

THE PROHIBITION OF CLUSTER MUNITIONS

Setting International Precedents for Defining Inhumanity

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By the end of 2008, ninety-five states had signed the Convention on Cluster Munitions, which bans the development, production, acquisition, stockpiling, and transfer of cluster munitions; imposes significant obligations for the clearance of unexploded cluster munition remnants; and elaborates novel requirements for so-called victim assistance. This article examines this agreement and the process that led up to it in terms of the precedents it sets for future arguments about weapon technologies and the regulation of armed conflict. Particularly noteworthy was the process for determining what counts as a "cluster munition" under the convention. The definition structure transformed the argument from considerations of what types should be prohibited to demanding justifications for what should be allowed. In other words, rather than the burden of proof resting with those seeking a ban, the presumption became that exclusions from prohibition had to be argued in by proponents of specific submunition-based weapons. This approach contrasts with the manner in which the burden of proof regarding cluster munitions has been handled in international humanitarian law.

KEYWORDS: Cluster munitions; international humanitarian law; Convention on Cluster Munitions; arms control; disarmament

On May 30, 2008, 107 states adopted the Convention on Cluster Munitions (CCM), a treaty that was the outcome of the "Oslo Process," which began at a conference in Norway in February 2007. That conference produced the Oslo Declaration, which included a commitment that states would:

1. Conclude by 2008 a legally binding international instrument that will:
 - i. prohibit the use, production, transfer, and stockpiling of cluster munitions that cause unacceptable harm to civilians, and
 - ii. 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.¹

This article examines the prohibition agreed in the CCM in terms of the precedents it may set for future arguments about weapon technologies and the regulation of armed

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conflict. Particular attention is given to how the definition for “cluster munitions” was devised during the negotiations. As indicated by the above quotation from the Oslo Declaration, the Oslo Process set out to determine which cluster munitions “cause unacceptable harm to civilians.” The implied obligation of determining what constitutes “unacceptable harm” provided a shared language for structuring contestations regarding the complex and problematic matter of how humanitarian concern should enter into decisions to use force.

In the end, a categorical prohibition was agreed. As with the Mine Ban Treaty (MBT), which prohibits antipersonnel mines, the CCM bans the development, production, acquisition, stockpiling, retention, and transfer of a specified type of weapon. This article argues that what is perhaps particularly noteworthy was the *process* undertaken for determining what should be considered a cluster munition and thus prohibited. During the Oslo Process, the structure adopted for the definition of cluster munitions served to demand that states make the case for what exclusions should be *allowed*. In other words, proponents wishing to retain specific submunition-based weapons had to successfully argue for exclusions from the prohibition. This “precautionary approach” contrasted with the manner in which the burden of proof for the permissibility of cluster munitions had been handled in past years under prevailing interpretations of international humanitarian law (IHL).

The following section briefly surveys the international rules that limit the means and methods of armed conflict. The third section reviews the appraisals made of the permissibility of cluster munitions prior to 2006. Together, sections three and four illustrate the contingencies and transformations of how concerns and responses were characterized.² The fifth section then examines how the aforementioned “precautionary” argumentation entered into the Oslo Process and the final agreed CCM text. This analysis sets the basis for comparing the CCM to other treaty processes in the final discussion section, as well as for considering key areas for the future.

Humanity and Weaponry

Throughout history, concerns have been raised about the acceptability of certain means of warfare. With differing degrees of success, attempts have been made to single out poisons, crossbows, firearms, artillery, and other weapons as abhorrent or inappropriate.³ Assessing the “limits at which the necessities of war ought to yield to the requirements of humanity”—to quote from the 1868 Declaration of St. Petersburg—raises profound issues, not least how some forms of injuring can be considered acceptable while others are not.⁴

In modern times, much of the state-level discussion about the appropriateness of specific weapons has related to their permissibility under IHL as well as customary international law.⁵ With regard to IHL, as the First Additional Protocol to the Geneva Conventions states, “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”⁶ IHL seeks a balance between the principles of humanity and military necessity. The balancing of these is reflected in a number of specific rules, such as the rules on superfluous injury and unnecessary suffering, on

environmental protection, of distinction, against indiscriminate attacks, of proportionality, and of feasible precautions.⁷ The rules and principles of IHL are complemented by various treaties. The UN Convention on Certain Conventional Weapons (CCW) is specifically concerned with weapons regarded as excessively injurious or having indiscriminate effects.

Much of the controversy about cluster munitions in the last decade has centered on their potential for indiscriminate effects both at the time of use and afterward as a result of submunitions left unexploded. With regard to usage, concerns were formulated variously in terms of accuracy and in terms of the “area effect,” meaning the area over which the smaller explosive submunitions are scattered from a single cluster munition. Nongovernmental organizations (NGOs) in particular expressed concerns about the area effects of these weapons, including concerns that the area of a strike could contain both military and civilian objects, especially in locations of civilian concentration.⁸ States and some international organizations, however, tended to express these worries in terms of “accuracy,” which could be read as relating to the capacity of the weapon’s delivery system to put the area of effect in the location where the commander desired it. During the Oslo Process, the area-effect formulation of the problem came to the fore, as reflected in the treaty text. With regard to post-conflict harm, the high “failure rate” of submunitions (as well as the number of submunitions contained in each cluster munition) was generally blamed for unexploded munitions that present a post-conflict threat to civilians and an impediment to agriculture and reconstruction efforts.⁹

Prior to the agreement of the CCM, cluster munitions had not been prohibited by a specific treaty; however, Protocol V of the CCW does place generic demands on states for post-conflict ordnance clearance. As with other weapons, the use of cluster munitions has been subject to the rules of IHL. Given the concerns about indiscriminate effects and unexploded ordnance, the rules against indiscriminate attacks and proportionality have been central to discussions of cluster munition legality under IHL in the CCW and elsewhere.¹⁰ The First Additional Protocol to the Geneva Convention pertains to both of these rules; it bans an indiscriminate attack, which it defines as one that “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.”¹¹

Under IHL, determinations of legality have turned on the interpretation of such rules. Yet, central terms in IHL have been disputed or uncertain—such as the meaning of “attack,” “excessive” civilian loss of life and damage, and “concrete and direct military advantage.”¹²

Determinations of the legality of cluster munitions under the rules against indiscriminate attacks and assessments of proportionality have also turned on other complicating factors. For instance, governments argued that whatever is used instead of cluster munitions will still entail risks for belligerents and civilians too.¹³ Some believe that assessing the risk of unexploded ordnance hazards requires information regarding dud rates across varied terrains and conditions, the likely rate of fatalities and severe injuries from contact with these items, and the probability that future clearance operations would locate and remove any threats.¹⁴

Despite demands for complex data to substantiate the illegality of cluster munitions under IHL, major deficiencies can be identified in the understanding of the humanitarian

effects of these weapons on the part of past users. For instance, an analysis of official government statements between 1990 and 2005 found that the United Kingdom had undertaken no practical assessments of the humanitarian consequences of cluster munitions and had not collected data on the details of submunitions discovered in disposal operations or the failure rates of its submunitions in combat situations.¹⁵ In a similar vein, a 2005 report by the Defense Science Board Task Force of the U.S. Department of Defense said it could “identify no comprehensive approach—empirical observation or otherwise—to determine and document operational combat failure rates of U.S. munitions. . . . There is no method in place that can systematically determine and document the reliability rates of a broad range of munitions during combat.”¹⁶ Such conclusions raise significant doubts about the ability and willingness of major states to undertake an informed balance between humanity and military necessity.

Pre-2006: Dominance of IHL-Based Approaches

To understand what kind of break the CCM offers from past dominant approaches to assessing the acceptability of weapons, this section reviews evaluations of the legality and appropriateness of cluster munitions from 2000 to 2006.

Legal analyses and opinions during this period range from arguments for a categorical ban, to a ban of weapons with certain age or technical characteristics, to a continuance of the then-dominant state practice of considering the permissibility of attacks on a case-by-case basis.¹⁷ In deriving these alternative assessments, different interpretations of the basic issues at stake were offered. For instance, whether the rules of IHL—particularly the rule against indiscriminate attacks and the assessment of proportionality—set definite enough standards for judgment was subject to disagreement. Charles Garraway and Thomas McDonnell both stressed the vagueness of the rule of proportionality as a basis for evaluating weapons, while Thomas Herthel cleared cluster munitions of any special proportionality concerns.¹⁸ To help clarify the meaning of what were taken as disputed terms, Virgil Wiebe, Karen Hulme, and Timothy McCormack and Paramdeep Mtharu (with some variation) maintained that, given past experience, proportionality assessments should consider the likely long-term unexploded ordnance effects.¹⁹ This proposal contrasted with the appraisal made in other legal analyses as well as in the practice of states such as the United Kingdom and the United States.²⁰

While the negative humanitarian impacts of cluster munitions were argued to be more or less known through reference to information and analysis provided by NGOs and intergovernmental organizations, legal analyses provided little detailed argument about the operational military utility of cluster munitions. The claims made about utility almost exclusively rested on abstract statements made by government officials or military officers.²¹

Of note in terms of the themes of this article is the limited extent cluster munitions as a category of weapons were deemed illegal under IHL. While Y.K.J. Yeung Sik Yuen offered the legal opinion that cluster munitions “are indiscriminate and accordingly contrary to humanitarian and human rights law,” such conclusions were not supported in many (if

any) detailed legal assessments.²² Instead, even those making calls for a ban either limited this to certain “legacy munitions,” justified a wide-ranging ban on a non-legal basis, or recognized that the assessment of illegality depended on highly contingent technical performance considerations.²³

Such skepticism regarding the legal justification of calling for an outright ban was mirrored in the position taken by the International Committee of the Red Cross (ICRC) in its earlier articulations of the problem of cluster munitions. Along with the importance of greater responsibility by users in clearing explosive remnants of war, warning affected civilian populations of risks, and providing technical advice on what munitions were used in conflict, in 2000 it maintained that:

- The use of cluster bombs and other types of submunitions against military objectives in populated areas should be prohibited, as is currently the case with incendiary weapons (another weapon causing area-wide effects) under Protocol III of the 1980 UN Convention on Certain Conventional Weapons.
- In order to reduce the risk to civilians in future conflicts, cluster bomb and other submunitions should be fitted with mechanisms which will ensure their self-destruction immediately after the device fails to explode upon impact as designed.
- The use of cluster bombs should be suspended until an international agreement on their use and clearance has been achieved.²⁴

Prior to 2006, UN agencies had likewise identified cluster munitions as a class of weapons of concern but called for measures short of a categorical prohibition. During the November 2005 meeting of the CCW, eleven agencies issued a statement calling for the addition of cluster munitions to the 2006 CCW agenda.²⁵ Many NGOs at the time had likewise taken the position of demanding a freeze or moratorium on the use, manufacture, sale, and transfer of cluster munitions. Formed in November 2003, the Cluster Munition Coalition (CMC) initially called for a moratorium until the humanitarian problems associated with these weapons had been resolved.²⁶ Later recommendations by the coalition stipulated there should be no use in or near populated areas, a clarification of the rules of IHL, an increased reliability and accuracy of munitions, and a ban on those types that consistently caused humanitarian problems.²⁷

This “moratorium-plus” position was reflected in the positions of many of the CMC’s member organizations such as Landmine Action, Human Rights Watch, and Mines Action Canada.²⁸ In contrast to such qualified calls for regulation, the Mennonite Central Committee stood out for many years in arguing for an outright ban.²⁹ Between 2003 and 2004, Handicap International moved from demanding a moratorium to demanding a categorical ban.³⁰

In official state positions, weapons today known as cluster munitions have been a topic of focus for some time. During the 1974 and 1976 Conferences of Government Experts on Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects, a group of states proposed a categorical prohibition. In the years immediately prior to 2006, however, such calls were not evident. Government responses to humanitarian concerns about cluster munitions before 2006 can be divided into three groupings:

- 1) *No special concern*. Some states (such as Russia) maintained that cluster munitions posed no distinctive concerns; others (such as Poland) said that any concerns were already addressed by Protocol V to the CCW.³¹
- 2) *Limited reforms*. While not acknowledging the need for a comprehensive prohibition, a number of states did contend that additional measures were prudent to avoid humanitarian problems. These included:
 - a) *Clarification of IHL*. In relation to the aforementioned uncertainties about the meaning of IHL, some states sought to clarify how IHL should be interpreted.³² Austria, Norway, and Sweden, for instance, each spoke to the need to consider the post-conflict effects of unexploded submunition remnants in calculations of proportionality.³³
 - b) *Setting apart*. Some states differentiated between types of cluster munitions. So, although it argued that they were legal under IHL, the United States destroyed certain stockpiles, evaluated the need for retrofitting specific existing submunitions, and set a goal (later postponed) of achieving a field reliability of 99 percent or higher for new ground- and air-delivered submunitions.³⁴ Similarly, Argentina, Denmark, Germany, Norway, South Africa, and Sweden set minimum reliability rates for future procurements, generally at 99 percent. In parallel, Australia, Belgium, Canada, Denmark, France, Germany, Greece, Italy, Netherlands, Norway, Poland, Switzerland, and the United Kingdom stated within the CCW they had made plans to withdraw particular cluster munitions from service or had already destroyed certain types.
 - c) *Targeting procedures*. Prior to 2006, some states spoke about the special targeting procedures enacted in combat. In a 2005 CCW paper, for instance, the British government reported, "The UK does not regard it appropriate to use cluster munitions when the coordinates or location of a target are not known."³⁵ States including Brazil and Norway also raised concerns about the IHL rule of distinction in relation to high-altitude bombing.³⁶
- 3) *Substantial action*. In 2001 the European Parliament passed a resolution calling on states parties to the CCW to "declare an immediate moratorium until an international agreement has been negotiated on the regulation, restriction or banning of the use, production, and transfer of cluster munitions under the CCW."³⁷ But by early 2006, only the Holy See and Mexico had endorsed wide-ranging international calls for a moratorium, such as those made by the European Parliament and the CMC. In June 2001, Norway's parliament had instructed its government to support processes that could lead to an international ban; however, this did not gain traction until 2006.³⁸

2006: Shifting the Burden of Proof

Until 2006 then, much of the focus on the consequences of cluster munitions was framed in terms of their permissibility under IHL. Although the extent of reforms needed in rules,

technologies, and practices was disputed, the main argumentative logic was the core argumentative logic of IHL: the humanitarian consequences were to be weighed against military necessity. As such, the starting assumption was that these weapons, as a category, were permissible until proven otherwise.

But in 2006, critics' arguments shifted significantly; two contributing events appear to have been particularly important. The first of these was that in June 2006, after many months of parliamentary activity, Belgium became the first country to formally adopt legislation categorically prohibiting the manufacture, trade, and use of cluster munitions.³⁹ This represented a notable departure from the possibilities being mooted at the time in international fora.

The other significant event was the extensive use of cluster munitions in Lebanon by Israeli forces.⁴⁰ Two internal inquiries concluded that Israel's attacks using cluster munitions were as a whole consistent with international law and IHL.⁴¹ In contrast, a team of UN special rapporteurs that visited Lebanon in 2006 judged Israel's actions as "reckless, perhaps even deliberately reckless."⁴² What is also notable, for the purposes of this article, is that the rapporteurs went beyond commenting on the particular use Israel made of cluster munitions to comment on the category of weapons as a whole. The team argued that although "cluster munitions do not per se violate international law, the manner in which they were used by Israel appears to have been inconsistent with the principles of distinction and proportionality."⁴³ The team called for action within the CCW and antipersonnel Mine Ban Treaty to "add cluster munitions to the list of weapons banned under international law."⁴⁴ This seems to indicate that the rapporteurs did not think cluster munitions as a category were prohibited under IHL, but that as a matter of policy they did think such weapons should be eliminated. A follow-on UN Commission of Inquiry likewise made a similar call for a categorical prohibition.⁴⁵

As part of this developing discussion, some commentators also began to voice concern that claims about the military utility of cluster munitions rested on largely abstract arguments, in contrast with growing documentation of humanitarian harms.⁴⁶

In 2006, against the backdrop of this lack of substantiation of military utility by states and mounting demands for action, a number of organizations called for shifting the burden of proof. Rather than weighing the relative advantages and harms on a case-by-case basis, it was argued that a new starting presumption should frame the analysis: the recurring time of use and post-conflict humanitarian problems associated with cluster munitions should be given priority over their possible military utility. In 2006, Landmine Action argued for a categorical prohibition founded on:

- A precautionary approach: that in the face of consistent evidence of civilian death, injury and hardship, dispute over legal interpretations, and insufficient user-state efforts to understand or limit humanitarian impacts, the working presumption should be that the use of these weapons causes unnecessary civilian harm.
- Recognition that the solutions proposed short of a general prohibition are inadequate without broader reforms to state practice.⁴⁷

On this basis, the NGO called upon states to adopt a general prohibition on cluster munitions as a matter of national policy and to work for the extension of that policy

among other states as the strongest available mechanism for preventing further unnecessary harm.⁴⁸ Such an argument stood in contrast to the organization's previous positions, which were bounded by deference to the prevailing IHL framing.

The central argument that the burden of proof is on those creating the risk was also adopted by those who had tended explicitly to support an IHL-framed approach. While noting various measures associated with where, what kind, and to whom cluster munitions should be transferred that stopped short of a categorical ban, Human Rights Watch contended that "[i]t is up to States to demonstrate conclusively that any specific cluster munition is accurate and reliable enough to avoid excessive harm to civilians."⁴⁹ This built on previous calls by the organization to have an initial presumption that the use of cluster bombs in populated areas be considered indiscriminate.⁵⁰ Likewise, because of long-identified problems, the ICRC began calling for a shifting of the onus. Its 2007 publication, *Cluster Munitions: Decades of Failure, Decades of Civilian Suffering*, spoke to this history despite the existing provisions of IHL.⁵¹ In 2008, while noting the potential for certain technical modifications, the ICRC argued, "Governments will need to prove that new or existing models of cluster munition that feature technical improvements will not create the type of humanitarian problem that has arisen in past conflicts."⁵²

UN agencies also began to adopt positions that shifted the burden of proof. Statements on behalf of the UN Mine Action Team to the 2007 conferences of the Oslo Process in Lima and Vienna made strong statements of support for a wide-ranging prohibition. Further, the Mine Action Team's statement to the February 2008 conference in Wellington asserted that

From what UN agencies with a presence on the ground have seen, all cluster munitions that have been used and which types are still stockpiled, cause unacceptable harm to civilians. They should be prohibited. Those states that argue for the retention of other cluster munitions should provide data on their impact and possible harm to civilians based on tests that accurately reflect real conflict situations.⁵³

The Oslo Process and the Prohibition

This section turns from the general statements and positions forwarded since 2006 to the agreement of the CCM in 2008. The Oslo Process provided the institutional mechanism for turning the concerns identified by various constituencies into an international legal agreement. Conferences in Oslo, Norway (February 22–23, 2007); Lima, Peru (May 23–25, 2007); Vienna, Austria (December 4–7, 2007); and Wellington, New Zealand (February 18–22, 2008), produced a draft treaty text that acted as the basic proposal for the Dublin Diplomatic Conference formal negotiations (May 19–30, 2008).

The language of avoiding "unacceptable harm to civilians," contained in the Oslo Declaration produced by the conference that initiated the process in February 2007, was taken up by a range of others besides participating states. Previously, as part of the November 2006 CCW meeting, the UN Secretary-General Kofi Annan called for a "freeze" on the use of cluster munitions in or near populated areas, as well as on cluster munitions

"known to be inaccurate and unreliable."⁵⁴ By May 2008, new UN Secretary-General Ban Ki-moon expressed his concerns through the language of ending the "use, development, production, stockpiling and transfer of cluster munitions that cause unacceptable harm to civilians."⁵⁵

While the language of the Oslo Declaration regarding unacceptable harm to civilians was widely cited, just what that entailed vis-à-vis cluster munitions was one of the topics the Oslo Process had to resolve. Where and how lines should be drawn were difficult and open issues. In relation to post-conflict contamination, for instance, since it was widely acknowledged that no type of ordnance is free from reliability concerns, both what level of post-conflict contamination was "acceptable" and whether technical fixes were able to realize such standards in practice were matters for debate.

Certain states pointed to the Oslo Declaration language as evidence that the process was not intended to prohibit "all" cluster munitions.⁵⁶ At the start of the process, the proposed draft treaty text sought to set out what should be prohibited. The chair's discussion text for the Lima conference in May 2007 specified that states parties would never use cluster munitions that were defined as

Air carried dispersal systems or air delivered, surface or sub-surface launched containers, that are designed to disperse explosive sub-munitions intended to detonate following separation from the container or dispenser, unless they are designed to, manually or automatically, aim, detect and engage point targets, or are meant for smoke or flaring, or unless their use is regulated or prohibited under other treaties.⁵⁷

The reference to "engage point targets" reflected the views of Germany and others that certain so-called sensor-fuzed submunitions would not cause unacceptable harm because of their technical characteristics.

Other states and organizations contended that "cluster munitions" and "cluster munitions that cause unacceptable harm to civilians" were synonymous. Throughout the process, Cambodia, Ghana, Indonesia, Austria, and Mexico supported more all-encompassing definitions that made no allowances for any weapons that employ explosive submunitions. The Cluster Munition Coalition, while calling for no exemptions for permissible cluster munitions within the treaty, maintained that exclusions from the definition would be acceptable so long as they did not allow weapons that could cause the time of use area effects and the post-conflict contamination associated with cluster munitions.⁵⁸ Such an approach gave primacy to the achievement of a categorical prohibition.

Because the disagreement over which cluster munitions cause "unacceptable harm to civilians" was evident from the start, it was clear that how the definition was handled would be fundamental to the process. A range of options was available, including: 1) whether the prohibition would be categorical for all cluster munitions as defined by the convention; and 2) who would bear the burden of proof in determining what should or should not be prohibited.

With regard to the first point, the process could have sought a definition structure that prohibited everything it defined as a cluster munition or, contrastingly, one that only proscribed a subset of cluster munitions (i.e., separating prohibited cluster munitions from unprohibited cluster munitions). By banning, in any circumstances, the use of cluster

munitions, the chair's discussion text for Lima was in line with the former approach. While it made various references to what was not to be treated as a cluster munition for the purpose of the text, the ban it proposed on this weapon category was total.

Regarding the second point, the process could have started without a statement of what should be prohibited and then worked toward agreement about what should be included within the convention ban. This might have been done against the background of a fixed definition of cluster munitions with international discussions structured so that those arguing for a prohibition had to justify why specific subcategories of cluster munition be prohibited. Instead, the process adopted a wide-ranging prohibition and then hearing arguments for what, if any, exclusions should be allowed against that background.

These issues were contested behind the scenes between the May 2007 Lima conference and the December 2007 Vienna conference. The chair's discussion text tabled for the Vienna conference included a categorical prohibition that had the following definition:

"Cluster munition" means a munition that is designed to disperse or release explosive sub-munitions, and includes those explosive sub-munitions. It does not mean the following:

- (a) ...
- (b) ...
- (c) ...⁵⁹

Exclusions were meant to be argued in as part of "(a) ... (b) ... (c) ...". So rather than starting from a presumption of acceptability until proven otherwise, the definition stated that all weapons falling within the initial, broad category of cluster munitions were regarded as impermissible until the case was made otherwise.

This approach stands in marked contrast with the manner in which cluster munitions had been treated within the CCW, wherein even the hypothetical possibility that a certain weapon might be used in a manner appropriate under IHL had been enough to argue against attempts to establish prohibitions.⁶⁰

Despite strong resistance from certain countries, the basic definition structure introduced in the chair's discussion text for the Vienna conference remained intact after the meeting, through the conference in Wellington in February 2008, and into the final CCM text agreed in Dublin in May 2008. Switzerland, Sweden, and Norway were among those that stated their preference for a "classic approach," in which cluster munitions were defined and then specific types in need of prohibition agreed.⁶¹

Implications of Definition Structure for the Oslo Process

Whether adopting a wide-ranging prohibition and then arguing what exclusions should be allowed would result in a wide-ranging prohibition depended on the level of proof necessary for exclusions. As long as a significant burden was on those seeking exclusions, the definition structure favored a broader prohibition. States wishing to retain certain munitions options were left with the burden of justifying their arguments about what counted as "acceptable harm," among other things.

In contrast, especially for small states with minimal diplomatic resources and technical expertise, requiring exclusions to be “argued in” enabled them to actively participate in a critical area of the process. They did not need to substantiate what should be prohibited. Throughout the Oslo Process, a variety of states—including Indonesia, Botswana, Cambodia, Fiji, Guatemala, Zambia, Ghana, Jamaica, Lebanon, and the Cook Islands—drew on considerations such as the history of humanitarian problems with cluster munitions to argue that specific proposed exemptions or exclusions based on factors such as failure rates, “direct fire” capacity, and limits on the number of submunitions had not been sufficiently demonstrated.

Likewise, NGOs within the CMC did not have to make a positive case for what should be banned and could instead criticize the justifications for retention put forward during the Oslo Process by states such as Spain, Japan, Germany, the United Kingdom, Finland, Switzerland, and France.⁶² And because the CMC is an alliance of diverse NGOs with varying positions, there was the additional benefit of allowing disagreements to be handled as internal issues. Rather than putting up front where the line of acceptability should be drawn, the CMC could adopt the reactive position of demanding more evidence from certain states to justify proposed exclusions.

The Prohibition

This distribution of the burden of proof provided the framework for discussions during the Oslo Process that laid the basis for diplomatic negotiations in Dublin. As relates to the central prohibitions, the final Convention on Cluster Munitions text states:

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. [. . .]

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.⁶³

This definition provides a number of exclusions for munitions or systems that should not be considered as “cluster munitions,” though they might fall under the initial definition of the term. The list of characteristics in Article 2(c)(i–v) must be met cumulatively in order for a weapon to escape prohibition. These cumulative criteria are together required in order “to avoid indiscriminate area effects and the risks posed by unexploded submunitions.” During the negotiating process, the separate characteristics were presented by certain states as being individually sufficient to provide an adequate level of humanitarian protection. However, these claims were rejected as unproven or contradicted by evidence from testing and field experience. As noted earlier, the agreed definition frames the problematic nature of cluster munitions at the time of use in terms of “indiscriminate area effects” rather than in terms of “accuracy.” This may be significant in future arguments about the area effects of other explosive munitions.

Discussion

To understand the wider importance of the CCM text and how the Oslo Process defined cluster munitions for prohibition, this final section extends the themes of earlier sections through a comparative examination of the ban and an assessment of its future prospects.

Comparing the CCM and the Mine Ban Treaty

Parallels are regularly drawn between the 2008 CCM and the 1997 Mine Ban Treaty. The similarities are many: both were an outcome of collaborative efforts by a core group of geographically diverse states, intergovernmental organizations, and representatives of international civil society working under an explicitly humanitarian agenda; these efforts also culminated outside the existing consensus-based Geneva arms control mechanisms; and for both, the CCW was judged as having taken insufficient action.

Yet (in relation to the themes of this analysis) the two international treaties differ in significant respects. To paraphrase, Kenneth Rutherford presented the argumentative framing that supported the prohibition in the MBT:

- Antipersonnel landmines (APLs) were labeled as illegal under then-current IHL by NGOs and key pro-ban governments.
- In the main, this evaluation was justified by arguing that APLs fell foul of the requirements of proportionality.

- As part of the balancing required from this rule, those calling for a ban did not deny APLs had a military utility.
- However, they did maintain that overall the harms to civilians from APLs outweighed their military utility.⁶⁴

As Rutherford further contended, NGOs played a foundational agenda-setting role by shifting the debate about antipersonnel mines to the humanitarian consequences of the mines. Humanitarian concerns took center stage in the discussion, which was previously dominated by traditional arms control military and political issues. States rejecting ratification of the MBT have often accepted the terms of the discussion but have claimed that the military utility of APLs outweighs other concerns.⁶⁵

This article has outlined a rather different logic at work in the case of cluster munitions post-2006 and during the Oslo Process that can be summarized as follows:

- From 2006, few arguments were forwarded that cluster munitions were illegal. Rather, this category of weapons was regarded as problematic; this sense of being suspect was informed but not bounded by IHL.
- In the main, this starting position was justified by pointing to the decades of humanitarian problems and the inability of reforms to sufficiently prevent deleterious outcomes.
- This approach did not assume that all technical variations under a broad definition of cluster munitions were equally useful, dangerous, or (un)acceptable.
- Rather, given past history, the burden of proof for evidencing humanitarian acceptability rested with those seeking to retain these force options. In short, weapons had to be “ruled in” rather than “ruled out.”

In terms of their agenda-setting role, NGOs and others played a foundational role in the CCM in not just ensuring that humanitarian issues were central, but also going further by introducing a working presumption into deliberations that the starting position was that weapons falling under a broad definition of cluster munitions were unacceptable until proven otherwise.⁶⁶ To date, precious little has been offered by way of detailed analysis from states remaining outside of the CCM for retaining cluster munitions. As such, an argumentative difference exists between those who have and have not adopted the CCM; this difference can provide the future basis for a humanitarian critique of non-states parties.

In terms of the prohibition agreed, some aspects of the CCM represent an important step forward from the MBT. Yet some commentators have argued that because the MBT prohibits “all” antipersonnel landmines, whereas the CCM allows certain weapons to be excluded, the CCM is a step backward in legal terms.⁶⁷ However, the antipersonnel MBT does not prohibit the use, production, and stockpiling of all landmines, but rather only antipersonnel mines. Moreover, the MBT offers almost no guidance as to how one can be distinguished from the other. According to the terms of the treaty, a landmine is allowed if it can be plausibly asserted that it was designed to be exploded by the presence, proximity, or contact of a vehicle.⁶⁸ Yet there is no explanation in the MBT about how to assess for what purpose a mine was designed.

In addition, the MBT provides no explanation of why, in terms of humanitarian effects, one *should* be distinguished from the other. Like antipersonnel mines, anti-vehicle mines are the types of “victim-activated weapons” of concern in the MBT. Anti-vehicle mines are documented as having directly caused thousands of civilian casualties.⁶⁹ Furthermore, anti-vehicle mines have blocked humanitarian access in post-conflict periods, leaving some of the most vulnerable populations isolated from external assistance.

By contrast, Article 2 of the CCM provides an explanation of what is and is not a cluster munition, and it provides a statement of what the technical characteristics are intended to achieve: the avoidance of “indiscriminate area effects and the risks posed by unexploded submunitions.” By putting the technical characteristics in the context of the humanitarian effects that must be avoided, some explanation is given of *why* this exclusion is considered reasonable. Any weapons excluded under this part of Article 2 should not cause the humanitarian problems identified with cluster munitions during the Oslo Process.

The CCM Definition in the Future

Article 8 of the CCM provides a mechanism for raising issues of compliance by states parties through the UN secretary-general. Yet, past experience with the MBT and elsewhere also suggests that, in practice, the informal activities of civil society are likely to be more important than formal treaty mechanisms in policing compliance. How the burden of proof for substantiating the likely effects of borderline weapons is handled may be a crucial matter in the future.

In any instances where weapon systems meet the technical characteristics in Article 2(c)(i–v) but are still identified with significant harm, the reading of the effects-based wording in 2(c) will become a crucial matter. Whether the criteria in 2(c)(i–v) will be treated as “sufficient” or as “necessary but not necessarily sufficient” is one important issue. In line with the latter interpretation, the intent of the treaty under Article 2(c) “to avoid indiscriminate area effects and the risks posed by unexploded submunitions” could be read as providing an overarching requirement beyond the provisions of Article 2(c)(i–v). This effects-based wording could then be used to argue against the permissibility of systems that in principle meet the listed characteristics but still result in unacceptable effects. From a humanitarian perspective, such an effects-plus-design-based prohibition would provide a more comprehensive approach than the design-based prohibition in the MBT.

Past experience with mines suggests that the extent to which the CCM acts as the underpinning for an international norm against cluster munitions will be critical in ensuring compliance with its terms. Studies of the stigma against using nuclear weapons, of the norms opposing the transfer and use of antipersonnel landmines, and of the taboo against the development of chemical weapons have elaborated how particular weapons became stigmatized to such an extent that few now contemplate their use—whether or not these governments are party to formal agreements.⁷⁰ When the possession and use of certain weapons is seen as incompatible with the identity that a country wishes to foster in the international community, then that assessment can contribute to restrained actions both before and during conflict.

With its categorical prohibition, the CCM contains the sort of clear starting distinction needed to single out a class of weapons and to stigmatize their use and possession for non-states parties.⁷¹ During the closing sessions of the Dublin conference, the United Kingdom, Norway, Indonesia, Australia, the CMC, and the ICRC were among those that identified the potential for the convention to affect non-states parties.

The contribution of the CCM in fostering an international standard against the use, production, transfer, and stockpiling of cluster munitions is likely to turn on a number of considerations, including:

- the continued ability of international civil society and intergovernmental organizations to assess the humanitarian consequences of cluster munition use;
- the makeup of other international agreements relevant to cluster munitions (e.g., the CCW);
- the cooperation offered by states parties to non-states parties that undertake proscribed activities;
- whether weapon systems are produced that are seen to violate the spirit, if not the terms, of the convention;
- the extent of the use of cluster munitions by non-states parties; and
- how transgressions of the convention by states parties *and* non-states parties are handled (such as the transgressions during the August 2008 Georgia-Russia conflict).⁷²

The CCM: Beyond Cluster Munitions

The prospects for the CCM to affect a wider set of transformations in the regulation of armed conflict are likely to hinge on the extent to which the shifting of the burden of proof is taken up more widely. The manner in which proponents had to make a positive substantiated case for their continuing retention and use of any weapons that fell within the broad initial category of cluster munitions during the Oslo Process has strong parallels with what are called “precautionary” orientations to environmental and health risks adopted in some national and international regulations.⁷³ A central component of thinking in such regulations is that the burden of proving safety or acceptability can (and often should) rest with those who produce significant risks.

The precautionary orientation evident within the CCM could inform other debates about where and how the borderlines for proscribed technologies should be drawn. Contests over definitions and boundaries are evident for many technologies, from legions to tactical nuclear weapons.⁷⁴

Elements of the Oslo Process could inform other areas of weapons control in a variety of ways. Anti-vehicle mines, for example, have been subject to long-standing concerns and yet have not been tackled effectively by either the MBT or the CCW. A precautionary orientation could be used to reframe consideration of those weapons and put greater pressure on the types of “technical fix” solutions proposed by many who sought new anti-vehicle mine rules within the CCW. Given recent controversy regarding the use of white phosphorus munitions (especially in populated areas), the CCM could be

used as a precedent for arguing either that proponents must substantiate the case for retaining such a technology or (more modestly) that there should be a presumption against its use in populated areas. As a less direct parallel, efforts to develop an international Arms Trade Treaty to prevent arms transfers likely to violate international human rights and humanitarian law could incorporate burden of proof considerations. For instance, in cases where a country is regarded as having undertaken questionable actions in the past, the expectation could go beyond the suggestion that transferring states should take this into account in considering what to *restrict*.⁷⁵ Instead, the starting point could be that a positive case should be required to *allow* a shipment.

Exactly what shift in burden can be justified is an important question. While the phrase “precautionary principle” has become commonplace within political discourse, it covers a wide range of practices and orientations. Some formulations suggest that evidence of harm need not be conclusively demonstrated to justify considering possible responses, while other formulations go much further to forgo activities until reasonable grounds exist for the safety of those activities.

Precaution does not simply pertain to decisions about what activities should be allowed, but rather places a general demand that steps be undertaken to diminish significant areas of uncertainty. There is space for debate about what this general obligation implies.⁷⁶ In the manner in which demands were placed on certain governments to substantiate humanitarian claims, the Oslo Process indicated how evidence demands can help challenge past (complacent) practices. As such, the degree to which the CCM provides precedents for the structure of arguments in other areas will depend on how such matters are framed and addressed. This will include, for instance, the extent of past harm considered necessary to justify a precautionary orientation, the political interest or vulnerability of governments, the determination of civil society to effect change on specific issues and the framework within which legal processes are taken forward. Beyond these contextual issues, there will be further contestations regarding who will be responsible for providing evidence, including the role of so-called experts on various issues of humanitarian impact, weapon technology, military practices and law, and what level of evidence should be taken as sufficient to address identified concerns.⁷⁷

Still, the precautionary orientation evident in the Oslo Process and the CCM could provide an important framework for developing thinking about how humanity ought to enter into the use of force. Adopting such an approach requires engagement with the structures of argument, rather than simply with the facts and figures that provide the currency of such arguments. The movement to a precautionary orientation, when possible, can both articulate and facilitate radical shifts in the balance of argumentative power.

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NOTES

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6. Protocol Additional to the Geneva Conventions of 12 August 1949, entry into force December 7, 1979, Article 35(1).
7. See ICRC, "Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that May Become Explosive Remnants of War," CCW/GGE/XI/WG.1/WP.7, July 28, 2005.
8. Human Rights Watch (HRW), *Off Target* (Washington, DC: HRW, 2003); Thomas Nash, *Foreseeable Harm* (London: Landmine Action, 2006).
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24. ICRC, "Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that May Become Explosive Remnants of War," p. 39.
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