to prohibit through appropriate legislation financial institutions under their jurisdiction or control from investing directly or indirectly in companies involved in production, stockpiling or transfers of anti-personnel mines and other related controversial weapon systems such as cluster sub-munitions;
22. Calls on the EU and its Member States to ensure compliance with the legislation prohibiting investment in companies involved in anti-personnel mines, by creating effective control and punishment mechanisms; considers that this implies the obligation for financial institutions to adopt a policy of full transparency regarding the companies in which they invest.

European Parliament Resolution on a Mine-Free World, P6_TA(2005)0298, July 7, 2005.

⁸²⁶ *Banning Cluster Munitions*, pp. 39-40; "Act on the prohibition of the financing of production, use and possession of anti-personnel mines and submunitions," *Le Moniteur Belge*.

⁸²⁷ Loi du 4 juin 2009 portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo le 3 décembre 2008 ("Law of 4 June 2009 on the implementation of the Convention on Cluster Munitions, opened for signature in Oslo on 3 December 2008"), *Memorial Journal Officiel du Grand-Duché de Luxembourg*, A-no. 497, 2009, art. 3; Cluster Munitions Prohibition Act 2009, Public Act 2009 no. 68, sec. 10(2) (New Zealand); and Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 12-13 (Ireland).

cluster munition production,⁸²⁸ while the United Kingdom's legislation bans direct financing.⁸²⁹ Moving in that direction, the Swiss parliament adopted two motions requiring the government to draft legislation prohibiting investment in the production of all banned weapons, including cluster munitions.⁸³⁰

Besides passing legislation, states have expressed support for a ban on investment through policy and practice. In response to inquiries from Human Rights Watch and Landmine and Cluster Munition Monitor, and in other fora, Belgium, Colombia, France, Guatemala, Ireland, Lebanon, Luxembourg, Madagascar, Malawi, Malta, Mexico, New Zealand, Norway, Rwanda, the United Kingdom, and Zambia indicated that they believe investment in production is prohibited.⁸³¹ Demonstrating state practice, government pension funds in Ireland, New Zealand, Norway, and Sweden divested before or immediately after adoption of the convention.⁸³² Finally, financial institutions and investors have taken action to stop investment in cluster munition production in Argentina, Belgium, Canada, Denmark, France, Germany, Japan, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and elsewhere.⁸³³

Retention of Cluster Munitions

A final interpretive issue that is not tied to the prohibition on assistance involves retention of cluster munitions and submunitions. Article 3(6) allows states parties to retain or acquire the cluster munitions or submunitions "for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures," such as armor to protect troops and equipment from the weapons.⁸³⁴ Human Rights Watch opposed the inclusion of this provision because such exceptions are not clearly needed and leave room for abuse.

⁸²⁸ Statement by Hubert Falco, secretary of state for defense, Summary Report of the National Assembly, XIII Legislature, Extraordinary session of 2009-2010, July 6, 2010, http://www.assemblee-nationale.fr/13/cri/2009-2010-extra/20101008.asp#INTER_0 (accessed October 15, 2010).

⁸²⁹ Chris Bryant, statement, December 7, 2009, *Parliamentary Debates*, Commons, vol. 502 (2009-2010), col. 2WS, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091207/wmstext/91207m0001.htm#0912073000100> (accessed November 4, 2010).

⁸³⁰ "Financement des armes interdites: Le Conseil national soutient l'interdiction des investissements abjects dans la production des armes interdites par la Suisse" ("Financing of banned weapons: The National Council supports the ban on abject investment in production of weapons banned by Switzerland"), Handicap International press release, March 10, 2010.

⁸³¹ See *Cluster Munition Monitor 2010*, p. 2. Bulgaria has also noted that while a ban on investment in cluster munition production is not explicit in the text of the convention, it would need to be "considered in light of the general prohibition on development and production of cluster munitions." *Ibid.*, p. 124.

⁸³² *Ibid.*, p. 23.

⁸³³ *Ibid.*, p. 2.

⁸³⁴ Convention on Cluster Munitions, art. 3(6).

Clearance organizations accredited by the United Nations are not known to use live submunitions for training; alternatives exist, such as using simulated submunition explosions.⁸³⁵ The danger remains that a state party may transfer cluster munitions to a state not party or a non-state actor, or even use any cluster munitions left undestroyed.

Article 3(6) should not be seen as a requirement or encouragement to retain cluster munitions or submunitions. Instead, states parties should interpret the provision on retention narrowly. It requires that the “submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.”⁸³⁶ For most states parties, the minimum number absolutely necessary should be zero. Indeed, most of the stockpilers that have joined the convention and expressed a view on this issue so far have chosen not to retain any. These states include Afghanistan, Angola, Austria, Colombia, Honduras, Moldova, Montenegro, Norway, Portugal, and Slovenia.⁸³⁷

States parties that still believe they must retain some submunitions should keep the number as low as possible and review its necessity every year. In addition, they should strictly comply with the requirement to report annually on the “planned and actual use ... and their type, quantity and lot numbers” and, if the states transfer retained munitions, the recipient state party.⁸³⁸ Such transparency provides a safeguard against abuse.

Conclusion

To achieve the goal of eliminating cluster munitions, states must universalize, comprehensively implement, and strongly interpret the Convention on Cluster Munitions. They should promote universalization because it is the key to stigmatizing the weapons and establishing a new international standard of behavior that rejects cluster munitions. States parties should also implement *all* of the convention’s obligations, both positive and negative, and in interpreting contentious provisions, they should treat the convention’s underlying purpose as their guide.

The humanitarian problems created by cluster munitions demand their complete eradication. From their first major use in the Vietnam War to the present, cluster munitions have killed and injured civilians during attacks and for months and years afterwards. Their proliferation

⁸³⁵ CMC, *Policy Papers for the Dublin Diplomatic Conference on Cluster Munitions*, 2008, paper 10.

⁸³⁶ Convention on Cluster Munitions, art. 3(6).

⁸³⁷ *Cluster Munition Monitor 2010*, p. 2.

⁸³⁸ Convention on Cluster Munitions, art. 3(8).

has spread the potential for use around the world, and the need for remedial measures in the aftermath of conflict has imposed additional costs. For decades, consensual diplomacy and national measures partially addressed these problems. By moving outside traditional approaches to an alternative process, concerned states succeeded in negotiating an absolute and comprehensive ban. The Convention on Cluster Munitions, the result of the Oslo Process, is the only solution to the weapons' multiple problems. Through universalization and implementation, nations of the world have the power to end the civilian suffering that began with cluster munitions' widespread use half a century ago.

Meeting the Challenge

Protecting Civilians through the Convention on Cluster Munitions

For half a century, cluster munitions have inflicted suffering on civilians. Bystanders to armed conflicts have lost limbs and lives and had their livelihoods destroyed. During strikes, cluster munitions blanket broad areas with submunitions that spray high-velocity fragments in all directions. Many of these submunitions fail to explode on impact and linger for months or years, endangering unsuspecting children or farmers. Proliferation of cluster munitions has spread the potential for harm around the world, and the need for clearance of cluster munitions and victim assistance has imposed additional costs.

While the threat persists, the international community has taken a strong stand against cluster munitions. After traditional disarmament approaches fell short, a group of like-minded states, in collaboration with civil society, moved discussions to an independent forum. The product of these negotiations is the 2008 Convention on Cluster Munitions, a groundbreaking treaty that addresses all of the problems of the weapons. It not only prohibits use, production, transfer, and stockpiling, but also requires stockpile destruction, clearance, and victim assistance. It seeks both to eliminate the chance of future harm and to minimize the pain generated by past use.

The convention became binding law on states parties when it entered into force on August 1, 2010, but much work remains to be done. States must now strive to universalize the convention, implement all its obligations, and adopt strong interpretations of key provisions.

This comprehensive book, which represents the culmination of a decade of research by Human Rights Watch, seeks to build on the momentum of the convention's entry into force and contribute to achieving a world free of cluster munitions. It draws on field investigations to document the suffering cluster munitions cause to civilians. It examines the process to ban the weapons, borrowing from Human Rights Watch's firsthand experience as an active participant in the development of the Convention on Cluster Munitions. It also provides a thorough legal analysis of the convention and details the steps needed to fulfill the convention's promise. The book concludes that this absolute and multifaceted convention is the only viable solution to the scourge of cluster munitions.

A 14-year-old cluster munition survivor is accompanied by friends in the Rashidiyeh camp for Palestinian refugees in Tyre, Lebanon on November 27, 2008. Israel blanketed south Lebanon with cluster munitions during its 2006 war with Hezbollah. The boy lost his legs because he accidentally detonated an unexploded cluster submunition that lingered after an attack.

© 2008 Franco Pagetti/VII

