

# Looking Inwards and Looking Outwards – Specific Challenges and Strategic Directions From the Prohibition of Cluster Munitions

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This article considers the prohibition and definition of cluster munitions in the Convention on Cluster Munitions (CCM) as a possibly significant milestone towards stronger humanitarian disarmament, and in particular towards greater control of explosive weapons.<sup>1</sup> Whilst there are potential ambiguities and challenges within its definition, it may well also support attempts to develop greater constraint on other patterns of violence that cause substantial civilian harm.

The first part of the article ‘looks inwards’ to consider approaches to the definition of unacceptable weapons, noting three examples where it is arguably ambiguous or uncertain what the CCM prohibits. Consideration is given to how the multiple approaches to defining what is proscribed contrastingly structure the terms of future debate.

The second part of the article ‘looks outwards’ to consider the implications of the prohibition as defined in the CCM for broader debates around the acceptability of explosive weapons in populated areas. It then comments on the potential for approaches taken in the Mine Ban Treaty (MBT) and CCM to challenge the predominance of ‘armed conflict’ as an organising category, as seen reflected in the development of international policy on ‘armed violence’.

Whether looking ‘inwards’ or ‘outwards’, the article concludes that the gathering and presentation of evidence regarding humanitarian effects should be a primary concern, coupled with consideration regarding which bodies bear the burden of proof as to whether negative humanitarian effects are being sufficiently mitigated. In doing so, this article asks how

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<sup>1</sup> Explosive weapons include both explosive ordnance and improvised explosive devices.

the CCM could set important precedents and presumptions to reduce the destructive consequences of armed violence for civilian populations and societal development.

## I. Looking Inwards

### A. Defining Unacceptable Technologies of Violence

One of the ways in which states attempt to limit the humanitarian consequences of conflict is to establish international legal instruments that contend that certain weapons are particularly problematic and therefore need to be subject to specific regulations or prohibitions.<sup>2</sup> The difference between regulation and prohibition is often a question of interpretation – what might be considered a regulation at one level can consist of prohibitions at another level (*e.g.*, the 1997 Mine Ban Treaty can be considered a regulation of ‘landmines’ but also a comprehensive set of prohibitions on ‘antipersonnel landmines’; Convention on Certain Conventional Weapons [CCW] Protocol III is a regulation of incendiary weapons consisting of prohibitions on certain uses of these weapons).

The ways in which the technologies of warfare are defined vary considerably. Prohibitions and regulations have set limits on:

- certain *purposes* served by science and technology (*e.g.*, the 1993 Chemical Weapons Convention 1.a)
- specific types of weapons according to the purpose of their *design* (*e.g.*, 1997 Mine Ban Treaty; CCW Protocol IV in relation to ‘blinding laser weapons’)
- technologies with certain *measurement* characteristics (*e.g.*, CCW Amended Protocol II prohibiting use of anti-personnel mines that do not provide ‘a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass’)
- certain *deliberate effects* of weapons (*e.g.*, CCW Protocol I in relation to non-detectable fragments)

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<sup>2</sup> See B. Rappert, *Controlling the Weapons of War: Politics, Persuasion and the Prohibition of Inhumanity* (2006).

- certain *inadvertent effects* of weapons (*e.g.*, CCW Protocol V responds to the unintended effects of explosive ordnance that result from the improper technical performance of those weapons).<sup>3</sup>

All such ways of defining are open to question regarding the boundaries of what is proscribed and how that should be policed. The basic problem is one familiar to law: the application of general terms to specific instances is (at least in theory) always open to interpretation.<sup>4</sup> Some possible lines of questioning regarding definitions are explored in the next section, with specific attention to the CCM.

## B. Multiple Approaches to Definition of Cluster Munition in the CCM

The CCM establishes prohibitions on the use, production, stockpiling and transfer of cluster munitions as a broad category of weapons. In its delineation of a cluster munition, the CCM uses a number of different definition approaches in combination. Box 1 provides the central prohibition of this convention along with its definition of ‘cluster munition’.<sup>5</sup>

Box 1: The terms of prohibition in the CCM

### Article 1

#### *General obligations and scope of application*

Each State Party undertakes never under any circumstances to:

- a. Use cluster munitions;
- b. Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
- c. Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention. [...]

<sup>3</sup> By contrast to the other instruments listed here, Protocol V regulates explosive ordnance primarily through a set of positive obligations to undertake remedial action – its regulation of the parameters of the technology itself amounts to no more than the ‘encouragement’ of preventive measures to minimise the occurrence of explosive remnants of war.

<sup>4</sup> H.L.A. Hart, *The Concept of Law* (1994).

<sup>5</sup> In addition to the text here, the CCM also contains provisions that exclude ‘mines’ from the scope of the treaty, and include ‘bomblets’ from ‘dispensers’ within the prohibitions of Article 1.

## Article 2

### Definitions

[...]

Cluster munition means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

- a. A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- b. A munition or submunition designed to produce electrical or electronic effects;
- c. A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
  - i. Each munition contains fewer than ten explosive submunitions;
  - ii. Each explosive submunition weighs more than four kilograms;
  - iii. Each explosive submunition is designed to detect and engage a single target object;
  - iv. Each explosive submunition is equipped with an electronic self-destruction mechanism;
  - v. Each explosive submunition is equipped with an electronic self-deactivating feature.

As is evident from the Box, multiple terms are used to delineate what is or is not a cluster munition or explosive submunition:

- ‘Designed to’ and ‘designed exclusively for’
- ‘Weighing less’ and ‘weighs more’
- ‘Fewer than’
- ‘Equipped with’
- ‘Has ... characteristics’, ‘in order to avoid indiscriminate area effects and the risks posed by unexploded ordnance’.

The remainder of this section examines three of the approaches to defining that stem from these terms – those relating to *design*, *technical measurements*, and *effects*.

## 1. Design

Clauses invoking design in international treaties generally relate to the intention or purpose for which a weapon has been developed. In the CCM, for example, systems which may otherwise be labelled as cluster munitions (such as those that dispense flares, smoke, pyrotechnics or chaff) are not deemed so because they are ‘designed’ for different purposes. These are held to be distinct and recognisably different from the purpose of a cluster munition as defined by the convention (though, interestingly, the purpose of a cluster munition is not itself stated other than in so far as it is a ‘munition’).

As with other approaches, of note in defining technologies through design is the ground that it establishes for contests about what is and is not prohibited. Design-based definitions move dispute away from the interpretation of text onto the attribution of intentionality or purpose of (typically undefined) individuals.<sup>6</sup> Such attributions can be difficult to establish. For example, if a physical weapon is placed on a table, extracted from the history of deliberations, diagrams, tests, storage rules, maintenance procedures, uses and abuses that may otherwise accompany it (or other weapons that are similar but slightly different), who is to say for what purpose it is designed?

To take a concrete case, the Biological Weapons Convention (BWC) does not prohibit biological weapons *per se*. Instead, it restricts the use to certain purposes served by science and technology. This approach was taken in order to enable the BWC to be flexible enough to accommodate new technologies. While this has been achieved, a weakness of the purpose-based prohibition is the lack of precision about what is and is not permissible. The convention relies on a number of terms to carve out what is allowed, such as ‘prophylactic’, ‘protective’ and ‘peaceful purposes’. The meaning of these as they relate to determinations of the permissibility of particular activities has been a matter of contention. For instance, identifying when permitted bio-defence research strays into bio-offence has been one source of dispute. What for some appeared as benign defensive activities has been interpreted differently by others.<sup>7</sup>

Box 2 describes one possible source of dispute regarding design within the CCM.

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<sup>6</sup> Another challenge for definitions based on design is how to use such an approach to delineate a group of weapons that, in part, cause humanitarian problems by failing to perform as designed. This requires either some other approach to definition or an additional requirement for design to address the failure.

<sup>7</sup> See B. Rappert, *Controlling the Weapons of War*, *supra* note 2, Chapter 6.

## Box 2: Designed for air defence?

The CCM excludes from definition as cluster munitions weapons that are ‘designed exclusively for an air-defence role’. The term ‘air-defence role’ is not subject to further definition but the negotiating history indicates that this means weapons for use against aircraft in the air, and where the effects of the weapon are to be experienced in the air.

The UK-manufactured Starstreak weapon system is one that has *prima facie* characteristics of a cluster munition (it utilises three submunitions that contain explosives) but might be considered excluded because of its role as an air-defence weapon. Yet closer examination brings this into doubt. In recent years, the manufacturer’s literature for the promotion of this system widely advertised that it had utility against ground-based targets such as armoured personnel carriers.<sup>8</sup> This raises serious questions about how the term ‘exclusively designed’ should be interpreted.

At one level such utility claims by manufacturers dictate that the weapon should be considered prohibited. The ‘exclusively designed’ requirement seems intended to avoid a situation where weapons with the same technical characteristics as cluster munitions avoid prohibition based on claims that they *can* be used for air-defence.

Yet it is also possible that a weapon system is ‘designed’ from original project concept, through its development to final testing and sale, as a weapon for use in an air defence role. Claims of utility against ground based targets might then be added into the sales literature after the design process was completed in order to argue a more flexible role for the weapon.

<sup>8</sup> Brochures on file with the author for the ‘Starstreak High Velocity Missile (HVM)’ state that

a variety of threats can be defeated including aerial targets such as Unmanned Aerial Vehicles (UAVs) and helicopters and also surface targets such as Armoured Personnel Carriers (APCs), static installations or terrorist platforms.

This is repeated in brochures for ‘Starstreak Armoured Vehicle System (AVS)’ and ‘Starstreak Lightweight Multiple Launcher (LML)’. With respect to ‘surface threats such as light armoured vehicles (LAVs) and fast inshore attack craft (FIAC)’ brochures note that ‘Starstreak II has been designed to defeat these threats’. A Thales press release of 11 September 2007 noted that ‘the fact that Starstreak II can now defeat an increased array of threats is key in an environment where force protection is vital’. (see Thales UK, ‘Next-generation Starstreak provides enhanced force protection’, ASDNews, 11 September 2007).

Or they could be added on the basis of a utility realized once the weapon had been deployed in combat. As in other areas of innovation, the evolution of the purposes served by technology is commonplace in the military.<sup>9</sup>

If a utility against ground-based targets were claimed only after the design and production process was completed, it seems difficult to assert that this invalidates the designer's exclusive intent. And yet, where intent<sup>10</sup> should be 'found' is not set out in the CCM and there are no acceptable standards across major arm treaties for how this should be done.

## 2. Technical Measurements

The CCM requires certain physical measurements of the technology in question. These relate to the weight of particular parts of the weapon under scrutiny, the number of specific key components, and the presence (or absence) of certain sub-systems. Some of these elements of definition (weight and numbers) were objected to by certain state participants in the CCM negotiations as being problematic as a matter of principle. The objection was that such an approach must to some extent involve drawing an arbitrary line such that, for example, no-one could explain in moral, humanitarian or military terms why a submunition of 19.9 kilograms was unacceptable but a submunition of 20.1 kilograms was acceptable.

Despite such objections, metrics are in many respects much more amenable to interrogation than aspects of definition based on design (where the line of acceptability is 'deferred' out of the text itself into the messy question of where 'design' takes place).

Yet, measurement-based approaches can produce other types of problems. Box 3 describes the contingencies associated with 'when' a weapon becomes prohibited vis-à-vis its features. At issue here is whether packaged as individual items, sub-munitions might fall outside of the scope of the CCM.

<sup>9</sup> See D. MacKenzie/J. Wajcman (eds.), *The Social Shaping of Technology* (1999).

<sup>10</sup> Whilst the requirement that such systems are 'designed exclusively' for an air-defence role seems to reduce the possibility that certain systems will be allowed that may cause the same problems as cluster munitions, it could also be held to open up a degree of ambiguity as to what munitions or submunitions 'designed to dispense flares, smoke, pyrotechnics or chaff' are permissible. If these systems are not subject to the same test of 'exclusive' design does it follow that they are still excluded from prohibition if designed to fulfil additional purposes, one of which could be to kill and injure?

This problem is not hypothetical insomuch as the selling of the component parts has been one way proscriptions for other technologies have been circumvented in the past.<sup>11</sup>

This problem is very hard to avoid in defining cluster munitions because the submunitions are a fundamental component of the weapon, yet, on an individual basis, they are very difficult (if not impossible) to distinguish from other forms of explosive weapons. It is significant that the widely held concept of a cluster munition, reflected in the definition, is that it employs *multiple* explosive devices. Thus the fundamental defining feature of a cluster munition derives from the distinction between *one* and *more than one*.

Box 3: The number of explosive submunitions

An explosive submunition is defined in the CCM as ‘a conventional munition that in order to perform its task is dispersed or released by a cluster munition...’. Yet it is possible for certain explosive munitions to be used both individually and when compiled into a cluster munition. This raises difficult questions about the legality of those munitions

For example, it has been reported that the skeet submunitions from the BLU-108 (which would ordinarily be considered prohibited under the treaty) can be used in a configuration where they are fired individually from a different type of delivery system.<sup>12</sup> Fired individually, there would be no grounds for considering them as falling under the CCM, let alone being prohibited by it. Would it therefore be acceptable for a state party to the CCM to import such munitions? The same question would arise if a state were to export explosive submunitions permissible under the terms of Article 2.c to a country that was not a party to the treaty and had the capacity to deploy such submunitions in configurations of 10 or more per container.

It is likely that an answer to that question would rely on some further test of ‘intent’ amongst those seeking to procure these weapons. The result is much as in the previous case of design: judgements about the proper interpretation need to go beyond the text of the CCM.

### 3. Problematic Effects

An important component of the CCM is its articulation of the negative humanitarian effects of cluster munitions within the definition itself. Whilst

<sup>11</sup> See B. Rappert, *Controlling the Weapons of War*, *supra* note 2, Chapter 1.

<sup>12</sup> Jane’s Air-Launched Weapons, Issue 50, 2007, at 461.

certain other instruments use definitions incorporating reference to effects, this explicit and detailed articulation of the negative effects of cluster munitions is a distinct innovation. Specifically, in Article 2.c the CCM excludes from prohibition munitions that, ‘in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions’, have a cumulative set of characteristics set out in Article 2.c.(i)-(v).

By prefacing the characteristics set out in Article 2.c.(i)-(v) with a statement of the humanitarian problems that must be avoided, one interpretation of the text is that Article 2.c casts some doubt on the sufficiency of the five technical characteristics that follow. Whilst a narrow reading would argue that the technical characteristics are sufficient to avoid prohibition, this other reading recognises that such characteristics should only be considered sufficient so long as they meet the test of the ‘effects-based’ criteria. Yet, which reading should prevail is not specified or suggested by the text of the CCM.

The possibility that submunitions that meet the technical criteria of 2.c are found in the future to cause a problematic pattern of harm to civilian populations is discussed in Box 4. As a result, as with definitions based on design and technical measurements, in the future interpretation will be required about what the CCM prohibits in relation to the effects of weapons. However, how this is done, and by whom, is an open question.

Box 4: Sensor fuzed munitions

‘Sensor fuzed munitions’, which come in both unitary and submunition-based forms, use combinations of sensors and micro-processing to direct explosive force onto target objects.<sup>13</sup> The CCM splits up this category; unitary sensor fuzed munitions fall outside of the scope of the treaty and submunition-based sensor fuzed munitions are prohibited unless they also meet the requirements regarding submunition weight, numbers and other technical features to reduce post conflict risks.

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<sup>13</sup> As they descend over a target area, sensor fuzed munitions use a combination of sensors (infrared, laser) to identify ‘targets’ on the ground within a ‘target area’ being scanned by the sensors. On identifying a target – an object that meets certain programmed parameters – most current variations of these munitions fire an explosively formed projectile down at the target, usually applying explosive force within a relatively narrow area. ‘Targets’ in this context are usually defined (and therefore identified) on the basis of ‘heat signature profiles’ programmed into the munition (such as the heat and broad shape of a vehicle engine). Such heat signature profiles are not inherently ‘military’ or ‘civilian’ but rather are programmed to correspond to certain

A challenge to any assessment of the humanitarian risk of these weapons is that they have not been widely used in combat. No civilian casualties have been attributed, at the time of writing (and to the authors best knowledge), to submunition-based sensor fuzed weapons. However, in theoretical terms they present a number of distinct risks:

- \* Sensor fuzed munitions have a potential to strike certain military or civilian objects without distinction within a wide target area (that may be more or less wide depending on the specifics of the system) based on decision-making undertaken by a electronic components.
- \* As with all explosive weapons, sensor fuzed munitions present a risk of creating unexploded ordnance (though many contain systems that attempt to mitigate this risk).

It can be argued that all explosive weapons have some tendency to strike without distinction in the area that they affect. However, sensor fuzed munitions are subject to a particular calculus: that the probability of causing *any* damage to a military object in the target area may be dependent on the number of civilian objects present that match the targeting profile.<sup>14</sup>

Without much more information on what civilian objects might be considered targets by different sensor systems it is difficult to evaluate the future risk from these weapons.<sup>15</sup> So, for example, it is an open question whether the use of such

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vehicles commonly used by military forces. Whilst military personnel have broad control over the target area that will be searched by the munition sensors (subject to issues of accuracy in delivery), decision making as to the 'target' within that area is done by the munition itself.

<sup>14</sup> Following from the note above, if we consider that certain objects, as programmed into the munition, are liable to trigger the warhead, the legality of an attack using munitions with sensor fuzing must depend on some assessment of the presence or otherwise within the target area of civilian objects liable to be attacked. At a minimum, assessment of the relative balance of such civilian objects and military targets liable to be attacked would seem to be necessary. If the number of such civilian and military objects in the target area are equal, and all other factors being equal, the probability of a weapon striking a civilian object would be 0.5. It should also be considered that, as the ratio of such civilian to military objects in the target area increases, not only is the probability of striking a civilian object increased but the probability of a sensor fuzed submunition striking a military target is also reduced. This is a different logic to that which pertains with most non-sensor fuzed munitions, where the probability of causing damage to a military object is not directly related to the presence of certain civilian objects.

<sup>15</sup> If states have not undertaken research to gather data on the types of civilian objects that would provide a target for these sensors then it is difficult to see

weapons in urban areas might tend to produce a form of ‘indiscriminate area effect’ as established as grounds for prohibition in the CCM.<sup>16</sup> As we have noted above, the CCM provides no guidance on how data should be gathered on any humanitarian effects of such weapons arising from their use in combat, or who should be responsible for gathering such data.

#### 4. Looking Inwards: Conclusion

The CCM represents a major achievement in international disarmament and establishes a categorical prohibition across cluster munitions as a broad category. The definition of a cluster munition set out in its text uses a number of different definition approaches in combination. As with other such legal instruments, it leaves open important questions of ‘who’ is going to judge adherence to these standards and (a significant challenge) how these standards themselves should be interpreted.

Whilst there will be many areas of broad agreement on what is prohibited under the definition, there is potential for significant disagreement around the margins. How any such disagreements are approached will be important to ensuring the humanitarian intent of the treaty into the future. In particular, the standards of evidence and argument required in order to assert the permissibility of certain weapons or actions in the face of uncertainty will be very important.

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how any assessment could be made regarding the legality of their use in any particular circumstance (unless the area was wholly free from civilian objects.). Failure to gather this kind of information would be a continuation of the same form of political failure that allowed cluster munitions to continue to cause problems despite repeated expressions of concern from civil society and repeated claims that a technological solution is at hand. For the history of this failure with respect to cluster munitions see B. Rappert, ‘Out of Balance: UK Government Efforts to Understand Cluster Munitions and International Humanitarian Law’, *Landmine Action* (2005), and B. Rappert/R. Moyes, ‘Failure to Protect: A Case for the Prohibition of Cluster Munitions’, *Landmine Action* (2006).

<sup>16</sup> Notably, a UK Ministry of Defence press release of 19 November 2007 regarding the acquisition of ‘Ballistic Sensor Fuzed Munitions’ stated that:

The Army’s AS90 guns are to get a sophisticated new weapon that can more accurately seek out and destroy hostile armoured vehicles at long range (up to 22.5 km), day and night; in all weathers and in difficult terrain, such as forests and urban areas.

However, the UK withdrew the press statement above shortly after its release and replaced it with an alternative version that omitted reference to use in urban areas.

## II. Looking Outwards

The CCM is explicitly concerned with the suffering caused by cluster munitions at the time of their use and when they fail to function as intended. Whilst it builds on the concerns of the 1997 Mine Ban Treaty and CCW Protocol V (2003) regarding the ongoing risk to civilians, it also returns to long-standing concerns regarding the area-effects of certain explosive weapons to civilian populations at the time of attacks.<sup>17</sup>

To illustrate this, consider again the three box examples in the previous section. All of the examples contain a common theme – *that cluster munitions are very similar to other explosive weapons*. Beyond these questions around the margins of the definition of cluster munitions, even the many systems that would widely be agreed as falling under the prohibition are distinguished from other explosive weapons only in so far as they utilise *multiple* explosive items distributed from a single *container*. The process of developing new legislation on a type of weapon requires some assertion that this bounded group of technologies presents problems and challenges that are distinct by comparison with other weapon groups not subject to special controls – that is to say, that problematic weapons are ‘different’.

The similarity of cluster munitions to other explosive weapons was quite often asserted by politicians and diplomats in recent years as grounds for arguing *against* banning cluster munitions. The logic being that cluster munitions posed similar unexploded ordnance problems to other weapons and so should not be subject to special controls. Yet more recently, certain analyses have considered the similarity of cluster munitions to other explosive weapons as supporting arguments for *re-assessing explosive weapons* more widely.<sup>18</sup> This section will consider possible wider implications of CCM and its prohibition of cluster munitions.

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<sup>17</sup> See R. Moyes, ‘Explosive Violence: The Problem of Explosive Weapons’, *Landmine Action* (2009), at 58-63.

<sup>18</sup> See *ibid.*; also J. Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (2009).

## A. Building New Standards Regarding Explosive Weapons<sup>19</sup>

The CCM is the first legal instrument to prohibit a category of explosive weapons, in part, on the basis of their effects at the time of an attack. This is articulated in the aforementioned Article 2.c through the term ‘indiscriminate area effects’. The use of the term ‘indiscriminate’ is important here because it serves to link this problematic effect with the concept of ‘indiscriminate attacks’ – attacks which are subject to outright prohibition in the general rules of international law (see Article 51 of 1977 First Protocol Additional to the Geneva Conventions of 12 August 1949 [Additional Protocol I])<sup>20</sup>. Given their role in avoiding this effect, the cumulative characteristics of 2.c. (i) – (iii) should provide guidance on how the term ‘indiscriminate area effects’ is to be interpreted.

Of the cumulative characteristics, Art. 2.c (iii) requires that the individual submunitions should each strike a ‘single target object’. Such a ‘target object’ should be a vehicle, artillery piece or other such distinct item. It is therefore prohibited to use weapons where the explosive submunitions distribute

<sup>19</sup> This section of argument follows a line first developed in a policy paper, R. Moyes, ‘Implications of the Convention on Cluster Munitions for Developing a Norm Against Area-Effect Use of Explosive Weapons’, *Landmine Action* (2008): this line is also argued in B. Rappert/R. Moyes, ‘Enhancing the Protection of Civilians From Armed Conflict: Precautionary Lessons’, 26 *Medicine, Conflict and Survival* (2010) 24, at 40-41.

<sup>20</sup> The general parameters of ‘indiscriminate attacks’ are laid out in the 1977 First Protocol Additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I) at Article 51 (4) – (5):

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

[...]

explosive force and fragmentation randomly across an area and without specific limitations on these effects *within* that area.<sup>21</sup>

Seen in relation to the provisions of Article 51 of Additional Protocol I, the CCM implies that the use of explosive weapons across areas, without mechanisms to limit the effects of the individual weapons to single target objects will be ‘of a nature to strike military objectives and civilians or civilian objects without distinction’ and will thus be unlawful. Such a reading would most likely be relevant to the use of such weapons in or near populated areas and the history of deliberations on cluster munitions reinforce this. Prior to the stream of discussions that led to the adoption of the CCM, 25 countries issued a joint declaration in favour of an agreement that would, amongst other things, prohibit the use of cluster munitions ‘within concentrations of civilians’.<sup>22</sup>

## B. Explosive Weapons in Populated Areas

That certain explosive weapons should be prohibited from use amongst concentrations of civilians resonates with a developing international concern about the humanitarian impact of explosive weapons in populated areas. The Secretary-General of the United Nations has expressed increasing concern regarding ‘the humanitarian impact of explosive weapons, in particular when used in densely populated areas’.<sup>23</sup> The President of the ICRC has noted that the

ICRC’s key operations in 2009 – in the Gaza Strip and in Sri Lanka – provided stark illustrations of the potentially devastating humanitarian consequences of military operations conducted in densely populated areas, especially when heavy or highly explosive weapons are used.<sup>24</sup>

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<sup>21</sup> None of the characteristics intended to avoid indiscriminate area effects relate to the ‘accuracy’ of the container munition. So ‘indiscriminate area effects’ are not considered to result primarily from the risk of ‘area effects’ being inadvertently applied in the wrong place. Rather ‘indiscriminate area effects’ are wholly considered to result from the use of multiple explosive items to distribute explosive force and fragmentation randomly across a pre-defined area.

<sup>22</sup> Declaration on Cluster Munitions, issued by 25 states at the Third Review Conference of States Parties to the CCW, Geneva, CCW/CONF.III/WP.18, 17 November 2006.

<sup>23</sup> UN Security Council, Report of the Secretary-General on the Protection of Civilians in Armed Conflict, 29 May 2009, UN Doc. S/2009/277, at para. 36.

<sup>24</sup> The 2009 Annual Report of the International Committee of the Red Cross, Message from the President, ICRC, 2010, at 8.

In July 2010, the UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator stated that:

The use of 'ordinary' explosive weapons in populated areas also repeatedly causes unacceptably high levels of harm to civilians. From air strikes and artillery attacks in Afghanistan, Somalia, Yemen and Gaza to rockets launched at Israeli civilian areas by Palestinian militants and car bombs and suicide attacks in Pakistan or Iraq, use of explosive weapons and explosives has resulted in severe civilian suffering.<sup>25</sup>

Such problems result substantially from the blast and fragmentation effects of explosive weapons at the time of the attack. In his 2009 Report on the Protection of Civilians, the UN Secretary General described the mechanisms of harm as follows

First [...] the risk to civilians caught in the blast radius or killed or injured by damaged and collapsed buildings. Secondly [...] damage to infrastructure vital to the wellbeing of the civilian population, such as water and sanitation systems.<sup>26</sup>

Such an articulation recognises the area effect of explosive weapons (expressed in terms of the 'blast radius') as being a primary mechanism of civilian harm. As we have noted previously, this is one of the bases upon which cluster munitions are prohibited under the CCM.

If the use of explosive weapons in populated areas is to come under greater scrutiny, the CCM should provide an important point of reference through its clear implication that, for certain types of explosive weapons, use in populated areas should and can be prohibited.

Whilst the CCM raises the prospect of further prohibitions on explosive weapons in populated areas, an initial response from organisations pressing for improved humanitarian protection will likely interrogate the mechanisms of data-gathering that are in place (or not) to facilitate understanding of the levels of civilian harm being caused, as well as the particular weapons or patterns of actions associated with harm. This emphasis on data-gathering would echo, albeit on a much wider scale and with far greater humanitarian urgency, issues regarding evidence gathering regarding the actual effects of

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<sup>25</sup> Security Council Open Debate on the Protection of Civilians in Armed Conflict, 7 July 2010, Statement by John Holmes, Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator.

<sup>26</sup> Report of the Secretary-General, *supra* note 23, at para 36.

weapons meeting the technical characteristics of Art. 2.c. in relation to the effects based chapeaux in the CCM (as discussed above). It could also build upon the legal obligation in Art.5.1. for states to ‘make every effort to collect reliable relevant data’ with respect to victims of specific weapons. It would be in line with the general commitment of the 2006 Geneva Declaration on Armed Violence and Development<sup>27</sup> to ‘strive to achieve, by 2015, measurable reductions in the global burden of armed violence’ (signed by more than 100 countries) and, more specifically, of the 2010 Oslo Commitments on Armed Violence. The latter, endorsed by more than 60 states, includes a commitment to ‘measure and monitor the incidence and impact of armed violence at national, sub-national levels in a transparent way’.<sup>28</sup> Under CCW Amended Protocol II (on mines, booby-traps and other improvised explosive devices) and Protocol V (on explosive remnants of war) states have already accepted a legal responsibility to record what explosive weapons are used, where they have been used, and to make certain information available subsequently for the purposes of reducing civilian harm. This background of obligations and commitments provides a strong basis for arguments that the burden of proof regarding the acceptability of explosive weapons in populated areas is on states.

Against the background of these existing commitments, and with concern being raised at senior levels of the UN and elsewhere about this humanitarian issue, states will likely be called on to accept a specific responsibility to provide evidence regarding the civilian risk presented by explosive weapons in populated areas and articulate what specific technologies or patterns of use they consider permissible. Arguments for certain prohibitions, building on the example of the CCM, could take shape around such evidence. However, such arguments could also take shape around the *absence* of any such evidence or explanation from states. What will be crucial in the future is that such an absence of evidence is taken as a failure of responsibility in practice. This mode of argument was also strongly prevalent in the build-up to the CCM negotiations as states failed to provide evidence to back up their claims (whether that was regarding broad understanding of the impact of the weapons on civilians or specific issues of technological reliability *etc.*).<sup>29</sup>

<sup>27</sup> 2006 Geneva Declaration on Armed Violence and Development, available at <http://www.genevadeclaration.org/fileadmin/docs/GD-Declaration-091020-EN.pdf> (last visited 18 August 2011).

<sup>28</sup> 2010 Oslo Commitments on Armed Violence, available at <http://www.osloconferencearmedviolence.no/> (last visited 18 August 2011).

<sup>29</sup> See for example, B. Rappert, UK Government Efforts, *supra* note 15; B. Rappert/R. Moyes, Failure to Protect, *supra* note 15; C. King/O. Dullum/G.

### C. Armed Violence and Humanitarian Disarmament: The Legal Control of Weapons ‘in All Circumstances’

A significant feature of explosive weapons is that in the common practice of states they are generally reserved for use only in the special circumstances of ‘armed conflict’. States rarely use explosive weapons in the context of domestic policing and if they do it is generally regarded as a sign of political instability. Such a distinct pattern of categorical management, usually not made explicit, does not follow for other technologies. For example, firearms are widely used both in policing and conflict contexts, and certain chemical agents may be used in the context of law-enforcement but not in conflict. This pattern of categorical management with respect to explosive weapons should raise questions about what underpinning relationships of accountability and circumstance determine their permissibility or otherwise. If explosive weapons are generally considered unacceptable in the context of domestic law-enforcement (where users of weapons are accountable to the population amongst whom force is being used), in what contexts does their use become acceptable?<sup>30</sup>

International legal instruments regarding weapons apply their regulations or prohibitions on defined technologies, but also in defined contexts or circumstances. By asserting that it is applicable ‘in all circumstances’, the CCM builds on an important theme in the recent development of humanitarian weapon treaties. Where earlier legal instruments controlling weapon technologies may appear to present broad categorical prohibitions, it is possible to miss important contextual limitations on the controls in question. The 1868 St Petersburg Declaration,<sup>31</sup> 1899 Hague Declaration concerning Asphyxiating Gases, and the 1980 CCW<sup>32</sup> apply variously in ‘time of war’ or situations of ‘armed conflict’. Whilst the Chemical Weapons Convention

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Østern, ‘M85: An Analysis of Reliability’, Colin King Associates, Norwegian Defence Research Establishment (FFI) and Norwegian People’s Aid (2007).

<sup>30</sup> For a wider development of this argument see R. Moyes, *Explosive Violence*, *supra* note 17.

<sup>31</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 1868.

<sup>32</sup> The Scope of Application of the CCW is linked to ‘Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War victims’, which in turn states:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the

of 1992 is not limited in its scope of application only to situations of ‘armed conflict’, amongst the ‘purposes not prohibited’ are ‘law enforcement including domestic riot control purposes’.<sup>33</sup>

A significant development in ‘humanitarian disarmament’ treaties such as the 1997 Mine Ban Treaty and the CCM has been that they apply not only in armed conflict, but ‘in all circumstances’. This has important implications not only for broadening the scope of prohibitions (*e.g.*, to encompass more easily production, transfer, *etc.*) but also for slowly re-framing, and perhaps challenging, the concept of ‘armed conflict’ itself. By applying a common standard across both conflict and non-conflict settings, foundations are laid for questioning approaches that (re)affirm the distinctive nature of armed conflict as a readily identifiable context that is subject to special rules (rules that are significantly more permissive about the taking of human life than are generally held to apply in non-conflict settings).<sup>34</sup>

The re-framing taking place through this wider scope of application resonates with the developing concept of ‘armed violence’ as a framework for further policy and legal responses (noted also in the section above regarding commitments to evidence-gathering). As a policy framework, armed violence is now generally acknowledged as encompassing both conflict and

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state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

<sup>33</sup> See Art. 2, 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 45.

<sup>34</sup> This trajectory may also be seen as linked to the ongoing move away from ‘conditionality’ in the applicability of rules of armed conflict, whereby certain instruments are held to apply only where both parties to an armed conflict have accepted the legal standard (See for example Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims). The emphasis in such conditional instruments tended to be on the interests of the combatant personnel (such as the requirement for them to be spared from superfluous injury), an approach that resonates with concepts of ‘a fair fight’. On the other hand, instruments such as the MBT and CCM take their motivation fundamentally from the interests of the non-combatant population (both during the conflict and afterwards). Their prohibitions, binding in all circumstances, suggest that the interests of this population override the interests combatants might have in retaining the use of specific technologies.

non-conflict violence<sup>35</sup> and as promoting common mechanisms of analysis across all forms of violence using weapons. As such it provides a category that facilitates challenges to the notion of armed conflict as a distinctly special context within which distinctly different standards apply.

### III. Conclusion

The CCM provides a broad categorical prohibition on cluster munitions. As such it will directly contribute to curtailing the production, stockpiling, transfer and use of a set of weapons long associated with elevated civilian harm. Whilst the CCM can be seen to contain points of ambiguity and uncertainty in the detailed terms of its definition (as may be found in close readings of many such instruments), it also has potential to make a significant contribution to wider debates around the acceptability of explosive weapons in populated areas and on armed violence in general.

As with other treaties, the future political negotiation of meaning regarding the CCM will be of crucial importance. Resolving contestations over detailed interpretation of the text in a way that promotes humanitarian protection, and building on the potential of the CCM to support wider efforts to reduce the humanitarian impact of violence, will both require the ongoing work of practitioners amongst NGOs, international organisations, and state diplomats. It will likely be configurations of such practitioners who have the capacity to determine what interpretations predominate.

Whether ‘looking inwards’ at interpretations of the prohibition, or ‘outwards’ towards broader humanitarian issues, this article has argued that the gathering and presentation of evidence regarding humanitarian effects should be an issue of central concern. Elsewhere the authors have argued for the adoption of a ‘precautionary’ orientation such that, where there are grounds for humanitarian concern, those that argue the permissibility of certain weapons should bear the onus of proof regarding the mitigation of humanitarian risks.<sup>36</sup> Practitioners amongst NGOs, international organisations, and state diplomats have it within their power to demand such an approach.

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<sup>35</sup> See for example OECD, ‘Armed Violence Reduction: Enabling Development’ (2009); Report of the United Nations Secretary-General, ‘Promoting Development Through the Reduction and Prevention of Armed Violence’, UN Doc. A/64/228 (2009); 2010 Oslo Commitments, *supra* note 28.

<sup>36</sup> B. Rappert/R. Moyes, Enhancing the Protection, *supra* note 19.

Whilst the destructive capacity of weapon technologies has grown dramatically from the advent of modern explosive weapons in the mid-1800s, the same period has also provided evidence of human societies ability to establish certain limitations on such technologies. The CCM is a further example of this ability; an example that has the potential to consolidate the broad agenda of humanitarian disarmament to date whilst pointing to a still wider agenda in the future.