

DISSERTATION

“Disarmament with a Human Face? The Case of Cluster Munitions”

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Table of Abbreviations

AAMV	Austrian Aid for Mine Victims
A.Ch.	Appeals Chamber
ACHR	American Convention on Human Rights
API	1977 Protocol I Additional to the Geneva Conventions
APII	1977 Protocol II Additional to the Geneva Conventions
AJIL	American Journal of International Law
BLU	Bomblet Unit
CAT	Convention Against Torture
CESCR	Committee on Economic, Social and Cultural Rights
CCM	2008 Convention on Cluster Munitions
CCW	Convention on Conventional Weapons
CBU	Cluster Bomb Unit
CEM	Combined Effects Munition
CMC	Cluster Munition Coalition
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Co-operation in Europe
DRC	Democratic Republic of Congo
DPICM	Dual Purpose Improved Conventional Munition
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ESDP	European Security and Defence Policy
ERW	Explosive Remnants of War
EU	European Union
EUFOR	European Union Force
FRY	Federal Republic of Yugoslavia
GGE	Group of Governmental Experts
GPS	Global Positioning System
HRC	Human Rights Committee
HRL	human rights law
IAC	international armed conflict

IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee on the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defence Forces
IDP	internally displaced person
IFOR	Implementation Force
IHL	international humanitarian law
IO	International Organisation
ISAF	International Security Assistance Force
KFOR	Kosovo Force
KSE-BVG	Bundesverfassungsgesetz über Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland (Federal Constitutional Act on Cooperation and Solidarity in Sending Units and Individuals Abroad)
MAG	Mines Advisory Group
MDG	Millenium Development Goal
MINURCAT	Mission des Nations Unies en République Centrafricaine et au Tchad
MINURSO	Mission des Nations Unies pour l'organisation d'un référendum au Sahara occidental
MLRS	Multiple Launch Rocket System
MP	Member of Parliament
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
NIAC	non-international armed conflict
OSCE	Organisation for Security and Co-operation in Europe
OTP	Office of the Prosecutor
PfP	Partnership for Peace
RdC	Recueil des Cours

RoE	Rules of Engagement
RSK	Republika Srpska Krajina
SADARM	Sense and Destroy Armour Munition
SFOR	Stabilisation Force
SFW	Sensor-Fused Weapon
SMArt	Suchzündermunition für die Artillerie (Sensor-Fused Munition for the Artillery)
T.Ch.	Trial Chamber
TCS	troop contributing state
TEU	Treaty on European Union
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNDOF	United Nations Disengagement Observer Force
UNIDIR	United Nations Institute for Disarmament Research
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMACC	United Nations Mine Action Coordination Centre
UNMAS	United Nations Mine Action Service
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
UNTSO	United Nations Truce Supervision Office
U.S.	United States
UXO	unexploded ordnance
WWI	World War I
WWII	World War II

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1. Introduction

1.1. The Necessity for Disarmament with a Human Face in relation to Cluster Munitions

For over sixty years, cluster munitions have caused civilian harm not only because of the wide area effect and inaccuracy of these conventional weapons during attacks in armed conflicts but also because of their propensity to leave a vast post-conflict legacy of unexploded sub-munitions. There is abundant evidence that civilian lives and livelihoods may not only be endangered during armed conflicts but also tampering with sub-munition duds may maim or kill civilians.

Moreover, the presence of unexploded sub-munitions may render large tracts of agricultural and grazing land inaccessible as well as prevent or delay the return of refugees or Internally Displaced Persons for months, years or even decades after the end of armed hostilities. The dangers of unexploded sub-munitions are not confined to civilians alone. They have also materialised in respect of friendly troops whose advance was obstructed because their allies used these weapons. In addition, even clearance experts who are intimately familiar with all kinds of unexploded ordnance (UXO) have lost lives and limbs as a result of accidents with sub-munition duds.

Originally cluster munitions were designed to attack wide-area and fast-moving targets like airfields or large numbers of personnel or tanks remote from concentrations of civilians. However, the record of civilian harm suggests that in many armed conflicts cluster munitions have not in fact been so used. This observation must be made despite the existence of general rules of international humanitarian law (IHL) with the aim of protecting those that do not or no longer participate in military hostilities, including the rules on distinction and discrimination, on proportionality and on feasible precautions. Also the adoption of Protocol V on Explosive Remnants of War (ERW) to the Convention on Conventional Weapons (CCW) in 2003, which contains obligations of clearance regarding any type of unexploded ordnance, including unexploded sub-munitions, did not motivate certain states to abstain from using these weapons. While states within the framework of the CCW, the primary forum for specific IHL/disarmament rules on conventional weapons, until the present date could not agree on specific rules on cluster munitions, an alternative diplomatic process, the Oslo process, produced a Convention on Cluster Munitions (CCM) in little more than one year. This convention not only prohibits the use, stockpiling, production and transfer of these

weapons and thus, constitutes a specific disarmament treaty but also contains positive obligations to remedy the enduring consequences of the past use of these weapons, notably victim assistance or clearance of land contaminated with unexploded sub-munitions.

The fundamental aim of this thesis is to show why for the better protection, especially of civilians, from the effects of cluster munitions the adoption of a specific disarmament treaty like the CCM with a strong humanitarian focus was indeed necessary and which potential the CCM holds for meeting this objective.

This first begs the question of why the general rules of IHL and Protocol V to the CCW were apparently inadequate for ensuring better protection especially of civilians from the effects of cluster munitions? With regard to the general rules of IHL this author argues that the rules were partly insufficient, partly was their implementation inadequate. Concerning Protocol V to the CCW, this instrument simply does not deal with cluster munitions in *all* their problematic aspects.

Secondly, why is an analysis of human rights law (HRL) relevant in relation to protection of civilians from the effects of cluster munitions? This author is of the view that HRL is not only an additional layer to frame the issue in humanitarian terms; the arguably better capacity of HRL to remedy past harm incurred by individuals makes a HRL analysis compelling. Where comprehensive protection of individuals is the overall goal not only future victims from cluster munition use must be avoided but also the enduring consequences of past cluster munition use must be dealt with. This approach is further legitimised by the fact that the CCM itself expressly refers to HRL and is greatly influenced by a recent HRL convention, the Convention on the Rights of Persons with Disabilities (CRPD), in the context of victim assistance. Moreover, it draws upon lessons learnt from the 1997 Ottawa Convention on Anti-Personnel Mines which was the first disarmament treaty containing a specific provision on victim assistance.

Thirdly, why has it not been possible to conclude a specific treaty on cluster munitions in the forum that is primarily designed for prohibitions and regulations of conventional weapons, i.e. the CCW? As will be seen, within the framework of the CCW military and security considerations have until now prevailed over humanitarian concerns in relation to cluster munitions. Due to the practice of not only seeking but in practice requiring consensus for any decision within this framework, in particular major military powers like China, Russia or the United States may block any initiative contrary to their interests.

Conversely, why was an alternative diplomatic process, the Oslo process, more successful at obtaining such a convention? This author supports the view that one major

reason for its success was that this endeavour was pursued with a humanitarian focus utmost in the minds of participants. Consistent with the ultimate goal of the better protection of civilians from the effects of these weapons, the humanitarian community, including victims of cluster munitions, clearance experts and civil society, had much more influence on the outcome of this process than in the framework of the CCW. The inclusion of this greater humanitarian dimension was also ensured by the kind of states that participated in the process: Firstly, small and middle-sized states rather than major military powers were in the driving seat. Secondly, the Oslo process witnessed particularly active participation by states heavily affected by cluster munition use such as Laos or Lebanon. Moreover, a much greater number of African, Asian and Latin American states participated in this process than in the framework of the CCW.

In this regard, although the case of anti-personnel mines is closest to the case of cluster munitions in terms of similarity of the effects of the weapon systems, the nature of and the humanitarian motivations for the diplomatic process leading to the adoption of comparable disarmament conventions with the 1997 Ottawa Convention and the 2008 CCM., an in-depth comparison of the two cases is not the main theme of this thesis.¹ Still, to the extent that the case of anti-personnel mines is relevant for the topic at hand, in particular for the area of victim assistance and for the ability to bring humanitarian concerns associated with the use of cluster munitions to the forefront of the international agenda, it will be part of the analysis.

While the “disconnection between much of the academic discourse on international security related matters, including in disarmament, and what goes on in the negotiating chamber” has been lamented,² this work attempts to remedy this gap. It draws on the practical humanitarian evidence and the insights gained by this author as a legal adviser to CMC-Austria nationally and internationally in various conferences, including the Third Review Conference to the CCW, the Oslo, Vienna and Dublin Conference on Cluster Munitions. The intention is to offer in-depth academic analysis to problems faced by negotiators on the cluster munition issue based on these practical insights in the hope that this work may be interesting both for international legal scholars and practitioners.

¹ Convergences of the two processes have been analysed within the overall broader question of what lessons can be learnt for other multilateral disarmament or arms control endeavours from these successful processes. See J. Borrie *et al.*, “Learn, adapt, succeed: potential lessons from the Ottawa and Oslo processes for other disarmament and arms control challenges”, UNIDIR Disarmament Forum No. 2 (2009), at 19-26.

² J. Borrie, “Disarmament As Humanitarian Action: From Perspective to Practice” in J. Borrie & V.M. Randin, *Disarmament as Humanitarian Action: From Perspective to Practice*, 7, 11 (2006).

1.2. *On Methodology and Limitations of the Topic*

Human security as a concept “equates security with people rather than territories, with development rather than arms.”³ For the fundamental presumption that disarmament serves the overarching goal of the better protection of individuals where there have been proven humanitarian problems with the use of a conventional⁴ combat weapon in the past, this is the appropriate conceptual basis.⁵ This approach, which marks the specific expression in the realm of international security of the general paradigm shift of international law from benefiting primarily the state to benefiting the individual, is characterised by its preventive instead of reactive, holistic rather than sectoral and participative rather than exclusive nature.⁶

All of these characteristics provide important methodological benchmarks against which to analyse the cluster munition issue as a case of disarmament for the better protection of individuals from these weapons: Firstly, disarmament provides a more preventive approach towards protection of civilians from these weapons than general rules of IHL or specific regulations or prohibitions on use only. Secondly, as can be seen from the questions analysed the case of cluster munitions will be systematically analysed from both the IHL and HRL angle. However, this analysis is not constrained by sectoral limitations of the scope of application or possibilities of enforcement of these two legal regimes. Rather, these sectoral

³ The term “human security” was first coined by the United Nations Development Programme (UNDP) in its Human Development Report 1994 and this quote appears in the online synopsis of the report. The report uses a broad definition, describing “human security” as “safety from such chronic threats as hunger, disease and repression”, as well as “protection from sudden and hurtful disruptions in the patterns of daily life-whether in homes, in jobs or in communities.” See United Nations Development Programme, “Human Development Report 1994: New Dimensions of Human Security”, <http://hdr.undp.org/en/reports/global/hdr1994/chapters/> (last visited 20 January 2010).

⁴ For gaining an initial understanding of the term “conventional weapons”, the UN Register of Conventional Arms may be resorted to. Under the UN Register, conventional weapons are divided into seven categories, notably battle tanks; armoured combat vehicles; large calibre artillery systems; combat aircraft; attack helicopters; warships; and missiles and missile launchers. Thus, weapons of mass destruction, such as nuclear, biological and chemical weapons are excluded from falling under these categories. So are small arms and light weapons as well as cyber weaponry such as computer worms, Trojan horses, viruses or directed energy weapons which are capable of disrupting or destroying enemy computer systems without the use of explosives, i.e. with the use of beams of electromagnetic energy. However, for the present purposes, the categories to be found in the UN Register are sufficient to cover both the delivery systems and the explosive sub-munitions of cluster munitions. See UN General Assembly, Register of Conventional Arms, UN General Assembly Res 46/36 L, Transparency in armaments, 6 December 1991, Annex, UN Doc. A/RES/46/36.

⁵ This view is also endorsed by C. H. Ruge, “Mitigating the Effects of Armed Violence Through Disarmament: Counting the Human Costs” in Borrie & Randin, *Disarmament as Humanitarian Action*, *supra* note 2, at 23, 27; as well as K. Boyle & S. Simonsen, “Human security, human rights and disarmament”, UNIDIR Disarmament Forum No. 3 (2004), at 5, 11-12.

⁶ W. Benedek, “Human Security and human rights interaction”, 59 (1) International Social Science Journal 7, 10 (2008), <http://www3.interscience.wiley.com/cgi-bin/fulltext/121414631/PDFSTART> (last visited 20 January 2010).

limitations are noted as obstacles to adequate protection of civilians, mandating a more comprehensive, i.e. holistic approach towards the humanitarian problems associated with cluster munitions. Finally, the participatory character of a diplomatic process like the Oslo process with a particularly strong contribution from field experience by a variety of non-state actors, the ICRC, various UN operational agencies like the UN Mine Action Service or the United Nations Development Programme (UNDP) and NGOs, guarantees that normative outcomes adequately reflect the overarching concern for individuals. It is this evidence of concrete humanitarian consequences resulting from actual use of cluster munitions that justifies the individual-oriented approach to disarmament supported here.⁷

1.3. Overview of Chapters

Chapter 2 sets the stage by giving an account of the properties, military purpose, history of production and use as well as the humanitarian evidence of civilian harm associated with past use of the weapon. The purpose is to understand that cluster munitions may appear in many different types; the military rationale for which they were originally developed; technological developments to improve their reliability; as well as the actual circumstances in which these weapons have been used in recent armed conflicts. A summary of the evidence of civilian harm gathered from past cluster munition use follows, which is to prepare the ground for an understanding of what humanitarian challenges the new Convention on Cluster Munitions must deal with. For detailing these humanitarian consequences, the section draws from field research by NGOs, the ICRC and UN agencies, as well as most importantly, testimonies of victims who served as a vivid reminder within the framework of the CCW and throughout the Oslo process that any international treaty on cluster munitions must strive for improving their plight and better protecting civilians in the future. Not only the two fundamental consequences, death and permanent disability of civilians during or after cluster munition attacks but also the socio-economic harm when agricultural and grazing areas are inaccessible, as well as the challenges of victim assistance and clearance are described.

⁷ This record of humanitarian evidence from actual use of these weapons in recent armed conflicts also sets the issue of disarmament in this area apart from other disarmament treaties like the Biological and the Chemical Weapons Conventions; in those contexts, not the actual use of these weapons in contemporary armed conflicts but other problems connected to the production, stockpiling and proliferation of such weapons seem to be more pressing. On the challenges facing the Chemical Weapons Convention, see, for example, R. Thakur & E. Haru (eds.), *The Chemical Weapons Convention: Implementation, Challenges and Opportunities* (2006). On the Biological Weapons Convention, see, for example, J. Goldblat, "The Biological Weapons Convention – An overview," 318 *International Review of the Red Cross* 251-265, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jnpa?opendocument> (last visited 20 January 2010).

Chapter 3 then marks the first step in the review of the legal status quo before the adoption of the CCM. It is devoted to general IHL, in particular the customary international law rules on distinction, discrimination, proportionality and precautionary obligations in attack, as well as the more specific rules relevant to the use of cluster munitions contained in Protocol V to the CCW on Explosive Remnants of War (ERW). This analysis shall answer the question whether these rules are insufficient as such to prevent civilian harm or whether the rules were adequate but not properly implemented. The chapter also offers analysis of the scarce case law on cluster munition use before the Ethiopia and Eritrea Claims Commission and the ICTY and treats the issue of whether the rulings of these bodies were consistent in their legal reasoning.

Chapter 4 as the second part in the review of the legal status quo before the adoption of the CCM examines how HRL applies to the consequences of the use of cluster munitions. It begins with structural observations on the complementary relationship between IHL and HRL which are designed to lay emphasis on the institutional relevance of such an inquiry. Subsequently, it will be discussed how the rights to life, not to be subjected to cruel and inhuman treatment and the right to health with the underlying determinants of food, housing and water may be violated by cluster munition use. This evaluation is organised according to the two negative temporal humanitarian dimensions of cluster munition use, civilian harm during and after armed conflict. In terms of the first set of problems, that of the wide area effect and the inaccuracy of the sub-munitions in or near populated areas, the question will be broached as to whether HRL may afford a remedy for victims under the rights to life and not to be subjected to cruel and inhuman treatment in light of relevant jurisprudence of regional and universal HR treaty bodies and the ICTY and what the obstacles to such enforcement are.

The analysis pertaining to the post-conflict consequences of cluster munition use through unexploded sub-munitions starts off by inquiring whether it was justified by the European Court of Human Rights not to proceed to the merits in the case of *Behrami v. France*. That case involved a complaint under the right to life for the death of a child caused by an unexploded sub-munition in Kosovo for which the responsibility of France as a lead nation of the Kosovo Force (KFOR) in this area due to its wrongful omission of clearance was alleged. For want of a specific statement on the merits, it will then be examined as to what parallels may be drawn to environmental human rights jurisprudence to distil specific HRL obligations in the areas of clearance and warnings of civilians and what the shortcomings of applying HRL in this context are. The next subsection is intended to show to what extent an affected state is obliged under economic and social HRL to deal with the post-conflict

contamination with duds on that state's territory and compares the HRL response with the specific response provided by Protocol V to the CCW. As the last of the scarce specific legal statements on cluster munition use by international bodies and experts, the findings of three reports by HRL and IHL experts on cluster munition use in Israel and Lebanon mandated by the UN Human Rights Council shall be commented on. Two subsections devoted to answering the question how the Ottawa Convention on Anti-Personnel Mines and the Convention on the Right of People with Disabilities contribute to strengthening the treatment, rehabilitation and inclusion of victims.

Chapter 5 proceeds from the conclusion reached as a result of the two preceding chapters, namely that existing rules of IHL and HRL are inadequate to comprehensively deal with the humanitarian concerns emanating from the use of cluster munitions. In focusing on the Austrian national efforts to prohibit cluster munitions, a first part illustrates how the national and the international level are intertwined in the quest for specific prohibitions on cluster munitions. Austria was chosen as a case study neither out of patriotic or even nationalist sentiments of this author nor merely because of the fact that this author was closely involved in specific endeavours by the national NGO Cluster Munition Coalition-Austria (CMC-Austria) aiming at prohibiting cluster munitions; but Austria represents an ideal object of study, since it was one of the champions of specific prohibitions both on a national level with the enactment of national legislation on the prohibition of cluster munitions only as the second state worldwide and the international level with its membership of the core group of countries leading the Oslo process.

Documenting the various national steps towards a Federal Act on the Prohibition of Cluster Munitions already sheds light on some of the substantive issues that were to be discussed and negotiated in the Oslo process with the CCM as a result. Since these national steps occurred in advance of some of the discussions in the Oslo process, it is justified to elaborate on the various developments in the Oslo process only in the next subchapter from its launch with the Norwegian announcement at the end of the Third Review Conference to the CCW until now. This subchapter provides in-depth substantive and procedural analysis of the Oslo process, in part based on this author personally witnessing key events of this process, including the Third Review Conference to the CCW, the Oslo Conference on Cluster Munitions, the Vienna Conference on Cluster Munitions and the Dublin Conference for the Adoption of a Convention on Cluster Munitions.

The latter conference shall be the focus of Chapter 6 in which the assessment of the negotiations is structured around the major contentious areas, notably interoperability, the

definition of prohibited cluster munitions, transition periods, stockpile destruction, special user state obligations in respect of clearance and destruction of cluster munition remnants and victim assistance. Besides providing the drafting history, the outcome of the negotiations in these key areas, the text of the CCM as finally adopted will be evaluated.

Finally, Chapter 7 attempts to answer the question as to what contribution the CCM makes to IHL and HRL and presents an outlook of the status of the CCM.

2. General Legal Background and Factual Evidence in Relation to Cluster Munitions

In order to prepare the ground for the subsequent analytical chapters, this chapter is intended to provide an overview of the legal regimes in relation to cluster munitions and the concrete factual evidence on which the analysis will be based. It describes what cluster munitions are, their military purpose as well as historical background information on their use, production, proliferation and in particular, elaborates on the resulting humanitarian problems and challenges posed by cluster munition use.

2.1. General Background to Relevant Legal Regimes

Since the beginning of codification efforts of the international law of armed conflicts (hereinafter international humanitarian law, IHL) weapons have been prohibited or regulated in two ways, either through specific prohibitions/regulations or more general rules. Thus, the 1868 St. Petersburg Declaration already prohibited the use, in time of war, of explosive projectiles under 400 grammes weight,⁸ the 1899 Hague Declarations the use of projectiles and explosives from balloons⁹ (extended in time by the 1907 Hague Declaration),¹⁰ projectiles containing asphyxiating gases,¹¹ dum-dum bullets,¹² the 1907 Hague Convention VIII regulates the laying of automatic submarine mines,¹³ and the 1925 Gas Protocol

⁸ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 29 November/11 December 1868 [1868 St. Petersburg Declaration], 1 AJIL Supplement 95-96 (1907).

⁹ Declaration (IV:1) to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, 29 July 1899, 1 AJIL Supplement 153-155 (1907).

¹⁰ Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 October 1907, 2 AJIL Supplement 216-218 (1908).

¹¹ Declaration (IV:2) Concerning Asphyxiating Gases, 29 July 1899, 1 AJIL Supplement 157-159 (1907).

¹² Declaration (IV:3) Concerning Expanding Bullets, 29 July 1899, 1 AJIL Supplement 155-157 (1907).

¹³ Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 2 AJIL Supplement 138-145 (1908).

consolidated existing prohibitions on asphyxiating or poisonous gases and extended the scope of the prohibition to bacteriological warfare.¹⁴

In parallel, general principles and rules governing the use of weapons in armed conflict were developed. Thus, the 1868 St. Petersburg Declaration contains groundbreaking formulations of the need to reconcile the essential principles of military necessity and humanity as well as the rule that arms which uselessly aggravate the sufferings of disabled men are prohibited.¹⁵ This latter rule was subsequently reiterated by the 1907 Hague Convention IV,¹⁶ and the 1977 Protocol I Additional to the Geneva Conventions (API).¹⁷ These two instruments also provided for the rule that the right of parties to an armed conflict to choose means of warfare is not unlimited.¹⁸ The 1977 API now contains the most elaborate formulation of general rules of IHL pertaining to weapons, most importantly the prohibitions of direct attacks against civilians,¹⁹ indiscriminate attacks,²⁰ disproportionate attacks,²¹ and the obligations to take all feasible precautions in attack and against the effects of attacks.²²

While these rules reflect a fundamental concern about limiting the effects of weapons on civilians, it should be recalled that states were ready to negotiate specific rules on weapons also for other reasons but these humanitarian motives. It was the Russian concern about the vulnerability of its own troops to the bullets prohibited by the 1868 St. Petersburg Declaration that prompted the convening of the Commission of military experts that drafted it. It was also Russian concern that it was lagging behind in weapon technology that led to its initiative for the (unsuccessful) 1899 and 1907 Hague Peace Conference with the primary aim of considering a possible reduction of the excessive armaments of all nations in the first place.²³

These are considerations of a broader strategic nature, such as the influence of specific prohibitions/regulations on national or alliance armaments, the maintenance of military capabilities or needs and costs of substitution for specific weapons, evincing security concerns

¹⁴ Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 25 AJIL Supplement 94-96 (1931).

¹⁵ See *supra* note 8.

¹⁶ Art. 23 (e), Annex: Regulations Concerning the Laws and Customs of War on Land to Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, 2 AJIL Supplement 90-117 (1908).

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

¹⁸ Art. 22, Annex to Hague Convention (IV), *supra* note 16; Art. 35 (1), Additional Protocol I, *supra* note 17.

¹⁹ Art. 51 (2), Additional Protocol I, *supra* note 17.

²⁰ Arts. 51 (4), (5) (a), *ibid.*

²¹ Art. 51 (5) (b), *ibid.*

²² Arts. 57 (2) (a) (ii), (b); Art. 58, *ibid.*

²³ F. Kalshoven, "Arms, Armaments and International Law", 191 RdC 183, 208, 214-215 (1985).

for states rather than individuals.²⁴ Such thinking is typical of “disarmament” in the sense of a complete elimination of armaments and armed forces or “arms control”, a term originally coined for limiting the arms competition rather than substantially reversing it and thus actually contrasted with the term of disarmament. Subsequently, however, a variety of measures came to be understood as “arms control”, including the freeze, limitation or abolition of specific categories of weapons; the prevention of certain military activities; the regulation of the deployment of forces; the proscription of transfers of militarily important items; the reduction of the risk of an accidental war; or the restriction or prohibition of specific weapons in armed conflict.²⁵ Accordingly, the two terms of “disarmament” and “arms control” overlap where the abolition of specific categories of weapons is concerned. Hereinafter, the term “disarmament” shall be used.

Most importantly, in the period before World War II (WWII), a state-centred approach towards disarmament did not prevent the adoption of specific prohibitions with the humanitarian aim of ensuring protection for individuals. On the contrary, in principle humanitarian concerns were recognised as one motivation for universal reduction of all types of armaments contemplated by the League of Nations Disarmament Conference in the 1930s, since the threat to civilians, a humanitarian concern, was mentioned as one evaluation criterion for disarmament.²⁶ Still, the last step, the adoption of a specific disarmament treaty for the overarching concern of protection of individuals did not materialise.

With the post- WWII advent of the UN Charter and the Cold War era ushered in, the state-centred approach towards disarmament led to a growing estrangement between the hitherto joint purposes of promoting state security and the protection of individuals inspiring specific prohibitions/regulations of use of weapons under IHL. Principles governing disarmament and the regulation of armaments, which can be likened to arms control, were subordinated to the ultimate goal of maintenance of international peace and security. This can be seen from the power of the General Assembly under Art. 11 of the UN Charter to consider general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments. Moreover, the obligation of the Security Council under Art. 26 to formulate plans to be submitted to UN Member States for the establishment of a system for the regulation of armaments was imposed with the overarching goal of promoting the establishment and maintenance of

²⁴ *Ibid.*, 215; *Id.*, “The Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September-18 October 1974”, 6 Netherlands Yearbook of International Law 77, 85 (1975).

²⁵ J. Goldblat, *Arms Control Agreements: A Handbook*, XIII (1983).

²⁶ Kalshoven, “Arms”, *supra* note 23, at 218.

international peace and security. Accordingly, the system of collective security originally envisaged under the UN Charter is based on the continued existence of national armed forces. These would be made available to the Security Council or for self defence. Therefore, arms control measures serving the maintenance of military international peace,²⁷ and security may also extend to the maintenance of the status quo or even the controlled increase of armaments and armed forces.²⁸ This weak stance on disarmament may be explained initially by the fact that the foundations of the UN Charter were laid when WWII was still ongoing; moreover, there was a sense that while during the League of Nations period it was believed that WWI was caused by the arms race before the war, after WWII, many felt that this war could have been avoided had the great military powers maintained a sufficient military deterrence capability.²⁹

This development was not conducive to the general protection of civilians from the effects of the use of conventional weapons in armed conflicts in particular, since even specific weapon prohibitions of use under IHL suffer from the weakness that unless the development, production and stockpiling of such weapons is not prohibited a real risk remains that these weapons will still get used in certain circumstances.³⁰

This is even more true for those conventional weapons that are not specifically prohibited by IHL but only governed by general rules of IHL which are open to divergent interpretations in the heat of battle. Cluster munitions are a paradigmatic example in this regard. While there was a specific proposal on the prohibition of the use of cluster bombs with anti-personnel effects on the table in the 1970s, this proposal was rejected, since the above-described post-WWII state-centred mentality hampered specific prohibitions on weapons based on humanitarian concerns. Opponents to specific weapons prohibitions/restrictions successfully prevented this matter of being finally more closely linked to general rules of IHL on conventional weapons negotiated as part of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law which resulted in the adoption of the two 1977 Protocols Additional to the Geneva Conventions. Instead, the

²⁷ The term “peace” in this context may be understood as the mere absence of the organised use of force, the so called “negative peace”, as opposed to “positive” peace, which would require continued action on the part of states for maintaining the conditions for peace, including not only respect for the prohibition of the use of force but also the development of confidence-building measures; the promotion of human rights and fundamental freedoms; the enhancement of the quality of life; the satisfaction of human needs; or the protection of the environment. See R. Wolfrum, “Article 1” in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. I, 39, 41 (2nd ed., 2002).

²⁸ H. Schütz, “Article 26” in Simma *et al.* (eds.), *UN Charter Commentary*, *supra* note 27, at 464, 469.

²⁹ Goldblat, *Arms Control Agreements*, *supra* note 25, at 12.

³⁰ *Ibid.*, at 89; O. Bring, “Conventional Weapons in the Future. Humanitarian Law or Arms Control?”, 24 (3), *Journal of Peace Research* 275, 277 (1987).

Diplomatic Conference on IHL decided that a separate conference should be convened to reach agreements on specific weapon prohibitions/restrictions. Had such specific rules on weapons formally been more closely linked to the 1977 Protocols, humanitarian considerations would have been paramount. However, this would have gone against the approach of the great military powers and states associated with the two blocs to view the issue of weapons as a predominantly strategic one, being guided by security considerations such as reciprocal balance in armaments and armed forces, costs of substitution of weapons or of managing stockpiles.

The negotiated result of the two separate conferences convened under the auspices of the UN, the 1980 Convention on Conventional Weapons (CCW), itself a mixed creature of disarmament and IHL,³¹ did not include any rules on cluster munitions, since the mindset of certain states favoured security and military over humanitarian considerations. This traditional security and military bias of the CCW accounts for the fact that for years not even consensus on a mandate to adopt specific regulations/prohibitions to comprehensively address the humanitarian problems associated with the use of cluster munitions could be found. As a result, the use of cluster munitions in armed conflicts continued to be governed by general rules of IHL only.

Thus, reframing disarmament as a matter first and foremost for the protection of individuals in fact brings the wider concept of arms control back into line with one of the major motivations on which it was based in the UN Charter. In this respect, Art. 26 of the UN Charter expressly states that “the regulation of armaments”, i.e. arms control, shall occur for purposes of the maintenance of international peace and security *with least diversion for armaments of the world’s human and economic resources*.

Respecting the letter and spirit of this provision means that disarmament must serve the purpose of fulfilment of HRL. This is because disarmament contributes to avoiding that human and economic resources will be spent on dealing with the consequences of the use of a weapon or on research, development and maintenance of a weapon. In turn, this means that human and financial resources will be freed to fulfill economic and social human rights in

³¹ See the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, 1342 UNTS 137. On the one hand it reiterates general rules on IHL (paras. 2, 3, 4, 5, 8) such as the rule that the right to choose methods or means of warfare are not unlimited, the obligation to protect civilians against the effects of hostilities, or the prohibition of the use of weapons of a nature to cause superfluous injury or unnecessary suffering. On the other hand, it emphasises disarmament considerations (paras. 6, 7, 9, 10, 11, 12) like the ending the arms race, pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control or the desirability that all states become parties, especially the “militarily significant” ones, as well as mentions UN bodies tasked with disarmament.

particular, which is conducive to the programmatic demand of Art. 28 of the Universal Declaration of Human Rights that everyone is entitled to “a social and international legal order in which the rights and freedoms set forth in this Declaration can be fully realised.”³²

Regarding the specific example of cluster munitions, it may be argued that disarmament in respect of these weapons entails less probability and eventually excludes that these weapons will get used in the future. From this, it follows that in the future fewer and fewer resources should be needed for the expensive clearance of land contaminated with unexploded sub-munitions as well as treatment, rehabilitation and long-term care for victims of these weapons. As a result, the additional resources available could be used, for example, for investing in improving housing conditions, health care systems or education, which contributes to the fulfilment of human rights.

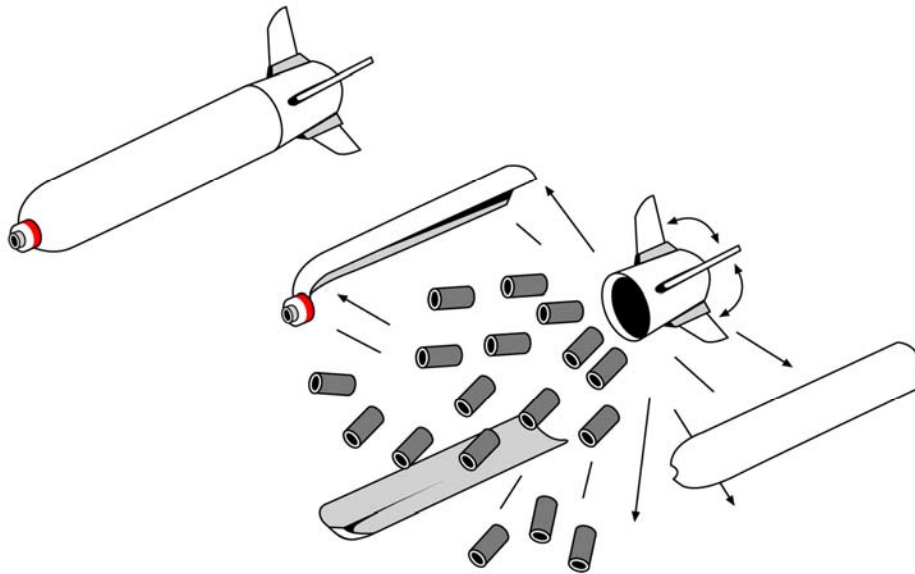
2.2. *What are Cluster munitions? Properties and Military Purpose*

*“ ‘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 ”*³³

This is the general definition to be found in the new Cluster Munition Convention adopted in Dublin on 30 May 2008. It encapsulates the specific properties of cluster munitions, a delivery system and multiple explosive sub-munitions contained therein. Delivery systems may consist in ground-based artillery, notably rockets/missiles and shells launched or fired from mortars or howitzers, in naval guns, in air-dropped bombs as well as in dispensers affixed to an aircraft. Once these free-falling (as opposed to precision-guided) rockets, shells or bombs have been launched, fired or dropped they release often hundreds of again free-falling explosive sub-munitions which are intended to detonate over a wide area prior to, on or after impact on the ground or a target. Dispensers differ from the other delivery systems in that they are affixed to an aircraft and release the explosive sub-munitions directly from there rather than being launched, fired or dropped and then opening up. The following graphic of an air-dropped cluster bomb demonstrates how a cluster munition works:

³² Art. 28, Universal Declaration of Human Rights, 10 December 1948, UN General Assembly Res 217 (III), Annex.

³³ Art. 2 (2), Convention on Cluster Munitions, 30 May 2008, Doc. CCM/77. This definition shall be subject to detailed comment at *infra* pp. 318-331.



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In general terms, cluster munitions were designed to be used to attack multiple targets, wide-area targets like airfields, industrial plants, ammunition storage houses as well as small or fast-moving targets like personnel, tanks or surface-to-air missile sites. Moreover, the original idea behind using cluster munitions was to compensate for aiming imprecisions with free-falling unitary munitions against single targets which could not be easily hit, since the hit probability is increased where a high number of free-falling explosive sub-munitions is delivered over a wide area.³⁴

Accordingly, the military value of cluster munitions is seen in the capability to deliver a higher number of explosives against the above-mentioned targets over a larger area within a shorter period of time than would be possible with conventional unitary munitions. This reduces exposure to enemy counter-attack as well as the number of firing platforms, ammunition and personnel required.³⁵

To fulfil these multiple purposes, a variety of explosive sub-munitions were produced with anti-personnel and anti-materiel capabilities. The most important feature of anti-

³⁴ E. Prokosch, *The Technology of Killing: A Military and Political History of Antipersonnel Weapons*, 82 (1995).

³⁵ Geneva International Centre for Humanitarian Demining, "A Guide to Cluster Munitions", 2nd ed., June 2009, at 23, <http://www.gichd.org/fileadmin/pdf/publications/Guide-to-Cluster-Munitions-June2009.pdf> (last visited 20 January 2010).

personnel sub-munitions is fragmentation upon detonation; fragmentation is caused by the shattering of the metal casing of the sub-munition.³⁶



This is an example of an anti-personnel sub-munition, the air-dropped BLU-63. © DanChurchAid, Jawat Metni

An anti-materiel sub-munition is characterised by a shaped charge designed to penetrate armour.³⁷

³⁶ O. Dullum, “Cluster weapons-military utility and alternatives”, Forsvarets Forskningsinstitut/Norwegian Defence Research Establishment, Report 2007/02345, at 30 (2008).

³⁷ The charge incorporates an inverted conical liner, usually made of copper. Upon detonation the liner collapses into a thin metal jet which is projected forwards onto the target, giving it the capability to penetrate armour and other protected vehicles. See Geneva Centre for Humanitarian Demining, “Guide to Cluster Munitions”, *supra* note 35, at 10.



This picture shows the air-dropped M118 “Rockeye” sub-munition, an example of an anti-materiel sub-munition with an anti-personnel side effect, as the sub-munition casing shatters upon impact with a soft, i.e. personnel target.

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Increasingly, sub-munitions were produced to combine both anti-personnel and anti-materiel effects which are known as “Dual Purpose Improved Conventional Munitions” (DPICM).



This picture shows the rocket-launched M-77, a “Dual Purpose Improved Conventional Munition” (DPICM).

© DanChurchAid, Jawad Metni

In order to render sub-munitions still more versatile against multiple targets, some sub-munitions also incorporate an incendiary element besides their anti-personnel and anti-materiel capabilities. Where this is the case, such sub-munitions are called “Combined Effects Munitions” (CEM).



Like this one, the air-dropped BLU-97. © John Rodsted, Landmine Action

Newer generation DPICM cluster munitions also incorporate self-destruct mechanisms, e.g. a back up fuse, which are designed to detonate the main charge of the sub-munition if the sub-munition’s primary fuse fails to function upon impact. The stated purpose of these additional devices is to reduce the number of unexploded sub-munitions left after deployment.



This picture shows an Israeli-produced M85 sub-munition with such a self-destruct mechanism. © Simon Conway, Landmine Action

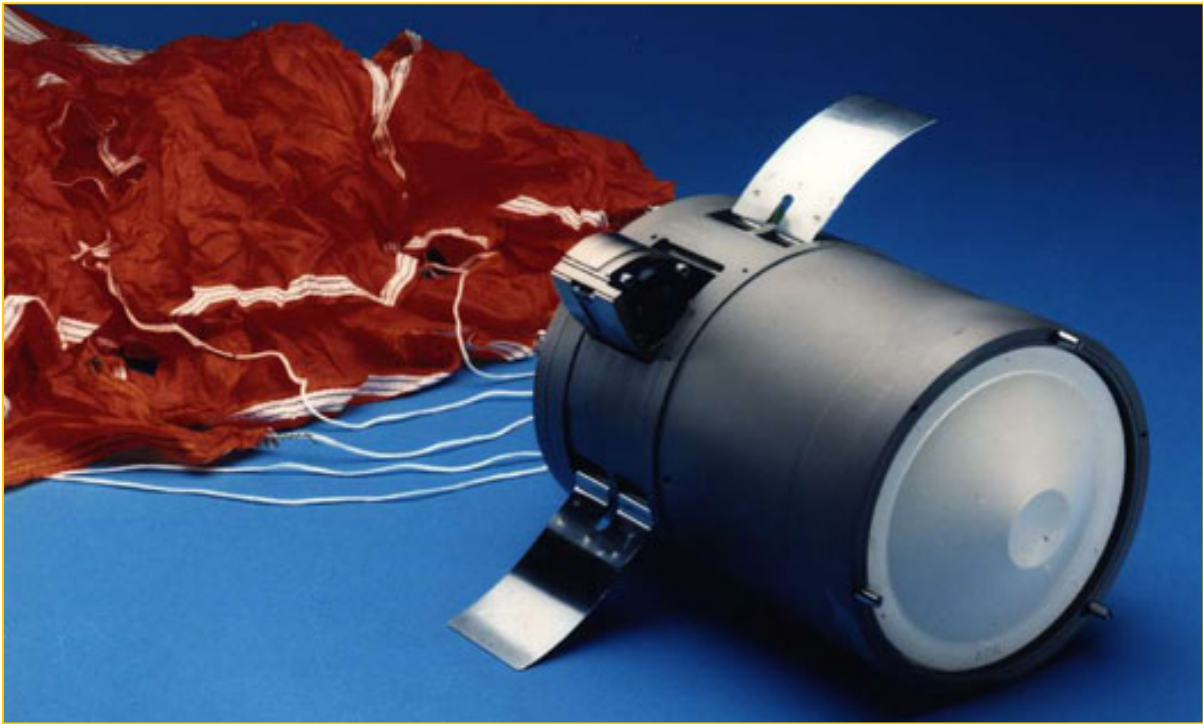
The latest in munition technology are the so-called “Sensor Fused Weapons” (SFW). The technical advance of these munitions purportedly consists in the fact that the sub-munitions include radar, infrared and/or wave sensors that may detect and engage individual targets, thereby approximating this to a precision-guided weapon. As soon as the ground-based or airborne delivery system releases the sub-munitions, the fuses of the sub-munitions are armed and the detection sensors activated. The sensors react to certain characteristics of a target such as the heat that a tank emits. If the sensors detect a target that corresponds to the pre-programmed target characteristics, the fuse stays in the armed position and an explosively formed projectile is fired onto the target. In the case that the confidence level of the sensor is not such as to assure target detection, a self-destruct mechanism will be triggered, destroying the sub-munition at a given height.³⁸ SFW typically also incorporate self-deactivation mechanisms; an electronic fuse, which requires an electrical power supply, allows a SFW to use a reserve battery which renders the munition inoperable if it fails to explode. This is designed to minimise the possibility of an unexploded sub-munition functioning through accidental or intentional handling.³⁹

SFW are particularly contentious weapons, for which up to now only limited information is available on their performance on the battlefield. Some would not even

³⁸ Geneva Centre for Humanitarian Demining, “Guide to Cluster Munitions”, *supra* note 35, at 15.

³⁹ *Ibid.*, at 17.

consider these munitions as cluster munitions, since it is pointed out that as opposed to the paradigmatic cluster munitions they are not dispersed in great numbers over a wide area but attack single targets; moreover, it is claimed that the sub-munitions are equipped with very advanced fail safe mechanisms that are likely to minimise the number of unexploded sub-munitions left on the ground after their use.⁴⁰



This picture shows a sub-munition of this type, the German-produced SMARt 155 (Suchzündermunition für die Artillerie), © 2000, Gesellschaft für Intelligente Wirksysteme

This short overview demonstrated that there are in fact many different types of cluster munitions, which has given rise to claims that certain types of cluster munitions pose more problems than others. Altogether, it is estimated that a total of 34 States have produced over 210 different types of cluster munitions.⁴¹

⁴⁰ Dullum, “Cluster weapons”, *supra* note 36, at 12, note 1. Sensor fused weapons shall be subject to more detailed comment when the Oslo process leading to the adoption of a new convention on cluster munitions is analysed. See *infra* pp. 244-353.

⁴¹ M. Hiznay, “Survey of Cluster Munitions Produced and Stockpiled”, ICRC Expert Meeting on Humanitarian, Military, Technical and Legal Challenges of Cluster Munitions, Montreux, 18-20 April 2007, at 23, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0915/\\$File/ICRC_002_0915.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0915/$File/ICRC_002_0915.PDF!Open) (last visited 20 January 2010).

2.3. *From Grimsby to Georgia: A History of Cluster Munition Use, Production and Proliferation*

“We cannot hope to match the communist enemy in manpower. If we wish to maintain our present standard of living, or anything approaching it, we cannot hope to match him in sheer weight of reserve materiel. We must, therefore, use our limited manpower far more effectively. And we must provide our soldiers with the finest weapons and equipment that the talent of our scientists and military experts and the ingenuity of our industrial community can produce.”⁴²

The first reported use of cluster munitions occurred during WWII, when the German Luftwaffe dropped around 1000 Sprengbombe Dickwandig 2 kg (SD2) “butterfly bombs” on the East English port town of Grimsby in 1943. Packed into larger bombs containing between 6 and 108 of these explosive sub-munitions each, they were named “butterfly bombs” because the cylindrical metal outer casings hinged open when the sub-munitions were activated and gave it the appearance of wings of a butterfly.⁴³ An eyewitness reported

“Some exploded on impact with the ground, some landed in the trees and were suspended by their ‘wings’ on the branches of trees, others caught on guttering, telephone wires, chimney stacks. It was dangerous to touch them. A young Naval Rating was seriously injured that night after kicking one of these bombs [...]. The Salvation officer and I tried to help him but he died before the Ambulance arrived. The police and the army were put in charge of trying to make them safe. The public was asked to report any sighting but under no circumstance attempt to move them. Those on the ground had sand bags placed around them by the Home Guard, leaving a vantage opening for a expert rifleman to fire from a safe distance to explode it. There was complete terror among the population of the town for many months as these bombs turned up in the most unexpected places. Even to this day, it could be possible to come across one of the butterfly bombs.”⁴⁴

This account serves as first evidence of the post-conflict problem of unexploded sub-munitions that may detonate at a later stage when intentionally or accidentally handled.

The next significant event in the history of the development of cluster munitions was the Korean War from 1950-1953. U.S. forces in command of the coalition authorised to use the UN flag, having pushed back North Korean forces and regained the 38th parallel in autumn 1950, advanced deeply into North Korea towards the Chinese border despite Chinese warnings that China would intervene militarily for self-defence purposes. As these warnings

⁴² U.S. Department of Defence, Annual Report for 1 January-30 June 1953, at 124, *quoted in* Prokosch, *The Technology of Killing*, *supra* note 34, at 32.

⁴³ C. King, “The Evolution of Cluster Munitions”, ICRC Expert Meeting Montreux 2007, *supra* note 41, at 11; SD2 butterfly bombs were also used by the Germans on Soviet artillery positions in Kursk. See S. Conway, “Cluster Munitions: Historical Overview of Use and Human Impacts”, *ibid.*, at 13.

⁴⁴ J. Dixon, “My Life in the Royal Navy during the Second World War”, http://www.carlsen.karoo.net/mainpage/4_draft.htm (last visited 20 January 2010).

went unheeded, the Chinese attacked UN troops on various flanks with an overwhelming number of personnel, causing major defeat and a hasty retreat by U.S.-led UN troops behind the 38th parallel.

The lesson was that the United States needed to improve its weapons technology to challenge a communist enemy possessing far superior manpower. In light of the horror scenario to be overrun by scores of enemy soldiers conventional weapon research and development in the United States in the 1950s and 1960s focused on devising more effective means to deliver large quantities of metal fragments over a wide area within a short time.⁴⁵

This realisation triggered the large-scale production of cluster munitions which came to be used massively in the armed conflicts in the “Indochinese laboratory” in the 1960s and 1970s. The newly-developed air-dropped cluster munitions encompassed a larger number of smaller explosive sub-munitions which could cover a wider area and were equipped with steel balls on the outside of the casing to ensure enhanced fragmentation upon detonation. Different types of sub-munitions could be used with different types of containers. For example, the CBU-24 cluster bombs, each containing almost 700 BLU-26 sub-munitions which results in some 200,000 steel fragments killing persons in all directions over a wide area, falls in this category; reportedly, a total of 285 Mio. BLU-26 sub-munitions were used in Vietnam, Laos and Cambodia in the 1960s and 1970s.⁴⁶ Other explosive sub-munitions had a primary anti-materiel capability, such as the above-mentioned “Rockeye” with an anti-personnel “fringe effect”.⁴⁷ In addition, CEMs were used, combining anti-personnel, anti-materiel and incendiary effects. Finally, also artillery-delivered DPICMs were deployed from 1968 onwards.⁴⁸

The stated targets against which cluster munitions were allegedly used by U.S. forces in Vietnam, Laos and Cambodia included antiaircraft installations, trucks, surface-to-surface missiles, communication centres, radar installations, supply routes, large numbers of unprotected enemy personnel and light armoured vehicles.⁴⁹ From this range of targets, two primary military tactical roles of cluster munitions may be discerned: The first is to inflict

⁴⁵ Prokosch, *The Technology of Killing*, *supra* note 34, at 32-33.

⁴⁶ *Ibid.*, at 84-85, 97.

⁴⁷ *Ibid.*, at 101. The use of plastic tail fins, shattering when the sub-munition explodes, gave rise to charges that the United States employed an anti-personnel weapon designed to produce plastic fragments undetectable by X-rays. These allegations were the primary reason why subsequently, Protocol I to the Convention on Conventional Weapons, prohibiting the use of weapons the primary effect of which is to injure by fragments undetectable by X-rays was adopted. See *ibid.*, at 102.

⁴⁸ *Ibid.*, at 102, 105-106.

⁴⁹ *Ibid.*, at 84, 99, 106; M. Krepon, “Weapons Potentially Inhumane: The Case of Cluster Bombs”, 52 *Foreign Affairs* 595-611 (1974), reproduced in R. A. Falk (ed.), *The Vietnam War and International Law*, Vol. 4, at 266, 269, 273-274 (1976).

damage and injury on area targets, i.e. large numbers of personnel, vehicles or military infrastructure. The second is to suppress enemy forces, i.e. ensuring that enemy fighters stay in their protected positions, put their vehicles under cover and refrain from using their weapons; thus, this would give the user of cluster munitions the opportunity to advance and use their weapons in turn.⁵⁰

Significantly, there was no debate at technical or political levels in the United States on possible indiscriminate effects of cluster munitions. Silence on the effects of cluster munition use was even deliberate to preclude a major public outcry like in the case of napalm use. This was despite some evidence through visits of foreign journalists to North Vietnam who saw first hand that cluster munitions caused civilian casualties at the time of use, since military targets in and around residential areas were attacked.⁵¹ However, this evidence was either downplayed by U.S. officials or outright rejected as North Vietnamese war propaganda.⁵² Consequently, U.S. military circles gained the upper hand and could use these weapons with little restraint.

Also, it seems that the other major humanitarian problem of unexploded sub-munitions with the potential to cause civilian casualties long after a conflict was insufficiently appreciated and documented by the opponents of this weapon. This is evidenced by a proposal presented by certain states on the initiative of Sweden to prohibit the use of anti-personnel cluster munitions at the 1974 and 1976 Conferences of Government Experts on the Use of Certain Conventional Weapons in Lucerne and Lugano. The ground invoked for the prohibition was mainly that of indiscriminately hitting combatants and civilians at the time of attack through the wide area effect of these munitions.⁵³ However, this initiative was not supported by major military powers like the United States, its NATO allies or the Soviet Union. As a result, no specific regulation or prohibition on cluster munitions was adopted.⁵⁴

Thus, cluster munitions could become an established weapon system in U.S. arsenals, and nothing stood in the way of major proliferation to other countries. Two direct results of this proliferation were cluster munition use by Israel, first in 1973 against Syria and in 1978 and 1982 against Lebanon, as well as by Morocco in the Western Sahara in the 1970s.

⁵⁰ Dullum, "Cluster Weapons", *supra* note 36, at 16.

⁵¹ Krepon, "Weapons Potentially Inhumane", *supra* note 49, at 269-274; Prokosch, *The Technology of Killing*, *supra* note 34, at 87-90, 97.

⁵² Prokosch, *The Technology of Killing*, *supra* note 34, at 90.

⁵³ International Committee of the Red Cross, Report on Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 1974, at 60-61 (1975); International Committee of the Red Cross, Report on Conference of Government Experts on the Use of Certain Conventional Weapons, Lugano, 1976, at 17-18 (1976).

⁵⁴ The reasons for the failure of this initiative shall be subject to further comment at *infra* pp. 244-247.

Interestingly, cluster munition transfers to Israel were subject to classified agreements between the United States and Israel. Their exact contents are thus not precisely known but it appears that the restriction was imposed on Israel only to use these weapons when attacked by two or more states, as in 1967 and 1973.⁵⁵ This seems to rule out cluster munition use in armed conflict when the Israeli Defence Forces are only confronting one other party that operates in or around civilian residential areas as in the case of confrontations with the PLO in 1978 and with Syria in 1982. This reflects an acknowledgement on the part of the United States that such use could result in civilian casualties. In the aftermath of Israel's 1982 incursion into Lebanon, the U.S. administration found a violation of these specific conditions placed on cluster munition transfers to Israel. As a consequence, it enforced a unilateral prohibition on further exports to Israel which was only lifted in 1988.⁵⁶

The other "superpower" during the Cold War, the Soviet Union, had also been busy from the beginning of the 1950s to develop its own types of cluster munitions. The Soviets preferred delivery systems containing heavier air-delivered cluster munitions with a greater capability to penetrate armour but also produced other types with anti-personnel capabilities.⁵⁷ During their intervention in Afghanistan between 1979 and 1989, Soviet forces used cluster munitions on a massive scale, killing and injuring civilians, creating large numbers of refugees and destroying crops and livestock. Also large numbers of unexploded sub-munitions were left behind. While Indochina was the testing ground for new American cluster munition types, Afghanistan was the testing ground for new Soviet cluster munitions.⁵⁸

Also a close ally of the United States, the United Kingdom, from the 1970s produced its own cluster munitions, especially the type BL755. At one of the above-mentioned government expert conferences in Lucerne in 1974, a UK government expert stated that this air-dropped cluster munition, containing 147 DPICM explosive sub-munitions, was designed to replace high-explosive bombs on such targets as armoured and soft-skinned vehicles, parked aircraft, anti-aircraft batteries, radar installations, small ships and headquarters or maintenance areas as well as the personnel manning them. He assured the other delegates at the conference that the area coverage of the sub-munitions would be less than 1 hectare, i.e.

⁵⁵ R. Moyes & T. Nash, "Cluster Munitions in Lebanon", Landmine Action Report November 2005, at 9, <http://www.landmineaction.org/resources/Cluster%20munitions%20in%20Lebanon.pdf> (last visited 20 January 2010).

⁵⁶ *Ibid.*

⁵⁷ King, "The Evolution of Cluster Munitions", ICRC Expert Meeting Montreux 2007, *supra* note 41, at 12.

⁵⁸ Conway, "Cluster Munitions: Historical Overview", ICRC Expert Meeting Montreux 2007, *supra* note 41, at 15.

less than 100 x 100 metres on the ground and that the fusing of the sub-munitions was such that detonation on impact was guaranteed regardless of the angle at which the sub-munitions struck the ground.⁵⁹

Both claims were proven wrong subsequently. Firstly, it was admitted that the real area coverage was rather 1000 x 1000 metres, or hundred times the area claimed by the UK expert in 1974.⁶⁰ Secondly, recent information by the UK government suggests that a certain number of unexploded sub-munitions will occur, as the test failure rate of the BL755 amounted to 6%.⁶¹ Even this last figure appears to be conservative in light of other information on the UK's first use of the BL755 in the 1982/83 Falklands/Malvinas armed conflict against Argentina where it was suggested that the failure rate under combat conditions was as high as 9,6 %. Moreover, it was reported that the only civilian casualties of that conflict were caused by the use of these weapons.⁶²

By the 1980s cluster munition technology formed an important component of the arsenals of both sides of the ideological spectrum in the Cold War, especially for NATO powers which feared to be overrun by large scale infantry and tank formations of Warsaw Pact states.⁶³ As we can see, the basic rationale for development and production of cluster munitions had not changed since the U.S. trauma after the Korean War.

The end of the Cold War did not mark the end of production and use of cluster munitions, as may be assumed given that one root cause of the basic fear of being subjected to a large conventional attack had been eliminated. On the contrary, the 1991 Gulf War marked the most extensive deployment of both air- and ground-delivered cluster munitions by the United States and their allies in Iraq since the interventions by the United States in Indochina and by the Soviet Union in Afghanistan. A total of 62,000 air-delivered Vietnam era and newer cluster munitions along with 100,000 DPICM artillery shells and 10,000 M-26 Multiple Launch Rocket System (MLRS) rockets, where a twelve-tube launcher fires one rocket from each tube and one rocket contains 644 M77 sub-munitions,⁶⁴ were used. It was

⁵⁹ ICRC, Report on 1974 Lucerne Conference, *supra* note 53, at 54.

⁶⁰ V. O. Wiebe, "Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law", 22 Michigan Journal of International Law 85, 153 (2000).

⁶¹ United Kingdom, House of Commons, Hansard, Written Answers, Column 2515 W, 17 March 2006, at 58611, http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060317/text/60317w04.htm#60317w04.html_snew0 (last visited 20 January 2010).

⁶² Conway, "Cluster Munitions: Historical Overview", ICRC Expert Meeting Montreux 2007, *supra* note 41, at 15.

⁶³ Dullum, "Cluster Weapons", *supra* note 36, at 12.

⁶⁴ Thus, this equates to 7728 sub-munitions dispensed per rocket launcher at the press of a button.

estimated that an overall number of 24-30 Mio. explosive sub-munitions were used.⁶⁵ The targets on which these weapon systems were deployed included fixed targets like radar installations, surface-to-air missile bases, communications installations, widely dispersed tanks, armoured personnel carriers, Scud missile launch areas, artillery guns, as well as the Iraqi transportation system.⁶⁶ One expert on cluster munitions, has contended that cluster munition use in the 1991 Operation Desert Storm was probably the best example of an effective use of these weapons, since cluster munition air-strikes had a demoralising effect on Iraqis and the ground war lasted only four days which was largely attributed to the effect of cluster munitions.⁶⁷

However, an official survey by the U.S. Air Force weakens that claim by conceding that air-delivered cluster munitions were less effective because many of the older models performed poorly in terms of accuracy and reliability due to bombing from higher altitudes than these weapons were designed for; greater patterns of dispersion and excessive numbers of unexploded sub-munitions resulted.⁶⁸ The propensity of cluster munitions to leave behind a large number of duds also prompted U.S. commanders to restrict cluster munition air strikes during the ground war and in some instances ground advances by coalition forces were stopped for fear of “friendly casualties”.⁶⁹ This legacy of duds also posed a major problem for the Iraqi and Kuwaiti civilian population at the post-conflict stage where accidents involving unexploded sub-munitions reportedly claimed more than 1,600 dead and 2,500 injured in the first two years after the end of the conflict alone.⁷⁰ Assuming a conservative overall dud rate of 5%, unexploded sub-munitions left from this multinational enforcement operation could be estimated between 1.2 and 1.5 Mio.

The end of the Cold War also did not mean that there was no prospect of cluster munition use in Europe. In the various armed conflicts between 1991-1999 cluster munition use in disintegrating Yugoslavia became a reality; from 1992-1995 the Bosnian and the Croatian Serbs used Orkan MLRS rockets, produced near Sarajevo and similar to the M-26 MLRS rockets used in Iraq where each of the twelve rockets of the launcher contains 288 KB-

⁶⁵ Human Rights Watch, “Ticking Time Bombs: NATO’s Use of Cluster Munitions in the Former Yugoslavia”, June 1999, http://www.hrw.org/legacy/reports/1999/nato2/nato995-02.htm#P123_28023 (last visited 27 January 2010) (reporting on the 1991 Operation Desert Storm experience with cluster munition use).

⁶⁶ *Ibid.*

⁶⁷ King, “The Evolution of Cluster Munitions”, ICRC Expert Meeting Montreux 2007, *supra* note 41, at 12.

⁶⁸ U.S. Air Force, Gulf War Air Power Survey, vol. 2, part 2, at 161-162, http://www.airforcehistory.hq.af.mil/Publications/fulltext/gulf_war_air_power_survey-vol2.pdf (last visited 20 January 2010); *ibid.*, vol. 2, part 1, at 261. King himself acknowledged the problem of large numbers of duds left behind after Operation Desert Storm.

⁶⁹ Human Rights Watch, “Ticking Time Bombs”, *supra* note 65.

⁷⁰ *Ibid.*

1 sub-munitions.⁷¹ The most atrocious single cluster shelling occurred on 2 and 3 May 1995 when the Krajina Serb armed group fired eight to twelve Orkan rockets on Zagreb, resulting in 7 dead and over 200 injured. Milan Martić, the leader of the self-proclaimed Republika Srpska Krajina, was convicted of war crimes and crimes against humanity by the International Criminal Tribunal for the Former Yugoslavia (ICTY) because of these civilian casualties of the Zagreb bombing.⁷²

Finally, from 24 March to 10 June 1999, NATO member states conducted air strikes against the then Federal Republic of Yugoslavia (FRY) in what was termed a “humanitarian intervention” aimed at stopping massive human rights violations committed by the Milosević regime against the Kosovo-Albanians. While the overall rationale of the intervention may have been morally justified, some of the means employed included the use by U.S., UK and Dutch forces of around 1,400 CBU87, RBL755 and Rockeye cluster munitions in Kosovo alone, containing approximately 300,000 explosive sub-munitions.⁷³ 196 casualties, 25 during and 171 after Operation Allied Force in Kosovo, 8 casualties in Montenegro, 94 casualties in Serbia and 56 casualties in Albania as a consequence of the use of cluster munitions by NATO member states were confirmed. However, the real casualty figure may be much higher, with 300 possible victims solely at the time of use in Kosovo and well over 100 additional casualties in Serbia.⁷⁴

Cluster munitions also became the weapon of choice of major military powers fighting against opponents which are perceived as terrorist threat. While the 1991 Gulf War could be still termed as a major symmetrical confrontation, many, if not most contemporary conflicts are characterised by their asymmetry between major military powers and weaker adversaries in terms of manpower and technology; while the adversary cannot hope for outright military victory, its goal is to inflict as many casualties as possible and erode the major power’s will to

⁷¹ Handicap International, “Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities”, May 2007, at 60-61, 64-65, <http://en.handicapinternational.be/downloads/> (last visited 20 January 2010).

⁷² This case shall be subject to detailed analysis *infra* in Chapter 3.6, at pp. 86-105.

⁷³ S. Maslen, “Explosive Remnants of War: Cluster Bombs and Landmines in Kosovo”, International Committee of the Red Cross, Mines-Arms Unit, August 2000, revised June 2001, at 6, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/explosive-remnants-of-war-brochure-311201/\\$File/ICRC_002_0780.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/explosive-remnants-of-war-brochure-311201/$File/ICRC_002_0780.pdf) (last visited 20 January 2010). See also R. Moyes, “Cluster munitions in Kosovo: Analysis of use, contamination and casualties”, February 2007, at 10, <http://www.landmineaction.org/resources/Cluster%20Munitions%20in%20Kosovo.pdf> (last visited 20 January 2010).

⁷⁴ These casualties found their entry into the groundbreaking global 2007 study on the humanitarian impact of cluster munitions published by Handicap International, an NGO with experience in advocacy against cluster munitions and rehabilitation of war victims. See Handicap International, “Circle of Impact”, *supra* note 71, at 57-59, 68-83.

fight.⁷⁵ To be sure, most conflicts from time immemorial have exhibited some degree of asymmetry but the ever widening technology gap in terms of weaponry and the increasing involvement of non-state actors are all reasons why contemporary armed conflicts are predominantly of an asymmetrical nature.⁷⁶ In such types of conflicts, the fundamental international humanitarian law (IHL) rule of distinction⁷⁷ tends to be seriously challenged by both sides: On the one hand, the weaker party often attacks civilians or civilian objects directly or may place military equipment close to or in the midst of civilian residential areas or specifically protected locations; on the other, the technologically superior military power, confronted with such practices by its opponent, may feel compelled to itself lower the standards for fundamental IHL rules by accepting higher civilian casualties as a result of indiscriminate use of its superior weaponry.⁷⁸

Cluster munition use by Russian forces in the armed conflicts in Chechnya in 1994-96 and 1999 perfectly fit these descriptions regarding the conduct of hostilities in asymmetric conflicts, since the Chechens lured Russian armed forces into attacking urban environments and the Russian armed forces responded, *inter alia*, by using these weapons where civilian casualties would be almost a guarantee.⁷⁹

The trend towards resorting to the use of cluster munitions against an adversary which wages its own operations from the midst of civilian areas has even exacerbated in the aftermath of the “9/11” terrorist attacks.

The military intervention by the United States in Afghanistan starting on 7 October 2001 saw extensive use of BLU-97 cluster sub-munitions (approximately 300.000) against Taliban military bases, frontlines, and positions in or near civilian residential areas, resulting once more in a large number of civilian casualties both at the time of use and the contamination of agricultural, grazing land, roads and irrigation at the post-conflict stage.⁸⁰

During the 2003 Operation Iraqi Freedom, the United States and the United Kingdom used more air-dropped cluster munitions from 20 March to 9 April than they did in

⁷⁵ R. M. Cassidy, “Russia in Afghanistan and Chechnya: Military Strategic Culture and the Paradoxes of Asymmetric Conflict”, U.S. Army War College, Strategic Studies Institute, February 2003, at 13, <http://www.strategicstudiesinstitute.army.mil/pdf/FILES/PUB125.pdf> (last visited 20 January 2010).

⁷⁶ R. Geiß, “Asymmetric conflict structures”, 864 International Review of the Red Cross 757, 758 (2006).

⁷⁷ The fundamental IHL rule of distinction shall be subject to comment in Chapter 3.2. at *infra* pp. 55-64.

⁷⁸ Geiß, “Asymmetric conflict structures”, *supra* note 76, at 764-766; T. Pfanner, “Asymmetrical warfare from the perspective of humanitarian law and humanitarian action”, 857 International Review of the Red Cross, 149, 161-163 (2005).

⁷⁹ On incidents of cluster munition use during the Chechen armed conflicts, see Wiebe, “Footprints of Death”, *supra* note 60, at 142-150; Handicap International, “Circle of Impact”, *supra* note 71, at 84-87.

⁸⁰ Human Rights Watch, “Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan”, December 2002, at 15-31, <http://hrw.org/reports/2002/us-afghanistan/Afghan1202.pdf> (last visited 20 January 2010).

Afghanistan in six months, notably 1206 containing more than 200,000 explosive sub-munitions. Coalition use of ground-launched cluster munitions even exceeded the number of air-dropped types with 10,782 containing approximately 2 Mio. sub-munitions. While Iraqi forces engaged in a host of practices in breach of IHL, i.e. the use of human shields, the abuse of the Red Cross and Red Crescent emblems and the location of military objectives in civilian residential areas, especially Coalition ground forces deployed cluster munitions extensively in or near populated areas, causing hundreds of civilian casualties in Iraqi major cities, including al-Hilla, al-Najaf, Karbala', Baghdad and Basra.⁸¹

In this conflict, certain technologically-improved cluster munitions were used on the battlefield for the first time: This included British use of the Israeli-produced L20A1 artillery projectile containing 49 M85 sub-munitions equipped with a self-destruct mechanism, i.e. a second fuse which is designed to explode the sub-munition within 15 seconds if the sub-munition fails to explode upon impact.⁸² The British Ministry of Defence stated that commanders were operating on the assumption that the failure rate of these sub-munitions was below 1%.⁸³ Nevertheless, Human Rights Watch found extensive evidence of duds stemming from this sub-munition in multiple areas of Basra.⁸⁴ This was a first indication that technological fixes like self-destruct mechanisms did not function as reliably under battlefield conditions as producers and user states claim.

The United States also used so-called "Sensor Fused Munitions", the ground-delivered Sense and Destroy Armour Munition (SADARM), which contains two explosive sub-munitions per delivery system; each sub-munition is equipped with a millimetre wave sensor and an infrared sensor. In addition, for the first time in combat, the United States used the air-dropped CBU-97/B/105 which contains ten BLU-108 sub-munitions that include four hockey puck-sized "skeets". Each of these "skeets" in turn is equipped with an array of sensors. On the performance of the SADARM, the U.S. Infantry reported that it had "exceeded expectations and became the preferred precision munitions for field artillery (FA) battalions and their supported maneuver commanders. Out of 121 SADARM rounds fired, 48 pieces of enemy equipment were destroyed."⁸⁵ With regard to the CBU-97/B/105, Human Rights

⁸¹ Human Rights Watch, "Off Target: The Conduct of the War and Civilian Casualties in Iraq", December 2003, at 56-60, 80-92, <http://hrw.org/reports/2003/usa1203/usa1203.pdf> (last visited 20 January 2010).

⁸² *Ibid.*, at 85, 112.

⁸³ C. King *et al.*, "M85: An analysis of reliability", December 2007, at 13, <http://www.npaid.org/filestore/M85.pdf> (last visited 20 January 2010).

⁸⁴ Human Rights Watch, "Off Target", *supra* note 81, at 112.

⁸⁵ U.S. Army, "Third Infantry Division (Mechanized) After Action Report Operation Iraqi Freedom", July 2003, at 56, 122, <http://www.globalsecurity.org/military/library/report/2003/3id-aar-jul03.pdf> (last visited 20 January 2010).

Watch could not find any unexploded sub-munitions when conducting an on-site visit where this weapon had been used.⁸⁶ However, another expert reported that a humanitarian demining organisation had found unexploded BLU-108 sub-munitions in the area of Mosul in northern Iraq while acknowledging that there was no evidence of civilian casualties caused by these duds.⁸⁷ Thus, interestingly, there is evidence that even of this allegedly sophisticated weapon, a number of BLU-108 sub-munitions failed.

From this description of the first use of two types of sensor-fused weapons, the SADARM and the CBU-105, one may deduce that the category of sensor-fused weapons in itself is not homogeneous. While the latter contains an overall number of 40 bomblets, the former only encompasses two. Not only has the United States produced sensor-fused munitions. Munitions of this variety also include the German SMArt 155 (Suchzünder Munition für die Artillerie, English: Sensor-Fused Munition for the Artillery) with two to four explosive sub-munitions where each sub-munition contains one active and one passive millimetre wave and one infrared sensor to detect and engage single targets as well as electronic fail-safe mechanisms;⁸⁸ or the French/Swedish BONUS 155mm artillery shells with two explosive sub-munitions where each sub-munition is similarly equipped with three infrared sensors and a laser radar to detect and engage single targets as well as with electronic fail-safe mechanisms.⁸⁹ However, neither the SMArt 155, nor the BONUS artillery shells have been used in combat as of yet.

A paradigmatic manifestation of an asymmetric armed conflict where cluster munitions have been used was that between Hezbollah and the Israeli Defence Forces (IDF) between 12 July and 14 August 2006 in Lebanon. While it is clear that Hezbollah at least in some instances launched rockets from the midst of or close to civilian areas against targets in northern Israel,⁹⁰ the IDF used approximately 4 Mio. ground-delivered and air-dropped

⁸⁶ Human Rights Watch, "Off Target", *supra* note 81, at 84-85, 111-112.

⁸⁷ R. McGrath, "Sensor-Fuzed Submunitions and Clean Battlefields: Examining the Facts", Lunchtime Presentation at the Dublin Conference on Cluster Munitions, 21 May 2008, <http://thebanbus.org/?s=Rae+McGrath> (last visited 20 January 2010).

⁸⁸ Dullum, "Cluster weapons", *supra* note 36, at 56.

⁸⁹ See the website of the French producer company Nexter, "Artillery Ammunition: Bonus", http://www.nexter-mechanics.fr/index.php?option=com_content&view=article&catid=50:munitions-dartillerie&id=109:bonus-&Itemid=93&lang=en (last visited 20 January 2010).

⁹⁰ Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Milon Kothari, Mission to Lebanon and Israel, 2 October 2006, UN-Doc. A/HRC/2/7, at para. 58.

cluster sub-munitions in response.⁹¹ The majority of cluster munitions used were 1,2 Mio. M77 sub-munition grenades delivered by the M26 MLRS rocket system of which most were fired by the IDF in the final days of the conflict when a ceasefire was already imminent.⁹²

Israel also fired sub-munitions delivered by 155mm U.S. produced artillery projectiles, each carrying 88 M42 and M46 DPICM.⁹³

Two models of the Israeli-produced M85, equally delivered by 155mm artillery projectiles, one with and one without self-destruct mechanism, were also used, accounting for 6% of all sub-munitions used; with regard to the M85 type with self-destruct mechanism, contrary to above-mentioned claims by manufacturers and users that the failure rate was less than 1%, duds from such sub-munitions were encountered in higher numbers than expected. As a result, post-conflict clearance efforts by the United Nations Mine Action Coordination Centre for Southern Lebanon (UNMACC-SL) revealed that the actual failure rate under combat conditions was at least 5%, if not 10%.⁹⁴ Also, other experts independently found the actual failure rate at around 10%.⁹⁵ The experience gained from Iraq and Lebanon provides robust evidence that the quantity of duds of allegedly very reliable cluster sub-munitions with self-destruct mechanisms will be significantly higher under real combat conditions than failure rates arrived at under ideal test conditions.

The IDF also dropped a significant number of old Vietnam-era CBU58 bomb containers, each containing 650 BLU63 sub-munitions where individual container shells have been found indicating that the warranty of these explosives had already expired in the 1970s.⁹⁶

On the other hand, also Hezbollah launched 118 Type-81 Chinese-produced cluster rockets, each containing 39 explosive sub-munitions, which amounts to 4563 explosive sub-

⁹¹ C. Clarke, "Unexploded Cluster Bombs and Submunitions in South Lebanon: Reliability from a Field Perspective", ICRC Expert Meeting Montreux, 2007, *supra* note 41, at 41; Human Rights Watch, "Flooding South Lebanon: Israel's Use of Cluster Munitions in Lebanon in July and August 2006", February 2008, at 39-40, <http://hrw.org/reports/2008/lebanon0208/lebanon0208web.pdf> (last visited 20 January 2010).

⁹² M. Rapoport, "IDF Commander: We Fired More than a Million Cluster Bombs in Lebanon", *Haaretz*, 12 September 2006, <http://www.haaretz.com/hasen/spages/761781.html> (last visited 20 January 2010).

⁹³ Human Rights Watch, "Flooding South Lebanon", *supra* note 91, at 29.

⁹⁴ Clarke, "Unexploded Cluster Bombs and Submunitions in South Lebanon", *supra* note 91, at 42; see also, King *et al.*, "M85: An analysis of reliability", *supra* note 83, at 14-22.

⁹⁵ King *et al.*, "M85: An analysis of reliability", *supra* note 83, at 15. For example, a newspaper report described the case of a woman who was severely injured by a dud stemming from an M 85 sub-munition with an allegedly reliable self-destruct mechanism. This casualty occurred in September 2007, more than a year after the end of the armed conflict between Israel and Hezbollah. See R. Murray, "What a 'Safe' Cluster Bomb Did", *Inter Press Service News Agency*, 15 October 2007, <http://ipsnews.net/print.asp?idnews=39652> (last visited 20 January 2010).

⁹⁶ *Ibid.*, at 42; Human Rights Watch, "Flooding South Lebanon", *supra* note 91, at 32.

munitions in total.⁹⁷ While this showed the negative potential consequences of the proliferation of these weapons to irresponsible non-state actors the scale of use pales in comparison with the massive number of Israeli use of these weapons.

As a consequence of IDF use of cluster munitions, it was estimated that up to 1 Mio. sub-munitions did not explode on impact, littering Lebanon with sub-munition duds that might explode upon the slightest movement of any person, entailing the risk of losses of lives and limbs until the present day.⁹⁸ The contamination of agricultural land by unexploded sub-munitions and the resulting inaccessibility of these areas have also led to severe economic losses where a large number of people depend on agriculture for a living.⁹⁹ Unexploded sub-munitions also blocked water supplies, access to houses and schools as well as inhibited rehabilitation and relief efforts.¹⁰⁰

The massive use of these weapons in Lebanon and the horrific consequences this entailed for civilian lives, limbs and lands were a triggering moment for a renewed consciousness of the humanitarian harm cluster munition use causes.

Finally, during the armed conflict between Russia and Georgia over the secessionist region of South Ossetia in August 2008, Russia used cluster munitions of its own production, air-dropped RBK series bombs, containing either 60 or 108 AO-2.5. RTM antipersonnel and anti-materiel sub-munitions each, ground-launched Uragan rockets, each containing 30 sub-munitions with self-destruct mechanisms, as well as at least one ground-fired Iskander missile, carrying 20 sub-munitions each. On the other hand, also Georgia used the Gradlar Multiple Launch Rocket System where each MK.-4 160 mm rocket contains 104 M-85 sub-munitions each. Altogether, it was confirmed that Russian cluster munitions killed 12

⁹⁷ Human Rights Watch, “Civilians Under Assault: Hezbollah’s Rocket Attacks on Israel in the 2006 War”, August 2007, at 44-48, <http://www.hrw.org/reports/2007/iop0807/iop0807web.pdf> (last visited 20 January 2010).

⁹⁸ Clarke, “Unexploded Cluster Bombs and Submunitions in South Lebanon”, *supra* note 91, at 41, 43. According to the UN Mine Action Coordination Centre for Southern Lebanon (UNMACC-SL), as of 1 January 2009, 218 civilian casualties occurred due to the presence of unexploded sub-munitions, 198 injured and 20 killed. See <http://www.maccsl.org/reports/Victims/Victims.pdf> (last visited 13 August 2009).

⁹⁹ Human Rights Council, Report of the Special Rapporteur on the right to food, Jean Ziegler, on his mission to Lebanon, 29 September 2006, UN Doc. A/HRC/2/8, at paras. 12, 23; Human Rights Watch, “Flooding South Lebanon”, *supra* note 91, at 57-59; Landmine Action, “Counting the cost: The economic impact of cluster munition contamination in Lebanon”, May 2008, at 10-17, http://www.landmineaction.org/resources/Counting_the_cost.pdf (last visited 20 January 2010).

¹⁰⁰ Landmine Action, “Foreseeable harm: The use and impact of cluster munitions in Lebanon: 2006”, October 2006, at 21-34, <http://www.landmineaction.org/resources/Foreseeable%20Harm.pdf> (last visited 20 January 2010).

civilians and injured 46, and Georgian cluster munitions killed four civilians and injured eight more.¹⁰¹

Despite successful efforts to address the humanitarian concerns, this last case showed the urgency of protecting civilians from the consequences of already completed cluster munition use as well as future use. While already touched upon, the manifold humanitarian impact and challenges of cluster munition use shall be detailed in the next subsection.

2.4. *Humanitarian Concerns*

“I was on my way to work that day – all medical workers were on duty every day, working extra hours. I was standing right across the street from the health centre, waiting to cross when the bombs fell. At first, there was this noise, something I’ve never heard before. And then it hit me in the leg. And then the other leg, too. I felt severe pain in my right leg, but I didn’t look at it. I was still standing, didn’t know what to do. There were detonations everywhere, cars were getting hit. I managed to cross to the other side of the street and to lie down behind a car. A car nearby was burning. I was in a state of shock, but I was also aware of everything that was happening. A woman fell down a couple of metres away from me, hit in the stomach by several fragments. My colleagues started coming out of the building, they were running around, looking for the injured. I was yelling, calling them, but they couldn’t see me. I started hitting the car in front of me with both of my hands. I tried to stand up; I was wearing trousers, I tried to pull them up a bit, to ease my way up. It was then that I saw it for the first time. I remember thinking clearly: so strange, a bare bone, no muscle tissue at all. It was my right leg. The other one didn’t react at all. There were many small bomb fragments in it. A green van stopped by. They told me later that it was a volunteer who collected the dead and the injured in the streets during the attacks. He tied up my leg and carried me into the van. He took me to the hospital, to the department of surgery. Then the burning sensation came, it was not just the leg, my whole body was burning. It was unbearable. I was hitting the doctor, asking him to spare me the pain, to kill me. ‘Throw me out the window!’ I remember repeating that many, many times. They sedated me. When I woke up the next day, my right leg was amputated. They saved the left leg. They had to patch it up; some of the fragments couldn’t be taken out.’ Gita shows her amputation without hesitation. I would show it to everyone, as many times as necessary, if only that could be a guarantee that something like this would never happen to anyone again.”¹⁰²

I have had more than 10 operations on my left leg. It was amputated below the knee. I wear a prosthesis. Look at it. It hurts. Now the shrapnel has been removed, but I have wounds in my right leg also. It hurts too. The last surgery was two months ago and lasted two hours. I don’t know which type of weapon injured me, but I know that it was a weapon that comes from the sky. During the war we run away from our village. We came back once the war was over. When we got back I was with three other girls from my family in front of the house when the thing exploded. I found the thing, and I started playing with it. I didn’t know exactly what it was. I dropped it and it exploded. I got injured, but the other three girls weren’t touched by the explosion. I don’t remember what happened next. They put me in a car and drove me to the hospital. I was unconscious for 20 days. I woke up and then fainted again and again. I was in the hospital in Sur, not in Beirut, and my parents were with me. When I was injured I could feel from the beginning that I didn’t have the leg anymore. I knew that. At the hospital I was very unhappy because I lost my leg, but apart from that everything else was ok. [...] Cluster munitions were all around my house. I saw lots of bomblets, it was like they were all around, but now they have been cleared. Some people had explained to me that I shouldn’t touch anything. This was before the

¹⁰¹ Human Rights Watch, “A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008”, April 2009, at 24-68, http://www.hrw.org/sites/default/files/reports/georgia0409web_0.pdf (last visited 20 January 2010).

¹⁰² Gita Jović, Serbian victim of NATO member state cluster munition of bombing of Niš on 7 May 1999, quoted in Norwegian People’s Aid, “Yellow Killers: The Impact of Cluster Munitions in Serbia and Montenegro”, February 2007, at 22, <http://www.npaid.org/filestore/YellowKillersNPA.pdf> (last visited 20 January 2010).

*incident. On the day of the incident I thought it was a toy, it looked like a ball. Incidents are normal; I know lots of kids in my situation.*¹⁰³

These are just two accounts that attest to the consistent pattern of civilian injury during as well as after cluster munition attacks in over 40 years of use of these weapons.

The first story is an example of civilian harm incurred by cluster munitions during attacks. Since the overwhelming majority of explosive sub-munitions is free-falling once they have been dispersed, i.e. cannot be guided towards a single target, there is a high probability that they will stray from the intended target and hit civilians or civilian objects. Apart from their unguided character and resulting inaccuracy, the wide dispersal pattern (footprint) of the sub-munitions delivered in the hundreds, sometimes even thousands, serves as an additional aggravating factor. That means that not only one or a few explosives may hit far from the intended target but literally hundreds or even thousands, which holds true even if some of the explosive sub-munitions land impact where intended.

As has been explained above, military forces regard cluster munitions as effective against area targets like airfields, radar installations or surface-to-air missile sites, or against moving targets whose precise location cannot be easily known because of their wide dispersal pattern. While in open, uninhabited areas civilian casualties at the time of cluster munition attacks are not likely, this military rationale is in tension with the humanitarian concern of inflicting substantial civilian harm where cluster munitions are used in or near civilian residential areas. Unfortunately, from Grimsby during WWII to Georgia in 2008 cluster munitions were used in or near populated areas.

The second account details the other major humanitarian concern associated with cluster munitions at the post-conflict stage: Since many sub-munitions do not explode upon impact they lie in wait as *de facto* anti-personnel landmines and may detonate upon the slightest movement by any person, killing and maiming long after an attack. The reasons why sub-munitions become duds are manifold and include design failures, environmental conditions and human error. Design failures means that certain mechanical components of the cluster munition fail to function as intended despite routine deployment. Examples include mid-air collision of sub-munitions, resulting in detonations and damage to other sub-munitions during flight, a failure of the ribbon responsible for starting the process of activation of the sub-munition or a faulty detonator that may have failed to initiate the main

¹⁰³ Rasha Zayoun, 17-year-old Lebanese girl injured by an unexploded sub-munition in Sour (Tyre), South Lebanon in 2007, based on an interview by Handicap International in Belgrade on 2 October 2007, <http://blog.banadvocates.org/index.php?post/2007/11/02/Rasha-Zayoun> (last visited 20 January 2010).

explosive charge.¹⁰⁴ Environmental factors comprise conditions of storage as well as soil and vegetation conditions. Poor ammunition storage practices such as exposing sub-munitions to extremely high temperatures, humidity or stockpiling very old types may lead to corrosion or degradation of the fuses.¹⁰⁵ With regard to soil and vegetation upon impact, many fuses found in cluster sub-munitions are mechanical impact fuses that require a certain amount of impact force to activate the detonator. This amount of force may not be achieved where the sub-munition does not land on a hard surface but on muddy, sandy or snowy ground, increasing the probability of duds left behind.¹⁰⁶ Moreover, the ribbon which sets in motion the detonation process of the sub-munitions may become entangled in trees and bushes, which may also preclude the impact needed to set off the main charge inside the sub-munition.¹⁰⁷ Finally, as with any weapon, even the most perfect design cannot compensate for human error during use, such as miscalculations of the required range and/or elevation for the sub-munition to arm correctly or the failure to set the projectile fuse correctly. Combat conditions, which often involve time pressure, tiredness, high levels of stress and difficult weather, still increase the potential for human error.¹⁰⁸

Typically, since the metal casing of sub-munitions shatters into large numbers of fragments upon explosion, irrespective of whether the sub-munition detonates as intended during or in a dud state after an armed conflict, shrapnel may kill or severely injure a victim; when a fragment enters the human body, it will transfer energy to the tissue at a very high rate, causing the formation of large cavities which in turn will induce tissue strain and rupture of muscles, nerves and blood vessels.¹⁰⁹ The probability of fatality is proportional to the ratio between deployed energy and body mass; since children have less body mass than adults, the overall damage caused by a fragment is much larger and consequently, children are at greater risk of succumbing to their wounds once hit.¹¹⁰ Among the most vulnerable body parts are the abdomen and the limbs which explains why many cluster munition victims¹¹¹ undergo multiple surgery of their limbs, often rendering amputations necessary.¹¹² Eye injuries or deafness are also common.¹¹³

¹⁰⁴ King *et al.*, “M85: An analysis of reliability”, *supra* note 83, at 28-30.

¹⁰⁵ Dullum, “Cluster weapons”, *supra* note 36, at 47.

¹⁰⁶ *Ibid.*

¹⁰⁷ King *et al.*, “M85: An analysis of reliability”, *supra* note 83, at 26-27.

¹⁰⁸ *Ibid.*, at 26.

¹⁰⁹ Dullum, “Cluster weapons”, *supra* note 36, at 37, 38.

¹¹⁰ *Ibid.*, at 40.

¹¹¹ For purposes of consistency, the term “victim” shall be used throughout this work while being aware of the preference of certain humanitarian organisations to refer to those directly affected by death and injury as “survivors”, which arguably implies a more positive connotation than “victim”. See in this regard, Survivor Corps, “What is Survivorship?”, <http://my.survivorcorps.org/NetCommunity/Page.aspx?pid=295> (last visited 20

Children are not only the most vulnerable group to suffer death and severe injury once hit but especially at the post-conflict stage are among the groups most at risk to fall victim to exploding sub-munition duds. The main reason is that children, who are mostly less aware of the risks of unexploded sub-munitions than adults, feel particularly attracted to the shapes and colours of the sub-munitions encountered and often start playing and tampering with the duds until they detonate.¹¹⁴

Men carrying out livelihood activities such as farming, herding animals, collecting wood or hunting are also amongst the most severely affected by sub-munition duds.¹¹⁵ For example, in Lebanon after the conflict in 2006, farmers went into their fields despite awareness of the dangers of unexploded sub-munitions out of economic necessity to save some of their tobacco, olive and citrus fruit harvests.¹¹⁶ Since the armed conflict in Lebanon in the summer of 2006 occurred during the peak season of the harvest, already a significant proportion of that harvest was lost. South Lebanon was especially hard hit by the contamination of agricultural fields, as agriculture makes up 70% of this area's economy, with 90% of the local population dependent on it.¹¹⁷ An aggravating factor was that many farmers usually repay their debts during the harvest season between May and October to secure credit for the next season; as a result, due to the loss of income from the 2006 harvests, many farmers have become more heavily indebted.¹¹⁸ Moreover, due to limited resources, professional clearance personnel in the immediate aftermath of the conflict focused their efforts on more heavily populated areas such as urban centres and roads rather than agricultural fields.¹¹⁹ As UNDP observed "People are forced to balance their need for

January 2010) (defining "survivorship" as "a positive and pragmatic approach to quality living even after a traumatic experience of affliction, adversity or loss." In contrast a victim mentality is characterised by blame, resentment, and self-pity, thus carrying a much more negative connotation than survivorship.)

¹¹² See for example, the accounts of cluster munition victims from Afghanistan, Cambodia, Ethiopia, Iraq, Lebanon, Serbia and Tajikistan at the Ban Advocates homepage, an initiative launched by Handicap International, to have the voice of victims heard in international deliberations on a treaty on cluster munitions, <http://blog.banadvocates.org/index.php?> (last visited 20 January 2010).

¹¹³ International Committee of the Red Cross, "Cluster Munition Victims: What is known and what is needed?", [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/\\$File/Cluster-munition-victims-factsheet.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/$File/Cluster-munition-victims-factsheet.pdf) (last visited 20 January 2010); Geneva International Centre for Humanitarian Demining, "A Guide to Cluster Munitions", *supra* note 35, at 89.

¹¹⁴ Handicap International in its report *Circle of Impact*, a global study on the humanitarian impact of cluster munition use, found that in most countries affected by cluster munitions, one major reason for child casualties at the post-conflict stage was playing and tampering with duds, including in Cambodia, Chechnya, Croatia, Eritrea, Iraq, Kosovo, Laos and Lebanon. See Handicap International, "Circle of Impact", *supra* note 71, at 25, 31, 51, 66, 71, 86, 107, 109, 125.

¹¹⁵ *Ibid.*, at 25, 31-33, 41, 49, 51, 53, 59, 61, 71, 81, 96-97, 108, 118, 123-124, 135.

¹¹⁶ *Ibid.*, at 123; Human Rights Watch, "Flooding South Lebanon", *supra* note 91, at 58.

¹¹⁷ Handicap International, "Circle of Impact", *supra* note 71, at 123.

¹¹⁸ Human Rights Council, Report of the Special Rapporteur on Food, *supra* note 99, at para. 22.

¹¹⁹ *Ibid.*, at para. 23; Human Rights Watch, "Flooding South Lebanon", *supra* note 91, at 59.

land with the threat of being killed or injured”.¹²⁰ Where, for instance, a whole family depends on farming a field, a farmer may be willing to undertake considerable risks. Under such circumstances, it also does not come as a surprise that many farmers attempted to defuse sub-munition duds themselves, including by burning, throwing them at hard surfaces or dumping them in unused areas like ditches and ponds.¹²¹

Another group especially endangered by unexploded sub-munitions in the immediate post-conflict period before large scale clearance has begun is that of internally displaced persons (IDPs) and refugees returning to their homes, since in many instances these people are unaware of and unprepared for the risk awaiting them.¹²²

The experience of clearance efforts of unexploded sub-munitions in Lebanon demonstrates that casualties caused by duds are not confined to civilians alone – although according to Handicap International 98% of the victims are civilians – but that also professional clearance experts are among them.¹²³ As a former clearance expert of the Serbian army, who was severely injured by an unexploded BLU-97 sub-munition in Serbia in 2000, reminded us

*“In the course of just one year after the war in Lebanon had ended, 45 of my fellow de-miners, 45 people who were trained to work with cluster munitions, became the victims of cluster munitions while clearing unexploded sub-munitions. This tells us that cluster munitions do not discriminate among their victims, and that there are no cluster bombs that can guarantee anyone’s safety; if professionals are getting injured, what can we expect will happen to civilians and innocent children?”*¹²⁴

Once a cluster munition victim loses one or several limbs, the first step is to ensure emergency and medical care including pre-hospital care, i.e. evacuation, first aid and transport to a medical facility, as well as hospital care where the victim will undergo surgery

¹²⁰ United Nations Development Programme, Bureau of Crisis Prevention and Recovery, “Prohibiting Cluster Munitions: Our chance to protect civilians”, April 2008, at 7, http://www.undp.org/cpr/documents/UNDP_clusterMunitions_2008.pdf (last visited 20 January 2010).

¹²¹ Landmine Action, “Counting the cost”, *supra* note 99, at 14; Human Rights Council, Report of the Special Rapporteur on Food, *supra* note 99, at para. 23.

¹²² Handicap International found that such returnees constituted near-majorities of the total sub-munition casualties during the immediate post-conflict period in a variety of affected countries and territories, including in Afghanistan, Kosovo, Laos, Lebanon and Vietnam. See Handicap International, “Circle of Impact”, *supra* note 71, at 32, 41, 70, 96, 122-123, 139.

¹²³ The statistics published by the United Nations Mine Action Coordination Centre for South Lebanon detail that between 14 August 2006 and 1 January 2009 there were altogether 55 casualties among deminers, the majority of them killed or injured by cluster sub-munition duds. See <http://www.maccsl.org/reports/Victims/Victims.pdf> (last visited 14 August 2009).

¹²⁴ B. Kapetanović, Statement at the Opening Ceremony, Wellington Conference on Cluster Munitions, 18 February 2008, <http://blog.banadvocates.org/index.php?post/2008/02/18/Branislavs-Statement-Wellington-February-2008> (last visited 20 January 2010).

and recovery from treatment.¹²⁵ But assistance to victims requires much more than just emergency and medical care. As an Iraqi cluster munition victim cautioned:

“After the operation, I did not receive physical rehabilitation or any other assistance, and this is the case for the majority of survivors. However, it is important to start physical rehabilitation as soon after the operation as possible and to continue it later on to regain maximum capability of the injured limbs and to learn to use your changed body.”¹²⁶

Such physical rehabilitation includes physiotherapy and the fitting of orthopaedic appliances such as prostheses, orthoses, crutches, and wheelchairs in order for the victim to recover his/her mobility.¹²⁷ This is not a one-off task, since such devices subsequently need to be replaced or readjusted on an ongoing basis.¹²⁸

Beyond the physical hardship that cluster munition victims face, they frequently also experience psychological trauma, as the following statement by a 16-year-old Afghan cluster munition victim illustrates:

“I face all sorts of barriers, material and immaterial, that prevent my full participation in community life. Cluster munitions prevented me from attending school, playing with other kids, and other social activities. Cluster munitions destroyed my dreams. People laugh at me and have a negative attitude towards me. They see me as a beggar. They pity me.”¹²⁹

Indeed, it is a common phenomenon that victims suffer a loss of dignity and self-esteem which is often exacerbated by a sense of being rejected by their communities due to their disability. In many cases, they may also not be able to resume their former work or attend school which contributes to their psychological problems. Hence, for many of them it is their greatest desire to become fully productive members of society again.¹³⁰ Thus, medical care and physical rehabilitation must be accompanied by psychological and social support and by measures promoting socio-economic inclusion of victims such as vocational training and the creation of employment opportunities.

¹²⁵ L. Maresca, “Assistance for the victims of cluster munitions: The perspective of the International Committee of the Red Cross”, Statement at the European Regional Conference on Cluster Munitions, 30 October 2007, <http://www.diplomatie.be/en/pdf/maresca.pdf> (last visited 20 January 2010).

¹²⁶ A. Najem, Statement during the Victim Assistance session, Vienna Conference on Cluster Munitions, 7 December 2007, <http://blog.banadvocates.org/index.php?post/2007/12/07/Ahmeds-speech-Vienna-December-2007> (last visited 20 January 2010).

¹²⁷ Maresca, “Assistance for the victims of cluster munitions”, *supra* note 125.

¹²⁸ *Ibid.*

¹²⁹ Soraj Ghulam Habib, Statement at the Opening Ceremony, Wellington Conference on Cluster Munitions, 18 February 2008, <http://blog.banadvocates.org/index.php?post/2008/02/18/Sorajs-Statement-Wellington-February-2008> (last visited 20 January 2010).

¹³⁰ ICRC, “Cluster munition victims”, *supra* note 113; Maresca, “Assistance for the victims of cluster munitions”, *supra* note 125.

However, for instance in Afghanistan, Iraq, Laos, Lebanon and Vietnam, the most heavily affected countries in terms of casualties, national capacities are inadequate to ensure such comprehensive assistance to cluster munition victims. Many of these victims live in poor and remote rural areas where access to health care and rehabilitation services, sometimes even basic care is limited, such as in Afghanistan, Laos and Vietnam.¹³¹ This problem is aggravated where the environment in which medical and rehabilitation services must be delivered remains insecure.¹³² The health care system may be weak and may have even suffered more due to armed conflict, with a lack of equipment or trained staff such as in Iraq where insufficient resources are devoted to psychosocial support and socio-economic inclusion services.¹³³ Where the governmental capacities are non-existent or stretched to their limits, such as in post-conflict South Lebanon, often NGO operators step in but also they cannot cover certain costs, including transport to and accommodation at health facilities which the direct victims and/or their family then have to pay out of their own pockets.¹³⁴

These costs may place a significant financial burden on the victims and their families. In addition, where males are the “breadwinners” their death or injury represents a great economic loss for their families.¹³⁵ Thus, not only the person that is killed or injured by cluster munitions may be regarded as victim but also their families. As the Serbian wife of a man severely injured by cluster munitions and the mother of two underage children, explained,

“I don’t know what was more difficult: To watch my husband’s torments, caused by these grave injuries, or my children growing up before their time. He was in the hospital when the children started a new school year. In addition to all the suffering and the pain, there were also financial troubles and uncertainty. Every visit to the hospital was painful, for me, for the children, and for their father. Instead of playing with other children, they were travelling all the time with me to the hospital to visit their father. [...] They experienced prejudice and intolerance at school for years because of their father’s disability. I often ask myself the question, and now I am asking you, too: Who is the cluster bomb victim? Is it just the one innocent person, the victim him- or herself, who is certainly suffering the most, or are we, the ones close to that person, also suffering too? The actual number of cluster munitions victims is much larger than what statistics show. Whole families, whole communities are affected by them.”¹³⁶

As regards communities, it has already been shown above that cluster sub-munition contamination poses a considerable obstacle to access to agricultural and pasture lands,

¹³¹ Handicap International, “Circle of Impact”, *supra* note 71, at 37, 45, 102.

¹³² ICRC, “Cluster munition victims”, *supra* note 113.

¹³³ Handicap International, “Circle of Impact”, *supra* note 71, at 113.

¹³⁴ *Ibid.*, at 129.

¹³⁵ ICRC, “Cluster munition victims”, *supra* note 113; Handicap International, “Circle of Impact”, *supra* note 71, at 139.

¹³⁶ Dusica Vučković, Statement on Victim Assistance, Wellington Conference on Cluster Munitions, 20 February 2008, <http://blog.banadvocates.org/index.php?post/2008/02/20/Dusicas-Statement-Wellington-February-2008> (last visited 20 January 2010).

especially by the poor rural population. In many affected countries where the population mainly depends on agriculture¹³⁷ and tending animals, loss of arable and grazing land still aggravates pre-existing poverty, entailing income losses and inhibiting longer-term development.¹³⁸ A particularly worrying development in many contaminated countries has been the upsurge of the so called “scrap metal trade” where individuals collect war waste in an attempt to compensate for their income losses due to lack of access to agricultural and grazing lands, creating one more incentive to deliberately handle sub-munition duds.¹³⁹

Under such circumstances, clearance becomes a top priority to increase the amount of arable land, food production and thus, development once the focus of clearance efforts can be shifted from the most densely populated contaminated areas.¹⁴⁰ Generally, coordinated clearance efforts are essential to reduce the threat of unexploded sub-munitions for civilians. In order to be effective, planning for clearance should usually already begin during conflict, i.e. before clearance teams can even deploy to the affected areas.¹⁴¹ Once armed hostilities have ended, the emergency clearance phase begins where the objective is to remove the most immediate hazards for the local population, the visible sub-munition duds. This includes clearance of essential infrastructure like routes for refugee/IDP return and for aid delivery. The better the location and impact of the hazard is identified at this stage, the more effective

¹³⁷ For instance, Handicap International reported that in Vietnam, 56,8 % of the population relies on agriculture for income. See Handicap International, “Circle of Impact”, *supra* note 71, at 45. In South Lebanon, according to different sources, agriculture is also the main source of income at between 56 and 70%. See *ibid.*, at 123; Landmine Action, “Counting the cost”, *supra* note 99, at 29 (quoting figures by the International Fund for Agricultural Development).

¹³⁸ For example, a preliminary assessment in the immediate aftermath of the armed conflict in Lebanon in 2006 by the Food and Agricultural Organisation (FAO) estimated that 9,450 hectares of land, or 26% of all agricultural land in South Lebanon was contaminated by unexploded sub-munitions. See Food and Agricultural Organisation, “Damage and Early Recovery Needs Assessment of Agriculture, Fisheries and Forestry”, November 2006, at 10, <http://www.fao.org/newsroom/common/ecg/1000445/en/LebanonDNAMFinalReportTCP.pdf> (last visited 20 January 2010). However, the more recent study by Landmine Action deems these figures as an overstatement, estimating the scale of contamination at 2,596 hectares, equating to 4,8 % of all farmland in this area. See Landmine Action, “Counting the cost”, *supra* note 99, at 10, 14.

¹³⁹ The collection of war waste has been identified as a particular problem in Cambodia, Laos, Afghanistan and Iraq. See Handicap International, “Circle of Impact”, *supra* note 71, at 27, 36, 97, 112.

¹⁴⁰ Compare Handicap International’s analysis of the impact of cluster munition contamination on food production and development in Laos and Afghanistan. Handicap International, “Circle of Impact”, *supra* note 71, at 36, 101.

¹⁴¹ The existence of model documents such as Concept of Operations papers facilitate the early development of calls for tender documents and the early issue of contracts to ensure that clearance agencies may be present at the clearance sites upon a ceasefire. This is also the time where liaison among various actors, including various clearance operators, NGOs, intergovernmental organisations, private demining companies, UN peacekeepers, the national army, ministries and other agencies should be developed to ensure the best possible coordination. See Geneva International Centre for Humanitarian Demining, “Clearance of Cluster Munitions based on experience in Lebanon”, Technical Notes for Mine Action 09.30/06, 1 January 2008, at 9, [http://www.mineactionstandards.org/tnma/TN_09.30.06-2008_clearance_of_cluster_munitions_based_on_experience_in_Lebanon_\(version_1.0\).pdf](http://www.mineactionstandards.org/tnma/TN_09.30.06-2008_clearance_of_cluster_munitions_based_on_experience_in_Lebanon_(version_1.0).pdf) (last visited 20 January 2010).

the immediate clearance efforts will be.¹⁴² For such a general threat assessments and technical surveys gathering information on the location of the munitions, the number, the type and technical specifications, the date of use, target location and description, the result of the strike (hits/misses), weather conditions, especially wind conditions at the time of use, as well as width and length of the impact area can greatly facilitate clearance of unexploded sub-munitions.¹⁴³

Obtaining this information may be particularly challenging where the user causing the sub-munition contamination is not the same as the state that exercises control over the affected territory at the post-conflict stage, as evidenced by the experiences from Kosovo, Serbia and Lebanon. While in Kosovo, NATO promptly handed over records with coordinates of proposed cluster munition bombing targets and the types used after the end of hostilities, this information was too inaccurate for effectively locating duds on the ground.¹⁴⁴ In contrast to Kosovo, NATO until recently did not provide any coordinates of the 1999 strike records to Serbian authorities concerning Serbia. Only at the end of September 2007, more than eight years after cluster bomb use, NATO finally transferred the data which are needed for a technical survey the Serbian authorities planned to carry out to identify locations of duds as a basis of clearance strategies.¹⁴⁵ As regards Lebanon, the user state Israel did not transfer any of the required information on target locations, quantities and types of cluster munitions used to the UNMACC until May 2009.¹⁴⁶ Previously, it had only given maps to the UN with circles where Israeli forces indicated where there may be a concentration of unexploded ordnance but these maps were not very helpful in finding out about the existing contamination and planning clearance priorities accordingly.¹⁴⁷

Where information on possible cluster munition strike locations is not forthcoming, it is all the more necessary during the emergency phase to keep accurate records on who

¹⁴² Geneva International Centre for Humanitarian Demining, "Guide to Cluster Munitions", *supra* note 35, at 40.

¹⁴³ J. Flanagan, "Explosive Remnants of War-Experience from Field Operations", Discussion Paper, Group of Governmental Experts of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 15 July 2002, UN Doc. CCW/GGE/II/WP.13, at 2.

¹⁴⁴ *Ibid.*

¹⁴⁵ NATO News, "NATO hands over target data on cluster munitions to the Serb authorities", 25 September 2007, http://www.nato.int/cps/en/SID-09A28E86-06C35391/natolive/news_7817.htm?mode=news (last visited 20 January 2010).

¹⁴⁶ See UN News Service, "Israel hands over cluster bomb maps to UN force in Lebanon", 13 May 2009, <http://www.un.org/apps/news/printnewsAr.asp?nid=30786> (last visited 20 January 2010); BBC News, "UN gets Israeli cluster bomb maps", 13 May 2009, http://news.bbc.co.uk/2/hi/middle_east/8048460.stm (last visited 20 January 2010).

¹⁴⁷ Dayla Farran, spokeswoman of UNMACC-SL, *quoted in* Human Rights Watch, "Flooding South Lebanon", *supra* note 91, at 91.

conducted clearance in which locations and the number and types of duds cleared to enable review and follow up for subsequent planning.¹⁴⁸

After the immediate visible threat of unexploded sub-munitions has been removed, clearance action moves to the post-emergency phase, using a metal detector assisted sub-surface search to also identify duds that may have become buried in soft ground in the meantime. During this phase, a system of prioritisation as to the remaining areas to be cleared must be developed. In deciding how to allocate priorities, technical data such as the nature and extent of contamination, accessibility of sites, weather conditions or ground cover; the group at risk, i.e. civilians, humanitarian workers, security forces, including UN peacekeepers; the potential value of contaminated land; as well as the international legal obligations to which the state is bound where clearance is conducted must be considered.¹⁴⁹

The prioritisation process will result in the decision that certain areas will not be cleared immediately. In that case, other complementary measures to reduce the risk of unexploded sub-munitions for the civilian population must be taken, including the marking and/or fencing of contaminated areas and the provision of warnings and risk education, until clearance is completed.

Marking systems involve combination of signs and physical barriers that should be clearly visible, representing the hazard, and indicate the danger in a form that is recognised nationally and locally, especially which side of the marked boundary is considered dangerous and which safe. Durable signs of minimal value should be used, as otherwise in poor areas they are likely to be removed. Where the sign could be masked by vegetation or terrain, the use of additional physical barriers should be considered.¹⁵⁰ Locations of markings and any casualties that occur despite the warning signs should be recorded as well as the markings maintained.¹⁵¹ Marking may be complemented by fencing but due to the fact that fencing is more expensive and in many cases will be removed by the local population it will be used more sparingly. For instance, fences would be erected around military installations or heavily contaminated sites close to densely populated areas which are not to be cleared in the immediate future, due, for example, to poor access to the site.¹⁵²

¹⁴⁸ Geneva International Centre for Humanitarian Demining, "Clearance of Cluster Munitions based on experience in Lebanon", *supra* note 141, at 10.

¹⁴⁹ Geneva International Centre for Humanitarian Demining, "Guide to Cluster Munitions", *supra* note 35, at 64-65.

¹⁵⁰ United Nations Mine Action Service, International Mine Action Standards, 2nd edn., 1 January 2003, No. 08.40, http://www.mineactionstandards.org/IMAS_archive/Amended/Amended1/IMAS_0840_1.pdf (last visited 20 January 2010).

¹⁵¹ Geneva International Centre for Humanitarian Demining, "Guide to Cluster Munitions", *supra* note 35, at 75.

¹⁵² *Ibid.*, at 77.

On the one hand, warnings to the civilian population are usually transmitted through the mass media to raise awareness of the immediate threat of unexploded sub-munitions but also through posters, leaflets, brochures or T-shirts. On the other, risk education involves a longer-term process designed to create lasting awareness among the affected population and is provided in different environments, including in schools, among peers at work, in villages, in recreational settings or at home through dialogue rather than one-way information.¹⁵³ In order to tailor warnings and risk education efforts to the specific needs of the affected community it is necessary to know who is primarily at risk (e.g. children or adults, males or females, farmers or shepherds?), where they are at risk, what the types of sub-munitions are that represent the risk and why they are at risk (for instance because they need to access their contaminated fields out of economic necessity).¹⁵⁴ As with clearance, community liaison is essential for the success of warnings and risk education that must both take into account the needs of the community and the specific local cultural values.¹⁵⁵

In terms of coordinating and financing clearance and activities complementary to it, the United Nations Mine Action Service (UNMAS), a division of the UN Department of Peacekeeping Operations, acts as a focal point in establishing and managing mine action coordination centres responsible for clearance of landmines and other Explosive Remnants of War (ERW), including unexploded sub-munitions in affected territories, planning and managing clearance operations and mobilising financial resources. With regard to mobilising financial resources, UNMAS manages the UN Voluntary Trust Fund for Assistance in Mine Action, established in 1994 by the UN Secretary-General to finance clearance operations and UNMAS coordination and advocacy services. Additional funding is provided by governments, international organisations, NGOs and private individuals.¹⁵⁶

¹⁵³ *Ibid.*, at 79-80. Risk reduction education in schools would, for example, incorporate games to ensure childrens' involvement so that the live-saving messages will not be lost on them. See, for example, UNICEF, "When learning saves lives: UNICEF supports mine-risk education in south Lebanon", http://www.unicef.org/emerg/lebanon_38279.html (last visited 20 January 2010).

¹⁵⁴ UNICEF & Geneva International Centre for Humanitarian Demining, "An Introduction to Mine Risk Education", International Mine Action Standards Mine Risk Education Best Practice Guidebook 1, November 2005, at 27, http://www.gichd.org/fileadmin/pdf/publications/MRE_Guidebooks_2005/MRE_Guidebook_1.pdf (last visited 20 January 2010).

¹⁵⁵ Geneva International Centre for Humanitarian Demining, "Guide to Cluster Munitions", *supra* note 35, at 81.

¹⁵⁶ See E-MINE Electronic Mine Information Network, <http://www.mineaction.org/overview.asp?o=21> (last visited 20 January 2010); http://www.mineaction.org/section.asp?s=who_pays_for_it (last visited 20 January 2010). Contributions to the Voluntary Mine Action Trust Fund alone totalled over \$ 126 Mio. from 1 January 2008 until 1 May 2009. The largest donor during this period were Canada with around \$ 40 Mio., Japan with around \$ 31 Mio., and the Netherlands with around \$ 13,5 Mio. See <http://www.mineaction.org/overview.asp?o=28> (last visited 20 January 2010). Overall, more than \$ 420 Mio. will be required in 2009 for addressing contamination of affected countries and territories by landmines and ERW, including unexploded sub-munitions, of which significant amounts are required in the countries most heavily affected by sub-munition duds. See

In terms of the significant resources that must be spent on clearance, from a development perspective, the following comments may be made: Firstly, since contamination occurs in countries that are already rather poor,¹⁵⁷ significant financial resources of the international community are needed to provide an adequate response. UNDP has drawn our attention to the fact that sub-munition contamination negatively impacts on the achievement of the following UN Millennium Development Goals (MDGs): MDG 1, eradicate extreme poverty and hunger due to restricted access to agricultural land, MDG 2, universal education due to restricted access to schools or delays in reconstructing school buildings after a conflict, MDG 3, gender equality, since female victims are less likely to receive medical care and more likely to face stigmatisation when injured or disabled and MDG 4, child health, as the presence of unexploded sub-munitions hampers efforts to decrease child mortality.¹⁵⁸ Secondly, the fact that these resources must be mobilised for clearance, rehabilitation of victims and related activities also means that they cannot be used for other pressing development issues; this indirectly also affects the achievement of other MDGs, including of MDG 5 (improve maternal health) and MDG 6 (combat HIV/AIDS, malaria and other diseases).¹⁵⁹

The existing humanitarian problem on the ground also reminds us that for a long time, the international community has adopted a *reactive* rather than a *preventive* approach towards the negative consequences of cluster munition use. This approach focused on remedying more or less successfully the effects, no matter the costs, without tackling the causes, i.e. preventing using these weapons at the outset. Instead, cluster munition use occurred for more than 60 years despite adverse humanitarian consequences each time these weapons were used.

http://www.mineaction.org/projects_funding.asp?c=&pillar=1&pillar=2&pillar=3&pillar=4&pillar=5&pillar=6&sh=%2C&aa= (last visited 27 October 2009).

¹⁵⁷ According to UNDP, Lebanon ranked 78th, Laos 133rd and Vietnam 114th out of 178 countries in 2008. No ranking was available for Afghanistan or Iraq. See, United Nations Development Programme, Human Development Reports, Country Tables, 2008 Statistical Factsheets, <http://hdr.undp.org/en/countries/alphabetical2008/> (last visited 27 October 2009).

¹⁵⁸ United Nations Development Programme, "Prohibiting Cluster Munitions", *supra* note 120, at 8.

¹⁵⁹ Cf. UN General Assembly, Report of the Group of Governmental Experts on the relationship between disarmament and development in the current international context, UN-Doc. A/59/119, 23 June 2004, at para. 32 (stating the discrepancy between rising military expenditure and inadequate accomplishment of poverty eradication and development goals as well as the heavy burden on the health system imposed by costs related to use of armaments, i.e. rehabilitation and long-term care for those injured).

3. Existing International Humanitarian Law relevant to Cluster Munitions: Prevention and Implementation Failed

“The use of Cluster Munitions is lawful and legitimate if such use takes into account existing International Humanitarian Law.”¹⁶⁰

“The ICRC also believes that a new international instrument is needed to comprehensively and effectively address the problem of cluster munitions. [...] I would like to emphasize that the ICRC does not take lightly its decision to call for regulation of a specific weapon. However, in our view, the severe and disproportionate human costs associated with cluster munitions necessitate such an approach.”¹⁶¹

“La utilización de las municiones en racimo en conflictos recientes ha demostrado que la naturaleza propia de estas armas, es decir, su falta de precisión aunada a sus elevadas tasas de error, hace que sus efectos sean desproporcionados e indiscriminados. Es evidente que las normas existentes del Derecho Internacional Humanitario no son suficientes para minimizar el riesgo permanente que su uso representa para la población civil.”¹⁶²

Cluster munitions are used in full-fledged military operations conducted between two or more fighting factions. The primary legal regime dealing with such situations of armed conflict is IHL with its overarching purpose to protect those that do not or do no longer participate in armed hostilities. However, as already mentioned, 98% of those suffering the consequences of cluster munition use have been civilians, i.e. precisely those that do not participate in armed hostilities. Thus, IHL apparently did not live up to its overarching purpose in protecting these civilians. Otherwise the humanitarian impact of the use of these weapons would not have been as severe. But the question arises why IHL failed: Was it because IHL principles and rules were insufficient in themselves to prevent this civilian harm or was it rather that the principles and rules were adequate but not properly implemented? Similarly, was civilian harm caused due to the nature of cluster munitions or rather through inappropriate use of these weapons? In engaging with these questions, it

¹⁶⁰ India, Statement to the Third Meeting of the Group of Governmental Experts to the Convention on Conventional Weapons, 7 July 2008, http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/07/india_07_07_08.pdf (last visited 27 October 2009).

¹⁶¹ International Committee of the Red Cross, Statement to the Third Review Conference to the Convention on Conventional Weapons, 7 November 2006, [http://www.onug.ch/80256EDD006B8954/\(httpAssets\)/3AE6F898E57895B1C125722000482BB7/\\$file/29+ICRC.pdf](http://www.onug.ch/80256EDD006B8954/(httpAssets)/3AE6F898E57895B1C125722000482BB7/$file/29+ICRC.pdf) (last visited 20 January 2010).

¹⁶² “The use of cluster munitions in recent conflicts has demonstrated that the nature of these weapons as such, that is to say, their lack of precision coupled with their high failure rates, entails that their effects are disproportionate and indiscriminate. It is evident that existing rules of International Humanitarian Law are not adequate to minimise the permanent risk that the use of these weapons represents for civilian populations.” See Mexico, Intervención del Embajador Pablo Macedo, Representante Permanente Alterno de México durante el Debate General de la III Conferencia de Examen de la Convención Sobre Ciertas Armas Convencionales, 7 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/287FCB768A4B0C81C1257220004730BE/\\$file/07+Mexico.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/287FCB768A4B0C81C1257220004730BE/$file/07+Mexico.pdf) (last visited 20 January 2010) (English translation by this author).

should be stated at the outset that until May 2008 there were no rules of international law specifically addressing cluster munitions in a comprehensive manner but the use of cluster munitions – like the use of any other weapon in armed conflict – was subject to general principles and rules of IHL. Thus, the following analysis relates to general IHL and addresses the principles and rules most relevant to cluster munitions. Protocol V to the CCW on ERW shall also be analysed.

3.1. *Military Necessity v. Humanity*

IHL adopts a realistic stance in that it is predicated on the assumption that a certain amount of death, injury and destruction in armed conflict is inevitable. On the other hand, past practices of “Total War” according to which armed hostilities may be conducted in a completely unrestrained fashion have shown that there should be limits to which weapons are used and how they are used.

IHL therefore attempts to strike a complex balance between two often countervailing considerations, notably military necessity and humanity. The 1868 St. Petersburg Declaration renouncing the use of certain explosive projectiles addressed this balance by fixing “the technical limits at which the necessities of war ought to yield to the requirements of humanity” and included a first definition of the principle of military necessity, stating that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”¹⁶³ Translated into present-day IHL the principle of military necessity recognises the use of lethal military force against military objectives, i.e. enemy combatants and military objects, as lawful.¹⁶⁴ The Declaration goes on to caution that “this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”¹⁶⁵

While this statement is restricted to soldiers alone, it encapsulates the generalisable rationale that where suffering, injury or destruction goes beyond what is militarily necessary, the infliction of such harm is forbidden by the principle of humanity. In this regard, it is also necessary to specify that military *necessity* must not be confused with mere military *utility*; this point was made by the ICRC already on the occasion of the second preparatory meeting

¹⁶³ 1868 St. Petersburg Declaration, *supra* note 8.

¹⁶⁴ Timothy McCormack *et al.*, “Report on States Parties’ Responses to the Questionnaire International Humanitarian Law & Explosive Remnants of War”, March 2006, http://www.gichd.org/fileadmin/pdf/CCW/XIIIth_Mtg_Mar06/CCW_McCormack_Report.pdf (last visited 20 January 2010).

¹⁶⁵ 1868 St. Petersburg Declaration, *supra* note 8.

for the 1980 conference where the CCW was adopted. Accordingly, where the use of a weapon is *essential* for the security of an attacker, these security concerns outweigh humanitarian arguments but where the use of a weapon is only militarily *useful* humanitarian arguments may well outweigh military considerations to lead to specific prohibitions and restrictions of a weapon. To state otherwise would mean that there would essentially only be a case for the prohibition or restriction of useless weapons, depriving any such specific regulation of its practical effect.¹⁶⁶ It should be remarked, however, that *military necessity* in practice is not always interpreted with concrete military scenarios in armed conflicts in mind. As was already mentioned *supra*, when taking up the issue of weapons, on the military side of the equation more strategic security arguments, such as the impact of specific weapon prohibitions/regulations on national or bloc military capabilities or the need and costs of substitution, inevitably come into play. Thus, in practice the lines between IHL and disarmament are blurred.¹⁶⁷

More specific IHL rules and obligations with regard to the conduct of hostilities and the use of any weapons, including cluster munitions, may be regarded as an emanation of the balance between military necessity and humanity. However, while military necessity was subject to a broader interpretation in practice, becoming intertwined with broader strategic security considerations, the notion of humanity was not endowed with a similarly broad meaning, resulting in a security/military bias towards the use of cluster munitions.

This bias shall now be exposed with an examination of the rules of distinction and discrimination, the rule on proportionality and precautionary obligations of an attacker in light of the two fundamental concerns associated with these weapons, their inaccuracy and wide area effect during armed conflicts and their propensity to leave large numbers of unexploded sub-munitions thereafter.

3.2. *Distinction and Discrimination*

Among these rules, most recently laid down in the 1977 Protocol on International Armed Conflicts Additional to the 1949 Geneva Conventions (API)¹⁶⁸ and recognised in the

¹⁶⁶ M. Aubert, “The International Committee of the Red Cross and the problem of excessively injurious or indiscriminate weapons”, No. 279 International Review of the Red Cross, 477, 482 (1990).

¹⁶⁷ Kalshoven, “Conference on the Use of Certain Conventional Weapons”, *supra* note 24, at 85.

¹⁶⁸ Additional Protocol I, *supra* note 17.

2005 study of the International Committee of the Red Cross (ICRC) on customary IHL¹⁶⁹ as customary law applicable to all types of armed conflicts, figure most prominently the rules of distinction and discrimination.

Art. 48 of API contains the basic obligation to distinguish at all times between civilian and military targets and to direct military operations against military objectives only. Art. 51 of API specifies when a party to an armed conflict violates the fundamental obligation under Art. 48. On the one hand, Art. 51 (2) prohibits attacks exclusively directed against civilians. On the other, Art. 51 (4) and (5) prohibit various manifestations of indiscriminate attacks. 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; (c) those which employ a method or means of combat the effects of which cannot be limited as required by IHL; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. Further, under Art. 51 (5) (a) of API 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 is singled out as a prohibited indiscriminate attack.

The difference between attacks directed against the civilian population as such and indiscriminate attacks hinges upon the *mens rea* of an attacker. In the former case, the attacker *intentionally* directs military operations against civilian targets. Any weapon, not just cluster munitions, can be used intentionally to target civilians or civilian objects. Thus, the problem is less the weapon itself but how the attacker uses the weapon in the specific circumstances.

In the latter case, an attacker might not have the intention of exclusively targeting civilians but shows a reckless disregard for the distinction between military and civilian targets.¹⁷⁰ For example, where an attacker fires blindly into territory without any clear idea of the military contribution that territory makes to the enemy or releases bombs over enemy territory after missing the original target, such practices would violate the prohibition under Art. 51 (4) (a) of API of attacks that are not directed at a specific military target.¹⁷¹ This manifestation of an indiscriminate attack has in common with the prohibition of attacks exclusively directed at civilians that any weapon, not just cluster munitions, may be used in

¹⁶⁹ J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, 3-46 (2005).

¹⁷⁰ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 118 (2004).

¹⁷¹ *Ibid.*

such a way. Thus, the statement quoted by an IDF commander in the Israeli newspaper Haaretz on Israeli cluster rocket use “What we did was insane and monstrous, we covered entire towns in cluster munitions”¹⁷² points to a violation of this limb of the prohibitions of indiscriminate attacks; covering entire towns in cluster munitions points to the use of great numbers of sub-munitions. Where great numbers of free-falling sub-munitions are used in or near populated areas, arguably grossly inadequate efforts were made to locate individual targets, as in such circumstances the wide dispersal pattern of the sub-munitions makes it virtually impossible to distinguish between military and civilian targets. However, such violation of the prohibition of indiscriminate attacks is still inconclusive as to the nature of the weapon, as the scenario described above could be seen as a particularly inappropriate use of the weapon.

The analysis is more complex with regard to Arts. 51 (4) (b) and (c) of API, since indiscriminate *methods* must be distinguished from indiscriminate *means* of combat. While the notion of indiscriminate *methods* of combat refers to the *specific way in which a weapon is used*, the prohibition of using an indiscriminate *means* of combat recognises that *due to its nature the weapon itself may not be directed at specific military targets, irrespective of the specific circumstances of its use*.¹⁷³

In fact, the criterion for determining whether a weapon is indiscriminate by nature, i.e. an indiscriminate means, was subject to considerable debate already during the 1970s conferences in the lead-up to the adoption of the CCW: For one group of experts, the *intended design* was the only yardstick from which to conclude that a weapon would be inherently indiscriminate. These experts believed that except for the case of a weapon intentionally designed to follow a random course and at the end of its trajectory hit whatever object happened to be there, all conventional weapons could be used in circumstances where there was virtually no risk of hitting civilians. Thus, generally, the specific way in which a weapon was used rather than its technical properties would be the decisive factor in determining whether an attack was indiscriminate. The prohibition of indiscriminate weapons should not be extended to other weapons simply because they might have been used

¹⁷² Rapoport, “IDF Commander: We Fired More than a Million Cluster Bombs in Lebanon”, *supra* note 92.

¹⁷³ International Committee of the Red Cross, Commentary on Article 51, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, at paras. 1957, 1962-1966, <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument> (last visited 20 January 2010).

indiscriminately in the past. Rather, the focus should be on specifically restricting such methods of use.¹⁷⁴

Other experts, basing themselves on the 1973 ICRC report on the work of conventional weapons experts proposed a wider concept of indiscriminate weapons to include both weapons indiscriminate by their very nature (intended design) and weapons *whose normal or typical use would have indiscriminate effects*.¹⁷⁵ In the words of Kalshoven

“This [latter] view has more force than may appear at first glance: past experience may in certain circumstances provide a sound basis for future expectations regarding the use of specific weapons, as much as with regard to other matters. It should be admitted, however, that the validity and persuasive force of such expectations will depend to a large extent on the actual conditions under which experience was gained, and they will have great difficulty in standing up against a sufficiently credible statement of changed intentions on the part of (potential) users of the weapons in question.”¹⁷⁶

This interpretation of the latter view arguably has the merit of taking into account *actual* contemporary battlefield realities as well as the implications for civilian harm, not just the design or use intended by producers and users.

With regard to the actual conditions under which the experience of consistent civilian harm emanating from cluster munitions was gained, it will be recalled that many recent armed conflicts in which these weapons were used were characterised by their asymmetrical nature. These include the 1999 Operation Allied Force, the 2001 Operation Enduring Freedom in Afghanistan, the 2003 Operation Iraqi Freedom, or the armed conflicts in Lebanon and Israel in 2006 and in Georgia in 2008. The reality of these conflicts is that powerful State armies increasingly encounter adversaries who intermingle with the civilian population. Whenever cluster munitions have been used, they have also been used in or near civilian residential areas as a result of the increasing asymmetrical character of contemporary armed conflicts. In these circumstances, the free-falling and thus, inaccurate multiple explosive sub-munitions combined with their wide dispersal pattern *does* have fatal consequences for civilians and civilian objects even if the weapons are primarily directed at military targets. There are numerous examples of such use, including in the conflicts detailed above.¹⁷⁷ While it is true that all unguided munitions are incapable of being 100% accurate

¹⁷⁴ ICRC, Report on the 1974 Lucerne Conference, *supra* note 53, at 10, paras. 30-31.

¹⁷⁵ *Ibid.*, at 11, para. 31.

¹⁷⁶ Kalshoven, “Conference on the Use of Certain Conventional Weapons”, *supra* note 24, at 77, 91.

¹⁷⁷ For example, during the 1999 Operation Allied Force, cluster munitions were intended for the airfield around Niš where two cluster munitions on 7 May 1999 impacted off target, killing at least 13 civilians and injuring another 60. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 8 June 2000, 39 ILM 1257, at para. 9. In Afghanistan and Iraq, Human Rights Watch detailed numerous instances of cluster munition use in or near populated areas. See Human Rights Watch, “Fatally Flawed”, *supra* note 80, at 20-23; Human Rights Watch, “Off Target”, *supra*

all the time, it is submitted that cluster munitions fall into a specific category due to the sheer numbers of explosive sub-munitions that are delivered over a wide area.¹⁷⁸ Finally, statements of changed intentions by (potential) users should be tested against their credibility when these weapons have always also been used in or near populated areas.

On the other hand, it is true that, for instance in the 1991 Gulf War many cluster munitions were deployed against dispersed Iraqi troops and tanks in the open desert.¹⁷⁹ However, here it may be argued that the 1991 Gulf War does not quite fit into the pattern of contemporary asymmetrical armed conflicts any more, since it involved a major traditional armed confrontation on the open battlefield. During the 1999 Operation Allied Force, NATO Supreme Headquarters Commander Major General Gertz claimed that

“They [cluster munitions] are being used when talking about ‘aerial [area] targets’ such as airfields so we use cluster bombs on soft targets like aircraft and trucks when they are on the airfield and we detect them and when we can make sure there is no collateral damage and we also use those cluster munitions in areas where we know there are valid military targets which we cannot see because they are under the wood. Of course we know where they are but they cannot be attacked accurately by precise weapons so we use cluster bombs against those targets.”¹⁸⁰

On the 2001 Operation Enduring Freedom in Afghanistan, it was reported that the United States used cluster munitions heavily on military bases in Herat. Purportedly, these military bases were large enough to encompass the dispersal pattern of the sub-munitions. Thus, there is an argument that when the explosives landed on target they would hit military objectives only. Also, the use of cluster munitions against Taliban and al Qaeda frontline troops in open areas away from civilians is consistent with the intended design of these weapons when assessed for its effect at the time of use.¹⁸¹

note 81, at 59-60, 80, 85-92. On evidence on use of cluster munitions in or near populated areas in Lebanon, see, for instance, Landmine Action, “Foreseeable harm”, *supra* note 100, at 12-15; Human Rights Council, Report of Alston, Hunt, Kälin and Kothari, Mission to Lebanon and Israel, *supra* note 90, at paras. 56-57; Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, 10 November 2006, UN Doc. A/HRC/3/2, paras. 252-254; Human Rights Watch, “Flooding South Lebanon”, *supra* note 91, at 39-44. On use of cluster munitions in or near populated areas in Georgia, see Human Rights Watch, “A Dying Practice”, *supra* note 101, at 40-51, 57-59.

¹⁷⁸ Compare the example of a single unguided bomb and the CBU-87 cluster munitions which contains 202 explosive sub-munitions per container: In the first case, a single bomb may go astray while in the second case 202 explosive sub-munitions may impact off the intended target.

¹⁷⁹ Major T. J. Herthel, “On the chopping block: cluster munitions and the law of war – unexploded submunitions from cluster bombs”, 51 Air Force Law Review 229, 264 (2001); King, “The Evolution of Cluster Munitions”, ICRC Expert Meeting Montreux 2007, *supra* note 41, at 12.

¹⁸⁰ See North Atlantic Treaty Organization, Press Conference given by NATO Spokesman, Jamie Shea and SHAPE Spokesman, Major General Walter Gertz, 14 May 1999, <http://www.nato.int/kosovo/press/p990514b.htm> (last visited 17 August 2009).

¹⁸¹ Human Rights Watch, “Fatally Flawed”, *supra* note 80, at 21.

Moreover, in some cases in the 2003 Operation Iraqi Freedom air-dropped cluster munitions were used against armoured vehicles, artillery or missiles. On the other hand, fewer of those types than in the past were used in or near civilian residential areas.¹⁸²

In any event, the view of the first group of experts prevailed and thus, a weapon can only be considered indiscriminate if its intended design makes it impossible to direct the weapon at specific military targets in *any* conceivable circumstances.¹⁸³ The fact that cluster munitions have also been used in some circumstances against military targets only, as shown above, speaks against the proposition that these weapons are indiscriminate in light of the prevailing interpretation of the prohibition of indiscriminate means of combat. Thus, cluster munition attacks are to be evaluated on a case-by-case basis under the prohibition of indiscriminate methods of combat. On this assumption, the use of cluster munitions is generally not considered to violate the prohibition of a *means* of combat which cannot be directed at a specific military objective under Art. 51 (4) (b) API, as was recently confirmed by the ICRC.¹⁸⁴

McCormack and other IHL experts in their 2006 Report on states parties' responses to a questionnaire on IHL and Explosive Remnants of War prepared for the Group of Governmental Experts (GGE) to the CCW called into question the way in which existing general rules of IHL address the legality of cluster munition attacks:

“If cluster munitions were only deployed against military targets far removed from civilian areas there would be no argument about their relationship to the prohibition on indiscriminate attacks. The fact that such use is theoretically possible will lead some States to continue to argue forcefully that these weapons are not prohibited under existing principles of IHL and should not be subject to a specific treaty ban. *Unfortunately the hypothetical exclusive use of cluster munitions against 'purely' military targets is simply not the reality and many cluster munitions have been used in recent conflicts against military targets in close physical proximity to civilian residential areas.*”¹⁸⁵

¹⁸² Human Rights Watch, “Off Target”, *supra* note 81, at 58.

¹⁸³ ICRC, Commentary on Article 51 API, *supra* note 173, at paras. 1962-1965. On the basis of this interpretation, for instance, the United Kingdom argued in submissions to the International Court of Justice quoted in the Court's Advisory Opinion *Legality of the Threat or Use of Nuclear Weapons* that in reality nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of low-yield nuclear weapons against warships on the High Seas or troops in sparsely populated areas, it was thus possible to envisage a nuclear attack which caused comparatively few casualties. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 *ICJ Reports* 226, at 262, para. 92.

¹⁸⁴ At the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, the ICRC stated that sub-munitions were not designed to fail on impact or target civilians. Thus, it was not the inherent nature of this weapon that was problematic. See International Committee of the Red Cross, Statement to the Committee of the Whole, Summary Record of Eleventh Session of the Committee of the Whole, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 26 May 2008, CCM/CW/SR/11, http://www.clustermunitionsdublin.ie/pdf/CoW11May26pm_004.pdf (last visited 17 August 2009).

¹⁸⁵ McCormack *et al.*, “Report on IHL and Explosive Remnants of War”, *supra* note 164, at 17.

The problem is that the prohibition of using cluster munitions indiscriminately was violated whenever these weapons were used, since they were also always used in or near civilian residential areas rather than only in open areas with no civilian targets nearby. Thus, breaches of the prohibition of indiscriminate methods of combat were the norm rather than the exception. Evidently then, the case-by-case assessment of the prohibition of indiscriminate methods of combat was not sufficient to guarantee protection of civilians from cluster munition attacks.

With regard to Art. 51 (4) (c) API, the prohibition of means or methods of combat whose effects cannot be limited in accordance with IHL, this prohibition is meant to refer to weapons or tactics that, although by their design may generally be initially targeted at military objectives, then become uncontrollable in time and/or space.¹⁸⁶ A paradigmatic example of a weapon that once launched escapes the control of an attacker is biological weapons. Biological agents with the potential to spread infections may be carried far beyond the intended target area by natural processes of wind or drainage, by living carriers of the agent or may be directly transmissible from one human being to another.¹⁸⁷ Also, the effects of biological weapons may last for an undetermined period of time, killing or disabling persons for days, weeks or months.¹⁸⁸

The second fundamental humanitarian problem associated with cluster munition use, the post-conflict legacy of unexploded sub-munitions, would also seem to fit the description of a weapon uncontrollable especially in time. This is because sub-munition duds which usually remain on the ground in large numbers due to excessive failure rates may kill and maim any person, whether military or civilian sometimes for years after armed hostilities have ended. Moreover, due to weather and terrain conditions, sub-munition duds may get buried and may move from where they originally land to other locations. In terms of these actual effects on civilians at the post-conflict stage, there is a commonality between anti-personnel landmines and sub-munition duds, since anti-personnel landmines also lie in wait to kill or maim anyone long after the end of military operations and may move from their original emplacement by the effects of the weather.

However, also in the case of the prohibition contained in Art. 51 (4) (c) API the decisive criterion for *means* uncontrollable in effects is whether these effects are *intended* by

¹⁸⁶ Henckaerts & Doswald Beck, *Customary International Humanitarian Law*, *supra* note 169, at 43.

¹⁸⁷ *Ibid.* See also International Committee of the Red Cross, Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects, Report on the Work of Experts, Geneva, 1973, at 21; ICRC, Report on the 1974 Lucerne Conference, *supra* note 53, at 10.

¹⁸⁸ ICRC, 1973 Weapons Report, *supra* note 187, at 21.

producers or users of the weapon. In the light of this criterion, a legal distinction may be drawn between the legacy of anti-personnel landmines and unexploded sub-munitions: While anti-personnel landmines are designed to kill and maim long after hostilities, the same is not true of unexploded sub-munitions, since explosive sub-munitions were intended to explode at the time of attack upon impact rather than long thereafter.¹⁸⁹

Thus, also under this heading, the legality of cluster munition use falls to be evaluated under the prohibition of indiscriminate methods of combat on a case-by-case basis. Unfortunately, unexploded sub-munitions causing civilian victims in the distant aftermath of a conflict have again been a consistent pattern rather than the exception. While generally all kinds of munitions leave a certain amount of unexploded ordnance after their use, in the case of using cluster munitions this problem is aggravated by the sheer number of explosive sub-munitions delivered as well as the high failure rates of the sub-munitions. The consequence of this interpretation is that bad cheap designs that would more often than not fail in real combat situations are not precluded. Since many fuses of sub-munitions are rather primitive mechanical impact fuses, employing such sensitive weapons would require even more care by a user. Unfortunately, this has not happened and also the prohibition to use methods of combat the effects of which cannot be limited in accordance with IHL has been violated every time cluster munitions were used.

For a long time, states focused on presenting technical improvements of the sub-munitions as a response to the threat of sub-munition duds. As mentioned above, already in 1974 when explicit prohibitions on certain types of cluster munitions were discussed by governmental delegates, a UK military expert announced technical improvements of the then new UK BL 755 cluster bomb. These improvements would help to contain the risk of unexploded sub-munitions. However, these assurances were subsequently proven wrong in

¹⁸⁹ Again, as much transpires from the statement by the ICRC delegation quoted above, stating that sub-munitions do not fall into the same category as landmines, as they are *not designed* to fail on impact. See International Committee of the Red Cross, Statement to the Dublin Conference on Cluster Munitions, *supra* note 183. See also Human Rights Watch, “Ticking Time Bombs”, *supra* note 65 (emphasising that sub-munitions may kill and maim civilians *despite*, and anti-personnel landmines *because* of their design). For the proposition that anti-personnel landmines are indiscriminate means of combat, see L. Doswald-Beck, “International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons”, 316 International Review of the Red Cross (1997), at fn. 22, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNFM> (last visited 20 January 2010). However, there were even rumours that a certain dud rate in certain types of sub-munitions was intentionally incorporated. Were this to be the case, then such types would indeed constitute an indiscriminate weapon in terms of their effect like anti-personnel mines. See V. O. Wiebe, “For Whom the Little Bells Toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions”, 35 Pepperdine Law Review 895, 950, fn. 317 (2008) (stating that in a call-in radio news program, a caller claiming to be a former U.S. field artillery officer said that his instructors claimed that the dud rate on MLRS rockets was intentionally designed to leave behind *de facto* minefields).

the Falklands/Malvinas conflict when sub-munitions failed at a minimum rate of 9,6%.¹⁹⁰ In later years, self-destruct mechanisms were propagated by producers and users as a technical remedy. But again, recent battlefield realities especially in Lebanon have proved claims wrong that such devices could prevent the humanitarian harm incurred by civilians through the presence of unexploded sub-munitions.¹⁹¹ Moreover, while clearance is a necessary measure to be taken in the aftermath of cluster munition use, it still cannot adequately prevent further casualties caused by unexploded sub-munitions. This is amply demonstrated by the experience of Lebanon where a well-coordinated clearance effort has been underway since armed hostilities ended in August 2006.¹⁹²

The use of cluster munitions in or near civilian residential areas also raises problems under Art. 51 (5) (a) API, the prohibition of bombardments 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. The inclusion of this provision was considered necessary by the drafters of API to avoid area bombings heavily resorted to by British, German and Japanese forces during WWII where entire civilian residential areas were attacked because of individual military targets contained therein.¹⁹³ Also Art. 51 (5) (a) API applies in a *specific circumstance of use of a weapon*, i.e. the use of weapons in areas where many civilians or civilian objects are present. Conversely, as cluster munitions may conceivably also be used in open, uninhabited areas in such circumstances no question of a breach of this rule arises.

While the overall object and purpose of the prohibition is clear, the interpretation of the terms of “clearly separate and distinct military objectives” and “concentration of civilians” still remains to be clarified. As regards the first, the issue must be addressed as to how large the distance between individual military objectives must be. At the Diplomatic Conference leading to the adoption of the 1977 Additional Protocols, a few states expressed their support for interpreting the wording of “clearly separate and distinct” to mean that area bombardments required a distance “at least sufficiently large to permit individual military objectives to be attacked separately”.¹⁹⁴ Still, this leaves attackers with a considerable discretion, as the terms “clearly separate and distinct” are subjective notions.¹⁹⁵ Moreover,

¹⁹⁰ See *supra* p. 33.

¹⁹¹ See *supra* pp. 37, 39.

¹⁹² See *supra* pp. 48-52 and accompanying footnotes.

¹⁹³ ICRC, Commentary on Article 51 API, *supra* note 173, at para. 1968.

¹⁹⁴ See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 43 with more references.

¹⁹⁵ ICRC, Commentary on Article 51 API, *supra* note 173, at para. 1974.

implementation of the prohibition may pose problems even where military objectives are separate from each other, as very large individual military objectives, e.g. military bases or munition factory buildings, may be intermingled with smaller civilian areas.

However, the use of cluster munitions even under such circumstances is likely to violate this prohibition. For instance, the CBU-87 cluster munition, the weapon of choice in 1991 Operation Desert Storm and the 1999 Operation Allied Force, may disperse 202 BLU-97 explosive sub-munition per cluster munition container over a mean impact area of 200 x 400 meters.¹⁹⁶ The analysis does not stop there, as the BLU-97 sub-munitions, like so many other types of sub-munitions are free-falling and thus inaccurate because they are susceptible to environmental conditions during their fall. This means that the sub-munitions may land far off the intended target, making it very probable that even small civilian residential areas surrounding a large military objective will be hit.

That also comparatively small civilian areas must be taken into account is not only evidenced by the mention of “villages” besides cities and towns. It is also evidenced by the definition of “concentration of civilians” clarified in Protocol III to the CCW which specifies that “concentration of civilians” means any concentration of civilians, be it permanent or temporary, such as inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.¹⁹⁷

The prohibition of area bombardment consequently imposes the clearest restriction on cluster munition use under general IHL, since it may reasonably be argued that any use of cluster munitions in or near civilian residential areas violates the prohibition due to the inaccuracy and wide-area effect of these weapons.

3.3. *Proportionality*

Art. 51 (5) (b) API, also considered to be a rule of customary international law applicable in both international and non-international armed conflicts, states that an attack is indiscriminate if it may be expected to cause incidental civilian harm which would be clearly excessive to the concrete and direct military advantage anticipated. Thus, the rule on proportionality is part of the complex overall regime to implement the basic obligation to

¹⁹⁶ Major General Chuck Wald, Transcript of U.S. Department of Defence News Briefing, 14 May 1999, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=542> (last visited 20 January 2010).

¹⁹⁷ Art. 1 (2), Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980, 1342 UNTS 171.

distinguish between civilian and military targets in order to provide protection for the civilian population against the effects of military operations.

In this regard, the difference between direct attacks on civilians and the other prohibitions of indiscriminate attacks under Arts. 51 (4) and (5) (a) API turns around the different states of mind of *intention* as opposed to *recklessness* of an attacker. The prohibition of disproportionate attacks adds an additional layer to the other manifestations of indiscriminate attacks where it is difficult to evidence a reckless state of mind of an attacker. Recklessness would exist in extreme cases with certain means (e.g. biological weapons) or methods (e.g. loosely aimed missiles) but ultimately the majority of attacks leading to civilian losses would hinge on the assessment whether or not an attack was proportionate.¹⁹⁸

Kalshoven has usefully explained the relationship between the rule on proportionality with the other manifestations of indiscriminate attacks under Art. 51 API on a scale between two opposite extremes. At the one end of the scale are attacks that manifestly disregard any distinction, such as firing blindly into an area; such attacks would already be covered by Art. 51 (4). At the other end of the scale are attacks on a well-defined military objective with precise weapons, but in the course of which some civilians happen to be too close to the military target and would inadvertently be killed. In such a case the loss of life of civilians would be unavoidable. He notes that somewhere on the scale between these poles must be the dividing-line separating permissible attacks on military objectives entailing acceptable collateral civilian harm from those prohibited attacks on military objectives entailing unacceptable losses to civilians.¹⁹⁹ Interestingly, as we shall see, also Norway as the initiator of the “Oslo process” used the formula of a prohibition of cluster munitions that cause unacceptable harm to civilians.²⁰⁰

However, existing IHL does not employ the notion of “unacceptable harm to civilians.” Rather, the rule on proportionality requires a sophisticated balancing act between military necessity and humanitarian considerations by weighing the expected civilian harm against the concrete and direct anticipated military advantage. Thus, proportionality is not assessed *post facto* between “actual civilian losses” and “actual military advantage” but rather *ex ante* at the time of an attack between the “civilian harm that *may* be expected” and

¹⁹⁸ A. Boivin, “The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare”, 2006 Geneva Academy on Human Rights and International Humanitarian Law, Research Paper No. 2, at 36, http://www.adh-geneve.ch/pdfs_publications/CTR_objectif_militaire.pdf (last visited 20 January 2010).

¹⁹⁹ F. Kalshoven, “Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-77”, 9 *Netherlands Yearbook of International Law* 107, 116 (1978).

²⁰⁰ See *infra*, pp. 255-256.

the “anticipated military advantage”.²⁰¹ The wording of “*may* be expected” rather than “expected” is indeed crucial; while generally such a proportionality assessment is incumbent upon an attacker in the specific circumstances, this wording introduces an element of objective reasonableness. Otherwise it would indeed be wholly left to an individual attacker whether the attack will be proportionate or not.²⁰² Accordingly, the critical issue is to interpret what civilian harm may be expected in light of the information available to the average reasonable commander at the time of attack.²⁰³

With regard to cluster munitions, firstly, the inaccuracy and wide dispersal pattern of the sub-munitions during strikes may create problems under the rule on proportionality *in the specific circumstance of use in or near populated areas*. Given the experience of delivery of high numbers of sub-munitions in or near populated areas, it is hardly conceivable how such use can ever respect the prohibition of disproportionate attacks. Conversely, cluster munition use in isolated areas uninhabited by civilians, e.g. in a desert, may not run counter to the rule on proportionality at the time of attack.

Legal difficulties under the rule on proportionality also arise in relation to the post-conflict legacy of unexploded sub-munitions with the potential of killing and maiming civilians, particularly children, of preventing access to agricultural and grazing lands and inhibiting the return of Internally Displaced Persons and refugees.²⁰⁴ These are long-term consequences rather than immediate and short-term consequences of cluster munition use.

Whether such long-term civilian harm must be factored in the proportionality assessment was subject to debate. In 2002, *Greenwood* in a working paper submitted to the GGE to the CCW presented the view that while immediate and short-term civilian harm must be taken into account, longer-term civilian damage cannot be part of the proportionality evaluation:

“[I]t is only the immediate risk from ERW which can be an issue. If, for example, cluster weapons are used against military targets in an area where there are known to be civilians, then the proportionality test may require that account be taken both of the risk to the civilians from sub-munitions exploding during the attack and of the risk from unexploded sub-munitions in the hours immediately after the attack. *It is an entirely different matter, however, to require that account be taken of the longer-term risk posed by ERW, particularly of the risk which ERW can pose after a conflict has ended or after civilians have returned to an area from which they had fled. The degree of that risk turns on too many*

²⁰¹ T.L.H. McCormack & P.B. Mtharu, “Expected Civilian Damage & The Proportionality Equation: International Humanitarian Law & Explosive Remnants of War”, November 2006, at 4, http://www.apcml.org/documents/un_report_exp_civilian_damage_1106.pdf (last visited 21 January 2010).

²⁰² Kalshoven, “Reaffirmation and Development of IHL”, *supra* note 199, at 118.

²⁰³ McCormack & Mtharu, “Expected Civilian Damage & The Proportionality Equation”, *supra* note 201, at 4.

²⁰⁴ L. Maresca, “Cluster munitions: moving toward specific regulation”, UNIDIR, Disarmament Forum, No. 4, 2006, at 27, 29, <http://www.unidir.ch/pdf/articles/pdf-art2531.pdf> (last visited 21 January 2010).

factors which are incapable of assessment at the time of the attack, such as when and whether civilians will be permitted to return to an area, what steps the party controlling that area will have taken to clear unexploded ordnance, what priority that party gives to the protection of civilians and so forth. The proportionality test has to be applied on the basis of information reasonably available at the time of the attack. The risks posed by ERW once the immediate aftermath of an attack has passed are too remote to be capable of assessment at that time.”²⁰⁵

On the other hand, in 2006, *McCormack & Mtharu* in their report on *Expected Civilian Damage & The Proportionality Equation* to delegates of the Third Review Conference of the CCW expressed a different view:

“The deliberate choice of cluster munitions on the basis of an expected dud rate which will leave sufficient numbers of unexploded submunitions so as to deny enemy combatants access to the target area may well produce an expected concrete and direct military advantage. That expected advantage is a mid to longer term advantage. [...] Surely then, in undertaking the requisite proportionality assessment, the expected mid to longer term civilian damage must also be taken into account. The military commander must expect that some civilian residents of the target area will attempt to return to their villages and to re-work their agricultural plots and that incidental civilian damage will inevitably occur as contact is made with unexploded submunitions. [...] [T]he important issue here is that the expected civilian damage must be taken into account – that it is unacceptable for the expected military advantage to be based on a longer timeframe while limiting the expected quantification of civilian damage only to the immediate effects of the attack itself.”²⁰⁶

Further, *McCormack & Mtharu* regard it as relevant that

“data from past conflicts helps inform the likelihood of future effects for the application of the proportionality assessment. Decisions about expected harm to civilians or damage to civilian objects from weapons likely to cause ERW ought to include consideration of the effects of such weapons in the past.”²⁰⁷

The arguments advanced by *McCormack & Mtharu* have the advantage that they take into account field-based realities on the post-conflict *actual* effect of unexploded submunitions on civilians and their communities. Indeed, a wealth of information both by humanitarian intergovernmental and non-governmental organisations is now available on these harmful consequences.²⁰⁸ This approach is reminiscent of the one taken by the ICRC and certain experts in the 1970s as detailed *supra*, notably to take past experience and thus, typical actual use and effects, into account when assessing a weapon’s legality.²⁰⁹

With regard to the view advocated by Greenwood that long-term humanitarian consequences of unexploded sub-munitions are too indeterminate to be considered in a

²⁰⁵ C. Greenwood, “Legal Issues Regarding Explosive Remnants of War”, 23 May 2002, UN Doc. CCW/GGE/I/WP.10, at 8. For a view in support of Greenwood’s arguments, see W. Boothby, “Cluster Bombs: Is There a Case For New Law?”, Harvard University, Occasional Paper Series, Fall 2005, No. 5, at 30-33, <http://www.hpcr.org/pdfs/OccasionalPaper5.pdf> (last visited 21 January 2010).

²⁰⁶ McCormack & Mtharu, “Expected Civilian Damage & The Proportionality Equation”, *supra* note 201, at 9.

²⁰⁷ *Ibid.*, at 11.

²⁰⁸ See Section 2.4., *supra* pp. 41-53 for numerous references.

²⁰⁹ *Supra* pp. 57-58.

proportionality assessment, admittedly, it is not certain upon launching an attack to pinpoint the exact moment when or whether civilians will return to an area. However, one reality from the aftermath of armed conflicts is that they will do so at the earliest opportunity.²¹⁰ Another is that returnees are often a group particularly at risk of falling victim to sub-munition duds, since they are often unaware of the risk awaiting them.²¹¹ Moreover, a common theme of research into long-term humanitarian consequences of sub-munition duds was that casualties continue to occur where duds are inadvertently handled by those carrying out farming or grazing activities, since these areas are usually not treated as a matter of priority of clearance efforts. In addition, a particular danger is that duds are deliberately handled by children, especially young boys.²¹² In light of these post-conflict realities, this author supports the conclusion reached by *McCormack & Mtharu* that “Damage to civilian property and civilian deaths will inexorably flow from the use of such weapons and must be taken into account in the proportionality equation.”²¹³

Admittedly, *Greenwood* is right when he says that the dangers posed by unexploded munitions appear to have been considered rarely if at all, noting that this problem has not been addressed by the ICRC Commentary on Art. 51 (5) (b) API.²¹⁴

While this is true, other IHL provisions do reflect a concern for certain long-term civilian harm. In this regard, Art. 54 (2) API and Art. 14 of Additional Protocol II (APII),²¹⁵ constituting customary international law in all types of armed conflicts,²¹⁶ provide for a prohibition to attack, destroy, remove or render useless foodstuffs, agricultural areas, drinking water installations and supply and irrigation works for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party. It is clear that only such attacks are covered by this specific prohibition that are launched *for the specific purpose* of denying them to the civilian population. Conversely, it was expressly not intended by the drafters to include the denial of agricultural areas and water installations for other purposes such as preventing the enemy from advancing or from using such areas as a cover.²¹⁷ Accordingly, the intent must be shown to deny food and water to the civilian

²¹⁰ International Committee of the Red Cross, Observations on the Legal Issues related to the Use of Cluster Munitions, 25 June 2007, UN Doc. CCW/GGE/2007/WP.8, at para. 11.

²¹¹ See *supra*, p. 45 with references.

²¹² See *ibid.*

²¹³ McCormack & Mtharu, “Expected Civilian Damage & The Proportionality Equation”, *supra* note 201, at 13.

²¹⁴ Greenwood, “Legal Issues Regarding Explosive Remnants of War”, *supra* note 205, at 7.

²¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

²¹⁶ Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 189-193.

²¹⁷ International Committee of the Red Cross, Commentary on Article 54 API, para. 2104, fn. 13, <http://www.icrc.org/ihl.nsf/COM/470-750069?OpenDocument> (last visited 21 January 2010).

population, which in essence is an application of the generic prohibition to use starvation of civilians intentionally as a method of combat.²¹⁸

Leaving the issue of the requisite *mens rea* aside, particularly the wording of *render useless* food and water installations demonstrates that this is a specific example where the attacker has to consider long-term civilian losses. With regard to the *de facto* equal effects of anti-personnel landmines on civilians, for example, it has been observed that the deployment of landmines in agricultural areas or in irrigation works may violate this prohibition.²¹⁹

The proposition that an attacker must take long-term civilian harm into account is also reflected in Art. 55 API. This rule prohibits the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population.

The ICJ in its *Nuclear Weapons* Advisory Opinion gave the following reasons for the importance of protecting the environment during armed conflict: “The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”²²⁰ Thus, the very rationale for specially protecting the environment is that attacks on the environment may entail long-term civilian losses that would have repercussions for future generations. In particular, the link between long-term damage to the environment and the fact that unexploded ordnance, including unexploded sub-munitions, make agricultural areas unfit for cultivation and remain dangerous to the civilian population has been explicitly recognised.²²¹

However, the threshold of “widespread”, “long-term” and “severe” may be difficult to surmount. Firstly, all these criteria have to be cumulatively satisfied. Secondly, “long-term” in this context refers to damage that will last for decades, “widespread” as encompassing an area of several hundred square kilometres and “severe” involves serious or significant disruption or harm to human life, natural economic resources or other assets.²²² Therefore, cluster munition contamination of the environment will arguably only fall under this prohibition in extreme cases where the threat of unexploded ordnance persists for decades.²²³

²¹⁸ *Ibid.*, at paras. 2098-2107.

²¹⁹ J. Pejić, “The right to food in situations of armed conflict”, 844 *International Review of the Red Cross* 1097, 1099 (2001).

²²⁰ *Nuclear Weapons* Advisory Opinion, *supra* note 183, at para. 29.

²²¹ A. Bouvier, “Protection of the Natural Environment in Time of Armed Conflict”, 285 *International Review of the Red Cross* 567-578 (1991), <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMAU> (last visited 21 January 2010); International Committee of the Red Cross, Commentary on Article 35 API, para. 1443, <http://www.icrc.org/ihl.nsf/COM/470-750044?OpenDocument> (last visited 21 January 2010).

²²² ICRC, Commentary on Article 35 API, *supra* note 221, at, paras. 1452, 1454, fn. 117, 1462.

²²³ Possibly, the ongoing threat of unexploded sub-munitions from the Soviet invasion in Afghanistan between 1979 and 1989 could satisfy the “long-term” damage requirement. While contamination by sub-munition duds in

On the other hand, if the long-term civilian harm were not part of the proportionality assessment, it would be possible to affect life, health and livelihood of civilian populations without rigorous constraint where that contamination was not inflicted on civilians for the very purpose of denying food and water to them or where that contamination would not reach the high threshold for falling under the prohibition of targeting the environment.

Another argument for including long-term civilian losses in the proportionality assessment is that such an understanding of proportionality follows from both the 1997 Ottawa Convention prohibiting anti-personnel landmines and the 2003 Protocol V on Explosive Remnants of War. With regard to the Ottawa Convention, the first preambular paragraph indicates that the comprehensive prohibitions of anti-personnel landmines stem from the concern about long-term losses inflicted on the civilian population. It reads:

“Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement.”²²⁴

If over 150 states parties to the convention recognise that anti-personnel landmines do cause long-term civilian harm, the argument that civilian harm equal in effect caused by unexploded sub-munitions is too remote to be taken into account lacks credibility.²²⁵ In a similar vein, the 2003 Protocol V on ERW in its preambular paragraph 1 states: “Recognizing the serious post-conflict humanitarian problems caused by explosive remnants of war.”²²⁶ Again it is incongruent to argue that states parties to the CCW recognise the post-conflict humanitarian problem caused by ERW, including sub-munition duds but then deny that these post-conflict concerns must be part of the proportionality assessment.

As regards the military side of the equation, the notion of “concrete and direct military advantage” must be interpreted. A number of states give the term “military advantage” a broad meaning. They have stated that this refers to the advantage anticipated from the attack

South East Asia has also been a problem for decades, the original attacks during the Vietnam Wars occurred before the entry into force of API.

²²⁴ Preambular para. 1, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 2056 UNTS 211.

²²⁵ Geneva International Centre for Humanitarian Demining, “Report on States Parties’ Responses to the Questionnaire International Humanitarian Law and Explosive Remnants of War: A Critique by the Geneva International Centre for Humanitarian Demining”, March 2006, http://www.gichd.org/fileadmin/pdf/CCW/XIIIth_Mtg_Mar06/GICHD_Critical_analysis_CCW_McCormack_Report.pdf (last visited 21 January 2010).

²²⁶ Protocol on Explosive Remnants of War, 28 November 2003, UN Doc. CCW/MSP/2003/2.

as a whole and not only from isolated or particular parts of that attack.²²⁷ The rationale behind this broad concept of military advantage is that modern strategies of warfare are often based on a series of separate actions ultimately forming one military operation. What is more important is the sum (the ultimate military purpose) rather than its specific parts (specific attacks); thus, the aggregate military operation may not be divided up into too many individual actions.²²⁸ From this in turn it may be inferred that states take a mid- or long-term military advantage into account for the proportionality assessment. Such advantages may be characterised by the fact that they may not materialise immediately. For example, this could include a series of separate attacks disabling an enemy force's command and control centre. More apposite to the issue at hand, *McCormack & Mtharu* cite to one of the reports by several Special Rapporteurs of the UN Human Rights Council where one Israeli government official justified Israel's use of cluster munitions in South Lebanon with the need to prevent Hezbollah fighters from returning to residential areas after the ceasefire.²²⁹ *McCormack & Mtharu* recognise that the deliberate choice of cluster munitions which will leave many duds as to deny the enemy access to certain areas may constitute a "concrete and direct military advantage". However, that statement must still be assessed against the criteria of "concrete" and "direct". The criterion of "concrete" means that there must be a sufficient degree of specificity, while "direct" speaks to a sufficiently close causal relationship between a military operation and the military advantage accruing from this operation to exclude merely potential or indeterminate advantages.²³⁰

This argument is in fact only valid for defensive military operations, i.e. where subsequent to scattering an area with sub-munition duds the party using cluster munitions would not enter the strike site anymore. Conversely, in offensive military operations, the military advantage flowing from the use of cluster munitions may be said to be reduced by the fact that such use would inhibit the advance of one's own ground forces because of the danger of duds remaining on the ground.²³¹

²²⁷ See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 49 (referencing the practice of Australia, Belgium, Canada, France, Germany, Italy, Netherlands, New Zealand, Nigeria, Spain, United Kingdom and United States).

²²⁸ S. Oeter, "Methods and Means of Combat" in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 185-186 (2nd edn., 2008).

²²⁹ McCormack & Mtharu, "Expected Civilian Damage & The Proportionality Equation", *supra* note 201, at 9; Human Rights Council, Report of Alston, Hunt, Kälin and Kothari, Mission to Lebanon and Israel, *supra* note 90, at paras. 55-56.

²³⁰ International Committee of the Red Cross, Commentary on Article 57 API, para. 2209, <http://www.icrc.org/ihl.nsf/COM/470-750073?OpenDocument> (last visited 21 January 2010).

²³¹ Human Rights Watch, "Fatally Flawed", *supra* note 80, at 29-30; M. Hiznay, "Operational and technical aspects of cluster munitions", No. 4 UNIDIR Disarmament Forum 15, 22 (2006).

Some states also interpret “military advantage” to include the security of an attacking state’s own forces.²³² In this regard, the doctrine of “zero casualty warfare” has gained prominence with some. This doctrine holds that complete avoidance of casualties to one’s own forces is a legitimate factor in interpreting the “military advantage” and must accordingly have an influence on the proportionality assessment. It is true that the urgency of a battlefield situation may demand that more importance to the military value of the security of a state’s own forces is attached. However, such an interpretation of military advantage tends to value the lives of one’s own military more than those of the adversary’s civilians. Accordingly, it has been argued that such reasoning would upset the balance between military advantage and incidental civilian harm required by the proportionality calculus and that some casualties to one’s own armed forces must be accepted for avoiding excessive civilian losses.²³³

The conclusion that long-term civilian damage must be factored in proportionality considerations at the time of an attack has also been supported by a number of stockpiling states in the context of the CCW in response to a survey on IHL and ERW which sought to clarify IHL rules relevant to ERW. For instance, Austria stated that

“the application of the principle [of proportionality] is not limited to the intended effects of an attack. [...] [T]he effects of duds – which are inherently incidental – seem to be covered by this provision.”²³⁴

Norway emphasised that military commanders must take into consideration

“both the humanitarian concerns related to the direct impact of the munitions as well as humanitarian effects caused by unexploded ordnance remaining on the ground after the attack.”²³⁵

Switzerland also took the view that

“the proportionality assessment [...] must also take into account the foreseeable incidental long-term effects of an attack such as the humanitarian costs caused by duds becoming ERW.”²³⁶

This view was also echoed by Sweden which argued that

²³² This view was propounded, for example, by Australia, Canada and New Zealand. See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 50 (2005).

²³³ A.P.V. Rogers, “Zero-Casualty Warfare”, 837 *International Review of the Red Cross* 165-181 (2000), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQCU> (last visited 21 January 2010); O. Bring, “International Humanitarian Law after Kosovo: Is *lex lata* Sufficient?”, 71 *Nordic Journal of International Law* 39, 47-48 (2002).

²³⁴ Austria, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005”, 4 August 2005, UN Doc. CCW/GGE/XI/WG.1/WP.14.

²³⁵ Norway, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005”, 29 July 2005, UN Doc. CCW/GGE/XI/WG.1/WP.5.

²³⁶ Switzerland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005”, 3 August 2005, UN Doc. CCW/GGE/XI/WG.1/WP.13.

“a cluster bomb with submunitions that have a high dud rate and is used in populated areas is likely to create disproportionate suffering for the civilian population compared with the military advantage from the use of such a weapon.”²³⁷

Also in the view of the Czech Republic

“the use of munitions, which is [sic] likely to fail, might contradict this principle [of proportionality], as the low reliability of such munitions could cause collateral damage exceeding the lawful level by increasing its probability and decreasing its military effectiveness.”²³⁸

On the other hand, the Russian Federation argued that it is less dangerous overall to deal with the consequences of improper functioning of cluster munitions and that all submunitions in the cluster munitions of the latest generation are equipped with self-destruction features so that collateral effects are minimized.²³⁹ Poland put forward a similar view, claiming that “Submunitions are modern munitions which do not leave too many explosive remnants of war.”²⁴⁰

McCormack and two collaborators summarised the findings of the survey on IHL and ERW undertaken within the framework of the CCW by acknowledging that a number of states considered the longer-term civilian harm to be expected to be relevant in the proportionality assessment but that one state had noted that this issue was still a matter of international debate. Responses, however, indicated the kind of information necessary to attackers to apply the proportionality rule properly, including the likely dud rate and whether the munitions contain any self-neutralising or self-destructing mechanisms.²⁴¹ Here, it may again be recalled that a battlefield reality revealed by recent reports on the humanitarian consequences of cluster munition use is that the dud rate claimed by manufacturers and user states determined under ideal test conditions is much lower than that found as a result of real-life combat conditions.²⁴² Where that is the case, not only humanitarian problems arise but also on the military side of the equation, since the discrepancy between test and actual failure rates and reliance upon the former means to overestimate the military advantage if that does not consist in the intentional laying of *de facto* anti-personnel mines.²⁴³

²³⁷ Sweden, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005”, 29 July 2005, UN Doc. CCW/GGE/XI/WG.1/WP.8.

²³⁸ Czech Republic, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005”, 10 February 2006, UN Doc. CCW/GGE/XIII/WG.1/WP.2.

²³⁹ Russian Federation, “Cluster Weapons – A Real Humanitarian Threat, Or an Imaginary One?”, 8 March 2006, UN Doc. CCW/GGE/XIII/WG.1/WP.11.

²⁴⁰ Poland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005”, 4 July 2005, UN Doc. CCW/GGE/XI/WG.1/WP.3.

²⁴¹ McCormack *et al.*, “Report on IHL and Explosive Remnants of War”, *supra* note 164, at 19.

²⁴² See *supra* pp. 37, 39 with references.

²⁴³ Cf., ICRC, Legal Issues related to the Use of Cluster Munitions, *supra* note 210, at 3, para. 13.

At the Third Review Conference to the CCW in November 2006, Ireland and Sweden submitted a proposal for a preambular paragraph to be included in the Final Declaration of the Conference which sought to recognise both the foreseeable short and long term effects of ERW on civilian populations as an important factor to be considered in applying the IHL rules on proportionality and precautions in attack.²⁴⁴

The Final Declaration of the Review Conference, adopted by consensus of all CCW states parties present, including major users and producers of cluster munitions like Israel, the United States or Russia, includes the following preambular paragraph:

“Noting the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack.”²⁴⁵

While the wording of this preambular paragraph does not specify *long-term* civilian harm, the fact that such a preambular paragraph was adopted makes it almost impossible, even for user and producer states of cluster munitions, to argue that such losses are incapable of being a factor in proportionality considerations. As a result, this represents a much needed clarification on the application of the rule on proportionality with regard to the use of cluster munitions, which attests to the weakness of a vague general rule to provide meaningful guidance in combat situations.

3.4. *Precautionary Obligations Imposed on the Attacker*

Where the legality of the use of cluster munitions is to be evaluated on a case-by-case basis, Art. 57 of API, also considered to reflect customary international law in all types of armed conflicts, acquires special significance. Art. 57 of API contains important obligations imposed on the attacker designed to avoid indiscriminate and disproportionate attacks. Especially relevant for the use of cluster munitions is the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding or at least minimising incidental loss of civilian life, injury to civilians and damage to civilian objects under Art. 57 (2) (a) (ii) of API. The term “feasible” is generally understood as “everything that is practicable or practically possible, taking into account all the circumstances ruling at

²⁴⁴ Ireland & Sweden, “Proposal for a Preambular Paragraph of the Final Declaration to be Adopted at the Third Review Conference, 25 October 2006, UN Doc. CCW/CONF.III/WP.4. See also Ireland, Statement to the CCW Review Conference, Main Committee II-Explosive Remnants of War, 9 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/4B53165D6C1731D0C1257224004F6163/\\$file/CCW+CONF.III+MCII+IRELAND.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/4B53165D6C1731D0C1257224004F6163/$file/CCW+CONF.III+MCII+IRELAND.pdf) (last visited 21 January 2010).

²⁴⁵ Third Review Conference to the Convention on Conventional Weapons, Final Declaration, 17 November 2006, UN Doc. CCW/CONF.III/11, Preamble, para. 11.

the time, including humanitarian and military considerations.”²⁴⁶ This introduces a subjective element to the scope of the obligation, since what is practicable or practically possible in the circumstances of a particular attack depends on the technological capabilities of an attacker. On the other hand, by also obliging an attacker to take into account humanitarian besides military considerations, it is equally clear that the wealth of information published by humanitarian organisations on probable civilian harm from cluster munition use must be a factor in the implementation of this obligation. Importantly, by virtue of Art. 51 (8) of API an attacking force is not released from compliance with this obligation even if it encounters an adversary armed force or group which engages in the practice of mingling with the civilian population to immunise certain areas from attack. Undoubtedly, such practices violate the prohibition of using human shields and/or the precautionary obligation of the defender to avoid locating military objectives within or near densely populated areas,²⁴⁷ but IHL does not defer to reciprocity considerations in the sense that once one side violates IHL the other may violate IHL as well.

The ICRC has specified what the implementation of this obligation means in the context of using cluster munitions; an attacker would be required to consider the accuracy of the cluster munitions, the size of the dispersal pattern, the amount of unexploded sub-munitions likely to occur, the presence of civilians in the proximity of military objectives and the use of alternative weapons in populated areas.²⁴⁸ Arguably, this obligation would also require a party whose cluster munition use resulted in unexploded sub-munitions to clear these or at least assist in their clearance.²⁴⁹ Apparently, these factors were not adequately considered in the many armed conflicts in which cluster munitions have been used. How else could one explain that these weapons have always been used in or near civilian residential areas, farmland or grazing areas? Asymmetrical armed conflict where adversaries inferior in technological capabilities mingle with the civilian population are also a constant feature of contemporary armed conflicts.

With regard to alternative weapon choices in and around civilian residential areas, precision-guided unitary weapons would seem to be the better option both in terms of hitting

²⁴⁶ See Art. 3 (10), Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, 35 ILM 1206 (1996); Art. 1 (5), Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, 1342 UNTS 171.

²⁴⁷ See Arts. 51 (7) and Art. 58 (b) of API, *supra* note 17.

²⁴⁸ International Committee of the Red Cross, Legal Issues Related to the Use of Cluster Munitions, *supra* note 210, at para. 15.

²⁴⁹ L. Maresca, “A new protocol on explosive remnants of war: The history and negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons”, 856 International Review of the Red Cross 815, 826, fn. 33 (2004).

exactly the intended military objective and of avoiding civilian casualties. However, one drawback with unitary weapons is that they deliver a much greater amount of explosive force than smaller sub-munitions. Thus, through the collapse of buildings due to the more powerful blast caused by unitary munitions indirectly, civilians may be more endangered than by the direct effects of explosive sub-munitions. Still, it is doubted whether such comparisons may be made in light of the fact that cluster munitions were not intended for use in or around populated areas. Moreover, the post-conflict problem of unexploded ordnance will be far more serious with cluster munitions than with unitary munitions.²⁵⁰

While both options have their drawbacks, it has repeatedly been argued that the alternative of using high explosive unitary artillery munitions instead of cluster munitions would actually prolong conflict, entail more civilian casualties and thus, make armed conflicts even less humane.²⁵¹ However, the proposition that the use of unitary high explosive would inevitably entail more civilian harm than the use of cluster munitions reflects too ready an acceptance on the part of those making such claims that with unitary munitions armed forces will equally violate the prohibitions of indiscriminate and disproportionate attacks as well as precautionary obligations of an attacker.²⁵² In each case of using any weapon, whether unitary or cluster munitions, an attacker has to demonstrate compliance with general rules of IHL, otherwise these rules would be meaningless. These arguments again illustrate the broader security and strategy considerations on the military side and the close relationship between IHL and disarmament.

In comparing more generally cluster munitions with the alternative of unitary munitions, it is necessary to more concretely outline the various roles for which cluster munitions were designed. In respect of air-dropped cluster munitions, the main military purpose of using cluster munitions is that of so-called close air support. Close air support entails supporting attacking friendly forces by engaging enemy targets in the vicinity of the attackers as to slow down the advance of the enemy as well as destroy its key military

²⁵⁰ Dullum, "Cluster weapons", *supra* note 36, at 79.

²⁵¹ See, for example, United States, Opening Statement to the Third Review Conference to the CCW, 7 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/AC4F9F4B10B117B4C125722000478F7F/\\$file/14+USA.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/AC4F9F4B10B117B4C125722000478F7F/$file/14+USA.pdf) (last visited 21 January 2010); United Kingdom, Statement on Entry into Force of Protocol V to the CCW, 13 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/1BD562D743F84188C125722E006043E8/\\$file/25+UK.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/1BD562D743F84188C125722E006043E8/$file/25+UK.pdf) (last visited 21 January 2010).

²⁵² V.O. Wiebe, "The Drops that Carve the Stone: State and Manufacturer Responsibility for the Humanitarian Impact of Cluster Munitions and Explosive Remnants of War", University of St. Thomas School of Law, Legal Studies Research Paper No. 5/21, at 11 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=849864 (last visited 21 January 2010).

infrastructure like communication nodes, radars, air defence systems or observation posts. Conversely, close air support provides opportunities for the attacker to advance themselves and use their weapons. However, as already mentioned, the main disadvantage of unguided air-dropped cluster sub-munitions is that they are inaccurate, since they are free-falling and susceptible to environmental conditions like wind during their fall. There are precision-guided bombs as alternatives which avoid the problem of inaccuracy.²⁵³

With regard to ground-launched cluster munitions, U.S. infantry officers complained about the fact that in order to destroy rocket-launching sites from a long distance the ground launched Multiple Launch Rocket Systems were the only weapon choice since the U.S. armed forces did not possess alternative unitary artillery with the same long-range capabilities.²⁵⁴

Unguided artillery is inaccurate especially at mid- to long-term ranges beyond 15 km. It will be recalled here that one of the original purposes of cluster munitions was to compensate for aiming imprecision with unitary artillery munitions at long ranges, since due to the dispersion effect and the high number of sub-munitions it is more probable to at least partly hit a single target from a distance. However, this effect comes at the cost that due to the inaccuracy, wide dispersal pattern and the number of sub-munitions the use of cluster munitions also has harmful consequences on persons or objects surrounding the target. As an alternative, the development of special fuses which are equipped with GPS navigation and enable corrections along the trajectory of artillery shells or rocket has been mentioned as to make them more accurate than current versions. The development of such an alternative would be relatively cheap, since current stocks of unitary artillery would not have to be substituted as a whole, only the fuses have to be exchanged.²⁵⁵ With no such alternatives at present, the obligation to take feasible precautions in minimising civilian harm would still require that artillery is used sparingly given the high risks of inflicting excessive incidental civilian harm.

With regard to defeating armoured targets in particular, DPICM cluster munitions were favoured by the military because of their capability to pierce through armour. However, main battle tanks and howitzers now incorporate soft material as a liner in the ceiling which minimises this destructive effect of the shaped charge of the sub-munitions. In addition, the introduction of explosive reactive armour that could be bolted to the exterior has made main

²⁵³ Dullum, "Cluster weapons", *supra* note 36, at 17, 51.

²⁵⁴ Human Rights Watch, "Off Target", *supra* note 81, at 95-96.

²⁵⁵ Dullum, "Cluster weapons", *supra* note 36, at 50.

battle tanks more resistant against such munitions.²⁵⁶ Moreover, the penetration of the metal jet formed in the shaped charge to pierce armour may not destroy the target with the first sub-munition hitting it but up to a dozen hits would be required to knock out heavy tanks. What has been said for artillery at long ranges can also be said more specifically for armoured targets, notably that once guided unitary artillery becomes available this would constitute a viable alternative.²⁵⁷ Thus, even in the case of the scenario of a major conventional attack or threat of an attack with high numbers of tanks cluster munitions would have a reduced effectiveness due to these technological advances in tank technology.

A special case in this respect is the one of SFW the functioning of which have already been described above as purportedly providing a capability to accurately attack single targets at a distance.²⁵⁸ SFWs have been singled out as being the most effective option against armoured vehicles, more effective than both traditional cluster munitions as well as unitary munitions due to the size of the projectiles and their explosive force.²⁵⁹ It is claimed that the major advantage of SFWs in comparison to traditional cluster munitions lies in the fact that the major problems of inaccuracy and unreliability are avoided, inaccuracy because arguably the sensors enable engagement of single targets rather than target areas over which unguided sub-munitions are dispersed and unreliability because the fail-safe mechanisms incorporated into these modern sub-munitions are more reliable than such mechanisms contained in traditional sub-munitions. This is also the reason why there were such intensive discussions on the question whether all or some types of SFW should be excluded from a convention on the prohibition of cluster munitions.²⁶⁰

In general, questions arise as to how “intelligent” sensors could ever be. Once the person in the loop has completed the aiming process and pushed the button, the sensors scan an area and typically react to the heat a tank, for example, emits. This means that it is effectively the sensors that take the final decision on whether or not to engage a target independent from a human being. Thus, once an attacker has fired such a weapon over a target area, the process of confirming and engaging an individual target or rejecting a target and initiating self-destruction is out of human control. In this respect, doubts remain as to how the sensors will be able to reliably distinguish a tank from a civilian bus which may emit

²⁵⁶ P. Smyth, “Goodbye, Cluster Munitions: Will we Regret it?”, Royal United Services Institute, 6 June 2008, <http://www.rusi.org/analysis/commentary/ref:C484929A16D007/> (last visited 21 January 2010).

²⁵⁷ Dullum, “Cluster weapons”, *supra* note 36, at 78.

²⁵⁸ See *supra* pp. 27-28, 37-38.

²⁵⁹ Dullum, “Cluster weapons”, *supra* note 36, at 52-54.

²⁶⁰ See the analysis of the *travaux préparatoires* to the Convention on Cluster Munitions *infra*, Chapter 6.2., at pp. 318-331.

the same amount of heat and may roughly be of the same size, as to the accuracy of the container munition in whose target area the sensors operate, how the electronic self-destruct or self-deactivation mechanisms have been tested, and whether these tests are better suited to simulating actual combat performance than tests on cluster munitions conducted in the past.²⁶¹

This may especially pose difficulties in an asymmetrical combat setting in and around civilian residential areas where there may be many targets, including civilian objects, that could potentially be sensed and destroyed by the sensors. As a consequence, even with the use of this most modern version of cluster munitions it is at present unclear to what extent especially the prohibition enshrined in Art. 51 (4) (c) of API of methods of combat the effects of which cannot be limited according to IHL can be respected.

Moreover, as already mentioned above, in the only instance where SFW were used on the battlefield, in 2003 in Iraq, the fact that a humanitarian clearance organisation did find unexploded BLU-108 sub-munitions stemming from the CBU-97/B/105 SFW, raises some doubts as to whether the electronic self-destruct mechanisms of these weapons can effectively counter the problem of unexploded sub-munitions at the post-conflict stage and thus, guarantee respect for the prohibition under Art. 51 (4) (c) of API. These dangers seem to caution against using these weapons as alternatives for traditional cluster munitions in and around populated areas. The problem is thus with SFWs that still no sufficient body of evidence exists from operational experience to make the case either way that the fundamental humanitarian concerns associated with the use of cluster munitions can or cannot be avoided.

While certain developed states hail these weapons as alternatives to traditional cluster munitions they should be reminded that in respect of their procurement or development of SFW they are also under a customary international law obligation to determine when studying, developing, acquiring or adopting a new weapon like SFW whether the employment of this weapon would be prohibited in some or all circumstances by IHL or any other rule of international law pursuant to Art. 36 of API.²⁶² In this respect, a new weapon

²⁶¹ For a compilation of questions that may aid in establishing a rational basis for concluding whether sensor-fused weapons constitute a solution to the fundamental problems associated with cluster munitions, see R. Moyes, "A sensor fused solution?", Landmine Action Campaign Newsletter, Issue 13, autumn 2007, at 6-7, <http://www.landmineaction.org/resources/Campaign%2013.pdf> (last visited 21 January 2010); T. Küchenmeister, "Sensor Fused Alternative Cluster Munitions – Friend or Foe?", Aktionsbündnis landmine.de, August 2008, at 7-8, <http://www.landmine.de/download/SFW-Alternative-CM.pdf> (last visited 21 January 2010).

²⁶² The ICRC recently published a detailed guide on the provision. See International Committee of the Red Cross, "A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977", December 2006, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-864-p931/\\$File/irrc_864_ICRC_Geneva.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-864-p931/$File/irrc_864_ICRC_Geneva.pdf) (last visited 21 January 2010).

does not necessarily have to be new in a technical sense but this obligation of national review would, for instance, also apply to all weapons to be acquired for the first time or to all weapons that are modified in a way that alters its function. In such a review, not only the weapon's design and characteristics but also its potential harmful effects on human health or the environment must be considered, necessitating a multidisciplinary approach.²⁶³

This would require the review body to draw from information from a wide range of actors, not only from the military or weapon manufacturers. Potentially, this obligation would be of significant preventive value, as not only the declared manner in which the weapon will be used on the battlefield should be analysed but methods of using weapons should also be tested against the nature of future armed conflicts.²⁶⁴ Moreover, claims by manufacturers should be critically and independently analysed.

The case of cluster munitions, however, shows two specific limitations of this obligation. Firstly, the obligation to review does not prescribe how weapons should be tested. The battlefield realities associated with the use of cluster munitions drastically revealed the discrepancy between test and combat conditions. Accordingly, considerable difficulties are involved to create test conditions that approximate combat reality. Secondly, there is no obligation to make the substantive findings of the review authority public, as the development of new means and methods of combat is linked to future armed forces' capabilities which states are reluctant to disclose to rivals.

However, if one considers the fundamental obligation to ensure respect for IHL in all circumstances then a state may arguably be under an obligation to share the results of the review where it is concluded that a weapon is illegal. Thus, in such cases transparency in the procurement or production process of a weapon would be greatly enhanced. Moreover, the legal basis for the review must necessarily be broad, since Art. 36 binds states parties not only to conduct the review in the light of API or IHL but also in the light of any other rule of international law. This provides an additional justification for examining cluster munition use under HRL.²⁶⁵

While these are interesting recommendations, evidently in the process of cluster munition development and proliferation careful reviews were either not conducted or not acted upon. For too long states have not sufficiently asked themselves as to what the viable

²⁶³ *Ibid.*, at 17-20.

²⁶⁴ J. McClelland, "The review of weapons in accordance with Article 36 of Additional Protocol I", 850 *International Review of the Red Cross* 397, 411 (2003).

²⁶⁵ K. Lawand, "Reviewing the legality of new weapons, means and methods of warfare", 864 *International Review of the Red Cross* 925, 927, 929 (2006).

alternatives to the use of cluster munitions are to ensure better respect for fundamental rules of IHL. Such assessment would have been required under the heading of the obligation to take all feasible precautions to minimise civilian harm and wrong procurement decisions, in the sense of stockpiling great numbers of inaccurate and unreliable weapons instead of procuring or developing more accurate and reliable alternatives, could have been avoided. Thus, care must be taken when considering SFW as viable alternatives.

The conclusion drawn from the analysis of general rules of IHL is that too much reliance is placed on whether armed forces or groups respect the prohibitions on indiscriminate and disproportionate attacks on a case-by-case basis. Because of the prevailing interpretation of when a weapon is deemed indiscriminate by nature, i.e. only if the intended weapon design is such as to make it impossible to distinguish between military and civilian targets in all circumstances, the evaluation of cluster munition use rests on such a case-by-case analysis in line with the prohibition of indiscriminate methods of combat. It is submitted that only the prohibition of indiscriminate means of combat is truly preventive as the use of such weapons will be prohibited in all circumstances at the outset. However, the fact that the prevailing interpretation of indiscriminate means of combat just resorts to the intended design of the weapon rather than its typical effects on the battlefield ensures that consistent actual battlefield experience where harmful effects on civilians are not an intended result are not adequately taken into account. Conversely, the prohibition of indiscriminate methods which has regard to how a weapon is used in specific circumstances implies that there may be circumstances where the use of weapon is legal. Had cluster munitions only been used in open, uninhabited areas there might have been a case that general rules of IHL are adequate to prevent civilian harm from the use of these weapons. Since that has not been the case for over thirty years after the adoption of API, the view already put forward by *Kalshoven* in 1990 that he did not share the optimism of those who believed that “indiscriminate effects” provided standards that could simply be applied to existing and possible future weapons may be fully endorsed.²⁶⁶ Therefore, the problem is that general rules of IHL were too vague in character to provide sufficient restraint for cluster munition use. They were thus not sufficiently preventive and precautionary obligations of the attacker in preventing civilian harm in specific cases have not been properly implemented.

A limited response is to compensate for the lack of respect of general IHL rules by virtue of decisions of international bodies on state or individual responsibility for cluster

²⁶⁶ See F. Kalshoven, “The Conventional Weapons Convention: Underlying Legal Principles”, No. 279 *International Review of the Red Cross* 510, 517 (1990).

munition use in or near civilian residential areas. However, this is mostly a reactive remedy and the potential deterrent effect on other armed forces or groups that are not party to specific proceedings is limited. With this in mind, two cases where the use of cluster munitions led international bodies to a decision on IHL violations shall be analysed.

3.5. *The Eritrea-Ethiopia Claims Commission Partial Award of 28 April 2004*

Following an international armed conflict between Eritrea and Ethiopia from 1998-2000, the two states concluded a Peace Agreement in Algiers in December of 2000 which established under its Art. 5 a Claims Commission whose mandate is to decide through binding arbitration, *inter alia*, all claims for loss, damage or injury resulting from IHL violations by one government against the other, and by nationals of one party against the government of the other party or entities owned or controlled by the other.²⁶⁷

Among the various claims put forward was a claim by Ethiopia that Eritrean aircraft had dropped cluster bombs that killed 53, including twelve school children, wounded 185 civilians, including 42 school children, and damaged property in the vicinity of a school and the surrounding neighbourhood in Mekele on 5 June 1998.²⁶⁸

The type of cluster munition used by Eritrea was the CB-250-K air-dropped cluster munition which contains 240 PM-1 explosive sub-munitions each. Upon dropping the cluster munition, it opens at a preset altitude and disperses the explosive sub-munitions. The cluster munition is unguided in the sense that once the cluster munition is dropped no longer can the user influence its trajectory nor the fall of the explosive sub-munitions. The explosive sub-munitions are so-called CEMs, i.e. they combine an anti-materiel, anti-personnel and incendiary effect. The anti-matériel effect is achieved by a shaped charge which can penetrate up to 15 cm of armour, the anti-personnel effect by the pre-fragmented metal casing of the sub-munition which shatters upon impact. Furthermore, the sub-munitions incorporate a zirconium ring, giving them an additional incendiary effect. On impacting the ground or the target, these effects are dispersed over an area of no less than 50.000 m².²⁶⁹

²⁶⁷ Art. 5, Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260 (2001).

²⁶⁸ Eritrea Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia's Claim 2, 28 April 2004, [http://www.pca-cpa.org/upload/files/ET%20Partial%20Award\(1\).pdf](http://www.pca-cpa.org/upload/files/ET%20Partial%20Award(1).pdf) (last visited 21 January 2010).

²⁶⁹ S. Maslen & V.O. Wiebe, "Cluster munitions: A survey of legal responses", Landmine Action, March 2008, [http://www.landmineaction.org/resources/Cluster_a_survey\(1\).pdf](http://www.landmineaction.org/resources/Cluster_a_survey(1).pdf) (last visited 21 January 2010).

In the proceedings before the commission, the two states agreed that there had been three sorties by Eritrean aircraft armed with said cluster munitions, one of which hit Mekele airport and one the Ayder school approximately seven kilometres away from the airport. However, there was disagreement as to whether the third sortie hit the Ayder school area or Mekele airport, Ethiopia arguing that the third strike hit the school, which Eritrea disputed.²⁷⁰ The issue was relevant in that Ethiopia argued that, “given the extreme odds against the two errors resulting in the bombing the same place, the Commission must conclude that the Ayder School and neighbourhood were deliberate and unlawful targets of those two sorties.”²⁷¹ On the other hand, Eritrea in denying that the third strike hit the school and surroundings argued that it had no reasons to target civilians and that it had strong reasons to target Mekele airport.²⁷²

The commission found that the third strike had indeed hit the Ayder school area and not the airport. Yet, it was not convinced that Eritrea deliberately targeted civilian areas since Eritrea had obvious and compelling reasons to concentrate its limited air power on Ethiopia’s air fighting capability rather than on Ethiopia’s civilians.²⁷³ It held that Eritrea’s conduct had to be assessed against Art. 57 of API, the essence of which it determined to be “that all feasible precautions to prevent unintended injury to protected persons must be taken in choosing targets, in the choice of means and methods of attack and in the actual conduct of operations.”²⁷⁴

In deciding that Eritrea had failed to take all feasible precautions as required by customary international law reflected in Art. 57 of API, the commission regarded the manner in which the airstrikes had been carried out as relevant: Since two out of the three cluster munition attacks did not come close to their intended target, this indicated a lack of essential care. Moreover, Eritrea did not take appropriate actions after the consequences of the two sorties hitting the school and its surroundings became known to prevent recurrence of civilian harm.²⁷⁵

Significantly, the commission merely *inferred* rather than proved Eritrea’s lack of feasible precautions in its two cluster munition attacks from the *ex post facto* result that the attacks hit the school and surroundings rather than Mekele airport. As the commission acknowledged, it could not determine why the cluster munitions dropped hit the

²⁷⁰ Eritrea Ethiopia Claims Commission, Partial Award, *supra* note 268, at paras. 104-106.

²⁷¹ *Ibid.*, at para. 105.

²⁷² *Ibid.*, at para. 106.

²⁷³ *Ibid.*, at para. 108.

²⁷⁴ *Ibid.*, at para. 110.

²⁷⁵ *Ibid.*, at para. 111.

neighbourhood of the school rather than the airport, since all of the information critical to that issue was in the possession of Eritrea which did not make that information available. Faced with such a dilemma, the commission considered that it was entitled to draw negative inferences from this uncooperative conduct by Eritrea to conclude that Eritrea had violated its obligation to take all feasible precautions. The commission supported this approach by citing to the *Corfu Channel* judgement by the ICJ.²⁷⁶

As will be recalled, in the *Corfu Channel* case the problem was that the UK which alleged Albania's responsibility for damages incurred by the explosion of submarine mines in Albanian territorial waters could not prove that the laying of the mines was directly attributable to Albania. However, since there were difficulties in obtaining facts that would point to knowledge by the Albanian authorities that mines were laid in its territorial waters by virtue of Albania's exclusive control over its territory and thus, exclusive knowledge, the ICJ allowed the UK to have recourse to inferences of fact and circumstantial evidence that would support a conclusion that Albania must have known about the laying of mines.²⁷⁷

The recourse to the admissibility of factual inferences in line with *Corfu Channel* would make sense if answering the question whether Eritrea took all feasible precautions in its cluster munition attacks depended upon information over which Eritrea had exclusive possession only, for example, on whether the pilots flying the sorties made errors in programming the computers. Eritrea only made assertions to the effect that the computers had been set to attack Mekele airport without making direct evidence from the pilots available or even naming the pilots for purposes of witness hearings.

However, to prove Eritrea's violation of its obligation to take all feasible precautions other information but the one exclusively in possession of Eritrea could have been resorted to. For instance, cluster munitions of the same type had been used in the Sudanese armed conflict since 1995 from which the harmful effects on civilians both at the time of use as well as at the post-conflict stage resulted.²⁷⁸ Moreover, the general danger of using cluster munitions against an airport in or around civilian residential areas already led to prosecution of an individual, Milan Martić, for war crimes and crimes against humanity by the ICTY in 1995.²⁷⁹ Thus, the major criticism to be voiced is that the commission did not adequately take the characteristics of cluster munitions into account, especially in and around populated

²⁷⁶ *Ibid.*, at para. 112.

²⁷⁷ *Corfu Channel (Merits) (UK v. Albania)*, 1949 ICJ 4, at 17-23 (Judgement, 9 April).

²⁷⁸ Mennonite Central Committee, "Clusters of Death: Global Report on Cluster Bomb Production and Use", 2000, <http://clusterbombs.mcc.org/clusterbombs/resources/research/death/> (last visited 21 January 2010).

²⁷⁹ See *infra* pp. 86-105.

areas.²⁸⁰ While there may have been some unpopulated space between Mekele town and the airport, one village is just less than a kilometre away from the airfield. Furthermore, the fact that the explosive sub-munitions could stray as far as around four kilometres from the intended target should have prompted the commission to raise the accuracy and the wide area effect problems of the cluster munitions used.²⁸¹

The second ground on which the commission's award was based, Eritrea's failure to take appropriate actions as a reaction to civilian harm observed with the two airstrikes to prevent further recurrence of such harm, represents a welcome application of Art. 57 (2) (b) of API which obliges military commanders to cancel or suspend an attack if it becomes apparent that a further attack may lead to excessive civilian harm in relation to the concrete and direct military advantage. In this regard, the commission found that after the second strike which hit the school and surroundings despite early news reports of events at Mekele, neither the aircraft flying the second sortie nor the one flying the third was inspected and no evidence had been provided indicating any changes in Eritrean training or doctrine to prevent recurrence of further civilian harm.²⁸² This signals to armed forces and groups that it is not enough to take all feasible precautions *before* an attack but also thereafter.²⁸³

Less fortunate was the commission's statement that it regarded Eritrea's argument as valid that it had to use some inexperienced pilots and ground crew, as it did not have more than a few experienced personnel. In the view of the commission these facts could not be held against Eritrea for in these circumstances it was not "feasible" and thus, practically possible for Eritrea to deploy more experienced personnel.²⁸⁴ With respect, following such reasoning states would be effectively dispensed from properly training their armed forces. They could simply point to the lack of capabilities of their service members to avoid a finding that they violated their obligations to take all feasible precautions in an armed conflict. Such an interpretation also runs counter to some explicit provisions of API which provide for peace time preventive measures and even render them meaningless, for instance, Art. 1, the generic obligation to ensure respect for IHL and Art. 82 which provides for legal advisers to be made available to the armed forces at all times.

²⁸⁰ See in this sense also, Maslen & Wiebe, "Cluster munitions: A survey of legal responses", *supra* note 269, at 12-13; Wiebe, "For Whom the Little Bells Toll", *supra* note 189, at 14-17, 20.

²⁸¹ See Wiebe, "For Whom the Little Bells Toll", *supra* note 189, at 15.

²⁸² Eritrea Ethiopia Claims Commission, Partial Award, *supra* note 268, at para. 111.

²⁸³ The suspension of further cluster munition attacks by the Netherlands in Operation Allied Force can be seen as an example of observance of the obligation to take all feasible precautions to prevent recurrence of civilian harm already inflicted. See, Handicap International, "Circle of Impact", *supra* note 71, at 69.

²⁸⁴ Eritrea Ethiopia Claims Commission, Partial Award, *supra* note 268, at para. 109-110.

While the commission's award thus appears limited due to the fact that it did not take into account the inaccuracy, wide dispersal pattern and the propensity of the CB-250-K air-dropped cluster munition used by Eritrea in or near populated areas, the ICTY in the *Martić* case engaged in a detailed analysis of these factors. This case whose proceedings lasted from 1995-2008 shall now be subject to comment in the next section.

3.6. *The Landmark Martić Case Before the ICTY*²⁸⁵

In the mid-morning hours of 2 May 1995 without warning between four and six Orkan rockets, a cluster munition where each rocket contains 288 sub-munitions which in turn are equipped with 420 small steel balls, were launched by armed forces of the self-proclaimed Republika Srpska Krajina (RSK) from between 47 to 51 km south of Zagreb. There were military targets in and around Zagreb at the time of these attacks, including the Ministry of Defence building in the city centre and Zagreb airport which was also used for military purposes and where civilian residential areas were within a distance of around 500 m. Explosive sub-munitions hit targets in central Zagreb and the village of Plešo near Zagreb airport. At midday on 3 May 1995 Zagreb was again shelled with four to six Orkan rockets which hit locations in central Zagreb. Milan Martić, the President and Commander in Chief of the armed forces of the RSK ordered these attacks in the course of which seven persons not actively participating in the hostilities were killed and at least another 214 civilians injured. Most of these victims were claimed at the time of the attack but two clearance experts were killed and injured, respectively, due to the presence of unexploded sub-munitions in the immediate aftermath of the attack. On 2 May, the first attack received massive media coverage before the second attack was launched on 3 May.²⁸⁶ Also four children were seriously injured over two months after the attacks due to tampering with unexploded sub-munitions caused by the shellings.²⁸⁷

Thus, especially the first attack on 2 May displays the commonality with cluster munition attacks by Eritrea in that in both cases an intended target was an airport used for

²⁸⁵ This and the next Chapter 3.7. represents a modified version of an article by this author. See A. Breitegger, "The landmark *Martić* case and the inconsistent treatment of cluster munition use by the Office of the Prosecutor of the ICTY", 21 (3) *Humanitäres Völkerrecht/Journal of Peace and Armed Conflict* 164-180 (2008).

²⁸⁶ *Prosecutor v. Martić*, Judgement, Case No. IT-95-11-T, T. Ch. I, 12 June 2007, at paras. 303-322, 456-463.

²⁸⁷ At the Rule 61 hearing, which is analysed below, Prosecution witness Franjo Tuksa testified that at the end of July 1995, four children were severely injured due to tampering with unexploded sub-munitions that remained in a park in Zagreb as a result of the 2 and 3 May cluster rocket attacks. See *Prosecutor v. Martić*, Transcript of the Hearing for Confirmation of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-11-R61, 27 February 1996, at 66-67.

military purposes but the explosive sub-munitions hit civilian residential areas off the military objective instead. Also, in both cases civilian residential areas were less than one kilometre away from the military target.

A difference between the two cases is that the Eritrea Ethiopia Claims Commission Award concerned state responsibility while the *Martić* case before the ICTY individual criminal responsibility. This means that before the ICTY the mental element to decide on responsibility has a particular significance. As shall be shown, the mental element also explains why the ICTY in the *Martić* case considered the characteristics of the cluster munition used.

Martić was initially indicted for knowingly and wilfully ordering unlawful attacks against the civilian population of Zagreb both on 2 and 3 May, thereby violating the laws and customs of war under article 3 of the ICTY Statute (Counts I and III). Alternatively, he was charged with command responsibility for failing to prevent these shellings (Counts II and IV).²⁸⁸ Thus, from the very beginning, the indictment was concerned with *wilful* attacks on civilians.

The International Committee of the Red Cross (ICRC) commentary on article 85 (3) (a) of API concerning grave breaches committed in international armed conflicts specifies with regard to *wilfully* that this “encompasses the concepts of “wrongful intent” or “recklessness”, viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e. when a person acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions).”²⁸⁹ Thus, the precise basis on which Eritrea was held responsible as a state by the Eritrea-Ethiopia Claims Commission, the failure to take the necessary precautions would not suffice for a finding on individual criminal responsibility for cluster munition attacks before the ICTY.

The indictment against Martić was confirmed by a single ICTY judge who issued several arrest warrants. Since the arrest warrant could not be executed despite reasonable efforts and the accused remained at large for a considerable time, the ICTY judge who had confirmed the indictment ordered that an ICTY Trial Chamber review the indictment in a

²⁸⁸ *Prosecutor v. Martić*, Initial Indictment, Case No. IT-95-11, 25 July 1995.

²⁸⁹ International Committee of the Red Cross, Commentary on article 85 of the 1977 Additional Protocol I, para. 3474, <http://www.icrc.org/ihl.nsf/COM/470-750111?OpenDocument> (last visited 21 January 2010).

public hearing pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence.²⁹⁰ In this regard, it is especially relevant if Martić's armed group deliberately targeted the civilian population as such or if they made some attempt to direct operations at military objectives within Zagreb which were not hit due to the choice of the weapon. In the first case, it may be argued that the Martić case is just an aberration of cluster munition use since that weapon was used in a particularly irresponsible, i.e. deliberate manner. On the other hand, in the second case, the focus would be more on the weapon and if the weapon can be reasonably used in populated areas in a discriminate manner rather than on the specific *mens rea* of the attacker. In other words, if the latter approach were adopted it would be more difficult to argue that the *Martić* case was a simple aberration and implications for other uses of cluster munitions could be drawn more easily.

The Rule 61 hearing transcripts evidence in this regard that the Office of the Prosecutor (OTP) primarily focused on the fact that the Orkan rockets were chosen to intentionally target and terrorise the civilian population and that the attack occurred in an area where there were no legitimate military targets.²⁹¹ This is another parallel to the proceedings before the Eritrea Ethiopia Claims Commission proceedings where the applicant Ethiopia argued that Eritrea's cluster munition use which resulted in civilian harm evidenced that Eritrea intentionally targeted civilians.

The focus by the OTP on deliberate attacks against civilians cannot be explained by article 3 of the ICTY Statute itself since this provision does not contain an explicit reference to either deliberate attacks on civilians or indiscriminate attacks under its heading of "laws or customs of war". However, not long before the 1996 *Martić* Rule 61 proceedings the ICTY in its celebrated Decision on Interlocutory Appeals in *Prosecutor v. Tadić* on 2 October 1995

²⁹⁰ Rule 61 ensures that an ICTY investigation may proceed despite the initial non-appearance of an accused. Upon activation of Rule 61 the OTP must present the indictment together with evidence supporting it to the Trial Chamber in open court proceedings and the Trial Chamber must again decide whether there are reasonable grounds to reconfirm the indictment as well as issue an international arrest warrant to all states rather than only to the ones which appear to be in the best position to execute the arrest warrant. See *Prosecutor v. Martić*, Decision pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-11-R61, 8 March 1996, at 129-131; on Rule 61 generally, see M. Thieroff & E. A. Amley, "Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61", 23 Yale Journal of International Law 231 (1998).

²⁹¹ This may be confirmed by the line of questioning pursued by the Prosecution of witness Sergeant Curtis, a British police officer seconded to the ICTY Prosecutor's Office; for instance, Mr. Curtis was asked whether he saw any military installations in the Orkan rocket strike areas where civilian victims occurred. Also another prosecution witness, Franjo Tukša, the police chief of war crimes and terrorism in the city of Zagreb responsible for investigating the shellings, testified that there were neither military installations in Zagreb city centre nor in and around Zagreb airport. Likewise, Major Ted Itani, an expert witness on technical aspects of the Orkan rocket, when asked whether the use of this weapon could have a terrorising effect on civilians, acknowledged this as a possibility. See *Prosecutor v. Martić*, Transcript of Rule 61 Hearing, *supra* note 287, at 13, 28, 64, 68, 75, 78, 114.

established that unenumerated offences are also subject to prosecution under article 3 of the ICTY Statute.²⁹²

Since the classification of the armed conflict as well as the extent to which war crimes are subject to prosecution both in international and non-international armed conflicts posed significant difficulties in the *Tadić* case at the stage of jurisdiction, it is understandable that the OTP opted for formulations of offences that are the same under treaty law and customary international law regardless of the nature of the conflict. In this respect, the prohibition of attacks against the civilian population as such provided this common denominator as it is the same in article 51 (2) of API, in article 13 (2) of the 1977 Additional Protocol II on Non-International Armed Conflicts (APII) as well as customary international law.²⁹³

Yet, it must be emphasised that the OTP also contended that even assuming that there were legitimate military targets in downtown Zagreb that the wrong weapon was used to attack them. With regard to this submission the OTP put the question to expert witness Itani that assuming the aim of the use of Orkan rockets on Zagreb was to hit military targets whether then this weapon was appropriate to use; the witness answered that he would have used a more precise and more destructive weapon.²⁹⁴ By supporting the use of a more destructive weapon in a populated area, this statement exposes also the weakness of the argument that if cluster munitions cannot be used any more then greater use of unitary high-explosive munitions would result in more collateral damage.

The ICTY Trial Chamber in its Rule 61 Decision of 8 March 1996 recognised articles 51 (2) of API and 13 (2) of APII as appropriate legal bases for the charges but as opposed to the OTP explicitly referenced articles 51 (4) (b) and 51 (5) (b) of API and thereby endorsed the OTP submission that even if an attack was directed against a legitimate military objective an unlawful attack against civilians may have been ordered.²⁹⁵ As to the factual basis for the indictment, the Trial Chamber took note of the witnesses' testimonies that there were no military targets around the locations where civilians were killed by the explosive sub-munitions. Nevertheless, it observed that the administration building of the Ministry of the

²⁹² *Prosecutor v. Tadić*, Decision on Defence Motion for the Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, App.Ch., 2 October 1995, at paras. 87-137.

²⁹³ See Prosecution submissions to that effect during the Rule 61 hearings, *Prosecutor v. Martić*, Transcript of Rule 61 Hearing, *supra* note 287, at 14-16.

²⁹⁴ See *ibid.*, at 29, 113.

²⁹⁵ On the other hand, the tribunal failed to prove that these specific rules were applicable outside the treaty regime of API as a matter of customary international law to non-international armed conflicts since no identical provisions are to be found in APII. This may raise problems of *nullum crimen sine lege* since the accused may argue that the conflict was an internal one in which the rules quoted from API are not applicable as a matter of customary international law.

Interior was allegedly hit on 2 May 1995.²⁹⁶ However, in determining that there were reasonable grounds for reconfirming the indictment the ICTY stated that

“In respect of its accuracy and striking force, the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb.”²⁹⁷

If viewed in isolation it may be surmised that the Trial Chamber primarily upheld the indictment on the ground that the rocket attacks had been ordered for the purpose of intentionally targeting and terrorising the civilian population. Nevertheless, the quotations of the Tribunal of the prohibitions of indiscriminate attacks and the finding that apparently, there were military targets in Zagreb at the time of the attacks caution against such a narrow interpretation. Finally, the very fact that the Trial Chamber reconfirmed the indictment for *wilfully* attacking civilians makes it clear that the ICTY accepted that there were reasonable grounds for prosecuting Martić not only for intentionally but alternatively also for recklessly attacking civilians, i.e. hitting civilians as a consequence of indiscriminate attacks, even were it to be established that there was an intention to hit military targets.

In the following years up to trial proceedings, two important developments occurred. Firstly, Martić finally surrendered to ICTY custody in 2002. This guaranteed full involvement in the further proceedings of the Defence which argued that there were indeed military targets in Zagreb that were the object of the attacks. Thus, the Prosecution was forced to devote more attention to elaborating on the meaning of *wilfully* attacking civilians even if there were military targets in and around Zagreb.

Secondly, the ICTY in the *Blaskić* and *Galić* cases elaborated more in-depth on the elements of the crime of unlawful attacks on civilians. The *Blaskić* Trial Chamber judgement of 2000 where the accused was, *inter alia*, convicted for using home made mortars which were especially difficult to guide accurately exclusively against military targets stands for the proposition that a direct attack on civilians may be inferred from the indiscriminate nature of the weapons used.²⁹⁸ For the crime of unlawful attacks on civilians under article 3 of the ICTY Statute the Trial Chamber identified the following elements: (a) causation of civilian deaths and/or serious bodily injury within the civilian population or damage to civilian property; and (b) that such attacks must have been conducted intentionally in the knowledge, *or when it was impossible not to know that civilians or civilian property were being*

²⁹⁶ *Prosecutor v. Martić*, Decision pursuant to Rule 61, *supra* note 290, at 145.

²⁹⁷ *Ibid.*, at 147.

²⁹⁸ *Prosecutor v. Blaskić*, Judgement, Case No. IT-95-14-T, T.Ch., 3 March 2000, at paras. 501, 512.

targeted.²⁹⁹ Significantly, the ICTY in its 2003 Trial Chamber judgement in the *Galić* case, which concerned continual sniper attacks on civilians in Sarajevo, ruled that “[...] indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.”³⁰⁰ On the *mens rea* element of “wilfulness”, the Trial Chamber confirmed the interpretation given in the ICRC Commentary on article 85 API viewed above as including recklessness but excluding mere negligence.³⁰¹

The Second Amended Indictment of 2002, besides adding other charges for crimes allegedly committed by the accused elsewhere in Croatia, contained revised Counts 15 to 19 for the Zagreb attacks, including murder as a crime against humanity and as a war crime, inhuman acts as a crime against humanity and cruel treatment and attacks on civilians as war crimes.³⁰²

The ICTY’s jurisprudence in the *Blaskić* and *Galić* cases provided room for refinement of the OTP’s argument set out in its 2004 Trial Brief that Martić was responsible for ordering unlawful attacks on civilians even if the attacks *had been aimed at legitimate military targets within Zagreb they were an inappropriate and unlawful choice of weapon* due to the wide dispersal pattern of the sub-munitions and the inability to distinguish between civilian and military targets in populated areas.³⁰³ For the crime of unlawful attacks against civilians, the OTP identified the following elements: (i) an attack resulted in civilian deaths and/or serious civilian injury; (ii) the perpetrator knew or should have known the civilian status of the persons killed or seriously injured; and (iii) the attack was *wilfully* directed against civilians. Moreover, an indiscriminate attack could substantiate an allegation that the attack was in reality directed at civilians.³⁰⁴ This interpretation is in line with the *Blaskić* and *Galić* judgements and represents a conscious effort of the ICTY to make violations of the prohibitions of indiscriminate attacks punishable for all types of armed conflict under article 3 of the ICTY Statute under the heading of “direct attacks against civilians”.³⁰⁵

²⁹⁹ *Ibid.*, at para. 180.

³⁰⁰ *Prosecutor v. Galić*, Judgement, Case No. IT-98-29-T, T.Ch. I., 5 December 2003, at para. 57.

³⁰¹ The Trial Chamber significantly added that the prohibition of indiscriminate attacks explicitly only provided for by API constitutes customary international law applicable to all types of armed conflicts. See *ibid.*, at paras. 54, 57.

³⁰² For the last count, again articles 51 (2) API and article 13 (2) APII were cited as legal grounds. See *Prosecutor v. Martić*, Amended Indictment, Case No. IT-95-11, 18 December 2002, at paras. 21-55.

³⁰³ *Prosecutor v. Martić*, Prosecution’s Pre-Trial Brief, Case No. IT-95-11-PT, 7 May 2004, at para. 123.

³⁰⁴ *Ibid.*, at paras. 203-204.

³⁰⁵ W.J. Fenrick, “Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals: Symposium Article: Riding the Rhino: Attempting to Develop Usable Legal Standards for Combat Activities”, 30 Boston College International & Comparative Law Review 111, 129 (2007). Also the

Thus, the OTP focused more on the contention that even if there had been military targets in Zagreb through the use of cluster munitions still unlawful attacks were committed. This was necessary to prevail over the Defence which argued that indeed the attacks had been intended on military targets in and around Zagreb.³⁰⁶ Against this background, the 2007 Trial Chamber judgement shall be assessed.

The Trial Chamber first outlined the law relevant to Counts 15-19, ordering murder both as a war crime and crime against humanity, other inhuman acts, a crime against humanity, cruel treatment, a war crime and the war crime of attacks on civilians. As for murder the required objective element is death of persons not actively participating in hostilities caused by an act or omission. In addition, direct or at least indirect intent must be established. “Indirect intent” is understood as knowledge that death was a *probable* consequence of the perpetrator’s conduct.³⁰⁷

Both “Other inhumane acts” and “cruel treatment” require proof of firstly, an act or omission causing serious mental or physical suffering or injury, or constituting a serious attack on the human dignity of the victims.³⁰⁸ The required *mens rea* is the same as for murder, i.e. at least indirect intent, the knowledge that cruel treatment or inhumane treatment was a *likely* (synonymous to *probable*) consequence of the act or omission.³⁰⁹ The only difference between the two relates to the status of the victims: While the Trial Chamber noted that for inhumane acts as a crime against humanity proof of combatant status *hors de combat* is not sufficient, the war crime of cruel treatment merely requires that the victim did not actively participate in hostilities.³¹⁰

Finally, the crime of attacks on civilians has in common with the three others that a direct attack on civilians resulted in death or serious bodily injury of civilians.³¹¹ In this

Appeals Chamber judgement in the *Galić* case confirmed this interpretation. See *Prosecutor v. Galić*, Judgement, Case No. IT-98-29-A, A.Ch., 30 November 2006, at para. 132.

³⁰⁶ Interestingly, the Prosecution did not pursue further evidence that it had presented at the Rule 61 hearing as to casualties that occurred about two months after the attacks through the second problem associated with cluster munitions, the presence of duds. This is confirmed by the Second Amended Indictment of 2005 which included a list of victims from the Zagreb bombings in Annex II where the names of the four children seriously injured by a dud two months after the attacks were not included. See *Prosecutor v. Martić*, Second Amended Indictment, Case No. IT-95-11, 9 December 2005, Annex II.

³⁰⁷ *Prosecutor v. Martić*, Trial Chamber Judgement, *supra* note 286, at para. 60.

³⁰⁸ The ICTY has treated “cruel treatment” and “inhumane treatment” as synonymous. See *Prosecutor v. Delalić and Others*, Judgement, Case No. IT-96-21-T, T.Ch. II, 16 November 1998, para. 552; *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-T, T.Ch. III, 26 February 2001, at para. 265; *Prosecutor v. Blaskić*, *supra* note 296, at para. 186.

³⁰⁹ *Prosecutor v. Martić*, Judgement, *supra* note 286, at paras. 78-85, citing to further ICTY jurisprudence.

³¹⁰ *Ibid.*, at paras. 51-56, 79.

³¹¹ On the question as to who may be regarded as a civilian, the Trial Chamber considered the definition given under article 50 API according to which anyone who is not a combatant has civilian status as customary international law. See *ibid.*, at para. 71.

regard, the Trial Chamber was consistent with jurisprudence of the ICTY in the *Blaskić* and *Galić* judgements that “a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.”³¹² Significantly, the judges cited to the *Galić* Appeals Chamber judgement of November 2006 in which the objective elements were specified that they could take into account to determine whether an attack was in fact directed against civilians. These elements include the means and methods used, the status of the victims, their number and the extent to which the attacking force may be said to have complied with its precautionary IHL obligations.³¹³

The ICTY’s approach of inferring from certain factors, including the failure to take the feasible precautionary obligations upon attack, a direct attack against civilians seems to be at odds with the approach by the Eritrea Ethiopia Claims Commission which was not prepared to hold that Eritrea’s failure to take feasible precautions indicated a direct attack on Ethiopian civilians. As will be recalled, the claims commission held that due to the fact that Eritrea had good reasons to concentrate its limited air combat capabilities on the adversary’s air fighting capabilities and due to the fact that Eritrean forces had limited experience with using the cluster munitions at issue, no such direct attack had taken place.

However, the seemingly divergent approaches by the two bodies on this point may be understood against the background that the claims commission had to evaluate state responsibility and the ICTY individual criminal responsibility. In the claims commission’s approach the issue of the mental element is taken into account in identifying whether the proper basis for state responsibility is that of direct attacks on civilians under Art. 51 (2) of API requiring intentional targeting of civilians or the failure of precautionary obligations under Art. 57 of API which does not require a showing of intentional targeting of civilians. This approach is consistent with the general rules of IHL. On the other hand, the ICTY’s specific stance is to merge deliberate attacks against civilians in accordance with Art. 51 (2) of API and indiscriminate attacks pursuant to Arts. 51 (4), 57 of API under the heading of direct attacks against civilians which merely requires the showing of recklessness as a common *mens rea* as opposed to deliberation and thus deviates from the general rules of IHL. As has been noted above, this deviation was a conscious attempt by the ICTY in specifying what conduct could fall under Art. 3 of its Statute as violations of the laws and customs of war.

³¹² *Ibid.*, at para. 69.

³¹³ *Prosecutor v. Galić*, Appeals Judgement, *supra* note 305, at para. 132.

With regard to *mens rea* in *Martić*, the difference between the other three crimes and attacks on civilians is that the indirect intent that needs to be established requires that the attack is launched in the acceptance of the *possibility* of civilian harm rather than knowledge of the *probable* consequences.³¹⁴

When examining how the Trial Chamber applied the law to the facts of the case, the focus shall first be on the crime of attacks on civilians, since the threshold of proof regarding the intent is the lowest compared to the other crimes charged. At the outset, the Trial Chamber found it established that Martić had ordered the shelling by noting, *inter alia*, that in his capacity of President of the RSK he led decisions of the Supreme Defence Council as a matter of his constitutional authority and the decision to shell Zagreb had been taken by Martić and the RSK armed group Main Staff General Čeleketić alone rather than the whole Supreme Defence Council.³¹⁵

For proving that the Orkan rocket attacks caused death to civilians, the Trial Chamber extensively relied on the testimony of Branko Lazarević, head of the Zagreb police department of on-site investigations at the time. Lazarević compiled extensive reports based on on-site investigations of the locations where the explosive sub-munitions struck as well as on forensic medical evidence. He found that five people were killed on 2 May and two on 3 May.³¹⁶ The detailed testimony of some of those injured serves as evidence of the kind of injuries cluster munition victims sustain: For instance, Mina Žunac, wounded on 2 May, suffered serious injuries in her right leg, making amputation of a part of the right foot necessary. She also had a fracture of her right knee, hip and fist and sustained head injuries. Her head was full of shrapnel and she continues to have over 45 pieces of shrapnel in her leg. As a result of these injuries sustained, Ms Žunac underwent at least ten surgeries.³¹⁷ This is a concrete illustration of amputation of limbs as the aforementioned frequent consequence of cluster munition use as well as the need for multiple surgeries in the aftermath of such use.³¹⁸

Sanja Risović, another victim, who was wounded on 3 May, had a total of eleven operations on her back and her hand and up to 2007 had to spend three weeks in rehabilitation each year. Her injuries and the time she had to devote to their treatment have

³¹⁴ Here again, the Trial Chamber cited to the *Galić* Appeals Judgement and the ICRC Commentary on Article 85 API. See *Prosecutor v. Martić*, Judgement, *supra* note 286, at para. 72, fn. 138.

³¹⁵ *Ibid.*, at paras. 456-460.

³¹⁶ *Ibid.*, at paras. 305-313.

³¹⁷ *Prosecutor v. Martić*, Testimony of Mina Žunac, Transcript of Trial Chamber Hearings, Case No. IT-95-11-T, T.Ch. I, 20 June 2006, at 5822, 5824-5825.

³¹⁸ See *supra* p. 43.

severely impacted on her ability to work and to care for her daughter.³¹⁹ This in turn shows that not only the injured person itself is affected but also relatives that are dependent on the victim.

Among the evidence of death and injuries caused by the Orkan rocket attacks were also the two police officers and bomb disposal experts Ivan Markulin and Ivica Pukšec, who died and sustained serious injuries, respectively, when they were trying to defuse unexploded sub-munitions left behind after the attacks.³²⁰ Thus, the Trial Chamber also took into account death and injuries caused by the second fundamental concern associated with the use of cluster munitions, the presence of unexploded sub-munitions that may kill and maim any person at the post-conflict stage. This also amounts to a recognition that injuries caused to clearance professionals is relevant evidence for finding unlawful attacks on civilians, since the clearance activity cannot be interpreted as direct/active participation in hostilities.

With regard to the question of whether from these casualties it followed that the Orkan rocket attacks amounted to unlawful attacks on civilians the Trial Chamber noted the arguments put forward by the Defence that there were military targets in Zagreb at the time of the attacks, including the Ministry of Interior, the Ministry of Defence, Zagreb airport which also had a military purpose and the Presidential Palace. Significantly, the judges did not generally dispute that these objects constituted military targets. In fact, they relied on testimony that for instance, the Ministry of Defence complex included military facilities and institutions.³²¹ The Trial Chamber also responded to evidence put forward by the Defence that the Ministry of Defence, the Presidential Palace and the airport, all military targets, were hit; by stating that only the airport was hit and by further noting that two police buildings received damage caused by the attacks, one can infer that the ICTY recognised that there were in fact military targets in Zagreb at the time of the attacks.

However, the judges ruled that “the presence or otherwise of military targets in Zagreb is irrelevant in light of the nature of the M-87 Orkan.”³²² Therefore, the tribunal was not prepared to hold that there were no military targets in Zagreb whatsoever and on that basis conclude that an unlawful attack on civilians had been perpetrated. Rather, it indicated that the nature of the cluster munitions used would be decisive in finding an unlawful attack

³¹⁹ *Prosecutor v. Martić*, Testimony of Sanja Risović, Transcript of Trial Chamber Hearings, Case No. IT-95-T, T.Ch. I, 14 June 2006, at 5587-5588.

³²⁰ *Prosecutor v. Martić*, Transcript of the Rule 61 Hearing, *supra* note 287, at p. 87. Pukšec was among the victims that was expressly included in the list of victims prepared by the Prosecution in the Second Amended Indictment. See *Prosecutor v. Martić*, Second Amended Indictment, Annex II, *supra* note 306.

³²¹ *Prosecutor v. Martić*, Testimony of Branko Lazarević, Transcript of Trial Chamber Hearings, Case No. 95-11-T, 14 June 2006, at 5628.

³²² *Prosecutor v. Martić*, Trial Chamber Judgement, *supra* note 286, at para. 461.

on civilians. Thus, one may observe here that the ICTY as opposed to the Eritrea Ethiopia Claims Commission regarded the characteristics of the cluster munition used in the specific circumstances of using it in and around civilian residential areas as decisive.

On the M-87 Orkan rocket, the Trial Chamber found, relying heavily on the testimony of artillery expert witness for the Prosecution, Jožef Poje, that

“[t]he M-87 Orkan is a non-guided projectile, the primary military use of which is to target soldiers and armoured vehicles. Each rocket may contain either a cluster warhead with 288 so-called bomblets or 24 anti-tank shells. The evidence shows that rockets with cluster warheads containing bomblets were launched in the attacks on Zagreb on 2 and 3 May 1995. Each bomblet contains 420 pellets of 3mm in diameter. The bomblets are ejected from the rocket at a height of 800-1000m above the targeted area and explode upon impact, releasing the pellets. The maximum firing range of the M-87 Orkan is 50 kilometres. The dispersion error of the rocket at 800-1000m in the air increases with the firing range. Fired from the maximum range, this error is about 1000m in any direction. The area of dispersion of the bomblets on the ground is about two hectares. Each pellet has a lethal range of ten metres.”³²³

These are important findings as to the design and function of cluster munitions like the Orkan rocket. Firstly, the ICTY described the components of cluster munitions, a container or delivery system, in this case a rocket, each containing 288 KB-1 explosive sub-munitions. In this regard, Jožef Poje specified that twelve rockets are contained in a launcher which is mounted on a truck, enabling the user to effect individual launches or launches of all twelve rockets in short intervals of two, four or six seconds; that means that no less than 3456 explosive sub-munitions (288 x 12) can be launched at the press of a button. The tribunal also accurately observed that at a certain altitude the container (here: the rocket) opens and disperses the 288 KB-1 explosive sub-munitions which upon impact are designed to explode on the ground over an area as large as two hectares (20000 square metres). Importantly, the judges also emphasised that the Orkan rocket is *unguided*, which means, again in the words of expert Poje that “[a]t the moment when the rocket propulsion engine ceases to work, then the flight is [...] a free flight. As of that moment, we can no longer correct or adjust its trajectory.”³²⁴

With regard to the primary military purpose of the Orkan found by the Trial Chamber, notably to target soldiers and armoured vehicles, it is important to add their original intended use against such targets in *open, uninhabited areas*. The first effect (anti-personnel effect) is achieved through the release of the little metal pellets welded onto each bomblet, creating a fragmentation effect which makes it possible to kill dispersed soldiers, the second through a

³²³ *Ibid.*, at para. 462.

³²⁴ *Prosecutor v. Martić*, Testimony of Jožef Poje, Transcript of Trial Chamber Hearings, Case No. 95-11-T, T.Ch. I, 6 June 2006, at 5067.

shaped charge which can pierce up to 6cm of armour.³²⁵ Emphasising the original military purpose of cluster munitions to attack dispersed troops and armour in *open, uninhabited areas* would have brought an even sharper contrast to the conclusion by the Trial Chamber that “the M-87 is an indiscriminate weapon, the use of which in *densely populated areas*, such as Zagreb, [as opposed to open, uninhabited areas] will result in the infliction of severe casualties.”³²⁶

In concluding that the M-87 Orkan was incapable of hitting specific targets, the ICTY not only drew upon the character of the cluster rocket as a non-guided high dispersion weapon but also upon the fact that the rockets had been launched from the maximum of its range, i.e. around 50 kilometres from Zagreb, resulting in a dispersal error of about 1 km in any direction.³²⁷ However, the range from which the Orkan was launched in the specific instance did not exceed the maximum range from which targets with this multiple-rocket launcher could be hit, as these rockets were designed to be launched from a range of up to 50 km.³²⁸ An expert on cluster munitions who has extensively written on these weapons since 2000, proved in this context that eight of the actual twelve rockets launched performed as well as could be expected given that they fell within the dispersal error of about 1 km from the nearest military target.³²⁹ Moreover, even within the probable target area when the weapon is used as designed there were civilian targets in the immediate vicinity of single military targets. Thus, irrespective of the fact that the rockets were used from the extreme of their intended range that does not change, it only further aggravates, the fundamental characteristics of cluster munitions that they are incapable of hitting specific military targets intermingled with densely populated civilian residential areas. This is a landmark conclusion by the ICTY with implications for all instances of cluster munition use to date, since they have always been used in or near densely populated areas, including in Eritrea’s use of cluster munitions against Ethiopia referred to above.

As for the required *mens rea* of “wilfulness” the Trial Chamber concluded that by 2 May 1995, the effects of firing the M-87 Orkan on Zagreb were known to those involved.³³⁰

³²⁵ *Ibid.*, at 5068.

³²⁶ *Prosecutor v. Martić*, Judgement, *supra* note 286, at para. 463.

³²⁷ *Ibid.*, at paras. 462-463.

³²⁸ *Prosecutor v. Martić*, Testimony of Jožef Poje, *supra* note 324, at 5138.

³²⁹ Prof. Wiebe found that strikes one and two hit both at an equidistance of 750 and 850m, respectively, from the Presidential Palace and the Ministry of Defence, strike three less than 300m from the Ministry of Defence, strike four at a distance of 780m from the Presidential Palace and strike five at an equidistance of between 900 and 970m from the Presidential Palace and the Ministry of the Interior. The three strikes designated by strike site number 6 in the Annex to the judgement did not miss the airport by more than 500m. See V.O. Wiebe, “For Whom the Little Bells Toll”, *supra* note 189, at 939-940.

³³⁰ *Prosecutor v. Martić*, Judgement, *supra* note 286, at para. 463.

This author submits that the evidence to prove the mental element was thin, even contradictory. While one witness testified that “persons who are familiar with these artillery pieces knew that they were intended for targeting wider areas and not points, and that as such they could entail a lot of casualties”,³³¹ another stated that it would have been easy to conclude what the consequences of using the Orkan would be but allowed for the possibility that not everyone is familiar with the consequences of using this weapon.³³²

However, other evidence could have been resorted to, since the same Orkan rockets were already used by the Krajina Serbs before the Zagreb bombing, for example in Zaton in January 1993 and in Gospić in 1993 when two men and one woman were injured as a result of KB-1 sub-munitions.³³³ Significantly, Martić had held various posts in the RSK government since 1991, first Minister of Defence, then from June 1991 until 1994 Minister of the Interior. In the latter capacity, he directed the training of paramilitary police that became part of the RSK armed group and was member of the Supreme Defence Council from April 1993 which took all important military decisions.³³⁴ From this, it could have been concluded that already in 1993, the effects of the Orkan rockets used by the RSK armed group were known to Martić.

The evidence for establishing “wilfulness” for the attack on 3 May was much stronger because of the extensive media coverage on casualties from the rocket attack of 2 May.³³⁵ This is another commonality with the Eritrea Ethiopia Claims Commission Award, since the failure to prevent recurrence of civilian harm from previous cluster munition use despite knowledge of the harm also contributed to the decision on Eritrea’s responsibility in that case.

Since the Trial Chamber reiterated previous ICTY jurisprudence analysed above that a direct attack on civilians may be inferred from the indiscriminate character of the Orkan rocket, it was able to conclude that Martić wilfully made the civilian population of Zagreb object of the attacks on 2 and 3 May 1995 and that he thus incurred individual criminal responsibility for the war crime of attacks on civilians.³³⁶

With regard to Count 15, murder as a crime against humanity, the judges held that due to the characteristics of the M-87 Orkan and the large-scale nature of the attack the shelling

³³¹ *Prosecutor v. Martić*, Testimony of Rade Rašeta, Transcript of Trial Chamber Hearings, Case No. 95-11-T, T.Ch. I, 2 May 2006, at 3939.

³³² *Prosecutor v. Martić*, Testimony of Jožef Poje, *supra* note 324, at 5113-5114.

³³³ Handicap International, “Circle of Impact”, *supra* note 71, at 64-65.

³³⁴ *Prosecutor v. Martić*, Judgement, *supra* note 286, at paras. 135, 137, 144, 151, 155-156.

³³⁵ *Ibid.*, at para. 463.

³³⁶ *Ibid.*, para. 472.

also constituted a widespread attack directed against the civilian population of Zagreb. The Tribunal also had no problem in finding that all seven deaths were caused by the Orkan rocket attacks and that due to the nature of the cluster rockets he was aware that death was a probable consequence of these attacks. The accused could only be convicted of a crime against humanity in relation to six of the seven persons killed, since Ivan Markulin, the police officer and bomb disposal expert, could not be termed a “civilian” for the purposes of crimes against humanity. On the other hand, Markulin’s death formed the basis for a finding of Martić’s responsibility besides the death of the other six persons under Count 16, murder as a war crime in accordance with article 3 of the ICTY Statute because Markulin was not taking an active part in hostilities.³³⁷

The fact that the Trial Chamber held that the launch of eight to twelve Orkan rockets (i.e. 3456 explosive sub-munitions at most) in densely populated areas, which entailed seven deaths, may be sufficiently widespread to amount to a crime against humanity already in 1995 is another landmark conclusion of the 2007 judgement. Significantly, expert witness Poje testified that because of their high dispersion pattern multiple-barrel rocket launchers in *general* are unsuitable for firing on targets in populated areas, *not only the Orkan but others too*.³³⁸ Accordingly, Poje did not only confine his findings to one type of MLRS, the Orkan cluster rocket but indicated that MLRS systems dispersing explosive sub-munitions more generally will display the same incapability of hitting specific targets in populated areas.

Therefore, the conclusions concerning the Orkan multiple-launch rocket system may equally be applied to the M-26 MLRS system when used in or near populated areas. The M-26 MLRS may fire up to 12 rockets at a time from a range of up to 32 km (thus less than the Orkan rocket’s range of up to 50 km). Each M-26 cluster rocket contains 644 M-77 dual purpose improved conventional sub-munitions (as opposed to 288 DPICM in the Orkan). Compared with the Orkan rocket where 3456 explosive sub-munitions may be used at the press of a button, a user of the M-26 may disperse 7728 explosive sub-munitions at the press of a button. The sheer number of sub-munitions that may be dispensed from the M-26 is thus more than two times higher than with the Orkan rocket. This makes it reasonable to assume that the dispersion pattern will be similar to sub-munitions released by an Orkan rocket despite the fact that the M-26 is only suitable for use from shorter ranges.

Therefore, where the launching of eight to twelve Orkan rockets into populated areas, entailing a large number of civilian casualties, amounts to a crime against humanity, there is

³³⁷ *Ibid.*, para. 470.

³³⁸ *Prosecutor v. Martić*, Testimony of Jožef Poje, *supra* note 324, at 5107.

a strong case that the use by the United States and Israel of M-26 cluster rockets equally was a crime against humanity.³³⁹ Reportedly, U.S. ground forces used such cluster rockets in Iraqi populated areas in 2003,³⁴⁰ and especially Israel used no less than 1800 M-26 cluster rockets, i.e. 1800 x 64 M-77 explosive sub-munitions, equating to almost 1,2 Mio. explosive M-77 sub-munitions in the last three days during hostilities with Hezbollah in 2006.³⁴¹

Finally, another landmark conclusion reached by the Trial Chamber was that the use of cluster munitions with wide area effects in densely populated areas which results in persons not actively participating in hostilities seriously injured, may constitute cruel treatment punishable as a war crime under article 3 ICTY Statute and upon satisfaction of the general requirements, inhumane acts punishable as a crime against humanity under article 5 ICTY Statute.³⁴² The prohibition of subjecting persons to cruel or inhuman treatment forms part of the prohibition of torture and cruel or inhuman and degrading treatment under both HRL and IHL.³⁴³ This ruling is a first reminder that the use of cluster munitions not only poses problems under IHL but also under the complementary regime of HRL.³⁴⁴

The findings of the Trial Chamber were upheld by the ICTY Appeals Chamber. For purposes of this discussion, Martić stated *inter alia* that the Trial Chamber erred when it held that the M-87 Orkan was an indiscriminate weapon. In contrast, he argued that it was a precise weapon, even from a long distance.³⁴⁵ He supported this statement with a different expert report than the one on which the Trial Chamber finally relied and a memorandum from

³³⁹ In this respect, compare the conclusion by the Commission of Inquiry on Lebanon established by the Human Rights Council which stated that “The use of cluster munitions by the IDF was of no military advantage and was in contradiction to the principles of distinction and proportionality. These were *part of a widespread and systematic targeting of civilians and their property causing great suffering, injury and death* during and after conflict.” See Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at para. 337. However, it should be noted that also Hezbollah fired cluster rockets into Israel, although on a much smaller scale. Reportedly, Hezbollah fired 118 Type-81 cluster rockets, each containing 39 explosive sub-munitions, amounting to the dispersal of 4602 sub-munitions in total. See Human Rights Watch, “Civilians under Assault”, *supra* note 98, at 44-48.

³⁴⁰ Human Rights Watch detailed that 1014 MLRS rockets were used by the U.S. ground forces in Iraq, entailing hundreds of civilian casualties in Iraqi major cities, including al-Hilla, al-Najaf, Karbala, Baghdad and Basra. See Human Rights Watch, “Off Target”, *supra* note 81, at 82, 85.

³⁴¹ Handicap International, “Circle of Impact”, *supra* note 71, at 120.

³⁴² *Prosecutor v. Martić*, Judgement, *supra* note 286, at para. 471.

³⁴³ Arts. 1, 16, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; Art. 7, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 17; Common Art. 3, para. 1 a, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Arts. 50/51/130/147, *ibid*.

³⁴⁴ How these two regimes relate to each other with regard to cluster munition use shall be subject to analysis *infra* in Chapter 4, at pp. 115-185.

³⁴⁵ *Prosecutor v. Martić*, Judgement, Case No. IT-95-11-A, App. Ch., 8 October 2008, at paras. 239-240.

the United Nations Military Observers which concluded that the dispersal error would be an ellipse of only 180m x 165m rather than 1000m x 1000m.³⁴⁶ Martić also emphasised that the targets aimed at were large and similar weapons have been used by many armies in the recent past. Moreover, he doubted the expert witnesses' expertise and rebuked the Trial Chamber for failing to consider that apart from the Orkan rocket, the Krajina Serb armed group only had the more powerful Luna rocket system at its disposal.³⁴⁷ Finally, Martić challenged the Trial Chamber judgement on the grounds that it did not take into account Croatia's own precautionary obligations to protect its civilian population against the effects of military operations under Art. 58 API and that it wrongfully held that the attack constituted a widespread attack against the civilian population.³⁴⁸

On the alleged precision of the Orkan rocket, the Appeals Chamber held that the basis for finding the different dispersion error relied on by the Defence had not been sufficiently revealed. This would have been necessary in view of the fact that the dispersion pattern depends on a number of factors, including the firing range. More fundamentally, the Appeals Chamber was not prepared to accept that a dispersion error of 180m x 165m would make the finding that the Orkan rocket was incapable of hitting specific targets unreasonable.³⁴⁹ The implication is that the ICTY adopts a strict stance on errors in accuracy of artillery weapons used in populated areas. This makes the statement on the insufficient accuracy of the Orkan rocket in populated areas generalisable for other cluster munitions, as virtually all cluster munition types ever used have some dispersion errors, which makes it probable that a high number of sub-munitions lands far off an intended target. Consequently, there is zero tolerance for using cluster munitions in populated areas and the Appeals Chamber endorsed the Trial Chamber's approach to disregard the presence of military targets in Zagreb at the time of the attacks.³⁵⁰

In this context, the Appeals Chamber also dismissed the argument that many armies used similar weapons in the recent past as irrelevant.³⁵¹ It is submitted that it did rightfully so, as the mere fact that cluster munitions have been used in recent armed conflicts is of no relevance for the inquiry whether the use of the Orkan rocket was lawful in the circumstances of the Zagreb bombing. It may be added that this statement would have weakened the position of the Defence, not strengthened it, as the use of similar cluster munitions in

³⁴⁶ *Ibid.*, at para. 250.

³⁴⁷ *Ibid.*, at para. 239.

³⁴⁸ *Ibid.*, at para. 239-240.

³⁴⁹ *Ibid.*, at para. 250.

³⁵⁰ *Ibid.*, at para. 251.

³⁵¹ *Ibid.*

populated areas has always entailed civilian casualties and thus, was always unlawful in such circumstances.

The Appeals Chamber also rejected Martić's challenges of the expertise of the expert witnesses on whose testimony the Trial Chamber heavily relied, as he had not pointed to any specific lack of expertise or error.³⁵²

Moreover, the Appeals Chamber explicitly addressed the argument that opponents to any specific rules on cluster munitions frequently tend to make, that in relation to the alternative of using more powerful unitary weapons cluster munition use in populated areas would still be a preferable option. In this regard, the Appeals Chamber rejected the argument that relatively speaking, the Orkan was the appropriate weapon choice, as the alternative of using the larger and more powerful Luna unitary rocket system would potentially have been still worse in terms of civilian casualties. The judges found that whether the Krajina Serbs had another artillery system at their disposal was irrelevant as regards the inquiry whether or not the Orkan rocket was indiscriminately used in the circumstances at hand.³⁵³ The implication is that the statement that were one to prohibit cluster munitions because they are an indiscriminate method of combat in populated areas something else even more indiscriminate will be used instead will not be accepted as a matter of IHL.

On the allegation that the Trial Chamber failed to take the lack of respect by Croatia of its precautionary obligations as a defender into account, the Appeals Chamber had no difficulty in rejecting this submission. It held that it was one of the pillars of IHL that its provisions have to be applied in all circumstances, citing to the obligation to respect and ensure respect for IHL enshrined in common Art. 1 of the Geneva Conventions as well as Art. 1 of API. Thus, one side could not claim that its obligations would be diminished or non-existent just because the other side does not respect all of its obligations.³⁵⁴ Again, this statement of principle is important in light of the record of use of cluster munitions that these weapons have been used to a large extent in asymmetrical armed conflicts where the defender frequently mingles with the civilian population or positions itself in the midst of civilian objects. However, under IHL considerations of reciprocity have receded to the background.³⁵⁵

³⁵² *Ibid.*, at para. 249.

³⁵³ *Ibid.*, at para. 248.

³⁵⁴ *Ibid.*, at para. 270.

³⁵⁵ This conclusion can be sustained, for example, by resorting to Art. 51 (8) which obliges attackers to honour their obligations even if the other side violates its own obligations to protect civilians.

Finally, the Appeals Chamber also confirmed the Trial Chamber's on the shelling of Zagreb as a widespread attack against the civilian population, by noting that Martić did not challenge the high number of civilian casualties caused by the bombing and did not object to the fact that of the purported military targets, only one was hit.³⁵⁶

In short, the 2007 and 2008 *Martić* judgements reached fundamental conclusions with regard to the first fundamental problem associated with cluster munition use, their wide area effect with harmful consequences for civilians in populated areas. Perhaps the most important signal it sends is that the use of cluster munitions in areas where military targets are intermingled with civilians and civilian objects – circumstances all too present in contemporary armed conflicts – is generally unlawful under IHL. It is this fundamental and generalisable statement that sets this judgement apart from the award by the Eritrea Ethiopia Claims Commission which only took into account whether the specific conduct by the personnel using cluster munitions evidenced a lack of feasible precautions rather than raising the more fundamental question whether cluster munitions can be lawfully used in and around populated areas at all.

However, even these judgements constitute a missed opportunity, since more attention, especially by the OTP could have been devoted to the second humanitarian problem of cluster munition use, the problem of deaths and injury at the post-conflict stage as a result of tampering with landmine-like sub-munitions that were left unexploded. In this respect, the Trial Chamber expressly included one dead and one seriously injured police officers among the victims on the basis of which it held Martić responsible for cruel treatment under article 3 of the ICTY Statute.

While these were casualties occurring in the immediate aftermath of the attacks on 2 and 3 May, as was observed above, already in 1996 the OTP presented evidence of four children that were severely injured in Zagreb as a consequence of tampering with unexploded sub-munitions from the May attacks over two months afterwards. However, it did not pursue this issue any further.³⁵⁷ Indeed, it would have been easy for the ICTY to establish a causal link between these injuries and the use of the Orkan rockets in May, since

³⁵⁶ *Prosecutor v. Martić*, Appeals Chamber Judgement, *supra* note 345, at para. 255. The Appeals Chamber also approved of the Trial Chamber's treatment of the *mens rea*, i.e. that the effects of the M-87 Orkan were known to Martić. *Ibid.*, at para. 256.

³⁵⁷ It appears that this was not a conscious decision but that the OTP was confident that focusing on the immediate casualties resulting from the 2 and 3 May attacks would already provide a sufficient basis for a conviction in this case. See Wiebe, "For Whom the Little Bells Toll", *supra* note 189, at 44, fn. 207 (citing to an e-mail received from Alex Whiting of the Prosecution team in the *Martić* case).

large numbers of duds were recovered,³⁵⁸ Zagreb had never been shelled with cluster munitions before and the incident occurred close to a site of an earlier explosion on 3 May.³⁵⁹ Thus, the objective elements for the crimes of attacks on civilians and cruel treatment would have also been satisfied in respect of these post-conflict casualties.

With regard to the required *mens rea*, the OTP would have had to prove that Martić acknowledged as a possibility or knew of the probability, respectively, of civilian injury through the presence of duds months after cluster munition use. Evidence exists from which the mental element could have been established, since as specified above, the Krajina Serbs had used Orkan rockets in Croatia already before 1995. In this respect, it is noteworthy that five people were killed and seven injured from unexploded sub-munitions stemming from Orkan rocket use by the Krajina Serbs between 1 January and 14 July 1993 in Zadar, Muc, Sibenik and Sukosan. In 1994, one boy was killed by an unexploded sub-munition.³⁶⁰

Including long-term post-conflict casualties through unexploded sub-munitions in the conviction for unlawful attacks on civilians and/or cruel treatment would have been an important recognition that such casualties are also a possible and even likely consequence of cluster munition use. Had the Trial Chamber resorted to the four long-term casualties in holding Martić responsible it would have strengthened the view endorsed in 2006 by state parties in the Final Declaration of the Third Review Conference to the CCW that such long-term civilian harm must indeed be considered by an attacking force in complying with its obligation to conduct a proportionality assessment before launching an attack. Unfortunately, it missed this opportunity but nevertheless both the OTP and the Trial Chamber are to be credited for prosecuting and convicting, respectively, Martić on the basis of cluster munition use in civilian residential areas.

However, the more fundamental opportunity was missed subsequently in the context of cluster munition use by NATO member states during “Operation Allied Force”. The controversial decision by the OTP not to investigate cluster munition use and other alleged war crimes in this context cannot but leave a bitter aftertaste of selective justice. In the next section, this author argues that there were no good legal reasons in not investigating cluster munition use in the former Yugoslavia by NATO member state individuals while

³⁵⁸ Mario Petrić, Chief of the Anti-Explosives Department of the Zagreb police, testified at the 1996 Rule 61 Hearing that altogether 1599 unexploded sub-munitions were cleared. See *Prosecutor v. Martić*, Transcript of the Rule 61 Hearing, *supra* note 287, at 90.

³⁵⁹ *Ibid.*, at 45.

³⁶⁰ Handicap International, “Fatal Footprint: The Global Human Impact of Cluster Munitions”, November 2006, at 23, http://www.mineaction.org/downloads/1/Fatal_Footprint_HI_report_on_CM_casualties.1.pdf (last visited 21 January 2010).

investigating and prosecuting the head of the Krajina Serbs for the same conduct in the former Yugoslavia.

3.7. The Failure of the ICTY OTP to Prosecute NATO Member States Individuals for Cluster Munition Use in Operation Allied Force

As reported *supra*,³⁶¹ U.S., UK and Dutch armed forces extensively used air-dropped cluster munitions during the 1999 NATO “Operation Allied Force” whose objective was to stop massive human rights violations committed by the Milosević regime against Kosovo-Albanians. These instances of cluster munition use also resulted in a great number of civilian casualties. Since the competence of the ICTY includes prosecution of persons irrespective of their nationality for serious IHL violations committed on the territory of the former Yugoslavia since 1991 on an open-ended basis, alleged war crimes by NATO member states individuals in 1999 undeniably fall within the jurisdiction of the tribunal.³⁶² It did not come as a surprise, therefore, that the ICTY Prosecutor in fact received numerous requests during Operation Allied Force to commence investigations into alleged war crimes perpetrated by NATO member states. As a result, the ICTY Prosecutor established a Special Review Committee which had the task of advising her on whether or not there was a reasonable basis to proceed with investigations against NATO member states individuals. This Special Review Committee issued a Final Report in June 2000 in which it recommended to the ICTY Prosecutor not to commence any investigation into alleged war crimes in relation to the NATO airstrikes.³⁶³ While the Prosecutor is not bound by these recommendations she decided to follow the advice of the Review Committee: She concluded that although some mistakes were made by NATO she was satisfied that there had been no deliberate targeting of civilians or unlawful military targets by NATO during the air campaign.³⁶⁴

³⁶¹ See *supra* p. 35.

³⁶² Compare Art. 1 of the ICTY Statute which states: “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.” See UNSC Res 827 of 25 May 1993, UN Doc. S/RES/827.

³⁶³ Final Report by the NATO bombing Review Committee, *supra* note 177. The Final Report has been fiercely criticised by commentators. See, for example, N. Ronzitti, “Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?”, 840 International Review of the Red Cross 1017 (2000); P. Benvenuti, “The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia”, 12 (3) EJIL 503 (2001); A. Massa, “NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?”, 24 Berkeley Journal of International Law 610 (2006).

³⁶⁴ President of the International Criminal Tribunal for the Former Yugoslavia, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law

The Review Committee Report addressed the issue of cluster munition use by NATO member states armed forces in the following manner:

“Cluster bombs were used by NATO forces during the bombing campaign. There is no specific treaty provision which prohibits or restricts the use of cluster bombs although, of course, cluster bombs must be used in compliance with the general principles applicable to the use of all weapons. Human Rights Watch has condemned the use of cluster bombs alleging that the high “dud” or failure rate of the submunitions (bomblets) contained inside cluster bombs converts these submunitions into antipersonnel landmines which, it asserts, are now prohibited under customary international law. Whether antipersonnel landmines are prohibited under current customary international law is debatable, although there is a strong trend in that direction. There is, however, no general legal consensus that cluster bombs are, in legal terms, equivalent to antipersonnel landmines. It should be noted that the use of cluster bombs was an issue of sorts in the *Martić* Rule 61 Hearing Decision of Trial Chamber I on 8 March 1996. In that decision the Chamber stated there was no formal provision forbidding the use of cluster bombs as such (para. 18 of judgment) but it regarded the use of the Orkan rocket with a cluster bomb warhead in that particular case as evidence of the intent of the accused to deliberately attack the civilian population because the rocket was inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb and the accused indicated he intended to attack the city as such (paras. 23-31 of judgment). The Chamber concluded that “the use of the Orkan rocket in this case was not designed to hit military targets but to terrorise the civilians of Zagreb” (para. 31 of judgment). There is no indication cluster bombs were used in such a fashion by NATO. It is the opinion of the committee, based on information presently available, that the OTP should not commence an investigation into use of cluster bombs as such by NATO.”³⁶⁵

The analysis by the Review Committee is objectionable on three grounds: Firstly, the Review Committee did not analyse how general rules of IHL relate to the use of cluster munitions despite emphasising that in the absence of specific treaty prohibitions or restrictions on cluster munitions these weapons must be used in compliance with general principles of IHL. In other words, it did not bother to identify the prohibitions of indiscriminate and disproportionate attacks nor the obligation to take all feasible precautions and the extent to which these general rules can be respected with regard to cluster munition use as examined in the preceding Chapters 3.1 to 3.4.³⁶⁶

Secondly, in the view of this author, the committee misconstrued Human Rights Watch’s legal assessment of the problem of unexploded sub-munitions. However, Human Rights Watch never claimed that unexploded sub-munitions are *legally* equivalent to

Committed in the Territory of the former Yugoslavia since 1991, 7 August 2000, at para. 192, UN Docs. A/55/273-S/2000/777.

³⁶⁵ Final Report by the NATO bombing Review Committee, *supra* note 177, at para. 27.

³⁶⁶ A side point concerns the difference between general *rules* and general *principles* of IHL which was not clarified by the Review Committee. The already cited recent report by McCormack and others clarified this distinction in that military necessity and humanity were identified as general principles guiding the behaviour of parties to an armed conflict whereas these general principles have been given more specific content by the more specific prohibitions of indiscriminate and disproportionate attacks and the obligation to take all feasible precautions upon attack. Violations of the specific rules may constitute war crimes and may lead to individual criminal responsibility. Thus, these specific rules are much more than vague principles lacking real content where states may hide like behind a convenient smokescreen. See McCormack *et al.*, “Report on IHL & ERW”, *supra* note 164, at 8.

antipersonnel mines. Human Rights Watch stated that the high dud rate of explosive sub-munitions *de facto* rather than *legally* turns these weapons into antipersonnel landmines. In a 1999 report on NATO member states' use of cluster munitions in the then FRY, Human Rights Watch emphasised that sub-munitions may kill and maim civilians *despite*, and antipersonnel landmines *because* of their design.³⁶⁷ This evidences that Human Rights Watch was well aware of the fact that the standard under the general prohibition of indiscriminate attacks and the specific prohibitions under the 1997 Ottawa Convention on Anti-Personnel Mines is the weapon's *intended design rather than its actual effects*.³⁶⁸ Therefore, cluster munitions are not equivalent to antipersonnel mines in legal terms. Aside from grounding this conclusion in the prevailing design-based as opposed to an effects-based approach, treating cluster munitions separately from antipersonnel landmines is also warranted since cluster munition use results in the additional problems of inaccuracy and wide area effect at the time of use.

Thirdly, the case distinguishing between NATO cluster munition use and the *Martić* case was unduly selective. This is especially true when the most notorious incident of cluster munition use by NATO member states in the Serbian city of Niš is compared with the facts in the *Martić* case.

At 11:20 am on 7 May 1999 at least two NATO member states air-dropped CBU-87 cluster bombs, each containing 202 BLU-97 sub-munitions hit two of the locations most frequented by civilians in Serbia's third largest city of Niš, around the market place and the city hospital, around 2km from each other. The alleged target was the military airport about 4 km from the city centre. The Review Committee confirmed that at least 13 civilians were killed, seven in the vicinity of the market place, and another seven in two streets near the hospital. 27 civilians were seriously wounded and there are hospital records indicating that 30 others received some medical treatment as a result of this attack.³⁶⁹ The Committee assumed a figure of 60 injured.³⁷⁰ Additionally, as many as 70 others reportedly received

³⁶⁷ Human Rights Watch, "Ticking Time Bombs", *supra* note 65.

³⁶⁸ Art. 2 of the 1997 Ottawa Convention states: "Anti-personnel mine means a mine *designed* to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons" (emphasis added). See 1997 Ottawa Convention, *supra* note 224. While there was some debate on whether anti-personnel landmines should be prohibited on the basis of their design only or on their actual effects also the former view finally prevailed. See S. Maslen, *Commentaries on Arms Control Treaties, Vol. I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* 116-118 (2nd edn., 2005).

³⁶⁹ According to orthopaedic surgeons in Niš main hospital, cluster sub-munition fragments caused severe injuries, i.e. wide devastation of soft tissues and bones including neurovascular destruction, resulting in a high number of amputations. See Handicap International, "Circle of Impact", *supra* note 71, at 80.

³⁷⁰ Final Report to the Prosecutor by the NATO bombing Review Committee, *supra* note 177, at para. 9.

some first aid but were sent home without any medical record kept. NATO officials expressed regret about civilian casualties and attributed them to a technical malfunction of the cluster bombs used causing them to land wide off target.

Five days later, at 2:55 pm on 12 May 1999, another densely populated suburb of Niš, Duvanište, was hit with BLU-97 submunitions stemming from NATO member state aircraft. Again, the purported target was the airport about 7km away from this suburb. No civilian was killed but thirteen were injured.³⁷¹

The Orkan cluster rocket attacks on Zagreb in 1995 and the CBU-87 cluster munition attacks on Niš in 1999 reveal the following commonalities: Firstly, as in the case of Zagreb there were indisputably military targets in and around Niš. NATO officials alleged that the attack was aimed at the airport which was used for military purposes; it is recalled that one of the military targets in Zagreb was also the airport that was at least partly used for military purposes.³⁷² Of the military targets against which the cluster munition strikes had allegedly been directed, the sub-munitions strikes in the vicinity of Zagreb airport came even closest of all the strikes to the intended object.

Secondly, civilian residential areas were nearby the individual military targets: In the case of Zagreb airport, Plešo village was around 500m away from the airport.³⁷³ The Niš suburb of Medoševac is only 150m from Niš airfield.³⁷⁴

Thirdly, concerning the weapons and the way they were used, compared with the Orkan cluster rocket attacks on Zagreb, also the CBU-87 is a cluster munition which consists of a delivery system (here: an air-dropped bomb) and explosive sub-munitions encompassed by the container. This bomb container as in the case of the Orkan rocket opens at a certain altitude and disperses the 202 BLU-97 explosive sub-munitions which upon impact are designed to explode on the ground over an area of between 243 x 121m (around 2,9 hectares),³⁷⁵ and 200 x 400m (around 8 hectares).³⁷⁶ Thus, the dispersal pattern of the explosive sub-munitions by one CBU-87 is even larger than for the Orkan rocket (2 hectares). The discrepancies in the estimated sizes of the dispersal pattern of the explosive

³⁷¹ Norwegian People's Aid, "Yellow Killers", *supra* note 102, at 22-25.

³⁷² *Prosecutor v. Martić*, Testimony of Ivan Mikulčić, Transcript of Trial Chamber Hearings, Case No. IT-95-11-T, 14 June 2006, at 5610.

³⁷³ *Ibid.*, at 5608.

³⁷⁴ Agence France Presse, "Sorrow and rage in Niš, as NATO raids kill 15", 7 May 1999, <http://www.bulgaria-italia.com/fry/nisHospital.htm> (last visited 21 January 2010).

³⁷⁵ Geneva International Centre for Humanitarian Demining, "A Guide to Cluster Munitions", First Edition, November 2007, at 11, <http://www.gichd.org/fileadmin/pdf/publications/Guide-to-Cluster-Munitions-Nov2007.pdf> (last visited 21 January 2010).

³⁷⁶ Major General Chuck Wald, Transcript of U.S. Department of Defense News Briefing, 14 May 1999, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=542> (last visited 21 January 2010).

sub-munitions resulting from CBU-87 use may be explained by the differences between the main impact area of a cluster munition strike and the entire perimeter that may be covered by a strike, since there may well be “stray” sub-munitions that fall wide off the main impact area.³⁷⁷ Like the Orkan rocket, the CBU-87 is unguided, i.e. once the bomb is dropped the flight is a free flight and as of that moment, the user can no longer control the trajectory of the bomb.³⁷⁸

While the 288 KB-1 sub-munitions are DPICM with an anti-armour and anti-personnel effect, the 202 BLU-97 explosive sub-munitions dispensed by the CBU-87 are even CEM. In both cases, the anti-armour effect is achieved by a shaped charge but the BLU-97 sub-munition may penetrate more than 20 cm of armour,³⁷⁹ whereas the KB-1 sub-munition can only penetrate 6 cm of armour. With regard to the anti-personnel effect, upon impact, one BLU-97 sub-munition is designed to shatter into approximately 300 steel fragments at extremely high speed, making it possible to cause human injury up to a distance of about 150m in any direction where the sub-munition falls.³⁸⁰ Assuming a mean impact area for the BLU-97 sub-munition of 200 x 400m the actual impact area where persons can be killed may even be as large as 350 x 550m (around 19,25 hectares).³⁸¹ On the other hand, the lethal range of the pellets that are dispersed by a KB-1 sub-munition upon impact and accounting for the anti-personnel fragmentation effect can only kill within a perimeter of 10 metres. Since the BLU-97 can cover a much wider area through fragmentation than the KB-1 sub-munitions, it follows that the actual dispersion pattern may be much larger in the case of the BLU-97 sub-munitions than in the case of the KB-1 sub-munitions.

In terms of the accuracy of targeting unguided munitions like air-dropped cluster munitions, it may be observed that the U.S. Air Force already noted in respect of the 1991 Operation Desert Storm that bombing sorties from medium to high altitudes of above 15.000 feet (around 4.500 m) contribute to greater targeting inaccuracies because of the greater distance to the target and the resulting greater difficulties to accurately identify the objects on the ground.³⁸² With regard to Operation Allied Force in 1999, the Review Committee instituted by the ICTY OTP generally acknowledged that at least part of the air campaign

³⁷⁷ Mennonite Central Committee, “Clusters of Death”, *supra* note 278.

³⁷⁸ This was admitted by Major General Wald in the U.S. Department of Defence briefing quoted above in the following words: “The weapon then *free-falls* to a certain attitude, and it opens up. [...] Then once it opens up, it’s not very high above the ground, [...] and then it goes into a pattern that is about 200x400 meters.” See Wald, U.S. Department of Defense News Briefing, *supra* note 376.

³⁷⁹ Geneva International Centre for Humanitarian Demining, “Guide to Cluster Munitions”, *supra* note 35, at 12.

³⁸⁰ Mennonite Central Committee, “Clusters of Death”, *supra* note 278.

³⁸¹ *Ibid.*

³⁸² U.S. Air Force, Gulf War Air Power Survey, *supra* note 68, at 161-162.

had been conducted at an altitude above 15.000 feet, resulting in targeting problems.³⁸³ The sub-munitions dispersed are more likely to land further off target, the longer they are in the air and the more they are susceptible to environmental conditions like wind during their fall. Where the great distance from which the Orkan rocket was launched contributed to increasing its inaccuracy, the equivalent can be seen from dropping the air-delivered CBU-87 from medium to high altitudes, aggravating the accuracy problems with these area weapons.³⁸⁴

Further, both Zagreb and Niš were targeted with cluster munitions at times when it could be assumed that a large number of civilians would be out on the streets, increasing the probability of civilian casualties.

Finally, the number of civilian deaths at 13 or 14 in Niš as a result of sub-munitions straying far from the intended target on one day is (about) twice of the number of seven civilian deaths occurring through cluster munition use on Zagreb on two days. If one assumes the figure given by the ICTY Review Committee to be correct, the number of 60 injured civilians on one day in Niš is also strikingly similar to the 54 injured on 3 May 1995 in Zagreb which, as shall be recalled, in the initial indictment against Martić formed a count separate from the attack of 2 May.

With regard to the differences between the two cases, it must first be emphasised that the Trial Chamber in the Rule 61 Decision in the *Martić* case did find that it was reasonable to believe that the main reason why the Orkan rocket was used was to attack and terrorise the civilian population deliberately. However, as noted above, it also reconfirmed that there was a reasonable basis to assume that an unlawful attack against civilians had been *wilfully* ordered. Thus, the Trial Chamber also accepted the alternative argument by the OTP that even if the intended purpose of Orkan rocket use had been to hit military targets in Zagreb it was still not the appropriate weapon choice. Moreover, while enumerating the characteristics and circumstances of use of the Orkan rockets, the Review Committee seemed to rely primarily on the indications of intent by Martić to terrorise civilians in Zagreb without discussing the other points enumerated, especially that the Orkan rocket, just like the CBU-87 is inaccurate even where there is some attempt to hit military targets. Therefore, the interpretation of the *Martić* Rule 61 Hearing Decision by the Review Committee appeared

³⁸³ Final Report to the Prosecutor by the NATO bombing Review Committee, *supra* note 177, at para. 56.

³⁸⁴ See in this sense Dullum who explains that “When dropped from a distance or from high altitudes, an unguided bomb is inherently inaccurate due to errors in the aircraft attitude [the speed, roll and dive angle of the aircraft] and position of the drop, and of [to! sic] atmospheric effects” (emphasis added). Dullum, “Cluster Weapons”, *supra* note 36, at 51.

unduly restrictive. Furthermore, the quote according to which the use of the Orkan rocket was not intended to hit military objectives was unduly selective. Nevertheless, the Prosecutor decided to follow this and other recommendations not to investigate allegations of serious IHL violations committed by NATO member states officials.

The Review Committee's distinguishing NATO member states cluster munition use from cluster munition use in the *Martić* case appears even less tenable in light of the 2007 and 2008 judgements. First and foremost, the Trial Chamber in the *Martić* case assumed that there were military targets in Zagreb at the time of attack. This effectively removed the scope of a finding that the Orkan rocket was evidence of a *deliberate* attack on civilians. Then, the issue moves to whether there was *reckless* use of the Orkan rocket on Zagreb to conclude that an unlawful attack on civilians had been perpetrated. Thus, it seriously undermines the element on which the Review Committee's distinction between the *Martić* Rule 61 decision and NATO cluster munition use rested, since in both cases (Zagreb and Niš) military targets were present at the time of the attacks.

Decisive for the Trial Chamber's conclusion, endorsed by the Appeals Chamber, that *Martić* ordered an unlawful attack on civilians were the consequences of the nature of the Orkan rocket when used in civilian residential areas and the accused's knowledge of the problematic characteristics of this weapon in these circumstances

Comparing the analysis of the Trial Chamber in the *Martić* case with regard to the crime of unlawful attacks against civilians, firstly, there is no doubt that NATO authorities ordered cluster bombings, since NATO officials admitted in press conferences that cluster munitions had been used and civilian casualties caused as a result of the wide area effect of the CBU-87s.³⁸⁵ Secondly, as noted above, by relying on previous ICTY jurisprudence, especially on the 2006 *Galić* judgement, the 2007 and 2008 *Martić* judgements stand for the proposition that a direct attack on civilians may be inferred from the nature of the Orkan rocket as inaccurate high-dispersion weapon, resulting in indiscriminate attacks in populated areas.

³⁸⁵ See, for example, NATO Major General Gertz's statement at a news briefing on 8 May 1999: "NATO has confirmed that the damage to the market and clinic was caused by a NATO weapon which missed its target. This strike was directed against Nis airfield utilising cluster munitions. [...] Once again of course civilian casualties were never intended and NATO regrets the loss of life and injuries inflicted. [...] We were using cluster bombs on the Nis target because, as I already mentioned, cluster bombs are used in aerial [sic: area] targets where we know that collateral damage could not occur, and it would be speculation if I would continue on the reason why some of the clusters obviously did go astray, maybe because of a technical malfunction or they could have been inadvertently released." NATO Daily Briefing, Operation Allied Force, 8 May 1999, http://www.pbs.org/newshour/bb/europe/jan-june99/nato_briefing_5-8.html (last visited 21 January 2010).

The factual comparison between the Orkan rocket and the CBU-87 suggests that the same argument may also be made with the CBU-87 used in Niš. Here, NATO officials claimed that the sub-munitions landed far off the intended target because of a technical malfunction of the weapon. This seems to imply that conversely, if the weapon had worked as designed civilian harm could have been avoided. However, even in that case civilian casualties would have been likely, since the nearest Niš suburb is only 150m from the airport, the intended target. Thus, even if the sub-munitions had fallen precisely in the area of the target, the reach of the sub-munition fragments upon impact would have been exactly 150m beyond the outer limits of that area, making civilian casualties reasonably probable. Moreover, precise targeting is likely to be precluded due to the unguided nature of the CBU-87, a problem that exacerbates the higher the altitude from which the bomb containers are dropped.

The final crucial element in determining whether the OTP should have investigated cluster munition use by NATO member states officials, especially for the incident in Niš, is that of *mens rea*, i.e. whether NATO member states personnel could be said to have knowledge of the possibility that civilian victims in populated areas would result due to the wide dispersal pattern of the CBU-87.

Such knowledge can indeed be imputed to NATO personnel and officials. Significantly, NATO member states used cluster munitions, especially CBU-87s *before* the attack on Niš.³⁸⁶ Moreover, despite a reported internal directive by then U.S. President Clinton to cease the use of cluster bombs after the Niš incident, BLU-97 sub-munitions again hit civilian residential areas in Duvanište, over 7 km far off the intended target of Niš airport on 12 May 1999, seriously injuring three and wounding ten others, all of whom received medical treatment.³⁸⁷ The fact that NATO personnel again targeted Niš with CBU-87s a few days later despite the 7 May incident sheds significant doubt on whether NATO member states officials and personnel complied with their precautionary IHL obligations which may

³⁸⁶ For instance, on 10 April 1999, cluster munition use was confirmed in the area between Podujevo and Kursumlija on the Serbian-Kosovo border which claimed five civilians dead and three injured near the villages Merdare and Mirovac. On 13 April 1999, one clearance expert was killed on Mount Kopaonik in southern Serbia when trying to defuse a BLU-97. On 17 April 1999, fragments from a stray sub-munition killed one three-year-old girl. The sub-munition was intended to hit Batajnica airfield in the west of Belgrade, about three kilometres away and another person was injured. On 28 April 1999, the airfield in Golubovci near Podgorica in Montenegro was the intended object of two CBU-87 strikes but BLU-97 sub-munitions fell a few kilometres away from the airfield into nearby villages where one civilian was killed and three wounded. On 3 May, a public transport bus and a car were hit in north western Kosovo, resulting in seventeen killed and at least 43 injured; cluster bomb remains were documented for this attack. See Human Rights Watch, "Civilian Deaths in the NATO Air Campaign", February 2000, <http://www.hrw.org/reports/2000/nato/> (last visited 21 January 2010); Norwegian People's Aid, "Yellow Killers", *supra* note 102, at 26, 33.

³⁸⁷ Norwegian People's Aid, "Yellow Killers", *supra* note 102, at 25.

be resorted to as an element of inferring a direct attack on civilians for the purposes of individual criminal responsibility in line with the 2006 *Galić* Appeals judgement on which the Trial Chamber in the *Martić* case relied.

Therefore, there would have been a reasonable basis for an investigation by the OTP into NATO member states use of cluster munitions against the FRY for at least unlawful attacks on civilians under article 3 of the ICTY Statute.

While the decision by the ICTY OTP to follow the recommendation by the Review Committee not to investigate into cluster munition use by NATO member states against the FRY cannot be reasonably defended on legal grounds compared with the investigation, prosecution and conviction for cluster munition use in the *Martić* case, it is abundantly clear that the OTP acted in this way due to political constraints. After all, the very existence of the ICTY is dependent on the good will of the UN Security Council, especially the permanent members. An investigation into cluster munition use by NATO member states armed forces would have meant to investigate against U.S, possibly also UK and Dutch nationals, US and UK nationals being nationals of permanent members of the UN Security Council.

Moreover, it may be argued that at the time the Review Committee was established (mid-May 1999) Operation Allied Force aimed at stopping massive human rights violations by the Milošević regime against Kosovo-Albanians was still ongoing; announcing an investigation into war crimes allegedly committed by NATO member states armed forces might have effectively precluded further military action for accomplishing this essentially humanitarian purpose. However, this last argument fails to convince both for legal and political reasons: Firstly, a fundamental proposition on which IHL rests is that it binds any party to the armed conflict irrespective of the underlying motive behind using armed force, however laudable that motive might be (i.e. humanitarian intervention). The character of humanitarian law (*jus in bello*) is thus fundamentally different from the rules relating to the legality of the use of force (*jus ad bellum*) where the underlying purpose for using armed force comes into play, and it must remain different, since otherwise protection of vulnerable individuals under IHL would be dependent on whether he/she is a national of an “aggressor state” or a state militarily intervening for humanitarian purposes.

Secondly, even if the specific motives of a “humanitarian intervention” were to be taken into account the question arises whether the use of cluster munitions is suited to achieve such humanitarian purposes. After all, most of the casualties that occurred through cluster munition use were not Serbian military and political authorities but civilians. As evidenced, among those affected were also civilians from a state not even party to the conflict, i.e.

Albania. Significantly, the Independent International Commission on Kosovo, set up at the behest of then Swedish Prime Minister Persson and endorsed by former UN Secretary-General Annan for the purpose of evaluating international legal and political issues relating to Kosovo, recommended in its report that “cluster bombs should never be used in any future undertaking under UN auspices or claiming to be a ‘humanitarian intervention’.”³⁸⁸

Therefore, not only the general rules of IHL have been inadequate but also the enforcement of these rules after the fact since examples are scarce and where there has been enforcement like in the context of the ICTY it only occurred on a selective basis.³⁸⁹ However, especially the ICTY judgements in the *Martić* case at least contain important clarifications as to how the general rules of IHL relate to the use of cluster munitions.

Not least because of the serious challenges to the general IHL rules by the use of cluster munitions in the 1999 Operation Allied Force by the United States, the United Kingdom and the Netherlands, in the 2001/2 Operation Enduring Freedom in Afghanistan by the United States and the 2003 Operation Iraqi Freedom by the United States and the United Kingdom, states parties to the CCW adopted more specific rules with a bearing on cluster munitions contained in the 2003 Protocol V to the CCW on ERW.³⁹⁰

However, as shown in the next Chapter, also this specific convention is inadequate in dealing comprehensively with the problems raised by the use of cluster munitions.

3.8. The 2003 Protocol V on Explosive Remnants of War: Specific Rules Inadequate to Deal With the Cluster Munition Problem

The notion of ERW refers to any explosive munitions that have been fired, dropped or otherwise delivered during military operations but have failed to explode as intended. In the words of Protocol V on ERW to the CCW, ERW comprise unexploded ordnance as well as

³⁸⁸ Among the most prominent members of this independent expert commission were notably Justice Richard Goldstone of South Africa, serving as Chief Prosecutor of the ICTY and the ICTR from 1994-1996, Professor Richard Falk, one of the most eminent U.S. scholars on international humanitarian law, and Michael Ignatieff, one of the most eminent scholars of international relations who has published a seminal work on the NATO bombing in Kosovo, winning the Orwell Prize for political non-fiction in 2000, and worked with the International Commission on Intervention and State Sovereignty on preparing the report *Responsibility to Protect*. See Independent International Commission on Kosovo, “The Kosovo Report”, 2000, <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (last visited 21 January 2010).

³⁸⁹ It should be acknowledged that the Orkan rocket was also used by the Bosnian Serbs on several occasions between 1992 and 1995 in other parts of the former Yugoslavia, like on the towns of Livno, the UN safe area of Bihać and a refugee camp south of Tuzla. Serbian forces reportedly also used cluster munitions during the NATO air campaign but it is unconfirmed whether there are still unexploded sub-munitions stemming from this use. All these instances have also not been subject to prosecution by the ICTY but it seems that the two instances examined here claimed the highest number of victims during attacks. See Handicap International, “Fatal Footprint”, *supra* note 360, at 22, 26.

³⁹⁰ Protocol V to the CCW, *supra* note 226.

abandoned explosive ordnance. Unexploded ordnance is defined as “explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so.” Abandoned unexploded ordnance means explosive ordnance that has not been used during an armed conflict and that has been left behind by a party to a conflict, irrespective of whether the explosive ordnance has been primed, fused, armed or otherwise prepared for use.³⁹¹

The first thing to note about the scope of Protocol V is that unlike the previous four protocols to the CCW, it does not regulate or prohibit a particular weapon but applies to any explosive conventional munition that may result in ERW. Thus, it may be incongruent to suggest that this is a treaty specifically regulating cluster munitions. However, by generally addressing the post-conflict impact of unexploded ordnance it also speaks to the fundamental problem of cluster munitions to leave large numbers of unexploded sub-munitions which may endanger civilians long after their use. In that sense, Protocol V more specifically addresses cluster munitions than the general rules of IHL.

Certainly prompted by the experience of the 1999 Operation Allied Force where unexploded sub-munitions claimed a great number of civilian victims, the ICRC and NGOs such as Landmine Action, Human Rights Watch, Handicap International and the Mines Advisory Group took the initiative in 2000 in addressing the post-conflict problems of unexploded ordnance other than antipersonnel landmines as a general category. In its proposals to the First Meeting of the Preparatory Committee for the 2001 Review Conference to the CCW, the ICRC called for the negotiation of a new treaty on ERW which should enshrine the fundamental principle that the users of failed munitions should be responsible for clearance or at least assist clearance by the territorial state. The very rationale behind this proposal was that traditionally only the territorial state had clearance obligations.

Moreover, a specific element proposed by the ICRC was also a prohibition on the use of cluster munitions against military objects located in concentrations of civilians.³⁹² That the ICRC considered it necessary to propose such a prohibition for a new treaty on ERW again speaks volumes on compliance by armed forces with the general IHL prohibition to treat as a single military objective a number of clearly separated and distinct military objectives located in concentrations of civilians under Art. 51 (5) (a) of API. While throughout 2001 with the Second Review Conference to the CCW and 2002 with further meetings of governmental

³⁹¹ *Ibid.*, Arts. 2 (2), 2 (3), 2 (4).

³⁹² See Maresca, “History and negotiation of Protocol V”, *supra* note 249, at 819.

experts to the CCW the momentum grew to develop a new treaty on clearance of ERW, the sharing of information to facilitate clearance and risk education and the provision of warnings to civilians, views among CCW states parties remained divided whether specific regulations or prohibitions on cluster munitions were warranted.

The fundamental rationale put forward by the ICRC to enshrine the principle of user state responsibility for clearance of unexploded ordnance was endorsed by a number of delegations and organisations, since clearance is often difficult if the affected state was not a party to the conflict and does not have information on the type of munitions used and on their location.³⁹³ On the other hand, already then, China, Pakistan, Russia and the United States voiced their reservations about specific rules on cluster munitions; especially Russia and the United States believed that the existing general rules of IHL were adequate to deal with cluster munitions and that better implementation of the existing rules rather than new rules was needed.³⁹⁴ At the end of 2002, CCW states parties endorsed negotiation of a new protocol on generic post-conflict remedial measures to reduce the risks of ERW and on exploring whether the negotiations could also deal with measures to improve the reliability of munitions in areas such as manufacturing, handling and stockpiling of munitions. On the other hand, separate from the negotiations, CCW experts would discuss preventive measures aimed at improving the design of munitions, including cluster munitions, and the implementation of existing IHL principles on ERW.³⁹⁵ It must be emphasised here that decision-making within the framework of the CCW has traditionally been governed by consensus. Therefore, the opposition of literally only one state party to the CCW suffices to prevent a decision from being taken. This aspect is also important for understanding why it was impossible for the CCW states parties to take specific measures on cluster munitions subsequently and why an alternative diplomatic process, the “Oslo process”, emerged for the negotiation of a convention prohibiting cluster munitions.³⁹⁶

The 2003 Protocol V as finally adopted corresponded to the CCW decisions on the scope of the negotiating mandate outlined above. In fact, it is the only protocol to the CCW with a Preamble which affirms the two major objectives of the negotiations, notably the need to conclude a Protocol on post-conflict remedial measures of a generic nature in order to minimise the risks and effects of ERW and the willingness to address generic preventive

³⁹³ *Ibid.*, at 826-827.

³⁹⁴ *Ibid.*, at 821.

³⁹⁵ *Ibid.*, at 822.

³⁹⁶ Chapter 5.2. *infra* pp. 244-353.

measures for improving the reliability of munitions through voluntary best practices.³⁹⁷ The Preamble thus already makes clear that the protocol is a mix between legally binding obligations and non-binding voluntary best practices. This is the first major inadequacy of Protocol V in dealing with cluster munitions, since the legally binding part only refers to post-conflict reactive rather than preventive measures before or at the time of use. Accordingly, Protocol V does not address the first major humanitarian problem emanating from the use of cluster munitions, notably the inaccuracy and the wide dispersal pattern of the explosive sub-munitions at the time of use, especially when used in or near populated areas. The voluntary best practice approach taken by Art. 9 of Protocol V in combination with Part 3 of the Technical Annex to Protocol V only concerns production, stockpiling, transport, training of personnel and transfer in relation to all types of explosive ordnance, including cluster munitions but contains no provision on the use of cluster munitions.³⁹⁸

As has been noted above, the definition of ERW comprises both unexploded but also abandoned ordnance which are the principal situations when explosive munitions become a risk to civilians at the post-conflict stage. The most important post-conflict measures for the protection of civilians that Protocol V imposes on states parties are related to ERW clearance.

Clearance obligations were up to then limited to the removal of landmines.³⁹⁹ Art. 3 (2) of Protocol V enshrines a general obligation of states parties and parties to an armed conflict on marking and clearance, destruction or removal of ERW other than mines as soon as feasible after the cessation of hostilities. Art. 3 (3) outlines the various stages of clearance of ERW: firstly, a survey and threat assessment must be made, then priorities for clearance must be identified before the actual marking and clearance begins for which resources must be mobilised. These measures were expressly based on the experience gained by clearance organisations reflected in the International Mine Action Standards which states parties must take into account by virtue of Art. 3 (4). The clearance process shall also be facilitated by the obligation contained in Art. 4 to the maximum extent possible and as far as practicable to record, retain and transmit information to the party in control of the territory and to civilians on the use of explosive ordnance or abandonment of explosive ordnance. Art. 5 imposes on states parties and parties to an armed conflict the obligation to take all feasible precautions to protect civilians from ERW, which may include warnings, risk education, marking, fencing

³⁹⁷ Preamble, paras. 2, 3, Protocol V, *supra* note 226.

³⁹⁸ See *ibid.*, Art. 9, Protocol V and Part 3, Technical Annex.

³⁹⁹ See Arts. 3 (2), 5 (2) (b), 10, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, 35 ILM 1206 (1996); Art. 5, 1997 Ottawa Convention, *supra* note 224.

and monitoring of affected territory.⁴⁰⁰ Thus, Art. 5 of Protocol V specifies the meaning of the general obligation under Art. 57 of API to take all feasible precautions in minimising civilian harm.

Perhaps the most innovative provisions of Protocol V impose special obligations on the user of explosive ordnance which may be different from the state which has territorial control over the areas affected by ERW in the aftermath of armed conflict. These special obligations reflect the awareness that in such circumstances, which were present in Kosovo, Serbia and Lebanon for example, clearance for the territorial state of unexploded ordnance, including unexploded sub-munitions, may prove particularly challenging. In this context, Art. 3 (1) provides that in cases where a user of explosive ordnance which has become ERW, does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, *inter alia* technical, financial, material or human resources assistance [...] to facilitate marking and clearance, removal or destruction of explosive remnants of war.

Art. 4 (2) adds the obligation on user states without delay after the cessation of active hostilities and as far as practicable, subject to the user's legitimate security interests, to make available to the party in control of the affected territory information on the use of explosive ordnance to facilitate rapid marking and clearance.⁴⁰¹ Part 1 of the Technical Annex to Protocol V specifies the type of information which should be transmitted by a user state: the general location of known and probable unexploded ordnance; the types and approximate number of explosive ordnance used in targeted areas; the method of identifying the explosive ordnance, including colour, size and shape and other relevant markings, as well as the method of safe disposal of the exploded ordnance.

However, as innovative and far-reaching as these special obligations appear at first sight, their likely impact on the ground is subject to some fundamental limitations. Firstly, Art. 1 (4) provides that Arts. 3, 4, 5 and 8 of the protocol apply to *ERW other than existing ERW as defined in Art. 2 (5)*. Art. 2 (5) makes it clear that existing ERW means unexploded ordnance and abandoned explosive ordnance *that existed prior to the entry into force of this Protocol*. Therefore, the scope of the special user obligations is limited as these obligations do not deal with the already existing problem on the ground, i.e. only apply to future ERW and do not apply retroactively. In fact, Protocol V only entered into force in November 2006 and thus, provided that the states involved are parties to the Protocol, could only bind a user after

⁴⁰⁰ Legally non-binding best practice elements of warnings, risk education, marking, fencing and monitoring of ERW affected areas are contained in Part 2 of the Technical Annex to Protocol V.

⁴⁰¹ Arts. 3 (1), 4 (2), Protocol V, *supra* note 226.

that date.⁴⁰² With regard to already existing ERW, the protocol only contains the weak obligation under Art. 7 that each state party in a position to do so shall provide assistance in dealing with this existing ERW contamination, as far as necessary and feasible.

Secondly, even where Protocol V entered into force for a state the user state obligations under Art. 3 (1) and Art. 4 (2) are qualified by the wording of “feasible” and “as far as practicable, subject to legitimate security interests”, respectively. This gives user states still significant discretion in the fulfilment of these obligations and thus, weakens the practical effect of these provisions. Also Art. 7, which is on its face already a weak obligation of assistance with the existing ERW problem is qualified in that it only applies to states parties “in a position to do so” and only “as far as necessary and feasible”. In this respect, a commentator has even gone so far as stating that Protocol V “is replete with so many qualifiers that virtually all key provisions are essentially voluntary in nature, not compulsory.”⁴⁰³ Moreover, the content of the data to be transmitted to a territorial state and its civilian population under Art. 4 (2) does not form part of legally binding information requirements anyway.

Therefore, Protocol V on ERW is not adequate in addressing the challenges posed by cluster munition use, since it does not speak to the problems of cluster munitions at the time of use, obligations to deal with the post-conflict problem of unexploded sub-munitions fail to provide a remedy for existing ERW and the obligations that will arise for states parties in the future are worded in a weak manner. In the end, neither general nor more specific rules of IHL were adequate to comprehensively tackle the fundamental humanitarian problems associated with cluster munition use before the adoption of the new Convention on Cluster Munitions in May 2008.

It should be noted that IHL is not the only international legal regime applicable to the use and consequences of the use of cluster munitions. The problems that cluster munitions

⁴⁰² This is the reason why, even assuming that the relevant user states were already states parties to Protocol V, the obligations would not be applicable to the situation of Serbia and Lebanon, for example, in principle clear violations of Protocol V. The only state so far where the issue of compliance with Protocol V has arisen was Russia which ratified Protocol V on 21 July 2008 and which used cluster munitions in Georgia in August 2008. Since Protocol V will enter into force for Russia six months after notification of its consent to be bound (thus on 21 January 2009), Russia pending entry into force of Protocol V has the obligation not to defeat object and purpose of Protocol V in accordance with Art. 18 of the Vienna Convention on the Law of Treaties. Since the object and purpose of Protocol V is protection of civilians from ERW the fact that Russia has used cluster munitions and not taken any steps to assist in the clearance of unexploded sub-munitions in Georgia suggests that Russia has violated its obligation not to defeat object and purpose of Protocol V. *Ibid.*, Arts. 1 (3), 2 (5); Art. 5 (4), Convention on Conventional Weapons, *supra* note 31; Art. 18, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

⁴⁰³ See S. Goose, “Cluster Munitions in the Crosshairs: In Pursuit of a Prohibition”, in J. Williams, S. Goose & M. Wareham (eds.), *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (2008), at 217, 223.

raise must also be evaluated within the framework of human rights law complementary to IHL for the already above-mentioned reasons.⁴⁰⁴ Fundamentally, there is a practical institutional relevance to this inquiry. While IHL does not provide for a general possibility of individual redress for victims of violations, such a possibility exists under HRL treaties such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) or the American Convention on Human Rights.⁴⁰⁵ Victims of IHL violations have increasingly resorted to individual HRL complaints before international human rights bodies like the Inter-American Commission and Court of Human Rights and the European Court of Human Rights.⁴⁰⁶ In view of these institutional advantages of HRL over IHL, the parameters of the relationship between these two legal regimes in the context of cluster munition use shall be subject to examination in the following Chapter.

4. The Use of Cluster Munitions as a Human Rights Problem

4.1. *The Complementarity Between IHL and Human Rights Law*

*“How can a government defend that it is necessary to spend more money to protect their citizens against undefined military attack than to guard them against omnipresent enemies of good health and other real threats to human security on a daily basis?”*⁴⁰⁷

The applicability of IHL generally presupposes the existence of an armed conflict. However, in an armed conflict the application of HRL is not excluded. This can already be seen from the derogation provisions contained in certain HRL conventions: For instance, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides for the

⁴⁰⁴ See *supra* p. 11.

⁴⁰⁵ F. Hampson & I. Salama, Working paper on the relationship between human rights law and international humanitarian law, Sub-Commission on the Promotion and Protection of Human Rights, 21 June 2005, UN Doc. E/CN.4/Sub.2/2005/14, at para. 49; C. Byron, “A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies”, 47 *Virginia Journal of International Law* 839, 847 (2007); H. Heintze, “On the relationship between human rights law protection and international humanitarian law”, 856 *International Review of the Red Cross* 789, 798 (2004).

⁴⁰⁶ See, for example, *Salas and Others v. United States of America*, Inter-American Commission of Human Rights, Decision on Admissibility, 14 October 1993, Case No. 10573, 123 ILR 117-138 (2003) (concerning non-combatant deaths and property destruction during the armed intervention by US forces in Panama); *Abella v. Argentina*, Inter-American Commission of Human Rights, Decision on Admissibility, 30 October 1997, Case No. 11137, Doc. OEA/Ser.L/V/II.95 (concerning an attack by armed non-state actors against military barracks and the government armed forces’ response which were alleged to have conducted indiscriminate attacks and arbitrary executions); *Bámaca-Velásquez v. Guatemala*, Inter-American Court of Human Rights, Judgement, 25 November 2000 (Ser. C) No. 70 (concerning a rebel leader who forcibly disappeared during the non-international armed conflict in Guatemala in 1992); *Isayeva and Others v. Russia*, App. No. 57950/00, European Court of Human Rights, Judgement, 24 February 2005 (concerning indiscriminate attacks of Russian armed forces on a Chechen village).

⁴⁰⁷ Boyle & Simonsen, “Human security, human rights and disarmament”, *supra* note 5, at 11.

possibility to derogate from certain rights in time of public emergency which threatens the life of the nation.⁴⁰⁸ Even more explicitly, Art. 15 of the European Convention on Human Rights (ECHR) recognises the possibility of derogation in time of *war* or other public emergency threatening the life of the nation, *provided that derogation measures are not inconsistent with its other obligations under international law*.⁴⁰⁹ Hence, HRL is generally also applicable in armed conflict. Otherwise the insertion of derogation provisions would have been superfluous. The proposition for taking HRL into account in armed conflicts is further strengthened by the fact that HRL instruments typically provide in relation to civil and political rights that certain rights are non-derogable in times of armed conflict. In this regard, both the ICCPR and the ECHR include the prohibitions of arbitrary killings, torture or cruel, inhuman or degrading treatment or punishment or slavery among the non-derogable rights. However, the non-derogability of the right to life is further qualified under the ECHR by providing under Art. 15 (2) that “lawful acts of war” are an exception to this non-derogable character of the right to life.⁴¹⁰

On the other hand, it may also be argued that IHL recognises that the legal regime of HRL must be taken into account in armed conflict by virtue of the “Martens Clause”,⁴¹¹ which reads in its most modern version in Art. 1 (2) of API as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”⁴¹²

It is clear that one purpose of the Martens Clause is to state that even where there are no express conventional IHL rules certain conduct might still not be lawful under customary international law. However, this would only amount to a reaffirmation that customary international law continues to apply alongside international treaty law and would deny any independent legal effect to the Martens Clause. But there are good reasons for those views ascribing a greater legal importance to the Martens Clause in that the clause should at least be understood as a guiding interpretative principle of IHL in cases of doubt where existing IHL

⁴⁰⁸ Art. 4, International Covenant on Civil and Political Rights, *supra* note 343.

⁴⁰⁹ Art. 15, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

⁴¹⁰ Art. 4 (2), International Covenant on Civil and Political Rights, *supra* note 343; Art. 15 (2), European Convention on Human Rights, *supra* note 409.

⁴¹¹ The “Martens Clause” was named after the Russian diplomat and publicist Fyodor Fyodorovich Martens who introduced the clause as a compromise formula in debates on a possible POW status for resistance movements in occupied territories at the 1899 Hague Peace Conference. See A. Cassese, “The Martens Clause: Half of a Loaf or Simply Pie in the Sky?”, 11 EJIL 187, at 187, 194-196 (2000).

⁴¹² Art. 1 (2), Additional Protocol I, *supra* note 17.

rules are not sufficiently rigorous or precise.⁴¹³ The very wording of the clause suggests not only “established custom” but also “considerations of humanity” and “dictates of public conscience” as yardsticks against which the protection of persons in armed conflict must be measured. With regard to both “considerations of humanity” and “dictates of public conscience” it has been emphasised that the enormous impact of human rights must influence their interpretation.⁴¹⁴

Thus, in principle it may be deduced from both IHL and HRL that one regime recognises that the other may also be applicable in the respective general scope of application. However, how the two relate to each other must still be clarified in a particular case.

The ICJ had the opportunity to consider the issue of the relationship between IHL and HRL in two Advisory Opinions and one contentious case. In the *Nuclear Weapons* Advisory Opinion the ICJ recognised that in principle HRL continues to apply in the event of an armed conflict. However, the court held that whether the use of a certain weapon in warfare was “arbitrary” and therefore violated the right to life under Art. 6 of the ICCPR had to be determined by reference to IHL as the *lex specialis* to HRL.⁴¹⁵ While the court’s analysis of the relationship between IHL and HRL in this advisory opinion was confined to the right to life, in the 2003 *Wall* Advisory Opinion, the ICJ considered more generally that the protection of the ICCPR does not cease in time of armed conflict, save by virtue of the possibility of derogation in respect of certain rights. The ICJ also confirmed the *lex specialis* character of IHL in relation to HRL during armed conflict. As to the relationship between IHL and HRL,

⁴¹³ See *Prosecutor v. Kupreskić*, Judgement, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, at para. 525; *Nuclear Weapons* Advisory Opinion, *supra* note 182 (Judge Shahabudeen & Judge Weeramantry, Diss.Op.), T. Meron, “The Martens Clause, Principles of Humanity, and the Dictates of Public Conscience”, 94 AJIL 78, at 87-88 (2000).

⁴¹⁴ *Nuclear Weapons* Advisory Opinion, *supra* note 183 (Judge Weeramantry, Diss. Op.). In the *Furundzija* case the ICTY established the customary international law nature of the prohibition of torture *inter alia* on the basis of the Martens Clause and held that “respect for human dignity is [...] the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.” See *Prosecutor v. Furundzija*, Judgement, Case No. IT-95-17/1, T. Ch. II, 10 December 1998, at para. 198. In a similar vein, *Hampson and Salama* stated that “[t]he institutional complementarity of IHL and HRsL also finds an important conceptual and legal basis in the Martens Clause [...]. It is obvious that the development of HRsL increases the frequency of potential violations of the Martens Clause. The more human rights norms and standards expand in scope the broader the application of the requirements of ‘principles of humanity and the dictates of public conscience’. We therefore agree with the view that the Martens Clause reverses the classical assumption of international law. With regard to both HRsL and IHL, one cannot assume that everything that is not explicitly prohibited by law is allowed in practice.” See *Hampson & Salama*, Relationship between human rights and international humanitarian law, *supra* note 405, at paras 15, 18. With regard to the protection of persons in the power of a party to an IAC, Art. 72 of API provides that the relevant protections are additional, *inter alia*, to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict. Moreover, APII in its preambular para. 2 recalls that international instruments relating to human rights offer a basic protection to the human person.

⁴¹⁵ *Nuclear Weapons* Adv. Op., *supra* note 183, at para. 25.

the court merely gave general guidance by stating that some rights may be exclusively matters of IHL, others exclusively matters of HRL, yet others matters of both IHL and HRL.⁴¹⁶ This dictum was reaffirmed by the ICJ in its 2005 judgement in the contentious case of *Democratic Republic of Congo v. Uganda* which dealt with IHL and HRL violations by Uganda in Democratic Republic of Congo (DRC) territory both as a matter of occupation and more generally.⁴¹⁷

These general observations do not provide any indication as to how the *lex specialis* maxim should be interpreted nor how to ascertain which of the three possible scenarios controls in a specific situation. However, where both IHL and HRL regulate the particular situation at hand it can be said that they apply simultaneously unless there is a conflict between the two legal regimes. In the case of conflict the *lex specialis* principle becomes relevant.⁴¹⁸ Structural differences exist at the outset between IHL and HRL in that IHL with its regulation of non-international armed conflicts (NIAC) explicitly also binds non-state armed groups while HRL treaties only explicitly bind states. While in recent years commentators such as *Clapham* took pains to show that non-state armed groups are also bound by HRL,⁴¹⁹ the fact remains that HRL treaty bodies generally only have the competence to examine alleged HRL violations by states. In that sense, from an institutional point of view the overlap between IHL and IHL with regard to a NIAC can only arise in the case of the use of cluster munitions by the armed forces of a state. Conversely, in international armed conflicts such an overlap and thus, the application of the *lex specialis* principle would generally arise, since by definition this situation involves armed hostilities between two or more states.

As regards the content of the principle of *lex specialis derogat legi generali* the International Law Commission recently elaborated on the meaning of this interpretative tool. Most importantly, application of this principle does not mean that the *lex specialis* completely displaces the more general rule but that the more specific rule is to be applied *primarily* since it is better suited to the context in which it operates. On the other hand, the more general rule

⁴¹⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 ICJ 136, at paras. 105-106.

⁴¹⁷ Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 ICJ para. 216 (Judgement, 19 December).

⁴¹⁸ Commission on Human Rights, Report on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions of the Special Rapporteur, Philip Alston, UN Doc. E/CN.4/2005/7, 22 December 2004, at para. 50.

⁴¹⁹ See e.g. A. Clapham, *Human Rights Obligations of Non-State Actors*, 271-299 (2006).

is thereby not extinguished and continues to give direction to the interpretation and application of the more specific rule.⁴²⁰

An analysis of the complementarity between IHL and HRL with particular regard to the use of cluster munitions must be informed by the humanitarian impact of cluster munitions both during and after armed conflict. Thus, during armed conflicts the use of cluster munitions would primarily be governed by IHL, since IHL as the *lex specialis* is better equipped to deal with the specific context of the conduct of military operations in armed conflicts than HRL without however, forgetting to pay due regard to the values of “public conscience” and “humanity” embodied both in IHL and HRL.

At the post-conflict stage when sub-munition duds may continue to endanger lives, limbs and livelihoods, military operations will have ended. Since the application of IHL with regard to using weapons like cluster munitions depends on the existence of general military operations, i.e. an armed conflict,⁴²¹ there is *prima facie* no case for resorting to IHL for post-conflict civilian harm. Inasmuch as there is no more state of emergency, HRL will primarily govern in such a situation but the general protection of human beings under HRL was recently supplemented by Protocol V to the CCW on ERW. In this regard, Protocol V may even be regarded as *lex specialis* to general measures states would be required to take under HRL for the protection of civilians from the dangers of unexploded sub-munitions.

Beyond the general HRL framework, recently attempts were made to particularly address the plight of persons with disabilities which include cluster munition victims through one of the most recent HRL treaties, the Convention on the Rights of Persons with Disabilities. The adoption of this convention was inspired by the fact that for the disabled access to existing HRL protection must be improved in light of their specific needs. The 1997 Ottawa Convention on Antipersonnel Mines constitutes an important precursor to this treaty where a provision on victim assistance was inserted into a disarmament treaty for the first time. The remainder of Chapter 4 is an attempt to draw a comprehensive picture as to what HRL has to say in terms of cluster munition use.

While specific rules on victim assistance contribute to relieving the plight of cluster munition victims, it is argued that HRL generally is also inadequate for comprehensively tackling all the humanitarian problems resulting from cluster munition use.

⁴²⁰ International Law Commission, Report on the work of its fifty-eighth session to the General Assembly, UN Doc. A/61/10 (2006), at 409; Hampson & Salama, Relationship between human rights and international humanitarian law, *supra* note 405, at para. 57.

⁴²¹ This is true for the context of the conduct of hostilities relevant for the present topic. In other contexts, such as the treatment of detained persons, applicability of IHL remains relevant after the close of general military operations.

4.2. The Right to Life and its Application to Cluster Munition Use During Armed Conflict

The preceding analysis already suggests that the issue whether a person's right to life in an armed conflict has been violated primarily has to be answered by IHL as *lex specialis* to HRL. IHL is the specific regime dealing with armed conflict, since this is an exceptional situation already recognised by the HRL derogation provisions where a general level of violence and death are tolerated. Embodied in this idea is the point of departure of IHL that there is a category of persons that lawfully participate in hostilities and that may be lawfully killed or injured.⁴²² This point of departure is also based on the rationale that IHL rules should not unduly obstruct armed forces in their attempt to strike down rebellions or to win an international armed conflict. On the other hand, persons that do not participate in hostilities enjoy general protection from the dangers of military operations.⁴²³ Thus, there is a specific obligation for those engaged in military operations in an armed conflict to distinguish between military and civilian targets.⁴²⁴

This fundamental obligation is further specified in the rules of IHL most relevant to the use of cluster munitions examined in *supra* Chapter 3, i.e. the prohibitions of indiscriminate and disproportionate attacks and the obligation to take all feasible precautions to minimise civilian harm.⁴²⁵ The practical consequence of the interpretation of these rules is that unless it can be shown that these rules were violated in a specific case there is a presumption that military operations are lawful. In terms of cluster munition use, this has already been demonstrated for the prohibition of indiscriminate attacks.⁴²⁶ As shown above, with regard to the problem of civilian losses during armed conflict as a result of the inaccuracy and wide area effect of explosive sub-munitions, the response of IHL has traditionally been not to regard cluster munitions as an indiscriminate means of combat prohibited in all circumstances but depending on the specific circumstances of use as an indiscriminate or lawful method of combat. Thus, unless it can be shown that the use of cluster munitions was indiscriminate in the specific circumstances their use is lawful even if civilian losses are incurred. Moreover, implementation of the precautionary obligation to

⁴²² This idea is reflected in the notion of military objects that may be lawfully attacked in accordance with Art. 52 of API which constitutes customary international law for all types of armed conflicts. See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 29-32.

⁴²³ Art. 51, Additional Protocol I, *supra* note 17; Art. 13, Additional Protocol II, *supra* note 215.

⁴²⁴ Art. 48, Additional Protocol I, *supra* note 17.

⁴²⁵ See *supra* pp. 55-82.

⁴²⁶ See *supra* pp. 55-64.

minimise civilian harm is dependent on the technological and thus, subjective military capabilities of an attacker, i.e. whether more precise weapon alternatives have to be used.

Viewed in this sense, the application of IHL as *lex specialis* to HRL to the use of cluster munitions in military operations during armed conflict means that what constitutes a violation of the right to life in armed conflict is heavily qualified by excluding *a priori* that such a violation may occur against specific categories of persons.

However, the ulterior motives of using military force have no bearing on whether the right to life as specifically articulated by IHL was violated; therefore, it is irrelevant whether civilian harm results from a “benevolent” humanitarian intervention or a “malevolent” aggression.

On the other hand, a right to kill and injure for certain categories of persons like under IHL is alien to HRL. Instead, HRL seeks to avoid death and injury to any person from the outset, regardless of their status and on a non-discriminatory basis. It follows that under HRL obligations like the IHL obligation to distinguish between civilian and military targets are unknown. If state agents use deadly force HRL would likely be violated unless the state can demonstrate that it acted on recognised grounds of law enforcement, including self-defence or defence of others, preventing the escape of a person from lawful arrest or quelling a riot or insurrection, as the ECHR explicitly confirms in its Art. 2 (2).⁴²⁷ Therefore, HRL is based on the reverse presumption compared to IHL that the use of lethal force is unlawful and only recognises the use of lethal force in exceptional situations while IHL generally accepts such force in the event of an armed conflict.⁴²⁸

The contrasting of the rules of IHL on distinction, discrimination, proportionality and precautionary obligations with the right to life under HRL demonstrates that the two regimes differ considerably in scope at first sight when it comes to evaluating the legality of military operations, including the use of cluster munitions by armed forces of states. This would suggest that due to the *lex specialis* character of IHL and the fundamental rationale of these rules not to obstruct military victory there would be no place for the application of HRL in this context.

However, such a simple conclusion would not adequately take into account that only HRL provides for individual redress for victims of violations. But difficulties remain; as *Doswald-Beck* recently emphasised, the HRL bodies generally only have the competence to

⁴²⁷ See Art. 2 (2), European Convention on Human Rights, *supra* note 409; *Guerrero v. Colombia*, Human Rights Committee, 31 March 1982, Communication No. R. 11/45, UN Doc. A/37/40, Supp. No. 40, at para. 13.2.

⁴²⁸ This also implies that HRL is concerned with ulterior motives for using lethal force in contrast to IHL.

resort to provisions of the treaties which created them.⁴²⁹ Theoretically, in principle it may be a problem not to have the competence to directly apply IHL in light of the different results that HRL could yield in terms of evaluating the legality of military operations. This is especially true of the divergent interpretations in which lethal force can be used against military objectives. Were one to apply HRL this would only be possible where the limited law-enforcement goals can be invoked while under IHL this would be generally possible. Hence, a true HRL approach to combat operations during an armed conflict is likely to be resisted by armed forces, since it would create a burden to practically eliminate all civilian casualties which may hinder the effectiveness of military operations to overpower the adversary.⁴³⁰

However, it is submitted that to begin with, at least in the practice of the European Court of Human Rights (ECtHR) with regard to NIAC this problem has not arisen. This is most evident from the cases of *Isayeva, Yusupova & Bazayeva v. Russia*,⁴³¹ and *Isayeva v. Russia*.⁴³² Both of these cases involved the use of heavy combat weapons by Russian armed forces against civilian convoys among which were allegedly Chechen rebels in October 1999 when there was undeniably a NIAC in Chechnya.⁴³³ The ECtHR considered whether the planning and execution of the military operations in question showed the requisite care in order for the use of lethal force to be proportionate to the aim pursued to suppress armed rebels.⁴³⁴ The court determined that in both cases Russia violated its positive obligation to take appropriate care to ensure that risks to the lives of civilians are minimised, *inter alia*, by the Russian forces' choice of weapons: In the *Isayeva, Yusupova & Bazayeva* case, the

⁴²⁹ L. Doswald-Beck, "The right to life in armed conflict: does international humanitarian law provide all the answers?", 864 *International Review of the Red Cross* 881, 882 (2006). The only exception in a human rights case was the *Abella* case in which the Inter-American Commission of Human Rights directly resorted to IHL. See *Abella*, *supra* note 406. Interestingly, the ECHR would theoretically provide a basis for the ECtHR to directly resort to IHL to interpret the scope of the right to life during armed conflict. This is because of Art. 15 (2) ECHR which states that no derogation shall be made from the right to life, "except in respect of deaths resulting from lawful acts of war." Thus, where a state invokes a derogation under Art. 15, the ECtHR would have to assess whether deaths resulted from such lawful acts. However, no such derogation has ever been made.

⁴³⁰ P. Rowe, *The Impact of Human Rights Law on Armed Forces*, 135-137 (2006).

⁴³¹ *Isayeva, Yusupova & Bazayeva v. Russia*, App. Nos. 57947/00, 57948/00, 57949/00, European Court of Human Rights, Judgement, 24 February 2005.

⁴³² *Isayeva v. Russia*, *supra* note 406.

⁴³³ The applicants and the third party submissions explicitly referred to the existence of a NIAC calling for the application of common Art. 3 of the 1949 Geneva Conventions. The Court in both cases recognised the exceptional character of the situation prevailing in Chechnya at the time while noting that no derogation under Art. 15 had been made. While the government pleaded the exception under Art. 2 (2) (a) ECHR, i.e. justification of the use of force in defence of any person from unlawful violence, the Court said that in principle this was a situation which could include the deployment of armed units equipped with combat weapons to regain control over territory and to suppress an illegal armed insurgency. In *Isayeva*, the Court even characterised the situation as "conflict." See *Isayeva v. Russia*, *supra* note 406, at para. 180.

⁴³⁴ *Isayeva, Yusupova & Bazayeva v. Russia*, *supra* note 431, at paras. 171, 182; *Isayeva v. Russia*, *supra* note 406, at 180-181.

weapons causing the civilian losses were 12 S-24 non-guided air-to-ground missiles where on explosion each missile bursts into several thousand pieces of shrapnel and impacts on a radius exceeding 300 metres delivered by SU-25 aeroplanes.⁴³⁵ In the other case, the weapons in question were heavy free-falling unitary high-explosion air-dropped FAB-250 and FAB-500 bombs with a damage radius exceeding 1000 metres each.⁴³⁶ While these constitute unitary weapons, these missiles and bombs share many of the characteristics of cluster munitions especially when used against military targets intermingled with large concentrations of civilians. All these weapon systems are unguided, burst into significant quantities of metal fragments and may kill and injure persons over a wide area.

The review of this ECtHR jurisprudence shows that despite the fact that respect for the right to life under HRL is generally subject to more stringent conditions than under IHL when it comes to interpreting the ECHR with regard to the conduct of military operations in a NIAC the reasoning is almost identical as in IHL.⁴³⁷ That is to say, whether the use of lethal force by the armed forces of a state is justified will be evaluated on the basis of feasible precautions undertaken by the attacker in the choice of means and methods of combat. Moreover, the commonalities between the high explosive unitary weapons used in the Chechen cases and cluster munitions in terms of endangering civilians especially where military targets are intermingled with civilian targets also suggests that the ECtHR would be equally able to find a violation of the right to life under Art. 2 of the ECHR in similar circumstances.

Under the individual complaints procedure pursuant to the American system of human rights, there would equally be no room for the argument that a HRL body would interpret the conduct of military operations, including the use of cluster munitions, differently under HRL from IHL. This is because in the case most relevant to the present topic, *Abella v. Argentina (Tablada)*,⁴³⁸ which *inter alia* involved an allegation under the right to life that government armed forces had used prohibited incendiary weapons in response to an attack by non-state

⁴³⁵ *Isayeva, Yusupova & Bazayeva v. Russia*, *supra* note 431, at para. 195.

⁴³⁶ *Isayeva v. Russia*, *supra* note 406, at para. 190.

⁴³⁷ One can extend this observation of an approximation in the application of standards by the ECtHR even to situations where IHL is not applicable because arguably the situation at hand only constitutes “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” In *Ergi v. Turkey*, which concerned the death of the civilian resident of a village in south-eastern Turkey subject to an armed operation by Turkish security forces in response to the alleged presence of PKK members in the village, the ECtHR held with reference to the earlier case of *McCann* that in evaluating proportionality not only the actions of the government agents actually using force but also the planning and control of these actions must be considered. Furthermore, a state was required to take certain positive measures to protect the right to life. Accordingly, responsibility of a state party to the ECHR was engaged if states “fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.” *Ergi v. Turkey*, App. No. 66/1997/850/1057, European Court of Human Rights, Judgement, 28 July 1998, at para. 79.

⁴³⁸ See *Abella v. Argentina*, *supra* note 406.

armed actors of a military base, the Inter-American Commission on Human Rights directly applied IHL in order to evaluate whether the right to life under Art. 4 of the American Convention on Human Rights (ACHR) had been violated.⁴³⁹

However, the approach of the commission to directly apply IHL for finding a violation of the ACHR has been strongly criticised by legal commentators.⁴⁴⁰ Moreover, the Inter-American Court of Human Rights (IACtHR) in the *Las Palmeras* case determined in response to opposing pleadings by the commission and the respondent government that it had no competence to apply IHL directly.⁴⁴¹

On the other hand, the Inter-American Court of Human Rights in the subsequent *Bámaca-Velásquez* case, which involved the capture and execution of a rebel leader during the NIAC in Guatemala took a more nuanced approach. The IACtHR, after finding that there was a NIAC, held that although it did not have competence to hold a state responsible for violations of international treaties other than the ACHR, it could observe that certain conduct that violates the ACHR also violates other international treaties such as the 1949 Geneva Conventions. Moreover, IHL treaties may be taken into consideration as elements for the interpretation of the ACHR.⁴⁴² While the respective approaches reveal inconsistencies between the commission and the court, one may nevertheless discern the likely tendency that both will interpret the right to life under HRL with regard to the conduct of military operations in a NIAC not inconsistent with IHL.

The other two HRL bodies, before which individuals can bring a complaint alleging a violation of the right to life during an armed conflict, the Human Rights Committee (HRC) and the African Court of Human and Peoples' Rights, have so far not taken the existence of an armed conflict into account or have not been confronted with complaints for HRL violations during armed conflict.⁴⁴³ However, the HRC gave some indication as to how it would apply the right to life to military operations during armed conflicts in the context of its General Comment No. 31 on the nature of the general obligations imposed on states parties to the ICCPR. In this respect, the HRC stated that

⁴³⁹ *Ibid.*, at paras. 157-171, 186-188.

⁴⁴⁰ See e.g. L. Moir, "Law and the Inter-American Human Rights System", 25 Human Rights Quarterly 182, 195 (2003); L. Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* case", 324 International Review of the Red Cross 505, 509 (1998).

⁴⁴¹ The case concerned the execution of six unarmed civilians by Colombian police. *Las Palmeras*, Judgement on Preliminary Objections, Inter-American Court of Human Rights, 4 February 2000, Ser. C, No. 67, at paras. 33-34.

⁴⁴² *Bámaca-Velásquez v. Guatemala*, *supra* note 406, at paras. 207-209.

⁴⁴³ In this regard, the HRC views in the case of *Guerrero v. Colombia* where government agents killed innocent civilians in the execution of extraordinary measures against rebels, generally arose out of a NIAC. However, the existence of a NIAC had no bearing on the reasoning of the HRC. See *Guerrero*, *supra* note 427.

“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”⁴⁴⁴

As has been observed, this statement by the HRC is not as clear as the ICJ’s dicta in respect of the *lex specialis* character of IHL in relation to HRL during armed conflict.⁴⁴⁵

In the specific context of derogations, the HRC noted in its General Comment No. 29 that Art. 4 (1) of the ICCPR requires that no measure derogating from the provisions of the Covenant may be inconsistent with the state party’s other international obligations, particularly IHL. Moreover, in deciding on the legality of the derogation in question the committee has the competence to take a state party’s other international obligations into account although it is not the function of the HRC to find violations by a state party of other international treaties.⁴⁴⁶ However, this General Comment is also not helpful with regard to the right to life, since this right is not subject to derogation. Still, a combined reading of these two General Comments enables the conclusion that the HRC would take IHL into account for determining whether ICCPR rights were violated during armed conflict but it would not apply IHL directly.

This then is an approach not so radically different from the treaty bodies under the ECHR and ACHR. Concluding Observations of the HRC in response to the submission of states parties reports provide specific evidence where the HRC resorted to IHL to interpret what constituted an arbitrary deprivation of life, thus echoing the approach of the ICJ. For instance, in its 2003 Concluding Observations on Israel, the committee took IHL concepts into account, in particular the specific practice of using human shields during military operations which according to the HRC often resulted in arbitrary deprivation of the right to life. Thus, the use of human shields, a specific IHL violation⁴⁴⁷ was used by the HRC to interpret the scope of Art. 6 of the ICCPR.⁴⁴⁸ Further, in its 2007 Concluding Observations on Sudan, the HRC was explicitly concerned about widespread and systematic serious human

⁴⁴⁴ Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 11.

⁴⁴⁵ Heintze, “Relationship between IHL and HRL”, *supra* note 405, at 797.

⁴⁴⁶ Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), 31 August 2001, UN Doc. CCPR/21/Rev.1/Add.11, at paras. 9-10.

⁴⁴⁷ See Art. 23, Geneva Convention III, *supra* note 343; Art. 28, Geneva Convention IV, *supra* note 343; Art. 51 (7), Additional Protocol I, *supra* note 17.

⁴⁴⁸ The HRC also took the existence of an armed conflict in the occupied territories into account in respect of the practice of “targeted killings” by noting Israel’s arguments framed exclusively in IHL terms, e.g. that only persons directly participating in hostilities were targeted. However, in its specific recommendation, the HRC called on Israel to exhaust all measures to arrest terror suspects before resorting to deadly force, which will be impractical to implement during ongoing armed hostilities. See Human Rights Committee, Concluding Observations on Israel, 21 August 2003, UN Doc. CCPR/CO/78/ISR, at paras. 15,17.

rights violations particularly in the context of the armed conflict in Darfur, *inter alia*, attacks against the civilian population.⁴⁴⁹ Accordingly, also here the HRC took the existence of a NIAC into account and used “attacks against civilians” as an IHL concept to find a violation of Art. 6 of the ICCPR.

While the concern that HRL bodies may evaluate cluster munition attacks in the context of a NIAC substantially differently under HRL than under IHL appears thus unfounded, an evaluation under HRL through the lens of the right to life has the added benefit of filling some of the gaps in IHL as regards an investigation of cluster munition attacks after the events in question.

As the UN Special Rapporteur on Extrajudicial, summary and arbitrary executions emphasised, particularly in NIAC IHL does not impose an obligation to investigate and prosecute alleged unlawful killings in the conduct of military operations. On the other hand, the “grave breaches” regime in relation to an IAC, most notably where indiscriminate attacks are launched in the knowledge that such attacks will cause excessive civilian harm, obliges states under customary international law to criminally prosecute at least their own nationals or crimes allegedly committed on their territory.⁴⁵⁰

HRL especially fills the gap in relation to NIAC in that it generally requires states to conduct a prompt, thorough and effective investigation after allegations of violations of the right to life as part of their general positive obligation to ensure the right to life to individuals.⁴⁵¹ In the *Isayeva, Yusupova & Bazayeva* case, the ECtHR spelled out the modalities required for such an investigation in great detail: A state confronted with allegations on unlawful killings in an armed conflict must initiate an investigation out of its own motion. Such investigation must be independent in the sense of lacking, for all practical intents and purposes, institutional and hierarchical connection with those implicated in the events. The investigation must be effective as to be capable of leading to a determination of whether or not the force used was justified in the circumstances and to the identification and

⁴⁴⁹ Human Rights Committee, Concluding Observations on Sudan, 29 August 2007, UN Doc. CCPR/C/SDN/CO/3, at para. 9.

⁴⁵⁰ Art. 85 (3), Additional Protocol I, *supra* note 17. Even for states not party to Additional Protocol I, this obligation constitutes customary international law. See Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 607-611.

⁴⁵¹ Commission on Human Rights, Report on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions of the Special Rapporteur, Philip Alston, 8 March 2006, UN Doc. E/CN.4/2006/53, at paras. 33-43. See also *Isayeva, Yusupova & Bazayeva v. Russia*, *supra* note 431, at paras. 208-225; *Isayeva v. Russia*, *supra* note 406, at para. 209; *Myrna Mack Chang v. Guatemala*, Inter-American Court of Human Rights, Judgement, 25 November 2003, at paras. 152-158; *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, African Commission on Human and Peoples' Rights, No. 74/92, Decision, 11 October 1995, at para. 22.

punishment of responsible individuals. This would require securing evidence in relation to the incident, including witness testimonies, forensic evidence or an autopsy into the cause of death. Moreover, it is implied that an investigation be initiated promptly and be rendered public as to prevent any appearance of tolerance on the part of the state authorities of possibly unlawful acts.⁴⁵² Also for criminal prosecutions in relation to “grave breaches” committed in an IAC, these modalities generally constitute a welcome specification.

Importantly, the UN Special Rapporteur on Extrajudicial, summary and arbitrary executions emphasised that the obligation to investigate as part of the obligation to ensure the right to life entails more than criminal prosecution; states are also bound under HRL to undertake systematic supervision and periodic investigation necessary to prevent recurrences of violations, in particular to identify institutional shortcomings that allowed unlawful conduct in military operations during armed conflict to occur.⁴⁵³ It should be recalled that IHL on IAC also provides for the generic obligation to ensure respect for its rules which includes measures already taken during peacetime to prevent violations of IHL during armed conflict.⁴⁵⁴ Moreover, as observed above, the Eritrea-Ethiopia Claims Commission in evaluating Eritrea’s responsibility for a cluster munition attack hitting Ethiopian civilians stated that the obligation to take all feasible precautions in minimising civilian harm would have required Eritrea to prevent the recurrence of further civilian harm by inspecting the aircraft flying the respective sorties or changing the training and doctrine of the Eritrean armed forces. Observance of the obligation to conduct non-criminal investigations imposed by HRL would arguably have enabled Eritrea to respect its precautionary obligations in preventing further civilian harm. In this sense, the obligation under HRL reinforces IHL precautionary obligations.

However, a decision on the merits of an individual complaint by a HRL body based on the right to life for the consequences of cluster munition use during an IAC encounters one major obstacle which is present under HRL but not IHL, notably jurisdiction. A common feature of HRL treaties is that states are only obliged to respect and ensure the human rights of individuals subject to their jurisdiction.⁴⁵⁵ It will be recalled that state jurisdiction generally

⁴⁵² *Isayeva, Yusupova & Bazayeva v. Russia*, *supra* note 431, at paras. 208-213.

⁴⁵³ Commission on Human Rights, 2006 Report by Special Rapporteur Alston, *supra* note 451, at para. 41.

⁴⁵⁴ See common Art. 1, 1949 Geneva Conventions, *supra* note 343; Art. 1, Additional Protocol I, *supra* note 17.

⁴⁵⁵ In this regard, Art. 2 of the ICCPR provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]” See International Covenant on Civil and Political Rights, *supra* note 343. Art. 1 of the ECHR states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms [...]” See European Convention on Human Rights, *supra* note 409. According to Art. 1 (1) of the ACHR “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and

means the extent of a state's right to regulate conduct through legislation (jurisdiction to regulate), through its courts to regulate legal differences between individuals (jurisdiction to adjudicate) or regulate conduct by taking executive action (jurisdiction to enforce). While states regularly decide themselves on the limits of their own jurisdiction, international law poses limits on a state's jurisdiction so as to not impinge on another state's exercise of jurisdiction. Therefore, a sufficiently close link is usually required to justify one state's exercise of jurisdiction where this could conflict with other jurisdictions.⁴⁵⁶

What establishes such a link to bring individuals within the jurisdiction of a state is still contested. In an IAC, one of the states involved will usually operate outside its own territory. While HRL bodies have accepted that a state's effective control over territory other than its own and authority and control over an individual detained abroad could place individuals affected by their conduct under that state's jurisdiction,⁴⁵⁷ significant uncertainties remain as to whether this also extends to individuals affected by the conduct of military operations outside the territory of a state. The level of control by a state over the foreign theatre of hostilities will typically be less than in a situation of occupation.

The ECtHR was confronted with the question of the extent of its jurisdiction in extraterritorial military operations during IAC most prominently in the case of *Banković and Others v. Belgium* and 16 other NATO member states.⁴⁵⁸ The case arose out of the aerial bombardment by NATO member states of a television station building in Belgrade during the 1999 Operation Allied Force which resulted in civilian deaths. Significantly, NATO member states armed forces did not exercise any effective control over Serbian (then FRY) territory

to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]. See American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

⁴⁵⁶ This approach was essentially taken by the ICJ in the *Nottebohm* case which concerned the question whether the nationality conferred on Nottebohm was opposable to Guatemala for the purposes of exercising diplomatic protection on his behalf. While this did not concern a case of double nationality strictly speaking, the criterion of a *genuine link* in addition to the formal nationality essentially concerns a relevant criterion for determining which state properly has jurisdiction over a dual national. See *Nottebohm (Liechtenstein v. Guatemala)* (2nd Phase, Merits), 1955 ICJ 4 (Judgement, 4 April). For an interesting argument regarding a concept of jurisdiction under HRL treaties autonomous from general international law, see M. Milanović, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139174 (last visited 21 January 2010).

⁴⁵⁷ See Human Rights Committee, Concluding Observations on Israel, *supra* note 448, at paras. 11, 15; *Saldias de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/13/D/52/1979, Views of 29 July 1981; *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, UN Doc. CCPR/C/13/D/56/1979, Views of 29 July 1981; *Coard v. United States*, Inter-American Commission on Human Rights, Decision of 29 September 1999, Case No. 10951, 123 ILR 156-189 (2003); *Loizidou v. Turkey*, App. No. 15318/89, European Court of Human Rights, Judgement on Preliminary Objections, 23 March 1995.

⁴⁵⁸ *Banković and Others v. Belgium and Others*, App. No. 52207/99, European Court of Human Rights, Grand Chamber Decision on Admissibility, 12 December 2001, 123 ILR 94-117 (2003).

but only controlled the airspace above. On the issue of the extent of its jurisdiction in such a case, the court stated that it only recognised jurisdiction under Art. 1 of the ECHR

“when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally exercised by that Government.”⁴⁵⁹

Applicants’ main submission was that the obligation under Art. 1 of the ECHR to securing Convention rights to individuals under a state’s jurisdiction could be divided and tailored to the specific extraterritorial act in question.

However, the court explicitly rejected this argument, since that would be

“tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”⁴⁶⁰

Thus, the decision of the court signals that airstrikes performed by states outside their territory during an IAC do not result in bringing the victims of such airstrikes within the jurisdiction of these states.⁴⁶¹ This then effectively removes the civilian victims of the use of air-dropped cluster munitions in or near populated areas during an IAC from the scrutiny of the ECtHR.

The ECtHR in *Banković* also regarded the then FRY, which was not a state party to the ECHR at the time, as outside of the legal space (*espace juridique*) of the states parties to the ECHR, a multilateral treaty operating in an essentially regional context not designed to be applied throughout the world.⁴⁶² This notion of the *espace juridique* would add an additional limiting factor to the extent of the court’s recognition of state jurisdiction under Art. 1 of the ECHR, as such jurisdiction would only be accepted where its exercise takes place on another state party’s territory. Following such reasoning, the use of cluster munitions by the United Kingdom in Iraq, for example, would also not be accepted as an exercise of jurisdiction, since Iraq is not a state party to the ECHR, which is significant because most of the instances of cluster munition use occurred in interventionist IAC far away from the territory of the states parties to the ECHR involved.

⁴⁵⁹ *Id.*, at para. 71.

⁴⁶⁰ *Id.*, at para. 75.

⁴⁶¹ Byron, “A Blurring of the Boundaries”, *supra* note 405, at 871; M. Gondek, “Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?”, 52 *Netherlands International Law Review* 349, 372 (2005).

⁴⁶² *Banković and Others v. Belgium and Others*, *supra* note 458, at para. 80.

However, this last obstacle to ECtHR jurisdiction was effectively removed by the later judgement in the case of *Issa v. Turkey*⁴⁶³ which concerned the alleged arrest, torture and murder of several shepherds while Turkish armed forces were conducting military operations against Kurds in Northern Iraq. Here, the Court was prepared to accept that the applicants could have been under Turkey's jurisdiction in the territory of Iraq.⁴⁶⁴

The court also reaffirmed the threshold of "effective overall control" but significantly added that

"[m]oreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be *under the former State's authority and control* through its agents operating [...] in the latter State."⁴⁶⁵

The recognition of a jurisdictional extraterritorial ground on account of a state's authority and control over persons constitutes a reversal of *Banković*. There the Court had only affirmed jurisdiction besides effective control over territory in respect of activities of diplomatic or consular agents abroad.⁴⁶⁶

Moreover, the Court expanded the notion of "effective overall control" in an interesting manner by stating that as a consequence of ad hoc military operations on the ground a state could be considered to exercise *temporarily* effective overall control of a particular portion of territory even if on the facts of the case it was not satisfied that this threshold was crossed.⁴⁶⁷ For the determination whether Turkey exercised authority and control over the applicants the Court considered proof of Turkish troop operations in the precise area where the killings allegedly took place essential.⁴⁶⁸

It is interesting to consider if the *Issa* judgement provides any support for the proposition that the ECtHR could assert jurisdiction over a case involving an extraterritorial

⁴⁶³ *Issa and Others v. Turkey*, App. No. 31821/96, European Court of Human Rights, Judgement, 16 November 2004.

⁴⁶⁴ The same holds true for the case of *Öcalan v. Turkey* where not only jurisdiction was upheld for the extraterritorial detention of PKK leader Abdullah Öcalan by Turkish authorities in Kenya, also a State not party to the ECHR, but Turkey also incurred responsibility for these extraterritorial acts. See also E. Roxstrom, M. Gibney & T. Einarsen, "The NATO Bombing Case (*Banković et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection", 23 Boston University International Law Journal 130 (2005); R. Wilde, "Legal 'Black Hole'? Extraterritorial State Action and International Treaty Law on Civil and Political Rights", 26 Michigan Journal of International Law 739, 792-796 (2005).

⁴⁶⁵ *Issa v. Turkey*, *supra* note 463, at para. 71.

⁴⁶⁶ *Banković and Others v. Belgium and Others*, *supra* note 458, at para. 73; J. Cerone, "Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations", 39 Vanderbilt Journal of Transnational Law 1447, 1491 (2006); Gondek, "Extraterritorial Application of the European Convention on Human Rights", *supra* note 461, at 374; R. Opie, "Human Rights Violations by Peacekeepers", New Zealand Law Review 1, 28 (2006).

⁴⁶⁷ *Issa v. Turkey*, *supra* note 463, at paras. 74-75.

⁴⁶⁸ *Ibid.*, para. 76. The Court finally was not convinced that it had been proven beyond reasonable doubt that the Turkish military had operated in the precise area where the killings allegedly took place.

use of cluster munitions during an IAC. The combination of the relaxation of the “effective overall control” criterion together with the reinvigorated standard of “authority and control” over persons would point in this direction. However, it is submitted that the factual basis on which the complaints in this case rested involved the *detention* of the affected persons *before* killing them. Thus, the question remains open whether the court would be prepared to hold these criteria to be established where a person is killed in the course of the conduct of hostilities in an IAC without prior detention.

Elements of the ECtHR’s judgement in the case of *Ilascu v. Moldova and Russia*⁴⁶⁹ where applicants were arrested at their homes in Tiraspol by security personnel of the *de facto* regime of Transdniestria and subsequently sentenced to death and long terms of imprisonment, respectively, on account of politically charged offenses against the pro-Russian regime on Moldovan soil, may now provide support for the proposition that jurisdiction can be divided and tailored according to extraterritorial conduct.

In that case, violations by Russia as well as Moldova of applicants’ rights to life, to be free from torture and not to be arbitrarily deprived of freedom were alleged; applicants submitted that Transdniestria was effectively controlled by Russia and Moldova had failed to discharge its positive obligations under the Convention despite having lost *de facto* control over Transdniestria. The Court accepted that the acts complained of fell under the jurisdiction of Russia by virtue of its significant military influence and its military, economic and political support of the *de facto* regime in Transdniestria outside its own territory.⁴⁷⁰ Significantly, the Court in the following passage also held that applicants continued to remain under the jurisdiction of Moldova,

“The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, [...] it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State. Nevertheless, such a factual situation *reduces the scope of that jurisdiction* in that the undertaking given by the Court only in the light of the Contracting State’s positive obligations towards persons within its territory.”⁴⁷¹

Thus, the Court *did* in fact recognise by the wording “reduces the scope of jurisdiction” that jurisdiction may be divided and tailored in accordance with the actual control exercised. The last proposition constitutes a reversal of the earlier *Bankovic* dictum

⁴⁶⁹ *Ilascu v. Moldova & Russia*, App. No. 48787/99, European Court of Human Rights, Judgement of 8 July 2004, at para. 333.

⁴⁷⁰ *Ibid.*, at paras. 314-316, 392.

⁴⁷¹ *Ibid.*, at para. 333.

where the Court rejected precisely this possibility, which shows that the jurisprudence of the ECtHR remains incoherent.

The restrictive stance taken by the ECtHR towards affirming its jurisdiction for the conduct of military operations in IAC also seems to be at odds with the jurisprudence of the Inter-American Commission on Human Rights (IACCommHR). As opposed to the ECtHR in *Banković*, the IACCommHR in *Salas and Others v. United States of America*⁴⁷² upheld its jurisdiction in respect of the conduct of air and ground military operations by United States armed forces during the invasion of Panama in 1989 which caused large numbers of civilian deaths, injury and destruction of property.

Further, in *Alejandro v. Cuba*,⁴⁷³ where Cuban military aircraft shot down two unarmed civilian aircraft with missiles, the IACCommHR stated that

“In analyzing the facts, the Commission finds that the victims died as a consequence of direct actions of agents of the Cuban State in international air space. [emphasis in the original] The circumstance that the facts occurred outside the Cuban jurisdiction does not restrict nor limit the Commission's competent authority *ratione loci*, for, as has already been indicated, when agents of a State, whether they be military or civil, exercise power and authority over persons located outside the national territory, its obligation to respect human rights, in this case the rights recognized in the American Declaration, continues. In the opinion of the Commission, there is sufficient evidence to show that the agents of the Cuban State, despite being outside its territory, subjected to their authority the civil pilots of the "Hermanos al Rescate" organization.”⁴⁷⁴

This shows the different stance taken by the commission especially with regard to aerial bombardment, as it seems that the Inter-American Commission would be prepared to hold that those conducting extraterritorial military operations during an IAC, including the use of cluster munitions, come within the authority and control of the attacker.⁴⁷⁵

With regard to the HRC, it is difficult to discern from its scarce jurisprudence if it would be prepared to affirm its jurisdiction, however, certain general trends may be observed. It has been suggested that the cases of *Saldias de Lopez* and *Celiberti de Casariego v. Uruguay*,⁴⁷⁶ which both involved abductions and ill-treatment of individuals from Argentina and Brazil, respectively, stand for the proposition that the intentional killing of civilians during a brief incursion would also be sufficient to establish a relevant jurisdictional link.⁴⁷⁷ However, it is unclear whether this would only apply to the practice of targeted killings like

⁴⁷² *Salas v. United States*, *supra* note 406.

⁴⁷³ *Alejandro and Others v. Cuba*, Inter-American Commission on Human Rights, Decision on Admissibility of 29 September 1999, Case No. 11589, 104th Session, Doc. No. OAS/Ser.L/V/II.104.

⁴⁷⁴ *Ibid.*, at para. 25.

⁴⁷⁵ Byron, “A Blurring of the Boundaries”, *supra* note 405, at 880.

⁴⁷⁶ *Saldias de Lopez v. Uruguay*, *supra* note 457; *Celiberti de Casariego v. Uruguay*, *supra* note 457.

⁴⁷⁷ Byron, “A Blurring of the Boundaries”, *supra* note 405, at 868.

by Israel in the Occupied Palestinian Territories discussed above,⁴⁷⁸ or whether this would also apply to large-scale combat operations where there is typically not the same level of control over individuals. Evidence that the ICCPR may also be applied by the Human Rights Committee to the latter scenario can be derived from some Concluding Observations, including on Italy,⁴⁷⁹ Norway and Poland, where these states all accepted that the Human Rights Committee would have jurisdiction in respect of extraterritorial conduct of their armed forces in peacekeeping and peace-enforcement operations. Thus, one may conclude somewhat tenuously that the Human Rights Committee might affirm its jurisdiction for civilian harm resulting from cluster munition use during an IAC.

Still, this review of human rights jurisprudence indicates that the application of HRL to civilian victims of cluster munition use during an IAC encounters the significant obstacle of jurisdiction. In contrast, IHL provides for a generic obligation to respect and ensure respect for IHL in all circumstances, especially during an IAC.⁴⁸⁰ With regard to this obligation it is generally recognised that there are no territorial limits to this obligation, as it is inherent in the very notion of an IAC as an armed conflict between two or more state armed forces that at least one state involved in such a conflict will operate outside of its own territory. Therefore, states take this obligation with them wherever their armed forces are engaged in military operations.⁴⁸¹

Therefore, while HRL may be applied to extraterritorial use of cluster munitions during an IAC, IHL governing this type of conflicts seems to be better equipped to deal with that situation. However, as stated *supra*, no general remedy for individual victims under IHL exists.⁴⁸² A traditional way to circumvent this problem is that the victims' state of nationality

⁴⁷⁸ See *supra* pp. 130-131.

⁴⁷⁹ Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, at para. 3; Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Norway, 25 April 2006, UN Doc. CCPR/C/NOR/CO/5, at para. 6; Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations: Poland, 2 December 2004, UN Doc. CCPR/CO/82/POL, at para. 3.

⁴⁸⁰ Common Art. 1, Geneva Conventions I-IV, *supra* note 343; Art. 1 (1), Additional Protocol I, *supra* note 17. With regard to NIAC, this obligation is applicable to the extent of the applicability of common Art. 3 of the Geneva Conventions. See L. Boisson Chazournes & L. Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting Collective Interests", 837 International Review of the Red Cross 67-87 (2000), <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQCP> (last visited 21 January 2010).

⁴⁸¹ Rowe, *The Impact of Human Rights Law on Armed Forces*, *supra* note 430, at 121; Boisson Chazournes & Condorelli, "Common Article 1", *supra* note 480. The ECtHR in *Banković* explicitly contrasted the obligation to respect and ensure respect in common Art. 1 of the Geneva Conventions with Art. 1 of the ECHR to secure Convention rights to everyone within their jurisdiction in rejecting applicants' submission that this obligation could be divided and tailored in a manner proportionate to the level of control exercised. See *Banković and Others v. Belgium and Others*, *supra* note 458, at para. 75.

⁴⁸² To a certain extent, Art. 75 of the Rome Statute of the International Criminal Court can be regarded as an attempt to fill this gap, as it contains an express possibility for victims of international crimes to claim reparation

claims compensation on the ground of diplomatic protection in proceedings against the state whose armed forces inflicted death and injury on their nationals in the conduct of military operations in an IAC. This recently occurred, for example, in the *Armed Activities on the Territory of the Congo* case⁴⁸³ before the ICJ where the Democratic Republic of Congo claimed compensation for breaches of IHL and HRL from Uganda resulting from, *inter alia*, combat operations entailing civilian harm during an IAC and the court found both violations of Arts. 48 and 51 of API and Art. 6 of the ICCPR to be established. Still, this traditional way of claiming violations on behalf of victims that are a state's nationals is subject to the discretion of that state and states do not frequently espouse the claim of their nationals against another state.

Where HRL bodies have explicitly affirmed their jurisdiction concerning civilian losses as a result of combat operations – and this only goes for the IACommHR – they have applied IHL directly. Thus, in contrast to the jurisprudence of the ECtHR on the right to life in NIAC where the court has attempted to adapt IHL concepts (of precautionary obligations) to HRL norms with essentially the same result, the IACommHR has avoided to translate IHL into human rights-based language. Again, it is submitted that there are good practical reasons for adopting this approach, since armed forces in full-fledged combat operations will find it rather unrealistic, for example, to affect an arrest of an adversary combatant before killing him/her. Besides, as Rowe has pointed out, training of IHL has been internalised by soldiers since at least the beginning of the 20th century and has thus historically a high acceptance; the same cannot be said of HRL which is a much younger branch of international law.⁴⁸⁴ The backdrop of a proposition to overcome the *lex specialis* interpretation in relation to IHL and HRL may thus well be ill-advised. However, the above-mentioned Martens Clause which calls for humanitarian considerations to be taken into account where IHL rules are not sufficiently rigorous and precise would have resulted in an interpretation of IHL that gives more weight to humanitarian concerns in relation to military considerations. This is a common denominator between IHL and HRL embodied in the Martens Clause. Unfortunately, one has to repeat here that this has not occurred and cluster munitions have always been used in and near civilian residential areas.

for harm suffered which includes violations of the obligations under IHL to distinguish between civilian and military targets and the obligation not to cause disproportionate civilian casualties in military operations against lawful military targets. See Art. 75, Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

⁴⁸³ *Armed Activities*, 2005 ICJ judgement, *supra* note 417, at paras. 205-220.

⁴⁸⁴ Rowe, *The Impact of Human Rights Law on Armed Forces*, *supra* note 430, at 114-116.

While the right to life in respect of the use of cluster munitions is governed by the specific IHL rules of distinction, discrimination, proportionality and precautionary obligations, no specific rules exist with regard to the prohibition of cruel or inhuman treatment. The next Chapter will discuss the overlap of this prohibition under IHL and HRL in the specific context of cluster munition use and draw from jurisprudence of the ICTY which is particularly instructive.

4.3. The Right not to be Subjected to Cruel or Inhuman Treatment and its Application to Cluster Munition Use During Armed Conflict

The prohibitions of torture, cruel, inhuman or degrading treatment is contained in a plethora of HRL treaties and instruments, including in Art. 5 of the Universal Declaration of Human Rights, in Art. 6 of the ICCPR, in Art. 37 (a) of the Convention on the Rights of the Child and in regional HRL conventions.⁴⁸⁵ In addition, specific HRL conventions aiming at preventing and prosecuting acts of torture, cruel, inhuman or degrading treatment were adopted, most notably the Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment on a global level.⁴⁸⁶

Also under IHL these prohibitions are well-established: To begin with, common Art. 3 of the 1949 Geneva Conventions,⁴⁸⁷ which reflects a “minimum yardstick” and “elementary considerations of humanity” irrespective of the nature of an armed conflict,⁴⁸⁸ and applies to any person not actively participating in military hostilities, prohibits cruel treatment and torture as well as outrages upon personal dignity, in particular humiliating and degrading treatment. Other specific provisions of the Geneva Conventions reiterate these prohibitions for specific contexts.⁴⁸⁹ Art. 75 (2) (a) (ii) and (b) of API and Art. 4 (2) (a) and (e) of APII, which were designed to supplement the 1949 Geneva Conventions, also prohibit torture and

⁴⁸⁵ Art. 5 (2), American Convention on Human Rights, *supra* note 455; Art. 3, European Convention on Human Rights, *supra* note 409; Art. 5, African Charter on Human and Peoples’ Rights, 26 June 1981, 1520 UNTS 217.

⁴⁸⁶ Torture Convention, *supra* note 343. Specific regional HRL treaties on torture and cruel, inhuman or degrading treatment include the European Convention for the Prevention of Torture and Inhuman, Degrading Treatment or Punishment, 26 November 1987, Council of Europe Doc. No. 126 ETS, 27 ILM 1152 and the Inter-American Convention to Prevent and Punish Torture (IACAT), 9 December 1985, OAS Treaty Series No. 67.

⁴⁸⁷ See common Arts. 3 (1) (a) and (c), 1949 Geneva Conventions, *supra* note 343.

⁴⁸⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) (Merits), 1986 ICJ 14, at para. 218 (Judgement, 27 June).

⁴⁸⁹ Art. 12 (2), Geneva Convention I, *supra* note 343 (torture); Art. 12 (2), Geneva Convention II, *supra* note 343 (torture); Art. 17 (4), Geneva Convention III, *supra* note 343 (physical or mental torture or any other form of coercion); Art. 87 (3), *ibid.* (torture or cruelty); Art. 89, *ibid.* (disciplinary punishment that is inhuman, brutal or dangerous to the health of a prisoner of war); Art. 32, Geneva Convention IV, *supra* note 343 (torture and any other measures of brutality).

outrages upon personal dignity, in particular humiliating and degrading treatment. In addition, torture and humiliating and degrading treatment constitute war crimes in both IAC and NIAC, inhuman treatment a war crime in IAC, and cruel treatment in NIAC.⁴⁹⁰ If the specific requirements under international criminal law are fulfilled, torture, causing serious bodily or mental harm and other inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health may even amount to genocide or crimes against humanity.⁴⁹¹

Like the right to life, the right not to be subjected to torture, cruel, inhuman or degrading treatment is non-derogable under HRL in states of emergencies, including armed conflicts.⁴⁹² It is also generally recognised that the prohibition of torture in particular forms part of *jus cogens*, i.e. a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law of the same character.⁴⁹³ There is even some authority for the proposition that also the prohibitions of cruel, inhuman or degrading treatment have attained such a character.⁴⁹⁴

However, unlike in the case of the right to life where there are truly specific norms in the context of armed conflict by virtue of the rules on distinction, discrimination, proportionality and precautionary obligations, there is generally no meaning of the substantive content of torture, cruel or inhuman or degrading treatment independent under IHL from that under HRL; the only essential difference is structural in that IHL may bind non-state armed groups as well as state actors while under HRL, as already argued above, the extent to which non-state actors are bound by its obligations is still not as well-settled. In this respect, under HRL the explicit requirement that torture and other ill-treatment must have been committed with specific involvement of a state organ may be dispensed with under IHL to take the reality into account that such acts may also be committed in a NIAC where by definition one

⁴⁹⁰ See, for example, Arts. 8 (2) (a) (ii), 8 (2) (b) (xxi), 8 (2) (c) (i), 8 (2) (c) (ii), ICC Statute, *supra* note 483.

⁴⁹¹ Arts. 6 (b), 7 (1) (f) and (k), *ibid.*

⁴⁹² Art. 4 (2), International Covenant on Civil and Political Rights, *supra* note 343; Art. 2 (2), Torture Convention, *supra* note 342; Art. 27 (2), American Convention on Human Rights, *supra* note 455; Art. 15 (2), European Convention on Human Rights, *supra* note 409; Art. 5, Inter-American Convention Against Torture, *supra* note 487.

⁴⁹³ Art. 53, Vienna Convention on the Law of Treaties, *supra* note 402; *Prosecutor v. Delalić*, *supra* note 308, at para. 454; *Prosecutor v. Furundžija*, Judgement, *supra* note 410, at paras. 153-156; *Prosecutor v. Kunarac*, Judgement, Case No. IT-96-23/T & IT-96-23/1-T, T.Ch., 22 February 2001, at para. 466; Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, at para. 8.

⁴⁹⁴ Human Rights Committee, General Comment No. 24, *supra* note 493, at para. 8; M. Byers, "Conceptualising Jus Cogens and Obligations Erga Omnes", 7 Nordic Journal of International Law 211, 213-215 (1997).

of the parties will be a non-state actor.⁴⁹⁵ Thus, Art. 1 (1) of the CAT requires the intentional infliction of severe pain or physical or mental suffering for a prohibited purpose such as obtaining information, a confession, punishment, intimidation or coercion or any discrimination “by, or at the instigation of or with the consent or acquiescence” of a state organ; in contrast, IHL requires for an act to constitute torture only the intentional infliction of severe pain or physical or mental suffering for a prohibited purpose.⁴⁹⁶

With regard to the distinction between torture on the one and cruel and inhuman treatment on the other hand, one undisputed distinguishing element is the specific purpose which is required for torture but not for cruel and inhuman treatment.⁴⁹⁷ This is most relevant for the specific context of the use of cluster munitions. In this regard, the UN Special Rapporteur on Torture has persuasively shown that a situation of particular powerlessness of the victim vis-à-vis the perpetrator is a precondition for finding one of the specific purposes required for torture. Such a situation of powerlessness is typically given where the victim is deprived of his/her personal liberty. Conversely, the intentional infliction of severe suffering for law enforcement purposes such as effecting the lawful arrest of a person, preventing the escape of a person or quelling violent demonstrations or riots never amounts to torture, since the specific purpose as a constitutive element is lacking. Such conduct may be even lawful or constitute cruel or inhuman treatment, depending on whether the force used was proportionate, i.e. not excessive to the aim pursued. Among these other, generally lawful

⁴⁹⁵ See, in this sense, *Prosecutor v. Kunarac*, T.Ch. judgement, *supra* note 493, at paras. 470-497; C. Droege, “‘In truth the leitmotiv’: the prohibition of torture and other forms of ill-treatment in international humanitarian law”, 867 *International Review of the Red Cross* 515, 526 (2007).

⁴⁹⁶ See, for example, Elements of Crimes to the Rome Statute of the International Criminal Court for Arts. 8 (2) (a) (ii) and 8 (2) (c) (i), http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf (last visited 28 October 2009).

⁴⁹⁷ *Prosecutor v. Delalić*, *supra* note 308, at para. 442; Elements of Crime to the ICC Statute, *supra* note 496, for Arts. 8 (2) (a) (ii)-1, 8 (2) (a) (ii)-2, 8 (2) (c) (i)-3 and 8 (2) (c) (i)-4; M. Nowak, “What Practices Constitute Torture?: US and UN Standards”, 28 *Human Rights Quarterly* 809, 818, 824-828, 830 (2006) (with further references).

On the other hand, the approach of certain HRL bodies and the ICTY differ from the approach of the Human Rights Committee and the Elements of Crime under the ICC Statute on the question whether another distinguishing element between these various manifestations of prohibitions of ill-treatment is the intensity of the pain or suffering inflicted: While the ECtHR, the IACComm and IACtHR as well as the ICTY take the stance that the infliction of torture requires a higher level of suffering, the Elements of Crimes for the ICC Statute foresee “severe” pain or physical or mental suffering with regard to both prohibitions. The Human Rights Committee and the current UN Special Rapporteur for Torture also do not regard the severity of suffering inflicted as distinguishing element. In any event, the suffering inflicted on civilian victims would appear to attain even the higher threshold required by the ECtHR, the IACComm and IACtHR. See *Ireland v. United Kingdom*, App. No. 5310/71, European Court of Human Rights, Judgement, 18 January 1978, paras. 167-168; *Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights, Judgement, 17 September 1997 (Ser. C) No. 33, para. 57; *Prosecutor v. Kvocka*, Judgement, Case No. IT-98-30/1-T, T.Ch., 2 November 2001, at para. 161; Elements of Crimes to the ICC Statute, *supra* note 496, for Arts. 8 (2) (a) (ii)-1, 8 (2) (a) (ii)-2, 8 (2) (c) (i)-3 and 8 (2) (c) (i)-4; M. Nowak, “Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment”, 23 (4) *Netherlands Quarterly of Human Rights* 674, 678 (2005), <http://www.fiakat.org/en/spip.php?article420> (last visited 21 January 2010).

purposes, the UN Special Rapporteur also explicitly listed the use of force by the military in case of armed conflict.⁴⁹⁸ It follows that the scope of the prohibition of torture is restricted to detention or a similar situation of direct factual power and control over a victim while the scope of the prohibition of cruel or inhuman treatment is not so restricted.⁴⁹⁹ Significantly, in the conduct of military operations during an armed conflict through which civilians are seriously injured, such detention-like control by the perpetrator will typically be absent.

However then, if the difference between a lawful use of force and an unlawful use of force constituting cruel or inhuman treatment falls to be evaluated on the basis of whether such use of force was proportionate once again one encounters divergences between IHL and HRL which are similar as for the right to life argued above; this is because the notion of proportionality has a different role under both branches of international law: While under HRL the proportionality test would be applied to any person irrespective of his/her particular status in relation to the ultimate motive of the use of force, under IHL proportionality only comes into play with regard to civilians or persons not directly participating in hostilities in relation to a specific military objective in order to implement the specific IHL rule of distinction. Moreover, the rules on the conduct of hostilities under IHL are inherently inspired not only by humanitarian considerations but also by military necessity. It is in this context that relevant jurisprudence of the ICTY which was confined to victims that had not directly participated in hostilities must be understood.

This jurisprudence confirms for the specific context of armed conflict that the prohibition of cruel or inhuman treatment may be violated in case of the use of certain weapons where there is no factual detention-like control over the victim on the part of the perpetrator. In *Prosecutor v. Galić*, both the Trial and the Appeals Chambers concluded that widespread and systematic sniper, artillery and mortar attacks against civilians in Sarajevo between 1992 and 1994 entailed the defendant's individual criminal responsibility for "inhumane acts" as a crime against humanity.⁵⁰⁰ On the specific elements for "inhumane acts" the Trial Chamber noted that it was necessary to show that the impugned act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity and that the conduct in question was performed intentionally; with regard to intent,

⁴⁹⁸ Nowak, "What Practices Constitute Torture?", *supra* note 497, at 821.

⁴⁹⁹ *Ibid.*, at 832-835; Nowak, "Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment", *supra* note 497, at 676-679. Also see the definition of "torture" under Art. 7 (2) (e) of the ICC Statute: "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused." See Art. 7 (2) (e), ICC Statute, *supra* note 482.

⁵⁰⁰ *Prosecutor v. Galić*, Trial Chamber Judgement, *supra* note 300, at para. 599; *Prosecutor v. Galić*, Appeals Chamber Judgement, *supra* note 305, at paras. 154-159..

this requirement is already satisfied where the perpetrator was reckless, i.e. he/she knew that the conduct was likely to cause such injury, suffering or attack on human dignity.⁵⁰¹

The ICTY Trial Chamber in the *Strugar* case held that the accused was responsible for cruel treatment. Significantly, not the mistreatment of persons in detention but serious shrapnel injuries of persons not actively participating in hostilities requiring long-term medical treatment as a consequence of the shelling of Dubrovnik in December 1991 where the perpetrators did not have detention-like control over the victims were at issue.⁵⁰² With regard to the specific case of cluster munitions, as already mentioned above, the Trial Chamber judgement in the *Martić* case in line with this previous jurisprudence crucially added that the use of cluster munitions in densely populated areas, resulting in persons not actively participating in hostilities and civilians seriously injured, respectively, violates the prohibition of cruel or inhuman treatment. Importantly, detention-like control over the affected civilians was absent.⁵⁰³ At present, however, it is unclear how HRL bodies would apply the prohibition of cruel or inhuman treatment to the use of cluster munitions during armed conflict since no such complaint has been brought to date under any individual complaints procedure. However, no case like against *Martić* would usually arise before a HRL body, since *Martić* was the supreme commander over a non-state actor in respect of which a HRL body would not have any jurisdiction.⁵⁰⁴

As the analysis of the right to life and the right not to be subjected to cruel or inhuman treatment under HRL during armed conflict suggests, HRL like general rules of IHL are inadequate to deal with the specific humanitarian consequences of cluster munition use during armed conflict especially in or near civilian residential areas. Firstly, the arguably more stringent standards under HRL may not necessarily come into operation since IHL constitutes the *lex specialis*, such as in the case of the right to life. Secondly, the main advantage to consider situations of armed conflict under HRL that individual victims have an international remedy for HRL violations is reduced by the fact that where such cases have arisen the respective HRL body has interpreted the rights at stake either consistent with IHL or by applying IHL directly. In many situations of IAC, HRL will not provide any remedy to victims either, since unlike IHL HRL presupposes that violations have to be committed under

⁵⁰¹ *Prosecutor v. Galić*, Trial Chamber judgement, *supra* note 300, at paras. 152-154.

⁵⁰² *Prosecutor v. Strugar*, Judgement, Case No. IT-01-42-T, T.Ch. II, 31 January 2005, at paras. 260-276.

⁵⁰³ *Prosecutor v. Martić*, Trial Chamber Judgement, *supra* note 286, at para. 471.

⁵⁰⁴ The question of violations of HRL by non-state actors has arisen only in an indirect manner, e.g. in expulsion cases where it was held that states were barred from deporting an individual facing threat of torture or ill-treatment by non-state actors. See, for instance, *Elmi v. Australia*, Committee Against Torture, 25 May 1999, UN Doc. CAT/C/22/D/120/1998.

the respondent state's jurisdiction; this hurdle will prove in many cases too high to surmount for victims. In NIAC, individual HRL remedies will also be inadequate, since the respective HRL bodies can only decide on complaints against states, but not non-state actors.

4.4. The Right to Life and its Application to Post-Conflict Casualties due to Unexploded Sub-munitions

As regards the protection of civilians from the after-effects of unexploded submunitions that may as de facto landmines kill and maim those that intentionally or accidentally disturb duds, IHL traditionally did not add any rules other than the preventive general obligations imposed on an attacker to avoid such post-conflict civilian harm in the first place.

However, HRL as such is applicable. In this respect, Article 2 (1) of the ICCPR makes it clear that states parties are not only under an obligation to respect but also to ensure Covenant rights to all individuals within its territory and subject to its jurisdiction. More specifically, the HRC in its General Comment on the right to life under Article 6 of the Covenant recognised that the obligation to protect the lives of people on its territory extends to protection from general threats to human life, such as armed conflict and life threatening illness.⁵⁰⁵ In principle, the HRC also extended the obligation to protect individual lives to dangers emanating from nuclear waste.⁵⁰⁶

Thus, undoubtedly, the territorial state also has positive obligations to protect the lives of people living under its jurisdiction. Chapter 2 *supra* already gave some indication of what concrete measures would be required to protect the right to life when a state is faced with post-conflict sub-munition dud contamination of its territory, notably clearance of unexploded sub-munitions, marking and/or fencing of contaminated areas and risk education.⁵⁰⁷

Within the ECHR system, there would have been the opportunity for the ECtHR to precisely spell out these positive obligations under the right to life (Art. 2 of the ECHR) in the *Behrami* case.⁵⁰⁸ Already the study *Explosive Remnants of War: Cluster Bombs and*

⁵⁰⁵ Human Rights Committee, General Comment No. 6: The right to life, 16th Session, 30 April 1982, UN Doc. CCPR/C/21/Add.1, at paras. 2,5; M. Nowak, *U. N. Covenant on Civil and Political Rights: CCPR Commentary* 123 (2nd ed., 2005).

⁵⁰⁶ Nowak, *CCPR Commentary*, *supra* note 505, at 124.

⁵⁰⁷ See *supra* pp. 48-51.

⁵⁰⁸ *Behrami & Behrami v. France*, App. No. 71412/01, European Court of Human Rights, Grand Chamber, Admissibility Decision, 31 May 2007, 46 ILM 746 (2007). Note that another case was jointly decided with *Behrami*, notably the case of *Saramati v. France, Germany & Norway*, App. No. 78166/01 which involved the

Landmines in Kosovo by the ICRC ⁵⁰⁹ detailed the circumstances of the particular incident forming the basis for the application in that case.⁵¹⁰ There it was reported that a group of boys aged between 10 and 16 years went to a hilltop near two villages south of Mitrovica.⁵¹¹ Upon finding two unexploded BLU-97 sub-munitions left as a legacy of the 1999 Operation Allied Force by NATO member states one of the boys threw it to another whereupon the bomblet exploded, killing one Behrami brother and severely injuring the other. The BLU-97 bomblet is especially attractive to children because of its bright yellow colour and size not larger than a soda can.⁵¹²

The applicants of the complaint under Art. 2 of the ECHR argued that France as the lead nation of KFOR in the area around Mitrovica at the time had failed to mark and/or clear such unexploded sub-munitions which it knew were present at the site of the incident. This case was the first one ever where victims of unexploded sub-munitions invoked a human rights remedy for the post-conflict harm incurred by the use of cluster munitions. The difficulty in this case was fundamentally that France was part of the international presences in

alleged unlawful detention of the applicant by KFOR troops. Since this other case has no bearing on the subject matter at hand, the analysis here will only concentrate on *Behrami*. But see for a broader analysis of the implications of this joint decision on the ECtHR jurisprudence and general international law with regard to peace support operations numerous scholarly commentaries, including P. Klein, “Responsabilité pour les faits commis dans le cadre d’opérations de paix étendue du pouvoir de contrôle de la Cour européenne des droits de l’homme: quelques considérations critiques sur l’arrêt Behrami et Saramati”, 53 *Annuaire français de droit international* 43-64 (2008); G. Hafner, “The ECHR Torn between the United Nations and the States: the Behrami and Saramati Case”, in A. Fischer-Lescano *et al.* (eds.), *Frieden in Freiheit = Peace in liberty = Paix en liberté: Festschrift für Michael Bothe zum 70. Geburtstag*, at 103-121 (2008); M. Milanović & T. Papić, “As bad as it gets: The European Court of Human Rights’s Behrami and Saramati Decision and General International Law”, 58 (2) *ICLQ* 267-296 (2009); H. Krieger, “A Credibility Gap: the Behrami and Saramati Decision of the European Court of Human Rights”, 13 (1-2) *International Peacekeeping* 159-180 (2009); A. Breitegger, “Sacrificing the effectiveness of the European Convention on Human Rights on the altar of the effective functioning of peace support operations”, 11 (2) *International Community Law Review* 155-183 (2009); P. Boudeau-Livinec, G. P. Buzzini & S. Villalpando, “International Decision: Behrami & Behrami v. France; Saramati v. France, Germany & Norway: ECHR judgment on applicability of European Convention on Human Rights to acts undertaken pursuant to UN Chapter VII operation in Kosovo”, 102 *AJIL* 323-331 (2008); K. Mujezinovic Larsen, “Attribution of Conduct in Peace Operations: The ‘Ultimate Authority and Control’ Test”, 19 (3) *EJIL* 509-531 (2008); A. Sari, “Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases”, 8 *Human Rights Law Review* 151-170 (2008); C. Laly-Chevalier, “Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l’homme (Cour. eur. dr. h., gde ch., décision du 31 mai 2007, Behrami et Saramati)”, 40 (2) *Revue belge de droit international* 627-661 (2007); P. Palchetti, “Azioni di Forze Istituite o Autorizzate dalle Nazioni Unite Davanti Alla Corte Europea dei Diritti dell’Uomo: I Casi *Behrami* e *Saramati*”, 90 (3) *Rivista di Diritto Internazionale* 681-704 (2007).

⁵⁰⁹ Maslen, “Explosive Remnants of War”, *supra* note 73, at 11.

⁵¹⁰ That the incident reported in the ICRC study was in fact the same as the one that formed the basis for the *Behrami* case was confirmed by the Centre for Advice on Individual Rights in Europe (AIRES), one of the advisers for applicants in the *Behrami* case, in an e-mail to this author dated 19 October 2007.

⁵¹¹ Maslen, “Explosive Remnants of War”, *supra* note 73, at 11.

⁵¹² The CBU87 containing this sub-munition was the cluster munition type predominantly used in Kosovo in Operation Allied Force, to an overwhelming extent by US but also by Dutch troops, as already detailed at *supra*, p. 29. See also Moyes, “Cluster Munitions in Kosovo”, *supra* note 73, at 10. In this particular case, this author has no knowledge on whether the unexploded BLU-97 which caused the incident stemmed from US or Dutch use.

Kosovo, notably KFOR and the United Nations Mission in Kosovo (UNMIK). Since only Council of Europe member states can be parties to the ECHR and before the ECtHR rather than international organisations (IOs) like NATO or the UN, before even examining the merits, the ECtHR had to decide “whether this Court is competent to examine under the Convention ... States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo.”⁵¹³ Thus, the central preliminary issue concerned whether the requirements of Art. 1 of the ECHR were fulfilled which states that the “High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention.” If the question of jurisdiction *ratione personae* was not enough, also an issue of jurisdiction *ratione loci* arose, since the alleged violation by France took place outside of France’s own territory.

On these questions, applicants submitted firstly that KFOR, not UNMIK, was the relevant entity to turn to in the first place and secondly, that the alleged omission of French KFOR soldiers was neither attributable to the UN nor to NATO but to France as the individual Troop Contributing State (TCS) and state party to the ECHR. In the view of the applicants, KFOR was responsible for clearance of unexploded sub-munitions, since it had been aware of the unexploded ordinance and controlled the site. Moreover, NATO initially dropped the cluster bombs. If the UN Mine Action Coordination Centre (UNMACC) in Kosovo had the overall responsibility in coordinating the clearance efforts, KFOR retained responsibility for supporting this effort which was critical for the success of these operations.⁵¹⁴ KFOR conduct was not attributable to the UN since KFOR troops were not under UN command and personnel did not have any UN immunities. Nor was it attributable to NATO, in the applicants’ view, as the KFOR troops, for instance, were directly answerable to their national commanders who decided on the waiver of immunity of KFOR troops while the UN Secretary-General so decided for UNMIK personnel; the rules of engagement were national or individual TCS national claim offices had been set up.⁵¹⁵

In contrast, France argued that its status of a “lead nation” of a multinational brigade and its consequent control of a sector in Kosovo could detach it from its international mandate. These multinational brigades were commanded by an officer of the lead nation. However, the latter was commanded by the Commander of KFOR who was in turn commanded, through the NATO chain of command, by the UN Security Council (UNSC).

⁵¹³ See *Behrami v. France*, *supra* note 508, at para. 71.

⁵¹⁴ *Ibid.*, at para. 73.

⁵¹⁵ *Ibid.*, at para. 77.

The resolutions of the UNSC formed the legal basis for NATO to form and command KFOR. The respondent did not provide any more specific arguments with regard to clearance other than merely referring to the division of responsibility to that effect by UNSC Resolution 1244 between KFOR and UNMIK but concluded that acts of national contingents could not be imputed to a State but rather to the UN which exercised overall effective control of the territory.⁵¹⁶

The UN also intervened in this case as a third party, first pointing out that the general division of responsibilities of the international presences in Kosovo was left to be concretised and agreed upon in their daily operational realities. While it acknowledged that by the time of the incident the formal overall coordination for clearance was with UNMACC, there remained a residual responsibility by KFOR to identify, mark and report on the location of CBU sites. Accordingly, UNMIK's responsibility for clearance was dependent on accurate information on locations of unexploded sub-munitions and, since UNMIK was unaware of the location of the unmarked BLU-97s causing the incident in the present case, it took no clearance action.⁵¹⁷

The court dispensed with the issue of jurisdiction *ratione loci* rather swiftly, stating that KFOR and UNMIK had effective control over Kosovo and exercised the public powers normally exercised by the government of the then FRY.⁵¹⁸ Thus, the Court accepted even under the most restrictive test elaborated on in *Banković* that the conditions for extraterritorial applicability of the ECHR were satisfied.

However, the major stumbling block remained in the form of jurisdiction *ratione personae* which involved a decision whether it was France as an individual state that would have omitted marking and/or clearance or whether it was rather UNMIK or KFOR. In dealing with this question, the ECtHR adopted the following structure in its decision: Firstly, it established which entity, KFOR or UNMIK, had a mandate to clear, noting that the parties to the proceedings held different views on this matter. Secondly, it inquired whether the failure to clear could be attributed to the UN. Finally, the ECtHR examined whether it was competent *ratione personae* to review any conduct found attributable to the UN.⁵¹⁹

On the first question, the ECtHR ruled that UNSC Resolution 1244 provided UNMIK with the mandate for supervising clearance as of the date that it could take over

⁵¹⁶ *Ibid.*, at paras. 83, 92. Note that also a number of third TCS made submissions to the court. Among them was the United Kingdom which stated more specifically concerning clearance that responsibility was that of the UN Mine Action Coordination Centre (UNMACC). UNMACC being an agency of the UN, any allegation about clearance could not engage the responsibility of the ECHR state party France. See *ibid.*, at para. 113.

⁵¹⁷ *Ibid.*, at para. 119.

⁵¹⁸ *Ibid.*, at para. 70.

⁵¹⁹ *Ibid.*, at para. 121.

responsibilities for that task. The court found that UNMIK took over responsibility from KFOR by October 1999 and thus, before the date when the incident in the present case occurred (March 2000). It dismissed the arguments by applicants as well as the UN; whether NATO had dropped the cluster bombs in the first place or KFOR had failed to secure the site and provide information thereon to UNMIK was considered irrelevant by the ECtHR, as this would not alter the mandate of UNMIK.⁵²⁰

Did the ECtHR appropriately attach importance only to the legal mandate to clear? This author would answer this question in the negative since it would seem very odd to attribute an omission to an entity which had no factual power or possibility of acting in a particular situation, i.e. a close link to the specific omission in question. Not only is the legal mandate not sufficient to answer that question in a satisfactory manner but this sort of inquiry is also necessary in view of the legal standard of “effective control” for attributing conduct either to a state or an IO or to one of at least two IOs. This standard is codified in Art. 6 of the Draft Articles on the Responsibility of International Organisations which reads:

“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another organization shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over that conduct.”

While this draft provision was worded with traditional UN peacekeeping missions in mind, “effective control”, i.e. who gives the orders or may effect change of conduct in a particular situation, has proven as the relevant yardstick of attributing conduct across the different scenarios of peace support operations. To begin with, in classical peacekeeping operations contribution agreements between the TCS and the UN Secretary-General regularly have the effect of placing national contingents within the command structure of the UN.⁵²¹ Thus, in principle the UN has effective control over conduct of the individual peacekeeper and it is the UN, not the individual TCS that was regularly held responsible for wrongful conduct by the peacekeepers.⁵²²

Conversely, in UN Chapter VII-authorized military operations, national contingents are regularly not placed under UN command and thus, the individual TCS may effect changes

⁵²⁰ *Ibid.*, at paras. 125-126.

⁵²¹ M. Bothe, “Peacekeeping” in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. I, 687-688, 690-691 (2nd edn. 2002).

⁵²² See UN practice in relation to the United Nations Operation in Congo (ONUC), the United Nations Peacekeeping Force in Cyprus (UNFICYP) and others cited by the International Law Commission in International Law Commission, Report on its Work of its Fifty-Sixth Session to the UN General Assembly, UN Doc. A/59/10 (2004), at 110-112.

of conduct. It follows that TCS and not the UN have accepted responsibility for wrongful acts committed by its soldiers.⁵²³ Finally, there may be cases where states provide forces in support of a UN operation not as an integral part thereof but where operational command and control serves to distinguish conduct by the TCS from that of the IO.⁵²⁴

Thus, it is submitted that the standard of “effective control” helps to systematise the various scenarios in which the relationship between TCS and an IO or between various IOs may arise and constitutes customary international law given relevant UN and TCS practice together with pertinent UN official statements as *opinio juris*. The upshot of this is that this standard seeks to attribute conduct to the entity which has the *factual* power or possibility to effect change of conduct.

The operational challenges of cluster munition clearance attest to the sensibility of this factual approach rather than only confining the analysis of attribution to a reference to the abstract mandate. In this regard, the importance of detailed and accurate information on cluster munition strike areas for being able to effectively plan and coordinate clearance efforts has already been emphasised.⁵²⁵ Only inaccurate information to that effect had been received by NATO in March 2000 when the *Behrami* incident occurred. Moreover, KFOR assumed humanitarian clearance tasks without reporting back on its efforts to UNMIK. In contrast to the view of the ECtHR these facts are relevant in answering the question whether UNMIK was capable of fulfilling its mandate in the absence of adequate knowledge of the particular strike site. Who, if not NATO which dominated KFOR and whose member states United States or the Netherlands had dropped the sub-munitions at issue, could have had knowledge of individual strike sites? And how could UNMACC, i.e. the UN, have had effective control over the alleged omission without having such knowledge? In the light of this, it is submitted that the ECtHR should have appraised these facts in its examination.

Since the Court did not do so and concluded on the basis of the legal mandate of UNSC Res 1244 only that UNMIK was the responsible entity for clearance, it was easy to hold in a next step that UNMIK conduct is attributable to the UN.⁵²⁶ UNMIK under the terms

⁵²³ The paradigmatic example that comes to mind here is Operation Desert Storm against Iraq in 1991 authorised by UN Security Council Resolution 678 (1990). Also see the practice in relation to the United States with regard to the UN-authorised operation in Korea from 1950-53, as well as in relation to the Unified Task Force (UNITAF) in Somalia. See G. Gaja, Second report on responsibility of international organizations, 2 April 2004, UN Doc. A/CN.4/541, at paras. 32-33.

⁵²⁴ Report of the Secretary-General, Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters, 20 September 1996, UN-Doc. A/51/389, at paras. 17-18.

⁵²⁵ See *supra* pp. 48-49.

⁵²⁶ *Behrami v. France*, *supra* note 508, at paras. 142-143.

of SC Res 1244 is a subsidiary organ of the UNSC with the Special Representative of the UN Secretary-General at its head;⁵²⁷ accordingly, UNMIK is embedded into a UN institutional structure in much the same way as the classical UN peacekeeping operations.

However, even had the ECtHR incorporated these facts into his analysis and held that the clearance failure was KFOR's conduct, in light of its further examination of attribution in relation to KFOR conduct it would still have concluded that this omission was attributable to the UN. It will be recalled that the Court held KFOR to be "under the ultimate authority and control" of the UN Security Council, in fact adopting a different test than the customary international law test of "effective control", which has been identified by many scholarly commentators as the major flaw in the decision.⁵²⁸

The *Behrami* case signals that in circumstances where the UN is involved in clearance efforts it will be hard to single out wrongful omissions by individual states parties of the ECHR. Since this was the first case ever to involve victims of unexploded sub-munitions before the ECtHR, it may be considered a lost opportunity to clarify the positive obligations under the right to life incumbent upon those with effective control over a territory to mark and/or clear unexploded sub-munitions.

While there is thus no HRL treaty body jurisprudence that would explicitly speak to the issue of concrete positive measures in case of sub-munition contamination, such as marking or clearance of unexploded sub-munitions to protect the right to life, the judgement by the ECtHR in the *Öneryildiz* case⁵²⁹ where environmental risks led to the death of individuals may still provide some useful indications in this respect.

This case concerned the death of nine members of applicants' families who lived in slums surrounding a rubbish tip in Istanbul. Applicants alleged that the Turkish authorities had not done all that could have expected of them to prevent the death of their relatives caused by a methane gas explosion occurring in the rubbish tip. The court held that under Article 2 of the ECHR there was a positive obligation on States parties to take appropriate steps to safeguard the lives of those within their jurisdiction in the context of any activity, *a fortiori* where dangerous industrial activities such as the operation of waste-sites are at

⁵²⁷ That only UNMIK has the status of a subsidiary organ of the UN is confirmed by operative paragraph 6 where the UN Secretary-General is requested to appoint, in consultation with the UN Security Council, a Special Representative to *control the implementation of the civil presence*. See Op. para. 6, UN Security Council Res 1244 (1999), 10 June 1999, UN Doc. S/RES/1244.

⁵²⁸ See *Behrami v. France*, *supra* note 509, at 132-141, and the scholarly writings listed in *supra* note 508.

⁵²⁹ *Öneryildiz v. Turkey*, App. No. 48939/99, European Court of Human Rights, Judgement of 30 November 2004.

issue.⁵³⁰ Specifically, this positive obligation entailed such preventive operational measures as were necessary and sufficient to protect those individuals.⁵³¹ A preventive measure in this context that the Turkish government should have taken was the technical measure to timely install a gas-extraction system in the rubbish tip to avoid the deadly methane gas explosion.⁵³² Another practical preventive measure emphasised by the court was the necessity to provide affected residents with information on the risks associated with the waste-dump.⁵³³ The decisive factor for the court to state that Turkey had to comply with these positive obligations under Article 2 of the ECHR and to conclude that these obligations were violated was that Turkish authorities knew or ought to have known of the real and immediate risk to the inhabitants.⁵³⁴

The *Öneryildiz* case reveals interesting parallels with the case of territories of ECHR state parties that are contaminated with sub-munitions. Where a rubbish tip according to the court already gives rise to positive obligations of the territorial state to prevent dangers to the lives of those under that state's jurisdiction this must be true *a fortiori* for the dangers to individual lives emanating from cluster munition remnants. Thus, this would suggest that in the case of sub-munition contamination of a state this would impose on the affected state the positive obligation to take preventive operational measures to protect the lives in a similar vein as spelt out in the *Öneryildiz* judgement. In the specific circumstances, such preventive operational measures under Article 2 of the ECHR would precisely entail the appropriate technical measures of marking and clearance of unexploded sub-munitions to prevent this hazard from materialising, i.e. killing and maiming of individuals. Moreover, it would be incumbent on the affected ECHR state party to provide information to those being immediately at risk of falling victim to cluster munition remnants.⁵³⁵

However, these positive obligations have their limits in that the territorial state simply cannot prevent incidents with unexploded sub-munitions where it had no possibility to know of their precise location. Thus, this obligation is only violated by the territorial state if it knew or ought to have known of the real and immediate risk for specific individuals under its jurisdiction. As was elaborated on *supra*,⁵³⁶ very specific information is required for sub-munition clearance. In the absence of such information, locating the actual strike sites will be

⁵³⁰ *Ibid.*, at para. 71.

⁵³¹ *Ibid.*, at para. 101.

⁵³² *Ibid.*, at para. 107.

⁵³³ *Ibid.*, at paras. 90, 108.

⁵³⁴ *Ibid.*, paras. 98, 101-102

⁵³⁵ This is of practical relevance, since the ECHR states parties Albania, Bosnia and Herzegovina, Croatia, Montenegro and Serbia are all affected by sub-munition contamination.

⁵³⁶ See *supra* pp. 48-49.

impossible and the territorial state will neither be capable of engaging in effective marking and clearance efforts nor providing specific information to those living in the vicinity of the actual strike sites.

This problem is exacerbated by the fact that cluster munitions have been used predominantly in IAC recently (e.g. 1999 in Kosovo, 2001 in Afghanistan, 2003 in Iraq and 2006 in Lebanon) where the user state(s) will often not be the same as the one that has jurisdiction and control over a territory affected by unexploded sub-munitions at the post-conflict stage.

In such situations, the discharge of the obligation to protect the right to life by the territorial state depends in particular on whether the user furnishes information on the likely locations of sub-munition duds. This would make a compelling case for imposing specific obligations on the user(s) of cluster munitions to assist the territorial state with marking and clearance at least by providing detailed information on sub-munition strike sites. However, as useful as such an obligation would be, it will find a limitation in the aforementioned jurisdictional obstacle imposed by HRL treaties. On the other hand, leaving the territorial state entirely alone in its fate is not a satisfactory solution either.

To a limited extent, Protocol V on ERW to the CCW already discussed above has the potential of remedying this gap in the future as it imposes such an obligation on users of cluster munitions causing sub-munition dud contamination on a territory they do not control at the post-conflict stage to facilitate marking, clearance, removal or destruction of ERW, including cluster munition remnants, by making strike information available to the territorial state.⁵³⁷ As noted *supra*, under its Art. 5, Protocol V also imposes complementary obligations on the territorial state of warnings, risk education to the civilian population, marking, fencing and monitoring of affected territory. Thus, this establishes Protocol V as *lex specialis* as it can be considered an attempt to flesh out particular obligations compared to the general HRL framework.

But the fundamental weaknesses of this Protocol have already been noted and need not be reiterated here. Besides the uncertainty whether Protocol V can be effectively universalised, suffice it to say here that the practical effect of this Protocol has been limited so far; the obligations it imposes are not applicable retroactively and thus, could not be resorted to as a remedy for the already existing problem on the ground. Moreover, in the future, the potential of Protocol V would especially depend on how far states parties are prepared to go

⁵³⁷ See the discussion of Protocol V *supra* pp. 114-120.

in its implementation. The effectiveness of Protocol V depends on whether states parties will make frequent use of the many qualifications contained in the Protocol to essentially circumvent their obligations. In any event, not only the obligation to protect the right to life calls for specific measures of clearance as well as marking, risk education and warnings to the civilian population, as will be shown in the next section.

4.5. Unexploded Sub-munitions at the Post-Conflict Stage, the Rights to Health with the Underlying Determinants of Food, Housing, Water, a Healthy Environment and Specific Childrens' Rights

Obliging a state to protect individuals on its territory from a deadly hazard that unexploded sub-munitions littering the landscape represent also evidences the close interrelationship between the right to life and Art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁵³⁸ Art. 12 (1) of the ICESCR imposes on states parties the obligation to recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. As the Committee on Economic, Social and Cultural Rights (CESCR) emphasised in its General Comment on the right to health: “[...] the right to health embraces a wide range of socio-economic factors that promote conditions in which people lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”⁵³⁹ This shows the close connection of the right to health with a number of other rights under the ICESCR. These rights include Art. 7, the right of everyone to the enjoyment of just and favourable conditions of work which *inter alia* imposes an obligation on states parties to ensure in particular safe and healthy working conditions; as well as Art. 11, the right to an adequate standard of living with its components of ensuring adequate food, clothing and housing. The CESCR has also derived principally from Arts. 11 and 12 of the ICESCR the right to water which obliges states parties most importantly to ensure affordable access of individuals to water free from hazards for drinking, personal sanitation, washing of clothes, food preparation and personal and household hygiene.⁵⁴⁰

⁵³⁸ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

⁵³⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, 11 August 2000, UN Doc. E/C.12/2000/4, at para. 4.

⁵⁴⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water, 20 January 2003, UN Doc. E/C.12/2002/11, at para. 12.

The contamination of water installations, such as sanitation or irrigation canals, agricultural and pastoral land as well as houses or work places with sub-munition duds makes these areas inaccessible for use. This is incompatible with the enjoyment of these vital determinants of the right to health, including the right to live in a healthy environment and the rights to just and favourable conditions of work, food, housing and water. However, also the obligations of the territorial state under the ICESCR are subject to inherent limitations. This follows from the general obligation of states parties under Art. 2 (1) of the ICESCR according to which the fulfilment of obligations must only be progressively realised and is conditioned by the availability of resources. Usually, in the aftermath of armed conflicts the resources of the territorial state will be stretched to their limits. Still, the CESCR has made it clear that “available resources” do not only comprise resources within the affected state but also those available through international cooperation and assistance.⁵⁴¹ In this context, one can also understand the CESCR’s demand that states have an obligation to provide humanitarian assistance to affected states in times of emergency.⁵⁴² The contamination of a state’s territory with sub-munition duds can well be taken to constitute a humanitarian emergency, as is illustrated by the situation on the ground in Lebanon at least one year after the guns fell silent there in the summer of 2006. Protocol V on ERW to the CCW again provides an interesting mirror provision to this obligation to co-operate to provide humanitarian assistance. By virtue of Art. 8, Protocol V imposes on states in a position to do so an obligation to provide assistance for marking, clearance, removal, destruction of ERW, including cluster munition remnants as well as risk education through the UN system, other international, regional or national organisations, the ICRC, NGOs or on a bilateral basis. Such outside assistance seems to be generally justified in relation to an affected state; as a matter of fact, the affected state where unexploded sub-munitions remain on its territory after a conflict finds itself in an aggravated position to ensure the rights discussed above to its population and in the majority of cases did not cause this problem by using cluster munitions in the first place.

The aggravation of the territorial state’s capacity to fulfil its positive obligations in respect of the rights to life and the aforementioned economic, social and cultural rights becomes especially clear when having regard to the fulfilment of childrens’ rights where a state is confronted with sub-munition contamination: As children are among those most at risk of death or injury due to tampering with unexploded sub-munitions, such contamination

⁵⁴¹ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties’ Obligations, 14 December 1990, UN Doc. E/1991/23, at para. 13.

⁵⁴² Committee of Economic, Social and Cultural Rights, General Comment on the right to health, *supra* note 539, at para. 40.

gravely impacts on the enjoyment of a number of child-specific rights enshrined in the Convention on the Rights of the Child (CRC), to date the most widely ratified human rights treaty. This includes most prominently the inherent right to life of the child with the explicit positive obligation to ensure to the maximum extent possible the survival and development of the child under Art. 6 of the CRC. Moreover, since the presence of unexploded sub-munitions creates a high risk for children to suffer death and severe injury, the position of territorial states to fulfil the right to health of its children, in particular under Art. 24 (2) of the CRC to diminish child mortality and to ensure the provision of necessary assistance and health care to all children, is severely prejudiced. Also, how could one possibly ask a territorial state where as a result of sub-munition contamination the number of severely handicapped children is on a dangerous rise to adequately fulfil the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development pursuant to Art. 27 of the CRC? The specific right of children to rest and leisure and to engage in play and recreational activities under Art. 31 of the CRC is also likely to undergo a serious retrogression in an environment where such activities can simply be fatal. Accordingly, in such an environment, again an obligation of the territorial state to clear unexploded sub-munitions with all complementary measures such as marking, risk education and warnings to the civilian population would arise to prevent such retrogression in the enjoyment of these rights.

While human rights treaty monitoring bodies have not specifically examined cluster munition use to specifically reaffirm these obligations, the UN Special Procedures with a mandate from the UN Human Rights Council have. Their findings shall now be subject to comment in the next section.

4.6. The UN Special Procedures on the Use of Cluster Munitions in Lebanon and Israel

The UN Special Procedures have specifically examined cluster munition use during the armed conflict between Israel and Hezbollah in 2006. One structural reason for this is the different origin and scope of the respective mandates of the UN Special Procedures. While human rights treaty monitoring bodies were established as judicial or quasi-judicial bodies under a specific human rights treaty, the UN Special Procedures owe their existence to the UN Charter directly under the commitment of “promoting and encouraging respect for human rights”. Therefore, human rights treaty monitoring bodies have less flexibility in interpreting their jurisdiction, as this jurisdiction is generally limited to the respective human rights treaty.

Where allegations arise that also pertain to IHL, some effort must be made to confirm that the human rights treaty monitoring body has jurisdiction. Secondly, the mandates of UN Special Procedures consist of broad phenomena or country situations. Examples of the thematic procedures relevant to the issue include extrajudicial, summary or arbitrary executions rather than the rights to life or due process under the ICCPR or torture as a phenomenon at large rather than only the respective human right to be free from torture under the ICCPR or the UN Convention Against Torture.⁵⁴³

With regard to weapons in particular, UN Special Rapporteurs have broached this issue on various occasions. For instance, already in the 1980s, the then UN Special Rapporteur on Afghanistan addressed the use of booby-traps, i.e. objects that looked like toys in the shape of pens or small animals, and anti-personnel mines as part of his mandate to formulate proposals to ensure protection of human rights of all residents before, during and after the withdrawal of all foreign forces. He thus included a section on human rights in the armed conflict prevailing at the time and concluded that such use violated common Article 3 of the 1949 Geneva Conventions.⁵⁴⁴ In another report on Afghanistan, the same Special Rapporteur reported on high-altitude bombardments with bombs “containing 40 individual rockets which explode 24 hours after deployment,” which may well have been cluster munitions.⁵⁴⁵

At the beginning of the 1990s various human rights experts commissioned by the UN Commission of Human Rights referred to landmines in specific country situations as violations of specific human rights. Thus, in 1992 the UN Special Rapporteur on Afghanistan stated that the “problem of mines remains one of the main concerns as it is closely linked with the right to life.” He went on to report that the Afghan government for the first time handed over Soviet mine field plans to the United Nations.⁵⁴⁶ It follows that in the very similar case to unexploded sub-munitions, notably landmines, the importance of having information on the location of such weapons was emphasised under the right to life.

⁵⁴³ Cf. P. Alston, J. Morgan-Foster & W. Abresch, “The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the ‘War on Terror’”, 19 (1) EJIL 183, 200-201 (2008).

⁵⁴⁴ Commission on Human Rights, Report on the situation of human rights in Afghanistan prepared by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1984/55, 19 February 1985, UN Doc. E/CN.4/1985/21, at paras. 23, 99, 107-109, 175.

⁵⁴⁵ Commission on Human Rights, Report on the situation of human rights in Afghanistan prepared by the Special Rapporteur, Mr. Felix Ermacora, in accordance with Commission on Human Rights resolution 1984/55, 17 February 1986, UN Doc. E/CN.4/1986/24, at para. 86.

⁵⁴⁶ Commission on Human Rights, Report on the situation of human rights in Afghanistan submitted by Mr. Felix Ermacora, Special Rapporteur, in accordance with Commission on Human Rights resolution 1991/78, 17 February 1992, UN Doc. E/CN.4/1992/33, at para. 39.

Another report dating from 1994 on the human rights situation in Iraq included an entire section on the problem of landmines in the Kurdish territory in the northern part of the country. It reported on the overall scope of the problem and the circumstances in which casualties occurred. Most importantly, the Special Rapporteur made specific reference to an IHL instrument, notably the original Protocol II to the CCW and explicit standards that mines should not be used indiscriminately, against the civilian population, or laid without record of their location. He concluded that

“the specific standards articulated by the Convention [the CCW] derive from three customary principles of international humanitarian law: (a) that the right to adopt means of warfare is not unlimited; (b) that unnecessary suffering is prohibited; and (c) that non-combatants are to be protected. Insofar as landmines appear to have been placed by Iraqi troops in areas outside the war-zone without adequate protection for civilians, and inasmuch as it does not appear that the laying of the minefields was adequately recorded [...] the Government of Iraq may be in violation of customary international humanitarian law.”⁵⁴⁷

This shows the flexibility of the UN Special Procedures which enables them to explicitly refer, without more, to IHL alongside HRL, and the contribution that UN Special Procedures on human rights can make to the development of international law.⁵⁴⁸

Finally, a report of the same year by the then Special Representative of the Secretary-General on the human rights situation in Cambodia emphasised that the laying of mines threatened the right to life, food, health, and limiting the freedom of movement throughout the country. The report specifically recommended to the government of Cambodia to develop adequate services for the rehabilitation, care and training of handicapped and disabled, including victims of landmines. However, the report did not stop there but called on the Commission on Human Rights to “urge all States Members of the United Nations to adopt laws and strict practices to police the manufacture, supply and export of land-mines (particularly anti-personnel) many of which have been, and are being, installed in Cambodia with devastating consequences for the human rights of individuals injured and for the human rights of all in a society which is thereby destabilized”; to recommend to the government of Cambodia “that it consider drafting appropriate legislation to ban and make illegal and punishable by law the important as well as the use of mines in Cambodia”; to call upon other UN Member states to assist with the removal of mines; and to “urge the Secretary-General to

⁵⁴⁷ Commission on Human Rights, Report on the situation of human rights in Iraq, submitted by Mr. Max van der Stoep, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1993/74, 25 February 1994, UN-Doc. E/CN.4/1994/58, at para. 108.

⁵⁴⁸ Cf. D. O’ Donnell, “Trends in the application of international humanitarian law by United Nations human rights mechanisms”, 324 *International Review of the Red Cross* 481-503 (1998), <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPGA> (last visited 22 January 2010).

convene an international conference for an urgent review of the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 1980 to ban the manufacture, supply and export of anti-personnel mines.”⁵⁴⁹ Therefore, a human rights expert mandated by the Commission on Human Rights specifically recommended further legal developments in prohibitions relating to landmines on a national and international level.⁵⁵⁰

On cluster munition use during the armed conflict between Israel and Hezbollah in 2006, three different reports by UN-mandated experts were published, two of them by already existing UN Special procedures and the third by an ad hoc Commission of Inquiry.⁵⁵¹ The first of these reports by four UN human rights experts, notably the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right to health, the Representative of the Secretary-General on the human rights of IDPs and the Special Rapporteur on adequate housing, has the major advantage compared to the other two reports that its findings and legal analysis are based on country visits to both Israel and Lebanon. In contrast, the other two reports are based on missions to Lebanon only. This entails that the first report may be considered more balanced and impartial than the other two since it considered evidence submitted from both sides to the conflict.⁵⁵² The other two differ from each other inasmuch as the mandate of the Special Rapporteur on the right to food would have permitted him to visit both Lebanon and Israel. However, in the specific case the Rapporteur did not receive a positive response to his request to visit Israel. In contrast, the perception of partiality of the Commission of Inquiry was due to the inherent flaw of its mandate provided by the Human Rights Council Resolution S-2/1 which called upon three experts of IHL and HRL to only investigate the Israeli side of the conflict.⁵⁵³

At the outset, the report of the four UN experts outlined the main objectives of their mission broadly as involving (i) the assessment under international human rights and

⁵⁴⁹ Commission on Human Rights, Report of the Special Representative of the Secretary-General, Mr. Michael Kirby, on the situation of human rights in Cambodia submitted pursuant to Commission on Human Rights Resolution 1993/6, 21 February 1994, UN-Doc. E/CN.4/1994/73/Add.1, at paras. 76-79.

⁵⁵⁰ For further examples, see O’ Donnell, “Application of international humanitarian law by United Nations human rights mechanisms”, *supra* note 548.

⁵⁵¹ Human Rights Council, Report by Alston, Hunt, Kälin & Kothari, *supra* note 90; Human Rights Council, Report by Ziegler, *supra* note 99; Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177.

⁵⁵² However, the reaction in particular by Lebanon as an affected country and Islamic states was quite the opposite, condemning the report by the four human rights experts as one-sided, deferential to Israel and condescending to Lebanon while the Special Rapporteur on the right to food’s report was praised as balanced and serious. See K. Raja, “Criticisms of joint report on Lebanon situation”, Third World Network, 5 October 2006, <http://www.twinside.org.sg/title2/health.info/twninfohealth037.htm> (last visited 22 January 2010).

⁵⁵³ See also J. G. Stewart, “The UN Commission of Inquiry on Lebanon”, 5 (5) Journal of International Criminal Justice 1039 (2007).

humanitarian law as covered by the respective mandates, the impact on the civilian populations of the armed conflict that affected Lebanon and northern Israel (ii) an advice to the authorities on fulfilling their responsibility to protect and assist affected civilians in accordance with their human rights obligations; and (iii) recommendations to UN agencies and other relevant actors on how to best address the protection needs of the people concerned.⁵⁵⁴ Accordingly, consistent with the earlier practice of UN Special Procedures the experts also resorted to IHL in their analysis.

Under the heading of “protection of the civilian population during the conflict” the experts stated that despite Israel’s declared goal of conducting hostilities in accordance with IHL, the actual practice fell short in various respects, *including the reckless, perhaps even deliberately reckless, use of cluster munitions*. The justification for discussing such classical IHL violations was because of the impact of these violations on human life, housing, health and internal displacement.⁵⁵⁵

In doing so, the experts devoted one entire section of the report to the use of cluster bombs in southern Lebanon, citing the “massive use by the IDF of cluster munitions and the ongoing impact of unexploded sub-munitions (bomblets) on the civilian population” as “principal concern.”⁵⁵⁶ Of the two fundamental problematic characteristics of the use of cluster munitions, they emphasised in particular the post-conflict effect of unexploded sub-munitions. In their words, the unexploded bomblets were “small, often difficult to spot and highly volatile.”⁵⁵⁷

The experts did engage with the military reasons given by the Israeli side, particularly with the argument that cluster munitions were the most effective weapon against Hezbollah rocket launching sites. They accepted in principle that this would constitute a valid reason for using these weapons, since their damage radius covers a wide area and thus is able to neutralise mobile rocket launchers.⁵⁵⁸ Accordingly, the wide area effect of cluster munitions was primarily viewed as part of the abstract military effectiveness of attacking large mobile targets. However, as no information was provided by the Israeli authorities to substantiate this claim in the concrete circumstances, this abstract rationale was not accepted.

Significantly, the experts concluded that regardless of whether the military arguments provided by the Israeli government were sound, the use of cluster munitions in any event was

⁵⁵⁴ Human Rights Council, Report by Alston, Hunt, Kālin & Kothari, *supra* note 90, at para. 2.

⁵⁵⁵ *Ibid.*, at paras. 34, 37.

⁵⁵⁶ *Ibid.*, at para. 52.

⁵⁵⁷ *Ibid.*, at para. 53.

⁵⁵⁸ *Ibid.*, at para. 55.

inconsistent with principles of distinction and proportionality. This conclusion was made on the basis of the long-term effects of unexploded sub-munitions of which “Israel could not reasonable have been ignorant.” In contrast, “the long-term effect on the civilian population should have been obvious” to Israel.⁵⁵⁹

Evidence of the fact that Israel must have known of the propensity of sub-munitions to fail in large numbers can be seen in the acknowledgement by one government official that cluster munitions were used in part to prevent Hezbollah fighters from returning to the villages after the ceasefire.⁵⁶⁰ If the long-term military advantage of preventing Hezbollah fighters from returning to the villages may be ensured by unexploded sub-munitions, surely then Israel cannot argue that the same effects on civilians cannot be part of any reasonable proportionality calculation at the time of the attack. This argument had a direct impact on the expert opinion expressed by *McCormack* and *Mtharu* to delegates of the Third Review Conference to the CCW, since these IHL experts cited the argument by the UN human rights experts approvingly in favour of the proposition that mid- to longer-term consequences of ERW, including unexploded sub-munitions, must be taken into account when an attacker engages upon the required proportionality assessment between the anticipated military advantage and the expected civilian harm.⁵⁶¹

In their recommendations, the human rights experts called upon Israel to provide accurate strike data of its use of cluster munitions, including the grid references of the targets and to cooperate fully in the programme to eliminate the remaining unexploded bomblets.⁵⁶² This recognises the importance of user state assistance to the affected state. Of course, the UN Special Procedures are well-equipped to address such specific demands to individual states as these recommendations are of a legally non-binding character.

On the other hand, they recommended that the Lebanese government should develop, in cooperation with the international community, a comprehensive strategy to assist IDPs and returnees, including urgently addressing the protection challenge of access to livelihoods, in particular in farming areas affected by UXO.⁵⁶³ This constitutes a reaffirmation of the division of responsibilities between the affected territorial state and the international community in particular with regard to economic, social and cultural rights in the specific context of the right to food for IDPs and returning refugees in the post-conflict emergency

⁵⁵⁹ *Ibid.*, at paras. 56-57.

⁵⁶⁰ *Ibid.*, at para. 57.

⁵⁶¹ McCormack & Mtharu, “Expected Civilian Damage & the Proportionality Equation”, *supra* note 201, at 9-10, fn. 14-15.

⁵⁶² Human Rights Council, Report by Alston, Hunt, Kälin & Kothari, *supra* note 90, at para. 103 (a).

⁵⁶³ *Ibid.*, at para. 104 (f).

phase in Lebanon prevailing in the latter half of 2006. The international community, for its part, was called upon to significantly increase funding for the UNMACC in Southern Lebanon to more expeditiously complete the destruction of unexploded ordnance, including sub-munitions.

Most importantly, however, like their counterpart at the beginning of the 1990s in respect of antipersonnel mines, the experts urged the relevant bodies, including the Meetings of States Parties to the CCW and the Ottawa Convention, to add cluster munitions to the list of weapons banned under international law.⁵⁶⁴ This recommendation provides again indication that the human rights experts primarily viewed the post-conflict problem of unexploded sub-munitions as problematic, as the Ottawa Convention was mentioned; hence, the post-conflict effects of unexploded sub-munitions were apparently likened to antipersonnel mines. However, as shown above, while this is true on a factual level it is not accurate as a statement in terms of the law. Thus, any new international prohibition of cluster munitions could not possibly be adopted within the framework of the Ottawa Convention.

With regard to the other two reports, it must be asked whether the specific flaws in these reports to only investigate one side would play out in the particular case of cluster munition use during that conflict. Here, three observations may be made to argue that despite the flaw of perceived partiality, the Commission of Inquiry's and the Special Rapporteur on the right to food's findings would still be relevant.

Firstly, the Commission made a conscious attempt to take into account the conduct of Hezbollah as far as possible in evaluating the legality of IDF actions. This is apparent from the statement by the Commission that an inquiry into the conformity with IHL of the specific acts of the IDF in Lebanon requires that account also be taken of the conduct of the opponent and that it was not entitled to investigate the actions *by* Hezbollah *in* Israel (emphasis in the original).⁵⁶⁵ Conversely, this would allow consideration of Hezbollah actions in Lebanon as far as it was relevant to assess the legality of Israeli cluster munition use.

As the treatment of cluster munition use shows, the Commission took the probable military rationale to interdict repeated Hezbollah rocket firings into account.⁵⁶⁶ Still, it concluded that cluster munitions were used indiscriminately and that their use was excessive and not justified by military necessity.⁵⁶⁷

⁵⁶⁴ *Ibid.*, at para. 105 (d).

⁵⁶⁵ Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at paras. 14-15.

⁵⁶⁶ *Ibid.*, at paras. 252, 343.

⁵⁶⁷ *Ibid.*, at paras. 253-256, 343.

Secondly, the problem of partiality seems to be mitigated somewhat because the report by the four human rights experts which did investigate both sides and where the allegation of partiality cannot be raised as easily, explicitly referred to the necessity for an in-depth analysis of the issue whether the fact that the majority of cluster munitions were used in the last 72 hours of the armed conflict would indicate an intention to inhibit or prevent the return of civilians and a reckless disregard for the predictable civilian casualties.⁵⁶⁸ Thus, where a conceivably more impartial investigation raises such a possible conclusion and requests clarification by the Commission of Inquiry the findings of the Commission in this regard “that these weapons were used deliberately to turn large areas of fertile agricultural land into “no go” areas for the civilian population”⁵⁶⁹ cannot be simply dismissed as lacking impartiality.

More fundamentally still and related to this point, the authority of some of the findings and conclusions on cluster munition use by the Commission and the Special Rapporteur on the right to food are reinforced by the fact that the report by the four human rights experts had some findings and conclusions in common with the other two reports. In this context, both the report by the four human rights experts and the Commission urged to add cluster munitions to the list of banned weapons under international law.⁵⁷⁰ Moreover, all three reports called upon Israel to hand over full details of its cluster munition use to Lebanon to facilitate clearance of unexploded sub-munitions.⁵⁷¹ All three reports also devoted some attention to the problem of accessibility of agricultural areas as a result of unexploded sub-munitions in southern Lebanon.⁵⁷²

Thirdly and finally, both the Commission and the Special Rapporteur on the right to food report contained observations of a more general character on the characteristics of cluster munitions that would go beyond the specific situations in Lebanon and Israel. As the Commission remarked,

“The particular military use of these munitions lies in the wide area the munitions can cover. It provides the military with a very effective weapon against targets such as troops in the open or in defensive positions, artillery batteries, and concentrations of vehicles or tanks. However, the inherent area coverage of cluster munitions calls for clear separation between military targets and civilians or their

⁵⁶⁸ Human Rights Council, Report by Alston, Hunt, Kälin & Kothari, *supra* note 90, at para. 107 (b).

⁵⁶⁹ Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at para. 256.

⁵⁷⁰ Human Rights Council, Report by Alston, Hunt, Kälin & Kothari, *supra* note 90, at para. 106 (d); Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at para. 349 (26).

⁵⁷¹ See Human Rights Council, Report by Alston, Hunt, Kälin & Kothari, *supra* note 90, at para. 103 (a); Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at para. 349 (28); Human Rights Council, Report by Ziegler, *supra* note 99, at para. 31 (n).

⁵⁷² See Human Rights Council, Report by Alston, Hunt, Kälin & Kothari, *supra* note 90, at para. 104 (f); Human Rights Council, Report by Ziegler, *supra* note 99, at para. 23; Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at para. 299.

property otherwise the latter will suffer the indiscriminate consequences of their use. Account must also be taken of the known failure rates of such ammunition which can result in excessive and disproportionate harm to civilians after the conflict. Although there are ongoing efforts to ban cluster munitions, for example under the umbrella of the Conventional Weapons Convention, unfortunately there is no prohibition under international humanitarian law on their use at present. The key issue in relation to the law and their use by the military rests on the known wide dispersal pattern of the cluster munitions on the ground and hence the fact that they cannot be targeted precisely. As a result it is often difficult, if not impossible, for the military to discriminate between military and civilian objects when the weapons are used in or near populated areas. The pertinent issue therefore is how the munitions are used.”⁵⁷³

The report by the Special Rapporteur on the right to food included the following statement on the general legality of using cluster munitions:

“[U]sing cluster munitions in populated civilian areas, given the injuries and suffering that it will cause and given the effects that do not discriminate between military and civilian objectives, is likely to result in many violations of international humanitarian law. The dispersal of unexploded bomblets from cluster bombs also raises other serious concerns, not only as to their immediate effects on civilian life, but also in relation to the after-effects in terms of damage to agricultural fields, as well as life and civilian infrastructure.”⁵⁷⁴

Based on serious examinations of specific factual situations which derive directly from the authority of the Human Rights Council that in turn derives its authority directly from states, these general observations may be considered important contributions to international discussions on the use of these weapons as such irrespective of specific instances of use.

In this respect these statements together with the call for a specific international prohibition on cluster munitions added to the growing momentum for such a normative response within the CCW and the Oslo process in the latter half of 2006. That actors with a human rights agenda took up the issue of an international prohibition of cluster munitions also attests to the fact that the grounds for such a prohibition were increasingly framed in humanitarian terms.

In line with this agenda, also a more comprehensive response must be adopted as to deal with the existing problem already created by the use of cluster munitions rather than only prevent future civilian suffering. One important aspect of this reactive approach is to provide assistance for the existing victims of cluster munition use.

An important precedent for obligations on the part of the territorial state to assist victims is enshrined in Art. 39 of the CRC. According to that provision, states parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims of armed conflict. This provision will be brought more often

⁵⁷³ Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at paras. 254-255.

⁵⁷⁴ Human Rights Council, Report by Ziegler, *supra* note 99, at para. 12.

into operation than would be the case without the deadly hazard of unexploded sub-munitions on an affected state's territory; the particular additional considerable needs of cluster munition victims have already been noted in Chapter 2.4. *supra*, including emergency and medical care, physical rehabilitation and psychological and socio-economic support.⁵⁷⁵ The impact on childrens' human rights was confirmed by the Commission of Inquiry on Lebanon which viewed the fact that children continued to be victims of unexploded sub-munitions not only as a clear violation of IHL but also as "a blatant violation of one of the core principles of the Convention on the Rights of the Child, the right to life (art. 6 of the CRC)."⁵⁷⁶ The report also emphasised the necessity to provide special awareness sessions, i.e. risk reduction education, to children regarding the danger of unexploded sub-munitions, as well as reaffirmed states party obligations under the right to life to provide access to health facilities, especially for the disabled. In this context, also Art. 39 of the CRC was specifically invoked. While Art. 39 of the CRC contains specific obligations of states under whose jurisdiction child victims reside until recently, no such standards tailored to the specific needs of cluster munition victims existed.

Significant developments have occurred in the area of victim assistance recently with the adoption of the 1997 Ottawa Convention on Antipersonnel Mines and the adoption of the 2006 CRPD which shall be analysed in the following sections. Interestingly, a *human rights* approach towards these victims has been more and more recognised while this has been less the case with the prevention of new victims through clearance and related measures just discussed.⁵⁷⁷

4.7. *The 1997 Ottawa Convention on Antipersonnel Mines: a First Breakthrough on Victim Assistance*

⁵⁷⁵ See *supra* pp. 45-48.

⁵⁷⁶ Human Rights Council, Report of the Commission of Inquiry on Lebanon, *supra* note 177, at paras. 283-284.

⁵⁷⁷ But this human rights approach has more and more centred on the state under whose jurisdiction victims live at the post-conflict stage. This has the drawback of not focusing on the potential responsibility of the user state, whose legal responsibility may be incurred, since these post-conflict consequences of cluster munition use may amount to violations of general IHL. Because of this internationally wrongful act, the user state owes full reparation to the affected state and its individuals, including *restitution*. This would require precisely marking and clearance to re-establish the situation that existed before the internationally wrongful act by the user and also rehabilitation of victims. However, enshrining such responsibility may not be advisable on a political level. Indeed, during the negotiations of the new Convention on Cluster Munitions, specific obligations imposed on the user to assist the affected states with marking, clearance and destruction of cluster munition remnants as well as with the provision of victim assistance was on the table but such obligations were finally only included in a watered down fashion or not at all.

The 1997 Ottawa Convention on Antipersonnel Mines contains two references to assistance to mine victims. The first can be found in Preambular para. 3 which provides:

“*Wishing* to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration of mine victims,”⁵⁷⁸

Moreover, Art. 6 (3) of the Ottawa Convention states that:

“Each State party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programs. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.”⁵⁷⁹

As is widely known, the 1997 Ottawa Convention banning anti-personnel mines was adopted outside the traditional forum of the CCW in light of the perceived inadequacy of the CCW to deal comprehensively with the severe landmine crisis that had reached extraordinary proportions in the 1990s. To many, nothing less than a comprehensive prohibition of the use, stockpiling, production and transfer of anti-personnel mines could tackle the grave humanitarian problems resulting from massive use of these weapons on a global scale. This is why Canada announced at the close of the First Review Conference in May 1996 where Amended Protocol II to the CCW was adopted which represented a regulation rather than prohibition of anti-personnel mines that Canada would host an international meeting with a view to adopting a total prohibition of anti-personnel mines later that year. The International Strategy Conference Towards a Global Ban on Anti-Personnel Mines was finally held in Ottawa in October 1996 and at the end of this conference, then Canadian Foreign Minister Lloyd Axworthy challenged states to conclude an international convention completely prohibiting anti-personnel mines by the end of 1997. This announcement set the stage of what became known as the “Ottawa process”, an unprecedented humanitarian disarmament process with the specific feature of a close collaboration between small- to medium-sized like-minded states, the ICRC, UN agencies and civil society, organised in the International Campaign to Ban Landmines (ICBL), which resulted in the successful adoption of the Ottawa Convention, also known as the Mine Ban Treaty in September 1997.⁵⁸⁰

⁵⁷⁸ Preambular para. 3, 1997 Ottawa Convention, *supra* note 224.

⁵⁷⁹ Art. 6 (3), *ibid*.

⁵⁸⁰ The ICBL and Jody Williams were awarded the Nobel Peace Prize later in 1997 to specifically honour civil society contribution to the drafting of the Mine Ban Treaty and the unique partnership between civil society and states in multilateral disarmament efforts. On the negotiating history of the convention, see Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 22-44; S. Maslen & P. Herby, “An international ban on anti-

While the worldwide suffering of mine victims was the fundamental motivation behind drafting this treaty, surprisingly, a specific provision on victim assistance was absent from the draft treaty text before the final negotiations in Oslo in September 1997. At the beginning of negotiations, Norway put forward a proposal on assistance to mine victims which sought to impose an obligation for each state party in a position to do so to provide assistance for the rehabilitation of mine victims and to provide information to a database to that effect.⁵⁸¹ However, rehabilitation according to this proposal only included limited aspects of victim assistance, surgery, the supply of prosthetic devices, physiotherapy and psychological counselling;⁵⁸² on the other hand, the proposal for an obligation to provide information to a database was useful in that such an explicit obligation would allow states parties to understand the challenges faced in terms of the needs of mine victims. Civil society and in particular organisations specialising in victim assistance were not content with the limited scope of the provision thus proposed and advocated for the inclusion of an obligation to also assist victims with their social and economic reintegration.⁵⁸³

It is submitted that such an obligation merely constitutes a specification of a territorial state's fulfilment of its HRL obligations to protect the rights to life and economic and social rights of the people residing under its jurisdiction for the specific group of victims of landmine explosions. The finally adopted text of Art. 6 (3) of the Ottawa Convention quoted above then incorporates a reference not only to provide assistance for the care and rehabilitation but also for the social and economic reintegration of mine victims. The very inclusion of this provision can be regarded as a landmark achievement, since the Ottawa Convention is the first disarmament treaty to contain such humanitarian obligations on victim assistance.⁵⁸⁴ Especially because of this provision, it is legitimate to call this treaty "a unique mix of arms control based on humanitarian concern."⁵⁸⁵

personnel mines: History and negotiation of the 'Ottawa treaty' ", 325 *International Review of the Red Cross* 693-713 (1998), <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPJN> (last visited 22 January 2010).

⁵⁸¹ See Norway, Proposal to the Oslo Diplomatic Conference on Anti-Personnel Mines, 1 September 1997, Doc. APL/CW.5, referenced in Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 190.

⁵⁸² See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 190.

⁵⁸³ *Ibid.*

⁵⁸⁴ S. Bailey & T. Channareth, "Beyond the Rhetoric: The Mine Ban Treaty and Victim Assistance", in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 143. Subsequently, a provision on victim assistance was inserted by virtue of Art. 8 (2) of the 2003 Protocol V on ERW to the CCW which is worded in an identical manner but for the generic category of explosive remnants of war covered by the Protocol. This already extends the scope of victim assistance to those directly and indirectly injured through cluster munition remnants. Since Art. 8 (2) of Protocol V is identically worded as Art. 6 (3) of the Ottawa Convention, the comments in relation to the latter shall apply, *mutatis mutandis*, to the former.

⁵⁸⁵ S. Goose, M. Wareham & J. Williams, "Banning Landmines and Beyond", in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 2.

However, the link between the obligation on victim assistance and especially the affected state's obligations under HRL does not become immediately apparent from this provision nor the text of the Ottawa Convention as a whole. Firstly, no reference whatsoever to HRL is found either in the Preamble or the operative provisions of the treaty. As shall be seen later on, the link with broader HRL concerns, especially with the human rights of persons with disabilities, was only recognised at a later stage. Secondly, the wording of Art. 6 (3) imposes the obligation to provide victim assistance to "Each State Party in a position to do so." It remains to be clarified which states parties are meant by this provision. Naturally, one would turn to the territorial state as being the primary addressee of this obligation, since from a practical perspective the affected state will be most likely the one to know best what is required to assist its own victims. Subsequently, this interpretation was explicitly endorsed by the mine action community, for example the Geneva International Centre for Humanitarian Demining which stated that the primary responsibility for assistance to victims lies with the national government.⁵⁸⁶ Here then, the above-mentioned problem arises that in affected states vital capacities and infrastructure to assist their own victims are lacking in which case outside assistance to the territorial state is needed.⁵⁸⁷ As a result, the wording of "in a position to do so" significantly qualifies the obligation of a territorial state to assist its own victims in that it cannot be considered absolute and its fulfilment takes into account the respective capacities of mine-affected states.⁵⁸⁸ In circumstances where there is a lack of capacity of the affected state, also other states parties would be bound by the obligation to provide assistance to victims.⁵⁸⁹ This follows from the context of Art. 6 (3) of the Ottawa Convention which is embedded in Art. 6 entitled "International cooperation and assistance" as well as the explicit possibility for states parties under Art. 6 (7) (e) to request assistance in the elaboration of a national demining programme to determine assistance to victims.

However, a provision that the state whose armed forces used anti-personnel mines in the first place has a special responsibility in assisting the affected state is lacking. Indeed, this

⁵⁸⁶ The Geneva International Centre for Humanitarian Demining brings together mine action experts with a view, in partnership with states, IGOs and NGOs, to increasing the performance and professionalism of mine action. This includes providing operational assistance, disseminating knowledge, improving quality management and standards, as well as supporting instruments of international law. On victim assistance see, Geneva International Centre for Humanitarian Demining, "The Role of Mine Action in Victim Assistance", July 2002, at 14, http://www.gichd.org/fileadmin/pdf/publications/Role_MA_in_VA.pdf (last visited 22 January 2010).

⁵⁸⁷ *Ibid.*

⁵⁸⁸ See, in this sense, Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 194-195; Geneva International Centre for Humanitarian Demining, "The Role of Mine Action in Victim Assistance", *supra* note 586, at 14.

⁵⁸⁹ See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 195.

would not be a far-fetched proposition, since these consequences of anti-personnel mine use amount to violations of general IHL, most importantly the prohibition of indiscriminate attacks. Because of this internationally wrongful act, the user state in accordance with the law on state responsibility owes full reparation to the affected state and its individuals. This is confirmed by Art. 91 of API, providing for compensation by a state whose armed forces violated IHL.⁵⁹⁰ That the duty to make full reparation also includes non-monetary forms of reparation such as rehabilitation of victims may be confirmed by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the General Assembly in 2005.⁵⁹¹ Victim assistance would then be a remedy based on secondary norms of state responsibility rather than a primary obligation. However, proposals to enshrine such a specific user state responsibility implying a previous internationally wrongful act were not accepted during negotiations on the Ottawa Convention.⁵⁹² The obligation laid down under Art. 6 (3) of the Ottawa Convention may thus not be understood as being a secondary obligation based on an internationally wrongful act by the user state but rather a primary obligation primarily imposed on the territorial state.

The parallels between the final version of Art. 6 (3) of the Ottawa Convention and HRL obligations, especially in the area of economic and social rights are striking; as argued above, the obligations of a territorial state in this area are also qualified by the caveat of the availability of resources and subject to progressive realisation. Moreover, available resources also comprise those that a state can have recourse to by virtue of international cooperation and assistance. But the fact remains that this link to HRL was not explicitly recognised when adopting the Ottawa Convention. The convention also does not define the scope of the term “victim”, nor what “care and rehabilitation, and social and economic reintegration” precisely entail.

It was therefore left to the implementation stage to clarify these matters and to flesh out what specifically was required of states parties to meet their obligations under Art. 6 (3).⁵⁹³ A first culmination of these efforts occurred with the 2004 First Review Conference to

⁵⁹⁰ Legal scholars recognise, in contrast to certain states’ jurisprudence, that Art. 91 of API, which is modelled after Art. 3 of the 1907 Hague Convention IV, creates an individual right to invoke the responsibility of the wrongdoing state. See, for example, L. Zegveld, “Remedies for victims of violations of international humanitarian law”, 851 *International Review of the Red Cross* 506-507, 512 (2003) (with further references).

⁵⁹¹ UN General Assembly Res 60/147 with Annex, 21 March 2006, UN Doc. A/RES/60/147.

⁵⁹² See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 167-168, 170.

⁵⁹³ That implementation phase began when the treaty entered into force in March 1999 and the first annual meeting of states parties foreseen by Art. 11 of the Ottawa Convention was held in Maputo, Mozambique only two months later in May 1999. On the basis of a President Paper, states parties agreed in the Maputo Declaration

the Ottawa Convention in Nairobi where a detailed Final Report noted the remaining challenges and a formalised set of understandings were agreed to by states parties, the latter commonly known as the “Nairobi Action Plan”.⁵⁹⁴

Among the most important clarifications in the Final Report was the general acceptance that the definition of “victim” comprised “those who either individually or collectively have suffered physical or psychological injury, economic loss or substantial impairment of their fundamental rights through acts or omissions related to mine utilization.”⁵⁹⁵ This definition makes it clear that not only the person directly injured by a landmine explosion is considered a victim but also families and entire communities who also suffer from the socio-economic impact of landmine incidents and contamination.⁵⁹⁶ Moreover, the reference to “impairment of fundamental rights” also recognises that victim assistance is part of a broader context in states’ fulfilment of their HRL obligations toward these victims. This broader context is further expressed in the following terms:

“Victim assistance does not require the development of new fields or disciplines but rather calls for ensuring that existing health care and social service systems, rehabilitation programmes and legislative and policy frameworks are adequate to meet the needs of all citizens – including landmine victims. [...] Furthermore, the impetus provided by the Convention to assist mine victims has provided an opportunity to enhance the well-being of not only landmine victims but also other persons with war-related injuries and persons with disabilities. Assistance to landmine victims should be viewed as a part of a country’s overall public health and social services systems and human rights frameworks. [...] The

at the end of the meeting to set up an inter-sessional work programme with a view of engaging in focused informal discussions among all interested parties, i.e. all interested governments, international and non-governmental organisations on key areas of implementation, including victim assistance. This inter-sessional work programme was to be carried out by Standing Committees with each committee concentrating on one key area of implementation. See First Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Maputo Declaration, 7 May 1999, Doc. APLC/MSP.1/1999/L.6, at paras. 16-17. The establishment of a Standing Committee on Victim Assistance as well as the further annual meetings of states parties represented significant steps to gain an implementation-orientated understanding of the abovementioned undefined terms and the scope of states parties’ obligations in the area of victim assistance.

⁵⁹⁴ See Final Report of the First Review Conference to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Part II: Review of the Operation and Status of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction: 1999-2004, Part III: Ending the Suffering Caused By Anti-Personnel Mines: Nairobi Action Plan 2005-2009, Nairobi, 29 November-3 December 2004, 9 February 2005, Doc. APLC/CONF/2004/5.

⁵⁹⁵ *Ibid.*, at 27, para. 64.

⁵⁹⁶ As for the scope of who may be considered a “victim”, the proposition that not only the direct victim but also family members may fall under the definition of “victim” already had a precedent in HRL treaty law, notably in Art. 14 of the 1984 Convention Against Torture. This provision entitles victims of an act of torture to redress and fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the direct victim, also the victim’s dependants shall be entitled to compensation. However, *mutatis mutandis*, what has been said above on the UN Basic Principles and Guidelines on the Right to a Remedy is also valid here. This is because victim assistance constitutes a remedy based on secondary norms of state responsibility rather than a primary obligation. See Art. 14, Convention Against Torture, *supra* note 343.

States Parties have come to recognize that victim assistance is more than just a medical and rehabilitation issue – it is also a human rights issue.”⁵⁹⁷

The placing of victim assistance in the broader context of the fulfilment of HRL obligations is an important concept which also paved the way for addressing the specific needs of landmine and other war-related victims within the framework of efforts to negotiate the CRPD, a HRL instrument designed to better implement the human rights of disabled people. The link to then already ongoing efforts at negotiating this HRL convention is explicitly recognised by the Nairobi Review Conference Final Report.⁵⁹⁸

At the same time, states parties agreed on the fact that many mine-affected states are *not* in a position to afford adequate care and rehabilitation services as well as economic and social assistance to their populations, including mine victims and recognised that capacity-building in this regard must also be set against the general background of development and underdevelopment.⁵⁹⁹ This arguably stresses the importance of outside assistance for mine-affected states while states parties also recognised that “the ultimate responsibility for victim assistance rests with each State Party within which there are landmine survivors and other mine victims.” In addition, 23 states parties were singled out as being particularly concerned with the fulfilment of the territorial state’s victim assistance obligations due to the high numbers of landmine victims in those states.⁶⁰⁰

The Final Report also made a significant contribution to develop better specifications as to what concrete actions are required to live up to the obligation to provide victim assistance. Six key areas were identified to guide states parties in the implementation of Art. 6 (3): understanding the extent of the challenge faced; emergency and continuing medical care; physical rehabilitation, including physiotherapy, prosthetics and assistive devices; psychological support and social reintegration; economic reintegration; and the establishment, enforcement and implementation of relevant laws and public policies.⁶⁰¹ When compared with general HRL standards, especially in the area of economic and social rights, it becomes clear that the principles of victim assistance made in the Nairobi Action Plan constitute nothing but guidance on concrete implementation of such rights for the specific group of landmine victims.

⁵⁹⁷ *Ibid.*, at 27-28, paras. 65, 66, 68.

⁵⁹⁸ *Ibid.*, at 33, para. 84.

⁵⁹⁹ *Ibid.*, at 28, para. 67.

⁶⁰⁰ *Ibid.*, at 33, para. 85.

⁶⁰¹ *Ibid.*, at 28-33, paras. 69-86.

Understanding the extent of the challenges faced refers mainly to the development of a sophisticated data collection system in relation to landmine victims. This is a crucial element to identify both the number and the specific needs of landmine victims with a view to allocating the often limited resources available. From the Nairobi understandings it can be derived that only at the beginning of the 21st century the international community developed a standardised tool for data collection, the Information Management System for Mine Action (IMSMA) but even where this standardised tool is used by affected states parties by far not all casualties are reported or recorded, in particular in countries where ongoing conflicts were/are raging, in remote areas or where the resources are simply lacking.⁶⁰² Arguably, the convention was a catalyst for leading to this coordinated action which was until then lacking. This was a serious obstacle to delivering assistance to victims but it would be a far cry to claim that all obstacles have already been removed. As a consequence under Action No. 34 of the Nairobi Action Plan, states parties pledged to do their utmost to develop or enhance national mine victim data collection capacities.⁶⁰³

In terms of general economic and social rights, from a reading of the above-cited General Comment No. 14 by the CESCR on the right to health, with regard to the right to prevention, treatment and control of diseases, the CESCR emphasised that this refers to individual and collective state efforts to, *inter alia*, using and improving *data collection on a disaggregated basis*.⁶⁰⁴

Emergency care has a profound impact on the recovery of mine victims. The challenges identified by the Final Report include that adequately trained staff, medicines, equipment and infrastructure are available to deliver especially emergency but also ongoing medical care as well as the problem of access to remote mine areas and related difficulties in transporting such services to such areas.⁶⁰⁵ As a response, Action No. 29 of the Nairobi Action Plan calls on states parties to establish and enhance health-care services needed to respond to immediate and ongoing medical needs of victims.⁶⁰⁶

Physical rehabilitation and prosthetics concern primarily the provision of physiotherapy and the supply of prosthetic appliances and assistive devices, such as wheelchairs and crutches. Also here the challenges noted include adequately trained rehabilitation staff, including doctors, nurses, physiotherapists and orthopaedic technicians in

⁶⁰² *Ibid.*, at 29, para. 71.

⁶⁰³ *Ibid.*, at 100.

⁶⁰⁴ Committee on Economic, Social and Cultural Rights, General Comment on the Right to Health, *supra* note 539, at para. 16.

⁶⁰⁵ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 29, paras. 72-73.

⁶⁰⁶ *Ibid.*, at 99.

sufficient numbers and the necessary infrastructure to transport victims to these services, as well as an effective coordination between the relevant ministries and at national, regional and international levels to ensure an increase in the quality of services and the number of individuals to which they are delivered.⁶⁰⁷ Action No. 30 of the Action Plan translates this into increasing national physical rehabilitation capacity.⁶⁰⁸

These are specifications of the demands made by the CESCRC that public health and health-care facilities, goods and services, must be available in sufficient quantity, must be physically and economically accessible on a non-discriminatory basis, culturally acceptable, as well as scientifically and medically appropriate.⁶⁰⁹

In order to provide psychological support and ensure social reintegration the Nairobi Action Plan emphasised the usefulness of community-based peer support groups, associations for the disabled, sporting and recreational activities and professional counselling. Importantly, reference to participation of mine victims in designing programmes for purposes of social inclusion was also made. This is crucial information in understanding the specific needs of mine victims. Clearly, nobody else than other victims can fully understand the extent of the suffering faced by a victim and victims themselves should be integrated in decision-making as to assistance programmes since they themselves know what their needs are.⁶¹⁰ In this regard, Action No. 31 emphasised that states parties should develop capacities to meet the psychological and social support needs of mine victims with a view to achieving treatment on a par with those for physical rehabilitation and in this process, engage and empower also mine victims, their families and communities.⁶¹¹

For direct victims, their families and communities, economic reintegration is the highest priority. The Nairobi Final Report defines “economic reintegration” as “assistance programs that improve the economic status of mine victims in mine-affected communities through education, economic development of the community infrastructure and the creation of employment opportunities.”⁶¹² The rationale behind economic reintegration is that victims’ potential to become again productive members of society who do not remain on the sidelines is fully exploited. These efforts must also be seen against the background of development efforts in relation to entire communities.

⁶⁰⁷ *Ibid.*, at 30-31, paras. 74-75.

⁶⁰⁸ *Ibid.*, at 99.

⁶⁰⁹ Committee on Economic, Social and Cultural Rights, General Comment on the right to health, *supra* note 539, at para. 12.

⁶¹⁰ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 31, para. 76.

⁶¹¹ *Ibid.*, at 100.

⁶¹² *Ibid.*, at 31, para. 77.

For example, the ICRC Orthopaedic Programme in Afghanistan has not only focused on physical rehabilitation but developed tools for economic reintegration, including education for disabled children in public and private schools and home tuition for those too severely disabled to attend public schools where the home teachers are themselves disabled persons; vocational training for disabled teenagers; employment and training only for disabled adults in the orthopaedic programme with the result that orthopaedic centres became centres for disabled managed by peers; as well as micro credit schemes. The last initiative was particularly successful for the economic reintegration of landmine victims: Interest free loans are provided to victims for the purpose of starting their own small businesses in areas such as agriculture, livestock breeding or handicrafts. Once the business is up and running, the loan must be refunded after a certain time period and is available for fellow disabled who would like to follow this example with a view to constantly increasing the number of disabled entrepreneurs.⁶¹³

In addition, victims have been involved in the clearance process of their own communities. The humanitarian UK-based clearance NGO Mines Advisory Group (MAG) in particular has consistently adopted a “local demining” approach: Poor amputees and other victims are trained by experienced personnel in all aspects of demining. Once they have acquired the necessary expertise they are paid competitive salaries like other MAG employees for demining activities in and around their own communities.⁶¹⁴

The benefits of this “local demining” approach are manifold: Firstly, it ensures that the human beings thus trained regain a sense of self-esteem which is the guiding motivation behind all economic reintegration efforts. Secondly, especially the inclusion of women serves the objective of providing such assistance on a non-discriminatory basis to a particularly vulnerable societal group. Thirdly, this approach increases ownership and participation of local communities and increases local capacities in demining rather than creating new dependencies on assistance by staff from developed countries and is thus also suited to accomplish the broader goal of economic development of poor rural areas. Action No. 33 of

⁶¹³ See A. Cairo, Panel on Economic Reintegration in Austrian Federal Ministry for European and International Affairs, *Assisting Landmine Survivors: A Decade of Efforts*, Symposium, Austrian Defence Academy, 12 February 2007, at 25. This symposium was held on the occasion of the tenth anniversary of the adoption of the 1997 Ottawa Convention, specifically the Vienna Conference on Anti-Personnel Mines which had taken place in February 1997.

⁶¹⁴ In Cambodia, for example, national staff currently constitutes 99% of the overall MAG demining capacity. It is particularly noteworthy that out of the national staff, 38% are women and 7% amputees. Another example is the Lao PDR where 35% of all MAG staff are female with two all-female demining teams. See Mines Advisory Group, “Eliminating the legacy of conflict: Annual Review 2008”, at 14-15, 20-21, <http://www.maginternational.org/silo/files/annual-review-2008.pdf> (last visited 22 January 2010).

the Nairobi Action Plan accordingly commits states to actively support the socio-economic reintegration of mine victims by providing education, vocational training and developing sustainable economic activities and employment opportunities in mine-affected communities and to integrate these efforts in a broader economic development context.⁶¹⁵ The mention of not only physical but also “mental” health in Art. 12 (1) of the ICESCR confirms the relevance of psychological support as an element of victim assistance. Since the CESCR also recognises that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life,⁶¹⁶ the link of social reintegration coupled with psychological support for landmine victims as well as economic reintegration for fulfilling the right to health of landmine victims is established.

Finally, laws and policies in the area of victim assistance mean the promotion of effective treatment, care and protection of all disabled persons, including landmine victims. This includes, *inter alia*, pensions that are adequate to maintain a reasonable standard of living, legislation and plans of action to improve specific services for victims as well as to ensure their equal participation in society.⁶¹⁷ The demand to adopt relevant national laws and policies illustrates the wider HRL context in which victim assistance came to be understood, notably to ensure *de facto*/substantive equality rather than only formal equality for disabled persons in relation to other members of society. This HRL context is explicitly recognised by Action No. 33 of the Nairobi Action Plan which calls on states parties to ensure that national legal and policy frameworks effectively address the needs and *fundamental human rights* of mine victims.⁶¹⁸

The requirement of victim assistance that effective treatment, care and protection be afforded by the affected state through national legislation and action plans matches the obligation to fulfil the right to health which requires states to take appropriate legislative, administrative measures and to adopt a national health policy in a participatory and transparent process based on measurable indicators and benchmarks.⁶¹⁹ The emphasis on a participatory and transparent process is also reiterated by the Nairobi Final Report which mentions certain principles that should guide victim assistance efforts among which are

⁶¹⁵ See Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 100.

⁶¹⁶ Committee of Economic, Social and Cultural Rights, General Comment on the right to health, *supra* note 540, at para. 4.

⁶¹⁷ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 31-32, paras. 78-79.

⁶¹⁸ *Ibid.*, at 100.

⁶¹⁹ Committee of Economic, Social and Cultural Rights, General Comment on the right to health, *supra* note 539, at paras. 36, 43-44.

national ownership, non-discrimination of victims, empowerment of victims, and transparency and efficiency.⁶²⁰

With regard to the context of international cooperation and assistance in which Art. 6 (3) of the Ottawa Convention is embedded, one further parallel may be drawn in light of the fact that the CESCR stated that states other than the territorial state also have certain obligations towards the territorial state; in particular, the CESCR emphasised that it is incumbent upon states parties and other actors in a position to assist to provide international assistance and cooperation, especially of an economic and technical nature, which enables developing countries to fulfil their obligations under the ICESCR.⁶²¹ In the same vein, Art. 6 (3) of the Ottawa Convention imposes the obligation to provide victim assistance on *each state party in a position to do so*, including states parties other than the affected territorial state. This obligation on other states already follows from the general obligation under Art. 2 of the ICESCR according to which states parties undertake to take steps for the progressive realisation of economic, social and cultural rights not only individually, but also *through international assistance and cooperation, especially economic and technical*.

Therefore, one may conclude by stating that in the implementation phase of the Ottawa Convention states parties made it clear that the provision on victim assistance under Art. 6 (3) is nothing but a concrete effort at implementing the economic and social rights of one particular vulnerable societal group, notably landmine victims. This provision was revolutionary and enabled lessons to be learnt in providing victim assistance that are equally relevant for cluster munition victims since the suffering of landmine and cluster munition victims is comparable. The realisation that this specific endeavour must be placed in the more general context of implementing the fulfilment of especially the economic and social rights of these persons was also important, since it paved the way for the participation of landmine victims and other war victims, including cluster munition victims as constituency of the largest minority worldwide, disabled persons, in the negotiations leading to the adoption of the Convention on the Rights of Persons with Disabilities which shall be analysed in the next section.

⁶²⁰ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 28, para. 68.

⁶²¹ Committee of Economic, Social and Cultural Rights, General Comment on the right to health, *supra* note 539, at para. 45.

4.8. The Convention on the Rights of Persons with Disabilities: A Cross-Fertilising Tool for the Implementation of Assistance to Mine, Cluster Munition and Other Victims

For a long time, disability has not been recognised as a HRL issue but as a medical and charity issue just as victim assistance under the Ottawa Convention only came to be viewed as a broader HRL issue in the context of the implementation of that treaty. The concept of viewing disability as a medical and social welfare concern rather than a HRL issue had the effect to locate the problem of disability within an individual's physical, sensory, intellectual, psychosocial or other impairment that needs to be corrected by medical intervention to adapt the individual to mainstream society. As a result, disabled persons were treated as objects but not as subjects of rights with specific entitlements under HRL, resulting in their marginalisation from mainstream society.⁶²² This is reflected in HRL itself, since no specific convention on disabled people existed.⁶²³

Accordingly, even governments otherwise open to human rights concerns for a long time did not realise the need for a specific convention with a view to ensuring implementation

⁶²² On the other hand, disability advocates from the mid-1960s have attempted to challenge this predominant attitude towards disabled people by developing a "social model" of disability. This social model seeks to locate the problems relating to disability not within the individual concerned but rather in the external social environment which has constructed physical (such as high curbs or the lack of specific facilities like elevators to facilitate access to buildings), legal (such as legislation denying disabled people the right to vote or to adopt children) and social barriers (such as in the general attitude of people towards disabled fellow citizens) that prevent disabled people from participation and inclusion in mainstream society. See, for example, A. Lawson, "The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?", 34 *Syracuse Journal of International Law and Commerce* 563, 571-573 (2007); R. Kayess & P. French, "Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities", 8 *Human Rights Law Review* 1, 5-8 (2008); J. White & K. Young, "Nothing About Us Without Us: Securing the Disability Rights Convention" in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 241, 243-244.

⁶²³ Instead, in general HRL conventions disabled persons would only be covered by the general catch-all phrase of "other status". See Art. 2, Universal Declaration of Human Rights, *supra* note 25; Art. 2 (2), International Covenant on Economic, Social and Cultural Rights, *supra* note 538; Art. 2 (1), International Covenant on Civil and Political Rights, *supra* note 343. Still, Art. 25 of the Universal Declaration on Human Rights enshrines the right to social security for disabled persons. Moreover, of the specific thematic HRL conventions, none but the Convention on the Rights of the Child contains specific provisions on disabled persons. Art. 2 of the Convention on the Rights of the Child explicitly prohibits discrimination on the ground of disability. Moreover, Art. 23 of the Convention on the Rights of the Child contains a specific provision on mentally or physically disabled children who have the right to special care and, subject to available resources, to assistance designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities conducive to the achievement to social integration and individual development. See Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

of existing human rights in relation to disabled persons. Only gradually did the recognition sink in that this was a “huge gap in international human rights law.”⁶²⁴

An important statement of principle on how existing HRL should be implemented in relation to disabled persons was made by the CESCR in its 1994 General Comment No. 5 on Persons with Disabilities. Significantly, the CESCR clarified that discrimination on the ground of disability is covered by the generic phrase “or any other state” and specified that “disability-based discrimination may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.”⁶²⁵ The CESCR also emphasised that states parties to the ICESCR would be required to take measures specifically tailored to the needs of persons with disabilities, in particular legislation, to undo existing discrimination and reduce structural disadvantages. Such measures serve the objectives of full participation and equality and would mean to give preferential treatment to persons with disabilities, which is not considered discriminatory by allocating additional resources for achieving these purposes.⁶²⁶ This underlines the key feature of HRL as a remedial regime that aims at removing the cause for structural inequalities in the treatment of human beings of the past and thus lays the groundwork for providing more *de facto* equality in the future. Understood in this sense, the truly revolutionary character of the 1997 Ottawa Convention through inclusion of a specific provision on victim assistance is again revealed, since unlike other disarmament conventions this treaty is not only designed to prevent the use of prohibited weapons and thus, new victims in the future but also adds this remedial aspect of HRL by recognising that the needs of existing victims have not been adequately received attention in the past. Indeed, this aspect, as was argued above, has only been exploited to its full potential at the implementation stage but it is an important recognition to improve the institutional framework in which assistance to victims is delivered.

The General Comment also analysed specific rights under the ICESCR and how they should be implemented in respect of persons with disabilities, including the rights to work, social security, protection of the family, to an adequate standard of living, health and

⁶²⁴ White & Young, “Nothing About Us Without Us” in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 242.

⁶²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 5: Persons with disabilities, 9 December 1994, UN Doc. E/1995/22, at para. 15.

⁶²⁶ *Ibid.*, at paras. 9, 18.

education.⁶²⁷ However, also these useful specifications did not lead to the issue of rights of persons with disabilities to receive adequate implementation and gain further visibility on the international agenda.⁶²⁸ A landmark study conducted under the auspices of the United Nations entitled “The current use and future potential of United Nations human rights instruments in the context of disability” published in 2002 concluded after examining 27 state party reports to the ICESCR that fewer than half of the reports analysed mentioned either a policy or specific measure aimed at inclusion and participation of persons with disabilities, the term “right” was seldom used in this context and that no reference was made either to the UN Standard Rules or to General Comment No. 5.⁶²⁹

It was only in December 2001 that the General Assembly adopted a resolution on the initiative of Mexico which called for establishing an Ad Hoc Committee “to consider proposals for a comprehensive and integral international convention to protect and promote the rights and dignity of persons with disabilities.”⁶³⁰ There is of course a semantic difference between “considering proposals for a convention” and “beginning to negotiate a convention”. Accordingly, the first two meetings were devoted to getting clarity on the issue of the Ad Hoc Committee’s mandate but at the third meeting a Working Group was established to prepare a draft treaty text as basis for negotiations.⁶³¹

The negotiations were characterised by an unprecedented involvement of civil society in the negotiations for a HRL convention adopted under the auspices of the UN.⁶³² They also led to the emergence of a more diverse civil society coalition with participation of some

⁶²⁷ *Ibid.*, at paras. 20-35.

⁶²⁸ Lawson, “The United Nations Convention on the Rights of Persons with Disabilities”, *supra* note 622, at 577; Kayess & French, “Introducing the Convention on the Rights of Persons with Disabilities”, *supra* note 622, at 14.

⁶²⁹ G. Quinn & T. Degener, “Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability”, United Nations, 2002, at 130, <http://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> (last visited 22 January 2010).

⁶³⁰ Op. para. 1, UN General Assembly Res 56/168, 19 December 2001, UN Doc. A/RES/56/168.

⁶³¹ For a full account of all meetings of the Ad Hoc Committee, see <http://www.un.org/esa/socdev/enable/rights/uncontrib-ohchr2.htm> (last visited 22 January 2010).

⁶³² After the first meeting it was agreed that not only civil society organisations with consultative status to the UN would be admitted, and that all civil society organisations would have the right to make oral interventions and submit written material. Furthermore, the Working Group preparing draft treaty texts would also include civil society members. While disability rights organisations had already worked together for considerable time within the UN system, loosely organised as the International Disability Alliance, this group works in a rather isolated fashion from other mainstream human rights organisations. Seven disabled people’s organisations formed this alliance, including Disabled People’s International, Rehabilitation International, the World Network of Users and Survivors of Psychiatry, the World Blind Union, Inclusion International, the Deaf Blind Federation, and the World Federation of the Deaf. See White & Young, “Nothing About Us Without Us” in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 246-247, 251; J. E. Lord, “NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities”, 10 *ILSA Journal of International & Comparative Law* 311, 315 (2004); Lawson, “The United Nations Convention on the Rights of Persons with Disabilities” *supra* note 622, at 588.

NGOs that had been vocal members of the ICBL on assistance to victims in the successful Ottawa process aimed at prohibiting anti-personnel mines. Landmine Survivors Network (now renamed into Survivor Corps), a U.S. NGO, and Handicap International, a French NGO are particularly noteworthy; the former, for instance, made an effort to involve other players from the landmines campaign and the mainstream human rights community traditionally not so much engaged on disability issues such as Amnesty International, Human Rights Watch or Save the Children. In addition, it raised awareness with UNMACCs and Ottawa Convention states parties, encouraging them to get involved in this process.⁶³³ This engagement contributed to applying some lessons learnt from the ICBL campaign for civil society action in the negotiations of the CRPD; for instance, the strength of the ICBL had been to reunite a vast array of human rights, humanitarian, religious and veteran groups under the common umbrella of eliminating landmines from the face of the earth. In a similar vein, the involvement of organisations other than those traditionally working on disability issues meant to broaden the spectrum of civil society advocates and led to the formation of the International Disability Caucus which became the main coordinating branch for civil society in this process. Certain lessons learnt from the landmines campaign were also successfully brought into the disability campaign.⁶³⁴

The final outcome of the negotiations, the 2006 CRPD⁶³⁵ was to a great extent inspired by the contributions of the International Disability Caucus. There is no scope here for an exhaustive analysis of every single provision of this treaty. For present purposes, the potential of this treaty for reinforcing the victim assistance provision of the Ottawa Convention and for inspiring other efforts to assist war victims, including cluster munition victims, shall be explored. This examination is undertaken especially in view of the fact that, as mentioned above, the Nairobi Review Conference Final Report recognised that victim assistance must be seen as part of the overall national human rights framework.

It is worth emphasising again that the insertion of a victim assistance provision in the Ottawa Convention was revolutionary from the perspective of a disarmament treaty.

⁶³³ White & Young, “Nothing About Us Without Us” in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 252-253.

⁶³⁴ For example, pre-meeting workshops to prepare advocates for upcoming negotiations and to help them in their lobbying efforts nationally, regionally and internationally. Also, Daily Bulletins were prepared during the negotiations where governments participating in the negotiations were praised for good and reprimanded for bad interventions, also this being a “name and shame” technique employed successfully during the landmines campaign. See *ibid.*, at 247, 252-253.

⁶³⁵ Convention on the Rights of Persons with Disabilities, 13 December 2006, UN General Assembly Res 61/106, UN Doc. A/RES/61/106. The Convention entered into force on 3 May 2008 in accordance with Art. 45 (1) of the Convention on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

However, the character of the CRPD as a HRL convention places beyond dispute that the taking of positive measures by a state to assist victims of armed conflict, including cluster munition victims, is nothing but an issue of promoting, protecting and ensuring the full and equal enjoyment of all human rights they already have by virtue of their inherent dignity.⁶³⁶

Still, it must be understood that the CRPD only applies to the person directly injured by landmine or sub-munition explosions by virtue of the definition of persons with disabilities as “those who have long-term physical, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁶³⁷ On the other hand, as was shown above, the term “victim” entitled to assistance under the Ottawa Convention also covers family members of direct victims as well as entire communities in which survivors live.⁶³⁸

What certainly has the potential to spur renewed and more systematic efforts to assist victims is the recognition underlying the CRPD that persons with disabilities face attitudinal and environmental barriers which hinder their full and effective participation in society. This observation is aggravated by the fact that the majority of them live in conditions of poverty.⁶³⁹ Where this is the prevailing state of affairs, mine or cluster munition-affected states will hardly have a basis for arguing that victim assistance is already provided in an adequate fashion in these states.

One important provision in the tradition of a HRL convention devoted to a specific vulnerable group which has the potential of eliminating attitudinal barriers is Art. 8 of the CRPD.⁶⁴⁰ This provision obliges states parties *inter alia* to raise awareness among society regarding and foster respect for the rights of persons with disabilities and to combat stereotypes by conducting public awareness raising campaigns, including teaching respect for the rights of persons with disabilities in educational curricula and encouraging the media to show respect for disabled people. It is submitted that the ultimate purpose of establishing

⁶³⁶ Compare Art. 1, Convention on the Rights of Persons with Disabilities, *ibid*.

⁶³⁷ See *ibid*.

⁶³⁸ However, contrast the understanding of who has rights under the CRPD with the definition of “victim” in the other most recent HRL convention, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. Under Art. 24 of that treaty, “victim” means the disappeared person *and any individual who has suffered harm as a direct result of an enforced disappearance*. However, also here the rights of victims may be understood as specific remedies for the violation of primary rights. Thus, victim assistance is not regarded as a primary obligation in and of itself. See Art. 24, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, UN Doc. A/RES/61/177.

⁶³⁹ See Preamble, paras. e, k, t, v, Art. 1, *ibid*.

⁶⁴⁰ Compare Art. 5 (a), Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13, which obliges states parties to take all appropriate measures to “modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

HRL frameworks for specific groups of people is to change the place of these groups in societies for the better. But such change will only prevail in a sustainable manner if the attitude of all societal sectors is favourable to this change. As a practical matter, state authorities will have to undertake efforts like awareness-raising to gain support for the cause of reversing discriminatory social practices in relation to certain groups in the past. If implemented, these obligations would contribute towards better understanding the needs and support of mine and other war victims among the non-affected sectors of society in which they live.

General principles which should guide all further implementation are to be found in both frameworks: The general principles enumerated in Art. 3 of the CRPD overlap and complement the principles spelt out in the Nairobi Final Report which should guide victim assistance efforts. The principles of individual autonomy including the freedom to make one's own choices, independence of persons and full and effective participation and inclusion in society under the CRPD matches the principle of empowerment of victims emphasised in the Nairobi Final Report.⁶⁴¹ The principle of non-discrimination features in both the Disability Rights Convention and the Nairobi Final Report.⁶⁴² Equality of opportunity and accessibility as general principles under the Disability Rights Convention serve to underline the ultimate human rights-inspired goal of victim assistance.⁶⁴³ As noted by the Nairobi Final Report in relation to emergency and continuing medical care as well as physical rehabilitation and assistive devices, states parties to the Ottawa Convention faced a major challenge in relation to the accessibility of such services because of the remoteness of certain rural residential areas.⁶⁴⁴ The emphasis of the Nairobi Final Report on a gender perspective is reiterated by the general principle of equality between men and women in the Disability Rights Convention and by Art. 6 which specifically deals with women with disabilities.⁶⁴⁵

The demand by the Nairobi Final Report to view victim assistance as a human rights issue and to adopt an integrated and comprehensive approach to it reinforces the idea to regard mine and other war victims as a specific subgroup of persons with disabilities. The

⁶⁴¹ Art. 3 (a) (c), Convention on the Right of Persons with Disabilities, *supra* note 635; Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 28, para. 68.

⁶⁴² Art. 3 (b), Convention on the Right of Persons with Disabilities, *supra* note 635; Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 28, para. 68.

⁶⁴³ Art. 3 (e) (f), Convention on the Right of Persons with Disabilities, *supra* note 635.

⁶⁴⁴ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 30, paras. 73, 75.

⁶⁴⁵ Art. 3 (g), Convention on the Right of Persons with Disabilities, *supra* note 635; Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 28, para. 68.

general context of development that both the Nairobi Final Report and Action Plan stress that victim assistance must occur in is also taken up by Art. 32 CRPD. This provision commits states parties to implement national efforts to realise the human rights of persons with disabilities by international cooperation through international development programmes that are inclusive of and accessible to persons with disabilities.

With regard to the six areas of victim assistance identified in Nairobi, the CRPD relates to these areas as follows: Firstly, the necessity to collect data on mine victims to understand the extent of the challenges faced has as its equivalent Art. 31 (1) of the Disability Rights Convention which imposes on states parties the obligation to collect statistical and research data to enable them to formulate and implement policies in accordance with the convention. Under Art. 31 (3), states parties shall also be responsible for disseminating these statistics and ensure their accessibility to disabled persons in a similar way as Action No. 34 of the Nairobi Action Plan calls on states parties to the Ottawa Convention to ensure full access to the data collected. The CRPD adds to victim assistance in this regard the above-mentioned retroactive human rights perspective. According to Art. 31 (2) the information collected shall not only be used to address future-orientated policies and programmes but also to identify and address the barriers faced by persons with disabilities in exercising their rights. As described already in Chapter 2.4., this is relevant for mine or cluster munition victims as it is relevant for other persons with disabilities, since they often suffer from being rejected by their communities due to their disability.⁶⁴⁶ Thus, the CRPD will reinforce victim assistance under the Ottawa Convention in that it addresses the root causes, i.e. the social and physical barriers that contributed to inadequate efforts to provide victim assistance to date.

Secondly, Art. 25 (b) of the CRPD obliges states parties to provide health services specifically needed by persons with disabilities, including early identification and intervention and services designed to minimise and prevent further disabilities. This is but a more general expression of appropriate trauma surgical treatment and first-aid that mine and other war victims require in terms of emergency and ongoing medical care. Such treatment has a profound impact on the prospects of their immediate and long-term recovery.⁶⁴⁷ In addition, Art. 25 (c) of the Disability Rights Convention specifically responds to the challenge of problems related to the proximity of services to remote rural areas identified by the Nairobi Final Report by committing states parties to provide such health services as close as possible

⁶⁴⁶ See *supra* p. 46.

⁶⁴⁷ See Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 29, para. 72.

to people's own communities, including in rural areas.⁶⁴⁸ On the other hand, Art. 25 of the Disability Rights Convention also contributes to achieving the objective proclaimed in Nairobi that victim assistance efforts should be mainstreamed into a state's overall human rights framework, including in its general health care system. This is because it requires states parties to provide the same range, quality and standard of general health care and programmes as to other persons on the basis of free and informed consent of the person with an impairment.

With regard to physical rehabilitation and assistive devices, the Nairobi Final Report and Action Plan emphasise the ultimate goal of full reintegration. This translates in Art. 26 (1) of the CRPD into full inclusion and participation in all aspects of life. The challenge noted in Nairobi to increase, expand access to and ensure the sustainability of national physical rehabilitation capacities is taken up by Art. 26 (1) of the CRPD which binds states parties to organise, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, for instance in the area of health.⁶⁴⁹ Moreover, both the Nairobi Final Report and Action Plan demanded that states parties increase the number of trained rehabilitation specialists most needed by mine victims, including doctors, nurses, physiotherapists and orthopaedic technicians.⁶⁵⁰ Art. 26 (2) of the CRPD responds to this demand by obliging states parties to promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services. The provision of prosthetic appliances and assistive devices, including wheelchairs or crutches, is covered by Art. 26 (3) of the CRPD which imposes the obligation on states parties to promote the availability, knowledge and use of assistive devices and technologies designed for persons with disabilities.⁶⁵¹ Fundamentally, also in this area a particular challenge remaining for states parties to the Ottawa Convention according to the Nairobi Final Report is to ensure access to transportation to these services. The CRPD in this regard makes it clear that states parties shall provide these rehabilitation services in such a way that these are available to persons of disabilities as close as possible to their own communities, including in rural areas.⁶⁵²

Prosthetic appliances and assistive devices are even covered by a separate provision of the CRPD: Art. 20 enshrines the specific right of personal mobility of persons with disabilities which can be seen as a specific extension of the right to liberty of movement. Most

⁶⁴⁸ *Ibid.*, at 30, paras. 73, 75, Action No. 30, at 99.

⁶⁴⁹ *Ibid.*, at 30, para. 75.

⁶⁵⁰ *Ibid.*, at 30, para. 75, Action No. 30, at 99.

⁶⁵¹ *Ibid.*, at 30, para. 74.

⁶⁵² Art. 26 (1) (b), Convention on the Rights of Persons with Disabilities, *supra* note 635.

importantly, states parties to the CRPD under Art. 20 (b) shall facilitate affordable access to quality mobility aids, devices, assistive technologies and forms of live assistance, shall provide training in mobility skills to affected persons and specialist staff as well as encourage producers of such devices to take into account the specific mobility needs of disabled persons.

In this regard, the CRPD again adopts a more fundamental structural approach which, if it is adequately implemented, would improve the surrounding circumstances in which mine or cluster munition victims live. Art. 9 of the CRPD requires states parties to take steps, including the identification and elimination of barriers to participation in all aspects of life, to ensure that persons with disabilities are able to access the physical environment, i.e. buildings, roads, transportation and other indoor as well as outdoor facilities like schools, housing, medical facilities or workplaces.

Also in the victim assistance area of psychological support and social reintegration are there significant overlaps between the Nairobi Final Report and Action Plan and the CRPD: Action No. 31 identified the achievement of high standards and support on a par with those for physical rehabilitation. In developing national capacities to meet psychological and social needs direct victims, their families and communities must be engaged and empowered. That psychological support must be seen on a par with physical rehabilitation of victims is confirmed by Art. 26 (1) of the CRPD which refers to *comprehensive* rehabilitation and the overall objective that persons with disabilities shall attain not only full physical, but also mental, social and vocational ability, thus recognising that all these aspects are interrelated.

Furthermore, programmes and services must be performed in such a way that they support participation and inclusion in the community and all aspects of society.⁶⁵³ The Nairobi Final Report emphasised the causal relationship between psychological support and social well-being which is taken into account by *inter alia* community-based peer support groups, associations for the disabled, sports activities or professional counselling.⁶⁵⁴ The relevance of peer support groups is reflected in Art. 26 (1) of the CRPD which explicitly mentions peer support among the effective and appropriate measures to promote independence, full physical, mental, social and vocational ability, and full inclusion and participation in society. Sports activities form part of Art. 30 of the CRPD which enshrines the right of persons with disabilities to participate in cultural life, recreation, leisure and sport. A two-track approach is pursued here, since states parties to the CRPD must take appropriate measures to promote participation of disabled persons in mainstream sporting activities as

⁶⁵³ *Ibid.*

⁶⁵⁴ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 31, para. 76.

well as to ensure opportunities for persons with disabilities to organise, develop and participate in their own disability-specific sporting events.⁶⁵⁵

Art. 27 of the CRPD on the right to work and employment speaks to the issue of economic reintegration of victims. This includes, in particular, the obligation to promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business: Micro-credit schemes described *supra*,⁶⁵⁶ which aim at increasing the number of entrepreneurs among mine or other war victims would fall into the opportunities mentioned here.⁶⁵⁷ Art. 27 (1) (k) enjoins states parties to promote vocational and professional rehabilitation programmes for persons with disabilities; this would mean to promote economic reintegration programmes such as those implemented by the ICRC Orthopaedic Programme in Afghanistan referred to *supra*,⁶⁵⁸ which, in adopting a policy of positive discrimination, only provided employment and training for disabled adults with the result that orthopaedic centres became centres for disabled managed by peers.

The stance of positive discrimination taken by the ICRC in practice is reaffirmed in Art. 27 CPRD by expressly providing for the possibility to include affirmative action programmes, incentives and other measures to promote the employment of persons with disabilities in the private sector.⁶⁵⁹ The reference to affirmative action reiterates in the specific context of work and employment the general provision found under Art. 5 (4) of the CRPD that specific measures necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination.⁶⁶⁰ However, the formulation of permissible positive discrimination in the disability rights context differs from the other contexts in that it is not subject to the qualification that these measures must be discontinued when the

⁶⁵⁵ Art. 30 (5), Convention on the Rights of Persons with Disabilities, *supra* note 635.

⁶⁵⁶ See *supra* p. 173.

⁶⁵⁷ The obligation to promote employment opportunities and career advancement as well as assisting persons with disabilities in finding, obtaining, maintaining and returning to employment will be implemented in practice if a state party to the CRPD promotes, for example, programmes such as the Training for Rural Economic Empowerment (TREE) implemented by the International Labour Organisation; this programme adopts a community-based approach in poor rural areas to generating income opportunities in identifying potential employment before determining vocational training needs, involving the local community and social partners at all stages and ensuring follow-up support for beneficiaries. See P. Korpinen, Panel on Economic Reintegration in Austrian Federal Ministry for European and International Affairs, *Assisting Landmine Survivors*, *supra* note 613, at 23-24.

⁶⁵⁸ See *supra* p. 173.

⁶⁵⁹ Art. 27 (1) (h), Convention on the Rights of Persons with Disabilities, *supra* note 635.

⁶⁶⁰ Affirmative action measures, such as quota systems and other measures to increase representation of the disadvantaged group on the labour market, are already known in the context of racial discrimination under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. See Art. 1 (4), Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195; Art. 4 (1), Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 639.

objectives of equality of opportunity and treatment have been achieved.⁶⁶¹ This arguably recognises that certain persons with disabilities due to their permanent disability are also in need of long-term positive discrimination. While positive discrimination is thus not prohibited, among prohibited discrimination as “any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms”⁶⁶² is also the denial of “reasonable accommodation”. This concept is central to the Convention in that it requires to make necessary and appropriate individualised modification and adjustments so as to enable the specific individual to exercise his/her rights on an equal basis with others. Art. 5 (3) also contains a specific obligation on states parties to ensure the provision of reasonable accommodation, which may require states parties to ensure that practices are changed (e.g. accommodating persons with diabetes by allowing them work breaks to inject insulin), money spent on additional equipment, support or improved physical access (e.g. ramps for wheelchairs to access buildings).⁶⁶³ This obligation is reiterated for the context of work and employment under Art. 27 (1) (i) of the CRPD. Generally, the CRPD emphasises the inclusion of disabled persons in the open labour market more than victim assistance efforts which arguably seem to be still very much focused on providing special opportunities for mine victims. The CRPD can therefore help to inform a more long-term and sustainable strategy for the creation of employment opportunities of mine and other war victims.

Finally, where the Nairobi Action Plan calls upon states parties to the Ottawa Convention to ensure that national legal and policy frameworks effectively address the needs and fundamental human rights of mine victims, the CRPD enshrines the general obligations to adopt all appropriate legislative, administrative and other measures for implementing the human rights of persons with disabilities; to take all appropriate measures, including legislation to modify or abolish discriminatory laws, regulations, customs or practices; and to take the protection and promotion of disabled peoples’ human rights into account in all policies and programmes.⁶⁶⁴

⁶⁶¹ Compare Art. 5 (4), Convention of the Rights of Persons with Disabilities, *supra* note 635, with Art. 1 (4), Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 660, and Art. 4 (1) Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 639.

⁶⁶² Art. 2 (3), Convention of the Rights of Persons with Disabilities, *supra* note 635.

⁶⁶³ Kayess & French, “Introducing the Convention on the Rights of Persons with Disabilities”, *supra* note 622, at 9, fn. 36; Lawson, “The United Nations Convention on the Rights of Persons with Disabilities”, *supra* note 622, at 598.

⁶⁶⁴ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 100, Action No. 33; Arts. 4 (1) (a) (b) (c), Convention on the Rights of Persons with Disabilities, *supra* note 635.

Again, the CRPD has the potential of complementing victim assistance efforts in that it does not only commit states parties to adopt forward-looking legislation but also to get rid of legislation that may have promoted discriminatory treatment of persons with disabilities, including mine victims, in the past in the sense of corrective justice. Importantly, the CRPD lays down a complementary obligation to closely consult with and actively involve persons with disabilities in developing and implementing legislation and policies concerning them.⁶⁶⁵ This generic obligation serves to mainstream in a national context what Action No. 38 of the Nairobi Final Report provides in terms of ensuring effective integration of mine victims in the work of the Ottawa Convention,⁶⁶⁶ since especially victims themselves are in the best position to know what their particular needs are and what measures will be required to address those needs.

In terms of implementation, the CRPD adds mechanisms that may assist in monitoring victim assistance both on the national as well as the international level, on which the Ottawa Convention was silent. On the national level, states parties to the CRPD shall designate one or more focal points and coordination mechanisms within the government for disability matters as well as maintain, strengthen, designate or establish one or more independent mechanisms along the lines of national human rights institutions such as national human rights commissions and ombudspersons.⁶⁶⁷ In the view of this author, the designation of particular bodies with responsibilities regarding persons with disabilities has several benefits: Firstly, the relevant expertise is concentrated in specified institutions. Secondly, responsibilities in this field are clearly allocated, since the challenges may be daunting where competencies on persons with disabilities is spread over a multitude of governmental departments. Thirdly, such institutions may serve as good sources of information on the state of play regarding implementation of the rights of persons with disabilities, including victim assistance, within a state.

On the international level, a Committee on the Rights of Persons with Disabilities is intended to fulfil classical tasks of a HRL treaty body, which firstly includes consideration of

⁶⁶⁵ Art. 4 (3), Convention on the Rights of Persons with Disabilities, *supra* note 635. This outcome is a direct result also of the process leading to it, since – as mentioned above – disability rights advocates played an unprecedented prominent role in the negotiations of the CRPD, with “nothing about us without us” being their rallying cry. See White & Young, “Nothing About Us Without Us” in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 247.

⁶⁶⁶ Final Report of the First Review Conference to the Ottawa Convention, *supra* note 594, at 101, Action No. 38.

⁶⁶⁷ Arts. 33 (1) (2), Convention on the Rights of Persons with Disabilities, *supra* note 635.

and the issuing of suggestions and general recommendations to states parties' reports.⁶⁶⁸ Conversely, while the Ottawa Convention also requires states parties to submit compliance reports under Art. 7, victim assistance is not among the matters to which the reporting duties extend.⁶⁶⁹ Like the CRC, also the CRPD contains an obligation on states parties to make their reports to the treaty-monitoring Committee widely available to the public: This obligation has the purpose of increasing knowledge among the general public of the state's obligations under the treaty and thus, to promote implementation of the rights contained therein.⁶⁷⁰

Importantly, Art. 37 of the CRPD provides that the Committee in its relationship with the states parties shall have regard to ways in which national capacities for the implementation of the rights of the Convention may be increased, thus emphasising the overall objective of interaction between states parties and the Committee. Moreover, an Optional Protocol to the CRPD was adopted on the same date as the convention which adds two more enforcement mechanisms, notably an individual complaints procedure and in case of grave or systematic violations of the CRPD, an inquiry procedure which may include country visits, i.e. fact finding, with consent of the state party concerned.⁶⁷¹ Thus, in case mine, cluster or any other war-related victims claim to be victim of inadequate assistance efforts by the state party to the CRPD, they may bring a complaint before the Committee on the Rights of Persons with Disabilities which may result in the Committee adopting a view finding a violation of the victim's right; potential examples of violations which mine or cluster munition victims could vindicate include the lack of any measures to address problems of accessibility of emergency and ongoing medical care as well as physical rehabilitation, the exclusion of child victims of mine or sub-munition explosions from the general education

⁶⁶⁸ Art. 35 of the CRPD provides for an initial reporting obligation within two years after the entry into force of the convention for a state party, with subsequent reports being due every four years. Art. 36 of the CRPD outlines the specific mandate of the Committee in relation to state party reports.

⁶⁶⁹ Although a proposal was submitted by Landmine Survivors Network (now Survivor Corps) during the negotiations, this proposal failed to evince the necessary support. Subsequently, states were encouraged to voluntarily report on victim assistance but this reporting has remained piecemeal. See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 217; Survivor Corps, "Connecting the Dots: Victim Assistance and Human Rights in the Mine Ban Treaty, Convention on Cluster Munitions, Convention on the Rights of Persons with Disabilities", May 2008, <http://www.survivorcorps.org/NetCommunity/Document.Doc?id=17> (last visited 22 January 2010).

⁶⁷⁰ Compare, Art. 44 (6), Convention on the Rights of the Child, *supra* note 623; S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* 42 (1999). In addition, Art. 36 (4) of the CRPD requires states parties in light of the general spirit of the convention to facilitate access to the suggestions and general recommendations relating to these reports.

⁶⁷¹ See Arts. 1, 6, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, UN General Assembly Resolution 61/106, UN Doc. A/RES/61/106. In this respect, the competencies of the Committee on the Rights of Persons with Disabilities are very similar to those which the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the CEDAW enjoys. Compare Arts. 1, 8, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 October 1999, 2131 UNTS 83.

system, the lack of steps to ensure access by victims to affordable prostheses or other assistive devices or the failure to remedy physical barriers to public infrastructure or workplaces. Importantly, individual complaints by mine or other victims will typically involve violations of economic and social rights but are not restricted to these, since the CRPD is strongly rooted in the recognition that all human rights, civil, political or economic, social or cultural are interrelated and to be enjoyed on an equal footing.⁶⁷²

The foregoing analysis demonstrated that victim assistance may be seen as common denominator bringing two legal regimes closer which (at least) in practice seemed to be quite distant from each other, disarmament, focusing on national security concerns and human rights, focusing on the well-being of individuals. While in the realm of disarmament, making provision for dealing with the already existing consequences of using a weapon was revolutionary, such a provision can only be interpreted as a specific expression of implementing existing HRL. Since disarmament is understood here as a normative response in light of the failure of existing IHL to prevent civilian victims of anti-personnel mines, the approximation between disarmament and HRL also implies a growing convergence between IHL and HRL in the area of victim assistance.

Still, this does not mean that each regime does not have its own particular advantages and disadvantages in relation to the other: The primary advantage of the CRPD lies in the fact that it has a broad scope of application applying not only to victims of specific weapons but all victims, regardless of the cause of their impairment, and that it furnishes victims with the possibility to bring individual complaints before an international body in case of inadequate provision of victim assistance. Moreover, the CRPD has the potential of addressing victim assistance in a broader context in a more systematic fashion which includes dealing with structural factors contributing to inadequate past action in this regard.

On the other hand, provision for victim assistance in a disarmament treaty like the Ottawa Convention relating to a specific weapon will remain relevant because of the broader definition of victims, not only including victims but also families and entire communities entitled to assistance. At the same time, this weapon-specific approach means that such provisions should also be extended to other weapons. In this regard, the victim assistance

⁶⁷² Other Optional Protocols connected with specific thematic conventions that provide for an individual complaint procedure for economic and social rights include the Optional Protocols to the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of Discrimination Against Women. The issue of an individual complaints procedure to the main instrument on economic, social and cultural rights, the ICESCR, was finally settled with the adoption of the Optional Protocol to the ICSECR by virtue of UN General Assembly Res 63/117 on 10 December 2008, the 60th anniversary of the Universal Declaration of Human Rights.

provision contained in Art. 8 (2) of Protocol V on ERW has the advantage of dealing with post-conflict remnants of any conventional weapons except anti-personnel mines, including cluster munitions. However, this still does not address those persons victimised through the indiscriminate use of cluster munitions in or near civilian residential areas during armed conflict.

Thus, despite the great amount of headway made in improving the plight of victims of anti-personnel mines and cluster munitions through cross-fertilising effects of the CRPD this has not remedied all gaps in relation to cluster munition victims and there is still a need for more specific provisions on a national and international level from a HRL perspective as there is a need for such norms due to existing inadequacies in IHL. Efforts at establishing specific law shall now be analysed in the next sections, culminating in an in-depth analysis of the negotiation and significance of the new Convention on Cluster Munitions.

5. National and International Approaches to Enshrine Specific Norms on Cluster Munitions

5.1. Austria: From a Parliamentary Resolution to a Federal Act on the Prohibition of Cluster Munitions⁶⁷³

The impact of NGOs and civil society organisations in the area of disarmament on conventional weapons has become increasingly crucial for shaping and changing government positions both on a national and international level in order to establish specific norms on certain weapons. This was true for NGO and civil society involvement in the Ottawa process leading to a ban on anti-personnel mines in 1997 and this was also true for NGO and civil society involvement in the international process aiming at a prohibition on cluster munitions. In fact, it can be argued that meaningful progress in disarmament regarding these weapons cannot be made any more without incorporating a strong humanitarian dimension.⁶⁷⁴

Therefore, legal and political developments on a national and international level regarding cluster munitions cannot be fully appraised without shedding light on the

⁶⁷³ This chapter represents an extended version of the drafting history of the Austrian Federal Act on the Prohibition of Cluster Munitions published by this author in 12 Austrian Review of International and European Law (2007). All translations from original German documents are by this author.

⁶⁷⁴ R. J. Mathews & T. L. H. McCormack, "The influence of humanitarian principles in the negotiation of arms control treaties", 834 International Review of the Red Cross 331-352 (1999), <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JPTY> (last visited 22 January 2010); J. Borrie, "Tackling Disarmament Challenges", in Williams, Goose & Wareham, *Banning Landmines*, *supra* note 403, at 263, 264.

collaborative relationship between governments, Members of Parliament (MPs) and NGOs/civil society organisations. In fact, the national and international levels are closely intertwined, as developments on the one level may have a cross-fertilising effect on the other. The case of Austria provides an excellent example in this regard, since the international role of Austria as one of the leading states behind the conclusion of an international prohibition on cluster munitions also heavily influenced national legal developments. What follows is an analysis of these developments, in particular the various stages finally leading to the adoption of a national law prohibiting cluster munitions in Austria.⁶⁷⁵ The analysis of the Austrian national context precedes that of the international process leading to the CCM, as much of the substantive debate in this context occurred prior to similar discussions and negotiations on the international level. In this sense, the discussion of the national context is well suited to prepare the ground for an examination of the issues in the international diplomatic process called “Oslo process”.

While the slogan “individuals can make a difference” more often than not may be considered a hackneyed stereotype, it quite accurately describes NGO involvement in Austria on the issue of cluster munitions. For more than five years it was a single Austrian NGO called Austrian Aid For Mine Victims (AAMV) directed by a single person, Judith Majlath, which has been consistently engaged in national campaigning with Austrian government officials and Members of Parliament (MPs) as well as awareness raising activities.⁶⁷⁶ After successfully campaigning in Austria against anti-personnel mines as the Austrian Section of the ICBL, she and others already in 1999⁶⁷⁷ realised that something must also be done against the grave consequences for civilians resulting from the use of cluster munitions.

Thus, interestingly, the idea to focus on cluster munitions in national campaigning efforts was actually born on the international level as a result of exchanges with NGO colleagues from other countries. These first reflections in Maputo finally culminated in the foundation by AAMV together with other NGOs and international civil society organisations of the international civil society network of the Cluster Munition Coalition (CMC) in the Hague in 2003.⁶⁷⁸ The founding call of the CMC made clear that international and national efforts to effectively protect civilians from the harmful consequences of cluster munitions are

⁶⁷⁵ This analysis is based, in part, on an insider perspective of this author who was for some time closely involved in the Austrian national NGO campaign for a ban on cluster munitions.

⁶⁷⁶ Hungarian-born Judith Majlath, an English antiques arts dealer based in Vienna and London, founded AAMV in 1995 after a journey to Laos.

⁶⁷⁷ In 1999, the first meeting of states parties to the Ottawa Convention in Maputo took place.

⁶⁷⁸ The CMC now comprises around 300 civil society organisations from more than 80 countries. For information concerning the CMC, visit <http://www.stopclustermunitions.org/> (last visited 22 January 2010).

closely intertwined; the CMC first and foremost called for “no use, production or trade of cluster munitions until their humanitarian problems have been resolved.”⁶⁷⁹ This launch of an international civil society network also provided an additional impetus for channelling national campaign efforts. The promotion of national measures that will reduce or eliminate civilian harm from cluster munitions are inherent in the wording “no use, production and transfer until their humanitarian problems have been resolved”, which shows the close interrelationship between national and international efforts.⁶⁸⁰

As a result, AAMV (later renamed AAMV/CMC-Austria which shall be used hereinafter) intensified its efforts of national campaigning with Austrian government official and MPs as well as awareness raising activities since 2003.

The first visible impact of these activities was a request for a parliamentary resolution submitted by Green Party Member of Parliament (MP) Ulrike Lunacek and Social Democrat (SPÖ) MP Walter Posch on 22 December 2004.⁶⁸¹

In this request, the Austrian National Council (Nationalrat) was

“requested that the Austrian government be called upon [in a parliamentary resolution] to play, once again, a leading role on the issue of cluster munitions and cluster bombs (just like in the case of anti-personnel mines in the Ottawa process) and to take the following steps:

- 1) to promptly ratify Protocol V [on Explosive Remnants of War] to the Convention on Conventional Weapons (CCW);
- 2) to declare a unilateral Austrian moratorium in respect of the use, production, development, stockpiling and transfer of cluster munitions and cluster bombs;
- 3) to actively support the establishment of a new Protocol VI – specifically on cluster munitions – within the framework of the CCW;
- 4) to expand the Austrian Federal Act on the Prohibition of Anti-Personnel Mines (BGBl 13 I/1997) in scope to cover cluster munitions, since unexploded cluster bombs or cluster munitions, respectively, function as duds de facto like anti-personnel mines.”⁶⁸²

⁶⁷⁹ Pax Christi Netherlands, Conference Report, International Launch Conference, 12-13 November 2003, The Hague, at 41 (on file with the author).

⁶⁸⁰ A later updated CMC call made this even clearer. It called for ensuring the success of an international process establishing an effective prohibition on cluster munitions that cause unacceptable civilian harm as well as promoting national measures that would reduce or eliminate civilian harm from cluster munitions in advance of an international process being completed.

⁶⁸¹ Under Austrian Constitutional Law, parliamentary resolutions, while non-binding on the government, constitute an important parliamentary tool by which the Austrian MPs of the National and Federal Council (the two Austrian parliamentary chambers Nationalrat and Bundesrat) may express their wishes on the way the Austrian government conducts its foreign policy. The relevant provision of the Austrian Federal Constitutional Law (B-VG), Art. 52 (1) reads as follows: “The National Council and the Federal Council are entitled to examine the administration of affairs by the Federal Government, to interrogate its members about all subjects pertaining to execution, and to demand all relevant information *as well as to ventilate in resolutions their wishes about exercise of the executive power.*” (emphasis added). An English translation of the Federal Constitutional Law is available at http://www.ris.bka.gv.at/Dokumente/Erw/ERV_1930_1/ERV_1930_1.pdf (last visited 22 January 2010).

⁶⁸² Request by MPs Mag. Ulrike Lunacek, Mag. Walter Posch and Colleagues concerning an Austrian Initiative on the Prohibition of Cluster Bombs and Cluster Munitions, No. 499/A (E) XXII. GP, 22 December 2004, http://www.parlament.gv.at/PG/DE/XXII/A/A_00499/fname_033168.pdf (last visited 22 January 2010).

Significantly, this first request proceeded from the similarity between anti-personnel mines and unexploded cluster munitions as becomes clear by item 4. In this regard, it also mentions the Ottawa process leading to a prohibition of anti-personnel mines in the umbrella coupled with the demand that the Austrian government, like in the case of the Ottawa process, play a similar leading role on cluster munitions. One could possibly assume that it is implicit in this comparison that a similar process between like-minded states and civil society as in the case of the Ottawa process leading to a ban on anti-personnel mines could lead to a ban on cluster munitions. However, this assumption was not made explicit in this request, since under item 3, the Austrian government is called upon to actively support the establishment of a new international treaty on cluster munitions but it fails to suggest that such a convention could be adopted within international fora *other* than the CCW. Still, this request may be called progressive, since item 2 contains an appeal to the Austrian government to declare a comprehensive moratorium on all types of cluster munitions, including their use, production, development, stockpiling and transfer.

The demand under item 4, to expand the Austrian Federal Act on the Prohibition of Anti-Personnel Mines in scope to also cover cluster munitions, while addressed to the Austrian government with the best of intentions, may be termed less fortunate. This is because it fails to fully appreciate the *differences* between anti-personnel mines and cluster munitions: Anti-personnel mines and cluster munition share common effects in that *unexploded* cluster submunitions de facto function like victim-activated anti-personnel mines *at the post-conflict stage*. On the other hand, as already described *supra*,⁶⁸³ cluster munitions display differences in effects in comparison to anti-personnel mines when they *do* function as designed in view of their inaccuracy and wide dispersal patterns at the time of attack. Therefore, such an expansion of the pre-existing Anti-Personnel Ban Act would not have addressed all problematic aspects of cluster munition use. Instead, in view of the differences between anti-personnel mines and cluster munitions, a separate law on cluster munitions is generally needed.⁶⁸⁴

Parliamentary debate on this SPÖ/Green Party request was postponed throughout the year 2005 in order to arrive at a position based on consensus among the government parties on the one (Austrian People's Party, hereinafter: ÖVP, and Alliance for the Future of Austria, hereinafter: BZÖ) and the opposition parties (SPÖ and Green Party) on the other. Finally, the

⁶⁸³ See *supra* p. 107.

⁶⁸⁴ This has been the position that has been argued later, since March 2007, by AAMV/CMC-Austria.

request submitted by MPs Lunacek and Posch failed to attain the required majority in the Foreign Affairs Committee of the National Council on 5 July 2006.⁶⁸⁵ Rather, ÖVP and BZÖ MPs submitted a request for a parliamentary resolution on their part in which the Austrian government was called upon to actively support the adoption of a new CCW Protocol and to take technical and other measures to restrict cluster munitions with a failure rate higher than 1 %.⁶⁸⁶

On 11 July 2006, AAMV/CMC-Austria organised a briefing hosted by the SPÖ and the Green Party in Parliament.⁶⁸⁷ The briefing included speakers from AAMV/CMC-Austria, the ICRC, foreign NGOs Handicap International and Landmine.de as well as the Austrian Ministries of Foreign Affairs and Defence. It certainly served to provide awareness of the humanitarian consequences related to these weapons and to understand commonalities and differences of positions of the various stakeholders present. While there was general acknowledgement of the humanitarian concerns related to cluster munition use, there were differences of opinion as to how to most effectively address these concerns. One divergence of views revolved around the issue of whether an international restriction which only concerned a lowering of the sub-munition dud rate to less than 1 % would be adequate on the international level. While the ICRC and NGOs did not consider this an adequate solution, the governmental representatives expressed support for this approach, since in their view it was neither politically realistic nor militarily desirable to go further at that moment in time. The effectiveness of an international ban on cluster munitions advocated by the NGO and ICRC representatives without the participation of key user and producer states such as the United States, Russia and China was also doubted by the government representatives.

However, this argument may be challenged on the ground that the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines was also adopted as a result of efforts between like-minded middle and small-sized states and international civil society. Secondly, although the Ottawa Convention until the present date has neither been signed nor ratified by the United States, Russia or China, nevertheless at least in part, these states de facto comply with at least some of its norms. For instance, China has an export moratorium on antipersonnel mines in place since 1996, has not laid any new minefields in many years and as

⁶⁸⁵ Austrian National Council, Report by the Foreign Affairs Committee on the Request No. 499/A (E) by MPs Mag. Ulrike Lunacek, Mag. Walter Posch and Colleagues concerning an Austrian Initiative on the Prohibition of Cluster Bombs and Cluster Munitions, No. 1608 of the Supplements to the Stenographic Protocols of the National Council, 5 July 2006, http://www.parlament.gv.at/PG/DE/XXII/I/I_01608/fnameorig_066724.html (last visited 22 January 2010).

⁶⁸⁶ *Ibid.*

⁶⁸⁷ This section draws from the personal notes by this author who witnessed the briefing in person.

a result of the export moratorium also production significantly decreased.⁶⁸⁸ Russia has not made any state-approved transfers of any type of antipersonnel mine since 1994;⁶⁸⁹ the United States has prohibited any transfers of antipersonnel mines since 1992 and use has not been substantiated since Operation Desert Storm in 1991.⁶⁹⁰ Thus, it may be argued that such a treaty actually does make a difference even without participation of certain major powers. Thirdly, from a humanitarian perspective, it is better to start binding small and middle-sized states to more stringent obligations than to wait until all major powers are on board and then to bind all states to watered down obligations. In the view of the author, this focus on an urgent humanitarian approach sets the Mine Ban Treaty and the later concluded Convention on Cluster Munitions apart from traditional mere disarmament treaties like the Convention on the Prohibition of Chemical Weapons. This particular argument was to be finally put to rest soon as we shall see in the analysis of the development of Austria's international position.

From a military point of view, it was stressed that retaining cluster munitions was crucial for maintaining Austria's capacity to engage in peacekeeping and crisis management operations within international frameworks such as the European Security and Defence Policy (ESDP), since such operations could also involve more robust combat operations. It shall be recalled that the ESDP comprises the implementation of the so-called "Petersberg tasks" mentioned under Art. 17 (2) of the Treaty of the European Union (TEU). These "Petersberg tasks" foresee humanitarian and rescue, peacekeeping tasks, as well as more robust combat operations for crisis management, referred to as peacemaking, which means peace enforcement in this context.⁶⁹¹ This particular argument about maintaining Austria's capacity of participating in international operations was to recur at various stages until the early autumn of 2007, as shall be commented on further *infra*.⁶⁹²

⁶⁸⁸ International Campaign to Ban Landmines, "Country and Area Reports: China", Landmine Monitor Report 2008, <http://lm.icbl.org/index.php/publications/display?url=lm/2008/countries/china.html> (last visited 22 January 2010).

⁶⁸⁹ International Campaign to Ban Landmines, "Country and Area Reports: Russia", Landmine Monitor Report 2008, <http://lm.icbl.org/index.php/publications/display?url=lm/2008/countries/russia.html> (last visited 22 January 2010).

⁶⁹⁰ International Campaign to Ban Landmines, "Country and Area Reports: United States of America", Landmine Monitor Report 2007, <http://lm.icbl.org/index.php/publications/display?url=lm/2007/usa.html> (last visited 22 January 2010).

⁶⁹¹ These tasks are named "Petersberg tasks" after the Petersberg Conference near Bonn where the Foreign and Defence Ministers of the Western European Union convened in 1992 to decide on the tasks of this alliance. The term "peacemaking" was chosen instead of "peace enforcement" to avoid constitutional legal problems for Germany. See H. Neuhold, "The European Union at the Crossroads: Three Major Challenges", in P. Fischer, M.M. Karollus & S. Stadlmeier (eds.), *Die Welt im Spannungsfeld zwischen Regionalisierung und Globalisierung: Festschrift für Heribert Franz Köck* 253, at 256-257, n. 6 (2009).

⁶⁹² See *infra* pp. 214-231.

One day after this briefing, on 12 July 2006, parliamentary debate on the request submitted by the ÖVP and the BZÖ revealed fundamental differences in position between the government and opposition parties. In their statements both SPÖ and Green Party MPs referred to specific information on cluster munitions provided by the NGOs at the briefing the day before and regretted that it had not been possible to arrive at a common position on the prohibition of all types of cluster munitions, including those with an allegedly low failure rate.⁶⁹³ These statements attest to the fact that information provided by humanitarian NGOs/civil society organisations may have a great impact on MPs and may trigger parliamentary action.

However, at this stage, this information had not yet convinced the governmental parties, as is revealed by the statements of ÖVP, BZÖ MPs as well as the then State Secretary. These statements emphasised the need for the realistic solution of proceeding in a first step to reduce the failure rate of the explosive sub-munitions rather than aiming at the remote goal of a total prohibition, especially without the participation of the major military powers China, Russia and the United States.⁶⁹⁴

Finally, the ÖVP/BZÖ request was adopted as a parliamentary resolution by majority, with the SPÖ and Green opposition voting against. It read as follows:

“The Austrian Federal Government is requested,

1. to transmit Protocol V on the Convention on Conventional Weapons (CCW) to the Austrian National Council for ratification as speedily as possible as soon as the legal requirements are fulfilled and all authentic versions of the treaty text required for ratification are available;
2. to continue to actively support the establishment of a CCW-Protocol on cluster munitions and cluster bombs or *any other adequate international legal instrument*, since cluster bombs and cluster munitions with a high failure rate may have similar effects and humanitarian consequences as anti-personnel mines;
3. to declare – through the adoption of national legislation or in any other adequate manner – if needed, also unilaterally – that Austria is neither developing nor producing, transferring, stockpiling, nor using cluster bombs and cluster munitions with a high failure rate.”⁶⁹⁵

Since the resolution as adopted only supports international and national measures in relation to cluster bombs and cluster munitions *with a high failure rate*, it certainly came as a disappointment to the ban advocates AAMV/CMC-Austria, the SPÖ and the Green Party.

⁶⁹³ The statements referred hereinafter are all available at Austrian National Council, Stenographic Protocols of the 158th Session of the National Council of the Republic of Austria, XXII. GP (legislative period), 12 July 2006, http://www.parlament.gv.at/PG/DE/XXII/NRSITZ/NRSITZ_00158/fname_069221.pdf (last visited 22 January 2010). See Statement by MP Walter Posch (SPÖ), at 182-183; Statement by Ulrike Lunacek (Green Party), at 185-186.

⁶⁹⁴ See *ibid.*, Statement by State Secretary Hans Winkler, at 187-188; Statement by MP Markus Fauland (BZÖ), at 192-193; Statement by MP Walter Murauer (ÖVP), at 198.

⁶⁹⁵ Austrian National Council, Parliamentary Resolution of 12 July 2006, http://www.parlament.gv.at/PG/DE/XXII/I/I_01608/fnameorig_066725.html (last visited 22 January 2010).

However, it contained the important addition that the Austrian government was requested *not only* to actively support a new international convention on cluster munitions *within the CCW* but also “*any other adequate international legal instrument*”. Importantly, this was to enable Austria to support the adoption of an international convention *outside the CCW*. This crucial wording was inserted as a result of intense lobbying efforts by AAMV/CMC-Austria.

It was a macabre coincidence that on the very same day, the armed conflict between the Israeli Defence Forces and Hezbollah erupted in Lebanon and Northern Israel with both parties to the conflict using cluster munitions, as was already detailed *supra*.⁶⁹⁶ In this context, most importantly, the fact that sub-munitions of the type M 85 with the allegedly reliable self-destruct mechanism failed in far greater numbers than claimed by producers who had assured that the failure rate would be less than 1% served to actively undermine the approach just taken by the majority of the Austrian National Council.⁶⁹⁷

The grave humanitarian impact of cluster munitions on civilians in Lebanon certainly increased the momentum to urgently take steps on the international level. From 6 to 17 November 2006, states parties to the CCW met for the Third Review Conference to the CCW in Geneva. Austria was at the forefront of efforts to achieve a negotiating mandate for a new international treaty on cluster munitions within the CCW. It was in an initial group of six states that advocated such a mandate and was instrumental in efforts to increase the number of states in favour of a negotiating mandate of the CCW for a new international treaty to thirty until the end of the conference.

The statements of Austrian diplomats revealed a strengthened national position. The parliamentary resolution of 12 July 2006 only sought to prohibit cluster munitions with high failure rates. Therefore, it only focused on the post-conflict problem of cluster munitions leaving unexploded submunitions but it did not adequately address the wide area effect of cluster munitions *during* armed conflict. However, the statements of Austrian diplomatic representatives revealed a strengthened national position by emphasising that “Recent events have again shown that, *in addition to the question of the reliability of such weapons, specific rules need to be established addressing their use during conflict situations* [...]”.⁶⁹⁸ This

⁶⁹⁶ See *supra* pp. 38-40 with references.

⁶⁹⁷ See *supra* p. 39.

⁶⁹⁸ Statement by Markus Reiterer, Deputy Permanent Representative to the Conference on Disarmament on the Issue of Cluster Munitions, 8 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/5EEDA6435A3DF914C12572200069B1FD/\\$file/CCW+CONF.III+MCII+AUSTRIA.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/5EEDA6435A3DF914C12572200069B1FD/$file/CCW+CONF.III+MCII+AUSTRIA.pdf) (last visited 22 January 2010); Statement by Wolfgang Petritsch, Permanent Representative of Austria to the Conference on Disarmament on the Issue of Cluster Munitions, 13 November 2006,

constituted a clear acknowledgement of the humanitarian problems associated with cluster munitions *during* armed conflict. Still, the statements contained the following caveat: “This is not a proposal for a total ban on cluster munitions.”⁶⁹⁹ Therefore, this caveat made clear that at that stage, Austria was still not prepared to ban all types of cluster munitions.

The proposal of the group of about thirty states which included Austria failed to achieve the required consensus as a result of opposition of major military powers like the United States, Russia and China at the end of the conference. This outcome prompted Norway to press forward and announce its readiness to lead a process *outside* the framework of the CCW which should start in Oslo in early 2007. For Austria’s support of this new process, the above-mentioned wording of the Austrian parliamentary resolution where the Austrian government was requested *not only* to actively support a new international convention on cluster munitions *within the CCW* but also to support “*any other adequate international legal instrument*” had now acquired vital significance. Austria’s support of this new process also laid to rest the position advocated earlier according to which international efforts to alleviate civilian harm resulting from cluster munition use must include the major user and producer states.

The Review Conference also provided an opportunity for AAMV/CMC-Austria to exchange ideas with international NGO colleagues on campaign strategies on a national level. As a result of such exchanges, especially parallels between the national situations in Austria and Norway were identified. Norway had a stockpile of a variant of M85 of essentially the same type as Austria.⁷⁰⁰ Like Austria, Norway also had a national policy in place according to which cluster munition stockpiles had to have a failure rate per sub-munition of less than 1%. The rationale behind this policy was the confidence by the Norwegian government that its existing stockpiles of M 85 type sub-munitions met this requirement. However, a serious blow was dealt to this confidence in late 2005 for the first time when parallel tests conducted in Norway of British and Norwegian stockpiles of those kinds of sub-munitions showed failure rates of more than 1%. New tests in Norway were ordered to conclude whether or not the Norwegian stockpile complied with the self-imposed 1% limit. Until that was conclusively established, the Norwegian government declared a temporary unilateral moratorium on all

[http://www.onug.ch/80256EDD006B8954/\(httpAssets\)/4490CD0C4F68A995C125722E005FB1D5/\\$file/10+Au%20ria.pdf](http://www.onug.ch/80256EDD006B8954/(httpAssets)/4490CD0C4F68A995C125722E005FB1D5/$file/10+Au%20ria.pdf) (last visited 22 January 2010).

⁶⁹⁹ *Ibid.*

⁷⁰⁰ These artillery-delivered cluster munitions are called Deutsches Modell (DM) 642 which contain 63 DM1383 sub-munitions and DM 662 with 49 DM1385 sub-munitions, the latter being essentially the same as M85 sub-munitions with self-destruct mechanisms. These sub-munitions are both German Rheinmetall licence productions of Israeli Military Industries’ M85 sub-munitions.

types of cluster munitions in its arsenals, including those with an alleged failure rate of less than 1% in June 2006. The tests conducted in autumn 2006 established an overall average failure rate of just over 1%.⁷⁰¹ After these tests, Norway decided to extend its own moratorium on all types of cluster munitions, including the M 85 sub-munitions in November 2006, not only because its belief that its own stockpiles of cluster munitions with self-destruct mechanism met the 1% limit had been seriously shattered but also to give Norway the necessary credibility on the international plane, since it had decided to lead international efforts to achieve an international ban on cluster munitions that cause unacceptable humanitarian harm.⁷⁰²

As a result, AAMV/CMC-Austria took up suggestions to proceed in stages and to call for a national moratorium on all types of cluster munitions instead of a national ban law right away. This helped to ensure a more coherent campaign strategy of AAMV/CMC than that advocated previously. In its correspondence from now on, a recurring key message conveyed by AAMV/CMC-Austria was that Austria must also live up to the leadership role on the issue of cluster munitions shown at the CCW Review Conference on the national level by unilaterally declaring a national moratorium on these weapons until the adoption of a new international convention. The momentum for these kinds of messages was right, since after the CCW Review Conference, Austria was effectively in the same boat as Norway so what was achieved on a national level in Norway was definitely also worth pursuing in Austria.

Much earlier than expected these parallels also came to be reflected in terms of concrete action. A press conference held on 7 February 2007 and well-attended by Austrian print and electronic media, was a major opportunity for an urgent appeal to the government, including the newly-appointed Austrian Minister of Defence, Norbert Darabos (SPÖ). AAMV/CMC-Austria as well as Green Party Spokeswoman for Foreign Affairs, MP Lunacek, called on the Minister to unilaterally declare a moratorium on all types of cluster munitions stockpiled by the Austrian Armed Forces, including those with sub-munitions equipped with self-destruct mechanisms. This appeal came right before the Oslo Conference on Cluster Munitions as a first of a series of international conferences outside the framework of the CCW with the aim of prohibiting cluster munitions that cause unacceptable harm to

⁷⁰¹ 192 projectiles of the type DM 662 were fired, containing a total of 9408 M85 type of sub-munitions. Out of this number, 104 duds were left behind, which equates to an average failure rate of 1.11%. See King *et al.*, “M85: An analysis of reliability”, *supra* note 83, at 59.

⁷⁰² Norwegian Ministry of Foreign Affairs, “Norway to take the lead in efforts to achieve an international ban on cluster munitions”, Press Release of 3 November 2006, <http://www.regjeringen.no/en/dep/ud/press/News/2006/Norway-to-take-the-lead-in-efforts-to-achieve-an-international-ban-on-cluster-munitions.html?id=424460> (last visited 22 January 2010).

civilians which had been scheduled by the Norwegian government for 22 to 23 February 2007.

The appeal was broadcast by OE1, the most prominent Austrian radio broadcasting news channel, at 6pm prime time in its daily news journal and reported by various Austrian newspapers on 8 February 2007.⁷⁰³

Finally, on 19 February 2007, Minister for Foreign Affairs Ursula Plassnik and Minister of Defence Darabos delivered a common statement televised on Austrian national television (ORF) that Austria was now ready to adopt a national moratorium on cluster munitions.

Indeed, the timing of that decision was influenced by the beginning international diplomatic process and by the leadership role that Austria intended to play at the Oslo Conference on Cluster Munitions. As the Minister of Foreign Affairs stressed on 20 February in a common Press Release with the Minister of Defence,

“With this agreement on a comprehensive moratorium on the use of cluster munitions we are sending out a clear and unequivocal signal. Austria is thus consistently maintaining its international leading role in outlawing this type of weapon.”⁷⁰⁴

Plassnik also stressed that the moratorium was only the very first step:

“Our long-term goal is and remains a legally binding international treaty on the prohibition of cluster munitions. In Oslo we will therefore be joining forces with like-minded partner states to call for the elaboration of an international treaty by 2008. Only a legally binding instrument will allow us to effectively combat the disastrous humanitarian effects of cluster bombs at international level. These deadly weapons, which claim numerous victims worldwide every year, must be outlawed internationally. The conflict in southern Lebanon in summer 2006 clearly evidenced the urgent need for international action against cluster munitions. The international community is called upon to take concrete measures against the appalling and inhumane effects of this type of munitions. Austria is therefore ready to organise a follow-up to the Oslo Conference to take place in Vienna in autumn 2007.”

The Minister of Defence on his part made it clear that

“the use of cluster munitions can cause unbearable suffering among civilian populations. I personally was deeply shocked by the terrible images from the Lebanon we saw last year. We are thus taking a first elementary step to start putting an end to this horror. Although Austria possesses state-of-the-art munitions of this type with a very low failure rate for defence purposes only, we will renounce the use of these weapons. I do not see this renouncement as having any impact on our national defence, on the protection of our soldiers on duty or on our international obligations of solidarity. An international renouncement of this kind is also in the interest of our soldiers on duty or on our international obligations of solidarity.”

⁷⁰³ See, e.g., H. Dumbs, “Streumunition: Klein, bunt, tödlich”, *Die Presse*, 8 February 2007, <http://diepresse.com/home/politik/aussenpolitik/108461/index.do?parentid=0&act=0&isanonym=0> (last visited 22 January 2010); A. Parragh, “Gegen Bomben”, *Salzburger Nachrichten*, 8 February 2007, <http://search.salzburg.com/articles/1930590?highlight=Streubomben> (last visited 22 January 2010); R. Klär, “Initiative gegen Streubomben: Österreich soll Vorreiter sein”, *Kurier*, 8 February 2007, at 8 (on file with the author).

⁷⁰⁴ Austria, Ministry of European and International Affairs & Ministry of Defence, “Plassnik/Darabos: Austria renounces use of cluster munitions”, Press Release, 20 February 2007, <http://www.bmeia.gv.at/index.php?id=62390&L=1> (last visited 22 January 2010).

In that spirit, it was announced that Austria would issue a declaration regarding the moratorium at the Oslo Conference.⁷⁰⁵ Thus, the parallel to Norway is again apparent, since the moratorium was declared for the main reason of playing a leadership role in outlawing these weapons on the international level. The statement of the Minister of Defence significantly adds an argument on the limited military necessity of these weapons in national defence as well as multinational operations.

In accordance with the Ministry of European and International Affairs and the Ministry of Defence statements, on 21 February 2007, the Council of Ministers of the Austrian government took a unanimous decision regarding the national moratorium on the use of all types of cluster munitions, including those types constituting an M-85 variant with self-destruct mechanism also known as the “Hohlladungssprengkörpergranaten”. Significantly, the Council of Ministers also decided to uphold the comprehensive moratorium even if a future international convention should not be adopted or should fail to achieve such a far-reaching solution. Since Austria was neither producing nor transferring cluster munitions, the only thing remaining to be done in Austria was to prohibit the continued stockpiling of such weapons.

On 22 February 2007, the first day of the Oslo Conference on Cluster Munitions, the Austrian representative, in line with the earlier announcement provided a positive impetus by informing the other states present of the national moratorium and declaring Austria’s readiness to host a diplomatic conference on cluster munitions at the end of 2007. However, in Austria’s statement, it was also noted that “this moratorium will in no way interfere with Austria’s military commitments in international crisis management operations.”⁷⁰⁶

This caveat may be interpreted as reassuring states using cluster munitions with which Austria may undertake joint military operations, for instance within the context of operations with a UN Charter Chapter VII-authorisation, NATO Partnership for Peace (PfP) or the ESDP, that the continued participation of Austria in such operations would not be endangered or hampered with this self-imposed unilateral constraint. The continued collaboration with states opposed to prohibiting cluster munitions in joint military activities, the so-called “military interoperability” was to remain a debated issue in Austria in the drafting process of

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Republic of Austria, Statement by Ambassador Wolfgang Petritsch, On the Austrian Moratorium Concerning the Use of Cluster Bombs and Cluster Munitions, Oslo, February 22, 2007, available at <http://www.regjeringen.no/upload/UD/Vedlegg/ClusterAustria%20Petritsch.pdf> (last visited 22 January 2010).

its subsequent federal legislation on cluster munitions. This concern was also a prelude of similar concerns expressed by other participant states in the Oslo process when it came to negotiating a new convention on cluster munitions.

The national moratorium set in motion further parliamentary activity. Still on 22 February 2007, Green Party MP Lunacek submitted two parliamentary questions⁷⁰⁷ to Defence Minister Darabos in the Austrian National Council:

1. “In the aftermath of the Austrian moratorium, are you envisaging a national federal law on a total ban on cluster bombs and cluster munitions (i.e. on the use, stockpiling, development and production)?
2. Are you going to order the destruction of cluster munition stockpiles of the Austrian Armed Forces (especially those of the type M-85/155 mm)? If not, what should these stockpiles be used for? Are you possibly envisaging the sale of these stockpiles?”⁷⁰⁸

Before the MP submitted the parliamentary questions, she consulted with AAMV/CMC-Austria whose position was that the Austrian government’s declaration of a national moratorium could not be the end of the matter. A Federal Act on the total prohibition of cluster munitions which would also include the destruction of existing cluster munition stockpiles of the Austrian Armed Forces would be a logical next step.

In his reply dated 11 April 2007 to these parliamentary questions, Defence Minister Darabos stated that to him as the Federal Minister of Defence it was of great interest to lobby for an international prohibition of such means of combat and that he considered Austria’s leadership role important in this regard. Therefore, a sale of existing cluster munition stockpiles of the Austrian Armed Forces was out of the question. However, since cluster munitions are technically highly complex weapon systems an internal Ministry of Defence

⁷⁰⁷ Similar to parliamentary resolutions, under Austrian constitutional law, parliamentary questions are a means by which MPs may control the exercise of executive power. Art. 52 of the Austrian Federal Constitutional Law (B-VG) speaks to this issue, providing for the right of MPs to interrogate members of the Austrian federal government about all subjects pertaining to the exercise of the executive power. This provision of the Austrian Federal Constitutional Law provides the basis for a more detailed regulation of this right of interrogation in Section 91 of the 1975 Federal Law on the Rules of Procedure of the National Council (Bundesgesetz über die Geschäftsordnung des Nationalrates), which in relevant part reads as follows: “Parliamentary questions, which an MP would like to address to the Federal Government or one of its members during a session, are to be submitted to the President of the National Council with at least four copies in writing. They must be signed personally by at least five MPs, including the one asking the question [...]. The one to whom the question is addressed must answer it orally or in writing within two months after it has been submitted to the President [...].” See http://www.parlinkom.gv.at/PA/RG/GONR/gog13_Portal.shtml (last visited 22 January 2010).

⁷⁰⁸ Parliamentary Questions by MPs Lunacek & Friends to the Federal Minister of Defence Concerning the Process for an International Prohibition and the Adoption of an Austrian Moratorium on Cluster Munitions and Cluster Bombs, No. 361/J, XXIII. GP, 22 February 2007, http://www.parlament.gv.at/PG/DE/XXIII/J/J_00361/fnameorig_072975.html (last visited 22 January 2010).

review process was underway about the future course of action in relation to these stockpiles.⁷⁰⁹

The demands put forward by AAMV/CMC-Austria and Green Party MP Lunacek spurred further parliamentary action. On 24 April 2007, the SPÖ on their part introduced a first initiative for an Austrian Federal Act on the Prohibition of the Development, Procurement, Sale, Export, Import, Transit, Use and Possession of Cluster Munitions. This initiative read as follows:

“Definitions

§ 1. For purposes of this Federal Act:

1. “Cluster munitions” are munitions containing explosive sub-munitions, deployed by a means of delivery and designed to detonate on impact with a statistical distribution in a pre-defined target area;
2. “Cluster bombs” are containers including cluster munitions and releasing them upon activation.

Prohibitions

§ 2. The production, acquisition, sale, procurement, import, export, transit, use and possession of cluster munitions and cluster bombs are prohibited.

Exceptions

§ 3. Cluster munitions and cluster bombs which are intended exclusively for training of the Armed Forces or for demining or clearance purposes shall not be covered by the prohibition pursuant to § 2.

Penal Sanctions

§ 4. Anybody who, even if merely negligently, violates § 2 of this Federal Act shall be punished by a court of law either with a prison sentence of up to two years or with a fine of up to 360 daily rates [Tagessätze], provided the act is not subject to more severe punishment under other Federal Acts.

Seizure and Forfeiture

§ 5. (1) Cluster munitions and cluster bombs, which are subject to prohibition under § 6, shall be seized by a court of law.

(2) Machines and facilities for the production of cluster munitions prohibited under § 2 may be declared forfeit by a court of law. At the expense of the owner, it must be ensured that they can no longer be used in violation of the prohibition laid down in § 2.

(3) Means used to transport items subject to the prohibitions laid down in § 2 may be declared forfeit by a court of law.

(4) Items forfeit according to paras. 2 and 3 shall pass to the ownership of the Federation. Items seized according to para. 1 shall pass to the ownership of the Federation.

⁷⁰⁹ Written Reply by Mag. Norbert Darabos to Written Parliamentary Questions by Mag. Lunacek, & Friends, No. 361/J, 330/AB XXIII. GP, 11 April 2007, http://www.parlinkom.gv.at/pls/portal/docs/page/PG/DE/XXIII/AB/AB_00330/fnameorig_075817.html (last visited 22 January 2010).

Transitional Provision

§ 6. The prohibition of the possession of cluster munitions and cluster bombs pursuant to § 2 shall not apply to stockpiles of the Armed Forces existing on the date of the entry into force of this Federal Law, § 3 notwithstanding.

Execution

§ 7. This Federal Law shall be executed by:

1. The Federal Minister of the Interior and the Federal Minister of Defence with regard to § 3,
2. The Federal Minister of Justice with regard to §§ 4 and 5,
3. The Federal Minister of Defence with regard to § 6,
4. The Federal Minister of the Interior with regard to all other provisions.

Entry into Force

§ 8. This Federal Law shall enter into force on 1 May 2007.

Explanatory Memorandum Special Part (Relevant Extracts)

On § 1:

The selected definition of “cluster munitions” was modelled after a request submitted by the government coalition parties in the German Bundestag and adopted by a majority in June 2006 (German Bundestag Doc. No. 16/1995 of 28 June 2006). The characteristics of cluster munitions are the lack of an autonomous target detection capability and as a rule, the presence of a large number of duds posing a threat to civilians. The term cluster munitions does not comprise munitions that are delivered by direct fire, flare and smoke ammunitions, sensor fused munitions with a capability of individual target detection, non-explosive sub-munitions as well as landmines. Also cluster munition delivery systems, notably cluster bombs should be captured by the prohibition.

On § 2:

The prohibition forms the core content of this Bill. [...] cluster munitions may have an effect equal to that of antipersonnel mines. It was therefore appropriate to model draft § 2 after the prohibitions contained in the Federal Act on the Prohibition of Antipersonnel Mines.

On § 3:

The exception to the prohibitions pursuant to § 2 is intended to allow – in the same way as § 3 of the Federal Act on the Prohibition of Antipersonnel Mines (Federal Law Gazette I, No. 13/1997)– for training purposes of the Armed Forces or for purposes of clearance services, for the retention of some cluster munitions that are otherwise prohibited.

[...] On § 6:

In general, the Armed Forces are also addressees of the provisions of § 2 together with the exceptions laid down in § 3. Due to the costs involved, currently no provision shall be made for the destruction of existing stockpiles [...].”⁷¹⁰

⁷¹⁰ Bill submitted by MPs Dr. Einem, Gaal, Ing. Gartlehner, Parnigoni Concerning a Federal Act on the Prohibition of Cluster Munitions and Cluster Bombs, No. 192/A XXIII. GP, 24 April 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/A/A_00192/fnameorig_076335.html (last visited 22 January 2010).

While commendable in general, the Bill still revealed some shortcomings. Firstly, under § 1, the Bill included both a definition of “cluster munitions” as well as “cluster bombs”. With regard to “cluster bombs”, it suggested that “cluster bombs” are containers which include “cluster munitions”. However, cluster bombs also fall under “cluster munitions” of which they are the air-dropped variant. “Cluster munitions” may also be delivered by *e.g.* means of artillery rockets or howitzers. Therefore, “cluster munitions” are a generic term for any kind of artillery- or air-delivered weapon system in this context.

Also, the definition was modelled after that proposed by the German Bundestag; this in itself was not free from difficulties, since for quite some time the German official position was to support only a prohibition of cluster munitions with a dud rate higher than 1%.⁷¹¹ In this vein, while it is commendable that the Bill did not subscribe to this German restriction it engaged in a “copy and paste” exercise of the German Bundestag resolution in the Explanatory Memorandum. However, when closely compared to the Explanatory Report on the German Bundestag resolution, the latter appeared to be more accurate to the extent that it described cluster munition delivery means as *including artillery shells, missiles or aircraft*. From this it follows that cluster munitions equally encompass air-launched *cluster bombs*, which should have also been reflected in this draft. Moreover, neither in outlining the problematic characteristics of cluster munitions nor in the proposed exceptions did this draft contain any independent analysis or reasoning compared to the German original.

As regards the way in which the post-conflict problems associated with cluster munitions were framed, notably that the problem consisted in “duds posing a threat to civilians”, this begs the question of whether there may be any duds *not posing any threat to civilians*.

In respect of the proposed exceptions, notably direct-fire munitions, smoke and flare ammunition, sensor-fused weapons, non-explosive sub-munitions and landmines, it may be argued that only smoke and flare ammunitions and non-explosive sub-munitions definitely do

⁷¹¹ See, in this respect, *e.g.* Statement by H. E. Ambassador Friedrich Gröning, Commissioner of the Federal Government for Arms Control and Disarmament, Federal Foreign Office, Berlin, Third Review Conference to the CCW, Geneva, 7 November 2006, with the German Bundestag Parliamentary Resolution of 28 September 2006 [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/53DB78DB1039B635C125722000470940/\\$file/04+Germany.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/53DB78DB1039B635C125722000470940/$file/04+Germany.pdf) (last visited 22 January 2010).

not give rise to fundamental humanitarian concerns. Whether this is the case with direct-fire munitions and sensor-fused munitions is open to question.⁷¹²

Direct-fire munitions is a term for munitions used when the target may be seen with the naked eye by those firing and which explode within line of sight; these kinds of munitions may be distinguished from indirect-fire munitions where the person operating the weapon does not see the target but points the weapon in a certain direction upon instructions by others.⁷¹³ However, while the principle that munitions used in a direct-fire mode tend to be more accurate is acknowledged, doubts have been expressed whether certain cluster munitions fired from helicopters or main battle tanks are in fact direct-fire weapons understood in this sense, as these weapons are intended for targets that are *not* visible for the user like entrenched infantry and targets hidden behind obstacles.⁷¹⁴ Even in case cluster munitions were to be used as direct-fire munitions, this would contribute nothing to addressing the post-conflict legacy problem of unexploded sub-munitions.⁷¹⁵

With regard to sensor-fused munitions, their functioning and potential problematic characteristics have already been analysed *supra*.⁷¹⁶ The main drawbacks of the proposed exception were that it was a broadly-phased exception that would not take into account the existence of different types of sensor-fused munitions, for example in terms of the number of sub-munitions, and did not provide any independent answers to the questions already raised.

Moreover, the question arose whether the proposed exception for retention of cluster munitions for training purposes of the Armed Forces or for clearance under § 3 was necessary. This exception was modelled after the same exception contained in the Federal Act

⁷¹² On the issue of “landmines”, one could insert an exception on account of the fact that these weapons are already prohibited (anti-personnel mines under the 1997 Ottawa Convention) and/or regulated elsewhere (all mines but in particular anti-vehicle mines under the 1996 Amended Protocol II to the CCW). However, in the International Mine Action Standards which reflect generally accepted standards for clearance operations recognised by the UN Mine Action Service and other UN agencies, mines, especially remotely delivered landmines, which form part of a Cluster Bomb Unit (CBU), artillery shell or missile payload were included in the definition of “sub-munitions”. See International Mine Action Standards 04.10, Glossary of mine action terms, definitions and abbreviations, No. 3.255, 2nd ed., 2003, http://www.mineactionstandards.org/IMAS_archive/Amended/Amended3/IMAS_04.10_Edition2_Jan2008rev.pd (last visited 22 January 2010). See also, UNMAS, UNDP & UNICEF, “Proposed definitions for cluster munitions and sub-munitions”, 8 March 2005, UN Doc. CCW/GGE/X/WG.1/WP.3. In addition, certain states like the United States formally designate certain aerially-delivered mines as cluster bombs, for example, the CBU-89/B and the CBU-104 systems which contain a mix of anti-vehicle and anti-personnel mines called “Gator”. The very denomination of “Cluster Bomb Unit” (CBU) in connection with using these containers also for delivery of scatterable anti-vehicle mines is evidence that such mines can be seen as similar to cluster munitions. However, any mines were subsequently excluded from the new Convention on Cluster Munitions. See Art. 1 (2), Convention on Cluster Munitions, *supra* note 33.

⁷¹³ See Dullum, “Cluster weapons”, *supra* note 36, at 17.

⁷¹⁴ *Ibid.*, at 17, 24.

⁷¹⁵ Geneva International Centre for Humanitarian Demining, “A Guide to Cluster Munitions”, First Edition, *supra* note 375, at 19.

⁷¹⁶ See *supra* pp. 27-28, 37-38, 78-80.

on the Prohibition of Antipersonnel Mines. However, it may be instructive to note that in practice Austria in the antipersonnel mine context never availed itself of the possibility to retain live mines for these purposes.⁷¹⁷

Finally, the transitional provision under § 6 of this draft could be regarded as unsatisfactory at that stage. Austria has neither been a producer nor user of cluster munitions, however, it was stockpiling these weapons. Therefore, in the only instance where such a Bill would make a significant practical difference in Austria, it carved out a transitional provision for stockpiles held by the Austrian Armed Forces upon entry into force and failed to provide for the destruction of these stockpiles at a later stage. The Explanatory Memorandum on § 6 only specified that due to the destruction costs currently no stockpile destruction was envisaged without recommending any course of action on how to proceed with these stockpiles in the future.

In any event, while this first Bill suffered from certain weaknesses it increased pressure on the government to proceed with the drafting of a law.

Besides the first initiative for a Cluster Munitions Prohibition Bill, the SPÖ submitted a further set of the following parliamentary questions to Defence Minister Darabos:

1. What types of cluster munitions and how many are in the possession of the Austrian Armed Forces?
2. On which date were these munitions procured?
3. What were the costs of procurement (in €)?
4. What was the proportion of these costs in relation to the overall procurement costs of the Armed Forces in the year of procurement?
5. What is today's value of these munitions?
6. What military reasons were advanced for this procurement?
7. Who drafted this reasoning?
8. What led the Ministry of Defence – on the occasion of drafting the analysis part of the Austrian Security Doctrine – already in 2001 to conclude that within the next twenty years there was no prospect of Austria facing any threat from traditional military attack?
9. Were these findings still not available at the time of cluster munition procurement?
10. Who finally sanctioned by signature the procurement process before it was completed?

⁷¹⁷ This may be seen from transparency reports submitted by Austria as a state party to the 1997 Ottawa Convention required under Art. 7. For Austria's Art. 7 reports received 1999-2004, see <http://disarmament.un.org/MineBan.nsf> (last visited 22 January 2010). For those received 2005-2009, see [http://www.onug.ch/80256EE600585943/\(httpPages\)/A5378B203CBE9B8CC12573E7006380FA?OpenDocument](http://www.onug.ch/80256EE600585943/(httpPages)/A5378B203CBE9B8CC12573E7006380FA?OpenDocument) (last visited 22 January 2010). Indeed, not only Austrian national legislation but also the 1997 Ottawa Convention allows in Art. 3 the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques. However, also this exception in the context of anti-personnel mines was subject to debate; on the one hand, there is the argument that live mines are needed to conduct a real-life simulation of mine attacks or contamination and to develop military countermeasures and demining techniques. This was opposed by those who maintained that even for these purposes no live mines would be needed; rather, these purposes could be achieved by using "dumb" or "inert" mines. The second problem with the retention of anti-personnel mines for these purposes was that this possibility was limited to the "minimum number absolutely necessary." There have been difficulties as to specify how many mines can be retained without undermining the limited purposes of this exception and effectively keeping an operational stockpile under the guise of training. On this debate in the 1997 Ottawa Convention context, see Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 134-148.

11. In case it was not the Minister of Defence: What discretion did the civil servants of the Ministry of Defence have in questions of procurement?
12. How many of those cluster munitions in possession of the Austrian Armed Forces are still needed by the Armed Forces or by demining and clearance services [in the Ministry of the Interior] for purposes of training – especially of clearance personnel?
13. What are the costs of safe elimination (destruction) of cluster munition stockpiles held by the Austrian Armed Forces that would be in excess of those [needed for training purposes]?
14. What are the costs of stockpiling these cluster munitions in accordance with usual microeconomic calculation methods?⁷¹⁸

These parliamentary questions served the important purpose of pressuring the Minister of Defence into being completely transparent to the public on the prevailing Austrian situation in connection with cluster munitions. In this respect, they also contributed to carrying forward the debate on stockpile destruction and thus, remedying a fundamental deficit contained in the first Bill.

Exactly two months later, Defence Minister Darabos submitted his reply to these parliamentary questions.⁷¹⁹ He stated that the Austrian Armed Forces are stockpiling 12.672 so-called “Hohlladungssprengkörpergranaten” 92. Procurement of these stockpiles occurred in 1998 and 1999. The overall costs of procurement amounted to around 20,86 Mio. € of which 6,88 Mio. were spent in 1998, 9,58 Mio in 1999 and 4,40 Mio. in 2000. In relation to the overall budgetary post “Munition and Means of Short-Range Combat” [VA-Post 4591 “Munition und Nahkampfmittel”] this amounted to proportionate shares of 25,89% for the year of 1998, 33,97% for the year of 1999 and 17,85% for the year 2000. Today’s value of these munitions revolves around 10,44 Mio. €. As to the question of the military reasoning behind procurement, Darabos replied that in the catalogue of military duties of 1992 it was specified which tasks may be accomplished by the Artillery [Divisions of the Austrian Armed Forces] with the types of munitions introduced into the Austrian Armed Forces. Therein, it was also stated that with the munitions then at the disposal of the Austrian military only unarmoured targets could be engaged and that the means of combating armoured targets were limited. This catalogue of military duties was compiled by the then expert officer of the Artillery Division. On the Austrian Security and Defence Doctrine and the prospects of military threats to Austria, the Minister of Defence replied that in accordance with the military

⁷¹⁸ Parliamentary Questions by MPs Dr. Caspar Einem and Comrades to the Minister of Defence Concerning the Procurement of Cluster Munitions (Cluster Bombs and Howitzer Grenades) by the Austrian Armed Forces, 26 April 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/J/J_00723/fnameorig_076781.html (last visited 22 January 2010).

⁷¹⁹ Reply by Minister of Defence Norbert Darabos to the Parliamentary Questions (723/J) submitted by MPs Caspar Einem and Comrades to the Minister of Defence Concerning the Procurement of Cluster Munitions (Cluster Bombs and Howitzer Grenades) by the Austrian Armed Forces, 26 June 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/AB/AB_00742/fnameorig_081788.html (last visited 22 January 2010).

intelligence service findings then at their disposal, the Austrian Security and Defence Doctrine of 2001 proceeded from the assumption that the prospects of a direct military threat through conventional armed forces for Austrian territory have significantly decreased; however, such a threat could not be entirely ruled out.

If one accepts the fundamental rationale of cluster munition procurement by Austria as enhancing the Austrian Armed Forces' capability to engage armoured targets, this statement quite clearly illustrates that the likelihood of conventional armed forces equipped with a large number of armoured vehicles advancing against Austria is quite minimal indeed. Such a threat scenario was paradigmatic of the Cold War era when Western states were afraid that Warsaw Pact states could attempt to overrun them with large numbers of personnel and tanks; however, contemporary security threats are quite different, as, for instance the European Security Strategy emphatically demonstrates. The key threats listed in the European Security Strategy do not include conventional inter-state warfare on a massive scale but rather global terrorism; acquisition of weapons of mass destruction capabilities by non-state actors; regional conflicts; state failure fuelling civil conflicts; as well as organised crime.⁷²⁰ This is in line with observations already made that contemporary armed conflicts are predominantly of an asymmetrical character. In view of these changed realities, the justification for procuring cluster munitions, notably for enhancing military capability against armoured targets, is not particularly strong.

However, the findings of the Austrian Military Intelligence Service (Heeresnachrichtendienst) leading to the conclusion that the prospects of a massive military invasion of Austria are thin were not available when the catalogue of military duties was drafted in 1992 and the cluster munition procurement process initiated in 1996, as the reply to the next question indicates. According to Darabos, the signing of the procurement contract was within the competence of the head of the purchase department in the Ministry of Defence, who could handle such matters independently in the name of the Minister of Defence. On question 12, how many of the cluster munition stockpiles were needed for training, the reply by the Minister of Defence interestingly reveals that the "Hohlladungssprengkörpergranate 92" even now was subject to a prohibition of use during training and was only intended for use in actual combat. Also, the clearance of unexploded bomblets was currently not part of the training curriculum of the Austrian Armed Forces. Finally, Minister Darabos also provided figures in relation to the costs likely to be involved for the destruction of the stockpiles and

⁷²⁰ European Security Strategy, "A Secure Europe in a Better World", Brussels, 12 December 2003, <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> (last visited 22 January 2010).

the current costs of stockpiling; the destruction costs would amount to around 1 Mio. €, and the stockpiling costs to around 4.000 € per month.

The now publicly available information on the Austrian situation regarding cluster munitions prompted further efforts in relation to drafting a law. During the summer months, the Ministry of European and International Affairs took the lead and circulated a new draft which read as follows:

“Draft

Federal Act on the Prohibition of Cluster Munitions

Definitions

§ 1. For purposes of this Federal Act,

1. “cluster munitions” are containers including explosive submunitions which are intended to disperse these submunitions over an area in order to detonate them before, on, or after impact; however, this definition shall not comprise containers including submunitions falling under other already existing international law prohibitions or restrictions, flare and smoke ammunitions, pyrotechnical chemicals or sensor fused munitions with a capability to engage individual targets.
2. “procurement” is a transaction by which an Austrian citizen resident in Austria or a legal person, partnership or trading company registered in Austria or any other person, partnership or trading company that becomes active from within Austria is
 - a) negotiating a legal transaction that involves the transfer of cluster munitions from a third country to another third country, or
 - b) arranging such a legal transaction to be accomplished, or
 - c) buying or selling cluster munitions if that causes its transfer from a third country to another third country, or
 - d) arranging a transfer of cluster munitions over which they hold property from a third country to another third country.

Prohibitions

§ 2. The development, production, acquisition, sale, procurement, import, export, transit, use and possession of cluster munitions are prohibited.

Exceptions

§ 3. The prohibitions laid down under § 2 shall not be applicable to

1. cluster munitions which are envisaged exclusively for training of the Austrian Armed Forces or of demining or clearance services;
2. the import, possession and stockpiling of cluster munitions for purposes of their immediate decommissioning or other destruction;
3. within the framework of sending personnel in accordance with the Federal Constitutional Act on Cooperation and Solidarity in Sending Units and Individuals Abroad [Bundesverfassungsgesetz über Kooperation und Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland, in short: KSE-BVG] the participation in the decision on the use of cluster munitions by other states or the logistical implementation of such use.

Destruction

§ 4. Existing stockpiles of cluster munitions prohibited under § 2 must be reported to the Federal Ministry of Defence within one month after the entry into force of this Federal Law and must be destroyed against reimbursement of costs by the Ministry of Defence within three years at the latest.

Penal Sanctions

§ 5. Anybody who, even if merely negligently, violates § 2 of this Federal Law shall be punished by a court of law either with a prison sentence of up to two years or with a fine of up to 360 daily rates [*Tagessätze*], provided that the act is not subject to more severe punishment under other federal legislation.

Seizure and Forfeiture

- § 6. (1) Cluster munitions used to commit an act punishable under § 5 shall be seized by a court of law.
(2) Machines and facilities for the production of cluster munitions prohibited under § 2 can be declared forfeit by a court of law. At the expense of the owner, it must be ensured that they can no longer be used in violation of the prohibitions laid down in § 2.
(3) Means used to transport items subject to the prohibitions laid down in § 2 can be declared forfeit by a court of law.
(4) Items forfeit according to paras. 2 and 3 will pass to the ownership of the Federation [*Bund*].

Execution

§ 7. This Federal Act shall be executed by

1. the Federal Minister of the Interior and the Federal Minister of Defence with regard to § 3 (1) and (2),
2. the Federal Minister of Defence with regard to § 3 (3) and § 4,
3. the Federal Minister of Justice with regard to § 5 and § 6,
4. the Federal Minister of Interior with regard to the remaining provisions.

Entry into Force

§ 8. This Federal Act shall enter into force on 1 December 2007.”⁷²¹

The Explanatory Memorandum contained the following revised passages in comparison to that of the previous Bill:⁷²²

“Explanatory Memorandum

II. SPECIAL PART

On § 1:

The definition of “cluster munitions” was drafted with a view to discussions held on the international level, *inter alia*, within the framework of the Third Review Conference to the CCW or the Oslo process.

The specific characteristics of cluster munitions are their wide area effect, most often the lack of individual target detection and as a rule, the presence of a large number of duds posing a danger to civilians.

In the sense of § 1, “containers” are all delivery systems that include sub-munitions and that may disperse them even if the containers themselves constitute munitions (e.g. grenades). Cluster munitions are not only containers

⁷²¹ Draft, Federal Act on the Prohibition of Cluster Munitions, 24 August 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/ME/ME_00112/fnameorig_085527.html (last visited 22 January 2010).

⁷²² For any subsequent Bills the Explanatory Memoranda shall only be reproduced to the extent that they contained changes and/or raised new issues for debate in comparison to previous ones.

actually filled with sub-munitions but any containers which are designed to disperse explosive sub-munitions that are separated from the container over an area in order to detonate on, before or after impact.

The definition of cluster munitions does not comprise containers including sub-munitions falling under other already existing international law prohibitions or restrictions (see, *e.g.*, Protocol II to the CCW in its version amended on 3 May 1996, Federal Law Gazette III, No. 17/1999), flare or smoke ammunitions, pyrotechnical chemicals and sensor fused munitions with a capability to engage individual targets. The use of these types of weapons does not give rise to the same humanitarian concerns associated with cluster munitions, including the wide area effect and the presence of duds dangerous for civilians. Thus, they shall not be addressed by this Federal Act.

The definition of “procurement” corresponds to the definition laid down in § 1 (4) of the Federal Act on the Import, Export and Transit of War Material, Federal Law Gazette No. 510/1977 in its version currently in force.

On § 3:

The exception under (3) is indispensable for maintaining Austria’s active participation in military operations abroad where the Austrian Armed Forces cooperate with other nations, such as in the framework of the European Security and Defence Policy, the Partnership for Peace, the United Nations or the Organisation for Security and Cooperation in Europe. This exception prevents personnel sent on such missions from possibly falling under the penal provisions of this Federal Act. Notwithstanding this exception, the firing of cluster munitions through a member of an Austrian contingent and the use of Austrian cluster munitions within the framework of such military operations abroad shall still be punishable.

On § 4:

In order to ensure economical destruction of cluster munitions in due course, a maximum period of three years for their destruction is hereby determined.

On § 5:

Because of the analogy between the prohibitions and the similar necessity of prevention, the penal provision and the sentence prescribed was modelled, by analogy, after § 7 (1) of the Federal Act on the Import, Export and Transit of War Material (Federal Law Gazette No. 510/1977) as well as § 5 of the Federal Act on the Prohibition of Antipersonnel Mines (Federal Law Gazette I No. 13/1997).

On § 6:

Seizure and forfeiture are considered to be necessary supplementary measures to the prohibition laid down under § 2 and the provision for penal sanctions under § 5 [...].”⁷²³

In several respects, this draft constituted a significant improvement over the earlier Bill. First and foremost, in the definition contained under § 1, while retaining the fundamentally positive approach of the earlier Bill of a general broad prohibition of cluster munitions, especially including those with allegedly low failure rates and self-destruct mechanisms, no longer does one find the erroneous definition of “cluster bombs” suggested

⁷²³ Explanatory Memorandum to Draft, Federal Act on the Prohibition of Cluster Munitions, 24 August 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/ME/ME_00112/fnameorig_085528.html (last visited 22 January 2010).

previously. Instead, this new draft definition captured the essential components of cluster munitions as a generic category of both ground- and air-delivered types, the container and the explosive sub-munitions, and was simpler and more comprehensive than the earlier one, since it recognised that sub-munitions may not only be designed to explode *on* impact but also *before* or *after* impact. These additions were rightfully added, as some sub-munitions would explode in an airburst mode and others at a certain time after impact due to a time-delay fuse.⁷²⁴ Apart from the more apposite general definition, it may also be approvingly noted that the earlier exception for munitions delivered by direct firing was no longer retained.

In contrast to the earlier Bill, a landmark improvement can also be seen in the fact that this new version did include an explicit provision for the destruction of existing stockpiles within a short period of three years.

Moreover, the new version also prohibited the “development” of cluster munitions, thus extending the scope of the prohibitions and rendering it more expansive than the scope of the Federal Act on the Prohibition of Antipersonnel Mines which does not include such a prohibition.⁷²⁵ This constituted a welcome addition in recognition of the reality that cluster munition production is often only but the result of a lengthy multinational research and production process. In this regard, cluster munition production involves the fabrication and integration of a large number of components, including metal parts, explosives, fuses and packaging materials, and rarely are all components researched into and produced in one location only.⁷²⁶

However, the new draft also retained some weaknesses of the earlier Bill and sometimes included new shortcomings. Falling into the former category is the retention of the broad exception for sensor-fused munitions. Also the Explanatory Memorandum’s justification for this exception remained the same as before, since it again only contains the broad reference that all the exempted types of munitions do not give rise to the same humanitarian concerns associated with cluster munitions. Again this claim is not further substantiated with concrete evidence that this is necessarily the case under actual combat

⁷²⁴ An example of a cluster munition detonated in the air is the CB470 Cluster Bomb with 40 Alpha anti-personnel air-burst sub-munitions. See R. McGrath, “Cluster Bombs: The military effectiveness and impact on civilians of cluster munitions”, UK Working Group on Landmines, September 2000, Appendix, at 55, http://www.landmineaction.org/resources/Cluster_Bombs.pdf (last visited 22 January 2010). An example of a cluster munition which incorporates a time delay element in detonation after impact on the ground is the CBU-71/B where each bomb contains 650 sub-munitions.

While time delay fused sub-munitions are no longer common they were recently considered by some NATO and other countries as alternatives to anti-personnel mines. See M. Hiznay, “Survey of Cluster Munitions Produced and Stockpiled”, ICRC Expert Meeting Montreux 2007, *supra* note 41, at 23.

⁷²⁵ See Federal Act on the Prohibition of Anti-Personnel Mines, Federal Law Gazette BGBl I, No. 13/1997.

⁷²⁶ Cf. M. Hiznay, “Operational and technical aspects of cluster munitions”, *supra* note 231, at 20.

conditions. A new ambiguity was added by the inclusion of a broadly-phrased exclusion for containers including sub-munitions which already fall under existing international law prohibitions or restrictions. While apparently, the purpose of this clause was to exempt chemical, biological sub-munitions or landmines, the necessity for such a broad exemption stands open to question.

A further new weakness of this draft was the exception under § 3 (3), which sought to exempt the participation in the decision on the use of cluster munitions by other states or the logistical implementation of such use within the framework of joint military operations conducted under the auspices of international organisations. Participation of Austrian personnel in such joint military operations is subject to the provisions of the Federal Constitutional Act on Cooperation and Solidarity in Sending Units and Individuals Abroad (Bundesverfassungsgesetz über Kooperation and Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland, in short: KSE-BVG).⁷²⁷ As became clear from the Explanatory Memorandum on this provision, the motivations for that exception were to maintain Austria's active participation in multinational military operations within the frameworks of the ESDP, NATO's Partnership for Peace (PfP), the UN or the OSCE and to prevent personnel sent on such missions from possibly falling under the penal provisions of this Federal Act. Such penal provision was explicitly enshrined in § 5 of the draft. Notwithstanding the lack of a direct reference to it, this explanation implies that in principle also the assistance, encouragement, or inducement of somebody else to commit any of the acts prohibited by § 2 fell under the scope of the penal provision, i.e. assisting foreign personnel in any act prohibited to Austrian soldiers. This is confirmed by § 12 of the Austrian Penal Code which makes it clear that not only the direct perpetrator may commit a criminal offence *but also anybody who induces, encourages or assists another person to commit an offence*.⁷²⁸

The KSE-BVG provides essentially for the sending of persons for purposes of taking measures of securing peace in order to promote democracy, the rule of law and protection of human rights within the frameworks of the above-mentioned international organisations as well as military exercises and training to these ends.

Accordingly, in principle under the proposed national legislation Austrian personnel in multinational operations would be prohibited from using cluster munitions and from engaging

⁷²⁷ Bundesverfassungsgesetz über Kooperation and Solidarität bei der Entsendung von Einheiten und Einzelpersonen in das Ausland, Federal Law Gazette BGBl I, No. 38/1997.

⁷²⁸ See § 12, Austrian Penal Code, Federal Law Gazette No. 60/1974, in force since 1 Jan. 1975.

in a variety of other activities. With regard to these other activities, they would face possible criminal prosecution if they acted in such a way which could be interpreted as “assistance” to any nationally prohibited activity to personnel from other states for whom those activities are not prohibited. Then the underlying assumption was that Austria would have to refrain from participating in such multinational operations altogether whenever there was the possibility of cluster munition-related activities by personnel of another state as to avoid these unappealing consequences for its own personnel.

Moreover, the other assumption was that this would undermine the confidence in Austria as a reliable partner and active participant in such multinational military operations. Especially, such a drastic step would run counter to the concept of “military interoperability” which is defined broadly by the latest version of the NATO Glossary of Military Terms and Definitions as “the ability of military forces to train, exercise and operate effectively together in the execution of assigned missions and tasks.”⁷²⁹ The EU 2010 Military Headline Goal defines military interoperability as “the ability of our armed forces to work together and to interact with civilian tools. It is an instrument to enhance the effective use of military capabilities as a key enabler in achieving EU’s ambitions in Crisis Management Operations.”⁷³⁰ The American-British-Australian-Canadian (ABCA) Coalitions Operations Handbook published by the ABCA Standardisation Office under the ABCA agreement defines interoperability as the “ability of systems, units or forces to provide services to and accept services from other systems, units, or forces and to use the services so exchanged to enable them to operate effectively together.”⁷³¹ For interoperability generally to be achieved, the sharing of common doctrine and procedures, each other’s military equipment and bases, and to be able to communicate with each other, is necessary; joint planning, training and exercises contribute to achieving effective cooperation in these fields.⁷³² To avoid a negative impact on such interoperability functions in multinational operations, the exception was considered indispensable.

⁷²⁹ North Atlantic Treaty Organization Standardization Agency, “NATO Glossary of Terms and Definitions”, June 2007, Doc. AAP-6, at 2-M-6, <http://www.nato.int/docu/stanag/aap006/aap-6-2007.pdf> (last visited 22 January 2010).

⁷³⁰ European Union Headline Goal 2010, European Council of 17-18 June 2004, at para. 3, fn. 1, <http://consilium.europa.eu/uedocs/cmsUpload/2010%20Headline%20Goal.pdf> (last visited 22 January 2010).

⁷³¹ ABCA Coalition Operations Handbook, 1 November 2001, at 253 (Glossary-13), <http://www.transchool.eustis.army.mil/lic/documents/coalition%20ops%20handbook%20nov%2001.pdf> (last visited 22 January 2010).

⁷³² NATO, “Backgrounder: Interoperability for joint operations”, July 2006, at 1, <http://www.nato.int/docu/interoperability/interoperability.pdf> (last visited 22 January 2010).

This presupposed that this dilemma will inevitably arise in multinational operations in which Austria participates. However, this is far from being that clear.

Firstly, one should emphasise that the issue of using cluster munitions in multinational operations would only come into play in case of combat operations. With regard to ESDP operations, this would only be the case with upper-level ESDP operations involving a mandate to engage in peacemaking in accordance with the terms of the EU Treaty. Similarly, concerning NATO's PfP, this would only be relevant for operations within the so-called enhanced PfP which includes measures of peace enforcement. In practice, ESDP and NATO PfP operations may reach this level if they are given a robust mandate by the UN Security Council under Chapter VII of the UN Charter to take all necessary measures, including the use of military force. Combat operations would also be contemplated where UN member states are authorised to conduct enforcement or peace enforcement operations under Chapter VII. One example where cluster munitions were used by a coalition of the able and willing in an enforcement operation authorised by the UN Security Council under Chapter VII was the 1991 Operation Desert Storm.⁷³³

Finally, it may be observed that while the predecessor of the OSCE, the Conference on Security and Co-operation in Europe (CSCE) was established as a regional arrangement under Chapter VIII of the UN Charter which could imply enforcement action undertaken under the auspices of the UN Security Council, it also emphasised that CSCE peacekeeping operations *will not entail enforcement action*.⁷³⁴ Attempts to re-examine the debate on a role for wide scale armed peacekeeping in the OSCE context did not meet favourably with the majority of participating states of the OSCE.⁷³⁵

Therefore, it is submitted that armed peacekeeping operations under the auspices of the OSCE and the issue of cluster munition use is not a likely prospect. For the other frameworks it will be noted that robust combat operations only constitute but a fraction of the spectrum of multinational operations where Austrian personnel might be engaged. What

⁷³³ UN Security Council Res 678, 29 November 1990, UN Doc. S/RES/678 (1990). For details on the scope of use in 1991 Operation Desert Storm, see *supra*, pp. 27-28.

⁷³⁴ Conference on Security and Cooperation in Europe, Helsinki Document 1992, "The Challenges of Change", http://www.osce.org/documents/mcs/1992/07/4048_en.pdf (last visited 22 January 2010).

⁷³⁵ OSCE, Tenth Meeting of the Ministerial Council, Decision No. 4 Reviewing the OSCE Role in the Field of Peacekeeping Operations, 7 December 2002, Doc. MC (10), Dec. 4, http://www.osce.org/documents/mcs/2002/12/4174_en.pdf (last visited 22 January 2010); OSCE, Eleventh Meeting of the Ministerial Council, "Letter from the Chairperson of the Permanent Council to the Minister of Foreign Affairs of the Netherlands, Chairperson of the Eleventh Meeting of the Ministerial Council of the OSCE", 1 and 2 December 2003, http://osce.org/documents/mcs/2003/12/4175_en.pdf (last visited 22 January 2010); Chairman-in-Office's Activity Report for 2003, 20 February 2004, Doc. CIO.GAL/3/04/Rev.3, http://www.osce.org/documents/cio/2004/01/1936_en.pdf (last visited 22 January 2010).

follows is a review of the type of operations with Austrian participation at the relevant time of that debate (September 2007) where combat operations could be involved and thus, cluster munition use would become an issue.

Within the context of the ESDP, theoretically, combat operations would be contemplated by European Union Force (EUFOR)-Althea since its mandate by SC Res 1575 of 2004 includes the authorisation under Chapter VII to use the necessary force to implement the military aspects of the Dayton Peace Agreement just like the predecessor forces Implementation Force (IFOR) and Stabilisation Force (SFOR).⁷³⁶ However, the tasks in practice were not in any way related to combat missions but included implementation of law enforcement activities (criminal searches and investigation) to support local police, support for capacity-building of local police and the return of refugees.⁷³⁷ Thus, it can be said to be unrealistic to assume that the 112 Austrian Armed Forces personnel then serving with EUFOR-Althea would be embroiled in combat.

With regard to EUFOR Chad/Central African Republic, this ESDP operation was also furnished with a robust mandate by the UN Security Council under Chapter VII to *take all necessary measures* to fulfil the tasks assigned to it, notably to contribute to protecting civilians in danger, particularly refugees and displaced persons; to facilitate the delivery of humanitarian aid; and to contribute to protecting United Nations personnel, facilities, installations and equipment.⁷³⁸ Thus, it is not excluded that the multinational troops could be embroiled in combat and there was no doubt as to the insecure environment in which they operated;⁷³⁹ however, it is equally clear that the EU military presence was a temporary mission of a *humanitarian character* which was then converted into reinforcements for the UN peace enforcement mission Mission des Nations Unies en République Centrafricaine et au Tchad (MINURCAT). Given this humanitarian context, it is highly doubtful how the use of cluster munitions could in any way contribute to achieving these objectives in view of the indiscriminate wide area effect of these weapons especially in and around residential areas

⁷³⁶ See UN Security Council Res 1575, 22 November 2004, UN Doc. S/RES/1575; UN Security Council Res 1031, 15 December 1995, UN Doc. S/RES/1031; UN Security Council Res 1088, 12 December 1996, UN Doc. S/RES/1088.

⁷³⁷ G. Hauser, "Österreich – Zehn Jahre Mitgliedschaft in der NATO-Partnerschaft für den Frieden", Österreichische Militär Zeitung, No. 6/2005, <http://www.bmlv.gv.at/omz/ausgaben/artikel.php?id=347> (last visited 22 January 2010).

⁷³⁸ See op. para. 6, UN Security Council Res 1778, 25 September 2007, UN Doc. S/RES/1778 (2007).

⁷³⁹ A recent UN Secretary-General report attests to the insecure environment with the possibility of renewed rebel attacks and the practice of heavily armed bandits who target humanitarian workers and conduct armed robberies. See UN Secretary-General, Report to the UN Security Council on the United Nations Mission in the Central African Republic and Chad, 14 July 2009, UN Doc. S/2009/359, paras. 6-9.

like IDP or refugee camps as well as the post-conflict legacy of duds endangering the lives of the very refugees and displaced people they would be intended to protect.

Moreover, the trends in capability planning in the ESDP context indicate that possible reliance on cluster munitions is not a likely future prospect. As regards ESDP military capabilities where interoperability issues may arise, the 2003 European Security Strategy already significantly states:

“In contrast to the massive visible threat in the Cold War, none of the new threats is purely military; nor can it be tackled by purely military means. Each requires a mixture of instruments.”⁷⁴⁰

Based on this strategic guidance for the ESDP, EU Member States in the Headline Goal 2010 committed themselves to be able by 2010 to respond with rapid and decisive action applying a fully coherent approach to the whole spectrum of crisis management operations covered by Art. 17 (2) TEU and the tasks added by the European Security Strategy.⁷⁴¹

One key element of Headline Goal 2010 is the full operational readiness by 2007 of two simultaneously operating rapidly deployable battlegroups (within 10-15 days) across the whole spectrum of the Petersburg tasks, numbering 1500 personnel each and sustainable for a period of three months, including appropriate strategic lift, sustainability and debarkation assets. At a Military Capability Commitment Conference in November 2004, Austria committed itself to contribute to a battlegroup together with Germany and the Czech Republic.⁷⁴²

Another element of Headline Goal 2010 is the establishment of a European Defence Agency in the field of defence capability development, research, acquisition and armaments intended to contribute to developing benchmarks and milestones in order to evaluate progress towards the achievement of ESDP military capabilities, *inter alia*, concerning interoperability.⁷⁴³

The European Defence Agency, whose decision-making body is composed of the EU High Representative, the Defence Ministers of 26 participating Member States and the Commission,⁷⁴⁴ published a report entitled “An Initial Long-Term Vision for European

⁷⁴⁰ European Security Strategy, “A Secure Europe in a Better World”, *supra* note 720, at 7.

⁷⁴¹ Headline Goal 2010, *supra* note 730, at para. 4.

⁷⁴² Military Capability Commitment Conference, Brussels, 22 November 2004, approved by the General Affairs and External Relations Council, at 9, <http://www.consilium.europa.eu/uedocs/cmsUpload/MILITARY%20CAPABILITY%20COMMITMENT%20CONFERENCE%2022.11.04.pdf> (last visited 22 January 2010).

⁷⁴³ Headline Goal 2010, *supra* note 730, at para. 5.

⁷⁴⁴ The European Defence Agency was established pursuant to Council Joint Action 2004/551/CFSP of 12 July 2004. Also the Lisbon Treaty on the European Union makes reference to the European Defence Agency in Art. 42 (3). See Art. 42 (3), Treaty of the European Union, Consolidated Version, 9 May 2008, Official Journal

Defence Capability and Capacity Shortfalls” in 2006 designed to serve as guidance for defence planners in the development of ESDP military capabilities. The report emphasised that

“[i]n the conduct of war, ever greater attention will be paid to proportion and justification in the application of force, with an increasing tendency to hold individuals responsible for their actions not just at head of state or military commander level but down the command chain. *Attention to collateral damage will be ever more acute.*”⁷⁴⁵

It goes on to state

“All parties in modern conflicts realise that the political outcome will be determined *not just by the achievements of military objectives, but by the manner in which operations are conducted or are perceived to be conducted.* [...] [M]ilitary success achieved in the wrong way can mean political failure.”⁷⁴⁶

These are powerful statements for arguing that there is indeed no room for the use of cluster munitions, since military successes achieved through the indiscriminate targeting of civilians both during and after conflict will not serve the overall political purposes of ESDP crisis management operations.

Then, the report explicitly spoke to the issue of means of combat. In this context it noted

“the widespread perception that technology is putting into military hands the means to conduct operations *with ever greater precision and restraint,*”

and that

“intelligence (or knowledge, or information) will become an ever more important resource for successful operations, whilst kinetic energy has to be applied in ever more precise and limited quantities.”⁷⁴⁷

Most significantly, the report emphasised in this context:

“*Serious thought needs to be given to the future utility of unguided munitions (and of aircraft that cannot use smart weapons), as well as cluster bombs, mines and other weapons of indiscriminate effects.*”⁷⁴⁸

C115/13. Further background information on the European Defence Agency is available at <http://www.eda.europa.eu/genericitem.aspx?area=Background&id=122> (last visited 22 January 2010).

⁷⁴⁵ European Defence Agency, “An Initial Long-Term Vision for European Defence Capability and Capacity Needs”, 3 October 2006, at 7, <http://www.eda.europa.eu/genericitem.aspx?id=146> (last visited 22 January 2010). The Defence Ministers of the participating Member States endorsed the report as a reasonable foundation for the European Defence Agency’s medium-to-long term agendas while noting that general endorsement of the report does not mean that all participating Member States have agreed on all the particulars. Still, it constitutes a reasonable assessment of challenges arising under ESDP.

⁷⁴⁶ *Ibid.*, at 9.

⁷⁴⁷ *Ibid.*, at 10.

⁷⁴⁸ *Ibid.*, at 10.

The need to have *precision-guided* munitions rather than unguided munitions like cluster munitions at the disposal of ESDP operations was also emphasised during a 2006 ESDP military capabilities evaluation.⁷⁴⁹ Therefore, the military utility of cluster bombs for future ESDP crisis management operations was expressly doubted while precision and restraint seem not only possible but also necessary in order to achieve the political aims of EU military operations.

With regard to NATO PfP operations, the greatest number of Austrian personnel by far serving in such an operation is and was KFOR with over 500 Austrian soldiers assigned to this mission.⁷⁵⁰ As of 6 December 2007, KFOR consisted of personnel from 24 NATO nations and 10 non-NATO nations.⁷⁵¹ The basis of KFOR's mandate is UN Security Council Resolution 1244 which includes *all necessary means* under Chapter VII of the UN Charter to deter renewed hostilities, maintain and where necessary enforce a ceasefire.⁷⁵² Thus, KFOR constitutes an application of the enhanced NATO PfP which contemplates peace enforcement operations and thus, the use of offensive force. However, in practice, even though the security environment was unstable before and after the Kosovo-Albanian declaration of independence, KFOR tasks were more akin to a police force countering riots and disturbances rather than to military forces in a full-fledged armed conflict.⁷⁵³

Another application of NATO's enhanced PfP constitutes the International Security Assistance Force (ISAF). Originally, a multinational force was designed as a coalition of the

⁷⁴⁹ See Council of the European Union, Capabilities Improvement Chart I/2006, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/esdp/89603.pdf (last visited 22 January 2010).

⁷⁵⁰ As of January 2010, Austrian participation in KFOR was at 422 personnel. See Austrian Ministry of Defence, "Foreign Deployments of the Austrian Armed Forces", January 2010, http://www.bmlv.gv.at/misc/image_popup/popup.php?strAdresse=/english/introle/images/foreign_deployments.png&intSeite=1024&intHoehe=768&intMaxSeite=1024&intMaxHoehe=734&blnFremd=0 (last visited 22 January 2010).

⁷⁵¹ See NATO, "KFOR current situation", <http://www.nato.int/issues/kfor/071206-kfor-situation.pdf> (last visited 22 January 2010). As of 12 October 2009, KFOR consisted of 24 NATO member states and 8 states not member. See http://www.nato.int/kfor/structur/nations/placemap/kfor_placemat.pdf (last visited 6 October 2009).

⁷⁵² Op. para. 9 (a), UN Security Council Res 1244, *supra* note 527.

⁷⁵³ For instance, KFOR contingency planning before the declaration of independence included multinational training in the area of crowd and riot control with the specific aim to control a violent mob by means of adequate force. See, for example, Austrian Ministry of Defence, "Austrian Contingent/KFOR: Operation 'Problemkind'", 24 November 2007, <http://www.bmlv.gv.at/ausle/kfor/artikel.php?id=2196> (last visited 22 January 2010). After the declaration of independence, disturbances and riots, especially in the North of Kosovo, occurred, for example, in March 2008 when armed clashes between Serbs and UNMIK police as well as KFOR troops flared up. See International Crisis Group, "Kosovo's Fragile Transition", 25 September 2008, at 1, http://www.crisisgroup.org/library/documents/europe/balkans/196_kosovos_fragile_transition.pdf (last visited 22 January 2010). At the beginning of 2009 there was unrest in Mitrovica which led to several members of the local population being injured and property destroyed. KFOR was tasked to show a security presence by patrolling in the area, setting up observation posts and establishing check points. See, for example, Austrian Ministry of Defence, "Österreichische KFOR-Soldaten helfen im Norden des Kosovo", 20 January 2009, <http://www.bmlv.gv.at/ausle/kfor/artikel.php?id=2693> (last visited 22 January 2010).

able and willing to provide security in Kabul and surrounding areas under Chapter VII as envisaged in Annex 1 to the Bonn Agreement concluded between a number of Afghan internal ethnic factions.⁷⁵⁴ In August 2003, NATO assumed command and control over the force, whose mandate was expanded to also cover the entire Afghan territory in October 2003.⁷⁵⁵ In October 2006, ISAF's expansion over the entire territory was complete; however, until the present day, a separate U.S.-led Operation Enduring Freedom coalition remains on the ground.⁷⁵⁶ Since its inception, ISAF was provided with the robust mandate to take all necessary measures to fulfil its tasks, which thus again contemplates the possibility of peace enforcement.⁷⁵⁷ As of 5 December 2007, ISAF consisted of 37 troop contributing countries, including 25 NATO and 12 non-NATO states.⁷⁵⁸ Austria, however, in 2007 only contributed three staff officers, with the possibility of extending this number to ten service members.⁷⁵⁹ Over the past months, ISAF has been operating in a very difficult security environment with increased insurgent suicide and stand-off attacks by means of rockets and mortars of an asymmetric nature, compelling it to engage in combat operations and augment the size of ISAF forces; as a result, the number of civilian casualties was rising.⁷⁶⁰ However, because of the concern to reduce civilian casualties in ISAF combat operations, a French General heading operational planning for ISAF was quoted as saying that ISAF did not use cluster bombs.⁷⁶¹ Thus, also in this multinational military operation, cluster munition use is not an option despite the fact that the forces involved are engaged in robust combat. Significantly, the United States, a declared opponent of a comprehensive prohibition on cluster munitions,

⁷⁵⁴ See Op. para. 1, UN Security Council Res 1386, 20 December 2001, UN Doc. S/RES/1386.

⁷⁵⁵ See Op. paras. 1, 3, UN Security Council Res 1510, 13 October 2003, UN Doc. S/RES/1510.

⁷⁵⁶ For instance, the recent UN Security Council Resolution 1890 calls upon ISAF to continue to work in close consultation with, *inter alia*, the U.S.-led Operation Enduring Freedom coalition. See Op. para. 5, UN Security Council Res 1890, 8 October 2009, UN Doc. S/RES/1890. On NATO's role in Afghanistan, see NATO, "NATO's role in Afghanistan: The evolution of ISAF", http://www.nato.int/cps/en/natolive/topics_8189.htm#evolution (last visited 4 January 2010).

⁷⁵⁷ Op. para. 3, UN Security Council Res 1386, *supra* note 754; Op. para. 4, UN Security Council Res 1510, *supra* note 755.

⁷⁵⁸ As of 22 December 2009, ISAF consisted of 43 troop contributing states, 28 NATO member states and 15 states not member. See <http://www.isaf.nato.int/en/troop-contributing-nations-3.html> (last visited 25 January 2010).

⁷⁵⁹ As of December 2009, that number remained the same.

⁷⁶⁰ Report of the Secretary-General to the General Assembly and the Security Council, "The situation in Afghanistan and its implications for international peace and security", 22 September 2009, UN Docs. A/64/364, S/2009/475, at paras. 29-37.

⁷⁶¹ Daily Times, Pakistan, "NATO holding back full force in Afghanistan", 7 July 2007, http://www.dailytimes.com.pk/print.asp?page=2007/07/07\story_7-7-2007_pg4_12 (last visited 25 January 2010). A senior Dutch air force commander also said that his biggest worry during high-risk close support missions was causing harm to innocent Afghan civilians and confirmed that the Dutch air force was not using cluster munitions in Afghanistan. See M. Dodd, "Dutch pound Taliban positions", *The Australian*, 11 December 2007, <http://www.theaustralian.news.com.au/story/0,25197,22903147-2703,00.html> (last visited 25 January 2010).

also forms part of ISAF. Consequently, even if the Austrian staff officers participated in operational planning, interoperability problems in connection with cluster munition use would not arise at the time of the debate in late 2007.

In a similar vein as with ESDP operations, Austria's specialisations in NATO PfP missions until now did not extend to the planning and the execution of combat missions but included mainly training, standardisation in areas of leadership, logistical support and civilian emergency planning. Austria's military cooperation overall until now has focused on the lower spectrum of the "Petersberg tasks", notably peacekeeping, humanitarian and rescue tasks. As regards training, Austria hosted a larger PfP training exercise in 2001 where staff planning and operations concerning the set up and the securing of check points were simulated.⁷⁶² In respect of standardisation in leadership, Austria has hosted a number of courses in that area at the International Operations Command (Kommando für Internationale Einsätze) in Graz and Götzendorf.⁷⁶³ Concerning logistical support, Austria, on account of a national prohibition of cluster munitions, must for instance not assist another State using cluster munitions to transport them for a combat mission. Moreover, Austria would have to conduct stricter controls of aircraft in transit, which is important in light of the fact that between 1997 and 2002 alone, more than 91.000 flights in transit over Austrian territory, transporting foreign personnel and equipment, were undertaken as part of PfP missions.⁷⁶⁴

Within the framework of the PfP, Austria is also part of the Planning and Review Process which provides a basis for evaluating national military capabilities and their ability to effectively conduct peace support operations along the entire spectrum of the "Petersberg" tasks together with NATO states, i.e. interoperability. Countries participating in this process release information every two years on their defence policies and developments of their armed forces in relation to present and future PfP operations. On the basis of this information, participating Ministers of Defence issue a Ministerial Guidance which constitutes a political directive for country-specific Partnership Goals designed to define concrete objectives for purposes of enhanced interoperability between the respective PfP state and NATO members.⁷⁶⁵ Another instrument to enhance interoperability is the Operational Capabilities

⁷⁶² Austrian Ministry of Defence, "Soldaten aus 20 PfP Nationen üben in Österreich", 8 September 2001, <http://www.bmlv.gv.at/cms/artikel.php?ID=2011> (last visited 25 January 2010).

⁷⁶³ Hauser, "Österreich – Zehn Jahre Mitgliedschaft in der NATO-Partnerschaft für den Frieden", *supra* note 737.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*

Concept offered to PfP participating countries where in particular the readiness of troops announced by those states to conduct PfP operations may be tested.⁷⁶⁶

In this context, the Country Defence Rapporteur for Austria at NATO's International Staff, Defence Policy and Planning Division expressed satisfaction with current contributions to support UN-, EU- and NATO-led operations. Concerning future Partnership Goals he emphasised that additional network-enabled and cyber-defence related capabilities will be necessary to keep pace with developments of alliance members.⁷⁶⁷ Thus, NATO currently contents itself with the Austrian above-mentioned focus and specialties shown in PfP operations to date which did not include combat operations; the additional capabilities mentioned have nothing to do with the use of inaccurate and unreliable area weapons like cluster munitions.

Moreover, just like in the ESDP context, also in the NATO capability planning context trends away from unguided weapons like cluster munitions may be discerned. Since capability goals within the framework of the PfP serve the purpose of improving interoperability with NATO members it is useful to have a look at the capability needs of NATO itself. The major initiative in this respect was the 2002 Prague Capabilities Commitment which identified, among other things, the following primary areas: enhancing the number of large transport aircraft in Europe; increasing air-to-air refuelling capacity and most importantly, increase NATO's stock of *non-U.S., air-delivered precision-guided munitions*.⁷⁶⁸ A report to the NATO Parliamentary Assembly confirmed these needs and specifies further that future multinational military operations will be based on the notion of network enabled capabilities and extensive use of high-tech. In this context, it was again emphasised that for the development of platform-centric capabilities an increase in the number of *precision-guided munitions such as guided artillery, mortar shells and air-launched standoff missiles* is necessary.⁷⁶⁹ This stands in stark contrast to unguided cluster munitions and moreover, points at the search for alternatives to the use of cluster munitions from a military point of view in multinational contexts. As regards air-lift capabilities and air-to-air refuelling, there is nothing to say against building up these capabilities in principle. However, in a specific context, it

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Austrian Ministry of Defence, "Die Militärvertretung Brüssel und die NATO-Partnerschaft für den Frieden", *Truppendienst*, No. 6/2007, <http://www.bmlv.gv.at/truppendienst/ausgaben/artikel.php?id=655> (last visited 25 January 2010).

⁷⁶⁸ NATO, "NATO after Prague", http://www.nato.int/docu/after-prague/html_en/after_prague03.html (last visited 25 January 2010).

⁷⁶⁹ See NATO Parliamentary Assembly, "Interoperability: The Need For Transatlantic Harmonisation", 2006 Annual Session, Doc. 177 STC 06 E, <http://www.nato-pa.int/default.Asp?SHORTCUT=1004> (last visited 25 January 2010).

would have to be ensured that these capabilities not be used by a state foregoing the use of cluster munitions in favour of a state that may take advantage of these capabilities in order to then use or transport cluster munitions.

With regard to UN operations, the largest contingents of Austrian Armed Forces personnel serving abroad were with the United Nations Disengagement Observer Force (UNDOF, 373 in September 2007).⁷⁷⁰ However, neither this operation under UN command and control nor other multinational operations within the UN framework where Austria participates [UN Peacekeeping Force in Cyprus (UNFICYP), the UN Truce Supervision Organisation (UNTSO) or the Mission des Nations Unies pour l'organisation d'un référendum au Sahara occidental (MINURSO)] were established under Chapter VII of the UN Charter and thus, do not provide a mandate for combat operations.

This review attempted to show that the assumption that prohibiting also assistance to cluster munition use or related activities by other state's military personnel in multinational operations would not affect Austria's continued active participation in these missions. Firstly, Austria's contributions to such operations so far were not in any way related to the planning for the use and logistical implementation relating to the use of cluster munitions and secondly, at the time of the debates on this draft Austria only participated in operations where there was no theoretical or practical prospect that the issue of cluster munition use would even arise. Still, this will meet with the objection that Austria has declared its readiness to be prepared to participate in multinational military operations where the issue may arise in the future. However, it has also been shown that even in possible combat-related international operations the possibility of envisaging the use of cluster munitions will diminish, as military capability planning in both NATO and EU contexts indicates. This possibility will also diminish in the light of criticism voiced against the 1999 NATO Operation Allied Force and the decrease of military effectiveness, since sub-munition duds halt or delay the advance of friendly forces, as was recognised after the 1991 Operation Desert Storm.⁷⁷¹

On an international level, the example most directly relevant to interoperability concerns in relation to cluster munitions is that of anti-personnel mines. These weapons are comprehensively prohibited by the 1997 Ottawa Convention on Anti-Personnel Mines to which 156 states are parties to date, including key allies of the United States like Canada, the

⁷⁷⁰ As of January 2010, the number of Austrian personnel serving in UNDOF was 383. See Austrian Ministry of Defence, "Foreign Deployments of the Austrian Armed Forces", *supra* note 750.

⁷⁷¹ See *supra* p. 34 with references.

United Kingdom, Australia, France or Germany.⁷⁷² Among those states not party to the convention is most notably the United States. The Ottawa Convention does not only prohibit the use, development, production, stockpiling, retention and transfer of anti-personnel mines but under its Article 1 (1) (c) states parties are also prohibited from *assisting, encouraging or inducing, in any way, anyone to engage in any activity prohibited to a State party* under the convention. The broad wording of “in any way” and “anyone” which suggests that the potential accomplice may include another state or a group of states makes it clear that these prohibitions are generally applicable to joint military operations with states not party to the convention, including under the auspices of international organisations.

That the issue of reconciling the prohibition of assistance under Art. 1 (1) (c) with maintaining an active cooperation with states not party to the Ottawa Convention in joint or multinational military operations was considered is evidenced both by unilateral interpretative declarations by certain states upon ratification or accession as well as by subsequent declarations of their official positions on the meaning of prohibited assistance. For example, Canada upon ratification of the Ottawa Convention issued an interpretative declaration which reads as follows:

“[...] in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the *mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1 (c).*”⁷⁷³

This clarifies that “assistance” is not to be interpreted so broadly as to preclude any joint military operations with states not party to the convention. Thus, general participation in multinational military operations with states not party to the treaty would not suffice for the issue of prohibited assistance to arise.

Specific conduct by the state party must facilitate acts by the state not party which would be prohibited to the state party itself to be captured by the prohibition of assistance. This requirement of specificity in order to constitute prohibited assistance can also be derived from Art. 16 of the Articles on State Responsibility which regulates state responsibility for aid

⁷⁷² A list of states parties to the Ottawa Convention is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&lang=en (last visited 25 January 2010).

⁷⁷³ Statement of Understanding made by Canada, quoted in Chief of Defence Staff, Joint Doctrine Manual, “Law of Armed Conflict at the Operational and Tactical Levels”, Annex A to Chapter V, “Restrictions on the Use of Weapons”, at 5A-1, Annex A, “Main International Treaties on the Law of Armed Conflict Relating to Canada”, at A-8, 13 August 2001, http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf (last visited 25 January 2010). Similar declarations were also made by Australia, the Czech Republic, and the United Kingdom. See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 101.

or assistance in the commission of an internationally wrongful act of another state. For such responsibility of the assisting state, Art. 16 requires that the assisting state be aware of the circumstances making the conduct of the assisted state internationally wrongful, that the assistance must be provided with a view to facilitating the commission of the specific act and that the act would have been wrongful if committed by the assisting state itself.⁷⁷⁴ The condition of knowledge of the circumstances making the conduct wrongful as well as the clear link required between the assistance and the subsequent conduct by the assisted state expressed by the element “with a view to facilitate the commission of the act” illustrate that for such specificity to be present, a certain state of mind (knowledge) by the assisting state’s personnel and a certain causal proximity between the conduct of the assisting and the assisted state is required.⁷⁷⁵

Subsequently, a number of states parties to the Ottawa Convention made their official positions known as to which specific activities in connection with joint military operations would be captured by prohibited assistance, in other words, where the prohibition of assistance would prevail over the interest of military cooperation with states not party. Such specific prohibited activities include the participation in the planning and implementation of activities related to anti-personnel mine use in joint operations,⁷⁷⁶ the agreement to rules of engagement permitting the use or orders to use anti-personnel mines,⁷⁷⁷ the drawing of direct military benefit from anti-personnel mine use by a state not party to the convention,⁷⁷⁸ or the transit through, stockpiling of, or the authorisation of anti-personnel mines on national

⁷⁷⁴ J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, 149 (2002).

⁷⁷⁵ It is acknowledged that Art. 16 only applies to situations where both states involved, the assisting and the assisted state, are bound by the international obligation breached by the assisted state. To that extent, Art. 1 (1) (c) of the Ottawa Convention goes further in that it also covers the relationship between a state party and a state not party to the treaty. Still, the other elements of Art. 16 provide meaningful guidance as to the interpretation of assistance and the necessary degree of specificity to be fulfilled. In connection with Art. 16, in its recent 2007 judgement in the *Genocide* case, the International Court of Justice held that this is a rule of customary international law. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia)*, (Merits), 2007 ICJ para. 420 (Judgement, 26 February). The same requirements as in Art. 16 of the Articles on State Responsibility are reiterated by Art. 25 of the Draft Articles on the Responsibility of International Organisations. See International Law Commission, Report on its 58th Session, 61 UN-GAOR, Supp. No. 10, at 261, 279-280, UN Doc. A/61/10, 2006.

⁷⁷⁶ 43 states have declared this to be their position, including Albania, Australia, Belgium, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Japan, Kenya, Luxembourg, FYR of Macedonia, Malaysia, Mexico, Moldova, Namibia, Netherlands, New Zealand, Norway, Portugal, Qatar, Senegal, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tanzania, Turkey, United Kingdom, Uruguay, Yemen, Zambia and Zimbabwe. See Human Rights Watch, “Landmine Monitor Fact Sheet, A Prohibition On Assistance in a Future Treaty Banning Cluster Munitions: The Mine Ban Treaty Experience”, February 2008, <http://lm.icbl.org/index.php/content/view/full/22877> (last visited 25 January 2010).

⁷⁷⁷ This position has been advanced by Canada, France, Germany, Italy, Sweden and the United Kingdom. See *ibid.*

⁷⁷⁸ Brazil, Mexico, Switzerland and the United Kingdom are proponents of this view. See *ibid.*

territory.⁷⁷⁹ However, the latter prohibitions were interpreted more narrowly by certain states parties by stating that certain U.S. anti-personnel mine stockpiles on their territories are not under their jurisdiction or control and thus, not covered by the prohibitions.⁷⁸⁰

This does pose challenges to interoperability between states parties and not parties to the Ottawa Convention. For example, where personnel is embedded in U.S. headquarters and performs coalition staff functions the prohibition to participate in the planning of anti-personnel mine use affects military cooperation.⁷⁸¹ The fuelling or refuelling by personnel of a state party of United States aircraft without ascertaining whether the aircraft are fitted with anti-personnel mines, which would fall under prohibited implementation of activities related to anti-personnel use, also hampers the effectiveness of common operations.⁷⁸² Nor can a request from personnel of a state party for fire support (close air support) be addressed to that of a state not party without ascertaining that the latter will not use anti-personnel mines.⁷⁸³

However, while the balance between the prohibition of assistance in Art. 1 (1) (c) and interoperability could have been struck differently, the fact that no explicit treaty language on qualifying the prohibition of assistance in favour of interoperability with states not party found its way into the Ottawa Convention as adopted can be attributed to a conscious decision of the drafters. As the *travaux préparatoires* to the Ottawa Convention reveal, during negotiations the leader of the Ottawa process, Canada, chaired an informal meeting of NATO countries where the issue of interoperability was discussed. However, while Canada entertained the idea to include specific language on interoperability in the Ottawa Convention, states interested in this matter finally settled for the aforementioned solutions to clarify their positions through interpretative declarations, largely also due to the fact that the United States did not press too hard on this issue. Consequently, the prohibition of assistance remained

⁷⁷⁹ *Ibid.* According to Albania, Austria, Bosnia & Herzegovina, Brazil, Cameroon, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Guinea, Hungary, Italy, FYR of Macedonia, Malaysia, Mexico, Moldova, Namibia, New Zealand, Portugal, Samoa, Senegal, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, Yemen and Zambia, such conduct amounts to prohibited assistance.

⁷⁸⁰ *Ibid.* Germany, Japan, Qatar and the United Kingdom have adopted this interpretation.

⁷⁸¹ M. Kelly, "Legal Factors in Military Planning for Coalition Warfare and Military Interoperability", Vol. II, No. 2, Australian Army Journal 161, 168 (2005), http://www.apcml.org/documents/aaj_autumn05_kelly_17.pdf (last visited 25 January 2010).

⁷⁸² Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 98; Kelly, "Military Interoperability", *supra* note 778, at 169. Aerial refuelling has been emphasised as a key technical interoperability concern by NATO for alliance operations. See NATO, "Interoperability for joint operations", *supra* note 732, at 4.

⁷⁸³ Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 98; Kelly, "Military Interoperability", *supra* note 781, at 169.

unchanged and also no additional text to incorporate interoperability concerns was included.⁷⁸⁴ Similar scenarios may be conceivable concerning cluster munitions.⁷⁸⁵

This review of scenarios caught by the prohibition of assistance shows that had the proposed exception been adopted, Austria would have expressly allowed activities in multinational military operations in relation to cluster munitions that have been viewed by some states as prohibited assistance in the context of antipersonnel mines. The underlying assumption may then be that cluster munition use was seen differently from antipersonnel mine use in such operations but no reasons for this different treatment were advanced.⁷⁸⁶ The Ottawa Convention experience showed that interoperability problems could be managed by unilateral declarations which attempted to clarify the scope of prohibited assistance and emphasised that the mere general participation in military cooperation or operations with states not party bearing no relation to activities in connection with antipersonnel mines is permitted.

However, this may be open to the objection that multiple unilateral interpretative declarations carry the risk of inconsistent interpretations of the prohibition of assistance. While this is a valid concern, beyond the specific context, it should also be emphasised that interoperability concerns also regularly arise in multinational military operations where one troop contributing state has more stringent national or international legal obligations than others. For example, during the 1999 NATO Operation Allied Force in Kosovo major challenges emerged due to the fact that out of the participating states, while a majority were parties to API, the United States, France and Turkey were not. In this respect, it is generally known that the United States adopts a broad interpretation of the definition of “military target” under Art. 52 (2) API in that it considers it permissible to attack economic targets that sustain the enemy’s war-fighting capability instead of those objects which *effectively*

⁷⁸⁴ Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 100. As we shall see, this was one of the significant differences between the negotiations of the Ottawa Convention and the Convention on Cluster Munitions analysed below.

⁷⁸⁵ For an illustration of various conceivable scenarios, *see* Australia, Discussion Paper Cluster Munitions and Inter-Operability: The Oslo Process Discussion Text and Implications for International Operations, Wellington Conference on Cluster Munitions, 18-22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Discussion-paper-Au-et-al.pdf> (last visited 25 January 2010).

⁷⁸⁶ Precisely the difference between the two weapons was advanced as an argument for including an express provision on interoperability in a cluster munitions treaty while such an express provision was not included in the 1997 Ottawa Convention on anti-personnel mines. For instance, it was maintained that it was much more likely that cluster munitions would be used in conventional battles that are fast-moving or operations that are non-conventional or insurgent in nature than anti-personnel mines. *See ibid.*

contribute to military action.⁷⁸⁷ As a result, in the initial stages of the bombing campaign, significant disagreements arose between the United States and other allied nations as to what targets could be permissibly attacked, especially when all the uncontroversial military targets had been exhausted and the United States proposed to broaden the list of permissible targets to include economic targets such as power stations and the public transportation system.⁷⁸⁸ In order to accommodate these differing legal interpretations, decisions relating to targeting were subject to legal review by each contributing NATO member state.⁷⁸⁹ This also resulted in the cancellation of particular bombing sorties.⁷⁹⁰ Similarly, during Operation Iraqi Freedom in 2003, legal differences in assessing legitimate targets resulted in the use of “red cards” where coalition partners indicated their disapproval of their involvement in particular operations due to their more restrictive interpretations of legitimate targets.⁷⁹¹

Thus, interoperability concerns are not insurmountable although they may entail increased operational planning. In this respect, each troop contributing nation is likely to present to the coalition different Rules of Engagement (RoE), i.e. directives issued by competent military authority which specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered.⁷⁹² As a result, national political authorities should give specific guidance to the personnel sent on multinational operations on their state’s obligations with regard to cluster munitions when operating alongside other states with no or less stringent obligations in the RoE.⁷⁹³ Military lawyers have an important role to play in identifying such differences and providing legal advice.⁷⁹⁴ The joint force commander and planning staff must take legal limitations into account and construct the operational plan as to ensure that personnel of a state with more

⁷⁸⁷ United States Naval War College, *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, Newport, 1997, at § 8.1.1., <http://www.diils.org/file/8/view> (last visited 25 January 2010).

⁷⁸⁸ However, later NATO’s target lists were in fact broadened as to also include such targets. This has been alleged as the main factor why the campaign lost its effectiveness, since this facilitated targeting errors as in the case of hitting a trail of Albanian refugees and the Chinese embassy in Belgrade. See Kelly, “Military Interoperability”, *supra* note 781, at 163.

⁷⁸⁹ *Ibid.* Also see J. E. Peters *et al.*, *European Contributions to Operation Allied Force: Implications for Transatlantic Cooperation*, 26-29 (2001), http://www.rand.org/pubs/monograph_reports/2007/MR1391.pdf (last visited 25 January 2010).

⁷⁹⁰ Peters, *European Contributions to Operation Allied Force*, *supra* note 789, at 28.

⁷⁹¹ Kelly, “Military Interoperability”, *supra* note 781, at 165.

⁷⁹² NATO, “Glossary of Terms and Definitions”, Doc. AAP-6 (2009), at 2-R-10, <http://www.nato.int/docu/stanag/aap006/aap-6-2009.pdf> (last visited 25 January 2010).

⁷⁹³ K. Watkin, “Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing”, 15 *Duke Journal of Comparative & International Law* 281, 289 (2005).

⁷⁹⁴ G. Walsh, “Interoperability of United States and Canadian Armed Forces”, 15 *Duke Journal of Comparative & International Law* 315, 317 (2005).

stringent legal obligations may honour these obligations.⁷⁹⁵ Also, states with less stringent obligations like the United States have sometimes modified their doctrine for multinational operations to accommodate differences of their allies.⁷⁹⁶

Therefore, the exception under § 3 (3) of this draft legislation was not indispensable for the maintenance of Austrian active participation in multinational operations. Finally, the addition in the Explanatory Memorandum that *“notwithstanding, the firing of cluster munitions by a member of an Austrian contingent and the use of Austrian cluster munitions within the framework of such military operations abroad shall still be punishable”* still exacerbated confusion. As was rightly emphasised, on the one hand, Austrian soldiers would have been permitted to participate in the logistical implementation of use of cluster munitions by another troop contributing nation but on the other, were prohibited from taking the last step in such logistical implementation themselves, notably the firing, dropping or launching of cluster munitions.⁷⁹⁷ As we shall see, the debate on interoperability was soon laid to rest in the Austrian context. However, this debate is a useful indication of the still more controversial discussions and negotiations of this issue in the international context.

Subsequently, the following new Bill was presented by the governmental parties on 10 October 2007:

“Government Bill

Federal Act on the Prohibition of Cluster Munitions

Definitions

§ 1. For purposes of this Federal Act,

1. “cluster munitions” are containers including explosive sub-munitions which are intended to disperse these sub-munitions over an area in order to detonate them before, on, or after impact; however, this definition shall not comprise flare and smoke ammunitions, pyrotechnical chemicals, sensor fused munitions with a capability to engage individual targets or munitions used to set off avalanches.
2. “procurement” is a transaction by which an Austrian citizen resident in Austria or a legal person, partnership or trading company registered in Austria or any other person, partnership or trading company that becomes active from within Austria is
 - a) negotiating a legal transaction that involves the transfer of cluster munitions from a third country to another third country, or
 - b) arranging such a legal transaction to be accomplished, or

⁷⁹⁵ *Ibid.*, at 328.

⁷⁹⁶ Kelly, “Military Interoperability”, *supra* note 781, at 168.

⁷⁹⁷ Amnesty International Austria & International Fellowship of Reconciliation – Austrian Branch, “Comments on a Federal Act on the Prohibition of Cluster Munitions”, No. 11/SN-112/ME XXIII, 17 September 2007, http://www.parlament.gv.at/PG/DE/XXIII/ME/ME_00112_11/fnameorig_086540.html (last visited 25 January 2010).

- c) buying or selling cluster munitions if that causes its transfer from a third country to another third country, or
- d) arranging a transfer of cluster munitions over which they hold property from a third country to another third country.

Prohibitions

§ 2. The development, production, acquisition, sale, procurement, import, export, transit, use and possession of cluster munitions are prohibited.

Exceptions

§ 3. The prohibitions laid down under § 2 shall not be applicable to

- 1. cluster munitions which are envisaged exclusively for training of the Austrian Armed Forces or of demining or clearance services;
- 2. the import, possession and stockpiling of cluster munitions for purposes of their immediate decommissioning or other destruction.

Destruction

§ 4. Existing stockpiles of cluster munitions prohibited under § 2 must be reported to the Federal Ministry of Defence within one month after the entry into force of this Federal Act and must be destroyed against reimbursement of costs by the Ministry of Defence within a maximum period of three years after the entry into force of this Federal Act.

Penal Sanctions

§ 5. Anybody who, even if merely negligently, violates § 2 of this Federal Law shall be punished by a court of law either with a prison sentence of up to two years or with a fine of up to 360 daily rates [*Tagessätze*], provided that the act is not subject to more severe punishment under another federal law.

Seizure and Forfeiture

- § 6. (1) Cluster munitions used to commit an act punishable under § 5 shall be seized by a court of law.
- (2) Machines and facilities for the production of cluster munitions prohibited under § 2 can be declared forfeit by a court of law. At the expense of the owner, it must be ensured that they can no longer be used in violation of the prohibitions laid down in § 2.
- (3) Means used to transport items subject to the prohibitions laid down in § 2 can be declared forfeit by a court of law.
- (4) Items forfeit according to paras. 2 and 3 shall pass to the ownership of the Federation [*Bund*]. Items seized according to para. 1 shall pass to the ownership of the Federation and are to be reported to the Federal Ministry of Defence for destruction pursuant to § 4.

Execution

§ 7. This Federal Act shall be executed by

- 1. the Federal Minister of the Interior and the Federal Minister of Defence with regard to § 3,
- 2. the Federal Minister of Defence with regard to § 4,
- 3. the Federal Minister of Justice with regard to § 5 and § 6 paras. 1 to 3,
- 4. the Federal Minister of Justice and the Federal Minister of Defence with regard to § 6 para. 4,
- 5. the Federal Minister of the Interior with regard to the remaining provisions.

Entry into Force

§ 8. This Federal Act shall enter into force on 1 December 2007.”⁷⁹⁸

“Explanatory Memorandum

II. Special Part

On § 1:

The definition of cluster munitions does not comprise flare or smoke ammunitions, pyrotechnical chemicals, sensor fused munitions with a capability to engage individual targets and munitions used to set off avalanches. The use of these types of munitions does not give rise to the same humanitarian concerns associated with cluster munitions, including the wide area effect and the presence of duds dangerous for civilians. Thus, they shall not be covered by this Federal Act.

On § 2:

The prohibition forms the core content of this draft law. As already observed in the General Part of the Explanatory Memorandum, cluster munitions may have an effect equal to that of antipersonnel mines. It was therefore appropriate to model draft § 2 after the prohibition contained in the Federal Law on the Prohibition of Antipersonnel Mines. The provision as currently drafted is however wider in scope insofar as also the development of cluster munitions is prohibited.

On § 3:

The term “decommissioning” means the dismantling of the munitions into harmless single components.

On § 4:

The duties of reporting and destruction shall not extend to cluster munitions exempted from the prohibitions pursuant to § 3.

The existing cluster munition stockpiles of the Austrian Armed Forces shall be destroyed by the Federal Ministry of Defence at their own expense; the Federal Ministry of Defence is to be reimbursed for any destruction costs of stockpiles, if any, which have to be transferred to the Ministry by domestic arms manufacturers.”⁷⁹⁹

At the outset, it is to be observed that this was the draft that was to serve as a basis for further parliamentary deliberations.

⁷⁹⁸ Government Bill, Federal Act on the Prohibition of Cluster Munitions, No. 232 of the Supplements to the Stenographic Protocols of the Austrian National Council XXIII. GP, 10 October 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/I/I_00232/fnameorig_087959.html (last visited 25 January 2010).

⁷⁹⁹ Government Bill, Federal Act on the Prohibition of Cluster Munitions, No. 232 of the Supplements to the Stenographic Protocols of the Austrian National Council, Explanatory Materials, XXIII. GP, 10 October 2007, http://www.parlament.gv.at/PG/DE/XXIII/I/I_00232/fname_087961.pdf (last visited 25 January 2010).

In comparison to the draft initially submitted by the Ministry of European and International Affairs, this government-backed initiative on a Federal Law on the Prohibition of Cluster Munitions contained several improvements.

Most fundamentally, the exception contained under § 3 (3) under the earlier Bill for Austrian personnel sent to multinational prohibitions abroad under the KSE-BVG no longer formed part of the exceptions under § 3. As we shall see, on the international level the issue of interoperability was not to be solved so smoothly during the negotiations of the Convention on Cluster Munitions in Dublin. Moreover, the exception from the definition for cluster munitions “with sub-munitions falling under other already existing international law prohibitions or restrictions” could no longer be found in the Bill

However, as for the definition, one weakness became apparent with the circulation by the CMC experts of their draft definition of what should be prohibited as cluster munitions in a future Convention on Cluster Munitions. According to that proposed definition, a cluster munition was “a weapon comprising multiple explosive sub-munitions which are dispensed from a container.”⁸⁰⁰ Compared with the Austrian draft law, the focus of the proposed CMC definition was more on the explosive sub-munitions rather than on the container from which they are dispensed. This approach had the merit of taking into account that it is the explosive sub-munitions finally inflicting civilian harm, not the container.

Another weakness was that the draft retained a broad exemption for “sensor fused munitions with a capability to engage individual targets” from the prohibition without providing any further detailed justification why it was necessary and if yes, why it was valid for “sensor fused weapons” as a broad category.

This broad exception set in motion a fruitful exchange between CMC-Austria and their civil society colleagues. As a result of these exchanges, CMC-Austria expressed its political concerns shared by the other CMC members with regard to an exception on all sensor-fused munitions across the board to the Austrian government. Such exception could set a negative precedent for other states participating in the Oslo process, since it could actually pre-empt a possible stronger wording on sensor-fused munitions in a future cluster munition ban treaty.

These concerns were not unfounded, since the Australian government, a participant in the Oslo process, on 3 October 2007 announced that it had spent 14 Mio. Australian dollars on the acquisition of a new round of the German “SMArt 155” and thus had set a negative

⁸⁰⁰ Cluster Munition Coalition, “Definition for the Future Cluster Munition Convention”, October 2007, <http://www.wilpf.int.ch/disarmament/clustermunitions/News/October2007News/Oct16CMCdefinition.html> (last visited 25 January 2010). Moreover, an “explosive submunition” was defined as “a munition designed to be dispensed in multiple quantities from a container and to detonate prior to, on, or after impact.”

precedent.⁸⁰¹ This move by the Australian Ministry of Defence was fiercely criticised in a press release by Austcare, an Australian CMC member organisation stating that at a time while the precise definition of cluster munitions was being discussed in the Oslo process the Australian government should not have acquired the SMArt 155.⁸⁰²

Furthermore, in the notes on the draft definition proposed by the CMC it was emphasised that “with this definition there is no exception for, *inter alia*, sensor-fused munitions although it recognises that some states believe certain weapons do not cause unacceptable harm [the wording used in the Final Declaration of the Oslo Conference on Cluster Munitions] to civilians. However, too little is known about these weapons and their effects to warrant a blanket exception in the convention at this time. The CMC believes that the burden of proof is on governments to demonstrate otherwise.”⁸⁰³

CMC-Austria soon learned that due to the busy parliamentary schedule debate on the draft in the Foreign Affairs Committee would only take place on 27 November. This meant that the legislation could only be enacted at the beginning of December 2007. Importantly, this would coincide with the Third Diplomatic Conference on Cluster Munitions in the Oslo Process from 5-7 December 2007 hosted by Austria in Vienna. Since the intention was to announce the enactment of legislation on the prohibition on cluster munitions at the Vienna Conference on Cluster Munitions to give a positive impetus to the conference, there was a chance that the Austrian government would be responsive to arguments that an ambitious outcome on the sensor fused weapon issue could be undermined at that stage.

Before the decisive debate in the Foreign Affairs Committee, CMC-Austria drafted a letter addressed to all MPs of the Committee and held a press conference in which CMC-Austria advocated the clear position that a comprehensive definition of cluster munitions should also include sensor-fused munitions and that the exception then provided for in the Bill be struck out. This position was substantiated with the argument that due to the uncertainties currently involved with sensor-fused munitions the case had not been made for excluding these weapons from a comprehensive national prohibition. CMC-Austria also emphasised the strengths of the current draft at length, especially the absence of any exception from the definition of cluster munitions for sub-munitions with self-destruct mechanisms or a specific failure rate and the short deadline of three years for the destruction of existing stockpiles. In

⁸⁰¹ Australia, Department of Defence, “Defence Purchases New Anti-Tank Artillery Round”, Defence Media Release CPA 346/07, 3 October 2007, <http://www.defence.gov.au/media/2007/34607.doc> (last visited 25 January 2010).

⁸⁰² Austcare, “Austcare Calls for Australian Leadership to Ban Clusters”, Media Release, 8 October 2007, <http://www.alertnet.org/thenews/fromthefield/austcare/11918050001.htm> (last visited 25 January 2010).

⁸⁰³ Cluster Munition Coalition, “Cluster Munition Draft Definition”, *supra* note 800.

its appeal for support of the proposed legislation, CMC-Austria underlined the significance of the legislation to be passed early by stating that it could establish Austria in a lasting manner as a standard-setting example internationally. A positive vote on the Bill was not about individual, political party, government or NGO interests but about a common signal of humanity in the lead-up to the Vienna Conference on Cluster Munitions from 5 to 7 December.

On 27 November, the government Bill on a Federal Act on the Prohibition of Cluster Munitions was debated and voted upon by the MPs of the Foreign Affairs Committee. During debate, ÖVP, SPÖ and Green Party MPs introduced the following amendment request:

“On (1) concerning § 1 (1):

The exception for certain sensor-fused munitions originally provided for shall be dispensed with to expand the humanitarian scope of this Law. [italics by the author]

On (2):

The offence of procurement shall also be applicable to Austrian citizens with no residence in Austria.

On (3) concerning § 8:

The government initiative provides for 1 Dec. 2007 as the date of entry into force. Due to the parliamentary schedule [debate in the plenary could not take place before 6 Dec. 2007] this would entail a retroactive entry into force which would not be permissible in view of the penal provisions contained in the Act. As a consequence of this amendment this Act may enter into force as promptly as possible.”⁸⁰⁴

Two separate final votes were conducted. One was on the Federal Act without the amendments requested. This vote was unanimous. The other one was a separate vote on the amended version of the Federal Act taking into account the amendment request. On this, there was an absolute majority through the positive votes of SPÖ, ÖVP and Green Party MPs with the minority of FPÖ and BZÖ MPs voting against. FPÖ and BZÖ MPs voted against the amendment precisely because they could not support an elimination of the sensor-fused exception. In their view, the retention of these high-technology state-of-the-art munitions was indispensable for developing future military capabilities of the Austrian Armed Forces.

Thus, the final result of the vote in the Foreign Affairs Committee of the National Council read as follows:

“Federal Act on the Prohibition of Cluster Munitions

The National Council has decided:

⁸⁰⁴ Report of the Foreign Affairs Committee of the National Federal Council on the government Bill: Federal Act on the Prohibition of Cluster Munitions (No. 232 of Supplements), No. 350 of the Supplements to the Stenographic Protocols of the National Council XXIII.GP, 27 November 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/I/I_00350/fnameorig_093084.html (last visited 25 January 2010).

Definitions

§ 1. For purposes of this Federal Act,

1. “cluster munitions” are containers including explosive submunitions which are intended to disperse these submunitions over an area in order to detonate them before, on, or after impact; however, this definition shall not comprise flare and smoke ammunitions, pyrotechnical chemicals or munitions used to set off avalanches.
2. “procurement” is a transaction by which an Austrian citizen or a legal person, partnership or trading company registered in Austria or any other person, partnership or trading company that becomes active from within Austria is
 - a) negotiating a legal transaction that involves the transfer of cluster munitions from a third country to another third country, or
 - b) arranging such a legal transaction to be accomplished, or
 - c) buying or selling cluster munitions if that causes its transfer from a third country to another third country, or
 - d) arranging a transfer of cluster munitions over which they hold property from a third country to another third country.

Prohibitions

§ 2. The development, production, acquisition, sale, procurement, import, export, transit, use and possession of cluster munitions are prohibited.

Exceptions

§ 3. The prohibitions laid down under § 2 shall not be applicable to

1. cluster munitions which are envisaged exclusively for training of the Austrian Armed Forces or of demining or clearance services;
2. the import, possession and stockpiling of cluster munitions for purposes of their immediate decommissioning or other destruction.

Destruction

§ 4. Existing supplies of cluster munitions prohibited under § 2 must be reported to the Federal Ministry of Defence within one month after the entry into force of this Federal Act and must be destroyed against reimbursement of costs by the Ministry of Defence within a maximum period of three years after the entry into force of this Federal Act.

Penal Sanctions

§ 5. Anybody who, even if merely negligently, violates § 2 of this Federal Law shall be punished by a court of law either with a prison sentence of up to two years or with a fine of up to 360 daily rates [*Tagessätze*], provided that the act is not subject to more severe punishment under other federal laws.

Seizure and Forfeiture

§ 6. (1) Cluster munitions used to commit an act punishable under § 5 shall be seized by a court of law.
(2) Machines and facilities for the production of cluster munitions prohibited under § 2 can be declared forfeit by a court of law. At the expense of the owner, it must be ensured that they can no longer be used in violation of the prohibitions laid down in § 2.
(3) Means used to transport items subject to the prohibitions laid down in § 2 can be declared forfeit by a court of law.
(4) Items forfeit according to paras. 2 and 3 shall pass to the ownership of the Federation [*Bund*]. Items confiscated according to para. 1 shall pass to the ownership of the Federation and are to be reported to the Federal Ministry of Defence for destruction pursuant to § 4.

Execution

§ 7. This Federal Act shall be executed by

2. the Federal Minister of the Interior and the Federal Minister of Defence with regard to § 3,
3. the Federal Minister of Defence with regard to § 4,
4. the Federal Minister of Justice with regard to § 5 and § 6 paras. 1 to 3,
5. the Federal Minister of Justice and the Federal Minister of Defence with regard to § 6 para. 4,
6. the Federal Minister of the Interior with regard to the remaining provisions.

Entry into Force

§ 8. This Federal Act shall enter into force upon expiry of the day of publication in the Austrian Federal Gazette.”⁸⁰⁵

Moreover, the Foreign Affairs Committee unanimously adopted the following decisions for the parliamentary record:

“The Foreign Affairs Committee assumes

- that the definition of the territorial and personal scope in § 1 comprises all relevant facts with a sufficient link to Austria in the sense of the territoriality principle under penal law including duty free bonded warehouses [German: Zollfreilager];
- that the exception for training of the Austrian Armed Forces under § 3 (1) does not aim at or include training in the use of prohibited munitions;
- that the Federal Government will submit a report to the National Council especially on the destruction of existing stockpiles pursuant to § 4, on criminal law proceedings pursuant to §§ 5 and 6, and on progress on efforts to achieve an international law prohibition on cluster munitions by the end of three years after the entry into force of this Federal Act.

As a result of its deliberations, the Foreign Affairs Committee thus requests that the National Council [in plenary session] give its assent to the enclosed Bill according to the constitution.”⁸⁰⁶

Thus, a Federal Act on the Prohibition of Cluster Munitions without any exception giving rise to humanitarian concerns, especially a definition of cluster munitions without any exception for sensor-fused munitions as an entire category, had almost become a reality. In comparing the Bill with that submitted to the plenary of the National Council, it also contained a broader scope of the active personality principle with procurement since it also applied to Austrian citizens with no residence in Austria. The amendment to § 8 on entry into force was also reasonable in light of the fundamental general principle of criminal law of the

⁸⁰⁵ Federal Act on the Prohibition of Cluster Munitions, No. 350 of Supplements XXIII. GP, Committee Report National Council, Text of Legislation, 27 November 2007, http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXIII/I/I_00350/fnameorig_093085.html (last visited 25 January 2010).

⁸⁰⁶ See Report of the Foreign Affairs Committee, *supra* note 804.

prohibition of retroactivity.⁸⁰⁷ The decision on interpreting the territorial and personal scope in § 1 as covering all relevant facts with a sufficient link to Austria not only ensures that a dangerous loophole with duty free bonded warehouses will not arise but also places the provision squarely within the accepted notion of a “genuine link” as jurisdictional principle of international law.⁸⁰⁸ Further, the determination that the retention of a certain number of cluster munitions by the Austrian Armed Forces shall not include the training in the use of such munitions was an important clarification; this shed light on the fundamental rationale of this exception, notably that Austrian Armed Forces and clearance specialists in the Ministry of the Interior in principle have the possibility to be trained to live up to clearance tasks they might be confronted with when participating in future peacekeeping missions.⁸⁰⁹

Finally, the reporting duties of the Austrian government to the National Council on stockpile destruction and criminal proceedings ensure adequate parliamentary control over the execution of this Act.

This Bill accepted by the Foreign Affairs Committee enabled the Minister of European and International Affairs to give the positive impetus to the Vienna Conference on Cluster Munitions the government so greatly desired. In her welcome address to the Vienna Conference on Cluster Munitions on 5 December 2007, Minister Plassnik stated:

“[...] I am proud to inform you that the Austrian Parliament will adopt tomorrow a national law that bans the possession, use, production, development and transfer of cluster munitions. Once this law is in force, all types of cluster munitions will be illegal, including so-called “intelligent” sensor-fused munitions. We hope that this law will become a trend setter and we stand ready to assist other States in their own legislative efforts.”⁸¹⁰

On 6 December the Bill assented to by the Foreign Affairs Committee was voted upon in the plenary of the National Council. The Bill was subjected to the same differentiated vote as in the Foreign Affairs Committee, with § 1 on the definition of cluster munitions being voted on separately and adopted by SPÖ/ÖVP/Green Party majority, with the BZÖ and the

⁸⁰⁷ Compare, e.g., § 1 of the Austrian Penal Code which reads as follows: “A sentence or a preventive measure may only be imposed in respect of such criminal act for which an explicit sentence is provided and which was already punishable at the time of its commission.”

⁸⁰⁸ For the notion of “genuine link” see *supra* note 456 (containing an explanatory comment on the *Nottebohm* case).

⁸⁰⁹ As mentioned *supra*, in the anti-personnel mine context, Austria has never retained any mines for training or development of countermeasures, i.e. measures to defend against cluster munition attacks, despite the legal possibility to do so both in the 1997 Ottawa Convention and the 1997 Federal Act on the Prohibition of Anti-Personnel Mines. In the meantime, at the Berlin Conference on Stockpile Destruction Austria stated on 25 June 2009 that neither would it retain any cluster munitions for training or research purposes.

⁸¹⁰ Vienna Conference on Cluster Munitions, Statement by Ursula Plassnik, Austrian Minister for European and International Affairs, 5 December 2007, <http://www.bmeia.gv.at/index.php?id=62146&L=0> (last visited 25 January 2010).

FPÖ voting against, and the rest of the Bill agreed upon unanimously. The final hurdle with regard to securing parliamentary support occurred with the debates on the Bill in the Foreign Affairs Committee and the plenary of the Federal Council, the second Austrian parliamentary chamber representing the interests of the provinces, on 18 and 20 December, respectively.⁸¹¹ On 18 December, the Foreign Affairs Committee, once again with the votes of the SPÖ, ÖVP and the Green Party, submitted the request to the plenary to raise no objection to the Bill as enacted by the National Council and on 20 December, the plenary of the Federal Council followed suit.

The Federal Act was published in the Federal Law Gazette on 7 January 2008 and thus, entered into force as the new Federal Act on the Prohibition of Cluster Munitions on 8 January 2008.⁸¹² Austria then had the most stringent national prohibition of cluster munitions in place in the world. The Federal Act was only the second of its kind after Belgium adopted legislation banning cluster munitions in 2006. However, the Belgian legislation included an exemption from the prohibition of cluster munitions for certain kinds of sensor-fused weapons.⁸¹³ The omission of any exclusion for all or certain types of sensor-fused weapons from the definition of cluster munitions could be viewed at the time as reflecting a precautionary approach both in terms of substance as well as in terms of political process. As for substance, it may be argued that no field-based evidence according to which sensor-fused munitions did not possess the characteristics giving rise to the same humanitarian concerns as those sub-munition based weapon systems acknowledged as cluster munitions could be provided. Thus, erring on the side of caution seemed to be a rational strategy already from a

⁸¹¹ Involvement of the Federal Council [Bundesrat] in the adoption of federal legislation is regulated by Art. 42 of the Austrian Federal Constitutional Act (B-VG) which reads as follows: (2) Save as otherwise provided by constitutional law, an enactment can be authenticated and published only if the Federal Council has not raised a reasoned objection to this enactment. (3) This objection must be conveyed to the National Council in writing by the Chairman of the Federal Council within eight weeks of the enactment's arrival; the Federal Chancellor shall be informed thereof. (4) If the National Council in the presence of at least half of its members once more carries its original resolution, this shall be authenticated and published. If the Federal Council resolves not to raise any objection or if no reasoned objection is raised within the deadline laid down in para. 3 above, the enactment shall be authenticated and published. For an English translation see *supra* note 681.

⁸¹² Federal Act on the Prohibition of Cluster Munitions, Federal Law Gazette BGBl I, No. 12/2008, entry into force 8 January 2008, http://ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2008_I_12/BGBLA_2008_I_12.pdf (last visited 25 January 2010).

⁸¹³ See Moniteur Belge, Loi réglant des activités économiques et individuelles avec des armes, 8 June 2006, pp. 29839-29868, <http://www.ejustice.just.fgov.be/cgi/api2.pl?lg=fr&pd=2006-06-09&numac=2006009449> (last visited 25 January 2010). Art. 2 (4) on the definition of sub-munitions reads in the French original: “les sous-munitions”: “toute munition qui, pour remplir sa fonction, se sépare d’une munition mère. Cela recouvre toutes les munitions ou charges explosives conçues pour exploser à un moment donné après avoir été lancées ou éjectées d’une munition à dispersion mère, à l’exception: [...] – des dispositifs qui contiennent plusieurs munitions uniquement destinées à percer et détruire des engins blindés, qui ne sont utilisables qu’à cette fin sans possibilité de saturer indistinctement des zones de combat, notamment par le contrôle obligatoire de leur trajectoire et de leur destination, et qui, le cas échéant, ne peuvent exploser du fait du contact, de la présence ou de la proximité d’une personne”.

substantive point of view. With regard to political process, considerations as to not hamper efforts at a comprehensive definition on the international level weighed heavily on the mind of the majority of the MPs and the government and most likely had a great influence on finally adopting the legislation without any exclusion for sensor fused weapons.

Related to such considerations was the need to maintain a close and constructive cooperation with the CMC which would have arguably been jeopardised had Austria decided to retain a broad exclusion for sensor fused munitions in its national legislation. We shall see that this approach was to be modified subsequently as a result of the definition of prohibited cluster munitions adopted in the new Convention on Cluster Munitions, which again demonstrates how closely intertwined the national and international political levels were in efforts to specifically prohibit cluster munitions.

All other possible types of cluster munitions were equally prohibited. In particular, there were no exceptions for sub-munitions with self-destruct, self-deactivation or self-neutralising mechanisms, sub-munitions based on a specific failure (reliability) rate, so-called “direct fire” sub-munitions or cluster munitions containing ten or fewer sub-munitions. However, the definition as finally adopted was still not entirely satisfactory, since – regardless of whether or not this result was intended – the emphasis on what was prohibited was still more on the container than on the individual explosive sub-munitions that actually inflict civilian suffering.

This general shortcoming notwithstanding, a wide variety of activities in connection with the weapons thus defined were prohibited, notably the development, production, acquisition, sale, procurement, import, export, transit, use and possession. In this respect, the inclusion of a prohibition of development of cluster munitions broadened the scope of the prohibitions in comparison to the 1997 Federal Act on Antipersonnel Mines. The prohibitions also extended to the transit of cluster munitions through Austria, ensuring that the Austrian territory can no longer be used in any way for the proliferation of these weapons. Since “possession” of cluster munitions was banned, also the stockpiling of cluster munitions can be considered to be covered by the ban. Still, this could have been made more explicit in the law, as “stockpiling” should have been enumerated as a separate prohibition under § 2.

This would have also been justified for systematic reasons, since § 3 (2) provides for an exception to the prohibition that literally extends to “stockpiling” besides “possession”.⁸¹⁴

⁸¹⁴ However, on this point, the Federal Act on Cluster Munitions follows the inconsistency of the Federal Act on the Prohibition of Anti-Personnel Mines which among the general prohibitions also only includes “possession” under § 2 but “possession” and “stockpiling” under § 3 (2) that equally provides for an exception from these

Another issue worthy of comment is that no specific prohibition on “assistance” was inserted among the prohibitions under § 2. Generally, this seemed to be legitimate, since it is already clear by virtue of § 12 of the Austrian Penal Code that assistance, encouragement and inducement to any specifically criminalised conduct is prohibited.

However, it would have been desirable to include a specific prohibition on assistance especially with regard to any financing by Austrian natural or legal persons of foreign cluster munition producers. In this regard, it remains debatable if such actions would fall under the specific criminal prohibitions of the Federal Act in connection with § 12 of the Austrian Penal Code. This is because a prohibited “assistance” pursuant to this provision requires that the principal perpetrator has engaged in criminally punishable conduct to which the conduct by the accomplice made a causal contribution. The prohibited “assistance” is thus at least to a limited extent accessory, i.e. dependent, on the realisation of the *actus reus* (objective element) of a punishable attempt by the principal perpetrator.⁸¹⁵ Since the principal perpetrator, i.e. the producer company, will likely be registered abroad and production will also take place abroad the question arises whether Austria would have criminal jurisdiction over the principal perpetrator at all.

As for the Federal Act, the only specific statement as to its jurisdictional scope may be made with respect to the clarification adopted by the Foreign Affairs Committee that the definition of the territorial and personal scope in § 1 comprises all relevant facts with a sufficient link to Austria in the sense of the territoriality principle. However, this clarification was only adopted for the specific crime of “procurement” of cluster munitions which requires specific acts in relation to a transfer of cluster munitions. It is submitted that the financing of cluster munition producers will not be specific enough as to fall under this specific prohibition. Therefore, the general provisions on the ambit of Austrian criminal jurisdiction in cases where there is a foreign link must be resorted to under §§ 64, 65 of the Austrian Penal Code. Besides the specific crimes enumerated, under § 64 (1) (8) of the Austrian Penal Code an assistance to a criminally punishable conduct only falls under Austrian criminal jurisdiction if the principal perpetrator committed the crime in Austria. Thus, this regulates the reverse case, i.e. where a foreigner engages in conduct abroad constituting assistance to a crime committed in Austria.

prohibitions for purposes of decommissioning or destruction. Compare Federal Act on the Prohibition of Anti-Personnel Mines, *supra* note 725.

⁸¹⁵ E. E. Fabrizio, *Strafgesetzbuch: Kurzkomentar*, 70, 73-74 (9th ed., 2006).

Further, § 64 (1) (6) of the Austrian Penal Code provides for Austrian criminal jurisdiction in respect of crimes to whose prosecution Austria is obliged, even if they were committed abroad and irrespective of the criminal law of the *locus delicti*. This is nothing else but the Austrian reference to international treaties to which Austria is a party and which bind states parties to provide for universal jurisdiction for the prosecution of crimes laid down in such a treaty. However, since the subsequently adopted Convention on Cluster Munitions did not foresee universal jurisdiction for prosecution of criminal acts in relation to cluster munitions, this provision also does not provide an adequate jurisdictional basis for Austrian prosecution of the principal crime of production of cluster munitions by foreigners abroad.⁸¹⁶

On the other hand, if financing of foreign companies producing cluster munitions abroad fell outside the reach of Austrian criminal jurisdiction, it may be asked why it was considered necessary in the first place to enshrine the exception under § 3 (3) in the earlier draft Bill which would have exempted the participation in the decision on the use of cluster munitions by other states or the logistical implementation of such use for multinational military operations. After all, the Explanatory Memorandum on this draft provision stated that this exception was designed to prevent Austrian personnel in multinational military operations from falling under the penal provisions of this Act. Both participation in the decision on the use and logistical implementation of such use are typical acts of assistance and the principal perpetrators, the users, will be foreign nationals operating abroad. This demonstrates that this exception and the rationale for it only make sense if it were acknowledged that an assistance to anyone anywhere was capable of falling under the penal provisions of the Federal Act.

In any event, since criminal law requires a particular amount of clarity due to the general criminal law principle of *nullum crimen sine lege* already for that reason it would have been desirable to clarify in this legislation that assistance to any of these activities specifically included financing of foreign companies producing cluster munitions even if these foreign companies operate abroad. Moreover, the Belgian legislation prohibiting cluster

⁸¹⁶ Both the 1997 Ottawa Convention and the 2008 Convention on Cluster Munitions do not provide for compulsory universal jurisdiction. This may be deduced from the respective Arts. 9 of both treaties which oblige states parties to take all appropriate measures, including penal sanctions, to prevent and suppress any prohibited activity *by persons or on territory under its jurisdiction or control*. For the Ottawa Convention, the drafting debates reveal in this regard that attempts to include a regime of universal jurisdiction were ultimately rejected. See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 255-259. For the Convention on Cluster Munitions it is instructive to note Norway's statement on the general scope of application of the Convention made at the Wellington Conference on Cluster Munitions that it "is also important to underline that draft article 9 deals with sanctions under national law, and *we are not here creating a new category of international crimes or universal jurisdiction* [...]" See Norway, "Statement on general scope and obligations in relation to interoperability", 18 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Norway-general-obligations-statement.pdf> (last visited 25 January 2010).

munitions subsequently inserted an explicit prohibition of financing either Belgian or foreign companies which engage in the production, use, repair, exposition for sale, the sale, the distribution, the import, export, stockpiling or transport of *inter alia* cluster munitions.⁸¹⁷

Further positive aspects of the Federal Law included the additional interpretative statement made in the Foreign Affairs Committee of the National Council that the exception contained in § 3 (1) for training purposes of the armed forces shall not mean training in the use of cluster munitions. In the final version, there was also no exception on interoperability for Austrian personnel sent on multinational military missions. Thus, especially no activities which may assist other coalition service members in the use, transport, stockpiling etc. of cluster munitions may be undertaken by Austrian service members. The deadline for destroying the existing stockpiles of the Austrian Armed Forces is only three years.

Finally, an adequate follow-up to governmental implementation was entrenched with a duty of the government to report on stockpile destruction, criminal proceedings in relation to the legislation and the Oslo process after the expiry of the deadline of three years.

Altogether, the adoption of the Federal Act on the Prohibition of Cluster Munitions accomplished its main purpose to entrench Austria as a trend-setter on the prohibition of cluster munitions in the Oslo process. The discussions in its run-up can also be seen as a prelude to the international negotiations on the new Convention on Cluster Munitions several months later, since many issues that arose in the national context were also subject to intense

⁸¹⁷ Art. 8 of the Belgian legislation reads in its original version: “Nul ne peut fabriquer, réparer, exposer en vente, vendre, céder ou transporter des armes prohibées, en tenir en dépôt, en détenir ou en être porteur. [...]Est également interdit le financement d'une entreprise de droit belge ou de droit étranger dont l'activité consiste en la fabrication, l'utilisation, la réparation, l'exposition en vente, la vente, la distribution, l'importation ou l'exportation, l'entreposage ou le transport de mines antipersonnel et/ou de sous-munitions au sens de la présente loi en vue de leur propagation. A cette fin, le Roi publiera, au plus tard le premier jour du treizième mois suivant le mois de la publication de la loi, une liste publique i) des entreprises dont il a été démontré qu'elles exercent l'une des activités visées à l'alinéa précédent ; ii) des entreprises actionnaires à plus de 50 % d'une entreprise au point i) ; iii) des organismes de placement collectif détenteurs d'instruments financiers d'une entreprise aux points i) et ii). Il fixera également les modalités de publication de cette liste. Par financement d'une entreprise figurant dans cette liste, on entend toutes les formes de soutien financier, à savoir les crédits et les garanties bancaires, ainsi que l'acquisition pour compte propre d'instruments financiers émis par cette entreprise. Lorsqu'un financement a déjà été accordé à une entreprise figurant dans la liste, ce financement doit être complètement interrompu pour autant que cela soit contractuellement possible. Cette interdiction ne s'applique pas aux organismes de placement dont la politique d'investissement, conformément à leurs statuts ou à leurs règlements de gestion, a pour objet de suivre la composition d'un indice d'actions ou d'obligations déterminé. L'interdiction de financement ne s'applique pas non plus aux projets bien déterminés d'une entreprise figurant dans cette liste, pour autant que le financement ne vise aucune des activités mentionnées dans cet article. L'entreprise est tenue de confirmer ceci dans une déclaration écrite.” See Belgium, Loi interdisant le financement de la fabrication, de l'utilisation ou de la détention de mines antipersonnel et de sous-munitions, 26 April 2007, <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/2007/04/26/104281.pdf> (last visited 25 January 2010).

debate and negotiations on the international level. The analysis of the evolution of the Austrian position also reveals that even small and middle-sized states needed to be convinced to adopt a primarily humanitarian stance in respect of cluster munitions. For such an evolution to take place, credible and reliable evidence on the part of civil society, in this case AAMV/CMC-Austria, was necessary to shape government positions. In the next chapter, the history of the Oslo process where such dynamics could be observed on a larger scale shall be reviewed before proceeding to an analysis of the new Convention on Cluster Munitions.

5.2. *The Oslo Process on Cluster Munitions*

5.2.1. **The Third Review Conference of the CCW and Norway's Announcement to Lead a New Diplomatic Process**

“It would certainly be desirable to introduce a broad prohibition or restriction of use of fragmentation weapons, which typically are employed against a very large area, with the substantial risk for indiscriminate effects that such use entails. The formulation of such a broad rule raises great difficulties. A specific ban on use is less difficult to devise in regard to one type of fragmentation weapons, namely, those which are constructed in the form of a cluster of bomblets and which are primarily [sic!] suited for use against personnel. These anti-personnel fragmentation weapons tend to have both indiscriminate effects and to cause unnecessary suffering. At detonation a vast number of small fragments or pellets are dispersed, evenly covering a large area with a high degree of hit probability for any person in the area. The effects of such a detonation on unprotected persons – military or civilian – in the comparatively large target area is almost certain to be severe with multiple injuries caused by many tiny fragments. Multiple injuries considerably raise the level of pain and suffering. They often call for prolonged and difficult medical treatment and the cumulative effect of the many injuries increases the mortality risk. It is queried whether the military value of these weapons is so great as to justify the suffering they cause. [...] The following draft rule is submitted for examination: “Cluster warheads with bomblets which act through the ejection of a great number of small calibre fragments or pellets are prohibited for use.”⁸¹⁸

This proposal was not submitted recently but already in 1974 on the initiative of Sweden when the first in a series of diplomatic conferences leading to the adoption of the two Protocols Additional to the 1949 Geneva Conventions and the 1980 CCW were convened. The proposal remained on the table at yet another meeting of governmental experts in Lugano in 1976.

The triggering event for this initiative was undoubtedly the excessive use of cluster munitions by the United States on the battlefields in South-East Asia. It has already been mentioned above that this effort at prohibiting at least certain cluster munitions ultimately did not succeed.⁸¹⁹ One reason for the failure of this initiative was certainly that NATO states, especially the United States and the United Kingdom, came prepared with military experts who emphasised the military utility (as opposed to military necessity) and downplayed the

⁸¹⁸ Egypt, Mexico, Norway, Sudan, Sweden, Switzerland & Yugoslavia, Working Paper, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 21 February 1974, UN Doc. CDDH/DT/2, at 8-9.

⁸¹⁹ See *supra*, p. 31.

humanitarian concerns of cluster munitions. If anything, these humanitarian concerns could be accommodated by incorporating technological improvements in new cluster munition types. A specific example already given above was that of the UK military expert who praised the military effectiveness of the then newly-developed BL755 cluster munition and made technical remarks as to how the dispersal pattern would be reduced and the fusing improved.⁸²⁰ Another example was the statement by another expert who said that the danger that civilians faced when a military target was situated in their vicinity due to the wide area effect of cluster munitions could be avoided as even light shelters would offer protection to any civilians near the target.⁸²¹

Moreover, no agreement could be found on whether the aspect of fragmentation in cluster munitions with the potential to inflict multiple wounds would result in more or less suffering than other conventional weapons.⁸²² These statements could prevail, since the ban advocate camp was not sufficiently equipped to counter them on the basis of its own evidence. In particular, there was a lack of reliable field evidence portraying the human suffering caused by cluster munitions. A factor that certainly contributed to this lack of field evidence was that states that were most affected by previous cluster munitions, Laos and Cambodia were not present at the conference, and the South Vietnamese Provisional Revolutionary government had been excluded from the conference in Lucerne in 1974 as a result of U.S. pressure.⁸²³ But also civil society was underrepresented.⁸²⁴

In the later Oslo process leading to the adoption of an international treaty prohibiting cluster munitions, just like in the Ottawa process to ban anti-personnel mines, civil society played a key role through their carefully documented field evidence to make the humanitarian case. Thus, civil society, which organised in an international network, was instrumental for challenging ban opponents, raising public awareness through effective media work and contributing to stigmatisation of the weapon at large.

In contrast, in the 1970s, this stigmatisation was only achieved for napalm bombs which arguably distracted all the attention from the civilian harm that was inflicted through cluster munitions.⁸²⁵ Fundamentally, since no affected states and not more NGOs were

⁸²⁰ See *supra* pp. 32-33.

⁸²¹ ICRC, Report on the 1974 Lucerne Conference, *supra* note 53, at 54, para. 174.

⁸²² *Ibid.*, at 60-61, paras. 213-216.

⁸²³ Prokosch, *Technology of Killing*, *supra* note 34, at 149.

⁸²⁴ Only two NGOs were listed in the ICRC report on the 1974 Lucerne conference, the Special NGO Committee on Disarmament and the Friends World Committee. See ICRC, Report on the 1974 Lucerne Conference, *supra* note 53, Annex I, 95.

⁸²⁵ Prokosch, *Technology of Killing*, *supra* note 34, at 170.

present at the meetings in the 1970s, also experts were not faced with cluster munition victims who would serve as a vivid testimony of the human suffering caused by these weapons.

All these factors were missing and thus, the humanitarian case could not be made compellingly enough to move an international process for a prohibition of cluster munitions forward.⁸²⁶ The fact that the second major humanitarian problem, the post-conflict legacy of *de facto* landmines, did not receive great attention was an additional testimony of this.

Finally, it has been suggested that the moment was perhaps not right to gather the necessary political momentum; when the first of these meetings was convened in 1974, the anti-Vietnam protest movement was already past its climax.⁸²⁷ Thus, no specific prohibitions or regulations on cluster munitions were adopted in the CCW which sought to prohibit or restrict weapons causing unnecessary suffering and/or indiscriminate effects. Even if specific provisions on cluster munitions along the lines of the Swedish proposal had been adopted this would not have been comprehensive enough, as the Swedish proposal would only have prohibited *antipersonnel* cluster munitions, leaving dangerous loopholes for anti-matériel, DPICM or CEM.⁸²⁸

While the CCW included from the beginning Protocol II on landmines, these norms soon proved to be ineffective to contain the massive use of landmines. The humanitarian disaster caused by anti-personnel mines triggered the already mentioned innovative diplomatic process, the Ottawa process, characterised by a close cooperation between a core group of small- to medium- sized states, the ICRC, UN agencies, and the global civil society network ICBL. However, despite the similarities in effects between antipersonnel mines and unexploded cluster sub-munitions the latter were not covered by the definition of prohibited antipersonnel mines in the Ottawa convention. This can also be attributed to the fact that the ICBL made a conscious decision not to include cluster munitions into the antipersonnel mines campaign.⁸²⁹ Had a definition of antipersonnel mines been incorporated based on the *effects* rather than the *design* of the weapon, many cluster munitions would already have been prohibited.

⁸²⁶ While there was public protest against cluster munition use by the US in South-East Asia as part of the broader anti-Vietnam War protest movement, this movement failed to attract widespread sympathy from the media. See *ibid.*, at 182.

⁸²⁷ E. Prokosch, "Why History Should Not Repeat Itself: Lessons From the 1970s Effort to Ban Cluster Bombs", Lunch Time Presentation at the Dublin Diplomatic Conference on Cluster Munitions, 22 May 2008 (personal notes of this author).

⁸²⁸ Wiebe, "Footprints of Death", *supra* note 60, at 157.

⁸²⁹ See *supra* p. 100, note 368. Also see the so called Bad Honnef Guidelines adopted by a number of ICBL members which argue for an effects-based rather than a design-based definition of anti-personnel mines. See Mine Action Programmes from a Development-Oriented Point of View ("The Bad Honnef Framework"), 1997, http://www.landmine.de/fix/BH_English.pdf (last visited 25 January 2010).

Thus, cluster munitions can be regarded as “unfinished business” of the 1970s and the 1990s. Importantly, the Ottawa process on antipersonnel mines proved that new humanitarian disarmament norms could be established without the participation of some powerful states. Also, in contrast to the 1970s the new process could arguably also gain international political momentum because the participants in this process could point to the failure to address the scourge of antipersonnel mines in another forum, notably the CCW.

The Ottawa Treaty experience and cluster munition use by the United States, the United Kingdom and the Netherlands in Operation Allied Force in 1999 gave renewed attention to the issue of cluster munitions besides those NGOs which since the Ottawa process have advocated an *effects*-based approach towards addressing the humanitarian problems of landmines and landmine-like weapons on the international level.⁸³⁰ As a result, one NGO, Human Rights Watch, called for a global moratorium on use, production and transfer of cluster munitions until the humanitarian concerns were adequately addressed on the international level. Other NGOs, Landmine Action, Handicap International, Mines Action Canada and AAMV/CMC-Austria, joined in Human Rights Watch’s call to develop a specific protocol on cluster munitions within the CCW in view of the Second Review Conference of the CCW in 2001.⁸³¹

However, as detailed *supra*,⁸³² this call did not receive a favourable response by all States parties to the CCW. In particular, this demand was opposed by major users or producers or stockpilers of the weapon like the United States, China, Russia, India and Pakistan. Again, any decision within the framework of the CCW requires consent even if no negotiations are involved.

Over the next years, work on the humanitarian concerns relating to cluster munitions was embedded into the broader category of ERW which culminated in the adoption of Protocol V to the CCW on ERW in November 2003. But even before that, just after the 2003 Iraq invasion by U.S. and UK troops, the Irish government in collaboration with Pax Christi Ireland hosted a conference on ERW where it was decided by NGOs to form a new global network to address the humanitarian concerns on cluster munitions. As has already been mentioned, the Cluster Munition Coalition (CMC) was formally launched in the Hague in November 2003 with the central campaign calls for no production, use and transfer of cluster

⁸³⁰ One advocate of this position in accordance with the Bad Honnef Guidelines has been the German NGO Landmine.de since 1995.

⁸³¹ Cf. Goose, “Cluster Munitions in the Crosshairs” in Williams, Goose & Wareham (eds.), *Banning Landmines*, *supra* note 403, at 221.

⁸³² See *supra* p. 116.

munitions until their humanitarian problems were resolved; increased resources for assistance to communities and individuals affected by unexploded cluster munitions and all other explosive remnants of war; and a special user responsibility for clearance, warnings, risk education, provision of information and victim assistance.⁸³³ Interestingly, discussion of the legal issues relating to the use of cluster munitions revealed that the civil society organisations present did not consider that there was a legal basis for a ban on cluster munitions, since the weapon itself was not inherently indiscriminate. On the other hand, it was emphasised that existing IHL was inadequate to deal with the humanitarian problems emanating from cluster munitions.⁸³⁴

Thus, civil society did not yet call for a specific disarmament treaty on cluster munitions based on the inadequacy of IHL and on the fact that general rules of IHL were never properly implemented in connection with past cluster munition use. While a first proposal on a negotiating mandate for an internationally binding legal instrument on cluster munitions was already made in 2003, opposition to any such mandate by China, Russia, the United States and others caused the CCW to only discuss technical improvements on sub-munitions and whether existing IHL was sufficient to address issues relating to sub-munitions throughout 2004 and 2005. An important contribution in this regard was a survey conducted among CCW states parties on IHL and ERW where a number of states made their views known.⁸³⁵ During 2006 in view of the upcoming Third Review Conference to the CCW, the CMC emphasised that the time was ripe for a CCW negotiating mandate on cluster munitions, otherwise concrete action should be considered outside the forum of the CCW.⁸³⁶

While informal discussions already began to prepare for the eventuality of failure of the Third Review Conference to the CCW in November 2006, especially Israel's massive use of cluster munitions in Lebanon in the summer of 2006 was a triggering moment for still more determined action by both certain states and NGOs. Austria, the Holy See, Ireland, Mexico, New Zealand and Sweden introduced a proposal for a mandate to negotiate a new legally-binding international instrument specifically on cluster munitions within the CCW to be decided at the Third Review Conference.⁸³⁷ The Norwegian Minister of Foreign Affairs in

⁸³³ See *supra* pp. 191-192.

⁸³⁴ Pax Christi Netherlands, CMC Launch Conference Report, *supra* note 676, at 26.

⁸³⁵ See *supra* pp. 72-73.

⁸³⁶ Goose, "Cluster Munitions in the Crosshairs" in Williams, Goose & Wareham (eds.), *Banning Landmines*, *supra* note 403, at 224.

⁸³⁷ Austria, Holy See, Ireland, Mexico, New Zealand and Sweden, Proposal for a Mandate to Negotiate a Legally-Binding Instrument that Addresses the Humanitarian Concerns Posed by Cluster Munitions, UN Doc. CCW/CONF.III/WP.1, 6 October 2006 (reissued on 25 October 2006).

response to a parliamentary question regarding cluster munition use in the armed conflict in Lebanon and Israel at the end of October 2006 stated that:

“In the Government’s view, the human suffering caused by the use of cluster munitions is unacceptable. This is why Norway will take the lead – together with other like-minded countries and international humanitarian actors – to put in place an international prohibition against cluster munitions.”⁸³⁸

This was interpreted as the first public indication that Norway would be prepared to take the initiative for an international diplomatic process outside the framework of the CCW.⁸³⁹ Another statement made by the Norwegian Foreign Minister just ahead of the Third Review Conference underlined the accuracy of this interpretation. He emphasised that Norway was prepared to take a leading role to speed up efforts to achieve an international ban on cluster munitions after noting that UN agencies, Norwegian and international humanitarian organisations as well as other interested countries expected Norway to play this leadership role. The Foreign Minister declared that Norway was ready to cooperate with like-minded countries and other partners such as the UN, the Red Cross movement and other humanitarian actors to start a negotiating process.⁸⁴⁰ This emphasis on the urgency to arrive at an international prohibition on cluster munitions and on a process between like-minded states, the UN, the Red Cross and other humanitarian actors was an indication that Norway was already actively considering failure of the CCW to decide on a negotiating mandate for a new international treaty on cluster munitions as a likely prospect.

For the NGO community cluster munition use during the conflict between Hezbollah and Israel provided yet another opportunity to gather field-based evidence of the humanitarian consequences of cluster munitions and perhaps even more importantly, mobilise the media to stigmatise the weapon in advance of the Third Review Conference.⁸⁴¹

This Third Review Conference took off with a statement by the then UN Secretary-General Kofi Annan on 7 November 2006. The highest UN official emphasised the

⁸³⁸ Jonas Gahr Støre, Norwegian Minister of Foreign Affairs, Reply to Olav Akselsen’s (Labour Party) question regarding the war in Libanon [sic!] and the use of cluster munitions, 24 October 2006, http://www.regjeringen.no/en/dep/ud/about_mfa/minister-of-foreign-affairs-jonas-gahr-s/Speeches-and-articles/2006/Reply-to-Olav-Akselsens-question-regarding-the-war-in-Libanon-and-cluster-munitions.html?id=420888# (last visited 25 January 2010).

⁸³⁹ Goose, “Cluster Munitions in the Crosshairs” in Williams, Goose & Wareham (eds.), *Banning Landmines*, *supra* note 403, at 225.

⁸⁴⁰ Norway, Ministry of Foreign Affairs, “Norway to take the lead in efforts to achieve an international ban on cluster munitions”, 3 November 2006, <http://www.regjeringen.no/en/dep/ud/press/News/2006/Norway-to-take-the-lead-in-efforts-to-achieve-an-international-ban-on-cluster-munitions.html?id=424460&epslanguage=en-GB> (last visited 7 April 2010).

⁸⁴¹ For example, Landmine Action produced a comprehensive report on the humanitarian consequences of cluster munition use in Lebanon still in 2006. See Landmine Action, “Foreseeable harm”, *supra* note 100. A variety of research reports subsequently published was also based on field evidence gathered in Lebanon. See in this context, King *et al*, “M85”, *supra* note 83; Human Rights Watch, “Flooding South Lebanon”, *supra* note 91.

importance of the issue of cluster munitions for the UN and challenged states parties of the CCW to devise effective norms to immediately address the atrocious, inhumane effects of cluster munitions both at the time of their use and after conflict ends. He also called on states parties to freeze both the use of cluster munitions against military assets located in or near populated areas and the transfer of those cluster munitions known to be inaccurate and unreliable, and to dispose of them.⁸⁴² Thus, one may observe that the UN Secretary-General did not only emphasise the need for an IHL prohibition of at least certain cluster munitions but for *disarmament* which would equally address transfers and stockpiles in relation to these weapons.

The following general exchange of views on 7 and 8 November 2006 brought to the fore three different positions on how to proceed with regard to cluster munitions. A first group comprised those states that advocated a specific regulation of cluster munitions within the CCW since existing IHL was not considered to be adequate to deal with all humanitarian problems posed by the use of these weapons.⁸⁴³ Other states regarded a continuation of the already existing discussion mandate for the GGE on the wider category of ERW as appropriate rather than the negotiation of a new treaty on cluster munitions,⁸⁴⁴ while certain

⁸⁴² UN Secretary-General, Message to the Third Review Conference of the Convention on Certain Conventional Weapons, 7 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/81D9D5CBD4AC8BC3C1257220002F981A/\\$file/UNSG+message+re+CCW+Third+RevCon+\(final\).doc](http://www.unog.ch/80256EDD006B8954/(httpAssets)/81D9D5CBD4AC8BC3C1257220002F981A/$file/UNSG+message+re+CCW+Third+RevCon+(final).doc) (last visited 25 January 2010).

⁸⁴³ States falling in this camp included: New Zealand, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/1160269FCFC6B8B6C12572200046EF66/\\$file/03+New+Zealand.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/1160269FCFC6B8B6C12572200046EF66/$file/03+New+Zealand.pdf) (last visited 25 January 2010); Mexico, Statement by Macedo, *supra* note 160; Switzerland, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/5E137C29CDB2E9FFC12572200068F66A/\\$file/CCW+CONF.III+SWITZERLAND.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/5E137C29CDB2E9FFC12572200068F66A/$file/CCW+CONF.III+SWITZERLAND.pdf) (last visited 25 January 2010); Holy See, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/086F7DE2F8308590C12572200047778B/\\$file/12+Holy+See.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/086F7DE2F8308590C12572200047778B/$file/12+Holy+See.pdf) (last visited 25 January 2010); Argentina, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/61FDC0BDE2351B98C12572200047B482/\\$file/18+Argentina.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/61FDC0BDE2351B98C12572200047B482/$file/18+Argentina.pdf) (last visited 25 January 2010); Austria, Statements by Markus Reiterer und Wolfgang Petritsch, *supra* note 698; Germany, Statement by Gröning, *supra* note 711; Lebanon, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/C494387857A94F12C125722F003AE726/\\$file/01+Lebanon.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/C494387857A94F12C125722F003AE726/$file/01+Lebanon.pdf) (last visited 25 January 2010).

⁸⁴⁴ Australia, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/4C0D505ED460775FC12572200046C59C/\\$file/02+Australia.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/4C0D505ED460775FC12572200046C59C/$file/02+Australia.pdf) (last visited 25 January 2010); South Korea, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/580A0402780751AEC125722000472081/\\$file/06+Republic+of+Korea.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/580A0402780751AEC125722000472081/$file/06+Republic+of+Korea.pdf) (last visited 25 January 2010); India, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/75643031BA5F13A0C125722000478386/\\$file/13+India.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/75643031BA5F13A0C125722000478386/$file/13+India.pdf) (last visited 25 January 2010); Brazil, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/897239567B984258C12572200047BFC0/\\$file/19+Brazil.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/897239567B984258C12572200047BFC0/$file/19+Brazil.pdf) (last visited 25 January 2010); Japan, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/91F35F3BF48F0C25C12572200047D0DB/\\$file/20+Japan.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/91F35F3BF48F0C25C12572200047D0DB/$file/20+Japan.pdf) (last visited 25 January 2010); Ukraine, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/1A60988F7979C47BC12572200047DF6D/\\$file/21+Ukraine.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/1A60988F7979C47BC12572200047DF6D/$file/21+Ukraine.pdf) (last visited 25 January 2010); Italy,

states were not convinced that cluster munitions warranted any further specific activity, neither specifically binding regulations nor the discussion of legally non-binding technical preventive measures.⁸⁴⁵ Norway's position during the conference was rather specific, as it did emphasise the humanitarian urgency to conclude an international legally binding instrument on cluster munitions but did not expressly state that such an instrument should be concluded within the CCW.⁸⁴⁶

The ICRC also endorsed the call for a specific international legal instrument on cluster munitions and stressed the humanitarian urgency of solving the problems posed by the use of these weapons, thus adding its credibility as a well-respected impartial humanitarian organisation to this demand.⁸⁴⁷ According to the ICRC, the specific characteristics of cluster munitions, the unfortunate history of their use and their severe and long-lasting costs to civilians justified strong action, including at a national level to immediately end the use and eliminate stocks of *inaccurate and unreliable* cluster munitions, and pending their destruction, not to transfer them to other countries, as well as to prohibit the targeting of cluster munitions against military objective located in a populated area.⁸⁴⁸ Thus, just like the UN Secretary-General the ICRC did not content itself with calling for a specific IHL regulation or prohibition on the use of these weapons but also for a disarmament treaty also addressing transfers and stockpile destruction on humanitarian grounds.

The UN Mine Action Team as representative of the operational focal point for clearance of mines and ERW, including unexploded sub-munitions, reiterated the message from the UN Secretary-General to devise effective norms to reduce and ultimately eliminate the adverse humanitarian impact of cluster munitions and to declare unilateral moratoria on the use of these weapons in or near populated areas as well as to freeze the transfer and destroy stockpiles of inaccurate and unreliable cluster munitions.

[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/CA39DEB409584374C125722000693A2D/\\$file/CCW+CONF.III+ITALY.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/CA39DEB409584374C125722000693A2D/$file/CCW+CONF.III+ITALY.pdf) (last visited 25 January 2010).

⁸⁴⁵ United States of America, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/AC4F9F4B10B117B4C125722000478F7F/\\$file/14+USA.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/AC4F9F4B10B117B4C125722000478F7F/$file/14+USA.pdf) (last visited 25 January 2010); Russian Federation, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/E701176903915C1EC1257220004740D0/\\$file/08+Russian+Federation.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/E701176903915C1EC1257220004740D0/$file/08+Russian+Federation.pdf) (last visited 25 January 2010); Pakistan, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/9CC66AF776BBEB7EC125722000475B52/\\$file/10+Pakistan.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/9CC66AF776BBEB7EC125722000475B52/$file/10+Pakistan.pdf) (last visited 25 January 2010).

⁸⁴⁶ Norway, General Statement to the Third Review Conference of the CCW, 7 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/A9580B6FCCBDE401C12572200068E78F/\\$file/CCW+CONF.III+NORWAY.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/A9580B6FCCBDE401C12572200068E78F/$file/CCW+CONF.III+NORWAY.pdf) (last visited 25 January 2010).

⁸⁴⁷ International Committee of the Red Cross, Statement to the Third Review Conference of the CCW, *supra* note 161.

⁸⁴⁸ *Ibid.*

Significantly, the UN Mine Action Team also called for technical requirements for new weapons systems to reduce risks to civilian population, thus advocating a precautionary or preventive rather than remedial approach towards technological developments that might occur in this area.⁸⁴⁹ As a matter of fact, such an approach is not well-established under IHL, since there are very few examples where new weapons have been subject to an international prohibition or restriction.⁸⁵⁰ Again, this reflects the particular humanitarian concerns associated with the use of cluster munitions which would necessitate such a precautionary approach.

Civil society represented first and foremost by the CMC came well prepared and in significant numbers to this conference. Already on the weekend before the conference started the CMC held a briefing session for participating members to ensure that everyone involved had adequate knowledge about the humanitarian problems associated with the weapon and the international challenge of the Review Conference ahead as well as to ensure a coordinated approach in conveying key messages to governments.

Probably the most important key message that the CMC delivered in its statements to states parties of the CCW was the urgency of tackling the humanitarian problem of cluster munitions which justified a decision on a mandate for negotiating a legally binding international instrument rather than continuing mere discussions on the way forward.⁸⁵¹ This urgency was also expressed in a public awareness-raising activity when CMC members gathered in front of the diplomat entrance of the UN in Geneva dressed in T-shirts with “Stop Cluster Munitions, Start a New Treaty” printed on them and handed out flyers with the same

⁸⁴⁹ UN Mine Action Team, Statement to the Third Review Conference of States Parties to the CCW Convention, 7 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/35F4F97BD01410D9C125722000483811/\\$file/30+UNMAS.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/35F4F97BD01410D9C125722000483811/$file/30+UNMAS.pdf) (last visited 25 January 2010).

⁸⁵⁰ In fact, it has been maintained that only the 1868 St Petersburg Declaration prohibiting the use of explosive projectiles under the weight of 400 g against individual soldiers and the 1995 CCW Protocol IV on Blinding Laser Weapons can be cited as examples of a strict precautionary approach towards weapons not (widely) used on the battlefield. See, for example, L. Doswald-Beck, “New Protocol on Blinding Laser Weapons”, 312 *International Review of the Red Cross* 272-299, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jn4y?opendocument> (last visited 25 January 2010); B. M. Carnahan & M. Robertson, “The Protocol on “Blinding Laser Weapons”: A New Direction for International Humanitarian Law”, 90 *AJIL* 484, 484, 490 (1996). To this list, one could possibly add the 1899 prohibition of dum-dum bullets, the prohibition of launching balloons filled with explosives and the 1925 and 1972 prohibitions of biological weapons.

⁸⁵¹ This key message becomes evident, for example, from the statement on behalf of the CMC as a whole and the statement by Human Rights Watch. See Cluster Munition Coalition, Statement to the Third Review Conference on Certain Conventional Weapons, 8 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/7C7CB9BF595CBC7FC1257289003C94F4/\\$file/061108+CMC.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/7C7CB9BF595CBC7FC1257289003C94F4/$file/061108+CMC.pdf) (last visited 25 January 2010); Human Rights Watch, Statement during the General Exchange of Views, Third Review Conference of the Convention on Conventional Weapons, 8 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/0D573BA9A191A2B6C1257220006921DC/\\$file/CCW+CONF.III+HRW.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/0D573BA9A191A2B6C1257220006921DC/$file/CCW+CONF.III+HRW.pdf) (last visited 25 January 2010).

slogan which summarised the humanitarian harm documented by the use of these weapons. What added credibility to the demands of civil society was the presence of cluster munition victims who confronted government delegates with a first hand account of their plight.⁸⁵² NGO members of the CMC also made use of the opportunity of lunch time events to present new research reports on the recent use of cluster munitions in Lebanon and the preliminary findings of a report on the global humanitarian impact of these weapons. These reports contributed to the purpose of making the humanitarian case by adding to the record of humanitarian evidence for a new treaty on cluster munitions.⁸⁵³

From this overview, it can be concluded that the opposition forming against cluster munitions yielded the first tangible results. First and foremost, cluster munitions figured prominently in discussions during the Third Review Conference. This was largely due to the pressure by civil society in getting states to acknowledge the humanitarian problems posed by the use of these weapons, by like-minded states which were ready to take action, but also by the UN and the ICRC which were active in the field and could contribute their credibility to the discussions. At the same time, not even those in favour of a specific international treaty on cluster munitions advocated a comprehensive prohibition of these weapons just yet. However, that was not the issue then since the objective was to simply agree on the fact that concrete action in the form of a negotiating mandate on a new international treaty within the CCW was necessary. In this regard, until the end of the Review Conference, the proposal for such a negotiating mandate initially introduced by Austria and Sweden and co-sponsored by four other states,⁸⁵⁴ was formally supported by 26 states.⁸⁵⁵

Consistent with what it had announced previously, Norway shared the view of Austria and others that the humanitarian disaster caused by cluster munitions needed to be dealt with urgently and that negotiations on an international treaty on cluster munitions should begin as promptly as possible; but Norway wanted to take the opportunity to underline that in her view negotiations should take place where they could effectively be conducted and where there was

⁸⁵² Statement by Firoz Ali Alizada, Handicap International Afghanistan (on file with the author); Statement by Habbouba Aoun, Landmine Resources Centre for Lebanon, on behalf of the Cluster Munition Coalition, 8 November 2006 (on file with the author).

⁸⁵³ On 7 November 2006, Landmine Action presented the most important findings of its report on the humanitarian consequences of cluster munition use in Lebanon in the summer of 2006. See Landmine Action, Landmine Action, "Foreseeable harm", *supra* note 100. On 8 November, Handicap International presented "Fatal Footprint" whose most significant finding of the preliminary report on the humanitarian impact of cluster munitions in 23 affected states and areas not internationally recognised was that 98% of the victims of these weapons were civilians. See Handicap International, "Fatal Footprint", *supra* note 360.

⁸⁵⁴ Holy See, Ireland, Mexico and New Zealand.

⁸⁵⁵ In addition to the states already mentioned, negotiations were supported by Argentina, Bosnia-Herzegovina, Chile, Costa Rica, Czech Republic, Denmark, Germany, Guatemala, Hungary, Liechtenstein, Lithuania, Luxemburg, Malta, Peru, Portugal, Serbia, Slovakia, Slovenia, Spain, Switzerland.

a realistic possibility of such a treaty. Here, Norway already made it clear that it was not convinced that the forum of the CCW could provide an adequate basis to produce such an international treaty.⁸⁵⁶

This statement indicated that Norway was already actively considering that the CCW would not be able to agree on a negotiating mandate for a new international convention on cluster munitions. That Norway's assessment was realistic may already be explained by the above-mentioned practice in the CCW to take any kind of decision only once consensus is achieved. As already mentioned, China, Pakistan, India, Russia, South Korea and the United States, some of which are major users, producers and stockpilers of the weapon, remained opposed to the ambitious humanitarian initiative to negotiate new legally binding international rules on cluster munitions. Therefore, it came as no surprise that the Review Conference decision agreed to by participating states parties of the CCW fell far short of the demands of Norway and other states who had been in favour of starting negotiations on a new international treaty on cluster munitions without any further delay. That decision read as follows:

“To convene, as a matter of urgency, an intersessional meeting of governmental experts:
To consider further the application and implementation of existing international humanitarian law to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions, including the factors affecting their reliability and their technical and design characteristics, with a view to minimizing the humanitarian impact of the use of these munitions.
This meeting of governmental experts will, *inter alia*, consider the results of the meeting of experts on cluster munitions to be held by the ICRC. The meeting of governmental experts will report to the next meeting of the High Contracting Parties.
The Meetings of Military and Technical Experts of the GGE shall continue their technical work and provide further advice, as required.”⁸⁵⁷

In the light of this outcome, Norway converted its previous allusions into reality that it would go outside of the framework of the CCW to achieve a convention on cluster munitions in an alternative diplomatic process. In a Press Release issued by the Norwegian Ministry of Foreign Affairs, Minister Jonas Gahr Støre invited countries that had shown an interest and a will to take urgent action to address the cluster munition problem, together with other partners such as the relevant UN organisations, the Red Cross movement and other humanitarian organisations, to an international conference in Oslo to start a process towards an international

⁸⁵⁶ Norway, Statement to the Special Plenary Meeting on Protocol V, 13 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (statement only available in audio format).

⁸⁵⁷ Third Review Conference of the High Contracting Parties to the CCW, Final Document, Part II: Final Declaration, Decision 1, at 6, UN Doc CCW/CONF.III/11, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/84E7CBDD66F28699C125729E00605345/\\$file/CCW+CONF.III+11+PART+II+E.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/84E7CBDD66F28699C125729E00605345/$file/CCW+CONF.III+11+PART+II+E.pdf) (last visited 25 January 2010).

ban on cluster munitions that have unacceptable humanitarian consequences.⁸⁵⁸ 24 other states expressed their disappointment at the failure of the Review Conference to agree on the urgency to negotiate an international treaty on cluster munitions by submitting a common Final Declaration on Cluster Munitions in which they called for an agreement that should, *inter alia*, (a) prohibit the use of cluster munitions within concentrations of civilians; (b) prohibit the development, production, stockpiling, transfer and use of cluster munitions that pose serious humanitarian hazards because they are for example unreliable and/or inaccurate; (c) assure the destruction of stockpiles of cluster munitions that pose serious humanitarian hazards because they are for example unreliable and/or inaccurate, and in this context establish forms of cooperation and assistance.⁸⁵⁹ Therefore, what was proposed at the end of the Third Review Conference was a more elaborate proposal for a humanitarian disarmament treaty that would prohibit the development, production, stockpiling and transfer along with the use of at least certain cluster munitions.

On the other hand, it may be noted that neither Norway nor any other state in favour of a specific international treaty on cluster munitions expressly proposed a total ban on cluster munitions. Rather, Norway used the rather enigmatic wording of “cluster munitions that cause unacceptable harm to civilians.” This wording may mean different things to different constituencies. As will become clear, one of the core intentions of Norway was to lead a process that emphasised the elimination of a *humanitarian* problem rather than let military or technical concerns prevail. A prohibition of cluster munitions should therefore be based on a careful analysis of the humanitarian concerns that types of existing munitions with more than one sub-munition cause. At the same time, this wording implies that there may be cluster munitions that cause *acceptable* harm to civilians which may be a justification for exclusions or exceptions from a definition of prohibited cluster munitions. As will be seen, defining the dividing line between what is acceptable as opposed to *unacceptable* in humanitarian terms in relation to what is a cluster munition in technical terms proved to be the key challenge in the diplomatic process that was now on the table.

Interestingly, the wording of acceptable/unacceptable also differs from the wording used by the customary international law rules of API, especially of Art. 51 (5) (b) on

⁸⁵⁸ Norway, Ministry of Foreign Affairs, “Norway takes the initiative for a ban on cluster munitions”, Press Release No. 149/06, 17 November 2006, <http://www.regjeringen.no/en/dep/ud/press/News/2006/Norway-takes-the-initiative-for-a-ban-on-cluster-munitions.html?id=436868#> (last visited 25 January 2010).

⁸⁵⁹ Declaration on Cluster Munitions by Austria, Belgium, Bosnia-Herzegovina, Croatia, Costa Rica, Czech Republic, Denmark, Germany, Holy See, Hungary, Ireland, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Sweden and Switzerland, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/E4AC282AA43501A6C125723000605378/\\$file/Sweden+\(CM\).pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/E4AC282AA43501A6C125723000605378/$file/Sweden+(CM).pdf) (last visited 25 January 2010).

proportionality which, as mentioned above, calls for an evaluation of whether civilian harm is *excessive* in relation to a direct and concrete military advantage pursued. In this context, it is also interesting to recall what was also already mentioned above, notably that the famous IHL scholar *Kalshoven* explained this balancing act underlying Art. 51 (5) (b) of API precisely in terms of a dividing line separating acceptable collateral civilian damage from such attacks which entailed unacceptable civilian losses. If that is the case, then Norway could have just adopted the formula of Art. 51 (5) (b) of API to signal to others that an appropriate balancing between humanitarian and military considerations must be found.

However, in the view of this author, Norway used the wording of “unacceptable harm” for good reasons. This is already justified by the view that existing IHL was obviously not capable of providing adequate protection for civilians from the use of these weapons in practice. The wording also marks a shift in focus from the way discussions had been conducted in the framework of the CCW for several years until then which arguably were based on existing IHL but which accorded priority to national security and military concerns over humanitarian considerations, i.e. human security based on protection of individual civilians.

Be that as it may, besides this essentially humanitarian rationale the wording of “unacceptable harm” also served the purpose of reassuring those that were not prepared to go as far as a comprehensive prohibition of cluster munitions at that stage and thus, of mobilising a first critical mass of support for the new alternative process.⁸⁶⁰

As was to be expected, the announcement by Norway did not meet with the support of all states present. The United States was most outspoken in stating its disappointment by Norway’s announcement to go outside the CCW framework for dealing with cluster munitions. It made it clear that states should not work outside the CCW to achieve meaningful results on cluster munitions, since the CCW took into account both humanitarian and military interests and truly brought together users and producers of weapons and humanitarian advocates.⁸⁶¹ Others, like India and the Republic of Korea, welcomed the decision of the

⁸⁶⁰ In this light, for example, the cautious wording of Austria of declaring in two of its statements that its support for a new international treaty on cluster munitions did not imply a proposal for a total ban may be understood. See Austria, Statements by Markus Reiterer and Wolfgang Petritsch, *supra* note 698.

⁸⁶¹ United States, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format).

Review Conference to continue discussions on cluster munitions within the CCW rather than start negotiations on a new treaty on cluster munitions.⁸⁶²

The ICRC and the CMC both welcomed Norway's announcement, with the ICRC offering to host an expert meeting in 2007 to contribute to a convergence of views on how to reduce the human costs of cluster munitions.⁸⁶³

Australia and the United Kingdom could be regarded as holding an intermediate position, since both recognised cluster munitions as a humanitarian problem and stated that they would have been in favour of negotiations. However, for those states what counted was a solution to the cluster munition problem in practical terms and this is why they still welcomed the agreement on a discussion mandate.⁸⁶⁴

Also Germany entertained an intermediate position in the sense that it subscribed to the final declaration by 25 states calling for a new international treaty on cluster munitions but added that it was only prepared to conclude such a treaty within the framework of the CCW.⁸⁶⁵

With the announcement of Norway on the table to start an alternative diplomatic process, it remained to be seen whether a sufficient critical mass of states would support it.

5.2.2. The First Litmus Test For a New Diplomatic Process on Cluster Munitions: The Oslo Conference on Cluster Munitions

At that stage, there was no reassurance whatsoever that the announcement of an alternative diplomatic process with the aim of banning cluster munitions that cause

⁸⁶² India, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format); Republic of Korea, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format).

⁸⁶³ ICRC, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format); Cluster Munition Coalition, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format).

⁸⁶⁴ Australia, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/0C1A931310AC367AC12572300061B464/\\$file/Australia.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/0C1A931310AC367AC12572300061B464/$file/Australia.pdf) (last visited 25 January 2010); United Kingdom, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format).

⁸⁶⁵ Germany, Statement at the Final Plenary Meeting, 17 November 2006, [http://www.unog.ch/80256EE600585943/\(httpPages\)/1DB747088014E6D7C12571C0003A0818?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/1DB747088014E6D7C12571C0003A0818?OpenDocument) (last visited 25 January 2010) (only in audio format).

unacceptable harm to civilians would translate into effective action at the international level. By “effective” one may understand a process which includes those states specially affected by the issue of cluster munitions, i.e. past users, producers, stockpilers but also those states contaminated by sub-munition duds. In an ideal world, the most effective action would be to include major users and producers like Russia or the United States along with the states most affected by sub-munition contamination including Laos, Afghanistan or Lebanon in a process leading to legally binding rules on these weapons. However, not getting any of the relevant states on board of an alternative diplomatic process would entail the danger that this alternative process could not acquire even a minimum of relevance for the problem on the ground.

As to the possible objection that for a meaningful diplomatic process major military powers must be on board, the idea for an alternative process was precisely born out of the deadlock in the CCW where the fulfilment of such an objective proved impossible. In that respect, it is clear that at the beginning of a new diplomatic process not all the relevant players are yet on board. Moreover, it is a historical fact that the CCW counts few states parties from the developing world. That the CCW itself was aware of the problem of its lack of legitimacy and representation among developing states may be derived from the fact that at the Third Review Conference one of the agenda items was a sponsorship programme to enable more active participation in CCW meetings by delegations from the developing world. In particular, the argument can be made that the CCW does not adequately reflect the interests of states contaminated with sub-munition duds.⁸⁶⁶

Still, tested against the relevance criteria of users, producers, stockpilers and affected states, the group of 25 states in favour of the final declaration were certainly not sufficient in themselves to create enough political pressure for the new process to become effective. While it was true that out of this group of 25, 16 states were stockpilers of the weapon,⁸⁶⁷ only 7 of them were producers or former producers,⁸⁶⁸ one (former) user,⁸⁶⁹ and three states affected⁸⁷⁰ by sub-munition contamination.⁸⁷¹

⁸⁶⁶ For instance, of the states worst affected by sub-munition contamination, only Laos is a state party to the CCW, while Afghanistan and Vietnam are mere signatories, and Lebanon and Iraq neither states parties nor signatories.

⁸⁶⁷ Austria, Belgium, Bosnia & Herzegovina, Croatia, Czech Republic, Denmark, Germany, Hungary, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Sweden and Switzerland.

⁸⁶⁸ Belgium, Bosnia & Herzegovina, Germany, Serbia, Slovakia, Sweden and Switzerland.

⁸⁶⁹ Serbia.

⁸⁷⁰ Bosnia & Herzegovina, Croatia and Serbia.

⁸⁷¹ An updated statistic published by the CMC in June 2009 shows that altogether 31 states are known to be affected by cluster munitions, 15 have used them, 34 have produced them or are still producing them, and 85 have stockpiled them. See Cluster Munition Coalition, “How Big Is the Problem?”,

Especially in the categories of user and affected states significant work lay ahead for an effective alternative process to be started. A first conference in this new diplomatic process was scheduled by Norway for 22-23 February 2007 in Oslo. In terms of strategy, Norway set out to identify a core group of states. This core group was not only formed out of a shared concern about the humanitarian urgency of concluding an international treaty banning cluster munitions; Norway also selected certain states on the basis of their willingness to invest heavily in a new process by providing leadership and resources necessary to carry out an initiative outside of traditional forums and without UN staff to take care of administrative matters.⁸⁷² Initially, the core group included Austria, Ireland, Mexico, New Zealand and Sweden. Austria was one of the most outspoken states at the Third Review Conference and had delivered several statements on behalf of other states interested in negotiating a new international treaty on cluster munitions. Moreover, as shown above, Austria had also already acknowledged the humanitarian concerns on cluster munitions by adopting a parliamentary resolution on a national level. Like Austria, Mexico, New Zealand and Sweden, Ireland had been in the initial group of six states in the CCW calling for a negotiating mandate on cluster munitions and had put forward a further proposal to include long-term civilian harm in the interpretation of the proportionality assessment to be conducted by attackers. However, only Austria, Norway and Sweden were stockpilers of the weapon, and in Sweden cluster munitions were produced.

The goal of this first conference was to rally a critical mass of states behind the idea of negotiating a new international treaty on banning cluster munitions that cause unacceptable harm to civilians. For this new process to be relevant, more than the 25 states supporting the final declaration would have to participate, especially some developed producer and user states and some developing affected states. The Oslo Conference on Cluster Munitions passed this first test of relevance with honours; a total of 49 states participated, which far surpassed expectations by the Norwegian government. Out of these 49 states 30 were stockpilers, 19 producers, six users and six affected states. For example, important European producers and stockpilers like France, Germany and the United Kingdom attended the Oslo Conference, with the United Kingdom also being the third-biggest user of cluster munitions. It was also noteworthy that two of the worst affected states, Afghanistan and Lebanon, were present.

<http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/06/how-big-is-the-problem-120609.pdf> (last visited 25 January 2010).

⁸⁷² Goose, "Cluster Munitions in the Crosshairs" in Williams, Goose & Wareham (eds.), *Banning Landmines*, *supra* note 403, at 225-226.

In his opening statement to the Conference, the Norwegian Minister of Foreign Affairs stressed that the time had come to agree on a new international instrument to ban cluster munitions that have unacceptable humanitarian consequences and a framework to ensure care and rehabilitation to victims and affected communities.

On the approach to be taken to achieve that end, he left no doubt about the *humanitarian* character of such a process which should be inclusive and mobilise states, humanitarian actors, civil society and the United Nations. While the Minister stated that this approach may mean to ban only the use of certain types of cluster munitions, he also dispensed with the idea that technical improvements in weapons technology may be sufficient to address the complex humanitarian problems caused by cluster munitions. Moreover, he confirmed the essential humanitarian core task ahead in closing by outlining the objective as reaching agreement on a plan for developing and implementing a new instrument of international humanitarian law that addresses *all* the unacceptable consequences of cluster munitions by 2008.⁸⁷³

Responding to the call for a humanitarian approach, Austria contributed to the momentum of this conference by informing the other participating states of its national moratorium.⁸⁷⁴ However, the real litmus test for the Oslo Conference was whether those states that had reservations on some issues could be won over politically for supporting this process. The tool by which that political commitment should be expressed was a Final Declaration, a draft of which had already been prepared by Norway and other members of the core group. Support for such a Final Declaration was not a foregone conclusion. Rather, the Oslo Conference already brought certain controversies to the fore which were to persist throughout the whole process.

For example, several states expressed a preference for continuing work on cluster munitions predominantly in the CCW, with the Oslo process exerting political pressure on achieving concrete results in the former forum which included major users, producers and stockpilers.⁸⁷⁵ Another issue concerned whether technical improvements such as restrictions

⁸⁷³ Norway, Opening Statement by Foreign Minister Jonas Gahr Støre, Oslo Conference on Cluster Munitions, 22 February 2007, <http://www.regjeringen.no/nn/dep/ud/Om-departementet/Utenriksminister-Jonas-Gahr-Store/Taler-og-artiklar/2007/oslo-conference-on-cluster-munitions-222.html?id=454595> (last visited 25 January 2010).

⁸⁷⁴ Austria, Statement on the Austrian Moratorium, *supra* note 706. Also Bosnia and Herzegovina announced its intention to declare a moratorium on the use of cluster munitions until an international prohibition of these weapons is established. See Bosnia & Herzegovina, Statement to the Oslo Conference, 22 February 2007, <http://www.regjeringen.no/upload/UD/Vedlegg/ClusterBosnia.pdf> (last visited 25 January 2010).

⁸⁷⁵ See Germany, Statement by Mr. Heinrich Haupt, Division of Arms Control, Federal Foreign Office, Oslo Conference on Cluster Munitions, 22-23 February 2007, <http://www.regjeringen.no/upload/UD/Vedlegg/ClusterGermany%20Haupt.pdf> (last visited 25 January 2010).

on use of cluster munitions with failure rates of over 1% were sufficient to achieve the goal of prohibiting cluster munitions that cause unacceptable harm to civilians. Argentina, Sweden, the United Kingdom and Germany expressed support for an approach designed to lower the failure rates of and equip sub-munitions with self-destruct mechanisms rather than a more comprehensive prohibition of cluster munitions.⁸⁷⁶ Sweden advocated this position mainly because of a national change of government before the Oslo Conference. This was also why Sweden finally retreated from the core group, with Peru taking Sweden's place.

Such statements were contested not only by other states but especially by the CMC and another expert who gave presentations on the problems associated with such technical fixes. Their main message was that figures of failure rates of 1% were determined under ideal test conditions which differed considerably from actual combat conditions.⁸⁷⁷

This also reflected the humanitarian focus of this new process where considerable room was given to voices from the field and cluster munition victims rather than only to diplomats, military experts or producers. Especially the constant presence and active participation of cluster munition victims was a vivid reminder to participating states that at the core of this new diplomatic process were humanitarian goals. The CMC also hosted a Civil Society Forum on the day before the official conference started and held a series of workshops during the official conference on technical and legal aspects relating to cluster munitions, investments on cluster munitions, on advocacy and media strategies and country-specific humanitarian situations in the cluster munition affected states of Afghanistan, Lebanon and Serbia. This underlined the educative role that civil society was to play throughout this process and the practice of convening a Civil Society Forum ahead of a conference was also followed in subsequent Oslo process meetings.

Despite certain fears on the part of Norway, other states, the CMC and other humanitarian organisations that certain states would not be able to subscribe to the Final

The statement by Germany was echoed by France, another important European producer and user state. Other states, like Italy, Argentina and the Netherlands also indicated their support for the CCW and their view that international action against cluster munitions should be taken in the framework of the CCW. In a similar vein, Egypt, Latvia, Switzerland, Sweden and Canada expressed their fears that the emerging Oslo process may compete negatively with the CCW framework. See K. Harrison, "Report from the Oslo Conference on Cluster Munitions, 23-25 February 2007", http://www.wilpf.int.ch/PDF/DisarmamentPDF/ClusterMunitions/OSLO_Report.pdf (last visited 25 January 2010).

⁸⁷⁶ Sweden, Intervention on Scope of a future instrument, Oslo Conference on Cluster Munitions, 23 February 2007, <http://www.regjeringen.no/upload/UD/Vedlegg/ClusterSweden.pdf> (last visited 25 January 2010).

⁸⁷⁷ For example, see G. Østern, Policy Adviser on Cluster Munitions, Norwegian People's Aid "Basing Policy Responses on Field Realities", Presentation to the Oslo Conference on Cluster Munitions, 22 February 2007, <http://www.regjeringen.no/upload/UD/Vedlegg/ClusterNorwePAid.pdf> (last visited 25 January 2010).

Declaration of the Oslo Conference, 46 out of 49 states present supported the Oslo Declaration which read as follows:

“Oslo Conference on Cluster Munitions,

22 – 23 February 2007

Declaration

A group of States, United Nations Organisations, the International Committee of the Red Cross, the Cluster Munitions Coalition and other humanitarian organisations met in Oslo on 22 – 23 February 2007 to discuss how to effectively address the humanitarian problems caused by cluster munitions. Recognising the grave consequences caused by the use of cluster munitions and the need for immediate action, states commit themselves to:

- 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.**
- 2. Consider taking steps at the national level to address these problems.**
- 3. Continue to address the humanitarian challenges posed by cluster munitions within the framework of international humanitarian law and in all relevant fora.**
- 4. Meet again to continue their work, including in Lima in May/June and Vienna in November/December 2007, and in Dublin in early 2008, and welcome the announcement of Belgium to organise a regional meeting.**⁸⁷⁸

Thus, the Oslo Declaration importantly enjoyed the support of European producer, user and stockpiler states like France, Germany and the United Kingdom, as well as two of the most heavily affected states, Afghanistan and Lebanon.⁸⁷⁹ Significantly, in its para. 1, the Declaration did not only envisage a new disarmament treaty on what would later be defined as cluster munitions that cause unacceptable harm to civilians within a clear deadline, notably only one year later by 2008 but it made the humanitarian focus of such a new treaty clear by committing states to establish a framework for cooperation and assistance that ensures adequate care for provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education and destruction of stockpiles of prohibited

⁸⁷⁸ Oslo Conference on Cluster Munitions, Final Declaration, 23 February 2007, [http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20\(final\)%2023%20February%202007.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20(final)%2023%20February%202007.pdf) (last visited 25 January 2010).

⁸⁷⁹ However, it failed to evince support from Japan, Poland and Romania. Japan stated that a decision on the course of action with regard to cluster munitions could not be taken until all humanitarian, technological, security and legal aspects were discussed with the participation of more countries. It attached importance to the upcoming ICRC expert meeting in April and the CCW GGE meeting in June 2007. Poland also emphasised the importance of the CCW which should not be put aside and considered that the results of the Oslo conference would give new momentum to work within the CCW. See Harrison, “Report from the Oslo Conference”, *supra* note 875.

cluster munitions. With regard to the reference to cluster munitions “that cause unacceptable harm to civilians”, some states emphasised the need to clarify this wording in a future definition of cluster munitions.⁸⁸⁰

The reference to “national steps” in para. 2 may be understood as responding to demands by the UN and CMC member NGOs to take unilateral national measures, such as the declaration of moratoria or the enactment of national legislation until the humanitarian problems were addressed on an international level.

Para. 3, and in particular the wording of “to continue to address the humanitarian challenges posed by cluster munitions ... in all relevant fora” was an important compromise between those states that still had expressed a preference for addressing cluster munitions in the CCW and those which regarded the CCW as ineffective. On the one hand, some states in accepting the Declaration explicitly interpreted this reference as meaning the CCW, on the other, those regarding the CCW as not any more appropriate to deal with cluster munitions considered it a success that the CCW was not expressly mentioned.

Finally, the Oslo Declaration laid down a roadmap towards concluding an international legally binding instrument on cluster munitions by 2008, with follow up conferences in Lima in May 2007, in Vienna in December 2007 and in Dublin in 2008. On the whole, the goal of this first conference in this new “Oslo process” can be considered to be fulfilled, notably to politically commit a first critical mass of countries prepared to adopt a new treaty prohibiting cluster munitions that cause unacceptable harm to civilians by a concrete deadline, namely 2008.

Yet, despite the fact that there was some level of political commitment, including by important European producer, user and stockpiler states it still remained to be seen whether all these states expressed their commitment because they were of the view that the new “Oslo process” was the only process viable to provide an effective humanitarian response to the cluster munition problem or whether some of them would use the momentum and pressure of the “Oslo process” for continuing work in the CCW.

For instance, the argument was still used by some signatories to the Oslo declaration that any effective initiative against cluster munitions should include the major users and producers. This could hardly be considered an unwavering commitment to concluding a treaty prohibiting cluster munitions that cause unacceptable harm to civilians, since it will be

⁸⁸⁰ Canada, the Netherlands and Switzerland. On the other hand, Mexico stated that in its understanding there was no such thing as a cluster munition that causes acceptable harm to civilians. Therefore, the process should aim at prohibiting cluster munitions *because* they cause unacceptable harm to civilians. See Harrison, “Report from the Oslo Conference”, *supra* note 875.

recalled that this process emerged as a response to the failure of the CCW process due to the opposition of these major users and/or producers to come up with a concrete deadline for a new legally binding instrument on cluster munitions. Still, for the core group countries it was necessary to engage with these arguments which were made precisely by producer and user states whose participation was vital for the credibility and effectiveness of a future international treaty on cluster munitions. And, after all hope dies last and at that stage while it was unlikely that sufficient momentum could be generated in order to negotiate new international law on cluster munitions within the CCW it could also not be entirely ruled out. This is why already at the Oslo Conference the formula of “two complementary processes that should be mutually reinforcing” was born.⁸⁸¹

In view of these complications, it may be concluded that the Oslo Conference was nothing more than a strong start. However, firstly significant opposition remained and secondly, concerns were justified that certain states signing up to the Oslo process still needed to be convinced that there was only a realistic prospect for a new treaty outside the forum of the CCW.

This became obvious at the expert meeting hosted by the ICRC in Montreux from 18-20 April 2007. Already announced at the Third Review Conference in November 2006, this expert meeting brought together humanitarian, military, technical and legal experts from a variety of backgrounds, including governmental, intergovernmental, non-governmental, to discuss key issues in the international debate on cluster munitions like the humanitarian impact and the military role of cluster munitions, the feasibility/desirability of technical solutions to eliminate the humanitarian problems, the adequacy/inadequacy of existing IHL or ways to approach a definition of cluster munitions on the international level.

On the one hand, US army officials emphasised the ongoing military utility, the feasibility of technical solutions to reduce humanitarian concerns and the adequacy of IHL while a Chinese governmental expert concurred with his US colleagues on the issue of adequacy of existing IHL but disagreed as to the feasibility and/or desirability of technical solutions to tackle the humanitarian problem. This indicated that the prospects of any new international treaty on cluster munitions within the CCW were indeed slim, since the US and

⁸⁸¹ In this regard, for example, the Co-Chair from New Zealand emphasised that the Oslo Conference was not a question of participation in the CCW or outside of it but rather an expression of likemindedness and that the two processes needed to draw strength from each other and be mutually reinforcing. See *ibid.*

China remained opposed to new rules and even on other measures there was apparently no consensus among those major military powers.⁸⁸²

On the other hand, Germany, an important European producer state and signatory to the Oslo Declaration, introduced a proposal for the upcoming GGE meeting of the CCW which was due to take place in June, thus reaffirming its preference for results to be achieved within that framework. The proposal sought to divide the universe of cluster munitions into three parts: Firstly, the use, transfer, stockpiling, development and production of any unreliable and/or inaccurate cluster munitions should be prohibited immediately. Secondly, the same activities in relation to accurate and/or reliable cluster munitions should be prohibited after a certain transition period (10 years were suggested), while so called “alternative munitions”, also referred to as “sensor-fused area munitions” (SEFAM) should substitute the military capabilities of cluster munitions after the transition period.⁸⁸³

According to this German draft, “unreliable” cluster munitions were those which contain sub-munitions of a dangerous dud rate of one percent or more measured in testing, “inaccurate” those which are effective also outside a pre-defined target area, i.e. the deviation from the centre of a pattern to the aim point.⁸⁸⁴

While this was an attempt to find some middle ground between those inspired mainly by the humanitarian problem associated with cluster munitions and those opposed to any new rules on cluster munitions, as was noted by one participant it was unrealistic to think that this proposal would succeed in the CCW. It would be “too little for many and too much for some”.⁸⁸⁵ In terms of substance, those most strongly behind the Oslo process criticised the use of terms such as “dangerous duds” and the reliance on testing regimes that differed from actual combat conditions as well as the fact that through a transition period some type of cluster munitions with documented humanitarian harm would continue to be used.⁸⁸⁶

⁸⁸² ICRC Expert Meeting Montreux 2007, *supra* note 41.

⁸⁸³ Germany, Draft CCW Protocol on Cluster Munitions, 1 May 2007, UN Doc. CCW/GGE/2007/WP.1.

⁸⁸⁴ *Ibid.*

⁸⁸⁵ ICRC Expert Meeting Montreux 2007, *supra* note 41, at 78-79.

⁸⁸⁶ For more detailed criticism, see Cluster Munition Coalition, “German proposal is not a basis for new cluster munition treaty”, 27 April 2007 (on file with the author). The notion of “dangerous duds” was also opposed by a number of experts at the expert meeting in Montreux.

5.2.3. The Lima Conference on Cluster Munitions, 23-25 May 2007

Thus, significant challenges remained for the next Oslo process conference in Lima from 23-25 May 2007. Before that conference, a first discussion text on a future cluster munition treaty was prepared and circulated by the core group.⁸⁸⁷

The intention was to enable streamlined discussions on the basis of a concrete text. The general structure of this discussion text strongly resembled that of the 1997 Ottawa Convention on Antipersonnel Mines with Article 1 on the general prohibitions and scope of application, Article 2 on the definition of prohibited weapons, as well as provisions on storage and stockpile destruction (Article 3), clearance (Article 4), international cooperation and assistance (Article 5), transparency measures and compliance (Articles 7 and 8), national implementation measures (Article 9), and provisions on dispute settlement (Article 10), future meetings of states parties (Article 11), review conferences (Article 12), and the final provisions on signature, ratification and entry into force (Articles 15-17).

Thus, the basic philosophy was the same as with the Ottawa Convention on Antipersonnel Mines, notably not only a traditional disarmament instrument with prohibitions on use, production, transfer and stockpiling of cluster munitions was envisaged but also one that contained humanitarian obligations such as clearance of contaminated areas.

In fact, this humanitarian focus which underpinned the Oslo process from the start was even more evident in the Lima discussion text than in the Ottawa Convention, since the Lima discussion text contained a stand-alone provision on victim assistance (Article 6) while in the Ottawa Convention victim assistance was only included as part of the provision on international cooperation and assistance (Article 6 (3), as described above). Significantly, Article 6 on victim assistance specifically referred to “human rights” as the fundamental rationale for providing medical care, rehabilitation and “facilitating social and economic reintegration” of cluster munition victims. Thus, it can be seen that the drafters of the discussion text attempted to build on lessons learnt from the Ottawa Convention as well as the adoption of the Convention on the Rights of People with Disabilities inasmuch as it was reaffirmed that the plight of cluster munition victims was a matter of *human rights* rather than a mere medical or welfare issue.

⁸⁸⁷ For the entire Lima Discussion Text, see Annex, *infra* pp. 377-384.

This human rights focus besides a disarmament focus set the work on a specific instrument on cluster munitions apart from other disarmament treaties like the Convention on the Prohibition of Chemical Weapons.

Moreover, unlike other disarmament treaties which rely on intrusive regimes of inspections and on independent expert bodies on verifying compliance (such as the Organisation for the Prohibition of Chemical Weapons), compliance was to be based here more on a cooperative rather than intrusive approach. Accordingly, the basic principle on compliance enshrined in the Lima discussion text was that states parties to the future treaty would agree to consult and cooperate with each other regarding the implementation of the future convention (Article 8 (1)). The only specific compliance mechanism foreseen in the Lima discussion text was the possibility to submit requests for clarification to another state party through the UN Secretary-General which in the case no response would be received could be brought up at the subsequent meeting of states parties. This compliance tool was modelled after the 1997 Ottawa Convention and also here, some lessons learnt were duly taken into account, since a further possibility of ensuring compliance in the form of field visits decided on a meeting of states parties against the will of a non-compliant state was neither included in the Lima discussion text nor any time thereafter in the Oslo process. As this possibility had never been resorted to in the implementation of the Ottawa Convention, it was not considered in the discussions and negotiations on a Convention on Cluster Munitions.

On this general structure of a human rights inspired disarmament treaty there was no discussion, as none of the states participating in the Oslo process ever stated that the new instrument should not include specific obligations to provide assistance to victims or to clear contaminated areas. This was already ensured once again by the active participation of cluster munition victims in the discussions, a prominent feature throughout the Oslo process. For example, a Serbian victim reported on his former profession as a clearance expert in the Serbian army at the time when NATO member states had used cluster munitions in and near populated civilian areas in Niš, Kraljevo, Ponikve and Sjenica; one day in November 2000 a sub-munition dud exploded and the clearance expert lost both arms and both legs. He emphasised that a new treaty could prevent civilian suffering in the future and that it can help people who have been disabled by cluster munitions in the past. Mr. Kapetanović hoped that state delegates would keep focusing on the needs of people and communities affected by

cluster munitions and he believed that the efforts would be rewarded with success, i.e. a strong ban.⁸⁸⁸

But how strong such a ban should be and in which forum it should be achieved were, much like in Oslo, the most controversial issues of the conference. Some important user, producer and stockpiler states, including France, Germany, Japan, Italy, or Australia expressed strong support for the CCW process. The argument was once again that the CCW included all the major users and producers of cluster munitions and a treaty concluded in this framework would be the most effective on the ground.⁸⁸⁹ It may be restated here that it seemed to be idealistic rather than realistic to assume that even less ambitious international law on cluster munitions had any realistic chance to succeed in the CCW within a timeframe that duly reflected the humanitarian urgency of the problem. Again, this may be concluded in light of the fact that the Third Review Conference in November 2006 could not achieve anything concrete after approximately five years of discussions. Also, only one month before in Montreux, divergent views among two of the major producer states, the United States and China, had again become apparent, which made any decision based on consensus within the CCW unlikely. Still, for example for France and Germany, it was important to attempt everything possible to decide on a negotiation mandate for a new Protocol VI on cluster munitions in the CCW.

Moreover, the argument about major producers and stockpilers does not adequately reflect the comprehensive nature of the proposed treaty, since it must be emphasised that this argument places overemphasis on the disarmament component but neglects the humanitarian/human rights component. Thus, such a treaty will be relevant even in the absence of participation of some major military powers especially when it comes to international assistance and funding of mine action/ERW programmes. Among the largest donors of such programmes which include clearance, risk education or victim assistance, were European states committed to the Oslo process like Norway, the United Kingdom, the Netherlands, Germany, Sweden, Denmark, Switzerland, Spain, Belgium, Ireland, Italy, France or Austria.⁸⁹⁰ Further, heavily affected states like Laos and Lebanon were also

⁸⁸⁸ CMC, Statement to the Lima Conference, delivered by Branislav Kapetanović, 23 May 2007, <http://www.wilpf.int.ch/disarmament/clustermunitions/LIMA/statements/23MayCMC.pdf> (last visited 25 January 2010).

⁸⁸⁹ For example, see France, General Statement, Lima Conference on Cluster Munitions, 23 May 2007, <http://www.wilpf.int.ch/disarmament/clustermunitions/LIMA/statements/23France.html> (last visited 25 January 2010).

⁸⁹⁰ See the figures quoted for 2007 in Landmine Monitor 2008, "Support for Mine Action", http://lm.icbl.org/index.php/publications/display?url=lm/2008/es/support_for_mine_action.html (last visited 25 January 2010).

strongly committed to the Oslo process. For these states, their motivation was clear, since victims in these states would greatly benefit from a new treaty with a strong human rights component that would deal with the pre-existing problem caused by sub-munition contamination.

Another concern expressed by certain states, including Italy, the Netherlands, Australia and Switzerland, was that a treaty adopted in the Oslo process would undermine the already existing Protocol V of the CCW.

At the outset, it should be noted that the treaty envisaged in the Oslo process and Protocol V are different in scope. The Lima discussion text contained prohibitions regarding a specific weapon, cluster munitions, addressing their effects during and after conflict, while Protocol V applies to any unexploded and abandoned ordnance at the post-conflict stage only. Thus, the cluster munitions discussion text and Protocol V only partially overlap to the extent that the post-conflict effects of cluster munitions are at issue. For other types of unexploded or abandoned ordnance, Protocol V only remains relevant.

Further, Protocol V does not have any retroactive effect and thus, does not apply to cluster munition remnants already existing before the entry into force of this treaty, i.e. November 2006. In contrast, the proposed text for a future convention specific to cluster munitions was not only preventive but also reactive in that it dealt with sub-munition contamination that would predate the entry into force of the future treaty. Thus, the issue of overlap or duplication would only arise with regard to cluster munition remnants created after the entry into force of Protocol V in November 2006.

In that respect, if a state became party to the future treaty as envisaged in the Lima draft and at the same time, was party to Protocol V then there would be parallel obligations in particular as to clearance of cluster munition remnants in areas under that state's jurisdiction and control. But that still would not in principle mean that through the operation of a new specific convention on cluster munitions Protocol V would be undermined. It would in principle only mean that fulfilment of the obligation under the future cluster munition convention also entails fulfilment of clearance obligations under Protocol V. However, in view of the preventive character of the proposed cluster munition treaty, if widely adhered to, this future treaty would have the effect that no new cluster munition remnants would be created and accordingly, no clearance and related obligations like recording of information on new ERW, on risk education or fencing under Protocol V in the cluster munition context would arise.

Still, in the event new cluster munition remnants were to be created (e.g. violation by state party of the future cluster munition convention or cluster munition use by a state not party to the future treaty) regarding the Lima draft, the argument could be made that this text did not adequately take into account the existence of Protocol V. Thus, there could be a risk that in these rare instances future states parties may divert their priorities and especially scarce resources to clearance and victim assistance activities concerning cluster munition remnants only. In that case, it may be concluded that indeed regarding ERW other than cluster munition remnants the fulfilment of obligations under Protocol V may be delayed or weakened. However, as will be seen *infra*, the lack of coherence between the future Convention on Cluster Munitions and Protocol V was subsequently remedied.⁸⁹¹

As was to be expected, the most contentious discussions in Lima were held on the definitions on what constitutes cluster munitions that cause unacceptable harm to civilians. The major divide was between those holding the view that technical benchmarks like accuracy, reliability, self-destruct or self-neutralisation mechanisms were not sufficient to remedy the humanitarian problems associated with cluster munition use and thus advocated a comprehensive prohibition of cluster munitions,⁸⁹² and those that did and thus, only advocated for a partial ban or regulation.⁸⁹³ In fact, the discussion represented the continuation of discussions in Oslo, with the CMC vehemently opposing with recent field evidence, especially from Lebanon, views as to the viability and desirability of approaches to the definition based on self-destruct mechanisms or failure rates. As an alternative to the Lima discussion text, Germany again lobbied for its proposal it was going to submit to the CCW GGE in June 2007.

Significantly, the Lima discussion text in its proposed Art. 2 on the definition of cluster munitions did not provide for exceptions to prohibited cluster munitions based on self-destruct mechanisms or failure rates. In this regard, the draft may be seen to be biased in favour of the position of especially core group members and affected states which did not support a partial ban.

⁸⁹¹ See the analysis of the Vienna Discussion Text, *infra* p. 286.

⁸⁹² Ireland, Intervention on Definitions, Lima Conference on Cluster Munitions, 24 May 2007, <http://www.wilpf.int.ch/disarmament/clustermunitions/LIMA/statements/24MayIreland.html> (last visited 25 January 2010). Norway, Lebanon, Chad, Senegal, Indonesia, Ecuador, Bosnia and the CMC also opposed exceptions from prohibitions based on self destruct or neutralisation mechanisms or failure rates. K. Harrison, "Report on the Lima Conference on Cluster Munitions 23-25 May 2007", at 27-29, <http://www.wilpf.int.ch/PDF/DisarmamentPDF/ClusterMunitions/LIMA%20REPORT.pdf> (last visited 25 January 2010).

⁸⁹³ Australia, Canada, Denmark, Egypt, Finland, France, Netherlands, Poland, Spain, Switzerland and the United Kingdom were not in favour of a comprehensive prohibition but dividing the cluster munition universe into illegal and legal weapons. See Harrison, "Report on the Lima Conference", *supra* note 892, at 27.

That did not mean, however, that the draft foresaw the prohibition of anything that could be technically considered a cluster munition. This is evidenced by an exception to the prohibition for those munitions that are designed to, manually or automatically, aim, detect and engage point targets, or are meant for smoke or flaring, or where their use is regulated or prohibited by other treaties. While the exception or exclusion for flare or smoke ammunition was uncontested, the other two posed more problems, at least for the CMC.

The exception for munitions designed to aim, detect and engage point targets was drafted with a view to sensor-fused weapons. The CMC had circulated certain key principles that it considered essential for any future treaty on cluster munitions. On the question of sensor-fused weapons, it stated that the CMC believed that the burden of proof must be on governments to demonstrate that such weapons do not cause unacceptable harm to civilians, that they do not have an indiscriminate wide area effect and that they do not leave behind large numbers of duds.⁸⁹⁴

In specific comments to the Lima discussion text, the CMC criticised that the current definition could be understood as capturing primarily the container or delivery system from which the explosive sub-munitions are dispensed.⁸⁹⁵ Thus, the definition in the Lima discussion text suffered from the same flaw as the Austrian Federal Act on the Prohibition of Cluster Munitions when it originally entered into force in January 2008, since what is the part ultimately causing civilian harm are the sub-munitions, not the container.

In addition, on the sensor-fused exception the lack of definition for “point target” gave rise to concerns as to what level of precision was required in order to detect and engage such targets.⁸⁹⁶

The exception for weapons whose use is regulated or prohibited under other treaties also posed problems in the eyes of the CMC. Rightfully, the CMC argued that this exception was vague, as it was not clear what weapons should be exempted, potentially landmines, incendiary, nuclear, biological, chemical weapons? Drawing the line to NBC and incendiary weapons should not be difficult if it is specified that what was to be addressed by a future

⁸⁹⁴ Cluster Munition Coalition, Treaty Principles, 19 June 2007, UN Doc. CCW/GGE/2007/WP.7. This is an indication on attempts to reverse the burden of proof with regard to cluster munitions. While traditionally under IHL the case has to be made that a weapon should be prohibited on humanitarian grounds, here the argument is that weapons should be presumed to fall under a possible prohibition unless the case is made that it does not cause the same humanitarian concern and therefore should be exempted from a ban.

⁸⁹⁵ Cluster Munition Coalition, “Observations by the Cluster Munition Coalition on the Chair’s discussion text for the Lima Conference on Cluster Munitions 23-25 May 2007”, <http://www.wilpf.int.ch/disarmament/clustermunitions/LIMA/statements/CMCchairtext.pdf> (last visited 25 January 2010).

⁸⁹⁶ See *ibid.*

treaty on cluster munitions was *conventional* explosives. However, subsequent regulations or prohibitions on cluster munitions, for instance within the CCW, could be weaker and thus, such an exception could be used to undermine a cluster munition treaty concluded in the Oslo process.⁸⁹⁷

These comments made clear that the Lima discussion text was in fact a good starting point in an attempt to show the way towards a negotiated and balanced outcome, since apparently it was still not ambitious enough for the CMC while it was too ambitious for certain states. On a positive note, the “Oslo process” gained additional momentum and enjoyed increased participation especially from African and Latin American countries. Thus, the geographical representation of participants became more diverse, and in contrast to the CCW, the Oslo process rapidly gained acceptance among less developed countries. Significantly, Cambodia and Laos, two of the most heavily affected states, participated in an Oslo process conference for the first time, as well as Albania, a European affected state. Moreover, Hungary during the conference announced a national moratorium concerning its cluster munitions and Peru declared its idea to create the first cluster munitions free zone in Latin America.⁸⁹⁸ On the other hand, it must be observed that among the new countries joining the process there was only one former user, Nigeria. Nevertheless, the Lima Conference achieved what is required for any diplomatic process to succeed, notably to evince support from developing countries. The increase in participation from 49 states participating in Oslo to 67 in Lima also meant that opponents could not simply ignore the “Oslo process” any more.

Some important European states, especially Germany, France and the United Kingdom, were still not prepared to accept that there were no realistic prospects that concrete action on cluster munitions would be taken within the framework of the CCW. In addition, the major opponents to the “Oslo process”, in particular the United States and Russia, were becoming aware that control over the international agenda on cluster munitions was escaping them.

These observations can be made in respect of the next meeting of the GGE of the CCW which convened from 19-22 June 2007. On the one hand, Germany submitted its Draft Protocol on Cluster Munitions already introduced at the ICRC expert meeting and at the Lima Conference, as well as a CCW Negotiating Mandate on Cluster Munitions, on behalf of the European Union which provided for a schedule of no less than three meetings to negotiate a

⁸⁹⁷ See *ibid.*

⁸⁹⁸ See Harrison, “Report on the Lima Conference”, *supra* note 892, at 17.

legally binding instrument that would address the humanitarian concerns of cluster munitions in all their aspects by the end of 2008.⁸⁹⁹ Also France strongly advocated the conclusion of a Protocol VI to the CCW that it did not regard as being in competition with the Oslo process but rather felt that the two processes would “mutually reinforce” one another. The paper on cluster munitions it submitted was, with slight modifications, identical to a non-paper already submitted to the Lima Conference and contained as key features a ban on the use, development, production, stockpiling and transfer of certain types of cluster munitions; the need not to restrict participation in coalition or alliance military operations and to preserve states’ defence interests; a definition of prohibited cluster munitions taking into account technical characteristics such as age and number of sub-munitions; an obligation to destroy stockpiles of prohibited cluster munitions while providing for a transition period during which prohibited cluster munitions could still be used, and best practice measures to improve the reliability and accuracy of authorised cluster munitions.⁹⁰⁰

The United Kingdom’s position overlapped with that of France inasmuch as it also did not support a prohibition on all types of cluster munitions. Rather, it supported a prohibition only on cluster munitions other than direct-fire munitions which released more than a specified number of sub-munitions that in turn contained explosives but no guidance system or fail-safe mechanisms. Moreover, like France, the United Kingdom specifically argued that a transition period during which the prohibition of use would not come into effect was necessary; this would be consistent with the aim of changing the military capabilities without incurring a capability gap.⁹⁰¹ These approaches contained many issues that remained controversial in the Oslo process, notably definitions based on guidance systems, numbers of sub-munitions, exceptions for using munitions in a direct fire mode or fail safe mechanisms; the need to respect the maintenance of international military coalitions and alliances as well as transition periods.

On the other hand, there were signs that the major users and producers hitherto hostile to the Oslo process were starting to react to it to regain control over the international agenda on cluster munitions. This was most evident from the statements by U.S. diplomats. Interestingly, the most significant of these statements was not made to the CCW itself but in a press conference the day before the GGE meeting. There, the United States announced that it

⁸⁹⁹ Germany, on behalf of the European Union, Draft CCW Negotiating Mandate on Cluster Munitions, UN Doc. CCW/GGE/2007/WP.3, 1 June 2007.

⁹⁰⁰ France, Paper on Cluster Munitions, UN Doc. CCW/GGE/2007/WP.2, 10 May 2007.

⁹⁰¹ United Kingdom, A Possible Definition of a Cluster Munition and a Submunition-Draft Proposals, UN Doc. CCW/GGE/2007/WP.9, 28 June 2007.

was now willing to consider negotiations on a treaty to regulate rather than ban cluster munitions. However, any treaty had to be concluded within the CCW to enjoy U.S. support.⁹⁰²

During the meeting itself, the United States argued that the impacts of cluster munitions were episodic and limited in scope, scale and duration as compared to other ERW; that there was no country in the world where cluster munitions constituted the principal ERW threat; and that existing resource mobilisation, coordination and clearance were sufficient to deal with the post-conflict problems associated with cluster munition use.⁹⁰³

It may well be that in absolute terms the problems caused by cluster munitions may still be regarded as limited since there have been, for instance, far fewer instances to date in which cluster munitions have been used compared to antipersonnel mines. However, this statement ignores that humanitarian initiatives must sometimes also be of a preventive character. In this regard, it was argued that if the huge stockpiles currently in the arsenals of states were to get used in the future the problem on the ground would be even more severe than the landmine crisis that prompted the Ottawa process in the 1990s. One may observe a proliferation argument for the sake of the ultimate goal, the better protection of civilians from these weapons, in line with the fundamental thesis of this study, i.e. disarmament serving first and foremost a humanitarian goal.

The fact remains that in the relatively limited circumstances in which cluster munitions have been used these weapons always caused a humanitarian problem. The U.S. statement also ignores that even within the CCW international norms have been adopted with a view to prevent future humanitarian problems; the perfect example in this regard is Protocol IV to the CCW on blinding laser weapons where weapons have been prohibited without them ever having been used.⁹⁰⁴

Russia, for its part, considered that the humanitarian problems associated with cluster munition use could be remedied by properly implementing IHL and that it was still premature to even impose legally binding restrictions on the technical characteristics of cluster munitions.⁹⁰⁵ It also maintained that the various types of modern cluster munitions were

⁹⁰² Reuters, "U.S. open to negotiations on cluster bombs but no ban", 18 June 2007, <http://www.reuters.com/article/topNews/idUSL1874660120070618> (last visited 25 January 2010).

⁹⁰³ United States of America, Intervention on Humanitarian Impacts of Cluster Munitions, delivered by Richard G. Kidd IV, Director Office of Weapons Removal and Abatement, 20 June 2007, <http://www.mineaction.org/downloads/1/Statement%20of%20the%20United%20States%20Richard%20Kidd%2020%20June%202007.pdf> (last visited 25 January 2010).

⁹⁰⁴ Protocol IV to the CCW was ratified by the United States on 21 January 2009 along with Protocol III on Incendiary Weapons and Protocol V on ERW. See ICRC Treaty Database, <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (last visited 25 January 2010).

⁹⁰⁵ Russian Federation, Position Paper on Cluster Munitions, UN Doc. CCW/GGE/2007/WP.6, 19 June 2007.

reliable and safe to use, and ensure highly effective strikes against a very wide array of targets.⁹⁰⁶ Other states, including Brazil, China and the Republic of Korea, also opposed negotiations on a new treaty on cluster munitions within the CCW.⁹⁰⁷

In fact, it was no great concession with much practical impact by the United States to suddenly declare its readiness to commence negotiations on a new treaty on cluster munitions within the CCW. The practice of the CCW that decisions would only be taken by consensus made such decision unlikely due to the opposition of the above-mentioned CCW states parties.

Moreover, while the GGE to the CCW could not take a decision it could propose a way ahead to the meeting of the states parties which was due to take place in November 2007. The recommendation adopted by the GGE to the CCW was that the 2007 Meeting of the High Contracting Parties should decide how best to address the humanitarian impact of cluster munitions as a matter of urgency, including the possibility of a new instrument; striking the right balance between military and humanitarian considerations should be part of the decision.⁹⁰⁸

Rather than making a straight recommendation to decide on negotiations the recommendation adopted reflected the fact that there was still no agreement on whether a new treaty on cluster munitions should be concluded. In view of the opposition of the above-mentioned states it also seemed unlikely that this would fundamentally change about five months later at the meeting of states parties. According to this author, the GGE meeting made clear that the major producers and users still tended to emphasise military aspects while downplaying humanitarian considerations. But hope dies last, and certainly the 2007 November meeting of states parties would mark a making or breaking point on whether the CCW could address the humanitarian urgency of dealing with the problems associated with cluster munition use.

Those representing humanitarian interests retained a rather low key presence at the GGE meeting. In particular the CMC did not make any statements on behalf of the coalition as a whole but only circulated principles that any treaty on cluster munitions in its view should contain as a working paper.⁹⁰⁹ On the other hand, the ICRC summarised its legal

⁹⁰⁶ *Ibid.*

⁹⁰⁷ K. Harrison, Report on the Meeting of the Group of Governmental Experts (GGE) of the Convention on Certain Conventional Weapons (CCW) 19-22 June 2007, <http://www.wilpf.int.ch/disarmament/CCWGGE2007/GGEindex.html> (last visited 25 January 2010).

⁹⁰⁸ Group of Governmental Experts of the States Parties to the Convention on Conventional Weapons, Procedural Report, UN Doc. CCW/GGE/2007/3, 9 August 2007, Annex III.

⁹⁰⁹ Cluster Munition Coalition, Treaty Principles, *supra* note 894.

concerns on the use of cluster munitions under general IHL, i.e. the rules already discussed extensively by this author in Chapter 3, the rule of distinction, the rule prohibiting indiscriminate attacks, the rule of proportionality, and the rule on feasible precautions. This legal analysis caused it to strongly argue for the development of new and specific regulations in view of the specific characteristics of cluster munitions as well as their history of causing severe humanitarian problems.⁹¹⁰

Between this GGE meeting to the CCW and the meeting of states parties, especially states committed to the Oslo process, in collaboration with the CMC, the ICRC and UN agencies like UNDP, put a lot of effort into further entrenching the humanitarian focus of the Oslo process on the international agenda. In this respect, three meetings with a humanitarian focus were held between the GGE to the CCW and the November meeting of states parties to the CCW: From 4-5 September 2007 the Latin American Regional Conference on Cluster Munitions, the Belgrade Conference of States Affected by Cluster Munitions from 3-4 October 2007, and the European Regional Conference on Cluster Munitions on 30 October 2007.

The Latin American Regional Conference on Cluster Munitions was held in San José, Costa Rica, with eighteen Latin American states participating.⁹¹¹ The objectives were winning over as many governments as possible for a proposal by core group member state Peru and Costa Rica on a Latin American Cluster Munition Free Zone,⁹¹² and to strengthen support by Latin America as a region for the strongest possible treaty in humanitarian terms concluded in the shortest possible time.

Significant progress towards achieving these aims could be made, since except for Cuba all Latin American states attended the conference and all states present but Brazil expressed support for the Oslo process. While Brazil was a substantial producer, exporter and stockpiler of cluster munitions, the other two Latin American producers of cluster munitions, Argentina and Chile, both declared that they no longer produced these weapons nor had they an intention to do so in the future.⁹¹³ In addition, Argentina announced that it had completed destruction of its cluster munition stockpiles. Participants emphasised the need to conclude a comprehensive cluster munition treaty with obligations for stockpile destruction, clearance of

⁹¹⁰ International Committee of the Red Cross, Legal Issues Related to Cluster Munitions, *supra* note 210.

⁹¹¹ Four states participated at an Oslo process meeting for the first time, El Salvador, Honduras, Nicaragua and Uruguay.

⁹¹² This idea was inspired by the example of the Treaty of Tlatelolco by which the Latin American states had established a regional nuclear weapon free zone.

⁹¹³ This is not devoid of any practical effect, since it has been proven that Eritrea used cluster munitions produced in Chile during its war against Ethiopia in 1998. See Maslen & Wiebe, "Cluster munitions: A survey of legal responses", *supra* note 269, at 12-13.

contaminated areas and victim assistance. In the view of Latin American governments, so-called technical solutions like self-destruct mechanisms did not present an adequate solution to addressing the humanitarian concerns posed by the use of cluster munitions.⁹¹⁴

The Belgrade Conference on Cluster Munitions represented an especially pertinent opportunity to demonstrate that humanitarian considerations were at the forefront of concerns in the Oslo process. This was due to the fact that this conference assembled almost exclusively states affected by past cluster munition use, including Afghanistan, Albania, Angola, Bosnia and Herzegovina, Azerbaijan, Cambodia, Chad, the Democratic Republic of the Congo, Croatia, Ethiopia, Guinea Bissau, Iraq, Kuwait, Laos, Lebanon, Monenegro, Sierra Leone, Serbia, Sudan, Tajikistan, Uganda and Vietnam. Especially Serbia qualified as a host, since this country had been specially affected by the issue of cluster munitions in a variety of ways: It was a state contaminated by cluster munitions used during the 1999 “Operation Allied Force” by NATO member states United States, United Kingdom and the Netherlands. But it was also a state which has formerly used, produced and was still stockpiling these weapons.

As had become tradition with Oslo process conferences, the CMC hosted an international forum on cluster munitions. At the Belgrade Civil Society Forum in particular, victims from Serbia, Tajikistan, Laos and Lebanon conveyed their first-hand experience of what it means to live in contaminated areas and their demand to include strong obligations on victim assistance in a future treaty. For instance, a Serbian victim of the 1999 cluster bombing of Niš, put forward some demands of cluster munition victims which should be understood not only as those directly injured by cluster munitions but also their families and affected communities; importantly, victim assistance in a future treaty should feature as a separate article and reflect the dual responsibility of the affected state itself as well as international actors providing assistance. Victim assistance should mean guaranteeing the implementation of data collection, emergency and continuing medical care, physical rehabilitation, psychological support, social inclusion, economic inclusion, legal support and disability laws and policies, linking assistance strategies to public health, development, poverty reduction and disability initiatives in affected communities.⁹¹⁵ Compulsory reporting should be required

⁹¹⁴ Cluster Munition Coalition, “Support for Ban on Cluster Munitions Grows in Latin America”, Press Release of 5 September 2007 (on file with the author).

⁹¹⁵ D. Dikić, Statement to the Belgrade Conference of States Affected by Cluster Munitions, 3 October 2007, <http://blog.banadvocates.org/index.php?post/2007/12/14/Dejans-speech-Belgrade-October-2007> (last visited 25 January 2010).

of both affected and donor states to measure progress towards the implementation of victim assistance goals.⁹¹⁶

Affected States agreed that victim assistance was to comprise these elements and that it should be provided with a view to help ensuring the full realisation of the human rights and promotion of the inherent dignity of victims, including the victims, their families and communities. In their endeavours, affected countries should be assisted by other states in a position to do so.⁹¹⁷

Among the other aspects discussed by states in Belgrade were clearance of unexploded ordnance from cluster munitions, international cooperation and assistance and the prevention of further proliferation of cluster munitions.

Regarding clearance, affected states recognised their obligation to clear all cluster munition remnants in areas under their jurisdiction and control. For clearance, general surveys to identify contaminated areas and GPS data on the location of cluster munition remnants were essential. Affected States should also ensure as soon as possible that all cluster munitions in such areas are perimeter-marked, monitored and protected by fencing or other means and that risk education is provided to reduce civilian harm arising from sub-munition duds.

In terms of international cooperation and assistance, affected States emphasised that they should have a right to participate in the fullest possible exchange of clearance equipment, scientific and technical information. Assistance should be provided by states in a position to do so for victim assistance, clearance, risk education and stockpile destruction through the United Nations system, international, regional or national organisations or institutions, the Red Cross movement, NGOs or on a bilateral basis.

To achieve the goal of prevention of further proliferation, affected states advocated for a clear prohibition to transfer and stockpile cluster munitions. In this regard, the safe and secure destruction of stockpiles should be undertaken as soon as possible and pending the entry into force of a new international treaty on cluster munitions the importance of national moratoria on the use, production and transfer of these weapons was emphasised.⁹¹⁸ Declarations on contemplated national measures were made by Albania, announcing that it would neither produce nor trade in cluster munitions, by Uganda and Montenegro which

⁹¹⁶ *Ibid.*

⁹¹⁷ Belgrade Conference of States Affected by Cluster Munitions, Chair's Summary, 4 October 2007 (on file with the author).

⁹¹⁸ *Ibid.*

declared their intention to destroy their stockpiles, as well as Serbia which was considering a national moratorium.⁹¹⁹

Another highlight of this conference was the declaration of the UN common position on cluster munitions agreed by the heads of all UN agencies at an inter-agency coordination meeting in September 2007. The UN demanded that for addressing the humanitarian, human rights and developmental effects of cluster munitions, a legally binding instrument of international humanitarian law that prohibits the use, development, production, stockpiling and transfer of cluster munitions that cause unacceptable harm to civilians; that requires the destruction of stockpiles and that provides for clearance, risk education and other risk mitigation activities, as well as actions for victim assistance, for cooperation, and for compliance and transparency measures was necessary. Until such treaty was adopted the UN called on states to take domestic measures to freeze the use and transfer of all cluster munitions. A very practical expression of UN support for the Oslo process was the organisation of sponsorship programmes by UNDP needed for participants from developing countries in Oslo process conferences.⁹²⁰

This may serve to dispel misconceptions that the initiators of the Oslo process have taken this issue out of the UN. Rather, the Belgrade Conference again underlined that the issue of cluster munitions had been taken out of the traditional diplomatic forum to address specific regulations or prohibitions based on IHL, the CCW. The alternative forum had been created because the CCW forum placed the perceived military needs of users and producers above humanitarian considerations and because this forum required consensus to take any decision.

However, it did not follow that a process driven above all by humanitarian concerns, i.e. victim perspectives, was without backing of the UN. The Belgrade Conference also made clear that part of this humanitarian focus was preventive. As the Norwegian Ambassador in his opening statement to the conference put it:

“Many of you can confirm the horrible consequences of the use of cluster munitions, and would agree that it is vital to prevent the proliferation of the billions of submunitions currently stockpiled. An instrument that prevents transfer of cluster munitions will be an instrument that prevents a humanitarian disaster of a larger magnitude than the landmines represented 10 years ago.”⁹²¹

⁹¹⁹ Cluster Munition Coalition, “Survivors and States Join Forces Against Cluster Bombs”, Press Release, 4 October 2007.

⁹²⁰ UN Office of the Resident Coordinator in Serbia, Statement to the Conference of States Affected by Cluster Munitions delivered by Lance Clark, UN Resident Coordinator and UNDP Resident Representative in Serbia, 3 October 2007 (on file with the author).

⁹²¹ Norway, The International Process towards a new Convention Prohibiting Cluster Munitions, Opening Statement by Ambassador Steffen Konstad, Belgrade Conference of States Affected by Cluster Munitions, http://www.regjeringen.no/nb/dep/ud/dep/org/avdelinger/avdeling_fn/Avdelingsdirektor-Steffen-

Half of the European Regional Conference on Cluster Munitions was devoted to the issue of stockpile destruction and thus, to one of the areas of the future treaty which should function in a preventive manner. Several presentations highlighted technical and financial challenges posed by stockpile destruction. Among the aspects commonly agreed by participants were that adequate attention should be paid to a framework for cooperation and assistance to account for both the lack of technical or financial capacities that certain stockpiling countries may have and that transparency and the exchange of technical information could be properly considered. On the other hand, discussions highlighted differences especially on the timeframe during which future states parties to a cluster munition treaty would be obliged to destroy their stockpiles and on whether the retention of a certain number of a stockpile should be permitted for keeping destruction or clearance capabilities.⁹²²

Like the Belgrade Conference, the European Regional Conference also extensively discussed the humanitarian challenge to provide victim assistance in a future international treaty on cluster munitions. Once again, a conference in the Oslo process emphasised a core feature for which this process was different from other attempts to deal with cluster munitions, notably to integrate a victim perspective as its fundamental rationale. As the Norwegian Ambassador emphasised, the plight of victims provided a reality check to diplomatic efforts to conclude a cluster munition treaty. With this in mind, diplomats would not be so easily trapped into drifting into the technical details based on theoretical tests and far removed from the reality of the suffering of victims which usually dominate multilateral arms negotiations.⁹²³ On the question of a provision in a future cluster munition treaty, it was emphasised that the obligation to provide victim assistance should be on the same footing as the other elements of the future convention, including clearance and stockpile destruction, and also subject to state reporting obligations. Furthermore, a broad definition of victim as encompassing the direct victims but also their families and affected communities, was advocated as well as a human-rights based approach inspired by the recent CRPD. This general human rights approach is reflected in the demand that the obligation to provide victim

[Kongstad/Taler-og-artikler/2007/The-International-Process-towards-a-new-treaty-on-cluster-munitions.html?id=484885](http://www.kongstad.no/taler-og-artikler/2007/The-International-Process-towards-a-new-treaty-on-cluster-munitions.html?id=484885) (last visited 25 January 2010).

⁹²² S. Bavaud, Security Policy Adviser, Federal Department of Defence of Switzerland, Rapporteur Summary on Stockpile Destruction, European Regional Conference on Cluster Munitions, 30 October 2007, <http://www.diplomatie.be/en/pdf/bavaud.pdf> (last visited 25 January 2010).

⁹²³ Norway, Victim Assistance and the Oslo Process on Cluster Munitions, European Regional Conference on Cluster Munitions, 30 October 2007, <http://www.diplomatie.be/en/pdf/kongstad.pdf> (last visited 25 January 2010).

assistance is primarily incumbent upon the territorial state in line with the traditional territorial focus of HRL. On the other hand, this obligation should be complemented by an obligation of other states parties in a position to do so to support these assistance efforts. This is in line with the obligation to have recourse not only to national but also to international resources to progressively realise especially economic and social human rights.⁹²⁴

Altogether, the three smaller conferences in San José, Belgrade and Brussels could be considered successful in driving the victim-orientated and human-rights inspired international agenda of the Oslo process. The pressure mounted for the CCW meeting of states parties in November to itself deal with the issue of cluster munitions in a concrete and urgent manner. This pressure also mounted as a result of an urgent appeal made by the ICRC in October 2007.

In that appeal, the ICRC emphasised the important aspect of prevention of proliferation of large amounts of stockpiles of cluster munitions. From the expert meeting in April 2007, the ICRC had come up with its own conclusions, notably that to date, the armed forces of the main users of cluster munitions had not presented concrete evidence that the specific military results to be achieved by the use of these weapons would outweigh their well documented humanitarian concerns and that technological fixes like improving the reliability of fuses or adding self-destruct mechanisms could be the sole solution to addressing the humanitarian problems. Based on these conclusions the ICRC called for the urgent adoption of a new treaty which would prohibit the use, development, production, stockpiling and transfer of inaccurate and unreliable cluster munitions, require the elimination of current stockpiles and provide for victim assistance, clearance and activities to minimise the impact of these weapons on civilians. Until such treaty was adopted, states should immediately end the use of cluster munitions on a national level, not transfer them to anyone and destroy existing stockpiles. The ICRC also made clear remarks on what the process to negotiate a new treaty should as well as what it should not look like; in the view of the ICRC the process should have a clear commitment to a new treaty completely prohibiting those weapons causing the humanitarian problem and a time frame for negotiations. At the same time, the ICRC cautioned against avoiding a repetition of disappointing efforts on anti-vehicle mines where after more than five years no new internationally binding rules within the CCW could

⁹²⁴ M. Reiterer, Austria, Summary on the Victim Assistance discussion, European Regional Conference on Cluster Munitions, 30 October 2007, <http://www.diplomatie.be/en/pdf/reiter.pdf> (last visited 25 January 2010).

be agreed on. It also expressed its concern about decision making processes that not only seek, but in practice require, consensus before any decision could be taken.⁹²⁵

With the guardian of IHL expressing quite clearly that it expected the states party meeting to the CCW meeting to come up with a clear time frame for negotiating a treaty prohibiting cluster munitions it became clear that this meeting marked a turning point for the relationship between the Oslo and the CCW processes. It will be recalled that Oslo process participants like Germany but also others sought to use what they saw as a reinvigorated CCW process to produce the most effective result on cluster munitions on the ground through the inclusion of major producers, users and stockpilers of the weapon. In this regard, Germany indeed stated that it considered “the adoption of the proposed clear and substantive negotiating mandate to be a decisive litmus test” for the CCW.⁹²⁶

The mandate referred to was nothing less than a mandate submitted by the EU “to establish a Group of Governmental Experts with a schedule of no less than three meetings to negotiate a legally-binding instrument that addresses the humanitarian concerns of cluster munitions by the end of 2008.”⁹²⁷ Significantly, what the EU had in mind was prohibition of use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians.

It was remarkable that at least all states agreed that the use of cluster munitions posed a humanitarian problem, even those states that had ignored or downplayed these concerns at the Third Review Conference one year earlier. This would provide some support for the argument of certain states participating in the Oslo process that this process would reinforce the CCW framework.

However, it became clear from the first day that negotiations even on a limited prohibition of cluster munitions would not be achievable. For instance, Russia still made it clear that it was opposed to any negotiations at this point.⁹²⁸ Other states like the United States, Pakistan or Brazil still emphasised the military utility of cluster munitions that needed

⁹²⁵ International Committee of the Red Cross, The ICRC’s position on cluster munitions and the need for urgent action, Statement to Geneva Diplomatic Missions by Dr. Jakob Kellenberger, President of the ICRC, 25 October 2007, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/cluster-munitions-statement-251007> (last visited 25 January 2010).

⁹²⁶ Germany, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Germany-statement-nov7WHATISTHIS.pdf (last visited 25 January 2010).

⁹²⁷ Portugal, Statement on behalf of the European Union, Consideration of the Report of the GGE: Cluster Munitions, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/EU-clusterstatement-nov7.pdf (last visited 25 January 2010).

⁹²⁸ Russia, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/RussianFed-statement-nov7.pdf (last visited 25 January 2010).

to be taken into account.⁹²⁹ Some states also emphasised that the CCW was the most appropriate forum as it included the major producers, users and stockpilers of cluster munitions and struck the appropriate balance between military and humanitarian considerations.⁹³⁰

These arguments were nothing new and doubts remain as to their strength: As to the first part, inclusion of all major military powers, while this is true as a general proposition, once again the fact that any decision, even those to initiate negotiations have to be taken by consensus means that the CCW will most often not live up to the potential to achieve meaningful results on the ground. If only one of these military powers does not give its stamp of approval then no results at all can be achieved. As for the second part, the balance between military and humanitarian concerns, it is to be doubted whether the CCW often achieves to balance the two, since many of those states that have a humanitarian interest in the issue of cluster munitions, affected and less developed states, are not states parties to the CCW. Furthermore, as both the ICRC and the CMC in its opening statement emphasised, concrete evidence of the military utility or necessity was scarce compared to the thorough documentation of humanitarian harm caused by the use of these weapons.

These persistent differences also explain the somewhat peculiar decision taken by the meeting of states parties on 13 November 2007 after little public debate and many informal consultations. It read in its most relevant part:

“The Meeting of High Contracting Parties to the CCW decided that the GGE [Group of Governmental Experts] will negotiate a proposal to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations.”⁹³¹

The wording of “negotiate a proposal” is tortuous, as it does not state that the objective of negotiations would be international legally binding rules, let alone that a prohibition of

⁹²⁹ United States of America, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/US-statement-nov7.pdf (last visited 25 January 2010); Pakistan, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Pakistan-statement-nov7.pdf (last visited 25 January 2010); Brazil, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Brazil-statement-nov7.pdf (last visited 25 January 2010).

⁹³⁰ Republic of Korea, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Korea-statement-nov7.pdf (last visited 25 January 2010); Japan, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Japan-statement-nov7.pdf (last visited 25 January 2010); China, Opening Statement to the 2007 Meeting of States Parties to the CCW, 7 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/China-statement-nov7.pdf (last visited 25 January 2010); United States, Opening Statement, *supra* note 929.

⁹³¹ Meeting of the High Contracting Parties to the CCW, Report, UN Doc. CCW/MSP/2007/5, 3 December 2007.

cluster munitions would be pursued. Moreover, the mandate also failed to establish a time frame in which tangible results were to be achieved.

The reactions to the outcome clearly reflected the fact that the CCW had missed this turning point for coming up with a concrete decision which reflected the humanitarian urgency of the problems associated with cluster munitions. A number of states, including Austria, Mexico, New Zealand and Switzerland, did not hide their disappointment about the fact that they would have expected the CCW to decide on a negotiating mandate for a new treaty prohibiting cluster munitions by 2008.⁹³²

The EU as a whole could not be content with this outcome either, since this meant that the EU's proposal for a negotiating mandate on a prohibition of cluster munitions that cause unacceptable harm to civilians by 2008 was rejected. On the other hand, Russia stated that it still harboured doubts as to any negotiations and that it was neither prepared to support proposals weakening its possibilities for defence nor that proposals should be in the form of technical fixes or have any economic and financial consequences. If technical proposals should be necessary, they should be in the form of recommendations and must be accompanied by a transition period.⁹³³ Therefore, while states participating in the CCW meeting of high contracting parties agreed on the humanitarian problem associated with the use of cluster munitions, the decision demonstrated that the rift between states on how to address the problem would not be overcome fast or easily. The CCW could be said to have failed the "litmus test" as Germany had put it.

As a consequence, especially the CMC emphasised that efforts should now be invested in the Oslo process while it was hopeless to still count on the CCW to address humanitarian concerns associated with cluster munition use in a meaningful manner, i.e. through a ban. In this regard, the CMC urged states to engage in substantive work on a new treaty in the next

⁹³² Austria, Concluding Statement to the Meeting of States Parties to the CCW, 13 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Austria_Nov13.pdf (last visited 25 January 2010); Mexico, Intervención de la Delegación de México en la Reunión Anual de Los Estados Partes de la Convención sobre Prohibiciones o Restricciones del Empleo de Ciertas Armas Convencionales que Puedan Considerarse Excesivamente Nocivas o de Efectos Indiscriminados (CCAC) Sobre el Tema Relativo a Las Municiones en Racimo, 13 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Mexico_Nov13.pdf (last visited 25 January 2010); New Zealand, Concluding Statement to the Meeting of States Parties to the CCW, 13 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/NZ-statement-nov13.pdf (last visited 25 January 2010); Switzerland, Déclaration de M. L'Ambassadeur Jürg Streuli, Reunion des Hautes Parties Contractantes, Convention sur l'interdiction où la limitation de l'emploi de certaines armes classiques, 13 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Switzerland_Nov13.pdf (last visited 25 January 2010).

⁹³³ K. Harrison, "Report on the Meeting of High Contracting Parties to the Convention on Certain Conventional Weapons, Geneva, 7-13 November 2007", http://www.wilpf.int.ch/disarmament/CCW_8MEET/MSPReport2007.html (last visited 25 January 2010).

Oslo process conference in Vienna due to be held from 5-7 December 2007.⁹³⁴ Certain of the states participating in the Oslo process also explicitly reaffirmed their support for the Oslo process alongside their readiness to continue work on cluster munitions within the CCW.⁹³⁵ In fact, this 2007 meeting of the states parties was a turning point; it signalled that only the Oslo process had the potential to deliver a new treaty on cluster munitions in a time frame that reflected the humanitarian urgency of the issue despite the often quoted “complementarity” between the two processes. Accordingly, all eyes were on Vienna to see how much support the alternative rather than complementary Oslo process could garner and how far states would be able to agree on substantive elements for a future treaty there.

5.2.4. The Vienna Conference on Cluster Munitions, 5-7 December 2007

Like before the last major Oslo process conference in Lima, also in the lead-up to the Vienna Conference on Cluster Munitions, a new discussion text for a future Convention on Cluster Munitions was forwarded by the core-group members. In comparison to the Lima discussion text, the Vienna discussion text⁹³⁶ contained the following modifications: Firstly, the proposed definition of cluster munitions in Article 2 was worded in much simpler a fashion. “Cluster munition” was defined as “a munition that is designed to disperse or release explosive sub-munitions, and includes those explosive sub-munitions.” The Vienna discussion text also contained a separate definition of “explosive sub-munitions” as “munitions that in order to perform their task separate from a parent munition and are designed to function by detonating an explosive charge prior to, on or immediately after impact.” As opposed to the Lima draft, the Vienna draft omitted any specific references to what would be excluded from the definition, including on sensor-fused weapons, smoke or flare ammunition, or weapons regulated or prohibited by other treaties. Most strikingly, the draft did not use the wording of “cluster munitions that cause unacceptable harm to civilians”

⁹³⁴ Cluster Munition Coalition, “No hope for cluster bomb ban in Geneva but momentum grows for Vienna treaty talks”, Press Release, 13 November 2007 (on file with the author).

⁹³⁵ Austria, Concluding Statement, *supra* note 932; New Zealand, Concluding Statement, *supra* note 932; Ireland, Concluding Statement to CCW MSP, 13 November 2007, http://www.wilpf.int.ch/PDF/DisarmamentPDF/CCW_8MSP_Nov2007/Ireland-nov13.pdf (last visited 25 January 2010). New Zealand was most outspoken on the issue of the relationship between the Oslo process and the CCW, stating that the difficulty the CCW was having in dealing meaningfully with the cluster munitions issue meant that much of its effort in 2008 would be directed towards fulfilling the specific, measurable and time-bound commitment undertaken in Oslo in February.

⁹³⁶ See Annexes, *infra* pp. 384-390.

any more. The draft also ensured that both the container and the explosive sub-munitions would be adequately covered by the prohibitions.

With regard to the obligations to destroy stockpiles of cluster munitions under the proposed Art. 3, the drafters only provided for one possibility for extending the initial deadline of six years for a period of up to ten years rather than providing for repeated extension requests as in the Lima discussion text.

As for the obligations to clear and destroy cluster munition remnants under the proposed Art. 4, the deadline for clearance was reduced from ten to five years, which was very ambitious given the extent of contamination with cluster munition remnants in countries such as Laos. The drafters also took more care than in the Lima text to model the individual steps that future states parties were obliged to take more closely after CCW Protocol V on ERW, in particular after Art. 3 of Protocol V. In this regard, mandatory measures according to the proposed Art. 4 of the Vienna draft included to survey and assess the threat posed by cluster munition remnants (taken almost *verbatim* from Art. 3 (3) (a) of Protocol V); to assess and prioritise needs and practicability in terms of marking, protection of civilians and clearance and destruction and take steps to mobilise resources to carry out these activities (modelled after Arts. 3 (3) (b) and (d) of Protocol V).

Entirely new provisions proposed by the Vienna discussion text were Arts. 4 (4) and 6 (4) which enshrined an obligation of former user states to provide assistance to an affected state. The proposed provisions, if adopted, would have been revolutionary. They would have had retroactive effect as opposed to Art. 3 (2) Protocol V to the CCW which included a special user responsibility but this responsibility would not cover past uses of cluster munitions. The proposed Arts. 4 (4) and 6 (4) would have also addressed inadequacies in the general regime of HRL applicable post-conflict and the reality that cluster munitions have been used to a large extent in IAC in the past. In the aftermath of such conflicts, as shown *supra*, it is the territorial state that has the general obligation to protect, most importantly, the right to life of its own population from cluster munition remnants.⁹³⁷ However, if the territorial state was not the user of cluster munitions in the first place it will not have adequate knowledge on where remnants are located on its territory. Thus, it seems legitimate to insert special obligations incumbent on a past user, especially to provide recorded information on the location of cluster munition remnants, to build upon the existing non-retroactive formulation of such obligations in Protocol V to the CCW and to complement existing HRL.

⁹³⁷ See *supra* pp. 145-154.

The victim assistance obligations and thus, also another important HRL component of the future treaty, was also strengthened compared to the Lima discussion text, as the wording “shall ... adequately provide” no longer left any doubt that the obligation to provide assistance to victims was to be considered hard law as opposed to the somewhat programmatic wording “shall endeavour” that the Lima text still employed. In addition, the Vienna discussion text made provision for data collection, included a reporting obligation on measures of victim assistance in the future Art. 7 on transparency measures, and made reference to the *rights* of cluster munition victims and the CRPD in some proposed preambular paragraphs.

On the other hand, in the proposed Art. 1 the Vienna discussion text, while maintaining the major thrust of the Lima discussion text with prohibitions on the use, development, production, stockpile, transfer as well as on assistance with any of the prohibited acts, the scope of the prohibition of assistance was modified. Before, a prohibition to assist, encourage or induce anyone, *in any way*, to engage in any activity prohibited to a state party was envisaged by the proposed Art. 1 (c); now, the scope of the prohibition was reduced to a prohibition of assistance, encouragement or inducement of anyone to engage in any activity and the reference to “in any way” was omitted.

The structure of the proposed Art. 1 derives from the one found in the 1997 Ottawa Convention on Anti-Personnel Mines. As already shown *supra*, certain future states parties during the *travaux préparatoires* to the Ottawa Convention raised the concern of the prohibition of assistance interfering unduly with military interoperability with states not party to the convention. The solution adopted in the antipersonnel mine context was that states concerned issued interpretative declarations which clarified that the mere participation in joint military operations with states not party to the convention would not infringe the prohibition of assistance. Indeed, the way the prohibition of assistance was worded [“in any way”] in the Ottawa Convention made the prohibition extremely broad on the face of it. However, as has been argued *supra*, the elements of “specifically” and “knowingly” should be read into the meaning of prohibited assistance.⁹³⁸

Arguably, the deletion of the three words “in any way” may provide comfort for those that may have concerns that joint military operations with states not party to the future cluster munition treaty would be effectively precluded through a broad prohibition of assistance.

⁹³⁸ See *supra* pp. 225-227.

However, as we shall see, this alone was not sufficient to accommodate those states that voiced this military concern of interoperability.

Aside from this marginal military concession, overall, the Vienna discussion text focused on further strengthening the humanitarian aspects of the future treaty rather than making more concessions on security and military aspects. In particular, the views of certain states arguing for exceptions from the definition of prohibited cluster munitions, for inserting an explicit provision preserving military interoperability or for the possibility to retain a certain number of cluster munitions for developing clearance and disposal capabilities in Lima were not incorporated in the Vienna discussion text itself. Instead, the core group members took note of conflicting positions on these issues in an Explanatory Annex to the main text.⁹³⁹

The importance of the Vienna Conference on Cluster Munitions could not be underestimated, as general agreement on the human rights elements of the future treaty could be achieved. In this regard, again the presence of victims as the human faces of suffering from the effects of cluster munitions ensured that states never lost sight of the central humanitarian rationale of the Oslo process. Virtually all states, for instance, sought to even strengthen the proposed provision on victim assistance, and there was almost unanimous agreement that the definition of “victim” to be enshrined in the future treaty should be broad and should include the families and whole affected communities besides the direct victims. Moreover, there was broad agreement on the human rights-based approach to victim assistance, which also embodied the notion of providing victim assistance on a non-discriminatory basis. Thus, the primary obligations would be imposed on the territorial state. It was felt, however, that these primary obligations must be complemented by efforts by the international community to enable capacities in the territorial state. Repeatedly, the obligation to report annually on measures taken to provide victim assistance was also endorsed by participants.⁹⁴⁰

As for the substantive elements of victim assistance, these largely corresponded to the specific elements already agreed on by states parties to the Ottawa Convention, except for the establishment, implementation and enforcement of national laws and policies. States also generally recognised the need to provide a framework for international cooperation and assistance to affected states. In this context, quite a few states expressed their support for

⁹³⁹ See Annexes *infra* p. 390.

⁹⁴⁰ For a summary of the Vienna Conference on Cluster Munitions, see K. Harrison, “Report from the Vienna Conference on Cluster Munitions 5-7 December”, at 20-22, 28, <http://www.wilpf.int.ch/PDF/DisarmamentPDF/ClusterMunitions/ViennaReport.pdf> (last visited 26 January 2010).

special obligations for users to assist with the clearance of cluster munition remnants caused by their past use while the view was also put forward that one needed to be careful about enshrining special obligations that retroactively addressed actions occurring 30, 40 years ago.⁹⁴¹

As regards the positive future obligations of clearance, developed states especially stressed that in this matter, a deadline should be incorporated that would allow affected states to meet this deadline; the five year deadline envisaged in the Vienna discussion text was considered too brief by many states including by Laos, the most severely affected state.⁹⁴²

The Vienna Conference not only served as an opportunity to consolidate agreement on the human rights oriented aspects of the future treaty but also to review the state of affairs regarding the more contentious disarmament components. As was to be expected, the definition of prohibited cluster munitions continued to be the most vexing issue. The general positions were largely unchanged in comparison to the Lima conference but participants were more specific about what they wanted to see in a future cluster munition treaty.

At this conference, the issue of whether cluster munitions with self-destruct mechanisms would not cause unacceptable harm to civilians was in the centre of debate. This debate was carried on to a more concrete level with the presentation of the report “M85: An analysis of reliability” published by the Norwegian Defence Research Establishment, the NGO Norwegian People’s Aid and a UK clearance expert.⁹⁴³

The report critically examined the proposition that the equipment of explosive sub-munitions with self-destruct fuses coupled with a maximum failure rate percentage of 1 or 2% could effectively prevent post-conflict civilian harm associated with the use of these weapons. These claims were especially analysed in the aftermath of concrete combat conditions in respect of the submunition type M85. This particular type was widely acknowledged to represent the “benchmark” among explosive sub-munitions with self-destruct mechanisms, and this was the only type with such secondary fuse to be actually used in combat by the UK in Iraq in 2003 and by Israel in Lebanon in 2006.⁹⁴⁴

The report drew upon field research into unexploded M85 sub-munitions found in Lebanon. Significantly, it was emphasised that conditions for deployment of cluster munitions in Lebanon were rather favourable, since the models used were relatively new, they were deployed onto predominantly hard and lightly vegetated ground, in good climatic conditions

⁹⁴¹ *Ibid.*, at 23.

⁹⁴² *Ibid.*, at 16.

⁹⁴³ King *et al.*, “M85: An analysis of reliability”, *supra* note 83.

⁹⁴⁴ *Ibid.*, at 8-9.

and Israeli gun crews were in home territory and thus, had to cope with comparatively low levels of stress.

Still, the actual failure rate of these M85 determined on the ground on the basis of strike site samples was nowhere near the 1 or 2 % failure rate claimed by manufacturers or users but rather around 10%. Accordingly, in more adverse combat conditions, such as when old, poorly maintained stockpiles are used by undisciplined soldiers in more stressful conditions and fired onto soft, heavily vegetated ground, the actual failure rates may still be higher.

Moreover, as the M85 is among the most highly sophisticated sub-munitions with that kind of mechanical self-destruct fuse, the authors stated that it was unlikely that any similar explosive sub-munitions would achieve significantly better results under combat conditions.

Further, even if such a minimum percentage could be achieved the sheer numbers of sub-munitions used would still account for a large number of duds.⁹⁴⁵ The authors also drew attention to the fact that current testing regimes were inadequate to realistically simulate real combat performance of the self-destruct mechanisms, as not only systemic failures were among the causes why self-destruct mechanisms malfunctioned but also human error and environmental factors. Such factors are difficult to take into account in testing regimes.⁹⁴⁶

Despite this field-based evidence, certain states continued to hold the position that cluster munitions with self-destruct mechanisms or with a failure rate of less than 1% should be exempted from the prohibitions.⁹⁴⁷ Other states regarded it as necessary to define cluster munitions that cause unacceptable harm to civilians along reliability and accuracy criteria.⁹⁴⁸ Further, some states proposed to exempt certain weapons with low numbers of sub-munitions, for instance, ten.⁹⁴⁹ Another solution proposed was to exclude sensor-fused weapons from a prohibition because such sub-munition based systems would have an individual targeting

⁹⁴⁵ *Ibid.*, at 21-22, 31.

⁹⁴⁶ *Ibid.*, at 39.

⁹⁴⁷ Finland and Japan favoured a general exemption for cluster munitions with self-destruct mechanisms. Denmark, France and Germany advocated for an immediate prohibition of cluster munitions without self-destruct mechanisms and a failure rate of more than 1 % while those falling outside of this category should be phased out after a transition period of 10 years. Statements to the Vienna Conference on Cluster Munitions, 6 December 2007 (personal notes by this author).

⁹⁴⁸ Among these states were Canada, Italy, Switzerland and the United Kingdom. See *ibid.*

⁹⁴⁹ *Ibid.* The Czech Republic, Italy and the United Kingdom proposed exemptions for cluster munitions with lower numbers of sub-munitions.

capability.⁹⁵⁰ Finally, certain states also argued in favour of exempting cluster munitions being used in a direct fire mode.⁹⁵¹

However, those who supported exceptions for certain weapons from a prohibition largely did not make any more concrete IHL arguments as to the military necessity that outweighed humanitarian concerns in those particular cases. The only more concrete military argument made was that in high-intensity armed conflicts when opponents or multiple mobile targets must be destroyed rapidly cluster munitions could be an appropriate means as well as certain types of cluster munitions in a force protection role, i.e. to ensure that adversaries cannot use their weapons and stay in their foxholes against a friendly force.⁹⁵²

Other statements contained a mere reference to national defence without providing any more concrete reasoning. Still, one may particularly doubt as to whether a short-term military advantage would be able to outweigh the long-term humanitarian harm through duds that would be left on a state's territory, were it to use these weapons in a last resort of self-defence. Quite a few times, the argument for a prohibition with exceptions was maintained by mentioning the necessity of crafting a treaty that could be ratified by major users and producers absent from the Oslo process.⁹⁵³ This argument would, however, not likely serve the fundamental humanitarian objective of the process, since a treaty, if any, acceptable to the United States or Russia would involve such broad exception from a prohibition that protection of civilians from the consistent dangers associated with all cluster munitions used to date would not be guaranteed.

Closely connected to the question of the definition was also the proposal by a few states to grant states parties a transition period of ten years during which certain more advanced types of cluster munitions could still be used while after that period they would have to be replaced by alternatives.⁹⁵⁴ However, making provision for a transition period during which a weapon that has been identified to cause unacceptable harm to civilians could

⁹⁵⁰ *Ibid.* Australia stated that sensor-fused weapons should be excluded from the definition of cluster munitions.

⁹⁵¹ Denmark, Germany, Italy and the United Kingdom expressed support for an exception of this kind. See Statements to the Vienna Conference on Cluster Munitions, 6 December 2007 (personal notes of this author). On objections to an exclusion from the definition of cluster munitions based on a direct fire delivery mode, see *supra* pp. 206-207.

⁹⁵² Statement by the United Kingdom, Vienna Conference on Cluster Munitions, 6 December 2007 (personal notes by this author).

⁹⁵³ For instance, Algeria, Denmark, Egypt, Finland, Japan, Morocco and the United Kingdom insisted on the participation of major users and producers of cluster munitions. See Harrison, "Report from the Vienna Conference", *supra* note 940, at 14-15.

⁹⁵⁴ In particular, Denmark, France, Germany, Japan and the United Kingdom considered a transition period to be necessary. See *ibid.*, at 13.

still be used would run counter to the humanitarian urgency of the problem to be addressed in the future treaty.

At the other end of the spectrum were quite a few states that wanted to see a prohibition of cluster munitions without such exceptions.⁹⁵⁵ While there was thus no agreement as to the scope of the prohibition, certain exclusions from the definition became clear such as smoke, flare and chaff ammunitions or antipersonnel mines.

Another military concern that came more prominently to the fore in Vienna was that of interoperability. The problems regarding that issue have already extensively been reviewed in the Austrian national context.⁹⁵⁶ Interoperability today may be regarded as a national security concern, since many states, especially NATO member states, inextricably link their national security with the capabilities of the alliance. Suffice it to state here that those states raising issues of maintaining their capability to conduct joint military operations with future states not party to a cluster munition treaty indicated that this problem could not be resolved in the same manner as in the Ottawa Convention on Antipersonnel Mines.

Accordingly, it was proposed that clear provision in the treaty text itself be made rather than addressing this concern by unilateral interpretative declarations.⁹⁵⁷ This signalled to other states participating in the Oslo process that states with interoperability concerns would not be content unless specific treaty language besides the prohibition of assistance would be included to allow for continued participation in joint military operations and cooperation.⁹⁵⁸

Finally, in terms of stockpile destruction, besides different views on whether the deadline of six years was adequate, some states also favoured an exception for retaining a

⁹⁵⁵ Among these states were Austria, Argentina, Bangladesh, Cambodia, Croatia, Democratic Republic of Congo, Egypt, Equatorial Guinea, Guinea, Indonesia, Kenya, Laos, Luxembourg, Mali, Nigeria, Norway, Mexico, Mozambique, Senegal, Seychelles, Sierra Leone, Sudan and Tajikistan. See *ibid.*, at 10.

⁹⁵⁶ See *supra* pp. 214-231.

⁹⁵⁷ The issue of interoperability was raised by Australia, Canada, the Czech Republic, Denmark, Egypt, France, Germany, Italy, Japan, Lithuania and the United Kingdom. While Australia maintained that resolving interoperability problems was a “red line issue” for them, the Czech Republic stated that the future treaty must contain clear provisions to allow for interoperability with states not party, or NATO member states would not be able to participate. See Harrison, “Report from the Vienna Conference”, *supra* note 940, at 13-14.

⁹⁵⁸ Although arguments were made similar to the arguments that were already presented by this author in the discussion of the drafting history of Austrian national legislation prohibiting cluster munitions. For instance, Norway rightfully drew attention to the fact that issues arising under interoperability have existed in all multinational operations where different states are bound by different legal obligations and mentioned that it was a NATO member itself. However, it should not be automatically assumed that the future convention would create an obstacle for joint military operations. Austria also questioned the need to include a specific exemption for interoperability, as the use of cluster munitions will increasingly become a non-issue in international operations. Moreover, also states with a total ban on cluster munitions like Austria could continue their engagements in UN peacekeeping operations. See Harrison, “Report from the Vienna Conference”, *supra* note 940, at 14.

limited number of live samples of cluster munitions for clearance training and the development of cluster munition countermeasures, i.e. measures to defend against cluster munition attacks.⁹⁵⁹ However, others pointed towards the fact that for these purposes live ammunition was normally not used and that in the context of the Ottawa Convention a similar exception had raised issues of abuse.⁹⁶⁰

Besides an in-depth discussion and identification of areas of convergence and divergence, the Vienna Conference was most notable in assembling the highest number of states (138) of the entire Oslo process. The greatest increase in participants came again from developing countries, especially from Africa. But also the Asia and Pacific, the Caucasus and Central Asia, as well as the Middle East and North Africa regions were represented in larger numbers than in previous Oslo process conferences. This left no doubt about the global dimension that the Oslo process had acquired. Almost all affected states with significant contamination of their territory were present, including for the first time Iraq, Kuwait, Saudi Arabia, Tajikistan which also endorsed the Oslo Declaration, and Vietnam.⁹⁶¹

While the biggest users, producers and stockpilers, including Russia, the United States, Israel, Brazil, India, Pakistan or South Korea remained outside this process, the presence of such a large number of states certainly increased the momentum for widespread international condemnation of these weapons, which would raise the political costs for these states to use these weapons in the future.

The great increase in the participation of developing countries, especially from Africa, also meant that these states were sympathetic to the prevention rationale underlying the Oslo process, notably to prevent huge stockpiles from being used in the future. Since many of these countries had experienced armed conflicts first hand and Africa was the biggest dumping ground for weapons produced in the West, it came as no surprise that Ghana announced on behalf of the African Union that it intended to build a common AU position on a complete ban on cluster munitions.⁹⁶² Uganda, for its part, declared its intention to co-host an African regional cluster munitions conference in March 2008.⁹⁶³

Consequently, the pressure also mounted on Australia, Canada and certain European states to provide more detailed arguments for the exceptions they were seeking or compromise. With the end of the Vienna Conference, the attention already turned to

⁹⁵⁹ *Ibid.*, at 13. An exception to the obligations on stockpile destruction along these lines was especially supported by Australia, Denmark, Germany and Switzerland.

⁹⁶⁰ *Ibid.* Compare statements by Norway and the CMC.

⁹⁶¹ *Ibid.*, at 28-29.

⁹⁶² *Ibid.*, at 5.

⁹⁶³ *Ibid.*

Wellington where the next Oslo process conference would take place. While the Vienna Conference was already crucial for identifying broad convergence on the human rights related aspects and the gulfs on the disarmament aspects still to be bridged, the Wellington Conference would still be more decisive, as the ultimate aim of this conference would be to rally as many states as possible behind a Final Declaration. That Final Declaration would establish the substantive basis, the Draft Convention on Cluster Munitions, on which formal negotiations would take place in Dublin in May 2008.

5.2.5. The Wellington Conference on Cluster Munitions: Bumps on the Road Towards the Wellington Declaration

As with previous Oslo process conferences, the core-group again presented a revised discussion text, naming it “Draft Cluster Munitions Convention”.⁹⁶⁴ Technically, however, it remained to be seen if this draft would be accepted by as large a number of states as possible in light of the clear areas of divergence identified on several issues in Vienna.

Despite the fact that certain states had expressed their discomfort with Art. 1 as proposed in Vienna, since it did not foresee a transition period or accommodated concerns on interoperability, the text before delegations in Wellington did not contain revisions taking these issues into account.⁹⁶⁵ Moreover, the new text in its proposed Art. 2 also did not make provision for exceptions from the definition of cluster munitions for certain types of weapons on the basis of accuracy or reliability criteria like fail safe mechanisms, sensor fusing technology, a certain failure or a lower number of sub-munitions. The only exclusions from the definition of cluster munitions found in the Wellington text were those considered uncontroversial, notably for munitions to dispense flares, smoke, pyrotechnics, chaff and those merely producing electrical or electronic effects, since these weapons do not contain explosives that lie at the root of the humanitarian problem to be addressed.

Therefore, opposition from those that supported specific exceptions for these areas could be expected. This time, the opposition took on a more coordinated manner (a group of around 15 states calling themselves “like-minded”)⁹⁶⁶ and in the form of concrete textual proposals.

⁹⁶⁴ For its text, see Annexes *infra*, pp. 391-399.

⁹⁶⁵ The only change included was to exclude mines from the scope of the Convention under the newly proposed Art. 1 (2).

⁹⁶⁶ These states included Australia, Canada, the Czech Republic, Denmark, France, Finland, Germany, Italy, Japan, the Netherlands, Slovakia, Spain, Sweden, Switzerland and the United Kingdom. The term “like-minded” was used by France in its closing statement at the Wellington Conference, speaking on behalf of all these

With regard to Art. 1 (c) and the concerns by certain states a prohibition of assistance to anyone, including states not party, to engage in any activity prohibited to a state party raised with military interoperability, Australia presented a discussion paper where these concerns were articulated in depth.⁹⁶⁷ The paper was useful in providing illustrative scenarios in which the proposed prohibition of assistance would interfere with interoperability in multinational operations as well as an interpretation of the prohibition of assistance and clarity on the options to solve these concerns.

The scenarios outlined (air support, refuelling services, multinational staff functions or an air traffic controller from a state party that passes coordinates for a target to aircraft from a state not party using or likely to use cluster munitions) largely correspond to those already described by this author when discussing the interoperability exception contained in an early Bill of the Austrian Federal Act on the Prohibition of Cluster Munitions.⁹⁶⁸ Thus, one can agree that challenges to interoperability are posed by the prohibition of assistance in such situations, especially with regard to the prohibition to assist in the use or transfer of cluster munitions.

One can also agree to the Australian analysis that assistance, encouragement, inducement in this context would presumably require mental and causation elements to be satisfied, i.e. acts which have and are intended to have a substantial effect in facilitating a specific act prohibited under the future convention.⁹⁶⁹ Nothing else transpires from this author's analysis *supra* based on the almost identical prohibition of assistance in the Ottawa Convention and Art. 16 of the Articles on State Responsibility.⁹⁷⁰ Thus, assistance should be understood as making a specific and direct contribution to an act prohibited to a state party with direct or indirect intent (i.e. at least knowledge that this contribution/assistance will probably be used for a prohibited act). This understanding of assistance would make it clear that the simple participation in combined operations with states not party that may use cluster munitions would not be prohibited; that this would not, as such, preclude national forces to be engaged in headquarters, missions or other planning activities while embedded with personnel

countries except for Spain. See Statement by France on behalf of like-minded countries, Closing Plenary of the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/France-et-al-closing-statement.pdf> (last visited 26 January 2010).

⁹⁶⁷ Australia, "Discussion Paper Cluster Munitions and Inter-operability, *supra* note 785. The paper was explicitly supported by Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland and the United Kingdom.

⁹⁶⁸ See *supra* pp. 227-228.

⁹⁶⁹ Australia, "Discussion Paper Cluster Munitions and Interoperability", *supra* note 785, at 2.

⁹⁷⁰ See *supra* pp. 226-229.

of states not party; that this would not preclude, as such, calling in close air support from personnel of states not party or prevent, as such, national forces from providing logistical support to forces of states not party; or that this would prevent, as such, states not party from having military bases on the territory of a state party or using a state party's ports.⁹⁷¹

Rather, the participation in specific operations involving cluster munitions used or transferred by a state not party would be prohibited. The participation in the planning of individual sorties involving cluster munitions would be prohibited. The request for air support or the provision of logistics with at least indirect intent would be prohibited. Finally, there is nothing wrong with states not party using ports of a state party as long as the state party would not regard it as probable that the state not party is stockpiling cluster munitions on its territory or transporting cluster munitions through its port.

However, disagreement still persisted on how to address these challenges. As has also already been described above, the solution that ultimately prevailed to take into account similar concerns in respect of anti-personnel mines in the context of the Ottawa Convention was to issue declarations on the meaning of prohibited assistance and on what was prohibited/permitted in multinational operations. In addition, generally differences in obligations among coalition partners may be resolved by different RoEs or specific national instructions.⁹⁷²

The Australian paper and other concerned states' statements made it clear that these solutions would not work for those states in the Oslo process concerned about interoperability. In particular, it was argued that cluster munitions posed a different problem from anti-personnel mines, since it was

“reasonable to expect that cluster munitions are much more likely than APM [anti-personnel mines] to be used by States in future operations. Cluster munitions form a critical component in the arsenals of such States. By contrast, APMs are less likely to be used in modern coalition warfare, having reduced military utility where conventional battles are fast-moving or operations are non-conventional or insurgent in nature.”⁹⁷³

However, one may object to the assumption that cluster munitions are more likely to be used than anti-personnel mines. While it is true that certain states not likely to become state party to a Convention on Cluster Munitions have huge stockpiles of cluster munitions, including Russia and the United States, this by itself does not mean that these stockpiles will

⁹⁷¹ These questions were raised by Canada. See Canada, Statement on General Obligations and Scope of Application, 18 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Canadian-Statement-on-General-Obligations-Scope.pdf> (last visited 26 January 2010).

⁹⁷² See *supra*, p. 230.

⁹⁷³ Australia, “Discussion Paper Cluster munitions and Interoperability”, *supra* note 785, at 2.

also get used in the future. Firstly, were cluster munitions to be effectively stigmatised the price even for these countries to use these weapons would be too high. Secondly, this assumption is strongly based on the military necessity to use cluster munitions in multinational operations. However, even in fast-moving enforcement operations of a conventional kind contemplated in the Australian paper the fact that all cluster munitions used to date left behind duds sheds considerable doubt as to the military effectiveness since the advance of friendly forces will be delayed or halted. Finally, the reference to non-conventional or insurgent warfare is misplaced, as insurgents usually mingle with the civilian population and do not advance in great numbers, a scenario for which cluster munitions are simply not adequate weapons. Therefore, if one does not adhere to the assumptions made in the Australian paper (and reasonable arguments can be made in the view of this author not to adhere to them) then the basis for arguing that different solutions must be found for cluster munitions than for anti-personnel mines is also undermined.

Moreover, the paper did not explain why the case of different obligations relating to cluster munitions should be unique or different from other contexts where coalition partners would also have differing obligations, for instance with regard to targeting.⁹⁷⁴

On the other hand, the Australian paper again is sound in its analysis of the aim of Art. 1 (c) to promote universalisation by imposing obligations which are designed to affect the behaviour of states not party. It is also significant that the paper emphasised that while addressing interoperability concerns, states should be advocates for an effective convention and seek to promote its universalisation. Further, addressing these concerns should not mean to condone continued use of cluster munitions that cause unacceptable harm to civilians.⁹⁷⁵

However, most textual suggestions regarding interoperability put forward in Wellington did not follow the kind of balance implied in the Australian paper.⁹⁷⁶ For instance, the United Kingdom proposed to delete the prohibition of assistance altogether. Given that cluster munition use in the last two decades has occurred as a result of joint military

⁹⁷⁴ Norway in its statement on the proposed Art. 1 gave other examples, such as states parties and not party to the ICC Statute, the Chemical Weapons Convention or different interpretations of international human rights obligations, all of which create interoperability problems. See Norway, Statement on interoperability, Wellington Conference, *supra* note 816.

⁹⁷⁵ Australia, "Discussion Paper Cluster munitions and Interoperability", *supra* note 785, at 1.

⁹⁷⁶ For an analysis of these interoperability proposals, see Human Rights Watch, "Interoperability and the Prohibition on Assistance", Memorandum to Delegates of the Dublin Diplomatic Conference on Cluster Munitions, May 2008, http://www.hrw.org/sites/default/files/reports/HRW_HLS_Interoperability_0508.pdf (last visited 26 January 2010).

operations in international armed conflicts in territories far from the territories of the users, the practical effect of the other prohibitions of Art. 1 would be significantly reduced.⁹⁷⁷

In a similar vein, a Japanese proposal would have changed Art. 1 (c) from providing for a prohibition of assistance to any prohibited act to a mere prohibition of assistance to develop, produce or otherwise acquire cluster munitions, thus permitting most significantly, the assistance in the use of cluster munitions by a state not party in joint military operations.⁹⁷⁸

France proposed to incorporate a separate provision according to which nothing in the future convention shall be interpreted as in any way preventing military interoperability between states parties and non-states parties to the treaty. The major flaw of this proposal lay in its broad scope, since the wording of “nothing in this convention” subjects the entire treaty to the concern of military interoperability, elevating it to a dominant interpretative maxim and completely undermining the humanitarian object and purpose of a future convention.⁹⁷⁹

Germany, while leaving Art. 1 (c) intact, suggested to incorporate an additional sentence to this provision which stated that this provision does not preclude the mere participation in the planning or the execution of operations, exercises or other military activities by the armed forces or by an individual national of a state party to this convention, conducted in combination with the armed forces of states not parties to this convention which engage in activity prohibited under this convention. In fact, this addition is closely modelled after the unilateral interpretative declarations submitted by, for instance, Canada, upon ratification of the Ottawa Convention on anti-personnel mines.

While the proposal can be considered more refined than the others, one may still question why it would not be more useful to clarify first hand the scope of the terms “assistance”, “encouragement” or “inducement” before deciding whether more language is needed to address interoperability concerns. Thus, this means nothing else but clarifying in a negative manner that for an act to be considered prohibited assistance, a specific and intentional contribution to an act prohibited to a state party must be made.

Moreover, the German proposal was more specific than these unilateral declarations in adding that the mere participation in the *planning or the execution* of operations, exercises or other military activity conducted in combination with the armed forces of states not party would not be precluded. In particular, with regard to “participation in the execution of

⁹⁷⁷ *Ibid.*, at 14.

⁹⁷⁸ *Ibid.*, at 15-16.

⁹⁷⁹ *Ibid.*, at 16-17.

operations” it has been suggested that this could be interpreted as permitting operational cooperation such as the provision of resources or intelligence and information related to targets it desires to strike with cluster munitions, thus circumventing its obligations under the treaty.⁹⁸⁰

In fact, the wording of this proposed provision suffers from the same flaw as the exception proposed in the early Bill for the Austrian Federal Act on the Prohibition of Cluster Munitions which had the effect of allowing the participation in the logistical facilitation of cluster munition use by personnel from a state not party to the future treaty but just prohibiting the armed forces of a state party from taking the last step in such logistical execution themselves, notably the firing, dropping or launching of cluster munitions.

If one appreciates that states concerned about interoperability would not accept anything less than concrete language in the future operational text of the convention, then an interesting informal proposal was also put forward by Canada in Wellington. That proposal read:

“Notwithstanding any other provision of this Convention, a State, on becoming a party to this Convention, may declare that, for a period of [xx] years after the entry into force of this Convention for the State concerned, it does not accept the application of Article 1 (c) with respect to its participation in combined operations and activities with non-party states. A declaration under this article may be withdrawn at any time. During this period in which the declaration under this article remains in force, the State concerned shall take steps to encourage the government of any non-party state participating in such combined operations and activities to ratify this Convention.”⁹⁸¹

In explaining its proposal, Canada made it clear that this would be a separate provision and that it was modelled after Art. 124 of the Rome Statute for the International Criminal Court (ICC) which permits states parties to make a declaration with the effect of opting out of the ICC’s jurisdiction over war crimes for up to seven years.⁹⁸² This proposal differs from all the others in that it implicitly recognises that the interoperability issue effectively only concerns a limited number of states participating in the Oslo process, in particular US allies. Secondly, a declaration to opt out of Art. 1 (c) for joint military operations would only be valid for a limited rather than unlimited time period. Finally, the

⁹⁸⁰ *Ibid.*, at 17.

⁹⁸¹ Canada, Statement on General Obligations and Scope of Application: Interoperability Informal, Wellington Conference on Cluster Munitions, 21 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Canada-statement interoperability informal.21feb08.pdf> (last visited 26 January 2010).

⁹⁸² Art. 124 of the Rome Statute reads: “Notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article may be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1.” See Art. 124, ICC Statute, *supra* note 482.

proposal required an active effort on the part of the state availing itself of the possibility to opt out of Art. 1 (c) to encourage states not party to ratify the convention. In this sense, only the Canadian informal proposal took issue with the demand of the Australian paper that advocates for interoperability should also be advocates for promoting the universalisation of the convention and should not condone the continued use of these weapons.

However, this should not endorse or conceal the flaws from which this proposal suffered. Firstly, the effect of such a declaration would be to permit assistance with any of the acts prohibited to a state party under the convention. Thus, the assistance to *all* prohibited activities, including the development, production, acquisition, transfer, use and stockpiling would be permitted in the interest of participation in joint military operations and military activities with states not party. Moreover, since Art. 124 of the Rome Statute was cited as inspiration for this informal proposal, it is interesting to note that the *travaux préparatoires* of the Rome Statute indicate that this provision was only inserted in the final stages of negotiations in order to secure the acceptance of certain states, including especially France as one permanent member of the Security Council.⁹⁸³ Accordingly, this opt-out clause was only incorporated as a measure of last resort, implying that all other options for obtaining an acceptable compromise between negotiating states had been futile. Such a final stage, however, could not have been reached with regard to the interoperability issue, since negotiations had not even started.

The other major area of contention with regard to the proposed Art. 1 was whether the prohibitions should apply immediately upon entry into force of the convention or whether a transition period should allow states parties to use otherwise prohibited weapons until the military capabilities that existing cluster munition stockpiles hold would be replaced with alternatives.

The textual proposals were again different in scope. The United Kingdom, for example, generally proposed a new Art. 1 (c): While striking out the original prohibition of assistance, this should be replaced with a formula according to which the entirety of the prohibitions contained in Arts. 1 (a) and (b) should not come into force until an unspecified number of years after entry into force.⁹⁸⁴ This would thus mean to create the same transitional

⁹⁸³ A. Zimmermann, "Article 124 Transitional Provision" in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, at 1281, 1281-1282 (1st edn., 1999).

⁹⁸⁴ United Kingdom, "Proposal on Art. 1", Compendium of Proposals, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/WCCM-Compendium-v2.pdf> (last visited 26 January 2010).

regime for all future states parties even if, for instance, certain developing countries would not require such a regime.

Other proposals were more restricted. In this respect, Japan's proposal specified that a transition period was a possibility of which states parties could make use by virtue of a declaration upon expressing their consent to be bound; the unspecified transitional period should apply to the use only when strictly necessary.⁹⁸⁵ The proposal did not elaborate on the notion of "strictly necessary" any further. It is to be noted that the use of any cluster munition, even the most inaccurate and unreliable ones, would have been permitted following Japan's proposal.

Germany and Switzerland circulated quite similar proposals on transition periods.⁹⁸⁶ In contrast to the Japanese proposal, the transition period would only allow the use of cluster munitions with self-destruct, self-neutralisation or self-deactivation mechanisms and the prohibition of transfer would continue to apply for any cluster munition. While the Swiss proposal still narrowed down the purposes for which cluster munitions with fail safe mechanisms could be used, notably for training, as last resort or for self-defence, the German proposal subjected declarations for a transition period to the obligations of states parties to provide transparency reports to the UN Secretary-General. Other states also supported the idea of transition periods, including Denmark, France, Italy, Slovakia, Spain and the Czech Republic.⁹⁸⁷ However, still other states rejected the notion of a transition period by arguing that it was inconsistent to prohibit weapons that cause unacceptable civilian harm but at the same time allow continued use of the weapon and thus, continued suffering of civilians from that weapon.⁹⁸⁸

⁹⁸⁵ Japan, "Comments on the Draft Cluster Munition Convention", <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Japan-article-one-comments.pdf> (last visited 26 January 2010).

⁹⁸⁶ Germany, "Proposal for Amendment to the Draft Cluster Munitions Convention: Transition Period", 20 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Germany-discussion-paper-transition-period.pdf> (last visited 26 January 2010); Switzerland, "Proposal for a new Art. on a Transition Period", Compendium of Proposals, *supra* note 984.

⁹⁸⁷ K. Harrison, "Report from the Wellington Conference on Cluster Munitions, 18-22 February 2008", at 11, http://www.wilpf.int.ch/PDF/DisarmamentPDF/ClusterMunitions/REPORT_Wellington.pdf (last visited 26 January 2010).

⁹⁸⁸ See Compendium of Proposals, *supra* note 984. Express opponents of a transition period included Ecuador, Ghana, Indonesia, Laos, Mauretania, Norway, Sierra Leone and the CMC. See Ecuador, General Statement, Wellington Conference on Cluster Munitions, 18 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Ecuador-Statement-general.pdf> (last visited 26 January 2010); Lao PDR, Déclaration Sur l'Article premier du projet de Convention sur les Armes à Sous-Munitions, Wellington Conference on Cluster Munitions, 18 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Laos-statement.pdf> (last visited 26 January 2010); Norway, Statement on interoperability, Wellington Conference, *supra* note 816; Ghana, Statement on Definitions, Wellington Conference on Cluster Munitions, 20 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Ghana-definitions.pdf> (last visited 26 January 2010).

As was to be expected, there continued to be major divergences on the question of the scope of the definition of prohibited weapons, in particular between those favouring a complete prohibition of all sub-munition based weapons⁹⁸⁹ and those who suggested exemptions to varying degrees. Australia, Canada, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Sweden and the United Kingdom enumerated certain reliability and accuracy characteristics, either individually or in some combination, as benchmarks for those cluster munitions that do not cause unacceptable harm to civilians.⁹⁹⁰

Among these characteristics were sensor-fusing (multiple or single) which had the capability to discriminate point targets or deliver effects within a defined area; fail-safe systems (mechanical and/or electronic self-destruct, self-neutralisation, self-deactivation mechanisms); restrictions on the numbers of sub-munitions per cluster munition; delivery by direct fire; failure rates; and accuracy (in terms of delivery of the cluster munition to the target area). The exemptions proposed ranged from very broad to narrower exemptions. The broadest exemptions were proposed by the United Kingdom which considered any of the following criteria sufficient, notably numbers of sub-munitions, self-destruct, self-neutralisation or self-deactivation mechanisms, direct fire weapons and munitions which incorporate systems designed to deliver effects within a pre-defined area or on point targets.

26 January 2010); Sierra Leone, General Statement, Wellington Conference on Cluster Munitions, 18 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Sierra-Leone-country-statement.pdf> (last visited 26 January 2010). See also Harrison, "Report from the Wellington Conference", *supra* note 987, at 11.

⁹⁸⁹ Including diverse states like Austria, Cambodia, Democratic Republic of Congo, Ecuador, Ghana, Guatemala, Laos, Mexico, Mozambique, Senegal, Sierra Leone, Zambia. See Cambodia, Statement on Definitions, Wellington Conference on Cluster Munitions, 19 February 2008, http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Cambodia-statement-intervention_on_CM_definition.pdf (last visited 26 January 2010); Democratic Republic of Congo, Déclaration sur Définitions, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Congo-Definitions.pdf> (last visited 26 January 2010); Ecuador, General Statement, *supra* note 988; Ghana, Statement on Definitions, *supra* note 988; Guatemala, Statement on Definitions, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Guatemala-definitions.pdf> (last visited 26 January 2010); Lao PDR, Déclaration sur Définitions, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Laos-definitions.pdf> (last visited 26 January 2010); Mexico, Intervención sobre el Artículo 2 relativo a las Definiciones, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Mexico-Definitions.pdf> (last visited 26 January 2010); Mozambique, Statement on Definitions, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/MOZAMBICAN-statement-definitions.pdf> (last visited 26 January 2010); Senegal, Déclaration sur l'Article 2, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Senegal-statement.pdf> (last visited 26 January 2010); Sierra Leone, General Statement, *supra* note 988; Zambia, Statement on Definitions, 19 February 2009, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Zambia-definitions.pdf> (last visited 26 January 2010).

⁹⁹⁰ All these proposals were compiled in the Compendium of Proposals, *supra* note 984.

Japan closely followed suit with proposing the same stand alone criteria, except for direct fire munitions.

Other states proposed narrower exemptions. For France, numbers of sub-munitions and direct-fire munitions constituted a stand alone criterion on which to base an exemption. As for accuracy, i.e. effectiveness only within a pre-defined target area, and reliability, i.e. dud rate of not more than one percent *or* equipped with fail safe mechanism, as opposed to the United Kingdom and Japan these were recognised as benchmarks only in a cumulative fashion. However, France coupled these exemptions with the possibility to review the whole definition upon five years after the entry into force of the convention.

Switzerland and Germany took a very similar approach; essentially, in their view sensor-fused weapons equipped with additional fail safe mechanisms should be completely exempted while accurate and reliable cluster munitions, i.e. those which contain sub-munitions of a dud rate of not more than one percent *and* equipped with fail safe mechanisms should be only temporarily exempted subject to a transition period.⁹⁹¹

In a similar vein, Sweden proposed exempting sensor-fused munitions with fail-safe mechanisms. However, it specified that the latter must be electrical rather than mechanical self-destruct and self-deactivation mechanisms. This specification was made with the understanding that battery-driven electrical fuses much more likely become inoperable than fuses depending on mechanical impact to discharge only. This exemption was coupled by the Swedish support for a transition period without, however specifying what weapons should be further exempted during that period.

Still other states, notably Australia and Norway, also expressed support for excluding sensor fused weapons equipped with fail safe mechanisms from the definition of cluster munitions.⁹⁹²

While interoperability, transition periods and possible exceptions from the definition of cluster munitions were the major areas of disagreement which could not be bridged at the Wellington Conference, other areas continued to remain contentious as well. Among these

⁹⁹¹ In addition, Switzerland, too, considered direct-fire munitions a stand-alone criterion for an exemption. Germany's proposed exemption was slightly narrower than Switzerland's, since completely exempted sensor fused weapons must be equipped with both self-destruct and self-deactivation mechanisms while in the Swiss proposal any self-destruct, self-deactivation or self-neutralisation mechanism besides sensor fusing would be sufficient. The Swiss proposal was expressly endorsed by Italy. See Compendium of Proposals, *supra* note 984.

⁹⁹² Australia, Intervention on Definitions, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Australia-Definitions.pdf> (last visited 26 January 2010); Norway, Intervention on Article 2, Definitions, Wellington Conference on Cluster Munitions, 19 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Norway-Statement%20Definitions.pdf> (last visited 26 January 2010).

issues were the retention of a certain number of cluster munitions for training detection, clearance, destruction techniques or the development of cluster munition countermeasures under Art. 3; the deletion of the current version of a special retroactive user responsibility to assist affected states with clearance under Art. 4; the respective deadlines for the obligations to destroy stockpiles and clear contaminated areas; the ambit of the definition of cluster munition victims and the scope of the obligations to provide victim assistance; as well as the number of ratifications required for the future convention to enter into force.⁹⁹³

Despite considerable divergences over certain issues and an increasingly antagonistic atmosphere, the core group members finally decided to submit the Wellington discussion text unchanged as the basic proposal for negotiations in Dublin. The many textual proposals were appended to the unchanged discussion text as the Compendium of Proposals,⁹⁹⁴ which was referred to as “other relevant proposals” in the Wellington Declaration to which Oslo process participants had to agree in order to be eligible for participating in the negotiations in Dublin. The Wellington Declaration reiterated that an enduring solution to the grave humanitarian consequences caused by the use of cluster munitions must be pursued and that this solution must include the conclusion of a legally binding international instrument prohibiting cluster munitions that cause unacceptable harm to civilians. States subscribing to the Wellington Declaration decided to forward the draft Cluster Munitions Convention as the basic proposal for consideration at the Dublin Diplomatic Conference, together with other relevant proposals including those contained in the compendium attached to this Declaration and those which may be put forward there.⁹⁹⁵

In this regard, it was not merely a semantic difference to refer to the unchanged discussion text as “basic proposal” and to the Compendium of Proposals as “other relevant proposal”. It meant that for getting the proposals contained in the Compendium of Proposals accepted, consensus or a two-thirds majority would be needed, which was not realistic given that the overwhelming majority of states supported the Wellington discussion text as it stood.

This was not uncontroversial, since in the lead-up to negotiations often heavily bracketed texts are submitted as a basis for negotiations. Thus, it would have been possible to include the proposed exemptions in a bracketed text, and acceptance of preserving the Wellington discussion text as the Draft Cluster Munitions Convention by those states calling for exceptions and referring to themselves as “like-minded” was not certain until the last

⁹⁹³ See Harrison, “Report from the Wellington Conference”, *supra* note 987, at 21-29; Compendium of Proposals, *supra* note 984.

⁹⁹⁴ Compendium of Proposals, *supra* note 984.

⁹⁹⁵ For the text of the Wellington Declaration, see Annexes, *infra* p. 400.

moment. However, also these states finally gave in and endorsed the Wellington Declaration which showed their willingness to enter into negotiations in Dublin. Still, to varying degrees, these states expressed their disappointment about what they perceived to be a lack of transparency, equilibrium and inclusiveness, since their textual proposals were not reflected. Moreover, these states emphasised that in their understanding both the Draft Convention text as well as the compendium of proposals would form the basis for negotiations.⁹⁹⁶

This, however, was not the case in light of the Wellington Declaration and the Draft Rules of Procedure circulated for the Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions which reiterated the distinction between the draft convention as basic proposal and other proposals that would be treated as amendments.⁹⁹⁷

Accordingly, uncertainty remained as to whether the “like-minded states” would attempt to obstruct the process of the adoption of the Draft Rules of Procedure to exert more influence on what would form part of the draft convention.

Ironically, the CCW especially in its second meeting of governmental experts in April 2008 provided an opportunity for Oslo process participants to overcome those differences and

⁹⁹⁶ Statement by France on behalf of like-minded countries, *supra* note 966; United Kingdom, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/UK-closing-statement.pdf> (last visited 26 January 2010); Germany, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Germany-closing-statement.pdf> (last visited 26 January 2010); Australia, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Australia-closing-statement.pdf> (last visited 26 January 2010); Canada, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Canada-closing-statement.pdf> (last visited 26 January 2010); Czech Republic, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Czech-Republic-closing-statement.pdf> (last visited 26 January 2010); Italy, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Italy-closing-statement.pdf> (last visited 26 January 2010); Netherlands, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Netherlands-closing-statement.pdf> (last visited 26 January 2010). Lithuania likewise endorsed the Wellington Declaration with the understanding that the Draft Convention and the compendium of proposals would enjoy equal footing. See Lithuania, Closing Statement to the Wellington Conference on Cluster Munitions, 22 February 2008, http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/closing-statements/Lithuania_closing-statement.pdf (last visited 26 January 2010).

⁹⁹⁷ Art. 30 of the Draft Rules of Procedure which were subsequently adopted by participating states in the Dublin negotiations read: “The draft Cluster Munitions Convention, dated 21 January 2008, shall constitute the basic proposal for consideration by the Conference.” In contrast, Art. 31 read: “Other proposals shall normally be submitted in writing to the Executive Secretary, who shall circulate copies to all delegations. As a general rule, no proposal shall be considered at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the consideration of amendments, even though these amendments have not been circulated or have only been circulated on the same day. See Draft Rules of Procedure, Diplomatic Conference for the Adoption of a Cluster Munitions Convention, 19 May 2008, Doc. CCM/2.

refocus efforts to emphasise commonalities in the face of a stalled CCW process, as the United States was in the process of reviewing its own position and especially the Russian or Chinese positions had not become more favourable towards a new CCW Protocol.⁹⁹⁸ With the CCW process dragging its feet towards coming up with any concrete decision to tackle the humanitarian concerns associated with cluster munition use, it was vividly demonstrated also to the so-called “like-minded States” that the Oslo process would be the only forum to provide concrete action for the foreseeable future. Thus, as negotiations in Dublin were getting closer, the “like-minded” states were prepared to engage constructively with other Oslo process participants rather than being perceived as blocking progress mainly on procedural matters.

In the lead-up to the Dublin negotiations, also African states met at an African Regional Conference on Cluster Munitions in Livingstone, Zambia. The outcome of this conference was the endorsement by 39 African states of the Livingstone Declaration. This Final Declaration entrenched the common African position in negotiations that all cluster munitions that cause unacceptable harm must be subject to negotiations and that the prohibitions on production, stockpiling, transfer and use should be total and immediate from the convention’s entry into force. The African states also supported victim assistance as an essential component of the future treaty and stressed the preventive aspect of this negotiating effort so as to avoid a similar disaster as with the landmine crisis in the 1990s.⁹⁹⁹

The Latin American and Caribbean countries, on their part, met for a Regional Conference on Cluster Munitions in Mexico. There, more than twenty states from the region, except for Brazil, one of three cluster munition producers in Latin America, and Cuba, agreed on a common position on a future convention; according to this common position, no weapons that would cause the same humanitarian effects as cluster munitions should be excluded from the prohibition; no transition period for further use should be enshrined; nor a loophole for addressing interoperability concerns should be left.

Consequently, there was a sense of common purpose and good faith that characterised state ambitions on the eve of formal negotiations in Dublin while of course areas of divergence remained.

⁹⁹⁸ J. Borrie, “How the Cluster Munition Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin”, 88 Disarmament Diplomacy, Summer 2008, <http://www.acronym.org.uk/textonly/dd/dd88/88jb.htm> (last visited 26 January 2010).

⁹⁹⁹ Livingstone Declaration on Cluster Munitions, 1 April 2008, http://www.iss.co.za/dynamic/administration/file_manager/file_links/LIVINGSTONEDECL.PDF?link_id=19&link_id=5859&link_type=12&slink_type=13&tmpl_id=3 (last visited 26 January 2010).

6. The Adoption of the Convention on Cluster Munitions in Dublin: An Analysis of the Negotiations and Important Substantive Provisions

“On the proposition of the Imperial Cabinet of Russia, an International Military Commission having assembled at St.Petersburg in order to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations, and that Commission having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity [...].”¹⁰⁰⁰

The humanitarian urgency and the good faith spirit of all delegations to negotiate a treaty could be felt at the conference venue of the Croke Park Stadium from day one, 19 May 2008. After formal opening statements by the Irish Minister of Foreign Affairs, a video message by UN Secretary-General Ban Ki moon, by UNDP, the ICRC and the CMC which brought an unprecedented number of cluster munition victims to an Oslo process Conference, the Irish President took the floor and explained the manner in which to conduct negotiations.¹⁰⁰¹ As is standard in multilateral treaty negotiations, the President emphasised that every effort would be made to reach general agreement, i.e. consensus, on the text but at the same time he made it clear that a new Convention on Cluster Munitions would be adopted on 30 May 2008, which included the possibility of voting by two-thirds majority. Consistent with the very limited time available for negotiations, the President discouraged general statements and the introduction of text in square brackets. Instead, the Irish Ambassador proposed to proceed quickly to negotiations Article by Article in the Committee of the Whole, while general statements should be made in a separate meeting. Different text options should be explored in informal discussions. Where there was general agreement on a provision it would be forwarded to the Plenary as a Presidency text. Failing such agreement, Friends of the Chair would be appointed to hold informal consultations the format of which was subject to their own discretion. The outcome of such consultations should then be shared with the Committee of the Whole which should then find general agreement on a given provision.

As was to be expected, there was still no agreement in particular on the definition of prohibited weapons, the questions of interoperability, transition periods, deadlines for stockpile destruction, the possibility of retention of cluster munitions for training purposes, the question of a special user responsibility in assisting with clearance and the scope of the

¹⁰⁰⁰ 1868 St. Petersburg Declaration, *supra* note 8.

¹⁰⁰¹ For all relevant documentation on the Diplomatic Conference, see <http://www.clustermunitionsdublin.ie/documents.asp> (last visited 26 January 2010). To the extent that certain statements made during the informal sessions are not available on this website, they are based on the personal notes of this author from the Conference.

victim assistance obligations. Therefore, Friends of the Chair were appointed with Switzerland being appointed Friend of the Chair for interoperability, New Zealand for the definition, Norway for stockpile destruction, Ireland for definitions other than cluster munitions and cluster munition victims as well as special user responsibility or Austria for victim assistance. The analysis shall be broken down into issue-specific sections. It shall start with the most contentious issues, interoperability (Art. 1) and the definition of cluster munitions (Art. 2). This shall be followed by the remaining most important issues in their (proposed) order in the Convention, i.e. transition periods (mainly proposed under Art. 1), stockpile destruction (Art. 3), clearance (Art. 4) and victim assistance (Art. 5).

6.1. *Interoperability*

At the outset of open informal discussions on interoperability, the Swiss Friend of the Chair posed several questions, notably: What are the different scenarios where these concerns arise? Why does the present draft treaty cause problems? Why are unilateral declarations like in the case of anti-personnel mines not sufficient? What different language was proposed and where should it be placed in the convention? It should also be added that the textual proposals that states had submitted on the subject in Wellington were already on the table as formal amendment proposals for negotiations.¹⁰⁰²

As for different scenarios, the United Kingdom and Australia referred to the Australian paper submitted in Wellington.¹⁰⁰³ Japan stated that not only the military but also civilian contractors needed to carry out activities for states not party to a future convention, including the need to transport cluster munitions. Germany mentioned the approval of joint operational plans with states not party. France listed as specific scenarios air to air refuelling, air to air support and any form of cooperation with states not party.¹⁰⁰⁴ Finally, the Philippines came up with joint military exercises, UN Chapter VII peace support operations, logistical support, visiting forces and transit of cluster munitions as relevant examples.

¹⁰⁰² Proposal by Japan for the amendment of Article 1, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Doc. CCM/10, 19 May 2008; Proposal by Germany, supported by Denmark, France, Italy, Spain, the Czech Republic and the United Kingdom for the amendment of Article 1, Doc. CCM/13, 19 May 2008; Proposal by the United Kingdom for the amendment of Article 1, Doc. CCM/14, 19 May 2008; Proposal by France for the amendment of Article 1, Doc. CCM/16, 19 May 2008.

¹⁰⁰³ See Australia, Discussion Paper Cluster Munitions and Interoperability, *supra* note 785.

¹⁰⁰⁴ The first two scenarios were also mentioned by the United Kingdom while Denmark also referred to the issue of close air support.

One major reason identified why the draft treaty created problems in terms of interoperability was that through the scope of draft Art. 1 (c) together with Art. 9 there was a risk of both state responsibility and individual criminal responsibility for state party personnel involved in joined military operations with personnel from states not party.¹⁰⁰⁵ It is true that implementation of the prohibitions contained in draft Art. 1 together with Art. 9 would in most states entail the adoption of criminal legislation. However, as the experience with precisely the same provisions in the Ottawa Convention shows, the wording of “appropriate” in Art. 9 gives states parties considerable discretion as to how to implement the prohibitions.

Thus, for example, states have enshrined specific exemptions from criminal legislation for foreigners, i.e. mainly military personnel, whose own country has not ratified the convention, or for their own military personnel when they serve abroad alongside personnel from states not party and they did not suspect nor had grounds of suspecting that conduct related to the use of anti-personnel mines would occur.¹⁰⁰⁶

Again, this demonstrates that states concerned have taken unilateral measures to address interoperability concerns without the need to create a specific international treaty provision applicable to all states parties, also to those that would be less concerned with interoperability. However, on the question why unilateral declarations or national legislative measures would not be sufficient, Australia, New Zealand and Canada pointed out that a wide range of interpretative declarations would give rise to different interpretations and that such declarations could even create a problem for the state submitting them, since they may be construed as disguised reservations prohibited under the future treaty.

While “interpretative declarations” intend to clarify the meaning or scope of certain treaty provisions where there are several possible interpretations, a “reservation” explicitly has the effect of excluding or modifying the legal effect of the treaty in its application to the state declaring it.¹⁰⁰⁷ The difference is indeed crucial, since “interpretative declarations” despite being so termed may in fact constitute “disguised reservations”,¹⁰⁰⁸ which would be expressly prohibited by draft Art. 19 of the future Cluster Munition Convention. On the other hand, if no objection is made to a genuine “interpretative declaration” by other states such

¹⁰⁰⁵ This was explicitly referred to by France, New Zealand and Sweden.

¹⁰⁰⁶ See Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 259-260.

¹⁰⁰⁷ See Art. 2 (1) (d), Vienna Convention on the Law of Treaties, *supra* note 402.

¹⁰⁰⁸ A. Aust, *Modern Treaty Law and Practice*, 104 (2000).

declaration may be taken into account as relevant context for the purposes of treaty interpretation.¹⁰⁰⁹

It is submitted that these arguments related to legal certainty sound reasonable in principle. However, there are alternatives to incorporating a broad exemption on interoperability, notably to more narrowly and carefully define the meaning of “assistance” at the outset and then see whether any additional language is needed to accommodate interoperability concerns. Notwithstanding, a clear trend among those states concerned about interoperability emerged to have specific treaty language on interoperability, not in Art. 1 itself but in a separate provision.¹⁰¹⁰

The strong outside influence that the United States played in relation to the interoperability issue is already evident from the fact that quite a few states, among them the closest allies of the United States, were also among the most active supporters of an interoperability provision in the future Convention. This strong influence was openly admitted by the U.S. Acting Assistant Secretary of State for Political-Military Affairs. At a briefing in Washington on 21 May 2008, he said that a Norwegian delegation had been in the United States and that the United States met with all NATO embassies in Washington to discuss the issue of how the future Cluster Munition Convention would impact on military cooperation between the United States and Oslo process allies.

In addition, the United States also contacted major contributors to peacekeeping and stabilisation operations on this issue. On possible missions where the problem could arise, the Assistant Secretary of State said that for example,

“any U.S. military ship would be technically not able to get involved in a peacekeeping operation, in providing disaster relief or humanitarian assistance as we’re doing right now in the aftermath of the earthquake in China and the typhoon in Burma, and not to mention everything we did in Southeast Asia after the tsunami in December of 2004.”¹⁰¹¹

With respect, it is hard to see how humanitarian assistance missions of the kind enumerated here may be jeopardised if certain allied partners of the United States decided not to use or transfer cluster munitions.¹⁰¹² When issue was taken with these remarks during the

¹⁰⁰⁹ *Ibid.*, at 103. The other argument again invoked by Australia was the assumption that cluster munitions will far more likely be used in the future, often with a short lead-up time.

¹⁰¹⁰ For instance, Germany, France, New Zealand, Italy and Japan, expressly declared their support for such a solution.

¹⁰¹¹ U.S. Department of State, “Ambassador Mull Briefs on U.S. Cluster Munitions Policy”, 21 May 2008, <http://www.america.gov/st/texttrans-english/2008/May/20080522163101eaifas0.8921015.html> (last visited 26 January 2010).

¹⁰¹² The Assistant Secretary of State’s remarks have been commented on thus, “If their tactical purpose was to influence or undermine the Dublin negotiations, their hyperbole made it hard for anyone to take him seriously.” See Borrie, “How the Cluster Munition Ban Was Won”, *supra* note 998.

briefing, the answers by the Assistant-Secretary of State remained elusive, pointing out that it is a reasonable expectation in humanitarian relief exercises that military units involved would have some form of these munitions as part of their inventory to defend themselves.¹⁰¹³

In light of this considerable pressure it becomes clear why there was finally no way around a solution which addressed this concern in the Convention text itself. This is also the underlying reason why this issue was treated differently in the present context than in the 1997 Ottawa Convention; as a matter of fact, the United States was involved in negotiations for the Ottawa Convention and only in the final stages could not agree to the treaty as adopted. In contrast, with regard to cluster munitions the United States remained outside of the Oslo process from the very beginning and this level of greater opposition to the process made it also pressure Oslo process participants harder to have its own interests not undermined.

In Dublin, Argentina, Austria, Indonesia, Jamaica, the Philippines and the ICRC all stated that interoperability was dealt with successfully under the Ottawa Convention, the Chemical Weapons Convention and the Biological Weapons Convention and that the use of cluster munitions in joint military operations would diminish.

However, as a result of closed informal consultations on the issue, the Swiss Friend of the Chair circulated a first informal proposal on a separate Article on interoperability on 21 May 2008. The informal proposal reflected the desire among the interoperability hardliners to have a separate provision on the issue while leaving Art. 1 intact. This separate proposed Article was entitled “Relations between States Parties and States not parties to this Convention” and consisted of four paragraphs. On a positive note, the first two paragraphs demonstrated the good faith also of those for whom interoperability was a red line issue like Australia, Canada, the Czech Republic, Denmark, the Netherlands or the United Kingdom, as they made it clear that each state party must encourage states not party to express its consent to be bound by the Convention (para. 1) and that each state party shall notify the governments of all states not party to the treaty of its obligations under the Convention, shall promote the norms it establishes and shall make its best efforts to discourage states not party to this Convention from using cluster munitions (para. 2). Accordingly, the fulfilment of such positive obligations may act as a guarantee that the permission to engage in certain military conduct in joint military operations or cooperation will not undermine the object and purpose of the convention to put an end to civilian suffering through the use of these weapons. Such

¹⁰¹³ U.S. Department of State, “Ambassador Mull Briefs on U.S. Cluster Munitions Policy”, *supra* note 1011.

obligations which would ensure the often quoted balance between humanitarian and military considerations by also enshrining an express humanitarian component in a provision addressing a security and military concern had been absent from most of the proposals presented before the Dublin negotiations. On this part of the provision there was soon consensus and even the critics of an interoperability provision had positive remarks on the first two paragraphs.¹⁰¹⁴

However, the proposed paras. 3 and 4 remained hotly debated as these two paragraphs sought to clarify the boundaries between permissive and prohibited conduct in military operations and cooperation with states not party. In their first version, these paragraphs read:

- “3. Notwithstanding the provisions of Article 1 of this convention and for the purposes of the maintenance of international peace and security in accordance with international law, a State Party may,
- a. host States not party to this Convention which engage in activities described in Article 1.
 - b. participate in the planning or execution of operations, exercises or other military and related logistic activities by that State Party, its armed forces or individual nationals, conducted in combination with armed forces of States not parties to this Convention which engage in activities described in Article 1.
4. Nothing in paragraph 3 of this Article shall, however, authorise a State Party to itself use cluster munitions as defined in Article 2 of this Convention.”

Criticism against the wording of this proposal was not unjustified. Para. 3 made a broad reference to the entire Art. 1, thus to all its paragraphs, not just Art. 1 (c) on the prohibition of assistance. The very vague and general wording of “for the purposes of the maintenance of international peace and security” may imply that the use of cluster munitions is generally suitable for achieving these purposes. Why the entire Art. 1 was referenced in the chapeau becomes then apparent with subpara. (a) which would have allowed a state party to “host” a state not party which engages in activities prohibited to a state party. The background for the insertion of this provision was that a number of states had foreign military bases, especially U.S. military bases, on their soil where cluster munitions are stockpiled. Hence the intention of these states to see to it that the protection of these foreign military bases would not be considered prohibited assistance to stockpiling of cluster munitions.

While it is already problematic to incorporate any exception for foreign stockpiling from a prohibition of assistance at all,¹⁰¹⁵ the way this was initially worded was sweeping, as

¹⁰¹⁴ Including Austria, Chile, Tanzania, the ICRC and the CMC.

¹⁰¹⁵ Experience with the implementation of the Ottawa Convention on antipersonnel mines shows that a total of 32 states parties prohibit foreign stockpiling on, or authorising of foreign antipersonnel mines on national territory. Only a minority of states parties, including Germany, Japan, Qatar and the United Kingdom, declared that U.S. anti-personnel mine stocks on their territory in U.S. military bases are not under their national jurisdiction or control and are thus not subject to the national implementation measures of that state party. See Human Rights Watch, “A Prohibition on Assistance in a Future Treaty Banning Cluster Munitions: The Mine

this ensures that a state not party could be hosted on a state party's territory for any prohibited conduct, including the use, development, production, acquisition, transfer and stockpiling of cluster munitions.

In a similar vein, subpara. (b) was excessively broad as to significantly even allow participation in the execution of the use of cluster munitions by a state not party short of actual physical use which would remain prohibited under para. 4. Thus, it was legitimately asked by the ICRC what kind of assistance would then still remain prohibited, as the sweeping formulations contained in the proposed para. 3 would render Art. 1 (c) meaningless. The comments and criticisms received prompted the Swiss Friend of the Chair to present a revised version of the proposal on 23 May, at the end of the first week of negotiations. That proposal read:

Proposal by the Friend of the President on Interoperability For the Committee of the Whole, 23 May 2008

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article of its obligations under this Convention, shall promote the norms it establishes and shall make in all circumstances its best efforts to discourage States not party to this Convention from using cluster munitions as defined in Article 2 of this Convention.
3. Notwithstanding the obligations of States Parties under Article 1 of this Convention, a State Party, in accordance with international law, may,
 - a. host States not party to this Convention which engage in activities described in Article 1;
 - b. *take part* in planning, operations, exercises or other military and related logistic activities conducted by that State Party, its armed forces or individual nationals, in combination with armed forces of States not parties to this Convention which engage in activities described in Article 1;*so long as a potential use in a specific operation by a State not party to this Convention is out of the effective control of the State party.*
4. Nothing in paragraph 3 of this Article shall, however, authorise a State Party to develop, produce, otherwise acquire, itself use, or expressly request the use of cluster munitions as defined in Article 2 of this Convention.

Thus, the first two paragraphs of the proposed provision remained almost unchanged in comparison to the proposal of 21 May. Para. 2 was strengthened in that states parties shall

Ban Treaty Experience”, *supra* note 776. Accordingly, the inclusion of an exception into a Convention on Cluster Munitions for foreign stockpiling means a weakening of the prohibition of assistance with regard to foreign stockpiling, since this would elevate a minority position under the Ottawa Convention to the general position under the CCM.

make “in all circumstances” its best efforts to discourage states not party from using cluster munitions. Arguably, this would have clarified that not only when a specific joint military operation with states not party would be undertaken these efforts must be made but also in more general strategic and political discussions with states not party. The wording of “in all circumstances” also reaffirms the approach followed in Art. 1 and arguably further develops the general IHL obligation to respect and ensure IHL “in all circumstances”.

However, in respect of the more controversial paras. 3 and 4, the major thrust of para. 3, with slight variations, could still be regarded as subject to the same legitimate criticism. The proposed chapeau to para. 3 still referred to Art. 1 as a whole. Moreover, para. 3 (a) still retained the formula that states not party which engage in activities prohibited to a state party may be hosted by the state party and para. 3 (b) also remained virtually unchanged. A new qualification was added at the end of para. 3; this addition in fact only really made sense together with para. 3 (b), as this was designed for covering the scenario where time is of the essence and the choice of munitions is beyond the control of state party personnel operating alongside personnel from a state not party which might then use cluster munitions.

On the other hand, the intention behind also adding this clause to para. 3 (a) was arguably to cover the scenario where a state party had stockpiles of cluster munitions from a state not party on its territory and through international agreements (e.g. Status of Forces Agreements) would not be able to legally induce the state not party to get rid of these stockpiles. However, the reference to “so long as a potential use in a specific operation by a state not party” did not fit with this different context.

As for para. 4, at least it was clarified that not only the use of cluster munitions by a state party itself but also the development, production and acquisition of cluster munitions would remain prohibited as well as to expressly request the use of these weapons.

However, still no agreement could be found at the end of the first week of negotiations or at the beginning of the second week in the plenary. As a result, a new proposal was circulated on 26 May 2008 in the afternoon which contained a revised version of paras. 3 and 4 of the interoperability provision. Para. 3 did not attempt to make explicit the permitted scenarios in joint military operations and cooperation any more but stated that:

“Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, or their military personnel or others under their jurisdiction, may engage in military cooperation with non-States Parties engaged in activities prohibited under this Convention.”

However, para. 4 was expanded as to now cover an explicit prohibition for a state party to “itself stockpile or transfer cluster munitions.” While a broad wording of “host” was

avoided and finally the intention of this exemption became clear, this might still permit a state party to stockpile foreign cluster munitions on its territory indefinitely as well as assist in the loading of cluster munitions from those foreign stockpiles.

The issue of foreign stockpiling of cluster munitions was brought into play especially because of existing U.S. military bases located in some of the Oslo participant states' territory. Thus, large U.S. military bases are, for instance, located in Germany, Italy, the United Kingdom (both mainland and in the British Indian Ocean Territories) or Japan.¹⁰¹⁶

Already during the implementation of the 1997 Ottawa Convention ambiguities of interpretation of the obligation to destroy stockpiles ensued because of the location of U.S. antipersonnel stockpiles in U.S. military bases on state party territory. In this regard, the German government has made it clear that stockpiles and transfers of U.S. antipersonnel mines would be permitted, since weapons of foreign armed forces within Germany are not covered by German law and control. In particular, according to the 1959 NATO Status of Forces Supplementary Agreement, the property of a foreign force shall be immune from search, seizure or censorship by German authorities except where immunity is waived by the foreign state.¹⁰¹⁷ This means that the German authorities have no jurisdiction or control over weapons of whatever type stockpiled by the United States in these bases unless the United States waives the immunity relating to enforcement jurisdiction. The seizure of weapon stockpiles by the German authorities would entail such an exercise of enforcement jurisdiction and could thus not occur without U.S. consent.

¹⁰¹⁶ For instance, in Germany, the largest U.S. military bases are Ramstein near Kaiserslautern and Spangdahlem near Trier. Italy has large U.S. military bases in Aviano, Veneto region and with the Naval Air Station Sigonella in Sicily. The United Kingdom hosts large U.S. airforce bases in Lakenheath, located 70 miles northeast of London and 25 miles from Cambridge, and Mildenhall near Suffolk. In the British Indian Ocean Territories, Diego Garcia has been repeatedly in the news because of the U.S. secret detention centre there. Torture has been allegedly committed, and certain countries, such as the United Kingdom, have been suspected of assisting the United States in secret flights operated by the U.S. Central Intelligence Agency to transport terrorist suspects to this island. See, e.g., K. Sullivan, "U.S. Fueled 'Rendition' Flights on British Soil", *Washington Post*, 22 February 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/21/AR2008022100822.html> (last visited 26 January 2010); R. Norton-Taylor, "Records show Diego Garcia link to alleged torture flights", *The Guardian*, 4 January 2007, <http://www.guardian.co.uk/uk/2007/jan/04/usa.world> (last visited 26 January 2010); D. Priest & B. Gellman, "U.S. Decries Abuse but Defends Interrogations", *Washington Post*, 26 December 2002, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html> (last visited 26 January 2010). In Japan, the U.S. is hosted in large bases in Kadena near Okinawa, Misawa in the north of the main island, as well as in Yokosuka, 65 km south of Tokyo and 30 km from Yokohama. For a list of U.S. military bases on foreign soil according to their size, see Center for Defense Information, "U.S. Military Bases in Foreign Nations According to the Department of Defense's Property Replacement Value (PRV)", current as of 30 September 2006, <http://www.cdi.org/pdfs/ReedBsrPRV.pdf> (last visited 26 January 2010).

¹⁰¹⁷ Art. 40, Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, 3 August 1959, 486 UNTS 6986.

In a similar vein, regarding the United Kingdom, for instance with regard to Diego Garcia, a bilateral agreement exists in which it is also specified that removable property brought into the island by or on behalf of the U.S. government shall be exempt from inspection, search and seizure.¹⁰¹⁸

Moreover, with regard to Japan, the Status of Forces Agreement between the United States and Japan provides that within the U.S. military facilities and areas the United States may take all the measures necessary for their establishment, operation, safeguarding and control. Accordingly, the same as in the case of Germany would apply in case of cluster munition stockpiles in these installations, as the territorial states cannot legally compel the United States in such cases to remove their cluster munition stockpiles. If one interprets the proposed Art. 1 (b) in combination with the obligation to destroy its stockpiles (irrespective of whether it applies to cluster munitions under its “jurisdiction or control” or to those under its “jurisdiction and control”), then one could argue that the prohibition is not violated at all and thus, also no issue of prohibited assistance would arise.¹⁰¹⁹

The case of Italy is different, as the U.S. commander of a military base will notify the Italian commander of all significant U.S. activities, with specific reference to, *inter alia*, the movements of materiel or weapons, and the Italian commander will advise the U.S. commander if he believes U.S. activities are not respecting applicable Italian law. Moreover, permanent increases of the operational component shall be authorised by the Italian authorities and temporary increases of military and civilian personnel will be approved by the Italian commander. Also, the Italian commander has free access to all the facilities.¹⁰²⁰ Given these competencies, Italy may exercise control over weapons stockpiled in these facilities, and if Italy does not advise a U.S. base commander that stockpiling of U.S. cluster munitions, if any, or settle this issue with the U.S. government, it would risk being in violation of the prohibition to stockpile cluster munitions.

Accordingly, in order not to place Italy and other states in the position of having to negotiate with the United States for the removal of cluster munitions stockpiled in U.S. military bases, this reference to “itself” stockpile or transfer was included.

¹⁰¹⁸ Exchange of Notes Constituting an Agreement Concerning a United States Naval Support Facility on Diego Garcia, British Indian Ocean Territory, 25 February 1976, 603 UNTS 273. This treaty also provides that such property may be freely removed by the United States, thus placing transfer of U.S. cluster munitions to a third state beyond the control of the United Kingdom.

¹⁰¹⁹ This interpretation was supported by Maslen in his commentary to the Ottawa Convention, *supra* note 368, at 104, 156-158.

¹⁰²⁰ Memorandum of Understanding between the Ministry of Defense of the Republic of Italy and the Department of Defense of the United States of America Concerning Use of Installations/Infrastructure by U.S. Forces in Italy, 2 February 1995.

Despite these concerns, however, the major gist of the new provision remained unchanged until it was agreed on 28 May 2008 that the draft convention would not be subjected to any more changes. On the contrary, by virtue of the next draft proposal by the Friend of the President of 27 May, in para. 2 reference to “in all circumstances” with regard to the obligation to make its best efforts to discourage use by a state not party was dropped again. However, para. 3 contained a slight improvement in that it allowed state parties to engage in military activities with states not party to the Convention which “might engage in activities prohibited under this Convention.” The specification of “might engage” instead of “engaged in” removed the direct link to activities prohibited to a state party and made the intention of the provision to not preclude the mere participation in joint military operations in matters unrelated to cluster munition specific activities more apparent.

While already the substance of this provision was among the most controversial Articles, a critical comment must also be made about the manner in which the negotiations on interoperability unfolded. Despite the assurances by the closest U.S. allies that interoperability was not an issue reduced to NATO cooperation and operations alone and by the Swiss Friend of the President that also states more critical of interoperability were involved in the evolution of these proposals, the decisive consultations were held in a small room with no microphone or translations into French or Spanish. This meant that especially Latin American and French speaking African countries were at a disadvantage in following the negotiations and contributing to them and that European NATO and other allies of the United States, including Australia, Canada, Japan or New Zealand, could dominate the outcome.¹⁰²¹

As a consequence, the following provision was finally adopted as part of the negotiation package:

Article 21

Relations with States not parties to this Convention

1. Each State Party shall encourage States not parties to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not parties to this Convention, referred to in paragraph 3 of this Article of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions as defined in Article 2 of this Convention.
3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, or their military personnel or nationals, may engage in military

¹⁰²¹ Criticism along these lines was also voiced by K. Harrison, “Update from the Dublin Diplomatic Conference on Cluster Munitions: Tuesday, 27 May 2008”, <http://www.wilpf.int.ch/disarmament/clustermunitions/Dublin%202008/Tuesday27.html> (last visited 26 January 2010).

cooperation and operations with States not parties to this Convention that might engage in activities prohibited to a State party.

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

- (a) To develop, produce or otherwise acquire cluster munitions;
- (b) To itself stockpile or transfer cluster munitions;
- (c) To itself use cluster munitions; or
- (d) To expressly request the use of cluster munitions in cases where the choice of munitions is within its exclusive control.¹⁰²²

6.2. *The Definition of Prohibited Cluster Munitions*

From the beginning, the New Zealand Friend of the President held negotiations in an open informal manner.¹⁰²³ In the centre of debates was whether or not an exclusion from the definition of cluster munitions should be incorporated in an Art. 2 (c). The Friend of the President structured the discussions first around the proposed lists of reliability and accuracy characteristics that those supporting exceptions or exclusions had proposed, including sensor-fusing, fail-safe systems, numbers of sub-munitions per cluster munition and delivery by direct fire.

During the first round, Germany emphasised that it was aiming at a complete prohibition of cluster munitions but that there existed alternative munitions that should be distinguished. The line should be drawn with cumulative characteristics, laying down a limit to the number of explosive submunitions (less than 10), sensor-fusing which should only function within a pre-defined area and electronic self-destruct and –deactivation mechanisms. At this point, however, it should not be forgotten that Germany also advocated for a transition period as part of its three-step approach where cluster munitions with a dud rate below one percent and effective only within a pre-defined area should be progressively phased out.

Be that as it may, the German proposal certainly had the most significant initial impact on the negotiations, as states quickly positioned themselves in various camps. Firstly, there were those states that showed some support for the German proposal, including Australia, Canada, Norway and Portugal. Secondly, there were those states not supporting any further exclusion from the definition under Art. 2 (c) at all, including Austria and many less developed Asian, African and Latin American and Caribbean states. Finally, there were those

¹⁰²² Art. 21, Convention on Cluster Munitions, *supra* note 33.

¹⁰²³ Since of these informal sessions no official Conference documentation is available, the statements reported here are based on personal Conference notes of this author.

states which supported more far-reaching exclusions; in particular, this included the United Kingdom but also Finland, Slovakia and Spain.

The negotiations were ably assisted by an independent expert who greatly contributed to a common understanding of some of the very technical concepts discussed.¹⁰²⁴ For instance, this expert explained the difference between sensor-fused munitions and traditional cluster munitions with the ability of sensor-fused weapons to discriminately hit targets and being thus the opposite of a free-falling munition. Moreover, he saw a difference between traditional cluster munitions and sensor fused munitions in that traditional cluster munitions explode on the ground in a wide area, making use of fragmentation while sensor-fused munitions explode in the air and do not display a pattern of fragmentation, which avoids a wide area effect. The negotiations thus soon moved away from concepts as vague as “accuracy” and “reliability”. Instead with regard to “accuracy” it was specified that this involves the entire process from locating to engaging a target with the aim of exploding the munition where it is supposed to explode. In this regard, also concepts proposed by Germany such as “point target” and “pre-defined area” were elaborated on. With regard to the concept of “point target” questions were raised as to what size a target could have in order to still qualify as “point target”.

Interestingly, these concepts were already discussed by the ICRC in its 1973 expert report on weapons. In that report, “point targets” were described as “by definition, well defined and usually small in size”. On the other hand, “area targets” were defined as “large in size” and as presenting “no specific aiming point to an attacker.” As examples of “area targets” enemy troops deployed over a wide area, or targets comprising many buildings or fixed installations were mentioned.¹⁰²⁵ This apparently neat distinction works well in cases where civilian and military targets are well separated but not where there are small single military targets within civilian concentrations.

The independent expert usefully distinguished two areas, notably one where the enemy is located and the other where the weapon will display its effect. The challenge then lies in how well the second area superimposes the first one and that presents a particular problem where the first area is quite small while the area of effectiveness where the sub-munitions actually hit is much larger.

¹⁰²⁴ Colin King who had already written a first groundbreaking study on explosive sub-munitions commissioned by the ICRC in 2000. He was also one of the authors of the report on the M-85 sub-munition with mechanical self-destruct mechanism quoted in *supra* note 83.

¹⁰²⁵ ICRC, 1973 Weapons Report, *supra* note 187, at 24, paras. 54-55.

The problem of the entire negotiations on whether a difference between sensor fused weapons with the additional cumulative requirements (limited numbers of sub-munitions and self-destruct and self-deactivation mechanisms) and cluster munitions should be warranted was aptly commented on by the ICRC which stated that it was a largely philosophical discussion to try to prove the unprovable. Indeed, the Oslo process is characterised by the fundamental aim of prohibiting cluster munitions that cause unacceptable harm to civilians. In this spirit, especially the CMC was the driving force behind an approach that would require proof that any weapon category excluded from the definition of prohibited weapons would not give rise to the same humanitarian concerns as cluster munitions.

Thus, there is a presumption that cluster munitions should be prohibited and that this presumption must be rebutted in individual cases for excluding a weapon from the prohibition. This approach, however, has already moved beyond the approach of traditional IHL according to which proof of humanitarian harm must be furnished in all circumstances to justify a general prohibition of a weapon. Therefore, there is the reverse presumption of legality of a weapon which must be rebutted to justify a prohibition.

The question then arises how humanitarian harm is measured? The Oslo process gave the answer to this question by relying on the *actual* effects of cluster munitions with the proposed additional cumulative requirements on civilians on the ground. But how is one to judge the actual effects of such technologically advanced munitions on civilians if these weapons have almost never been used? As the ICRC emphasised the only way to get certainty on the actual humanitarian effects of sensor fused weapons would require large scale use of such weapons. However, this would not be a desirable prospect given that the Oslo process was also inspired by the consideration of preventing the same humanitarian problems arising from cluster munitions in the future.

There are at the outset different alternatives how to solve this dilemma. Firstly, different alternatives may be informed by a precautionary approach which is guided by the fundamental rationale to protect civilians from serious harm before definitive proof through large scale use of this weapon is provided.¹⁰²⁶ One of these alternatives could be not to have any exclusion for such technologically advanced munitions. This is essentially what the states argued which did not support any exclusion under a future Art. 2 (c). A more nuanced approach would be to incorporate such an exclusion but at the same time explicitly enshrine

¹⁰²⁶ For an interesting argument on how to make use of the precautionary principle which derives from international environmental law to depleted uranium weapons, see L. Wexler, "Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty", 39 University of California Davis Law Review 459 (2006).

the obligation to review the definition (and this exclusion) at subsequent Review Conferences; this approach was proposed by the ICRC.¹⁰²⁷ On the other hand, one could envisage to make provision for an exclusion under Art. 2 (c) without any complementary provisions, as favoured by those possessing the capabilities to develop these advanced munitions.

The first approach (no Art. 2 [c] at all) accords precedence to humanitarian concerns over military considerations and applies lessons learnt from the past by taking a rigorous precautionary approach. As to the military considerations, advanced sensor fused munitions with additional highly developed fail safe mechanisms are considered by military experts to be an alternative to inaccurate and unreliable DPICM for long range artillery capabilities because it would more accurately and forcefully strike armoured targets like main battle tanks and self propelled howitzers at distances beyond 15 km.¹⁰²⁸

However, according to the first approach no faith should be put in technology to remedy the already experienced problems with cluster munitions. There is in principle some justification for this stance, since in the past also assurances were made that with technological fixes the humanitarian problems resulting from cluster munition use could be prevented; yet, on the battlefields these claims were proven wrong. On the other hand, sensor fused weapons have only been used once in a combat situation, by the United States in Iraq. One could thus say that the case cannot be made one way or another yet as regards humanitarian concerns, but that there is a concrete military rationale to fight armoured targets at long range with these weapons in the future instead of traditional cluster munitions. Accordingly, without a record of humanitarian harm, by still prohibiting also the most advanced sensor fused weapons, one may inadvertently deprive the militaries of a needed capability. In this regard, taking such a principled precautionary approach, while laudable from a humanitarian perspective, may invite more challenges from those outside of the Oslo process that the Oslo process does not strike the right balance between humanitarian and military considerations. Especially, this adds fuel to the arguments by major military powers represented in the CCW that this forum is better equipped to strike the right balance between these two competing rationales even if the CCW is far from balanced and actually has a heavy national security and military bias. Finally, as already observed *supra*, precedents are rare

¹⁰²⁷ A French amendment proposal submitted already in Wellington and part of the compendium also suggested a review obligation although the definition proposed by France was much more restrictive. See Proposal by France for the amendment of Article 2, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Doc. CCM/20, 19 May 2008.

¹⁰²⁸ Dullum, "Cluster weapons", *supra* note 36, at 50.

under IHL to prohibit weapons without (widespread) use on the battlefield to support an approach that errs on the side of humanitarian caution.¹⁰²⁹

Conversely, the third approach takes sides in favour of preserving the long-range attack capability against armoured target in the face of humanitarian uncertainty. The historical lessons from the 1970s where newly developed cluster munitions were hailed as sufficient to remedy past concerns would be ignored were such an approach to be followed slavishly.

Finally, the second approach which was suggested by the ICRC was to complement any exclusion by the explicit and specific possibility of reviewing any types of weapons at a subsequent conference. While a general provision on review conferences already featured in the Draft Convention under Art. 12, this would be a specific course of action binding on the states parties to revisit the issue of the definition.

This approach differs from the first one in that it is based more on a traditional understanding of IHL and disarmament by balancing humanitarian with security and military considerations. In this respect, it is cautious not to inadvertently undermine any future military capability without the humanitarian urgency underlying the Oslo process for prohibiting cluster munitions. On the other hand, future humanitarian concerns arising from these high technology sub-munition based systems are given specific recognition by enshrining a concrete obligation to review the definition should the same humanitarian problems as with cluster munitions materialise. Therefore, this approach is more sophisticated than the third one in that some level of humanitarian safeguards would be built into the exclusion. While based on the fundamental IHL and disarmament rationale of balancing humanitarian with military concerns, the way in which humanitarian concerns should be examined would mark a novelty under IHL and disarmament, as legal weapons have never been subjected to such an additional layer of international review before.

Thus, in principle, this second alternative seems to be more attractive than the other two, since it is more balanced. However, also this alternative has its drawbacks. Firstly, the basis for the review is still not clear. In this regard, one may raise the question how the review process should be more reliable than the assurances made by users and producers in the past regarding unproven technological fixes. Especially, how should one gain an understanding of the actual effects of these weapons in a combat situation other than through their use in future armed conflicts? One would need to align the testing regimes to the reality of combat, which

¹⁰²⁹ See *supra* p. 253, note 850.

has until now been proved to be impossible. Moreover, excluding a weapon from a prohibition now but building in a review clause regarding the definition does give the impression of postponing a clear decision at the current stage. This could contribute to considerable legal uncertainty and may actually hinder universalisation of the convention in the future, since states not party would not have a clear guidance as to how they should adapt their procurement policies in order to join the treaty.

Be that as it may, the positive bottom line of the discussions was that technical criteria should be scrutinised against the objectionable effects that cluster munitions cause to civilians, the fundamental purpose of the entire Oslo process. After the Friend of the President had drawn up a list of several alternatives with cumulative criteria and there had been some support for the German proposal, Norway submitted a decisive proposal on 21 May 2008. The proposal contained the following definition of a cluster munition as a

“munition that is designed to disperse or release explosive sub-munitions each weighing less than 20 kilograms, and includes those explosive sub-munitions. It does not mean the following:

- (a) ...
- (b) ...
- (c) a munition with sub-munitions each weighing more than five kilograms, designed to seek, detect and engage point targets, and equipped with electronic self destruct and self deactivation mechanisms.”¹⁰³⁰

In an explanation, Norway argued that weight as one of the cumulative criteria, in addition to other criteria of point target capability and fail-safe mechanisms, would effectively capture almost all cluster munitions used to date. According to Norway, the advantages of a weight limit were that this would reduce the total numbers of sub-munitions that could physically fit into a container/dispenser. This would substantially reduce the problem of unexploded sub-munitions. At the same time, this approach would safeguard against future miniaturisation (and resulting increase in numbers). Larger sub-munitions would also be easier to detect, less sensitive to handle and easier to clear, which would go some way towards reducing the risk for civilian accidents due to inadvertent contact with sub-munition duds.

The Norwegian paper also emphasised that this proposal would allow for weapons that may be technically considered cluster munitions but did not share the same humanitarian effects such as larger and heavier anti-runway and anti-structural bomblets. As for the upper limit of 20 kg above which sub-munitions would not be considered part of a cluster munition

¹⁰³⁰ Norway, “How to address the humanitarian effects of unacceptable cluster munitions: Explanatory note on the Norwegian informal proposal based on weight criterion to Art 2 on definitions”, 21 May 2008 (on file with the author).

such an exclusion was justified, since the intention was not to ban by default nuclear warheads and special purpose conventional bombs for which there were other treaties and which should be possible to use to preserve military capabilities on the battlefield, respectively. Between 5 and 20 kg per individual sub-munition a munition would have to have the additional characteristics to be excluded from the definition of cluster munitions while with less than 5 kg per sub-munition a weapon would be prohibited if the definition of a cluster munition was otherwise fulfilled. Finally, the Norwegians stressed that the criterion of weight constituted an added safeguard, as this criterion was easy to verify and in practice almost impossible to circumvent.¹⁰³¹

While the three major camps on the issue of a proposed exclusion under Art. 2 (c) remained unchanged,¹⁰³² the Friend of the President, for his part, produced his own discussion paper to move negotiations forward. In that discussion paper, the New Zealand Ambassador took up the criterion of weight proposed by the Norwegians, i.e. that sub-munitions weighing 20 kilograms or more would be excluded from the convention, while a possible Art. 2 (c) read as follows:

“(c) a munition *that has the following characteristics that limit its area effect and reduce the risk of unexploded ordnance contamination from its use:* [italics by this author]

- a. each munition contains fewer than 10 sub-munitions;
- b. each sub-munition weighs more than five kilograms;
- c. each sub-munition is designed to locate and engage a point target within a pre-defined area;
- d. each sub-munition is equipped with an electronic self-destruct mechanism;
- e. each sub-munition is equipped with an electronic self-deactivation mechanism.”¹⁰³³

Accordingly, this paper combined elements essentially of the German and Norwegian proposals. However, chapeau language was crucially added which made it clear not only that the technical criteria had to be fulfilled cumulatively but also that the yardstick against which this exclusion must be measured is the wide area effect and the risk of unexploded ordnance, the two humanitarian problems associated with the use of cluster munitions. Thus, while the motivation was to not deprive states of a military capability an attempt was made to balance this aim against the humanitarian concern to protect civilians from unacceptable harm in the future.

¹⁰³¹ *Ibid.*

¹⁰³² Some of those states opposed to any further exclusion under a future Art. 2 (c) had formalised their position by an official proposal in the meantime. See Proposal by Argentina, Costa Rica, Ecuador, Guatemala, Lebanon, Mexico, Palau and Uruguay for the amendment of Article 2, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 21 May 2008, Doc. CCM/71.

¹⁰³³ Chair’s Discussion Paper, 21 May 2008 (on file with the author).

Still, certain doubts as to the weight criterion were expressed by a number of delegations, in particular whether this would be a future proof element preventing the same humanitarian harm as in the past.¹⁰³⁴ Others made the argument that adopting such an approach would mean to return to traditional unitary heavy munitions which may induce military commanders to let their subordinates use even higher numbers entailing the risk of more civilian casualties.¹⁰³⁵

This latter reasoning, however, was eloquently refuted by the ICRC which emphasised that the use of each weapon involved a targeting decision under IHL. While such a decision would only be made once for a cluster munition if it were true that massive numbers of unitary munitions would be used instead of cluster munitions, then also many targeting decisions would have to be taken, each of which would have to comply with IHL. Thus, to automatically assume that the use of higher numbers of unitary munitions would entail more civilian casualties would raise serious questions under IHL.¹⁰³⁶

Other concerns that surfaced during discussions were that numbers and weight could be perceived by some to be motivated by commercial interests and that less developed states would be at a disadvantage meeting these technological standards.¹⁰³⁷

The first concern can be addressed to some extent by the *humanitarian* chapeau language which makes it clear that the technological criteria in and of itself are not sufficient to justify future use, production and transfer of sub-munition based weapons. In this regard, while the language proposed by the Friend of the President already reflected an effects-based (i.e. a munition that limits the area effect and reduces the risk of unexploded ordnance) rather than design-based approach (a munition that is designed to limit the area effect and reduce the UXO risk), there were interventions even proposing to strengthen this language, for instance, not only to limit but to avoid or at least minimise these effects.¹⁰³⁸

With regard to the second concern it is noted that this concern is informed by a classical disarmament perspective, since disarmament arguably seeks in the best case to

¹⁰³⁴ Delegations sceptical about the inclusion of weight as one of the criteria to define cluster munitions that do not cause unacceptable harm to civilians included Canada, Costa Rica, Mauretania, the Netherlands and South Africa.

¹⁰³⁵ The argument made by Finland and Spain was not new and had been repeatedly made by those opposed to specific cluster munition prohibition or regulation in the past.

¹⁰³⁶ International Committee of the Red Cross, Statement, Informal Debate on Definitions, Art. 2, 21 May 2008 (personal notes of this author).

¹⁰³⁷ These concerns were voiced, for instance, by Zambia, Ghana, Indonesia and Switzerland. See Zambia, Statement, Informal Debate on Definitions, 21 May 2008; Ghana, *ibid.*; Indonesia, Statement, Informal Debate on Definitions, 22 May 2008; Switzerland, *ibid.* (personal notes of this author).

¹⁰³⁸ Germany and the United Kingdom suggested strengthening the provision in this manner. See Germany, Statement, Informal Debate on Definitions, 21 May 2008; United Kingdom, Informal Debate on Definitions, 22 May 2008 (personal notes of this author).

eliminate weapons across all countries with different levels of development and in the worst case level out existing differences in terms of weapons technology available between potential adversaries. This is in tension with an IHL approach which inherently recognises that there may be different levels of weapon technology, apparent for instance, in the “obligation to take all feasible precautions”, since what is feasible depends on the technological capabilities of the weapon user.¹⁰³⁹

In this respect, however, the basic philosophy of the future convention is humanitarian and not a balance of military power. To that extent disarmament embraces the humanitarian aspect of IHL which gives meaning to the term “humanitarian disarmament”. After all, a Convention on Cluster Munitions should compensate for the inadequacies of IHL relating to the use of cluster munitions. IHL does recognise that military force is needed in armed conflicts but as Norway put it, whenever force is needed, excessive civilian harm should be avoided and this entails that modern accurate weapons will replace inaccurate and unreliable ones rather than military capabilities will be eliminated altogether.¹⁰⁴⁰

The next Friend of the President’s Paper contained an improved version of the humanitarian language in the chapeau as it spoke of a “munition that has *all of the following characteristics which minimise its area effect and the risk of unexploded ordnance contamination from its use.*”¹⁰⁴¹ Thus, the cumulative and effects-based approach to this exclusion was made more explicit by this revised draft. However, weight as one of the criteria did not feature in this draft, as some reservations had still been expressed about the appropriateness of this criterion to remedy the humanitarian concerns relating to cluster munition use. Instead, the draft retained the criterion of reducing the number of sub-munitions in a container to fewer than ten and the other conditions of point target strike capability and electronic self-destruct and deactivation mechanisms.

Still, there is merit in including both conditions, not only numbers but also weight; numbers only are open to abuse, since one may just deploy more delivery systems with fewer sub-munitions and in this way cause similar humanitarian harm. That might be the case even if the weapons are sensor fused as greater numbers would entail a greater risk of volatile small sub-munitions.

¹⁰³⁹ *Supra* pp. 74-75. See also M. Schmitt, “Precision attack and international humanitarian law”, 859 International Review of the Red Cross 445, 460 (2005).

¹⁰⁴⁰ Interestingly, Norway did not employ the wording of “unacceptable harm” but that of “excessive civilian harm”, the traditional IHL formula.

¹⁰⁴¹ Friend of the Chair’s Paper on Definition of a “Cluster Munition”, Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 22 May 2008 (on file with the author).

Significantly, some of those previously not supporting any Art. 2 (c) exclusion in the Convention started to show more flexibility in that they stated that any such exclusion should be complemented by an annual reporting obligation under the proposed Art. 7 and by a possibility to revisit the definition at a later stage.¹⁰⁴² Thus, these states leaned more towards the position advocated by the ICRC earlier. Moreover, some of the delegations initially critical about the desirability to include weight as a criterion reconsidered their original reservations and expressed support for a cumulative approach with weight of the individual explosive sub-munitions.¹⁰⁴³ This approximation of positions served as a basis for a series of bilateral consultations, as a result of which the Irish President could present his assessment of where consensus on an exclusion lay. A significant boost to building consensus was the radical shift of the position of the third-biggest user of cluster munitions of all times, the United Kingdom. On 28 May 2008, Prime Minister Gordon Brown delivered the following statement:

“After 10 days of intense talks in Dublin, we are now very close to agreement on a new international Convention prohibiting the use, production, stockpiling and transfer of cluster munitions that cause unacceptable harm to civilians. In order to secure as strong a Convention as possible in the last hours of negotiation we have issued instructions that we should support a ban on all cluster bombs, including those currently in service by the UK. This Convention will be a major breakthrough, and builds on the UK’s leadership on landmines and the Arms Trade Treaty. We will now work to encourage the widest possible international support for the new Convention.”¹⁰⁴⁴

Thus, the United Kingdom was finally prepared to scrap its entire arsenal of cluster munitions, including those with M85 sub-munitions as well as the multipurpose rockets fired from helicopters containing so-called M73 sub-munitions; especially in respect of the latter type of sub-munitions the United Kingdom strove for an exception from the prohibitions to protect what it regarded as a more accurate munition to be employed in a “direct-fire” mode.¹⁰⁴⁵

This encouraging development made it easier for the Irish President to present a proposal on the definition which remained the version finally adopted. It reads as follows:

“(c) a munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:

¹⁰⁴² Austria, Malta and Lebanon adopted this approach towards the proposed Art. 2 (c). See Statements summarised in Summary Record of the Committee of the Whole, Dublin Conference, 26 May 2008, *supra* note 184.

¹⁰⁴³ For instance, France, Malta, Mexico, Senegal, Sweden as well as the ICRC now indicated that they supported favourable consideration of weight as one of the exclusion criteria. See *ibid.*

¹⁰⁴⁴ Prime Minister Gordon Brown, “Breakthrough on cluster bombs draws closer”, Statement of 28 May 2008, <http://www.number10.gov.uk/Page15608> (last visited 26 January 2010).

¹⁰⁴⁵ Borrie, “How the Cluster Munition Ban Was Won”, *supra* note 998.

- (i) each munition contains fewer than 10 explosive sub-munitions;
- (ii) each sub-munition weighs more than four kilograms;
- (iii) each sub-munition is designed to detect and engage a single target object;
- (iv) each sub-munition is equipped with an electronic self-destruct mechanism;
- (v). each sub-munition is equipped with an electronic self-deactivation feature.”¹⁰⁴⁶

Firstly, the humanitarian chapeau language had been strengthened, as the yardstick on which this exclusion is based is no longer “minimise” area effect and the risk of “unexploded ordnance contamination” but on “avoid indiscriminate area effects and the risks posed by unexploded submunitions”. Thus, there is no tolerance of these effects whatsoever. Moreover, the fact that not only unexploded ordnance contamination but the risk posed by unexploded submunitions must be avoided also strengthens this language, as smaller numbers of individual unexploded sub-munitions rather than massive numbers resulting in “contamination” already pose a risk for civilians.

While the intention of the chapeau is clear, i.e. to adopt a humanitarian effects-based approach to this exclusion, in the view of this author this objective could have still been better reflected in the Convention as adopted. The main drawback is the subjective element that is included by the wording of “in order to avoid” the objectionable effects of cluster munitions. This means that the subjective intention rather than the objective result/effect of avoiding indiscriminate area effects and the risks posed by unexploded sub-munitions is decisive. It is true that the final exclusion better accomplishes the goal of enshrining these effects as independent yardstick against which the enumerated technical criteria must be tested, since the preceding versions imply a factual statement that these technical specifications generally accomplish the humanitarian aims.

However, the humanitarian effects as the ultimate yardstick could have been expressed in a more objective manner and as a stand-alone criterion. Moreover, the technical characteristics could have been enumerated in a non-exhaustive fashion. In this vein, the chapeau of the exclusion could have read as follows:

“A munition that avoids indiscriminate area effects and the risks posed by unexploded sub-munitions, and that has, at a minimum, all of the following characteristics: [...]”.

Be that as it may, the exclusion as finally adopted is very narrow and much narrower than, for instance, the very broad exemptions demanded by certain states at the outset of the Dublin negotiations. There is only a limited number of weapon systems that currently fulfil the technical criteria stipulated by Art. 2 (2) (c) of the Convention on Cluster Munitions. This

¹⁰⁴⁶ Draft Convention on Cluster Munitions, Presidency Paper, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 28 May 2008, Doc. CCM/PT/14.

would include the German SMArt 155,¹⁰⁴⁷ the French/Swedish BONUS,¹⁰⁴⁸ or the U.S. SADARM which is one of the two types of SFW ever used in combat.¹⁰⁴⁹ On the other hand, the other U.S. type SFW used in combat, the CBU-97/CBU-105 containing 40 BLU-108 sub-munitions, each weighing 3,4 kg, clearly falls outside the permitted exclusion under Art. 2 (2) (c), as would, based on the available information of this author, for instance, the Russian RBK-500 SPBE-D sensor fused weapon, since it includes 15 sub-munitions per container.

Therefore, at first sight, it does not come as a surprise that the negotiated result in Dublin was reproached on the basis that the

“major military powers that did participate, mostly Europeans, saw to it that their newest cluster munitions were not banned at the May meeting. But under the planned criteria for prohibition, every cluster bomb in the current U.S. arsenal would become illegal, including weapons carefully designed to pose little danger to civilians.”¹⁰⁵⁰

Two points must be made in response. The first is that this comment overemphasises the technical criteria provided for in Art. 2 (2) (c). However, it ignores the humanitarian object and purpose of the CCM to put an end for all time to the unacceptable harm to civilians and the humanitarian yardstick imposed by the chapeau of Art. 2 (2) (c) against which weapons possessing these criteria must ultimately be assessed. Thus, even if certain weapons fulfil the technical characteristics under Art. 2 (2) (c) of the CCM were they to claim civilian victims by striking targets indiscriminately or leaving unexploded sub-munitions they would still be prohibited under the CCM. In that sense, for those weapons fulfilling the technical criteria there is merely a legal presumption that they do not cause unacceptable harm to civilians. However, such presumptions are rebuttable in case of concrete humanitarian problems on the battlefield.

¹⁰⁴⁷ The German SMArt 155 has two or four explosive sub-munitions; each sub-munition weighs more than 4 kg; each sub-munition contains one active and one passive millimetre wave and one infrared sensor to detect and engage single targets. If no target is sensed, the sub-munition will electronically self-destruct in the air. Should this device still fail, the battery on which the functioning of the fuse depends will run dead. The search area is between 15,000 and 35,000 m². See Aktionsbündnis Landmine.De, “Sensor Fuzed Alternative Cluster Munitions,” *supra* note 261, at 14; Dullum, “Cluster weapons,” *supra* note 36, at 56.

¹⁰⁴⁸ The French/Swedish BONUS 155 mm artillery shells incorporate two explosive sub-munitions; each explosive sub-munition weighs 6,5 kg; each sub-munition is equipped with three multiband infrared sensors and a laser radar to detect and engage single targets and the two electronic self-destruct and deactivation devices. The search area for one shell is 64,000 m² and one sub-munition may pierce armour of more than 100mm at ranges around 30km. See Nexter, “Artillery Ammunition: Bonus,” *supra* note 89.

¹⁰⁴⁹ The SADARM contains two explosive sub-munitions per container and each sub-munition weighs 11,77 kg. Each submunition is equipped with a millimeter wave sensor and an infrared sensor array. Using the two sensors and detection logic, the submunition is designed to detect countermeasured targets in a variety of climates in an area of around 70,000m². If the sensor detects a target, the submunition fires an explosively formed penetrator (EFP) at the target. If no target is detected the submunition is designed to electronically self-destruct and self-deactivate. As has already been mentioned, of the SFW mentioned here, the SADARM is the only one that was actually used in combat. See *supra* note 85.

¹⁰⁵⁰ L. B. Thompson, “Thompson Files: Fuzed Weapons are good”, 1 August 2008, http://www.spacewar.com/reports/Thompson_Files_Fuzed_weapons_are_good_999.html (last visited 26 January 2010).

Secondly, as one civil society expert at the Dublin Conference emphasised, unlike with the systems that would fall outside the definition of prohibited cluster munitions, the BLU-108 sub-munitions have actually been used in combat in 2003. Unexploded sub-munitions were actually found around the area of Mosul. On the basis of photographic evidence, the expert concluded that it was clear from a humanitarian clearance team's overview on the battlefield performance of this weapon that the percentage of unexploded sub-munitions from this weapon was higher than the often quoted 1 % and that this weapon does not leave a clean battlefield contrary to claims of producers.¹⁰⁵¹ Accordingly, some humanitarian case with concrete battlefield evidence that the BLU-108 shares objectionable humanitarian harmful effects with other cluster munitions could be made while the same case cannot be made for other weapon systems like the SMARt and the BONUS as of now. Seen from that perspective, it does not seem unreasonable to set the limit between weapons prohibited by the CCM and those excluded from its scope precisely around the technical data pertaining to the BLU-108.

Therefore, where there is still lack of evidence of humanitarian harm the military capability to defeat armoured targets at long range was considered so important as to warrant an exclusion from prohibited cluster munitions. This is informed by a traditional IHL approach that requires a balance between military and humanitarian considerations. Still, one may object to that numerical and weight limits on the basis that they appear rather arbitrary.

In fact there is a historical precedent for at least weight as a criterion to distinguish between permissible and prohibited weapons, notably the 1868 St. Petersburg Declaration prohibiting the use of explosive projectiles of a weight below 400 grammes.

History shows that this prohibition was introduced to preclude the development of rifle bullets exploding upon impact with the human body which were considerably lighter than existing artillery shells. However, the weight limit was more or less arbitrary in that the newly developed bullets were far below 400 g and the artillery shells much heavier.¹⁰⁵² The arbitrariness of the weight limit was revealed in the light of a later blurring of the dividing lines between infantry and artillery; for instance, lighter artillery grenades and exploding anti-materiel bullets have been developed since. At present the view is held that only the exclusive anti-personnel use of bullets or only if such projectiles are designed to explode upon impact with the human body have survived as prohibition under customary international law.¹⁰⁵³

¹⁰⁵¹ McGrath, "Sensor-Fuzed Submunitions and Clean Battlefields", *supra* note 87.

¹⁰⁵² Kalshoven, "Arms", *supra* note 23, at 207-208.

¹⁰⁵³ Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 169, at 272-274.

This experience tells us to approach weight limits with caution, since they reflect the best of knowledge where to draw the line between prohibited and permissible weapon use in armed conflict at a given moment only. Thus, the limits set may prove to be legitimate only on a temporary basis. In the famous words of the St. Petersburg Declaration, “having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity.”¹⁰⁵⁴ On the other hand, the parties to the Declaration

“reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.”¹⁰⁵⁵

What has remained of the St. Petersburg Declaration is the rationale behind the limit originally set, notably to preclude the use of explosive projectiles, i.e. infantry munitions that are designed to explode upon impact with the human body only, as the use of such weapons goes beyond that militarily necessary to put an individual soldier out of action.

In a similar vein, one may posit with regard to the CCM that in the future, massive numbers of light and unguided sub-munitions with insensitive fuses in a container should never be used again as to preclude an indiscriminate area effect and the risks of unexploded sub-munitions. The humanitarian rationale behind the specific technical criteria, especially where they appear arbitrary, should thus always remain first and foremost on our minds to draw the line where the technical limits ought to yield to the requirements of humanity.

The above-mentioned military considerations, i.e. to preserve the capability to defeat armoured targets at long range, should also undermine the military argument that the effect of prohibiting cluster munitions would entail to revert to the use in greater numbers of heavier unitary munitions, irrespective of the IHL argument advanced by the ICRC.¹⁰⁵⁶

6.3. Transition Periods

As with the other major points of contention, also with regard to transition periods the various textual proposals submitted by Japan, the United Kingdom, Germany and Switzerland were included in the Conference documents as amendment proposals, with Slovakia tabling an additional proposal for a transition period of twelve years.¹⁰⁵⁷

¹⁰⁵⁴ 1868 St. Petersburg Declaration, *supra* note 8.

¹⁰⁵⁵ *Ibid.*

¹⁰⁵⁶ This argument was particularly emphasised by Australia. See the Australian statement summarised in Summary Record of the Committee of the Whole, Dublin Conference, 26 May 2008, *supra* note 184.

¹⁰⁵⁷ Japan, Proposal for the amendment of Article 1, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/10; United Kingdom, Proposal for the amendment of Article 1, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/14;

In contrast to the other two major issues, interoperability and the definition of cluster munitions, the views on the opposite sides proved to be more irreconcilable. Already in the round of general statements it became clear that especially Latin American and African states adopted a very firm stance against transition periods during which prohibited weapons could still be used, speaking about the need of an “immediate” prohibition,¹⁰⁵⁸ or of a treaty “without delays”,¹⁰⁵⁹ the latter also being part of the slogan “no exceptions, no delays, no loopholes” which reflected certain “red lines” for the CMC in the negotiations.¹⁰⁶⁰ The proponents of transition periods refrained from making express statements of support in this respect, with Estonia being the only exception, demanding a transition period that should be “as short as possible and as long as necessary.”¹⁰⁶¹ Until the end of the first week, there were only two allusions to transition periods in connection with negotiations on the definition.¹⁰⁶²

At the end of the first week, on 23 May 2008, the day had come to put the cards on the table regarding the issue of transition periods in the Committee of the Whole. Altogether, 69 states took the floor, with an overwhelming majority of 62 against transition periods and 8 in favour. Those in favour were mainly European user, producer and stockpiler states only, including Denmark, France, Germany, Sweden, Switzerland, Slovakia and the United Kingdom, with Japan being the only non-European state declaring its support for transition periods.¹⁰⁶³

Germany, Proposal for the amendment of Article 18, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/46; Switzerland, Proposal for additional text, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/50; Slovakia, Proposal for additional text: New Article (18 *bis*), Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/66.

¹⁰⁵⁸ Like Costa Rica or Benin. See Costa Rica, General Statement, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008 (personal notes of this author); Benin, General Statement, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, <http://www.clustermunitionsdublin.ie/documents/general-statements/benin.pdf> (last visited 26 January 2010).

¹⁰⁵⁹ Like Guinea. See Guinea, General Statement, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008 (personal notes of this author).

¹⁰⁶⁰ Niger and Panama literally repeated this slogan during their opening statements. See Niger, General Statement, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008 (personal notes of this author); Panama, General Statement, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008 (personal notes of this author).

¹⁰⁶¹ Estonia, General Statement, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008 (personal notes of this author).

¹⁰⁶² France stated that there was essentially the category of weapon with unclear status; in this connection, it mentioned the possibility of an “interim period”. See France, Informal Statement on Definitions, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 20 May 2008 (personal notes of this author). Also the United Kingdom spoke of “phasing out” cluster munitions with mechanical self-destruct mechanisms over time. See United Kingdom, Informal Statement on Definitions, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 22 May 2008 (personal notes of this author).

¹⁰⁶³ The statements are summarised in Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Summary Record of the Eighth Session of the Committee of the Whole, 23 May 2008, Doc. CCM/CW/SR/8, http://www.clustermunitionsdublin.ie/pdf/CoW8May23am_001.pdf (last visited 26 January 2010).

Probably the strongest argument against transition periods made by the opponents was that by allowing continued use of some cluster munitions during a transition period one would keep the door open for more civilian victims in the future, which would completely undermine the object and purpose of ending civilian suffering from the use of these weapons. Linked with this fundamental flaw is the observation that the very notion of a transition period implicitly assumes that certain weapons are unacceptable from a humanitarian point of view because otherwise one would exclude certain weapons from the prohibitions in perpetuity. Moreover, it was emphasised that this would introduce two different levels of states parties, i.e. those for whom the prohibitions would be effective immediately and those availing themselves of the possibility to phase out part of their arsenals.¹⁰⁶⁴ In this regard, also the difference between this convention as humanitarian and a traditional arms control convention was mentioned.¹⁰⁶⁵ Finally, if a state estimates that it would have to wait until the military capability be replaced that would be missing in case of compliance with the convention, it could simply wait to sign and ratify the treaty.¹⁰⁶⁶

Accordingly, those in favour of transition periods were very much on the defensive. It did not come as a surprise that a few of them, clearly uncomfortable of being so outnumbered, suggested to postpone negotiations until agreement on the definition of cluster munitions would have been reached and to appoint a Friend of the President on this issue.¹⁰⁶⁷ However, this idea was also firmly opposed by a number of delegations.¹⁰⁶⁸ In the end, the Irish President asked Germany to conduct further consultations and report back to the conference on the results of these consultations.¹⁰⁶⁹ As a result, it appeared unlikely that transition periods would remain any bargaining chip for the second week of negotiations in view of the unequivocal opposition from an overwhelming majority of delegations.

The report by Germany on its consultations had to acknowledge that also at the beginning of the second week there still remained a basic difference between states on whether to include a transition period in the convention at all. The advocates were eager to

¹⁰⁶⁴ Austria, Statement on Additional Proposals (Art. 18 bis): Transition Periods, *ibid.*

¹⁰⁶⁵ Benin, Statement on Additional Proposals (Art. 18 bis): Transition Periods, Committee of the Whole, 23 May 2008 (personal notes of this author).

¹⁰⁶⁶ Malta, Statement on Additional Proposals (Art. 18 bis): Transition Periods, Committee of the Whole, 23 May 2008 (personal notes of this author).

¹⁰⁶⁷ Denmark, Japan, Slovakia and Switzerland suggested to postpone negotiations until the scope of the definition of prohibited cluster munitions became clear. Moreover, the United Kingdom and Slovakia supported the idea of appointing a Friend of the President on transition periods. See Summary Record of the Eighth Session of the Committee of the Whole, *supra* note 1063.

¹⁰⁶⁸ *Ibid.* States opposed to the idea of appointing a Friend of the President on transition periods included Costa Rica, Malta, Nicaragua, Niger and Venezuela.

¹⁰⁶⁹ *Ibid.*

assure others that nobody wanted to create any loopholes and that Arts. 1 and 2 of the treaty should not be undermined. The circumstances in which cluster munitions use should still be allowed would be limited, such as territorial defence, and the cluster munitions to be phased out would have to be defined according to specific characteristics, such as numbers of submunitions, accuracy, reliability and age. Finally, in case there would be a need to enshrine a transition period, there would also be a need for subjecting those cluster munitions subject to the transition period to the reporting obligations required by the future Art. 7.¹⁰⁷⁰

Therefore, it came as no surprise that the issue of transition periods did not command any consensus in the last informal consultations that were held after Germany's report. Unlike with any other issue, there was clear, outspoken and overwhelming principled opposition against including a provision allowing for continued use of weapons that were otherwise considered unacceptable. As a result, the Convention on Cluster Munitions as finally adopted does not contain any transition period.

6.4. *Stockpile Destruction*

With regard to the obligation to destroy cluster munition stockpiles, essentially three issues were contentious at the beginning of the negotiations, namely what the basic deadline for destroying existing stockpiles should be; whether to allow for an extension of this initial deadline; and whether there was a need to enshrine an exception to this obligation for the development of and training in cluster munition detection, clearance or destruction techniques, or for the development of military countermeasures, such as armour protection for armed forces facing cluster munition attacks. The initial basis for discussions were amendment proposals submitted by the United Kingdom and Peru on extending the basic deadline from six to ten years,¹⁰⁷¹ and proposals by Australia, the United Kingdom and other states to enshrine an exemption for retaining munitions for testing and training for purposes of detection, clearance, destruction or the development of military countermeasures.¹⁰⁷²

¹⁰⁷⁰ Germany, Statement to the Committee of the Whole, Summary Record of the Committee of the Whole, Dublin Conference, 26 May 2008, *supra* note 184.

¹⁰⁷¹ United Kingdom, Proposal for the amendment of Article 3, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, CCM/29; Peru, Proposal for the amendment of Article 3, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, CCM/30.

¹⁰⁷² United Kingdom, Proposal for the amendment of Article 3, *supra* note 1068; Australia, Denmark, Finland, France, Germany, Italy, Japan, Slovakia, Sweden, Switzerland, and the United Kingdom, Proposal for the amendment of Article 3, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, CCM/28.

While it is clear that stockpile destruction is an expensive and complex process, the pressure should also be on states to destroy existing stockpiles as early as possible. In this regard, if one recognises, for instance, that ongoing storage costs of existing stockpiles are rather high then this would be all the more an incentive to enshrine as short a deadline for destruction as possible. On the other hand, given the technical and financial challenges involved, defining the basic deadline too short may lead to too many extension requests.¹⁰⁷³ Thus, the challenge before negotiators was to reflect, by the deadline for stockpile destruction and extensions, if any, the right balance between the technical and financial challenges and the humanitarian urgency to prevent future use and proliferation, especially to other states not party or non-state actors.

The calls for an exception for retaining a certain number of cluster munitions have been justified as necessary for the adequate and live training of personnel in detection of cluster munitions and in explosive ordnance disposal. Such retention is considered necessary for personnel to engage in humanitarian clearance operations but also to develop military countermeasures designed to minimise effects of cluster munition attacks or contamination on armed forces.¹⁰⁷⁴

Opponents of such a retention exemption have pointed out that the high metal content of most existing sub-munitions eliminates the need for retaining live samples for detection purposes; it is unclear how states will be able to reliably and safely create unexploded sub-munitions for training purposes; standard operating procedures of experienced clearance organisations do not use live munitions; stockpile destruction techniques could be developed with already existing stockpiles and after destruction there would be no further need for retention for this purpose; there are alternative methods to develop military countermeasures.¹⁰⁷⁵

Moreover, opponents repeatedly cited the Ottawa Convention experience in this regard; in its Art. 3, the 1997 Ottawa Convention on Anti-personnel Mines enshrines an exception to the prohibitions of retention and transfer for mine detection, clearance and destruction techniques for no more than “the minimum number absolutely necessary” to fulfil

¹⁰⁷³ See, in this sense, already Norway, Statement on Storage and Stockpile Destruction, Wellington Conference on Cluster Munitions, 18-22 February 2008, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Norway-stockpile-destruction-statement.pdf> (last visited 26 January 2010).

¹⁰⁷⁴ See, in this regard, Australia, Intervention on Storage and Stockpile Destruction, Wellington Conference on Cluster Munitions, 18-22 February 2008, http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Australia-Statement-Stockpiles_and_Storage_vers_1.pdf (last visited 26 January 2010).

¹⁰⁷⁵ For a useful summary of these arguments, see Cluster Munition Coalition, “Big risk, little gain: Calls for an exemption to retain munitions for training, development, and counter-measures”, Policy Paper No. 10, May 2008, Dublin Diplomatic Conference on Cluster Munitions (on file with this author).

these purposes. However, that minimum number was never defined and as a result, there was one state party that expressed its desire to keep almost 70,000 anti-personnel mines for research and training.¹⁰⁷⁶ While this was the most extreme example, it showed the potential for abuse for what would in fact be the retention of an operational stockpile despite reassurances to the contrary. In this context, it should be noted that the majority of states parties that retain mines, a total of 38 retain between 1,000 and 5,000 mines, another 23 states parties retain fewer than 1,000 mines and only ten more than 5,000 mines each.¹⁰⁷⁷

Despite these concerns, there was great support from delegations for inserting a longer initial destruction deadline than the initially proposed six years; for making provision for extension requests; and for inserting the proposed exemption for research and training.

As a result, a first paper by the Norwegian Friend of the President of 22 May provided for a deadline of eight years; the possibility to request an extension of the deadline for a period of up to four years and thereafter, for additional extension periods, in exceptional circumstances, of up to four years; as well as an exemption for the development and training in cluster munitions and sub-munitions detection, clearance, destruction or the development of cluster munition counter-measures.¹⁰⁷⁸ As opposed to the draft Convention the extension periods to be granted were shortened from ten years to four years. On the positive side, the information required for an extension request was extended to cover the quantity and type of cluster munitions and sub-munitions held at entry into force and any additional cluster munitions discovered after entry into force; the quantity and type of cluster munitions and sub-munitions destroyed during the initial period; and the quantity and type of cluster munitions and sub-munitions remaining to be destroyed during the extension period and the annual destruction rate expected to be achieved. Moreover, it was specified in this paper that the decision on whether to grant an extension request could also involve upholding the request for a shorter time period than requested and a detailed procedure on how to handle such requests was laid down.¹⁰⁷⁹ Finally, the possibility to retain or transfer live cluster munitions

¹⁰⁷⁶ On the example of that state party, Turkmenistan, as well as other controversial cases, see Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 143-148, 163-164.

¹⁰⁷⁷ See International Campaign to Ban Landmines, "Landmine Monitor Report 2008: Mines Retained for Research and Training", October 2008, <http://lm.icbl.org/index.php/publications/display?url=lm/2008/es/ban.html> (last visited 26 January 2010).

¹⁰⁷⁸ Friend of the President's Paper on Article 3-Storage and stockpile destruction, 22 May 2008 (on file with the author).

¹⁰⁷⁹ The proposed Art. 3 (5) of the Friend's Paper read: "The meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period. Based on their assessment, States Parties may also grant an extension request for a lesser amount of time than originally requested. Extension requests shall be submitted a minimum of nine months prior

or sub-munitions was complemented by a reporting obligation, thus at least ensuring transparency in this regard.¹⁰⁸⁰

However, as was criticised by the ICRC, the text provided for the possibility of an unlimited number of extension periods. Indeed, if such an unlimited possibility for extensions of the deadline had been included this would not have sat well with the fundamental objective to urgently prevent the further proliferation of cluster munitions. Moreover, the ICRC stated that the experience of the Ottawa Convention on Anti-personnel Mines had shown that States frequently requested unjustified extensions. For this reason, the ICRC suggested to strengthen the wording from requiring states to merely provide “a detailed explanation of the reasons for the proposed extension” to requiring them to provide “a detailed explanation of the *exceptional circumstances*” leading to the proposed extension.¹⁰⁸¹

In view of these and other comments that criticised the detail of the procedure for handling extension requests, a revised version of draft Art. 3 was presented by the Friend of the President on 25 May which was converted, almost literally, into a Presidency Text on 27 May 2008.¹⁰⁸²

Thus, this revised version required a detailed explanation of the exceptional circumstances rather than just reasons for an extension request and the detailed procedure in handling extension requests was shortened. The basic deadline was changed from the initial six to eight years with the possibility of an unspecified number of extensions of up to four years. However, as provided for in the last sentence of the proposed Art. 3, the requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its stockpile destruction obligations. This addition arguably is designed to counter abuse of the possibility of extending the deadline. With regard to the reports to be submitted by those states retaining, acquiring or transferring cluster munitions or sub-munitions for permitted purposes, it was striking that the text forwarded to the plenary dropped reference to

to the Meeting of States Parties or Review Conference that would consider them. To assist States Parties in the assessment of any requests for extensions to a deadline, a Meeting of States Parties or a Review Conference shall assign the President of the Meeting of States Parties or Review Conference immediately preceding the meeting that would consider them, the responsibility to conduct an assessment of extension requests received for consideration by the next Meeting of States Parties or Review Conference. That President may select interested States Parties and available experts to assist him in that task.”

¹⁰⁸⁰ The Paper obliged states parties to submit a detailed report on the planned use of retained or transferred weapons and their type, quantity and lot numbers. If cluster munitions or sub-munitions are transferred to another state party, the report must also include a reference to the receiving party. Moreover, the report shall be submitted annually to the UN Secretary-General in accordance with the procedure for submitting the report on other matters in accordance with Art. 7. See Friend of the President’s Paper, *supra* note 1078.

¹⁰⁸¹ International Committee of the Red Cross, Statement on draft Art. 3, Summary Record of the Eighth Session of the Committee of the Whole, *supra* note 1063.

¹⁰⁸² Presidency Text transmitted to the Plenary on Article 3: Storage and stockpile destruction, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 27 May 2008, Doc. CCM/PT/13/Corr.

the regular transparency reporting system under Art. 7, thus creating a separate reporting obligation under Art. 3 (8).

The Presidency Text specified that the obligations to separate, mark and destroy cluster munition stockpiles applied to all cluster munitions under a state party's "jurisdiction or control". Accordingly, the same formula as in the Ottawa Convention was used for the scope of the stockpile. Had this wording been retained, the issue of foreign stockpiling would again have arisen, since the individual circumstances of U.S. allies differ as to whether they exercise jurisdiction or control over such stockpiles. For instance, under this formula, as argued above, Italy would be under the obligation to itself destroy U.S. cluster munitions that may be stored in U.S. military bases.¹⁰⁸³

In order not to create a new difficulty for these U.S. allies which had been closed in Art. 21 (4) (b) of the Convention, negotiating states modified the scope of the stockpile destruction obligations from cluster munitions "under the jurisdiction *or* control" to "under the jurisdiction *and* control".¹⁰⁸⁴ This makes it clear that both jurisdiction as the capacity to exercise legal authority, i.e. the state's right to regulate conduct through legislation (jurisdiction to regulate), through its courts to regulate legal differences between individuals (jurisdiction to adjudicate) or regulate conduct by taking executive action (jurisdiction to enforce), as well as factual control over these stockpiles would have to be present for the obligations of stockpile destruction to be triggered.

Another issue would have arisen had the wording of "jurisdiction or control" been retained, since there may be situations where a state has undeniably jurisdiction but not control over part of its territory. This is the case where a non-state armed group has *de facto* control over that portion of the territory. In the Ottawa Convention, the scope of the obligation to destroy stockpiles was reduced in light of the fundamental principle of treaty interpretation that treaties must be interpreted in good faith. Accordingly, a good faith interpretation would mean that in such cases the stockpile destruction obligation would only be triggered once the state party regains control over these parts of its territory or where it captures anti-personnel mines from non-state armed groups.¹⁰⁸⁵ This interpretative effort is avoided by laying down the formula of "jurisdiction and control."

¹⁰⁸³ See *supra*, pp. 316-317.

¹⁰⁸⁴ That the issue of foreign stockpiling was the decisive motivation behind modifying the wording of Art. 3 in this way has also been confirmed by at least one legal adviser to one of the negotiating states. See T. Di Ruzza, Legal adviser of the Holy See in the Oslo Process, "The Convention on Cluster Munitions: Towards a Balance between Humanitarian and Military Considerations?", 47 (3-4) *Military Law and the Law of War Review* 405, 426 (2008).

¹⁰⁸⁵ Maslen, *Commentary on the Ottawa Convention*, *supra* note 368, at 159-160.

Thus, the final outcome of the negotiations with regard to Art. 3 looks as follows:

“Article 3
Storage and stockpile destruction”

1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction.
2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within eight years of entry into force of this Convention for that State Party it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions by a period of up to four years. A State Party may, in exceptional circumstances, request additional extensions of up to four years. The requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 2 of this Article.
4. Each request for an extension shall set out:
 - (a) The duration of the proposed extension;
 - (b) A detailed explanation of the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article and, where applicable, the exceptional circumstances justifying it;
 - (c) A plan for how and when stockpile destruction will be completed;
 - (d) The quantity and type of cluster munitions and explosive submunitions held at the entry into force of this Convention for that State Party and any additional cluster munitions or explosive submunitions discovered after such entry into force,
 - (e) The quantity and type of cluster munitions and explosive submunitions destroyed during the period referred to in paragraph 2 of this Article; and
 - (f) The quantity and type of cluster munitions and explosive submunitions remaining to be destroyed during the proposed extension and the annual destruction rate expected to be achieved.
5. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate. A request for an extension shall be submitted a minimum of nine months prior to the Meeting of States Parties or the Review Conference at which it is to be considered.
6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.
7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted.
8. States Parties retaining, acquiring or transferring cluster munitions or explosive submunitions for the purposes described in paragraphs 6 and 7 of this Article shall submit a detailed report on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers. If cluster munitions or explosive submunitions are transferred to another State Party for these purposes, the report shall include reference to the receiving party. Such a report shall be prepared for each year during which a State Party

retained, acquired or transferred cluster munitions or explosive submunitions and shall be submitted to the Secretary-General of the United Nations no later than 30 April of the following year.”¹⁰⁸⁶

6.5. Clearance and Destruction of Cluster Munition Remnants and Risk Reduction Education: The Question of Special User State Responsibility

Based on the analysis carried out on the inadequacies of existing IHL and HRL, special retroactive obligations on a past user would contribute to remedying several deficits: Firstly, it would address the inadequacy of implementation of IHL precautionary obligations which arguably would already require a party whose cluster munition use resulted in unexploded sub-munitions to at least assist in the clearance of these duds. Secondly, it would remedy the shortcoming of Protocol V which enshrines such special responsibility but that only applies to ERW created upon the entry into force of the protocol in 2006, not to already existing ERW. Thirdly, it would complement the weakness of HRL that its applicability is still very much focused on the territorial state. This is evident in the fact that the territorial state is not obliged to successfully mark and clear sub-munition contaminated areas where the location of duds is unknown in order to comply, for instance, with its obligation to protect the right to life of people under its jurisdiction and/or control.

These would already be compelling legal arguments in the view of this author for including special obligations on a past user state party to assist an affected state with the clearance of unexploded sub-munitions caused by such past use. In conformity with such reasoning, at the beginning of the negotiations, the Draft Cluster Munition Convention contained the following draft Article 4 (4):

“This paragraph [relating to clearance and destruction obligations of cluster munition remnants under a state’s jurisdiction or control] shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for it and have become cluster munition remnants located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter. In such cases, upon entry into force of this Convention for both States Parties, the former State Party shall provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through the UN system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants. Such assistance shall include information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.”¹⁰⁸⁷

¹⁰⁸⁶ Art. 3, Convention on Cluster Munitions, *supra* note 33.

¹⁰⁸⁷ Art. 4 (4), Draft Convention on Cluster Munitions, 19 May 2008, Doc. CCM/3.

Nevertheless, some states were opposed to laying down such special user responsibility.¹⁰⁸⁸ The argument repeatedly made was the need to avoid any inconsistencies between the future CCM on the one and Protocol V to the CCW and the Ottawa Convention on the other hand.¹⁰⁸⁹ Moreover, the risk that States might be deterred from joining the Convention should be borne in mind when considering any retroactive obligations.¹⁰⁹⁰

With regard to the first argument it may first be observed that there could only be a question of consistency if there are reasonable grounds for not regulating cluster munitions differently from ERW and anti-personnel mines. However, there is no basis for that argument in relation to anti-personnel mines, since a different regulation of cluster munitions from anti-personnel mines is warranted due to the additional problem of the wide area effect of cluster munitions during armed conflict which anti-personnel mines do not display. Moreover, while it is true that the Ottawa Convention finally did not require former user states to assist with the clearance of mined areas, during the negotiations of that treaty certain states did propose to include such a special responsibility. It is also worth observing in this respect that this issue is not even regulated in any consistent manner for the category of anti-personnel mines, since Amended Protocol II to the CCW does contain such special user state responsibility.¹⁰⁹¹

Also the argument that providing for such special responsibility would be inconsistent in relation to Protocol V fails to convince. Firstly, in the view of this author there is no such inconsistency, as Art. 7 (2) requires each state party to Protocol V “in a position to do so” to provide assistance in dealing with existing ERW, taking into account also the humanitarian objectives of Protocol V. In this respect, the special user state responsibility would simply imply a recognition that past users are in a specific “position to do so” to assist an affected state with clearance, since such a user state most importantly possesses knowledge of the presumed locations of unexploded sub-munitions. Thus, this would strengthen the existing obligations under Protocol V, not undermine them.

¹⁰⁸⁸ France and Germany, Proposal for the amendment of Article 4, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/32; United Kingdom, Proposal for the amendment of Article 4, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/33; Italy, Proposal for the amendment of Article 4, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/34. In addition, on 20 May 2008, Australia, Canada, Japan and Finland supported deleting reference to a special user state responsibility. See Summary Record of Second Session of the Committee of the Whole, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 20 May 2008, Doc. CCM/CW/SR/2.

¹⁰⁸⁹ Australia, Canada, France and Germany raised this issue during negotiations in the Committee of the Whole on 20 May 2008. See Summary Record of Second Session of the Committee of the Whole, *supra* note 1088.

¹⁰⁹⁰ This concern was raised by Finland during negotiations in the Committee of the Whole on 20 May 2008. See *ibid.*

¹⁰⁹¹ See Arts. 3 (2), 10 (3), Amended Protocol II to the CCW, *supra* note 246.

Secondly, even if the two regimes were inconsistent, there would be some justification for regulating them differently, as the presumptions on which the two treaties are based are different. While Protocol V presumes that in the future new ERW may be created by states parties, the CCM would act to prevent the creation of new cluster munition remnants by those states. In line with this preventive goal, under the CCM there could only be an issue in dealing with the existing cluster munition remnants problem, for which a special user state responsibility would be a desirable vehicle.¹⁰⁹²

Moreover, it is expressly permitted to enshrine retroactivity in international conventions which is supported by Art. 28 of the Vienna Convention on the Law of Treaties. Under the express terms of the provision:

*“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”*¹⁰⁹³

It follows from Art. 28 that states parties are free to enshrine retroactivity in the treaty.¹⁰⁹⁴ Secondly, the intention of this treaty is also to come to terms with the existing problem of sub-munition contamination. A special user responsibility would be absolutely crucial to accomplish the objective to “put an end for all time to the suffering and casualties caused by the use of cluster munitions.” Finally, if any situation has not ceased to exist, it also follows from Art. 28 that a treaty may regulate such situation that existed before and continues up to the present. Thus, there are in principle no legal difficulties standing in the way of a special user responsibility.

However, the second concern, notably that states, i.e. especially past user states, might be discouraged from joining the CCM were such responsibility included is not so easily

¹⁰⁹² In this sense, also the remarks by the ICRC may be understood which observed that Protocol V to the Convention on Certain Conventional Weapons refers to the explosive remnants of munitions that may still be used by states. In contrast, Art. 4 of the CCM would refer to remnants of cluster munitions that would be prohibited for use. Accordingly, the ICRC demanded that the wording of the draft Convention should reflect this distinction. See ICRC, Statement on Art. 4 to the Committee of the Whole, Summary Record of Second Session of the Committee of the Whole, 20 May 2008, *supra* note 1088.

¹⁰⁹³ Art. 28, Vienna Convention on the Law of Treaties, *supra* note 402.

¹⁰⁹⁴ Thus, the contrary position argued by Italy during the Wellington Conference is legally untenable. There, Italy stated that “In addition to the political/historical arguments there are juridical reasons which make the introduction of the concept of retroactivity unadvisable. The international law principle of the “Non-Retroactivity of Treaties” enshrined in article 28 of the Vienna Convention on the Law of Treaties encapsulates well this concept: A departure from this norm would create major difficulties and could become an obstacle to reach a consensus in the Oslo process.” See Italy, Retroactivity and International Arms Control Treaties: Retroactive aspects of article 4.4, Wellington Conference on Cluster Munitions, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/Italy-statement-Clearance.pdf> (last visited 26 January 2010).

dismissed, since states may be expected to be sensitive to accusations that they have used a weapon now judged illegal sometimes long ago in the past.

Only two states expressly spoke in favour of retaining the special user state responsibility contained in the draft Convention.¹⁰⁹⁵ Despite the staunch opposition by user and stockpiler states of the weapon, in a first informal paper circulated on 22 May 2008, the provision related to a special user responsibility in draft Art. 4 (4) was retained, albeit in a weakened form, since the obligation to provide assistance was qualified by the words “to the extent feasible” and the specification that such assistance shall include certain information designed to assist in locating cluster munition remnants by the words “where available.”

At the end of the first week of negotiations, still no consensus on Art. 4 (4) had been found and informal consultations continued up until 28 May 2008 when it was decided not to reopen the text of the draft Convention as it then stood. While it was not possible to achieve consensus on draft Art. 4 (4) in the (already weakened) version of 22 May 2008, the Presidency finally presented the following compromise that was then accepted by all delegations:

“This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter.

- (a) In such cases, upon entry into force of this Convention for both States Parties, the former State Party is strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through the UN system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants.
- (b) Such assistance shall include, where available, information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.”¹⁰⁹⁶

Therefore, the regulation of a special user responsibility was significantly weakened in the text as finally adopted. Due to political exigencies, one cannot speak of a hard obligation any more. Rather, the wording of “strongly encouraged” reflects a soft obligation of a moral character. It will depend on whether any former user state will act based on this provision as a

¹⁰⁹⁵ Lebanon and Venezuela. See Summary Record of Second Session of the Committee of the Whole, 20 May 2008, *supra* note 1088.

¹⁰⁹⁶ Convention on Cluster Munitions, *supra* note 33. By 28 May 2008, the compromise package presented by the President only featured in Art. 4 (4) (a) that a former user state “is encouraged” to provide assistance to another state affected by the past use of cluster munitions by the former state. However, the President could push through a last minute technical correction to include the word “strongly”.

future state party to determine the practical impact of what remained of an innovative concept in this area of international law.

As for the rest of Art. 4, the basic deadline for fulfilling the clearance obligations was extended from five to ten years to account for concerns by the most heavily affected states such as Laos, which repeatedly stated that they may not be able to comply with a more ambitious five-year deadline. If a state party is still unable to clear contaminated areas within ten years, it may apply for an extension for up to five years. Just like in the case of the Ottawa Convention, such a request must be accompanied by detailed information; in this respect, the CCM is even more detailed than the Ottawa Convention, expressly requiring a state party that requests an extension to set out the total area containing cluster munition remnants at the time of entry into force of the convention for that state party and any additional areas containing cluster munition remnants discovered after such entry into force; the total area already cleared since entry into force; and the total area remaining to be cleared during the extension.¹⁰⁹⁷ The obligation to clear and destroy cluster munition remnants is specified by a detailed catalogue of operational measures in Art. 4 (2) of the CCM which builds upon the precise treaties with which consistency was demanded by a variety of delegations, the Ottawa Convention and Protocol V on ERW to the CCW.¹⁰⁹⁸

¹⁰⁹⁷ The other information requirements closely follow Art. 5 (4) of the Ottawa Convention, *supra* note 224.

¹⁰⁹⁸ States parties shall (a) Survey, assess and record the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas under its jurisdiction or control; (b) Assess and prioritise needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies; (c) Take all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe; (d) Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and (e) Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants. The language of “survey, assess and record the threat posed by cluster munition remnants” is modelled after Art. 3 (3) (a) of Protocol V to the CCW. “Making every effort to identify all cluster munition contaminated areas under its jurisdiction or control” is taken from Art. 5 (2) of the Ottawa Convention. Art. 4 (2) (b) of the CCM consolidates Arts. 3 (3) (b), 3 (3) (d) and 5 of Protocol V, with the important additions of “develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies.” This last addition ensures that there is no duplication of structures and that there is no false prioritisation of cluster munition remnants over other ERW where other ERW represent a more immediate threat. See, in this sense, K. Harrison & R. Moyes, “CCW Protocol V and the Convention on Cluster Munitions: Note on Coherence”, *Landmine Action*, 26 June 2008, <http://www.landmineaction.org/resources/CCM%20CCW%20PV%20Coherence%20paper.pdf> (last visited 26 January 2010).

6.6. *Victim Assistance*

As has been seen *supra*, there has already been ample precedent in terms of victim assistance, including in the context of the Ottawa Convention.¹⁰⁹⁹ The lessons learnt there and in connection with the adoption of the Disability Rights Convention could be used during negotiations in Dublin.

From the beginning of the Oslo process there was overwhelming support for including a separate provision on victim assistance with strong obligations. This was no different during the Dublin negotiations although individual countries had problems with the broad scope of the definition of “victim”,¹¹⁰⁰ and were anxious to ensure that no special categories of cluster munition victims that would be favoured over other war victims would be created.¹¹⁰¹

However, these problems could be sorted out early on in the negotiations by including those persons directly impacted and the *affected* families and communities among “cluster munition victims” as defined by the convention. With regard to the second difficulty, in addition to already existing references to non-discrimination in the proposed Preamble, the need to avoid discriminating against different victims was to be included in the operative provision on victim assistance.

But the overwhelming majority of states sought to strengthen rather than weaken the obligation to provide victim assistance. As a result, a first non-paper by the Austrian Friend of the President already specified in its proposed Art 5 (1) that states parties with respect to cluster munition victims in areas under their jurisdiction or control shall not only adequately provide assistance in accordance with applicable HRL but also IHL.¹¹⁰² This reference importantly recognises that IHL in general is moving closer towards HRL by imposing

Art. 4 (2) (c), first sentence is modelled after Art. 5 (2) of the Ottawa Convention, whereas Art. 4 (2) (c) second sentence takes up relevant language from the Technical Annex, Part 2 of Protocol V on Warnings, Risk Education, Marking, Fencing and Monitoring. Art. 4 (2) (d) adapts the wording of Art. 3 (3) (c) of Protocol V for the purposes of clearing cluster munition remnants. Only Art. 4 (2) (e) on risk reduction education does not find an equivalent but the gist of this provision is certainly inspired by Technical Annex Part 2 of Protocol V together with the International Mine Action Standards, which shall be taken into account just like in Art. 3 (4) of Protocol V.

¹⁰⁹⁹ See *supra* pp. 165-191.

¹¹⁰⁰ The United Kingdom proposed to reduce the scope of the obligation to provide victim assistance to victims injured on a state party's own territory only. See United Kingdom, Proposal for the amendment of Article 5, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/36.

¹¹⁰¹ On this basis, Switzerland wanted to see any special reference to “cluster munition victims” omitted. See Switzerland, Proposal for the amendment of Article 5, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/35.

¹¹⁰² Non Paper by Friend of the President on Victim Assistance, 22 May 2008, 11am (on file with the author).

obligations on states with the aim of remedying the plight of past victims rather than only preventing future victims. However, a similar reasoning as to the obligation to provide victim assistance under the Ottawa Convention is appropriate here, as this obligation may not be understood by the negotiating parties as fulfilling the secondary obligation to make reparation after a previous internationally wrongful act but an original primary obligation imposed primarily on the territorial state. Evidence for that interpretation can be derived from the fact that a proposal to enshrine a special user responsibility in assisting the territorial state with providing victim assistance did not make its way into the CCM.¹¹⁰³

Moreover, this first paper contained a non-exhaustive rather than exhaustive enumeration of the victim assistance components. Thus, states would be required to adequately provide assistance, *including* (but not limited to) medical care and rehabilitation, psychological support and social and economic inclusion.

Significantly, with consistent advocacy by CMC experts which was most supported by Latin American states, the proposed new version of Art. 5 (2) also specified a catalogue of measures which states parties must take in order to adequately provide victim assistance, notably develop, implement and enforce relevant national laws and policies; assess the needs of victims; take steps to mobilise national and international resources; develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating it within existing national disability, development and human rights frameworks and mechanisms; closely consult with and actively involve victims and their representative organisations; and designate a focal point within the government for implementing victim assistance. In taking these measures, states shall not discriminate among cluster munitions victims, or between cluster munition victims and other victims and shall take into consideration relevant guidelines and good practices in the areas pertaining to victim assistance. The detailed nature of the required actions is in line with the newest generation of human rights treaty law; while earlier norm-setting efforts, such as the two Covenants, contented themselves with formulating very general obligations, leaving it to the treaty monitoring bodies to flesh out more concrete action-orientated obligations, the newest

¹¹⁰³ The Philippines proposed insertion of a new paragraph into Art. 5 which read as follows: “When a State Party, before entry into force of the Convention for it, has used or abandoned cluster munitions in areas under the jurisdiction or control of another State Party, the former State Party shall have the responsibility to help the latter State Party in addressing the requirements of victim assistance as delineated in Article 5 (1).” See Philippines, Proposal for the amendment of Article 5, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/58.

generation of human rights conventions such as the CRPD enshrine action-orientated obligations already in the convention itself.

The definition of “cluster munition victims” was expanded to also cover those who have been killed by the use of cluster munitions, in fact recognising that those who are most directly impacted by cluster munitions and their affected families and communities would not be left out of victim assistance efforts.¹¹⁰⁴

This first paper was still strengthened by adding to the definition of “cluster munition victims” that it applied to “all persons” who have been killed or suffered in other ways. Thus, it was understood that the definition of “cluster munition victims” extends to all persons harmed by cluster munitions in the affected areas, including migrants, refugees and other non-nationals.¹¹⁰⁵ Secondly, the fundamental obligation to provide victim assistance was explicitly subjected to age and gender-sensitive considerations consistent with specific concerns about women and children flowing from the CRPD with separate provisions on these groups but also UNSC Resolutions on women and children.¹¹⁰⁶ Moreover, the specific catalogue of implementing measures under Art. 5 (2) was better structured and further strengthened.¹¹⁰⁷

This revised paper by the Friend of the President was forwarded to the plenary as Presidency Text on 23 May 2008,¹¹⁰⁸ and was adopted as the final version with small grammatical modifications only which reads as follows:

¹¹⁰⁴ This expansion of the scope of the definition goes back to another proposal by the Philippines concerning the definition of “cluster munition victims” under Art. 2. See Philippines, Proposal for the amendment of Article 2, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 19 May 2008, Doc. CCM/57.

¹¹⁰⁵ See Non Paper by Friend of the President on Victim Assistance, 22 May 2008, pm (on file with the author). This understanding is again based the proposal submitted by the Philippines on Art. 2. See, Philippines, Proposal for the amendment of Article 2, *supra* note 1102.

¹¹⁰⁶ UNSC Res 1325 on women, peace and security and Res 1612 on children and armed conflict. Reference to these UNSC resolutions was also made in the Preamble to the Convention on Cluster Munitions. See Preamble, para. 14, Convention on Cluster Munitions, *supra* note 33.

¹¹⁰⁷ For instance, states parties shall “develop, implement and enforce any necessary national laws and policies” instead of “as necessary, develop, implement and enforce relevant national laws and policies”. To the obligation to “develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating it within the existing national disability, development and human rights frameworks and mechanisms” the wording “*while respecting the specific role and contribution of relevant actors*” was added. This is designed to reaffirm the independence of humanitarian NGOs which often fulfil important tasks in the area of victim assistance. Moreover, states shall not discriminate “among cluster munition victims, or between cluster munition victims and other victims” but also shall not discriminate “against cluster munition victims”, i.e. put cluster munition victims at a disadvantage over other victims, not only the other way round. Finally, the wording of “shall take into consideration” relevant guidelines and good practices in the victim assistance areas was changed to read shall “strive to incorporate”.

¹¹⁰⁸ Presidency Text transmitted to the Plenary on Victim Assistance, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, 23 May 2008, Doc. CCM/PT/12.

“Article 2

Definitions

For the purposes of this Convention:

2. **“Cluster munition victims”** means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;

Article 5

Victim assistance

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:

- (a) Assess the needs of cluster munition victims;
- (b) Develop, implement and enforce any necessary national laws and policies;
- (c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
- (d) Take steps to mobilise national and international resources;
- (e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
- (f) Closely consult with and actively involve cluster munition victims and their representative organisations;
- (g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
- (h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.”¹¹⁰⁹

The definition of “victim” is the first one of its kind in a binding HRL or disarmament treaty and builds upon preceding soft law instruments,¹¹¹⁰ and most importantly, the agreed

¹¹⁰⁹ Arts. 2 (1), 5, Convention on Cluster Munitions, *supra* note 33.

¹¹¹⁰ In this regard, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines “victims” as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.” See UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Res 40/34, Annex, 29 November 1985, UN Doc. A/RES/40/34. Also see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law which defines “victims” as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” See UN General Assembly, Basic Principles, *supra* note 591.

scope of that notion of the 2004 First Review Conference to the Ottawa Convention in the context of anti-personnel landmine victims as encompassing not only the direct victim and its family but also entire affected communities.

The complementarity between victim assistance as implemented under the Ottawa Convention, the ICESCR and the CRPD does not only exist with regard to the substantive areas of victim assistance. Art. 5 of the CCM also showed strong parallels and complementarity with the CRPD in terms of implementation of these substantive obligations. Thus, the obligation to assess the needs of cluster munition victims may be seen as a logical next step after the obligation to collect reliable data under Art. 5 (1). In a similar vein, under Art. 31 of the CRPD information collected in compliance with the obligation to collect statistics and research data shall be used to help assess the implementation of States Parties' obligations and to identify and address barriers faced by persons with disabilities in exercising their rights.

The obligation under the CCM to develop, implement and enforce relevant national laws and policies finds its equivalent in Art. 4 (1) (a) of the CRPD where states shall adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRPD.

The obligation under Art. 5 (2) (c) of the CCM to develop a national plan and budget may be regarded as one of the measures reflected in the general obligations of both Art. 2 (1) of the ICESCR and Art. 4 (2) of the CRPD to "take measures to the maximum of available resources." As the General Comment No. 5 on Persons with Disabilities published by the CESCR emphasised, the need to make appropriate budgetary provisions must be considered as one of the means of implementation of the general obligations under the ICESCR.¹¹¹¹ The demand that such national plan and budget shall be incorporated within the existing national disability, development and human rights frameworks and mechanisms under Art. 5 (2) (c) of the CCM may be served by Art. 33 (1) of the CRPD which requires states parties to give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.¹¹¹²

Similar to the obligation to develop a national plan and budget, also the obligation to take steps to mobilise national and international resources may be based on the general obligations under the ICESCR and the CRPD to take measures to the maximum of available

¹¹¹¹ Committee on Economic, Social and Cultural Rights, General Comment on Persons with Disabilities, *supra* note 625, at para. 13.

¹¹¹² In this sense, see also Survivor Corps, "Victim Assistance and Human Rights", *supra* note 669, at 12.

resources. In this regard, it is worth repeating that the CESCR noted in its General Comment No. 2 on the general obligations under the ICESCR that

“the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.”¹¹¹³

Thus, already by virtue of Art. 5 (2) (d) of the CCM a link is provided to Art. 6 on international cooperation and assistance.

The principle of non-discrimination provided for under Art. 5 (2) (e) of the CCM can be considered one of the general cornerstones of HRL; this provision thus emphatically reflects the HRL character of the provision. Non-discrimination in this context ensures that an artificial categorisation between cluster munition victims and other war victims is avoided. Indeed, for a victim it will in practice make little difference what the cause of the harm suffered is, cluster munitions or other weapons or causes. Moreover, a notion of non-discrimination where difference in treatment among victims of armed conflict is based merely on medical, rehabilitative, psychological or socio-economic needs, as mandated by Art. 5 (2) (e) of the CCM, is also inherent in one of the fundamental principles by which the Red Cross movement, one of the main providers of victim assistance, is guided, notably on impartiality.¹¹¹⁴

Under Art. 5 (2) (f) of the CCM the essential principle of participatory inclusion of victims in all decision-making is enshrined. That states parties shall closely “consult with and actively involve cluster munition victims and their representative organisations” is taken almost *verbatim* from Art. 4 (3) of the CRPD which commits states parties to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.”

Also the institution of a focal point features in both Conventions, in Art. 5 (2) (g) of the CCM and Art. 33 (1) of the CRPD, respectively.

¹¹¹³ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties' obligations, *supra* note 541.

¹¹¹⁴ See, in this context, Statutes of the Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in 1986, as amended in 1995 and 2006, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/\\$File/Statutes-EN-A5.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf) (last visited 26 January 2010).

Finally, the reference to “guidelines and good practices” that states must strive to incorporate, should help to build on already existing recommendations and practices by governments, IGOs as well as NGOs active in providing victim assistance.¹¹¹⁵

As a result, the provisions related to victim assistance in the CCM build upon the significant strides made in this area in the context of the Ottawa Convention, the CRPD and Protocol V. Firstly, it explicitly frames the issue of cluster munition victims as a HRL issue by expressing the determination of states parties to ensure the full realisation of the rights of all cluster munition victims, recognising their inherent dignity, and by referring to the CRPD in the Preamble.¹¹¹⁶

Secondly, in its Art. 5 (1) the connection with HRL is made clear by the reference of “in accordance with applicable human rights law”. Moreover, the reference to “international humanitarian law” points to the growing convergence between IHL and HRL also in this area, a key aspect for this author underlying the whole cluster munition issue.

Thirdly, the scope of the obligation as extending to cluster munition victims in areas under a state party’s jurisdiction or control clarifies that the obligation to provide victim assistance is mainly incumbent upon the affected territorial state, which is also in keeping with a traditional HRL concept based on triggering primarily obligations only for those states under whose jurisdiction or control victims are. The broad definition of “cluster munition victims” may also be explained by a HRL approach to, in particular, the post-conflict threat of cluster munition remnants, since contamination of populated and agricultural areas and potable water resources results, for instance, in impairments of the right to an adequate standard of living, including food, water and housing of the entire population of the affected area.

Finally, under the general ICESCR obligations the fulfilment of state party obligations is conditioned by the criterion of availability of resources but where there is a lack of national

¹¹¹⁵ Relevant guidelines would include those that were drafted in the context of victim assistance under the Ottawa Convention. The Geneva International Centre for Humanitarian Demining study on the role of mine action in victim assistance provides a good overview over such guidelines, including the ICBL Guidelines for the Care and Rehabilitation of Landmine Survivors, the Bern Manifesto elaborated by the Swiss government, the ICRC, UNICEF and the WHO, the Guidelines for Socio-Economic Integration of Landmine Survivors developed by the World Rehabilitation Fund under the auspices of UNDP or the Bad Honnef Guidelines adopted by ICBL experts. See Geneva International Centre for Humanitarian Demining, “The Role of Mine Action in Victim Assistance”, *supra* note 586, at 11-16.

¹¹¹⁶ Preamble, paras. 6, 9, Convention on Cluster Munitions, *supra* note 33.

resources a state must strive for fulfilling its HRL obligations by resorting to international cooperation and assistance. On the reverse side of the coin are the other states parties which arguably have international obligations to provide assistance to the state that is unable to fulfil its obligations under the ICESCR itself. Under the CCM, this translates into the primary obligation to provide victim assistance imposed on the affected territorial state but a complementary obligation “on each state party in a position to do so” to provide assistance for victim assistance efforts as foreseen under Art. 6 (7) of the CCM.¹¹¹⁷ This division of responsibilities in respect of victim assistance, represents a culmination of the understandings reached in relation to victim assistance under the Ottawa Convention while the text of that treaty only imposed an obligation on states parties in a position to do so to provide victim assistance.

Accordingly, the obligation to take steps collectively to achieve progressive realisation of economic, social and cultural rights under the ICESCR finds its equivalent in the CCM under the heading of “International cooperation and assistance” in Art. 6. This is not only valid for the obligation to provide victim assistance but also for the fulfilment of the other positive obligations under the CCM, i.e. the obligations to destroy stockpiles, to mark, clear and destroy cluster munition remnants, as well as to provide risk reduction education to civilians.

As has been argued *supra*, the obligations to mark, clear and destroy cluster munition remnants and to provide risk reduction education may be considered specific derivatives of positive obligations under HRL to safeguard the lives and the adequate standard of living of the general population under a state’s jurisdiction or control.¹¹¹⁸ If one takes the obligations under HRL to *prevent* general threats for the lives and arguably, also the livelihoods of the general population under a state’s jurisdiction or control seriously, then a classical

¹¹¹⁷ One of the leading negotiators and experts on victim assistance, Markus Reiterer, has emphasised that due to capacity shortcomings to comply with international obligations, developing states are reluctant to take on new international commitments without mirroring commitments on behalf of developed states for international cooperation and assistance. In this context, he specifically mentioned Art. 6 of the CCM. See M. Reiterer, “Some Thoughts on Compliance with International Obligations” in I. Buffard/J. Crawford/A. Pellet/S. Wittich, *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, 943, 945 (2008).

¹¹¹⁸ See *supra* pp. 145-156.

disarmament obligation to destroy stockpiles to prevent such a threat from even materialising may also be based on HRL.¹¹¹⁹

In any event, the argument can be made that the fewer cases of deaths and injuries arising from cluster munition use in the future, the more resources will be available to states to tackle other economic and social development challenges. Understood in this sense, the obligations under Arts. 6 (4), (5) and (7) of the CCM constitute specific offshoots of the collective obligations of states parties under the ICESCR to assist individual states parties with national resource constraints in meeting their obligations under this treaty. Moreover, the already mentioned CESCR demand that states have an obligation to cooperate in providing humanitarian assistance to affected states in times of emergency is directly taken up by Art. 6 (6) of the CCM which requires each state party in a position to do so to urgently provide emergency assistance to a state party which has become affected by cluster munition remnants after the entry into force of the convention. Finally, Art. 6 (8) of the CCM obliges each state party in a position to do so to provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected states parties.

In other words, Art. 6 of the CCM on the specific issue of cluster munitions is in keeping with the classic demand already spelt out in the Universal Declaration of Human Rights of “a social and international order in which the fundamental rights and freedoms can be fully realized.”¹¹²⁰ It also shows a spirit of solidarity between developed and less developed states with the latter unfortunately being also the most affected by cluster munition use.

7. Conclusions

“Determined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.”¹¹²¹

¹¹¹⁹ This would also be in line with a structural approach to HRL which may be read into Art. 28 of the Universal Declaration of Human Rights referred to at *supra* pp. 21-22.

¹¹²⁰ Art. 28, Universal Declaration of Human Rights, *supra* note 32. See, in this sense, also Di Ruzza, “Convention on Cluster Munitions”, *supra* note 1084, at 436, 437-439.

¹¹²¹ Preamble, para. 2, Convention on Cluster Munitions, *supra* note 33.

This thesis has made the case that for better protection of civilians, in particular, from the effects of cluster munitions there was no way around the adoption of a humanitarian disarmament treaty like the CCM.

Firstly, the interpretation of the general rules of IHL with regard to cluster munition use has resulted in the prevalence of military/security concerns over humanitarian considerations. This conclusion was substantiated by exposing the classical design-based rather than the effects-based interpretation of the prohibition of indiscriminate *means* of combat. Since only this prohibition would be truly preventive in the sense that certain weapons would be prohibited irrespective of the specific context of use, this interpretation ensures that consistent past battlefield experience with unintended civilian casualties is not adequately taken into account. The evaluation of the legality of cluster munition use thus rests on the prohibition of indiscriminate *methods* of combat, the way a weapon is used in particular circumstances. Such a case-by-case assessment of the legality of cluster munition use under the prohibition of indiscriminate attacks has, however, not prevented the use of these weapons in circumstances where civilian targets were intermingled with military ones. Moreover, for a long time it was not clear whether the proportionality assessment, in balancing the concrete and direct military advantage against expected civilian harm, required the consideration of long-term civilian harm. In respect of cluster munition use, taking this aspect into account is particularly relevant due to the long-term civilian harm these weapons regularly cause.

Secondly, where the general rules of IHL have potential for preventing civilian harm they have not been properly implemented. This was true for the obligation to take all feasible precautions in attack. Implementation of this obligation would have required attackers in past conflicts to consider the accuracy of cluster munitions, the size of the dispersal pattern, the likely amount of unexploded sub-munitions, the presence of civilian in the proximity of military objectives and the use of alternative weapons. However, the consistent evidence of civilian harm leads one to conclude that these factors were not appropriately taken into account.

Thirdly, Protocol V on ERW to the CCW only speaks to the post-conflict dimension of the problem that cluster munition use may cause but does not remedy the problems in relation to these weapons at the time of use. Furthermore, Protocol V only applies to ERW created

after the entry into force of this treaty and is thus inadequate for dealing with the challenge of pre-existing unexploded sub-munitions.

Generally, HRL provides an additional layer of protection for civilians especially relevant in relation to dealing with such pre-existing sub-munition dud contamination. Obligations of marking, warnings and risk education, as well as clearance were identified as specific emanations of a territorial state's positive HRL obligations towards its population to protect their lives and ensure their health with all its underlying determinants. However, the limits of its jurisdiction and the still existing uncertainty about its capacity to also bind non-state actors are inadequacies under HRL for the better protection of civilians from the effects of cluster munitions. Notwithstanding, HRL is a pertinent conceptual framework to reframe the issue of cluster munitions in humanitarian terms. Most importantly, drawing on the precedents of the implementation of the 1997 Ottawa Convention and the 2006 CRPD, HRL supports a paradigm shift from disarmament motivated by strategic national security considerations to disarmament motivated by human security, i.e. humanitarian concerns for victims.

For a variety of reasons, this necessary paradigm change was not possible in the CCW. First and foremost the practice of requiring rather than only seeking consensus means that powerful opponents to specific rules on cluster munitions like China, Russia or the United States may block any initiative that is perceived too ambitious for them. This makes it already difficult to conclude any new specific international weapons treaty. Even if consensus can be attained, it is unlikely that in respect of weapons that are actually used by some or all of these states stringent rules will result. Protocol V on ERW to the CCW is an example because its humanitarian potential is weakened by language qualifying state obligations like "as far as practicable, subject to legitimate security interests", "feasible" or "in a position to do so". In addition, the framework of the CCW has a record of giving greater weight to military and security experts than to humanitarian experts. This reduces the impact that the voice of victims, intergovernmental and non-governmental experts can have on outcomes. Finally, participation in the CCW and its protocols is not representative of all the world's regions. Especially African, Asian but also Latin American states generally sympathetic to disarmament initiatives are underrepresented in this forum. This makes it easier for European and North American developed states with strategic security considerations uppermost in their minds to dominate in CCW deliberations. Therefore, it did not come as a surprise that no

consensus emerged until 2008 within that framework whether to negotiate a legally binding instrument on cluster munitions at all, let alone on the scope of a potential Protocol VI.

In contrast, the Oslo process can be understood as a reaction to the standstill within the framework of the CCW. Norway took the ambitious and to some extent risky initiative to conclude a legally binding instrument that would prohibit cluster munitions that cause unacceptable harm to civilians outside the CCW. This concrete goal of a prohibition was shared by other small-sized states, including Austria, Ireland, Mexico, New Zealand and Peru, the core group which drove this alternative diplomatic process. Thus, none of the major military powers, i.e. China, India, Russia or the United States, would obstruct progress towards this ambitious aim in the first place.

Also contributions from the humanitarian community had an extraordinary influence on the outcome of the Oslo process, the CCM. Victims of cluster munitions who actively participated in Oslo process conferences vividly reminded state representatives of the predominant and ultimate *humanitarian* character of this endeavour. Civil society, loosely organised in the CMC, not only played its traditional role of attracting media attention through activism but also assumed the educative role of experts. This expertise was so highly valued by like-minded governmental representatives that CMC experts were given an extraordinary amount of slots for interventions and presentations at Oslo process conferences. The mutual appreciation between humanitarian-minded small-sized states and the CMC was so high that a close collaboration resulted, much closer than the collaboration with other states less enthusiastic about the initiative on the road to the Dublin negotiations. This alliance which cut across the traditional divide between states and NGOs was necessary to increase the chances of the CCM as a meaningful instrument which would enjoy the support also especially by certain European user, producer and stockpiler states.

The extraordinary role played by the CMC in the Oslo process was explicitly recognised in the Preamble to the CCM along with that of the United Nations and the ICRC. The operational agencies of the United Nations like the United Nations Mine Action Service or UNDP not only increased the field evidence-based credibility of the diplomatic process but the financial support provided by UNDP was vital in enabling the participation of especially African and Asian developing states.

The support of the process by the ICRC was also crucial in adding the credibility of the universally respected guardian of IHL. In particular, the ICRC's hosting of an expert

meeting on cluster munitions, which brought together supporters and opponents of the Oslo process, provided an opportunity where both camps could make their case. Further, the public appeal by the ICRC of October 2007 to urgently adopt a new disarmament treaty on cluster munitions helped to put the opponents of ambitious specific rules on cluster munitions, both inside and outside the Oslo process, on the defensive. Its statement that it was not convinced that military considerations could outweigh the well documented humanitarian concerns about cluster munition use or that technological solutions alone would suffice was certainly crucial in this context. With the guardian of IHL being that outspoken, it was difficult for opponents to (continue to) argue that the Oslo process was merely a “feel good” exercise mainly for those not stockpiling, producing or using cluster munitions.

Hence, all these factors made it possible to conclude an ambitious humanitarian disarmament convention, the CCM which will enter into force on 1 August 2010. The following reflections are an attempt to assess the potential of the CCM to influence IHL and HRL as well as accomplish the ultimate objective of a better protection of civilians from the harmful effects of cluster munitions.

The first point to be made about a possible influence on IHL interpretation is that the customary international law prohibition of indiscriminate weapons is placed in a more realistic context for conventional weapons. That would mean to evaluate the legality of a weapon in light of the nature and regular tactics prevailing in contemporary armed conflict and in light of a past record of humanitarian harm and not only base such a judgement on the design and effects of a weapon as intended in theory by users and producers. After the successful conclusion and entry into force of the CCM for the first 30 states parties, one may ask how legitimate an IHL interpretation of the prohibition of indiscriminate weapons still is to state that this prohibition is not violated where it is theoretically possible to use a weapon far away from civilian targets without inquiring to what extent this theoretical condition is present on a contemporary battlefield.

Paradoxically, precisely the most controversial exclusion from the definition of prohibited cluster munitions does most explicitly away with an IHL understanding which is blind to the actual effects under real combat conditions, notably Art. 2 (2) (c) of the CCM which connects the technical exclusion criteria with the overarching aim “to avoid indiscriminate area effects and the risks posed by unexploded submunitions.” As has been seen *supra*, such an effects-based approach was on the table in the 1970s before API, APII

and the CCW were adopted.¹¹²² Thus, this constitutes the revival of an approach that has been buried in the meantime which is not only desirable but necessary to bring the interpretation of specific rules of IHL back in line with the overarching balancing between humanitarian and military considerations.

In fact, the exclusive recourse to an “*intended* design and effects-based approach” to examining the legality of weapons under the prohibition of indiscriminate weapons has resulted in favouring military over humanitarian considerations in respect of conventional weapons. Accordingly, a way to make the general prohibition of indiscriminate weapons more than an empty shell in respect of conventional weapons would be to have recourse not only to the intended design and effects but also the actual effects of a weapon through the history of concrete use as a yardstick. The adoption of the CCM also pointed at the fact that generally, a better balance between military and humanitarian considerations must be adopted towards the use of weapons under IHL. After all, if a consistent record of humanitarian harm is not acted upon in respect of a specific weapon the need for disarmament for countering the inadequacies of IHL rules as well as their implementation will again arise.

Secondly, the prohibition on cluster munitions may reinvigorate discussions on setting a norm requiring states with accurate weapon capabilities to use these capabilities in civilian residential areas. Until recently, a majority of authors were against the proposition that there is a legal obligation to use precision-guided weapons in or around civilian areas if the militaries concerned possess such technology.¹¹²³ The CCM, again in particular the exclusion from the definition of prohibited cluster munitions under Art. 2 (2) (c), while not establishing such an obligation would seem to constitute a legal presumption that the use of miniaturised explosive unguided munitions with an area effect is inconsistent with the prohibition of indiscriminate attacks. Most importantly, this leads to an expectation that the choice of unguided conventional weapons with an area effect is incompatible under the obligation to take all feasible precautions in attack. After all, one major motivating factor behind

¹¹²² See *supra* p. 247.

¹¹²³ See, for example, C. B. Puckett, “In this Era of “Smart Weapons,” Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?”, 18 *Emory International Law Review* 645-723 (2004); Schmitt, “Precision attack and international humanitarian law”, *supra* note 1039, at 461; D. L. Infeld, “Precision guided munitions demonstrated their pinpoint accuracy in Desert Storm: But is a country obligated to use precision technology to minimize collateral civilian injury and damage”, 26 *George Washington Journal of International Law and Economics* 109, 140-141 (1992). On the contrary, albeit, tentative view that customary international law as analysed against the background of armed conflicts in the 1990s, ranging from Operation Desert Storm to Allied Force, recognises an obligation to use precision-guided munitions in urban settings, see S. W. Belt, “Missiles Over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas”, 47 *Naval Law Review* 115, 174 (2000).

prohibiting cluster munitions was the tendency to blanket populated areas in an indiscriminate manner rather than accurately attacking single target objects. Whereas this is not the same as outlawing all use of unguided weapons in and around civilian areas, it would go towards specifying that attackers would have to use weapons accurate enough to engage single target objects rather than targeting wide areas especially in locations containing both military and civilian targets.¹¹²⁴ However, significant challenges remain as noted by the UN Secretary-General in his 2009 report on the protection of civilians in armed conflict, expressing his concern about “the use in densely populated environments of explosive weapons that have so-called “area effect” in Sri Lanka and Gaza.¹¹²⁵

This tendency of creating ever-more stringent norms relating to the core obligations of distinction and taking of precautionary measures may invite the criticism of adding a legal asymmetry to the operational asymmetries prevailing in contemporary warfare. As a matter of fact, the CCM only legally binds the armed forces of states, not non-state armed groups. However, this first difficulty is remedied somewhat by the Preamble of the CCM which reads: “*Resolved* also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention.”¹¹²⁶ While this does not create a hard and fast obligation as such, it is to be understood as a clear mandate also to monitor the activities of non-state armed groups.¹¹²⁷

Still, even during the negotiations in Dublin there have been critical voices about the exclusion under Art. 2 (2) (c) since the effect may be to increase the technology gap between militaries in developed and less developed countries. As a matter of law, such arguments are irrelevant, since the obligation to take all feasible precautions to avoid and at least minimise civilian harm is as such a standard which takes into account different technological capabilities. Thus understood, this obligation is the more stringent the more advanced a state’s

¹¹²⁴ See, in this sense also R. Moyes, “Implications of the Convention on Cluster Munitions for developing a norm against area-effect use of explosive weapons”, Landmine Action Research Paper, 23 July 2008, <http://www.landmineaction.org/resources/The%20CCM%20and%20area-effect%20use%20of%20explosive%20weapons.pdf> (last visited 26 January 2010).

¹¹²⁵ UN Secretary-General, Report on the protection of civilians in armed conflict, 29 May 2009, UN Doc. S/2009/277, at paras. 36-37. It should be noted that in Gaza, cluster munitions were not used, in Sri Lanka cluster munition use still has not been confirmed.

¹¹²⁶ Preamble, para. 12, Convention on Cluster Munitions, *supra* note 33.

¹¹²⁷ In this regard, the activities of Geneva Call are noteworthy. Geneva Call is a humanitarian NGO committed to ensuring implementation of IHL by non-state armed groups. The most important activity so far has been the drawing up of so-called Deeds of Commitment by means of which non-state armed groups may subscribe to the norms contained in the 1997 Ottawa Convention on Antipersonnel Mines, thus compensating for the structural deficit that they cannot formally become parties to international conventions. See <http://www.genevacall.org/home.htm> (last visited 26 January 2010). Arguably, the CCM in its Preamble constitutes an entry point for Geneva Call for possible engagement with non-state armed groups in respect of cluster munitions.

weapon capabilities are. However, recent armed conflicts in which technologically advanced armies participated showed a steady increase in the use of more accurate weapons. This means that they are available in greater numbers than before. As a result, acquisition of such more accurate weapons than cluster munitions such as certain laser-guided and munitions possessing GPS is less costly than before.¹¹²⁸ The reality may be that the CCM through the exclusion of technologically advanced sub-munition based weapons under Art. 2 (2) (c) may trigger increased production and proliferation of the SMart 155s and BONUS currently only available to very few armies. But it may also simply be a matter of time until these weapons are more widely available at lower costs also to less developed countries.

It has been argued that the more advanced one party to the armed conflict is in terms of precision-guided capabilities, the more likely it is that an inferior opponent resorts to practices blatantly violating its own obligations to preserve the distinction between civilian and military targets such as the use of human shields. This scenario, according to a prominent commentator, would entail the danger that the more technologically advanced party will perceive IHL increasingly as disadvantaging it, which may spark a cycle of lawlessness.¹¹²⁹ Besides the reliance on a notion of reciprocity that does not accord with IHL, since Art. 51 (8) API does not release an attacker of its own obligations under IHL when it encounters an opponent violating IHL, such pitfalls should not lead to a downward spiral in IHL implementation but to increased engagement with non-state armed groups alongside requiring armed forces to use more accurate weapons in and around civilian areas.¹¹³⁰

With regard to HRL, the major achievement is without any doubt the action-orientated obligations to provide victim assistance which constitutes a major advancement compared to the weakly worded obligation under the 1997 Ottawa Convention. This is directly due to the influence of specific HRL entrenched in the latest conventions, especially the CRPD and the 2006 Convention on Enforced Disappearances, but also in the earlier 1984 Convention Against Torture. The characteristic feature of such HRL is that these conventions enshrine the general and specific HRL obligations in more detailed fashion whereas before only the treaty

¹¹²⁸ Compare the figures given by Belt in 2000: While for a modern precision-guided Joint Direct Attack Munition the price at the beginning of the 1990s was 50,000 U.S. dollars at a minimum, at the end of the 1990s it had dropped to around 18,000 U.S. dollars. See Belt, "Customary Norm Requiring the Use of Precision Munitions in Urban Areas", *supra* note 1123, at 168.

¹¹²⁹ M. N. Schmitt, "Asymmetrical Warfare and International Humanitarian Law", 62 Air Force Law Review 1, 42 (2008).

¹¹³⁰ As the UN Secretary-General noted in his latest report on protection of civilians in armed conflict, "while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts." See UN Secretary-General Report on Protection of Civilians, *supra* note 1125, at para. 40.

monitoring bodies like the CESCR fleshed out rather generally worded human rights treaty law in their own interpretations of the respective treaty, for example, in General Comments. Besides the specific implementation-orientated obligations under the CCM and the CRPD, in particular, the specifically prescribed division of responsibilities between the affected territorial state and the rest of the international community of state parties are testimony to this. In this regard, the general obligation under Art. 2 (1) of the ICESCR according to which states parties must take steps, individually and through international assistance and cooperation, with a view to achieving progressively economic, social and cultural rights, finds a specific contextual expression with the obligations of states parties in a position to do to assist the territorial state under Art. 6 of the CCM. This flows from the understanding that it may not be legally and morally justified to leave an affected state alone in its endeavour to remedy the existing consequences from past cluster munition use on its territory, since in many cases that state has not caused the humanitarian problem in the first place.

While the links to HRL are strong, the CCM does not create an individual complaints procedure presumably on the basis to avoid duplication with already existing fora, in particular the CRPD, since the Optional Protocol to the CRPD which already entered into force already creates such a classical HRL mechanism. Neither does the CCM establish individual victim rights but is rather addressed to states only. However, the human rights-infused components of the CCM which were fundamentally designed to deal with inadequacies under IHL are new evidence of a trend to adopt an increasingly remedial approach towards the consequences of past armed conflicts (with the 1997 Ottawa Convention, the 2003 Protocol V and the 2008 CCM) alongside a preventive approach. This constitutes progressive thinking under IHL which is traditionally weak in providing remedies for victims of armed conflict and demonstrates a growing convergence between IHL and HRL.

Beyond these legal implications of the CCM, one may legitimately ask what practical importance the treaty is likely to have. It is clear that any undertaking to treat this question at this point in time requires some “looking through the crystal ball”. However, one does not need to be a prophet to state that the ability of the treaty to provide lasting protection to civilians from cluster munitions depends firstly on a humanitarian-minded implementation of the CCM by states parties. Currently, this is especially true for the controversial issue of interoperability with states that will not become parties to the CCM in the foreseeable future, especially the United States. Unfortunately, the existence of this provision is another example of aggressive U.S. unilateralism (among others like the 1997 Ottawa Convention and the

Rome Statute of the International Criminal Court) with the aim of actively undermining any multilateral norm setting or implementation effort among others where these norms are perceived to threaten U.S. interests.

If states parties were to interpret Art. 21 (3) of the CCM too broadly in favour of military considerations then the entire object and purpose of the CCM to eliminate civilian suffering once and for all could be fundamentally undermined. After all, it may again be recalled that many notorious instances of cluster munition use occurred during coalition operations far away from the territories of coalition partners, including during the 1991 Operation Desert Storm, the 1999 Operation Allied Force, the 2001 Operation Enduring Freedom and the 2003 Operation Iraqi Freedom. The question of the relationship between the prohibition of assistance under Art. 1 (1) (c) and the provision on relations with states not party under Art. 21 of the CCM is of great practical significance, as the United States was particularly active in recent months to get an increase of troop strength from their allies for its combat efforts in Afghanistan and Pakistan.

Indeed there have been discouraging signs from Oslo process participants that have signed and/or ratified the CCM and have adopted or are in the process of adopting implementing legislation. Ireland, for example, one of the Oslo core group members, host of the negotiations of the CCM and state party, adopted legislation that excludes the application of the prohibition of assistance, encouragement or inducement to acts prohibited to a state party for any act or omission performed in joint military operations with states not party to the CCM, save for the prohibition found in Art. 21 (4) (d) of the CCM.¹¹³¹ Thus, the implementing legislation would on its face be even more permissive than the CCM and may completely undermine Ireland's implementation of the prohibition of assistance under Art. 1 (1) (c) of the CCM.

Another state party, Germany, an influential NATO member and traditional close U.S. ally, while not expressly including a provision in its implementing legislation of the CCM in its Explanatory Comments on the CCM annexed to the implementing legislation stated its view that

¹¹³¹ Section 7 (4) of the Cluster Munitions and Anti-Personnel Mines Act 2008 states that the prohibition of assistance does not apply to any act or omission made by any person in the course of his or her duties in the planning or conduct of operations by an International United Nations Force or in the planning or conduct of operations with a state that is not a Cluster Munitions Convention state. Section 7 (5) of the same Act categorically prohibits the express request of the use of cluster munitions in cases where the choice of munitions used is within his or her exclusive control. See Ireland, An Bille Um Chnuas-Mhuinisín Agus Mianaigh Fhrithphearsanra 2008/Cluster Munitions and Anti-Personnel Mines Act 2008, <http://foreignaffairs.gov.ie/uploads/documents/Political%20Division/a2008.pdf> (last visited 26 January 2010).

“a mere relaying of an order for a mission involving cluster munitions within a command structure does not contravene the provisions of the Convention. This does not constitute assistance, encouragement or inducement to activities that are generally prohibited to a state party under Art. 1.”¹¹³²

Thus, under this interpretation arguably, a state party to the CCM could knowingly tolerate or acquiesce in the cluster munition use by a state not party in a common military operation.

New Zealand, another core group member, state party to the CCM and ally of the United States, in its national interest analysis in the lead-up to its national implementing legislation required to ratify the convention, did not acknowledge the prohibition of assistance as a core prohibition of the CCM; at the same time, New Zealand expressed its discomfort with the unambiguous prohibition under Art. 21 (4) (d) of the CCM of expressly requesting the use of cluster munitions in cases where the choice of munitions is within a state party’s exclusive control, stating that there

“may be some risk associated with how this obligation and its operational impact would be perceived by New Zealand’s military partners which are not Party to the Convention [...]”¹¹³³

In addition, New Zealand viewed the positive obligations to promote the Convention to states not party and to make its best efforts to discourage states not parties from using cluster munitions as entailing potential costs and/or disadvantages.¹¹³⁴

Subsequently, some of these concerns were confirmed by the 2009 New Zealand Cluster Munitions Prohibitions Act.¹¹³⁵ The Act does not contain any reference to the positive obligations under Arts. 21 (1) and (2) of the CCM. On the other hand, under its Section 11 (3) the Act only enshrines as an absolute prohibition in multinational military operations that a member of the New Zealand Armed Forces must not expressly request the use of cluster munitions in cases where the choice of munitions is within his/her exclusive control. However, without the obligation to discourage states not parties from using cluster munitions, this absolute prohibition would be extremely narrow and would allow, for instance, an express

¹¹³² Germany, Deutscher Bundestag 16. Wahlperiode, Drucksache 16/12226, Denkschrift, 12 March 2009, at 41, <http://dip21.bundestag.de/dip21/btd/16/122/1612226.pdf> (last visited 26 January 2010)

¹¹³³ New Zealand, International treaty examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin 19-30 May 2008, Report of the Foreign Affairs, Defence and Trade Committee, March 2009, at Annex B, National Interest Analysis, para. 21, http://www.parliament.nz/NR/rdonlyres/9BC976BD-5A1F-44D1-8266-438956298E31/103915/DBSCH_SCR_4371_Internationaltreatyexaminationofthe.pdf (last visited 26 January 2010).

¹¹³⁴ *Ibid.*, at para. 20. http://www.legislation.govt.nz/act/public/2009/0068/latest/viewpdf.aspx?search=ts_act_Cluster+Munitions+Prohibition_resel&p=1 (last visited 26 March 2010).

¹¹³⁵ Cluster Munitions Prohibition Act 2009, Public Act No. 68, Date of Assent: 17 December 2009,

request for cluster munition use where the choice of munitions is not under the requesting state's control.

A very broad view of the permission to cooperate militarily with states not party and a narrow interpretation of the prohibition of assistance was also reflected in the Australian National Interest Analysis for national implementing legislation. It was stated there that Art. 21 (3) allows states parties to continue to effectively participate in coalition operations in which an ally may be using cluster munitions. Then, the analysis went on to say that Art. 21 (4) of the CCM reaffirms that certain obligations on states parties *still apply in these circumstances*.¹¹³⁶ Therefore, Australia is arguably of the view that the list of prohibitions under Art. 21 (4) is exhaustive in the sense that were it not for Art. 21 (4) the prohibition of assistance would not apply in coalition operations.

However, these positions are based on the presumption that such interoperability problems are inevitable. To reiterate this author's view this is far from clear. In any event, such rigid positions disregard the potential of Art. 21 (2) of the CCM that conflicts between Art. 1 (1) (c) and Arts. 21 (3) and (4), thus interoperability problems may be avoided at the outset. As this author has already argued elsewhere, the practical effect of the obligations to notify states not party to the CCM and to make best efforts to discourage use of cluster munitions by states not party depends on how seriously states parties take the implementation of these obligations.¹¹³⁷ This author also argued in this respect that the obligation to make its best efforts to discourage cluster munition use by states not party should be read to prevent states parties to agree to RoE which contemplate cluster munition use.¹¹³⁸ While it may be difficult to reach a common understanding of all states parties on the meaning of Arts. 1 (1) (c) and 21 (3) and (4) of the CCM, they would more probably have less difficulty in fleshing out what measures are practically required under Art. 21 (2) of the CCM.

To the credit of some of these states mentioned here, they also sent positive signals by advocating an interpretation of the CCM that would not reduce Art. 21 (2) to an empty shell. Ireland, for example, provided a statement of clarification regarding its legislation in which it emphasised that permitted activities in the framework of military cooperation is not only limited by Art. 21 (4) of the CCM but also by Art. 21 (2) and the rule on international treaty

¹¹³⁶ Australia, National Interest Analysis, 11 March 2009, at para. 15, http://www.aph.gov.au/house/committee/jsct/12march2009/treaties/munitions_nia.pdf (last visited 26 January 2010).

¹¹³⁷ See A. Breitegger, "Von Grimsby bis Oslo: Ein Ende von über 60 Jahren Leid für Zivilisten durch Streumunitionen?" in S. Wittich/A. Reinisch/A. Gattini (eds.), *Kosovo – Staatsschulden – Notstand – EU-Reformvertrag – Humanitätsrecht: Beiträge zum 33. Österreichischen Völkerrechtstag 2008 in Conegliano*, at 223, 236 (2009).

¹¹³⁸ *Ibid.*

interpretation that treaties must be performed in good faith. In this regard, it noted that any deliberate assistance in the commission of an act prohibited by the CCM in the context of military cooperation with a state not party would be inconsistent with the obligation to make best efforts to discourage the use of cluster munitions by the latter. Moreover, interpreted in good faith, the CCM does not allow states parties to arrange for states not parties to take prohibited actions on their behalf. Ireland further specified how it would operationalise the obligation to make its best efforts to discourage cluster munition use by states not party in joint military operations. It stated its intention to make every effort in the elaboration of codes of conduct, rules of engagement, caveats and similar agreements prepared for the mission to ensure that there is no prospect of cluster munition use.¹¹³⁹ Moreover, appropriate orders would be issued to Irish peacekeepers that under no circumstances they would deliberately assist, encourage or induce the commission of an act prohibited by the CCM by a state not party and any breach of such orders would constitute an offence punishable under military law.¹¹⁴⁰

In a similar vein, Germany stated that Art. 21 represents an opportunity, preferably together with partners in the lead-up to military operations with states not party, to actively request the latter to comply with the provisions of this Convention even if there is no guarantee of success for such compliance. Thus, besides constant promotion of accession to the Convention, the German government will emphatically make an effort in the planning of common operations, for instance with EU or NATO partners, that cluster munition use will not be contemplated. Germany further emphasised that it will prompt states not party to comply with the highest standards in line with the objectives of the Convention even in exceptional situations such as for force protection. Finally, Germany stated that the transport of and assistance to such transport of cluster munitions was not permitted by the interoperability provision. The German government has already implemented these two offences by decree to the German Armed Forces.¹¹⁴¹

¹¹³⁹ Ireland, Cluster Munitions and Anti-Personnel Mines Bill 2008, Parliamentary Debates, Official Report, Statement by Minister of Foreign Affairs Micheál Martin, 4 November 2008, <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20081104.xml&Page=1&Ex=892#N892> (last visited 26 January 2010).

¹¹⁴⁰ Ireland, Letter of Clarification to the Cluster Munition Coalition, 11 March 2009, *quoted in* Human Rights Watch, “Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions”, June 2009, http://www.hrw.org/sites/default/files/related_material/2009.06%20Arms%20Interop%20Paper%20Final.pdf (last visited 26 January 2010).

¹¹⁴¹ See Germany, Deutscher Bundestag Denkschrift, 12 March 2009, at 41, *supra* note 1132.

Also Austria remains one of the countries that maintain the highest standard of implementation in respect of interoperability despite the fact that the CCM as subsequently adopted could not do without an express provision on this particular concern.¹¹⁴² Interestingly, even before the adoption of the CCM, the FPÖ addressed a series of parliamentary questions to the Minister of Defence on interoperability, such as: Do any accords exist between the Republic of Austria and its ESDP or NATO PfP partners in respect of cluster munition use in joint missions, in particular whether any such accords exist in respect of the deployment of Austrian soldiers in Chad? Which consequences must an Austrian soldier expect who is member of a multinational brigade if this multinational brigade uses cluster munitions?¹¹⁴³ The answers provided by the Minister of Defence shed light on how to pragmatically solve interoperability problems: As has already been stated *supra*, the legal mandate of the Chad mission would not have excluded offensive use of force and thus, provision was made for robust combat action. In these circumstances, theoretically the prospect of cluster munition use could arise.

However, already then Austria issued a caveat for the deployment of the Austrian contingent in EUFOR Chad/RCA both in the phase of drawing up the concept of operations as well as upon declaration of placing themselves under EU orders. In this regard, the European Union was informed that due to national legislation the transport, handling and use of cluster munitions was not permitted to Austrian soldiers.¹¹⁴⁴ Thus, the capacity of Austria participating in multinational operations such as that in Chad remains although it adopts a strict stance in respect of possibly assisting other states' nationals in the use, transfer or stockpiling of cluster munitions. The Austrian example is noteworthy in that it may be resorted to as an example of state practice in relation to notifying other states participating in joint military operations of its own obligations even if this example occurred before the adoption of the CCM. Further, it reconfirms that other states usually accept national

¹¹⁴² With regard to the definition of prohibited cluster munitions, however, Austria lowered its previously stricter stance so as to bring its national legislation in line with the CCM, especially with the exclusions from the definition contained in Art. 2 (2). This has the effect of keeping the door open for procurement of the SMArt 155 sensor-fused munitions but until now, there are no concrete plans of procurement. Given Austria's leadership role in the Oslo process, it is not to be expected that Austria will take any decision to allow sensor-fused munitions for its armed forces lightly. For the amended Austrian Act on the Prohibition of Cluster Munitions, see Annexes, pp. 414-416.

¹¹⁴³ Parliamentary Questions by MPs Strache, Dr. Haimbuchner and Colleagues to the Federal Minister of Defence Concerning the Possible Use of Cluster Munitions Within the Framework of ESDP (European Security and Defence Policy) Missions With the Participation of Austrian Soldiers, No. 3500/J, XXIII. GP, 31 January 2008, http://www.parlament.gv.at/PG/DE/XXIII/J/J_03500/fname_100309.pdf (last visited 26 January 2010).

¹¹⁴⁴ Written Reply by Mag. Norbert Darabos to Written Parliamentary Questions by MPs Strache and Colleagues, No. 3392/AB, XXIII. GP, 21 March 2008, http://www.parlament.gv.at/PG/DE/XXIII/AB/AB_03392/fname_104451.pdf (last visited 26 January 2010).

restrictions on the scope of possible deployment in such multinational missions without excluding states with such restrictions from the mission as a whole.

NGO experts have echoed the approach that Art. 21 (2) of the CCM has the potential to avoid that the prohibition of assistance of anyone, including of states not party, is fundamentally undermined by the provisions of Arts. 21 (3) and (4).¹¹⁴⁵

In any event, a lasting prevention of interoperability problems could best be secured by the universalisation of the CCM. Art. 21 (1) translates this goal into a binding treaty obligation for states parties. However, this is not a likely prospect at the moment given the resistance against the CCM on the part of some major users, producers and stockpilers of the weapon. With regard to both interpretation of controversial provisions in the CCM as well as its universalisation, the First Meeting of States Parties due to take place in Laos in November 2010 will be significant in paving the future of the CCM.

In the meantime, the United States, biggest user and producer of cluster munitions of all times, has until the present date advocated the CCW to be the appropriate forum to address cluster munitions. For instance, in April 2009, at the end of the meeting of governmental experts, the United States was of the view that the most recent version of a Draft Protocol VI to the CCW would have a major positive humanitarian impact, as the text would require that many, if not most cluster munitions that currently exist would have to be removed. In the case of the United States, this would apply to over 95 % of their stocks.¹¹⁴⁶ However, it is unclear whether this is accurate in view of the vague prohibitions that the Draft Protocol lays down. For instance, munitions which are exclusively designed for use by direct fire delivery systems would not fall under the definition of prohibited weapons and those cluster munitions which are capable of being delivered accurately to a pre-defined target area and each explosive submunition possesses at least one of the following technical features: a self-destruction mechanism or an equivalent mechanism, including two or more initiating mechanisms; a self-neutralisation mechanism; a self-deactivating feature; or the cluster munition incorporates a mechanism or design which, after dispersal results in no more than 1% unexploded ordnance across the range of intended operational environments. Besides proposing these technical criteria for exceptions to prohibitions which have been shown in the Oslo process to be

¹¹⁴⁵ E. Schwager, "The Question of Interoperability – Interpretation of Articles 1 and 21 of the Convention on Cluster Munitions (CCM)", 21 (4) *Humanitäres Völkerrecht/Journal of Peace and Armed Conflict* 247-250 (2008); Human Rights Watch, "Prohibition of Assistance in the Convention on Cluster Munitions", *supra* note 1140.

¹¹⁴⁶ United States, Mission in Geneva, Closing Statement to the April 2009 session of the Group of governmental Experts to the CCW, 17 April 2009, <http://geneva.usmission.gov/news/2009/04/17/ccwclosing/> (last visited 26 January 2010).

unworkable and not live up to their promises in a combat environment, the Draft Protocol not only proposes a transition period during which even the most inaccurate and unreliable cluster munition types could still be used and any cluster munition produced after 1990 transferred but proposes still more exceptions for anti-ship and anti-runway munitions.¹¹⁴⁷

Also Russia, India, China, Pakistan and Israel remain hostile to the CCM. Russia, for example, could still not even agree to a new internationally binding Protocol to the CCW on cluster munitions in November 2008. Mainly for that reason the meeting of the states parties to the CCW decided that the GGE will continue its negotiations to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations but did not specify at all what it is that states parties of the CCW should negotiate.¹¹⁴⁸ Meanwhile, like Israel, Pakistan and China, Russia supports ongoing informal discussions on the above-mentioned Draft Protocol VI, stressing that a consensus decision on a protocol with meaningful effect was attainable.

India, for its part, has stressed on various occasions that a comprehensive universal ban on cluster munitions is not within the reach of the international community, neither within the CCW nor outside. It also expressed its scepticism on a partial prohibition on certain types of cluster munitions, which may in fact create space in the international market for more advanced types, thus making the technological upgrading of existing stocks expensive. India also rejected importing technical standards agreed in other international instruments negotiated outside the framework of the CCW,¹¹⁴⁹ while this can already be understood as directly referring to the CCM, this view was reportedly clarified by India going specifically on record, objecting to the wording of the latest Draft Protocol VI to the CCW which states that the rights and obligations of states parties to the CCM shall not be affected by a potential future CCW Protocol.¹¹⁵⁰

This shows that there is not only reluctance by major users, producers and stockpilers to commit themselves to the CCM but that there is also no agreement on how to pursue an alternative approach within the framework of the CCW. Any attempt by the United States, for example, to push for a regulation of cluster munitions based on technological advances will be eyed with suspicion by China, India and Russia in particular which fear lagging behind in

¹¹⁴⁷ See Chair's Consolidated Paper, Annex I, Cluster Munitions, 16 April 2009 (on file with the author), reproduced in the Annexes, at *infra* pp. 416-424.

¹¹⁴⁸ See 2008 Meeting of the States Parties to the CCW, Report, UN-Doc. CCW/MSP/2008/4, 23 January 2009, at para. 34.

¹¹⁴⁹ India, Statement at the GGE on Cluster Munitions, 14 April 2009, <http://www.mea.gov.in/speech/2009/06/14ss01.htm> (last visited 26 January 2010).

¹¹⁵⁰ K. Harrison, "Update from the "end" of the 2009 CCW GGE on cluster munitions" (on file with the author).

cluster munition technology since it is assumed that these countries have large stockpiles of inaccurate and unreliable cluster munitions and acquiring alternatives would be a highly costly exercise. However, the cost argument is not a particularly strong one for at least India and Russia, since both of these states are already equipped with sensor-fused weapons.¹¹⁵¹ Rather, the real problem with these states is their lack of political will and their insistence that cluster munitions represent a military capability they do not want to get rid of.

While these dynamics between the major users, producers and stockpilers of the weapon already complicate the task within the framework of the CCW, the difficulties are compounded by the fact that some of the states parties to the CCW will have become states parties to the CCM by the time any new CCW Protocol might be concluded. In this respect, Oslo process states strongly expressed their opposition to any CCW Protocol that would be incompatible with the CCM.¹¹⁵² This opposition is not only founded on political grounds but where Oslo process states have already signed the CCM, it would also be based on their customary international legal obligation not to defeat object and purpose of the CCM which is, *inter alia*, “to put an end for all time to the suffering and casualties caused by cluster munitions ...”¹¹⁵³

However, if the Draft Protocol VI is adopted as stands at the moment, the result would precisely be to have one extremely ambitious convention on cluster munitions from a humanitarian point of view and one far less ambitious. A treaty concluded within the CCW would weaken rather than strengthen protection of civilians from the effects of cluster munitions. It has been claimed that a treaty adopted within the CCW would have a more

¹¹⁵¹ For instance, India reportedly only in September 2008 was intending to acquire 510 CBU-105 air-dropped Sensor Fused Weapons from the United States in an arms deal valued at as much as \$355 million. Russia already produces its own types of sensor fused weapons. See Human Rights Watch/Landmine Action/Landmine Monitor/International Campaign to Ban Landmines/Cluster Munition Coalition, “Banning Cluster Munitions: Government Policy and Practice”, May 2009, at 210, 235, http://lm.icbl.org/cm/2009/banning_cluster_munitions_2009.pdf (last visited 26 January 2010).

¹¹⁵² For instance, in the CCW GGE meeting in November 2008, Costa Rica delivered a statement on behalf of Austria, Belgium, Benin, Bosnia & Herzegovina, Chile, Croatia, Ecuador, El Salvador, Guatemala, Holy See, Honduras, Indonesia, Ireland, Lebanon, Mexico, New Zealand, Nicaragua, Norway, Peru, the Philippines, Senegal, South Africa, Uganda, Uruguay and Venezuela that the proposal as it then stood was “unacceptable” to these states, as it would set a precedent allowing the CCW to fall behind stronger existing standards [i.e. the CCM]. See Joint Statement to the Group of Governmental Experts of the CCW, 7 November 2008, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/02/ccw-joint-statement-by-25-051108.pdf> (last visited 26 January 2010). Even more recently, France stated at the end of the second session of the Group of Governmental Experts to the CCW on 17 April 2009 that “la question des définitions et de la compatibilité avec la CASM [Convention sur Les Armes à Sous-Munitions] est un point dur pour ma délégation.” See France, Statement to the Group of Governmental Experts to the CCW, 17 April 2009, http://www.delegfrance-cd-geneve.org/IMG/pdf/Intervention_France_GGE_170409-2.pdf (last visited 26 January 2010).

¹¹⁵³ Preamble, para. 2, CCM, *supra* note 33. In the penultimate preambular paragraph, it also states that the States Parties to this Convention are “determined to work strenuously towards the promotion of its universalisation and its full implementation.”

effective impact since it might include some of the major users, producers or stockpilers.¹¹⁵⁴ As argued above the current draft is based on broad accuracy and reliability approaches towards defining prohibited weapons that either are excessively vague (“is capable of being delivered accurately to a pre-defined target area”) or have been shown during the Oslo process with credible field evidence to not provide sufficient humanitarian protection, i.e. regulations based on a certain failure rate or on self-destruct mechanisms. Accordingly, this mixture of definitions difficult to implement and those which are unworkable on the ground would not contribute towards improving protection of civilians. This would apply even if one assumed the *de facto* split in states parties to the CCM and a potential Draft Protocol VI for China, India, Israel, Pakistan, Russia and the United States in particular, and a resulting lack of incompatibility in substance between the two conventions.

Another scenario contemplated was that a Protocol VI will be adopted with the same scope of prohibitions and definition of cluster munitions as the CCM. However, the bargaining chip for the major users, producers or stockpilers would be a lengthy transition period. This view accepts that the notion of a transition period would constitute a temporary legitimisation of cluster munitions. But the endorsement of the main users, producers and stockpilers would offset this disadvantage if certain additional provisions were included in a future Protocol, declaring the use of cluster munitions during that period as exceptional and preferably also enshrining an immediate prohibition on transfers.¹¹⁵⁵ It is the view of this author that this option is at present unlikely to materialise, given that at least Russia and India still remain very hostile to the CCM. Thus, any attempt to align standards of a potential Protocol VI will probably meet the fierce resistance of these countries.

In addition, it is questionable how a subsequent treaty would not actively undermine the CCM adopted before, especially one effect that has so often been mentioned as the core rationale behind the conclusion of the CCM, notably to effectively stigmatise the weapon.¹¹⁵⁶

¹¹⁵⁴ See, for example, A. Deeks, “A Second Cluster Munitions Treaty?”, Center for Strategic & International Studies, 7 July 2008, http://www.csis.org/files/media/isis/pubs/080707_cluster_munitions.pdf (last visited 26 January 2010).

¹¹⁵⁵ D. Justen, “Das 21. Jahrhundert ohne Streumunition? Optionen für die Verhandlungen im Rahmen des VN-Waffenübereinkommens in Genf”, Stiftung für Wissenschaft und Politik Aktuell 23, May 2009, http://www.swp-berlin.org/common/get_document.php?asset_id=5948 (last visited 26 January 2010).

¹¹⁵⁶ For instance, the CMC in its newsletter of December 2008 stated in view of the failure of the November 2008 CCW meeting to push through an agreement legitimising ongoing use of the weapon that “During the Geneva talks the CMC has welcomed the strong support demonstrated by the majority of states for the standards set by the Convention on Cluster Munitions. It is expected that the continued stigmatisation of this weapon around the world will accelerate with the widespread signature of the treaty in Oslo and that this will eventually lead to a vast reduction in its use, production and transfer, even by the limited group of states remaining outside its legal norms.” See Cluster Munition Coalition, “Newsletter November-December 2008”, <http://www.stopclustermunitions.org/take-action/campaigners-in-action/?id=1104> (last visited 26 January 2010).

The Oxford Dictionary defines “stigmatise” as “regard worthy of disgrace”.¹¹⁵⁷ With regard to the meaning of “stigmatisation” in the context of cluster munitions, the ICRC stated that the “norms established by this Convention will also have an effect on the practice and positions of States that have not yet adhered to it. With the adoption and impending entry into force of this treaty, cluster munitions are already considered a stigmatized weapon by many countries, the media and the public. It will be difficult for anyone to use cluster munitions in the future.”¹¹⁵⁸ Thus, it is hoped that the CCM if it cannot be universalised in the near future will produce what has been termed “second-best responses”¹¹⁵⁹ by states reluctant to formal adherence to the convention as states parties, i.e. de facto compliance with CCM key norms.

In that sense, the model invoked is the 1997 Ottawa Convention to which the same states have not become states parties that still oppose the CCM, in particular China, India, Pakistan, Russia or the United States. Yet, as has been already shown *supra*, China and the United States have neither used nor exported anti-personnel mines, and Russia has not exported anti-personnel mines since the 1990s.¹¹⁶⁰

In addition, as further evidence of the stigmatisation of antipersonnel mines, the renunciation of production by companies was mentioned, as well as the practice of some states not party to provide reports on their stockpiles and mined areas as well as efforts to destroy mines under their jurisdiction or control.¹¹⁶¹ Commentators have explained these effects observable on the national level of states not party of the 1997 Ottawa Convention by a social rather than purely legal understanding of rules that are socially enforced, be it through law or social condemnation.¹¹⁶² Accordingly, this corresponds to the notion of social internalisation coined by Harold Hongju Koh which occurs when a norm acquires so much

¹¹⁵⁷ See Oxford Dictionaries Online, http://www.askoxford.com/results/?view=dict&freesearch=stigmatization&branch=13842570&textsearchtype=e_xact (last visited 26 January 2010).

¹¹⁵⁸ ICRC, “The Convention on Cluster Munitions – frequently asked questions”, 13 January 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/html/cluster-munitions-questions-and-answers-130109> (last visited 26 January 2010).

¹¹⁵⁹ L. Wexler, “The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty”, 20 Arizona Journal of International and Comparative Law 561 (2003).

¹¹⁶⁰ See *supra* pp. 195-196, notes 688-690.

¹¹⁶¹ For instance, as part of the stigmatisation of antipersonnel landmine production, the United States Campaign to Ban Landmines named 47 producer companies in a report. As a result, 17 producers renounced production just because of being named in the report. See United States Campaign to Ban Landmines, “Exposing the Source: U.S. Companies and the Production of Antipersonnel Landmines”, April 1997, <http://www.hrw.org/sites/default/files/reports/general2974.pdf> (last visited 26 January 2010); B. Rappert, “A convention beyond the Convention: Stigma, humanitarian standards and the Oslo Process”, Landmine Action, May 2008, [http://www.landmineaction.org/resources/A_convention_beyond\(1\).pdf](http://www.landmineaction.org/resources/A_convention_beyond(1).pdf) (last visited 26 January 2010).

¹¹⁶² See, for example, P. Herby & K. Lawand, “Unacceptable Behaviour: How Norms Are Established” in Williams *et al.* (eds.), *Banning Landmines*, *supra* note 403, at 199, 200.

public legitimacy that there is widespread obedience to it.¹¹⁶³ On the international level, especially with regard to IHL, this concept seems particularly appropriate, since the “public conscience” is precisely one of the terms employed by the Martens Clause which may be regarded as codifying pre-legal natural law values into positive international law. Moreover, both the Ottawa Convention and the Convention on Cluster Munitions expressly have recourse to the “public conscience” in their preambles, mentioning in particular UN agencies, the ICRC, the ICBL and the CMC.¹¹⁶⁴

In the present cluster munition context, a few examples may already be mentioned to show that the prohibition of the use, transfer, stockpiling and production of cluster munitions has an impact beyond those that have already signed and/or ratified the CCM.

For instance, Singapore, although it will not become party to the CCM at the moment, has declared an indefinite moratorium on cluster munitions in November 2008 in order to “ensure that Singapore’s cluster munitions will not be transferred to other parties who might use them in an irresponsible and indiscriminate manner. Through this imposition, we help stem the proliferation of cluster munitions.”¹¹⁶⁵ Also state not party Argentina has forsworn any future production of cluster munitions. Finland, Poland and Romania restrict any future potential use of cluster munitions to the defence of their own territories, i.e. will not use cluster munitions in multinational operations outside of their own territories.¹¹⁶⁶

With regard to the United States, the cluster munition policy of the U.S. Department of Defence still valid now was released on 19 June 2008.¹¹⁶⁷ While the United States recognised the need to minimise the unintended harm to civilian targets associated with unexploded ordnance from cluster munitions, she emphasises that cluster munitions are legitimate weapons with clear military utility. In particular, in the view of the United States, there remains a military requirement to engage area targets that include massed formations of enemy forces, individual targets dispersed over a defined area, targets whose precise locations are not known, and time-sensitive and moving targets. Consequently, the loss of the ability to employ cluster munitions would create a capability gap for indirect fire of area targets and

¹¹⁶³ H. H. Koh, “Review Essay: Why Do Nations Obey International Law?”, 106 Yale Journal of International Law 2599, 2656 (1997).

¹¹⁶⁴ See Preamble, para. 8, 1997 Ottawa Convention, *supra* note 224; Preamble, para. 17, Convention on Cluster Munitions, *supra* note 33.

¹¹⁶⁵ Singapore, “Joint Press Statement by Ministry of Foreign Affairs and Ministry of Defence: Singapore Imposes Export Moratorium on the Export of Cluster Munitions”, 26 November 2008, http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=4543 (last visited 26 January 2010).

¹¹⁶⁶ Human Rights Watch, “Cluster Munitions Information Chart”, November 2009, <http://www.hrw.org/en/news/2009/07/17/cluster-munition-information-chart> (last visited 26 March 2010).

¹¹⁶⁷ United States, Secretary of Defence, “DoD Policy on Cluster Munitions and Unintended Harm to Civilians”, 19 June 2008, <http://www.defenselink.mil/news/d20080709cmpolicy.pdf> (last visited 26 January 2010).

require an increase in other resources. The policy only prohibits the use and transfer of cluster munitions that after arming, result in more than 1 % unexploded ordnance across the range of intended operational environments after 2018.¹¹⁶⁸ Accordingly, the U.S. military may use any type of cluster munition, even the most unreliable ones, for almost another decade. This currently prompts 24 U.S. Senators to back a Cluster Munitions Civilian Protection Bill which would require the 1% reliability for all U.S. cluster munitions with immediate effect with the possibility of a presidential waiver if he certifies that any other use is vital to protect the security of the United States. However, within a period of 30 days, the President would have to specify what measures will be taken to protect civilians and whether or not the cluster munitions employed are fitted with fail safe mechanisms.¹¹⁶⁹

In contrast to its own potential use of cluster munitions, regarding exports, as part of the Omnibus Appropriations Act 2009 which determined the U.S. budget, a section was included banning with immediate effect the export of cluster munitions by the United States, “unless the submunitions of the cluster munitions have a 99 percent or higher functioning rate; and the agreement applicable to the assistance, transfer, or sale of the cluster munitions or cluster munitions technology specifies that the cluster munitions will only be used against clearly defined military targets and will not be used where civilians are known to be present.”¹¹⁷⁰

This latter step is significant in view of the fact that the United States is believed to have transferred hundreds of thousands of cluster munitions containing tens of millions of unreliable and inaccurate submunitions to at least 30 countries. Clearly, the more cluster munitions are transferred to other states the more likely they will get used, as has happened with U.S. cluster munitions by Israel in Lebanon and Syria, by Morocco in the Western Sahara, by the United Kingdom and the Netherlands in the former Yugoslavia, and by the United Kingdom in Iraq.¹¹⁷¹ Moreover, it has been assumed that only a fraction of the current U.S. cluster munition stockpile would fulfil this standard.¹¹⁷²

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ Cluster Munitions Civilian Protection Act 2009: A bill to limit the use of cluster munitions, 111st Session of Congress, 11 February 2009, <http://www.opencongress.org/bill/111-h981/text> (last visited 26 January 2010).

¹¹⁷⁰ United States, 111th Congress, Omnibus Appropriations Act 2009, Section 7056 (b), signed by the U.S. President on 11 March 2009, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1105enr.txt.pdf (last visited 26 January 2010).

¹¹⁷¹ Human Rights Watch/Landmine Action/Landmine Monitor/International Campaign to Ban Landmines/Cluster Munition Coalition, “Banning Cluster Munitions”, *supra* note 1151, at 260.

¹¹⁷² Human Rights Watch, “U.S. Cluster Bomb Exports Banned: Obama Should Initiate Review of US Stance on Treaty”, 12 March 2009, <http://www.hrw.org/en/news/2009/03/12/us-cluster-bomb-exports-banned> (last visited 26 January 2010).

It is instructive to note that the current U.S. national position on cluster munitions – while significantly less ambitious than the standards set by the CCM – is stronger than the current text under discussion in the CCW for a potential Draft Protocol VI. This is because the U.S. prohibits any transfers of cluster munitions other than those for weapons with sub-munitions that result in a “functioning rate” of 99% with immediate effect, while the Draft Protocol VI contemplates the possibility of a transition period in that respect. For the aim of the CCM to stigmatise the weapon this would be devastating, as the ultimate goal should be to pressure the United States and others into eventually replacing all cluster munitions that may scatter explosives indiscriminately over an area and leave behind large numbers of unexploded sub-munitions. One may cast legitimate doubts on whether such results may be achieved if the current U.S. policy is already given the stamp of legitimacy by a Protocol VI to the CCW.¹¹⁷³

The process of stigmatisation not only affects states but also extends to important other sectors, such as arms manufacturers. One illustrative recent example involves the powerful German Diehl arms manufacturing company, the producer of SMArt 155, one of the types of “sensor fused munitions” to which the *presumption* of exclusion from the definition of prohibited cluster munitions in the CCM applies. Diehl deemed it necessary to sue an internet journalist based in Regensburg for saying that the SMArt 155 that Diehl produces is a “cluster munition”.¹¹⁷⁴ Accordingly, Diehl sought a permanent Court injunction to prohibit the designation of “cluster munition” for its SMArt 155 to silence criticism of these sensor fused weapons never used on the battlefield. The company threatened to ask a fine of up to 250.000 Euro had the journalist maintained his characterisation of SMArt 155 as a “cluster munition”.¹¹⁷⁵ The dispute was finally put to rest by an out of court settlement which resulted in the journalist accepting not to employ the designation of “cluster munition” for SMArt 155 any more and Diehl withdrawing its action in exchange. Irrespective of how

¹¹⁷³ The view that a future Protocol VI could play a similar role in relation to the CCM as Amended Protocol II in relation to the 1997 Ottawa Convention is an inaccurate analogy, since it overlooks the essential fact that with regard to anti-personnel mines, Amended Protocol II was concluded *prior to* the Ottawa Convention, not thereafter. Thus, Amended Protocol II could not have the effect of lowering standards of the Ottawa Convention. On the other hand, this danger is very real for a future Protocol VI in relation to the CCM.

¹¹⁷⁴ The triggering event was an online article published by Stephan Aigner in the run-up to Bavarian elections in 2008 in which he criticised the Diehl arms company on the occasion of the award of an order of merit to Werner Diehl, Vice CEO of Diehl Stiftung and Co KG, by then Bavarian Prime Minister Günther Beckstein. See S. Aigner, “Verdienstorden und Streubomben”, Regensburg-Digital, 25 July 2008, <http://www.regensburg-digital.de/?p=1411> (last visited 26 January 2010).

¹¹⁷⁵ German-Foreign-Policy.Com, “Ban With Exemption”, 2 March 2009, <http://www.german-foreign-policy.com/en/fulltext/56230> (last visited 26 January 2010).

one would evaluate this settlement,¹¹⁷⁶ the very fact that one past producer company of cluster munitions would no longer want to be associated with these weapons, albeit for commercial reasons, shows that the stigmatisation process is well on its way.

Naturally, this stigmatisation process is far from over. One first precondition that the CCM can have this effect is to get as many states parties within the shortest time possible to make sure that especially the demand side of cluster munitions dries up. The first step in this regard is the swift entry into force of the CCM on 1 August 2010. The second is to maintain pressure by civil society represented by the CMC which contributed greatly to build the stigma surrounding the weapon and to name and shame those shunning the CCM. In the context of the 1997 Ottawa Convention, ongoing pressure was exerted by the ICBL especially through yearly publication of the Landmine Monitor which is now respected as the most authoritative source of information on implementation of the 1997 Ottawa Convention.¹¹⁷⁷ A first global overview of the state of affairs entitled *Banning Cluster Munitions: Government Policy and Practice* in respect of cluster munitions was produced jointly by the CMC, the ICBL, Landmine Action, Human Rights Watch and Landmine Monitor in 2009.¹¹⁷⁸ Arrangements are already in place to extend Landmine Monitor in 2010 to become the *Landmine and Cluster Munition Monitor*, thus also the civil society monitoring tool for the CCM.

At the same time, it must be acknowledged that this strategy of stigmatisation can only yield direct results with regard to those states that attach certain importance to their good standing in the international community. Accordingly, this author is of the view that in particular Russia and China will unlikely be impressed with “naming and shaming” techniques. As regards future use of cluster munitions, it is suggested that this has more negative relevance in terms of Russia, since Russia has been one of the biggest users of cluster munitions and use of these weapons remains a real prospect in light of recent Russian cluster munition use in Georgia. For China, a strategy that targets the demand side of cluster munitions will already yield significant results. Here, a lesson to be learnt from the recent past is to not only target state recipients of Chinese cluster munitions but also non-state actors as evidenced by Hezbollah’s use of Chinese cluster munitions. In this sense, universalisation

¹¹⁷⁶ Be it only noted here that the fact that the company Diehl attempted to monopolise the discussion on how to interpret the CCM and what to designate a cluster munition sparked significant uproar in some German media which saw this as an unjustifiable attempt to curtail the freedom of expression. For a compilation of critical German media reports on this case, see <http://waffen-diehl.de/> (last visited 26 January 2010).

¹¹⁷⁷ On Landmine Monitor as a civil society monitoring tool, see M. Wareham, “Evidence-Based Advocacy: Civil Society Monitoring of the Mine Ban Treaty” in Williams *et al.* (eds.), *Banning Landmines*, *supra* note 403, at 49-67.

¹¹⁷⁸ Human Rights Watch *et al.*, “Banning Cluster Munitions”, *supra* note 1151.

efforts should aim at getting almost all other states on board to make it economically less viable for Russia and China but also for India or South Korea to produce and export these weapons.

Apart from these great powers, one major stumbling block towards universalising the CCM will constitute the traditional disarmament mindset of certain states which argue strictly on the basis of reciprocity. In that respect, they ask why they should become party to the CCM if their neighbouring states and/or enemies do not show any willingness in this regard. This is true for diverse countries like Ethiopia, Finland, Georgia or Qatar,¹¹⁷⁹ and in this author's view, this would also account for fierce opposition to the CCM by India and Pakistan which in any event are known not to be overly committed to other pressing disarmament issues either.¹¹⁸⁰

Significant efforts must be spent to change these traditional disarmament attitudes which seem to be still rooted in a Cold War perception of disarmament where efforts in this field could be explained by maintaining a balance of deterrence capabilities between states. The CCM, however, is above anything else an initiative to protect individuals from some particularly objectionable effects of armed conflicts and any strategic arguments based on Cold War rhetoric seem to be misplaced in this context.

Finally, the broader inevitable question may be raised what lessons may be learnt from the conclusion of the CCM for other disarmament processes. While the exact content and structure of the CCM may not be easily replicated in other contexts, one fundamental lesson is that disarmament endeavours are necessary and may be ultimately successful where they are guided by a humanitarian instead of strategic rationale.¹¹⁸¹

¹¹⁷⁹ See *ibid.*, in the respective country sections.

¹¹⁸⁰ It is commonly known that both states are one of the few that never became party to the Non-Proliferation Treaty.

¹¹⁸¹ For instance, the current endeavour to conclude an Arms Trade Treaty as a means of especially halting the proliferation of small arms and light weapons shares the objective of the better protection of civilians from the humanitarian consequences of such weapons as underpinning element with the CCM and the 1997 Ottawa Convention. However, the fact that private possession of small arms is considered lawful by some states and that these weapons are not only used in armed conflicts but also for peaceful law enforcement purposes raise additional complexities which are not present in the case of cluster munitions. See Borrie *et al.*, "Learn, adapt, succeed", *supra* note 1, at 19-26.

Annexes

Lima Conference Discussion Text¹¹⁸²

“Preamble

Have agreed as follows:

Article 1 – General obligations and scope of application

Because of their unacceptable harm to civilians and civilian objects during and after use, each State Party undertakes never under any circumstances:

- a) To use cluster munitions as defined in Article 2.
- b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions as defined in Article 2.
- c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this convention.

Article 2 – Definition

The following weapons systems shall be considered prohibited cluster munitions under this treaty:

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.

Article 3 – Storage and stockpile destruction

1. Each State Party undertakes to separate cluster munitions as defined in Article 2 from stocks for potential use, and keep in separate stockpiles for the purpose of destruction.
2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions as defined in Article 2 under its jurisdiction or control, as soon as possible but not later than six years after the entry into force of this Convention for that State Party.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions, for a period of up to ten years.
4. Each request shall contain:
 - a) The duration of the proposed extension;

¹¹⁸² Chair’s Discussion Text for the Lima Conference, 23-25 May 2007, http://www.clusterconvention.org/pages/pages_vi/vib_opdoc_chairslima.html (last visited 26 January 2010).

b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means required for the destruction of all the cluster munitions referred to in paragraph 1,

c) A plan for how and when stockpile destruction will be completed.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 4 – Clearance of unexploded ordnance from cluster munitions

1. Each State Party undertakes to clear all unexploded ordnance from cluster munitions in areas under its jurisdiction and control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which cluster munitions are known or suspected to be present and shall ensure as soon as possible that all cluster munitions in such areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all cluster munitions contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions, for a period of up to ten years.

4. Each request shall contain:

a) The duration of the proposed extension;

b) A detailed explanation of the reasons for the proposed extension, including:

i) The preparation and status of work conducted under national clearing/demining programs;

ii) The financial and technical means available to the State Party for the destruction of all the cluster munitions; and

iii) Circumstances which impede the ability of the State Party to destroy all the cluster munitions in contaminated areas;

c) The humanitarian, social, economic, and environmental implications of the extension; and

d) Any other information relevant to the request for the proposed extension.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional

information on what has been undertaken in the previous extension period pursuant to this Article.

Article 5 – International cooperation and assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.
2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes.
3. Each State Party in a position to do so shall provide assistance for clearance of cluster munitions and related activities. Such assistance may be provided, inter alia, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis.
4. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions as defined in Article 2.
5. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national program to determine, inter alia:
 - a) The extent and scope of the contamination of unexploded ordnance from cluster munitions;
 - b) The financial, technological and human resources required for the implementation of the program;
 - c) The estimated number of years necessary to clear all unexploded ordnance in contaminated areas under the jurisdiction or control of the concerned State Party;
 - d) Awareness activities to reduce the incidence of injuries or deaths caused by unexploded ordnance from cluster munitions;
 - e) Assistance to victims from cluster munitions;
 - f) The relationship between the Government of the concerned State Party and the relevant governmental, inter-governmental or non-governmental entities that will work in the implementation of the program.
6. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

Article 6 – Victim assistance

1. Each State Party shall, in accordance with applicable international human rights standards, endeavour to take adequate steps such as providing medical care and rehabilitation as well as facilitating social and economic reintegration of victims of cluster munitions, in order to ensure the full realisation of their human rights and respect for their inherent dignity.
2. Each State Party in a position to do so shall provide assistance for the medical care and rehabilitation as well as social and economic reintegration of victims of cluster munitions and for cluster munitions awareness programs. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.

Article 7 – Transparency measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:

- a) The national implementation measures referred to in Article 9;
- b) The total of all stockpiled cluster munitions as defined in Article 2 owned or possessed by it, or under its jurisdiction or control, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;
- c) To the extent possible, the location of all areas that contain, or are suspected to contain, unexploded ordnance from cluster munitions under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munitions in each affected area and when they were used;
- d) The status of programs for the conversion or de-commissioning of production facilities for cluster munitions as defined in Article 2;
- e) The status of programs for the destruction, in accordance with Article 3, of cluster munitions as defined in Article 2, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
- f) The types and quantities of all cluster munitions destroyed in accordance with Article 3, after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of cluster munition destroyed;
- g) The technical characteristics of each type of cluster munition as defined in Article 2 produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate the clearance of unexploded ordnance caused by these munitions; and
- h) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified to be contaminated by unexploded ordnance from cluster munitions.

2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8 – Facilitation and clarification of compliance

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

2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The

Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. The Meeting of States Parties may consider and approve further procedures and mechanisms for determining instances of non-compliance with the provisions of this Convention and on the steps that may be taken in such instances.

Article 9 – National implementation measures

Each State shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10 – Settlement of disputes

1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.

2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

Article 11 – Meetings of States Parties

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:

- a) The operation and status of this Convention;
- b) Matters arising from the reports submitted under the provisions of this Convention;
- c) International cooperation and assistance in accordance with Article 5 and 6;
- d) The development of technologies to clear unexploded ordnance from cluster munitions;
- e) Submissions of States Parties under Article 8 and 10;
- f) Decisions on submissions of States Parties as provided for in Article 3 and 4.

2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

Article 12 – Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

a) To review the operation and status of this Convention;

b) To consider the need for and the interval between further meetings of the States Parties referred to in paragraph 2 of Article 11;

c) To take decisions on submissions of States Parties as provided for in Article 3 and 4.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13 – Amendments

1. At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14 – Costs

1. The costs of the Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Article 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted

appropriately.

Article 15 – Signature

This Convention, done at (...), on (...), shall be open for signature at (...), by all States from (...) until (...), and at the United Nations Headquarters in New York from (...) until its entry into force.

Article 16 – Ratification, acceptance, approval or accession

1. This Convention is subject to ratification, acceptance or approval of the Signatories.
2. It shall be open for accession by any State which has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17 – Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 20th instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18 – Provisional application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force.

Article 19 – Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20 – Duration and withdrawal

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six- month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.
4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

Article 21 – Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 22 – Authentic texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.”

Vienna Conference Discussion Text¹¹⁸³

.....
Resolved to do their utmost in providing assistance for the medical care and rehabilitation, psychological support and social and economic inclusion of victims of cluster munitions, which *inter alia* include the persons directly affected, their families and communities;

Determined to ensure the full realisation of the rights of victims of cluster munitions, and recognizing their inherent dignity;

Bearing in mind the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to this Convention undertake to ensure and promote the full realization of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability.

Mindful of the need to adequately coordinate efforts undertaken in various fora to address the rights and needs of victims of various types of weapons

.....

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

For the purposes of this Convention,

“**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) ...

“**Explosive sub-munitions**” means munitions that in order to perform their task separate from a parent munition and are designed to function by detonating an explosive charge prior to, on or immediately after impact.

¹¹⁸³ Vienna Conference on Cluster Munitions, Discussion Text and Explanatory Annex, http://www.clusterconvention.org/pages/pages_vi/vib_opdoc_chairsvienna.html#annex (last visited 26 January 2010).

“Unexploded cluster munitions” means cluster munitions that have been primed, fused, armed, or otherwise prepared for use and used. They may have been fired, dropped, launched or projected, and should have exploded but failed to do so.

“Abandoned cluster munitions” means cluster munitions that have not been used and that have been discarded or dumped, and that are no longer under the control of the party that discarded or dumped them. Abandoned cluster munitions may or may not have been prepared for use.

“Cluster munition remnants” means unexploded cluster munitions and abandoned cluster munitions.

“Transfer” means the physical movement of cluster munitions into or from national territory or the transfer of title to or control over cluster munitions, but does not include the transfer of territory containing cluster munition remnants.

Article 3 – Storage and Stockpile Destruction

1. Each State Party undertakes to separate cluster munitions from stocks for potential use and keep them in separate stockpiles for the purpose of destruction.
2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions under its jurisdiction or control, as soon as possible but not later than six years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 within that time period it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions for a period of up to ten years.
4. Each request shall contain:
 - a) The duration of the proposed extension;
 - b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article;
 - c) A plan for how and when stockpile destruction will be completed.
5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.
6. Notwithstanding the provisions of Article 1 the transfer of cluster munitions for the purpose of destruction is permitted.

Article 4 – Clearance and Destruction of Cluster Munition Remnants

1. Each State Party undertakes to clear and destroy or ensure the clearance and destruction of cluster munition remnants existing prior to entry into force of this Convention, in areas under its jurisdiction or control, as soon as possible but not later than 5 years after the entry into force of this Convention for that State Party.
2. As soon as feasible after entry into force of this Convention, each State Party that has been affected in the past or may be affected in the future by cluster munition use shall take the following measures, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:
 - (a) survey and assess the threat posed by cluster munition remnants;
 - (b) assess and prioritise needs and practicability in terms of marking, protection of civilians and clearance and destruction and take steps to mobilise resources to carry out these activities.
 - (c) ensure that all cluster munition remnants in such areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.
 - (d) clear and destroy all cluster munition remnants within its jurisdiction.
3. In conducting the above activities State Parties shall take into account international standards, including the International Mine Action Standards.
4. Where cluster munition remnants were delivered by a State Party before entry into force of this Convention to territory now under the jurisdiction or control of another State Party to this Convention, the former State Party

shall provide bilaterally, *inter alia*, technical, financial, material or human resources assistance to facilitate the marking, clearance and destruction of such cluster munition remnants.

5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants, referred to in paragraph 1 of this Article, within that time period, it may submit a request to a Meeting of the States Parties, or a Review Conference, for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants, for a period of up to 5 years.

6. Each request shall contain:

a) The duration of the proposed extension;

b) A detailed explanation of the reasons for the proposed extension, including:

i) The preparation and status of work conducted under national clearance and demining programmes;

ii) The financial and technical means available to, and required by, the State Party for the clearance and destruction of all cluster munition remnants; and

iii) Circumstances which impede the ability of the State Party to destroy all the cluster munition remnants in contaminated areas;

c) The humanitarian, social, economic, and environmental implications of the extension; and

d) Any other information relevant to the request for the proposed extension.

7. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 6 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

8. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 5 – Victim Assistance

(1) Each State Party with respect to victims of cluster munitions in areas under its jurisdiction or control shall, in accordance with applicable international human rights standards, adequately provide for their medical care and rehabilitation, psychological support and social and economic inclusion. Each State Party should make every effort to collect reliable relevant data with respect to victims of cluster munitions.

(2) In fulfilling its obligation under paragraph 1 of this Article each State Party shall take into consideration relevant guidelines and good practices in the areas of medical care and rehabilitation, psychological support as well as social and economic inclusion.

Article 6 – International Cooperation and Assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.

2. All States Parties in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, *inter alia*, through the United Nations system; international, regional or national organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis.

3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes.

4. Each State Party in a position to do so and in particular a State Party that has used cluster munitions on the territory of another State Party, shall provide assistance for clearance of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact of clearance of cluster munition remnants and related activities.

5. Each State Party in a position to do so shall provide assistance for the clearance and destruction of stockpiled cluster munitions.

6. Each State Party in a position to do so shall provide assistance to State Parties affected by the use of cluster munitions to identify, assess and prioritize needs and practical measures in terms of marking, protection of civilians and clearance and destruction as provided in Article 4.

7. States Parties may, with the purpose of developing a national action programme, request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, *inter alia*:

a) The extent and scope of the contamination of cluster munition remnants;

b) The financial, technological and human resources required for the implementation of the program;

c) The estimated number of years necessary to clear all cluster munitions remnants in contaminated areas under the jurisdiction or control of the concerned State Party;

- d) Awareness activities to reduce the incidence of injuries or deaths caused by cluster munition remnants;
 - e) Assistance to victims from cluster munitions;
 - f) The coordination relationship between the Government of the concerned State Party and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the program.
8. Each State Party in a position to do so shall provide assistance for medical care, rehabilitation and psychological support, social and economic reintegration of victims of cluster munitions and for risk education and cluster munitions awareness activities. Such assistance may be provided, *inter alia*, through the United Nations System, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.
9. Each State Party in a position to do so may contribute to relevant trust funds, in order to facilitate the provision of assistance under this Article.
10. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

Article 7 – Transparency Measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:
- a) The national implementation measures referred to in Article 9;
 - b) The total of all stockpiled cluster munitions owned or possessed by it, or under its jurisdiction or control, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;
 - c) To the extent possible, all other cluster munitions that are stockpiled on its territory;
 - d) The technical characteristics of each type of cluster munitions produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate the clearance of cluster munition remnants;
 - e) To the extent possible, the location of all areas that contain, or are suspected to contain, cluster munition remnants, under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munitions in each affected area and when they were used;
 - f) The status of programs for the conversion or de-commissioning of production facilities for cluster munitions;
 - g) The status of programs for the destruction, in accordance with Article 3, of cluster munitions, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
 - h) The types and quantities of all cluster munitions cleared and destroyed in accordance with Article 4, after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of cluster munitions cleared and destroyed; and
 - i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified to be contaminated by cluster munition remnants.
 - j) The measures taken in accordance with the provisions of Article 5 to adequately provide for the medical care and rehabilitation, psychological support and social and economic inclusion of victims of cluster munitions as well as to collect reliable relevant data.
 - k) In addition, each State Party shall provide the name and contact details of the institutions mandated to provide information as described in this Article and of the institutions mandated to carry out the measures described in this Article.
2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the previous calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.
3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8 – Facilitation and Clarification of Compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.
2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall

provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any Meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. Where a matter has been submitted to it pursuant to paragraph 3 the Meeting of the States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine the Meeting of the States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 5.

6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article the Meeting of States Parties may decide to adopt such other general procedures for clarification and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

Article 9 – National Implementation Measures

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons possessing its nationality, or by any natural or legal person anywhere on its territory or in any other place under its jurisdiction or control.

Article 10 – Settlement of Disputes

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of the States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.

2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

Article 11 – Meetings of States Parties

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the interpretation, application or implementation of this Convention, including:

- a) The operation and status of this Convention;
- b) Matters arising from the reports submitted under the provisions of this Convention;
- c) International cooperation and assistance in accordance with Article 6;
- d) The development of technologies to clear cluster munition remnants;
- e) Submissions of States Parties under Articles 8 and 10;
- f) Submissions of States Parties as provided for in Articles 3 and 4.

2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent Meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these Meetings as observers in accordance with the agreed Rules of Procedure.

Article 12 – Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review

Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

- a) To review the operation and status of this Convention;
- b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;
- c) To take decisions on submissions of States Parties as provided for in Articles 3 and 4.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13 – Amendments

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notifies the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties requests that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention that have accepted it upon deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14 – Costs

1. The costs of the Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

Article 15 – Signature

This Convention, done at (...), on (...), shall be open for signature at (...), by all States from (...) until (...), and at the United Nations Headquarters in New York from (...) until its entry into force.

Article 16 – Ratification, Acceptance, Approval or Accession

1. This Convention is subject to ratification, acceptance or approval of the Signatories.

2. It shall be open for accession by any State that has not signed the Convention.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17 – Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 20th instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or

accession.

Article 18 – Provisional Application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force.

Article 19 – Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20 - Duration and Withdrawal

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.
4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

Article 21 – Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 22 – Authentic Texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

EXPLANATORY ANNEX

Article 1: General obligations and scope of application

Within the framework of the current phrasing on general obligations and scope, it should be noted that at the Lima meeting, some States proposed that specific provision needed to be made for military interoperability with non States Party.

Article 2: Definitions

At the Lima Meeting there appeared to be broad agreement that landmines would be excluded from the definition of “cluster munition” since they are already covered by other treaties. Some States also proposed that one or more of the following should be excluded: flare, smoke and chaff munitions and sub-munitions that are inert post impact. There were other proposals to exclude sub-munitions that aim, detect and engage point targets, and some States proposed to exclude cluster munitions which contain fewer than a specified number of explosive sub-munitions, sub-munitions with self destruct or self deactivation or other failsafe mechanisms, explosive sub-munitions with a tested failure rate of less than a specified percentage, and that the age of the sub-munition should be relevant. Some other States opposed some or all of these elements, with some proposing a comprehensive prohibition on all cluster munitions.

Article 3: Stockpile Destruction

At the Lima Meeting some delegations raised the possibility of permitting the retention of cluster munitions (or sub-munitions) to facilitate the development of clearance and disposal capabilities. Other delegations expressed the view that such retention was neither necessary nor justified. A range of views was expressed as to the time-frame that should be permitted for stockpile destruction.

Wellington Discussion text¹¹⁸⁴
Draft Cluster Munitions Convention

The States Parties to this Convention,

Deeply concerned that civilian populations and individual civilians continue to suffer most from armed conflict,

Determined to put an end for all time to the suffering and casualties caused by the use of cluster munitions that kill or maim innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, delay or prevent the return of refugees and internally displaced persons, and have other severe humanitarian consequences that can persist for many years after use,

Concerned that cluster munition remnants can undermine international efforts to build peace and security, as well as implementation of human rights and fundamental freedoms,

Believing it necessary to do their utmost to contribute in an efficient and coordinated manner to resolving the challenge of removing cluster munition remnants located throughout the world, and to assure their destruction,

Deeply concerned also at the dangers presented by the large stockpiles of cluster munitions retained for operational use in national inventories, and determined to ensure the speedy destruction of these stockpiles,

Determined to ensure the full realisation of the rights of victims of cluster munitions, and recognizing their inherent dignity,

Resolved to do their utmost in providing assistance for the medical care and rehabilitation, psychological support and social and economic inclusion of victims of cluster munitions,

Bearing in mind the Convention on the Rights of Persons with Disabilities which, inter alia, requires that States Parties to that Convention undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability,

Mindful of the need adequately to coordinate efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and resolved to avoid discrimination among victims of various types of weapons,

Welcoming the global support for the international norm prohibiting the use of anti-personnel mines, enshrined in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

Welcoming also the entry into force on 12 November 2006 of the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, and wishing to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments,

Welcoming furthermore the steps taken in recent years, both unilaterally and multilaterally, aimed at prohibiting, restricting or suspending the use, stockpiling, production and transfer of cluster munitions,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and recognizing the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world,

¹¹⁸⁴ http://www.clusterconvention.org/pages/pages_vi/vib_opdoc_chairswellington.html (last visited 26 January 2010).

Reaffirming the Declaration of the Oslo Conference on Cluster Munitions, by which States inter alia committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and to 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,

Guided by the principle of international humanitarian law that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and in particular on the general rule that parties to a conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against military objectives only,

HAVE AGREED as follows:

Article 1 - General obligations and scope of application

1. 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.
2. This Convention does not apply to “mines” as defined by the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects.

Article 2 - Definitions

For the purposes of this Convention:

“Cluster munition victims” means persons who have suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their families and communities;

“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) a munition or sub-munition designed to dispense flares, smoke, pyrotechnics or chaff;
- (b) a munition or sub-munition designed to produce electrical or electronic effects;
- (c) ...

“Explosive sub-munitions” means munitions that in order to perform their task separate from a parent munition and are designed to function by detonating an explosive charge prior to, on or after impact;

“Unexploded cluster munitions” means cluster munitions that have been primed, fused, armed, or otherwise prepared for use and which have been used. They may have been fired, dropped, launched or projected, and should have exploded but failed to do so.

“Unexploded cluster munitions” includes both unexploded parent munitions and unexploded explosive sub-munitions;

“Abandoned cluster munitions” means cluster munitions that have not been used and that have been discarded or dumped, and that are no longer under the control of the party that discarded or dumped them. They may or may not have been prepared for use;

“Cluster munition remnants” means unexploded cluster munitions and abandoned cluster munitions;

“Transfer” means the physical movement of cluster munitions into or from national territory or the transfer of title to or control over cluster munitions, but does not include the transfer of territory containing cluster munition remnants.

Article 3 - Storage and stockpile destruction

1. Each State Party undertakes to remove all cluster munitions from stockpiles of munitions retained for operational use and keep them in separate stockpiles for the purpose of destruction.
2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions under its jurisdiction or control as soon as possible but not later than six years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.
3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within that time period it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions for a period of up to ten years.
4. Each request shall contain:
 - (a) The duration of the proposed extension;
 - (b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article; and
 - (c) A plan for how and when stockpile destruction will be completed.
5. The meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.
6. Notwithstanding the provisions of Article 1 of this Convention the transfer of cluster munitions for the purpose of destruction is permitted.

Article 4 - Clearance and destruction of cluster munition remnants

1. Each State Party undertakes to clear and destroy, or ensure the clearance and destruction, of cluster munition remnants located in areas under its jurisdiction or control, as follows:
 - (a) Where cluster munition remnants are located in areas under its jurisdiction or control at the date of entry into force of this Convention for that State Party, such clearance and destruction shall be completed as soon as possible but no later than 5 years from that date;
 - (b) Where, after entry into force of this Convention for that State Party, cluster munitions have become cluster munition remnants located in areas under its jurisdiction or control, such clearance and destruction must be completed as soon as possible but no later than 5 years after such cluster munitions became cluster munition remnants.
2. In fulfilling the obligations set out in paragraph 1 of this Article, each State Party shall as soon as possible take the following measures, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:
 - (a) Survey and assess the threat posed by cluster munition remnants;
 - (b) Assess and prioritise needs and practicability in terms of marking, protection of civilians and clearance and destruction, take steps to mobilise resources and develop a national plan to carry out these activities;
 - (c) Ensure that all cluster munition remnants located in areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects;
 - (d) Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and
 - (e) Conduct risk education to ensure awareness among civilians living in or around areas in which cluster munition remnants are located of the risks posed by such remnants.
3. In conducting the above activities each State Party shall take into account international standards, including the International Mine Action Standards.
4. This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for it and have become cluster munition remnants located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter. In such cases, upon entry into force of this Convention for both States Parties, the former State Party shall provide, inter alia, technical, financial, material or human resources assistance to the latter State Party,

either bilaterally or through a mutually agreed third party, including through the UN system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants. Such assistance shall include information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.

5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants referred to in paragraph 1 of this Article within that time period it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants for a period of up to 5 years.

6. A request for an extension shall be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the time period referred to in paragraph 1 of this Article for that State Party. Each request shall contain:

- (a) The duration of the proposed extension;
- (b) A detailed explanation of the reasons for the proposed extension, including:
 - (i) The preparation and status of work conducted under national clearance and demining programmes;
 - (ii) The financial and technical means available to, and required by, the State Party for the clearance and destruction of all cluster munition remnants; and
 - (iii) Circumstances that impede the ability of the State Party to destroy all cluster munition remnants located in areas under its jurisdiction or control;
- (c) The humanitarian, social, economic, and environmental implications of the extension; and
- (d) Any other information relevant to the request for the proposed extension.

7. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 6 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

8. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 5 - Victim Assistance

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with international human rights law, adequately provide for their medical care and rehabilitation, psychological support and social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligation under paragraph 1 of this Article each State Party shall take into consideration relevant guidelines and good practices in the areas of medical care and rehabilitation, psychological support as well as social and economic inclusion.

Article 6 - International cooperation and assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.

2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions or on a bilateral basis.

3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes.

4. In addition to any obligations it may have pursuant to paragraph 4 of Article 4 of this Convention, each State Party in a position to do so shall provide assistance for clearance of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact on clearance of cluster munition remnants and related activities.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions, and shall also provide assistance to identify, assess and prioritize needs and practical measures in terms of marking, risk education, protection of civilians and clearance and destruction as provided in Article 4.

6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall

urgently provide emergency assistance to the affected State Party.

7. Each State Party in a position to do so shall provide assistance for medical care, rehabilitation and psychological support, social and economic inclusion of all cluster munition victims. Such assistance may be provided, inter alia, through the United Nations System, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations or on a bilateral basis.

8. Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties.

9. Each State Party in a position to do so may contribute to relevant trust funds in order to facilitate the provision of assistance under this Article.

10. Each State Party may, with the purpose of developing a national action plan, request the United Nations, regional organisations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, inter alia:

- (a) The nature and extent of cluster munition remnants located in areas under its jurisdiction or control;
- (b) The financial, technological and human resources required for the implementation of the plan;
- (c) The time estimated as necessary to clear all cluster munition remnants located in areas under its jurisdiction or control;
- (d) Risk education programmes and awareness activities to reduce the incidence of injuries or deaths caused by cluster munition remnants;
- (e) Assistance to cluster munition victims; and
- (f) The relationship between the Government of the State Party concerned and the relevant governmental, inter-governmental or non-governmental entities that will work in the implementation of the plan.

11. States Parties giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes.

Article 7 - Transparency measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party, on:

- (a) The national implementation measures referred to in Article 9 of this Convention;
- (b) The total of all stockpiled cluster munitions owned or possessed by it, or under its jurisdiction or control, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;
- (c) To the extent possible, all other cluster munitions that are stockpiled on its territory;
- (d) The technical characteristics of each type of cluster munitions produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information that may facilitate the clearance of cluster munition remnants;
- (e) To the extent possible, the location of all areas that contain, or are suspected to contain, cluster munition remnants, under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munitions in each affected area and when they were used;
- (f) The status of programmes for the conversion or de-commissioning of production facilities for cluster munitions;
- (g) The status of programmes for the destruction, in accordance with Article 3 of this Convention, of cluster munitions, including details of the methods that will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
- (h) The types and quantities of cluster munitions destroyed in accordance with Article 3 of this Convention, including details of the methods of destruction used, the location of the destruction sites and the applicable safety and environmental standards observed;
- (i) Stockpiles discovered after reported completion of the programme referred to in paragraph 7(h) of this Article;
- (j) The types and quantities of all cluster munitions remnants cleared and destroyed in accordance with Article 4 of this Convention, to include a breakdown of the quantity of each type of cluster munitions remnants cleared and destroyed;
- (k) The measures taken to provide risk education and, in particular, an immediate and effective warning to civilians living in areas under its jurisdiction or control in which cluster munition remnants are located;
- (l) The measures taken in accordance with the provisions of Article 5 of this Convention adequately to provide for the medical care and rehabilitation, psychological support and social and economic inclusion of victims of cluster munitions as well as to collect reliable relevant data; and
- (m) The name and contact details of the institutions mandated to provide information and to carry out the

measures described in this paragraph.
2. The information provided in accordance with paragraph 1 of this Article shall be updated by the States Parties annually, covering the previous calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.
3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8 - Facilitation and clarification of compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.
2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.
3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.
4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.
5. Where a matter has been submitted to it pursuant to paragraph 3 of this Article the Meeting of the States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine the Meeting of the States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 5 of this Convention.
6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article the Meeting of States Parties may decide to adopt such other general procedures for clarification and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

Article 9 - National implementation measures

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10 - Settlement of disputes

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of the States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.
2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

Article 11 - Meetings of States Parties

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the interpretation, application or implementation of this Convention, including:

- a) The operation and status of this Convention;
- b) Matters arising from the reports submitted under the provisions of this Convention;
- c) International cooperation and assistance in accordance with Article 6 of this Convention;
- d) The development of technologies to clear cluster munition remnants;
- e) Submissions of States Parties under Articles 8 and 10 of this Convention; and
- f) Submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. States not parties to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross and relevant non-governmental organisations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

Article 12 - Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

- a) To review the operation and status of this Convention;
- b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11 of this Convention; and
- c) To take decisions on submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

3. States not parties to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross and relevant non-governmental organisations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13 - Amendments

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notifies the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross and relevant non-governmental organisations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties requests that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention that have accepted it upon deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of

acceptance.

Article 14 - Costs

1. The costs of the Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.
2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

Article 15 - Signature

This Convention, done at (...), on (...), shall be open for signature at (...), by all States from (...) until (...), and at the United Nations Headquarters in New York from (...) until its entry into force.

Article 16 - Ratification, acceptance, approval or accession

1. This Convention is subject to ratification, acceptance or approval of the Signatories.
2. It shall be open for accession by any State that has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17 - Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 20th instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 20th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18 - Provisional application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force.

Article 19 - Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20 - Duration and withdrawal

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

Article 21 - Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 22 - Authentic texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

Declaration of the Wellington Conference on Cluster Munitions¹¹⁸⁵

States met in Wellington from February 18 to 22, 2008, to pursue an enduring solution to the grave humanitarian consequences caused by the use of cluster munitions. They are convinced that this solution must include the conclusion in 2008 of a legally binding international instrument prohibiting cluster munitions that cause unacceptable harm to civilians.

In that spirit they affirm that the essential elements of such an instrument should include:

- A prohibition on the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians,
- 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.

The following States:

encouraged by the work of the Wellington Conference, and previous Conferences in Vienna, Lima and Oslo;

encouraged further by numerous national and regional initiatives, including meetings in Brussels, Belgrade and San José, and measures taken to address the humanitarian impact of cluster munitions;

encouraged by the active support given to this subject by the United Nations, and in other fora;

encouraged, finally, by the active support of the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other Non-Governmental Organisations;

welcome the convening of a Diplomatic Conference by the Government of Ireland in Dublin on 19 May 2008 to negotiate and adopt a legally binding instrument prohibiting cluster

¹¹⁸⁵ Wellington Declaration on Cluster Munitions, 22 February 2008, <http://www.clusterconvention.org/downloadablefiles/wellingtondeclaration.pdf> (last visited 26 January 2010).

munitions that cause unacceptable harm to civilians;

also welcome the important work done by participants engaged in the cluster munitions process on the text of a draft Cluster Munitions Convention, dated 21 January 2008, which contains the essential elements identified above and decide to forward it as the basic proposal for consideration at the Dublin Diplomatic Conference, together with other relevant proposals including those contained in the compendium attached to this Declaration and those which may be put forward there;

affirm their objective of concluding the negotiation of such an instrument prohibiting cluster munitions that cause unacceptable harm to civilians in Dublin in May 2008;

invite all other States to join them in their efforts towards concluding such an instrument.

**DIPLOMATIC CONFERENCE FOR
THE ADOPTION OF A CONVENTION
ON CLUSTER MUNITIONS**

DUBLIN 19 – 30 MAY 2008
Convention on Cluster Munitions¹¹⁸⁶

The States Parties to this Convention,

Deeply concerned that civilian populations and individual civilians continue to bear the brunt of armed conflict,

Determined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned,

Concerned that cluster munition remnants kill or maim civilians, including women and children, obstruct economic and social development, including through the loss of livelihood, impede post-conflict rehabilitation and reconstruction, delay or prevent the return of refugees and internally displaced persons, can negatively impact on national and international peace-building and humanitarian assistance efforts, and have other severe consequences that can persist for many years after use,

Deeply concerned also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and *determined* to ensure their rapid destruction,

Believing it necessary to contribute effectively in an efficient, coordinated manner to resolving the challenge of removing cluster munition remnants located throughout the world, and to ensure their destruction,

Determined also to ensure the full realisation of the rights of all cluster munition victims and *recognising* their inherent dignity,

Resolved to do their utmost in providing assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion,

¹¹⁸⁶ Convention on Cluster Munitions, *supra* note 33.

Recognising the need to provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups,
Bearing in mind the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to that Convention undertake to ensure and promote the full realisation of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability,

Mindful of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and *resolved* to avoid discrimination among victims of various types of weapons,

Reaffirming that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience,

Resolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention,

Welcoming the very broad international support for the international norm prohibiting anti-personnel mines, enshrined in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

Welcoming also the adoption of the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its entry into force on 12 November 2006, and *wishing* to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments,

Bearing in mind also United Nations Security Council Resolution 1325 on women, peace and security and United Nations Security Council Resolution 1612 on children in armed conflict,

Welcoming further the steps taken nationally, regionally and globally in recent years aimed at prohibiting, restricting or suspending the use, stockpiling, production and transfer of cluster munitions,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and *recognising* the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world,

Reaffirming the Declaration of the Oslo Conference on Cluster Munitions, by which, *inter alia*, States recognised the grave consequences caused by the use of cluster munitions and committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and would establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation for victims, clearance of contaminated areas, risk reduction education and destruction of stockpiles,

Emphasising the desirability of attracting the adherence of all States to this Convention, and *determined* to work strenuously towards the promotion of its universalisation and its full implementation,

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and the rules that the parties to a conflict shall at

all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against military objectives only, that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects and that the civilian population and individual civilians enjoy general protection against dangers arising from military operations,

HAVE AGREED as follows:

Article 1

General obligations and scope of application

1. 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.
2. Paragraph 1 of this Article applies, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.
3. This Convention does not apply to mines.

Article 2

Definitions

For the purposes of this Convention:

1. "Cluster munition victims" means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;
2. "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 selfdestruction mechanism;
 - (v) Each explosive submunition is equipped with an electronic selfdeactivating feature;
3. "Explosive submunition" means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact;
4. "Failed cluster munition" means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;
5. "Unexploded submunition" means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended;
6. "Abandoned cluster munitions" means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and

that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;

7. "Cluster munition remnants" means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;

8. "Transfer" involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants;

9. "Self-destruction mechanism" means an incorporated automatically functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated;

10. "Self-deactivating" means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition;

11. "Cluster munition contaminated area" means an area known or suspected to contain cluster munition remnants;

12. "Mine" means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;

13. "Explosive bomblet" means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact;

14. "Dispenser" means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release;

15. "Unexploded bomblet" means an explosive bomblet that has been dispersed, released or otherwise separated from a dispenser and has failed to explode as intended.

Article 3

Storage and stockpile destruction

1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction.

2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within eight years of entry into force of this Convention for that State Party it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions by a period of up to four years. A State Party may, in exceptional circumstances, request additional extensions of up to four years. The requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 2 of this Article.

4. Each request for an extension shall set out:

(a) The duration of the proposed extension;

(b) A detailed explanation of the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article and, where applicable, the exceptional circumstances justifying it;

(c) A plan for how and when stockpile destruction will be completed;

(d) The quantity and type of cluster munitions and explosive submunitions held at the entry into force of this Convention for that State Party and any additional cluster munitions or explosive submunitions discovered

after such entry into force;

(e) The quantity and type of cluster munitions and explosive submunitions destroyed during the period referred to in paragraph 2 of this Article; and

(f) The quantity and type of cluster munitions and explosive submunitions remaining to be destroyed during the proposed extension and the annual destruction rate expected to be achieved.

5. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate. A request for an extension shall be submitted a minimum of nine months prior to the Meeting of States Parties or the Review Conference at which it is to be considered.

6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.

7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted.

8. States Parties retaining, acquiring or transferring cluster munitions or explosive submunitions for the purposes described in paragraphs 6 and 7 of this Article shall submit a detailed report on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers. If cluster munitions or explosive submunitions are transferred to another State Party for these purposes, the report shall include reference to the receiving party. Such a report shall be prepared for each year during which a State Party retained, acquired or transferred cluster munitions or explosive submunitions and shall be submitted to the Secretary-General of the United Nations no later than 30 April of the following year.

Article 4

Clearance and destruction of cluster munition remnants and risk reduction education

1. Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control, as follows:

(a) Where cluster munition remnants are located in areas under its jurisdiction or control at the date of entry into force of this Convention for that State Party, such clearance and destruction shall be completed as soon as possible but not later than ten years from that date;

(b) Where, after entry into force of this Convention for that State Party, cluster munitions have become cluster munition remnants located in areas under its jurisdiction or control, such clearance and destruction must be completed as soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants; and

(c) Upon fulfilling either of its obligations set out in sub-paragraphs (a) and (b) of this paragraph, that State Party shall make a declaration of compliance to the next Meeting of States Parties.

2. In fulfilling its obligations under paragraph 1 of this Article, each State Party shall take the following measures as soon as possible, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:

(a) Survey, assess and record the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas under its jurisdiction or control;

(b) Assess and prioritise needs in terms of marking, protection of civilians,

clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies;

(c) Take all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe;

(d) Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and

(e) Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.

3. In conducting the activities referred to in paragraph 2 of this Article, each State Party shall take into account international standards, including the International Mine Action Standards (IMAS).

4. This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter.

(a) In such cases, upon entry into force of this Convention for both States Parties, the former State Party is strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through the United Nations system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants.

(b) Such assistance shall include, where available, information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.

5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants referred to in paragraph 1 of this Article within ten years of the entry into force of this Convention for that State Party, it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants by a period of up to five years. The requested extension shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 1 of this Article.

6. A request for an extension shall be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the time period referred to in paragraph 1 of this Article for that State Party. Each request shall be submitted a minimum of nine months prior to the Meeting of States Parties or Review Conference at which it is to be considered. Each request shall set out:

(a) The duration of the proposed extension;

(b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to and required by the State Party for the clearance and destruction of all cluster munition remnants during the proposed extension;

(c) The preparation of future work and the status of work already conducted under national clearance and demining programmes during the initial ten year period referred to in paragraph 1 of this Article and any subsequent extensions;

(d) The total area containing cluster munition remnants at the time of entry into force of this Convention for that State Party and any additional

areas containing cluster munition remnants discovered after such entry into force;

- (e) The total area containing cluster munition remnants cleared since entry into force of this Convention;
- (f) The total area containing cluster munition remnants remaining to be cleared during the proposed extension;
- (g) The circumstances that have impeded the ability of the State Party to destroy all cluster munition remnants located in areas under its jurisdiction or control during the initial ten year period referred to in paragraph 1 of this Article, and those that may impede this ability during the proposed extension;
- (h) The humanitarian, social, economic and environmental implications of the proposed extension; and
- (i) Any other information relevant to the request for the proposed extension.

7. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 6 of this Article, including, *inter alia*, the quantities of cluster munition remnants reported, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate.

8. Such an extension may be renewed by a period of up to five years upon the submission of a new request, in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension a State Party shall submit relevant additional information on what has been undertaken during the previous extension granted pursuant to this Article.

Article 5 *Victim assistance*

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:

- (a) Assess the needs of cluster munition victims;
- (b) Develop, implement and enforce any necessary national laws and policies;
- (c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
- (d) Take steps to mobilise national and international resources;
- (e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
- (f) Closely consult with and actively involve cluster munition victims and their representative organisations;
- (g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
- (h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

Article 6 *International cooperation and assistance*

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.
2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.
3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision and receipt of clearance and other such equipment and related technological information for humanitarian purposes.
4. In addition to any obligations it may have pursuant to paragraph 4 of Article 4 of this Convention, each State Party in a position to do so shall provide assistance for clearance and destruction of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact on clearance and destruction of cluster munition remnants and related activities.
5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions, and shall also provide assistance to identify, assess and prioritise needs and practical measures in terms of marking, risk reduction education, protection of civilians and clearance and destruction as provided in Article 4 of this Convention.
6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall urgently provide emergency assistance to the affected State Party.
7. Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.
8. Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties.
9. Each State Party in a position to do so may contribute to relevant trust funds in order to facilitate the provision of assistance under this Article.
10. Each State Party that seeks and receives assistance shall take all appropriate measures in order to facilitate the timely and effective implementation of this Convention, including facilitation of the entry and exit of personnel, materiel and equipment, in a manner consistent with national laws and regulations, taking into consideration international best practices.
11. Each State Party may, with the purpose of developing a national action plan, request the United Nations system, regional organisations, other States Parties or other competent intergovernmental or non-governmental institutions to assist its authorities to determine, *inter alia*:
 - (a) The nature and extent of cluster munition remnants located in areas under its jurisdiction or control;
 - (b) The financial, technological and human resources required for the implementation of the plan;
 - (c) The time estimated as necessary to clear and destroy all cluster munition remnants located in areas under its jurisdiction or control;
 - (d) Risk reduction education programmes and awareness activities to reduce the incidence of injuries or deaths caused by cluster munition remnants;
 - (e) Assistance to cluster munition victims; and

(f) The coordination relationship between the government of the State Party concerned and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the plan.

12. States Parties giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes.

Article 7 *Transparency measures*

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party, on:

- (a) The national implementation measures referred to in Article 9 of this Convention;
- (b) The total of all cluster munitions, including explosive submunitions, referred to in paragraph 1 of Article 3 of this Convention, to include a breakdown of their type, quantity and, if possible, lot numbers of each type;
- (c) The technical characteristics of each type of cluster munition produced by that State Party prior to entry into force of this Convention for it, to the extent known, and those currently owned or possessed by it, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of cluster munitions; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information that may facilitate the clearance of cluster munition remnants;
- (d) The status and progress of programmes for the conversion or decommissioning of production facilities for cluster munitions;
- (e) The status and progress of programmes for the destruction, in accordance with Article 3 of this Convention, of cluster munitions, including explosive submunitions, with details of the methods that will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;
- (f) The types and quantities of cluster munitions, including explosive submunitions, destroyed in accordance with Article 3 of this Convention, including details of the methods of destruction used, the location of the destruction sites and the applicable safety and environmental standards observed;
- (g) Stockpiles of cluster munitions, including explosive submunitions, discovered after reported completion of the programme referred to in sub-paragraph (e) of this paragraph, and plans for their destruction in accordance with Article 3 of this Convention;
- (h) To the extent possible, the size and location of all cluster munition contaminated areas under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of cluster munition remnant in each such area and when they were used;
- (i) The status and progress of programmes for the clearance and destruction of all types and quantities of cluster munition remnants cleared and destroyed in accordance with Article 4 of this Convention, to include the size and location of the cluster munition contaminated area cleared and a breakdown of the quantity of each type of cluster munition remnant cleared and destroyed;
- (j) The measures taken to provide risk reduction education and, in particular, an immediate and effective warning to civilians living in cluster munition contaminated areas under its jurisdiction or control;
- (k) The status and progress of implementation of its obligations under Article 5 of this Convention to adequately provide age- and gendersensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic

inclusion of cluster munition victims and to collect reliable relevant data with respect to cluster munition victims;

(l) The name and contact details of the institutions mandated to provide information and to carry out the measures described in this paragraph;

(m) The amount of national resources, including financial, material or in kind, allocated to the implementation of Articles 3, 4 and 5 of this Convention; and

(n) The amounts, types and destinations of international cooperation and assistance provided under Article 6 of this Convention.

2. The information provided in accordance with paragraph 1 of this Article shall be updated by the States Parties annually, covering the previous calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.

3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8

Facilitation and clarification of compliance

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

2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any Meeting of States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. Where a matter has been submitted to it pursuant to paragraph 3 of this Article, the Meeting of States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine, the Meeting of States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6 of this Convention.

6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article, the Meeting of States Parties may decide to adopt such other general procedures or specific mechanisms for clarification of compliance, including facts, and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

Article 9

National implementation measures

Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10 *Settlement of disputes*

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.
2. The Meeting of States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

Article 11 *Meetings of States Parties*

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Convention, including:
 - (a) The operation and status of this Convention;
 - (b) Matters arising from the reports submitted under the provisions of this Convention;
 - (c) International cooperation and assistance in accordance with Article 6 of this Convention;
 - (d) The development of technologies to clear cluster munition remnants;
 - (e) Submissions of States Parties under Articles 8 and 10 of this Convention; and
 - (f) Submissions of States Parties as provided for in Articles 3 and 4 of this Convention.
2. The first Meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend these meetings as observers in accordance with the agreed rules of procedure.

Article 12 *Review Conference* *s*

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.
2. The purpose of the Review Conference shall be:
 - (a) To review the operation and status of this Convention;
 - (b) To consider the need for and the interval between further Meetings of States Parties referred to in paragraph 2 of Article 11 of this Convention; and
 - (c) To take decisions on submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Review Conference as observers in accordance with the agreed rules of procedure.

Article 13 *Amendments*

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Secretary-General of the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the Secretary-General of the United Nations shall convene an Amendment Conference to which all States Parties shall be invited.
2. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Amendment Conference as observers in accordance with the agreed rules of procedure.
3. The Amendment Conference shall be held immediately following a Meeting of States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.
4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to all States.
5. An amendment to this Convention shall enter into force for States Parties that have accepted the amendment on the date of deposit of acceptances by a majority of the States which were Parties at the date of adoption of the amendment. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14 *Costs and administrative tasks*

1. The costs of the Meetings of States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not party to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.
2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.
3. The performance by the Secretary-General of the United Nations of administrative tasks assigned to him or her under this Convention is subject to an appropriate United Nations mandate.

Article 15 *Signature*

This Convention, done at Dublin on 30 May 2008, shall be open for signature at Oslo by all States on 3 December 2008 and thereafter at United Nations Headquarters in New York until its entry into force.

Article 16 *Ratification, acceptance, approval or accession*

1. This Convention is subject to ratification, acceptance or approval by the Signatories.

2. It shall be open for accession by any State that has not signed the Convention.
3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 17
Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the thirtieth instrument of ratification, acceptance, approval or accession has been deposited.
2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18
Provisional application

Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.

Article 19
Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20
Duration and withdrawal

1. This Convention shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.
3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that sixmonth period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

Article 21
Relations with States not party to this Convention

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.
3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
 - (a) To develop, produce or otherwise acquire cluster munitions;
 - (b) To itself stockpile or transfer cluster munitions;
 - (c) To itself use cluster munitions; or
 - (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

Article 22

Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 23

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention shall be equally authentic.

Comparison between Original Federal Act on the Prohibition of Cluster Munitions and the Federal Act as amended

Original Version	Amended Version ¹¹⁸⁷
§ 1. For purposes of this Federal Act, 1. “Cluster munitions” are containers including explosive submunitions which are intended to disperse these submunitions over an area in order to detonate them before, on, or after impact; however, this definition shall not comprise flare and smoke ammunitions, pyrotechnical chemicals or munitions used to set off avalanches. 2. “procurement” is a transaction by which an Austrian citizen or a legal person, partnership or trading company registered in Austria or any other person, partnership or trading company that becomes active from within Austria is - negotiating a legal transaction that involves the transfer of cluster munitions from a third country to another third country, or - arranging such a legal transaction to be accomplished, or - buying or selling cluster munitions if that causes its transfer from a third country to another third country, or - arranging a transfer of cluster munitions over which they hold property from a third country to another third country.	§ 1. For purposes of this Federal Act, <i>“Convention” means the Convention on Cluster Munitions.</i> <i>“Cluster Munitions” are conventional munitions in accordance with Art. 2 (2) of the Convention</i> “procurement” is a transaction by which an Austrian citizen or a legal person, partnership or trading company registered in Austria or any other person, partnership or trading company that becomes active from within Austria is - negotiating a legal transaction that involves the transfer of cluster munitions from a third country to another third country, or - arranging such a legal transaction to be accomplished, or - buying or selling cluster munitions if that causes its transfer from a third country to another third country, or - arranging a transfer of cluster munitions over which they hold property from a third country to another third country.

¹¹⁸⁷ Federal Act Amending the Federal Act on the Prohibition of Cluster Munitions, Austrian Federal Law Gazette I, No. 41/2009, published on 8 April 2009, entry into force on 9 April 2009 http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2009_I_41/BGBLA_2009_I_41.pdf (last visited 26 January 2010).

§ 2. The development, production, acquisition, sale, procurement, import, export, transit, use and possession of cluster munitions are prohibited.	§ 2. The development, production, acquisition, <i>relinquishment</i>, procurement, import, export, transit, use and possession of cluster munitions are prohibited.
§ 3. The prohibitions laid down under § 2 shall not be applicable to 1. cluster munitions which are envisaged exclusively for instruction of the Austrian Armed Forces or of demining or clearance services; 2. the import, export, transit, possession and stockpiling of cluster munitions for purposes of their immediate decommissioning or other destruction.	§ 3. The prohibitions laid down under § 2 shall not be applicable to 1. <i>the acquisition, the import, the possession and the use of cluster munitions which are envisaged exclusively for instruction of the Austrian Armed Forces or of demining or clearance services, as well as the export and transit of cluster munitions to another state party of the Convention exclusively for purposes of military instruction or demining and clearance;</i> 2. <i>the acquisition, relinquishment, import, possession and stockpiling of cluster munitions for purposes of their immediate decommissioning or other destruction, as well as the export and transit of cluster munitions to another state party of the Convention for these purposes.</i>
§ 4. Existing stockpiles of cluster munitions prohibited under § 2 must be reported to the Federal Ministry of Defence within one month after the entry into force of this Federal Act and must be destroyed against reimbursement of costs by the Ministry of Defence within a maximum period of three years.	§ 4. Existing stockpiles of cluster munitions prohibited under § 2 must be reported to the Federal Ministry of Defence and Sports within one month after the entry into force of this Federal Act and must be destroyed against reimbursement of costs by the Ministry of Defence and Sports within a maximum period of three years. <i>For cluster munitions which date back to a time before 1955, the reporting duty is owed to the Ministry of the Interior which is competent to further secure and destroy these cluster munitions in accordance with § 42 (5) of the Law on Weaponry, Federal Law Gazette I, No. 12/1997.</i>
§ 5. Anybody who, even if merely negligently, violates § 2 of this Federal Law shall be punished by a court of law either with a prison sentence of up to two years or with a fine of up to 360 daily rates [<i>Tagessätze</i>], provided that the act is not subject to more severe punishment under other federal legislation.	Unchanged
§ 6. (1) Cluster munitions used to commit an act punishable under § 5 shall be seized by a court of law. (2) Machines and facilities for the production of cluster munitions prohibited under § 2 can be declared forfeit by a court of law. At the expense of the owner, it must be ensured that they can no longer be used in violation of the prohibitions laid down in § 2. (3) Means used to transport items subject to the prohibitions laid down in § 2 can be declared forfeit by a court of law. (4) Items forfeit according to paras. 2 and 3 shall pass to the ownership of the Federation [<i>Bund</i>]. Items seized according to para. 1 shall pass to the ownership of the Federation and are to be reported to the Federal Ministry of Defence for destruction pursuant to § 4.	§ 6. (1) Cluster munitions used to commit an act punishable under § 5 shall be seized by a court of law. (2) Machines and facilities for the production of cluster munitions prohibited under § 2 can be declared forfeit by a court of law. At the expense of the owner, it must be ensured that they can no longer be used in violation of the prohibitions laid down in § 2. (3) Means used to transport items subject to the prohibitions laid down in § 2 can be declared forfeit by a court of law. (4) Items forfeit according to paras. 2 and 3 shall pass to the ownership of the Federation [<i>Bund</i>]. Items seized according to para. 1 shall pass to the ownership of the Federation and are to be reported to the Federal Ministry of Defence <i>and Sports, and the Federal</i>

	<i>Ministry of the Interior, respectively, for destruction pursuant to § 4.</i>
§ 7. This Federal Act shall be implemented by 1. the Federal Minister of the Interior and the Federal Minister of Defence with regard to § 3, 2. the Federal Minister of Defence with regard to § 4, 3. the Federal Minister of Justice with regard to § 5 and § 6 paras. 1 to 3, 4. the Federal Minister of Justice and the Federal Minister of Defence with regard to § 6 para. 4, 5. the Federal Minister of the Interior with regard to the remaining provisions.	§ 7. This Federal Act shall be implemented by 1. the Federal Minister of the Interior and the Federal Minister of Defence and Sports with regard to § 3, 2. the Federal Minister of the Interior and the Federal Minister of Defence and Sports with regard to § 4, 3. the Federal Minister of Justice with regard to § 5 and § 6 paras. 1 to 3, 4. the Federal Minister of Justice, the Federal Minister of the Interior and the Federal Minister of Defence and Sports with regard to § 6 para. 4, 5. the Federal Minister of the Interior with regard to the remaining provisions.
§ 8. This Federal Act shall enter into force upon Expiry of the day of publication in the Austrian Federal Law Gazette.	§ 8. (1) This Federal Act shall enter into force upon expiry of the day of publication in the Austrian Federal Law Gazette. (2) §§ 1-4 of the version Federal Law Gazette I, No. 41/2009 of the Federal Act shall enter into force upon expiry of the day of publication of the Convention on Cluster Munitions. (3) For war material which only falls under the definition of “cluster munitions” by virtue of the entry into force of § 1 (2) of the version Federal Law Gazette I, No. 41/2009 of the Federal Act, the time limits specified in § 4 start to run as of that time.

Group of Governmental Experts to the CCW: Consolidated Draft on a Protocol on Cluster Munitions, as of 16 April 2009¹¹⁸⁸

Article 1. General provision and scope of application

1. In conformity with the Charter of the United Nations, the rules of International Humanitarian Law and other rules of international law applicable to them, the High Contracting Parties agree to comply with the obligations specified in this Protocol , both individually and in cooperation with other High Contracting Parties, to address the humanitarian impact caused by cluster munitions.
2. This Protocol shall apply in all situations referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001, and to all situations resulting from conflicts referred therein.
3. This Protocol shall not affect any rights or obligations Parties to the Convention on Cluster Munitions, done at Dublin, Ireland, on 30 May 2008 and opened for signature in Oslo, Norway, on 3 December 2008, have under that Convention.
4. This Protocol shall not apply to mines, booby-traps and other devices as defined in Article 2 of the Protocol on Prohibitions or Restrictions on the use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to this Convention on Prohibitions or Restrcitions on the Use of

¹¹⁸⁸ Copy on file with the author.

Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (the Convention).

5. This Protocol does not apply to munitions or explosive submunitions that are exclusively designed as anti-ship munitions for use at sea when used against ships which are at sea at the time of the attack.
6. This Protocol does not apply to munitions which are designed exclusively as anti-runway munitions and that disperse or release explosive sub-munitions each of which weighs more than five kilograms, when used against hard-stand runways, constructed from mass concrete, reinforced concrete, asphalt or a combination of these, or from equivalent material which yields the same progressive strength.
7. The provisions of Articles 3, 5, 6, 7, 8, 9, 10, 11 & 12 of this Protocol shall apply to the munitions described in Article 2, paragraph 2 (d).

Article 2. Definitions

For the purposes of this Protocol:

1. "Cluster munition" means
 - (a) A conventional munition that is designed to disperse or release explosive submunitions, and includes those explosive submunitions; or
 - (b) A munition consisting of a container, affixed to an aircraft, which is designed to disperse or release multiple explosive submunitions, other than self-propelled explosive submunitions and includes those explosive submunitions.
2. "Cluster munition" does not mean or include:
 - (a) munitions or submunitions designed to dispense flares, smoke, pyrotechnics, or chaff;
 - (b) munitions or explosive submunitions designed exclusively for an air defence role;
 - (c) munitions or submunitions designed to produce electrical or electronic effects;
 - (d) munitions that, in order to avoid indiscriminate effects and the risks posed by unexploded submunitions, have all of the following characteristics:
 - (i) each munition contains fewer than 10 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.
 - (e) munitions which are exclusively designed for use by direct fire delivery systems.
3. "Explosive submunition" means a conventional munition, weighing less than 20 kilograms, that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact.
4. "Failed cluster munition" means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered during an armed conflict, and which should have dispersed or released its explosive submunitions but did not do so as intended.
5. "Unexploded submunition" means an explosive submunition which has been dispersed or released by, or otherwise separated from, a cluster munition during an armed conflict and has failed to explode as intended.
6. "Abandoned cluster munitions" means cluster munitions and explosive submunitions that have not been used during an armed conflict, that have been left behind or dumped by a party to an armed conflict or in a situation arising directly from an armed conflict, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use.
7. "Cluster munition remnants" means failed cluster munitions, abandoned cluster munitions and unexploded submunitions.

8. “Military objective” means, so far as objects are concerned, any object which by its nature location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.
9. “Civilian objects” are all objects, which are not military objectives as defined in paragraph 8 of this Article.
10. “Transfer” involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants.
11. “Self-destruction mechanism” means an incorporated or attached automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated or to which it is attached.
12. “Self-neutralisation mechanism” means an incorporated automatically-functioning mechanism which renders inoperable the munition into which it is incorporated.
13. “Self-deactivating” means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the munition.
14. “Cluster munition victims” means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities.
15. “Cluster munition contaminated area” means an area known or suspected to contain cluster munition remnants.

Article 3. Protection of civilians, the civilian population and civilian objects

1. In implementing this Protocol, each High Contracting Party and party to an armed conflict shall ensure full compliance with all applicable principles and rules of international humanitarian law.
2. Nothing in this Protocol shall be interpreted as detracting from, or otherwise prejudicing, other principles and rules of international humanitarian law.

Article 4. General prohibitions and restrictions

1. It is prohibited for a High Contracting Party to use, develop, produce or otherwise acquire cluster munitions that do not meet the criteria in paragraph 2.
2. The prohibition in paragraph 1 shall not apply if:
 - (a) The cluster munition is capable of being delivered accurately* to a pre-defined target area and each explosive submunition possesses one/two or more of the following safeguards that must effectively ensure with a high degree of reliability that unexploded submunitions will no longer function as explosive submunitions:
 - (i) a self-destruction mechanism or an equivalent mechanism, including two or more initiating mechanisms;
 - (ii) a self-neutralisation mechanism;
 - (iii) a self-deactivating feature;

or

* This does not mean that the cluster munition is necessarily equipped with a guidance system.

- (b) The cluster munition is capable of being delivered accurately to a pre-defined target area and incorporates a mechanism or design which, after dispersal, results in no more than 1% unexploded ordnance across the range of intended operational environments.

3. A High Contracting Party may defer compliance with the prohibition of use for a transition period not exceeding X years from the Protocol's entry into force for it. This deferral shall be announced by declaration at the time of its notification to be bound by this Protocol. In case a High Contracting Party is unable to comply with paragraph 1 of this Article within that transition period, it may notify a Conference of the High Contracting Parties that it will extend this period of deferred compliance for a period of up to X additional years.

4. Notwithstanding a High Contracting Party's deferral pursuant to paragraph 3 of the prohibition of use in paragraph 1, each High Contracting Party undertakes, immediately upon entry into force:

- (a) To use cluster munitions that do not meet the criteria in paragraph 2 only after approval by its highest-ranking operational commander in the area of operations/by the appropriate politically mandated operational authority, in accordance with national procedures;
- (b) To use only cluster munitions with the lowest possible unexploded ordnance rate, consistent with military requirements;

5. Each High Contracting Party undertakes, immediately upon entry into force of the Protocol for it:

- (a) Not to develop new types of cluster munitions/or produce cluster munitions which do not meet the requirements of paragraph 2;
- (b) To take steps in any design, procurement or production of cluster munitions to minimise the unexploded ordnance rate or incorporate additional safeguard mechanisms or designs;
- (c) To improve to the extent possible the accuracy of their cluster munitions and submunitions which meet the requirements of paragraph 2;
- (d) To complete an evaluation of the military requirements and remove the stocks of cluster munitions in excess of these requirements from active inventory as soon as possible and designate these stocks for destruction.

5 bis It is prohibited to use munitions or explosive submunitions that are exclusively designed as anti-ship munitions for use at sea, against targets other than ships which are at sea at the time of the attack.

5 bis It is prohibited to use anti-runway munitions against targets other than hard-stand runways, constructed from mass concrete, reinforced concrete, asphalt or a combination of these, or from an equivalent material which yields the same compressive strength.

6. The obligations in this Article do not apply to cluster munitions acquired or retained in a limited number for the exclusive purpose of training in detection, clearance, and destruction techniques, or for the development of cluster munitions countermeasures.

7. The High Contracting Parties in a position to do so are encouraged, through bilateral or multilateral mechanisms established between them, to facilitate the exchange of equipment, material, and scientific and technological information that will lessen the humanitarian impact of cluster munitions.

Article 5. Stockpile, storage and destruction

Each High Contracting Party undertakes:

- (a) To remove all cluster munitions under its jurisdiction and control that do not meet the standards provided for in Article 4 (2) from its operational stocks, separate them from munitions retained for operational use, mark and safely secure them, in accordance with national procedures;
- (b) To destroy or ensure the destruction of all cluster munitions under its jurisdiction and control that do not meet the standards provided for in Article 4 (2), as soon as feasible after the entry into force of this Protocol, starting no later than:
 - 5 years after the entry into force of the Protocol for the High Contracting Party; or
 - The end of the transition period referred to in article 4 if applicable to the High Contracting Party;

- (c) To create and/or maintain a stockpile surveillance and management program to ensure the operational quality and reliability of weapons permitted under this Protocol. In implementing this provision, the High Contracting Parties shall make use of, where appropriate, existing mechanisms, tools, and databases within the Convention's framework and other relevant instruments and mechanisms.

Article 6. Transfers

1. It is prohibited for a High Contracting Party to transfer cluster munitions that do not meet the requirements of Article 4 (2).
2. A High Contracting Party may defer compliance with the prohibition of transfer for a transition period not exceeding X years from the Protocol's entry into force for it.
3. Notwithstanding a High Contracting Party's deferral, pursuant to paragraph 2, of the prohibition of transfer, each High Contracting Party undertakes, immediately upon entry into force:
 - (a) Not to transfer any cluster munition manufactured before 1990 except pursuant to patterns of cooperation/security cooperation agreements existing at the time of the entry into force of the Protocol;
 - (b) Not to transfer any cluster munition that has been significantly degraded from its original specifications;
 - (c) Not to transfer any cluster munition or submunition to any recipient other than a State or State agency authorised to receive such transfers;
 - (d) To prevent unauthorised transfers, from areas under its jurisdiction or control, of any cluster munition or submunition,
 - (e) To ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant prohibitions of this Protocol.
4. A High Contracting Party that has deferred the application of paragraph 1 shall, during the period of deferral, not transfer any cluster munition or submunition that does not meet the requirements of Article 4 (2), unless the recipient State agrees to apply this Protocol with respect to the transferred items.
5. This Article does not apply to transfers for the purpose of destruction, retrofitting in order to comply with the criteria set forth in Article 4, development of training in detection and clearance, and for the development of cluster munition countermeasures.

Article 7. Clearance and Destruction of Cluster Munition Remnants

1. Each high Contracting Party and party to an armed conflict shall bear the responsibilities set out in this Article with respect to all cluster munition remnants in territory under its control. In cases where a user of cluster munitions which have become cluster munition remnants does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, inter alia technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including through the United Nations system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants.
2. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy cluster munition remnants in affected territories under its control. Areas affected by cluster munition remnants which are assessed pursuant to paragraph 3 of this Article as posing a serious humanitarian risk shall be accorded priority status for clearance, removal or destruction.
3. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take the following measures in affected territories under its control, to reduce the risk posed by cluster munition remnants:
 - (a) Survey and assess the threat posed by cluster munition remnants;
 - (b) Assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction taking into account the impact from other explosive remnants of war and landmines;
 - (c) Mark and clear, remove or destroy cluster munition remnants; and
 - (d) Take steps to mobilise resources to carry out these activities.

4. In conducting the above activities, the High Contracting Parties and parties to an armed conflict shall take into account international standards, including the International Mine Action Standards.

5. The High Contracting Parties shall cooperate, where appropriate, both among themselves and with other states, relevant regional and international organisations and non-governmental organisations on the provision of inter alia technical, financial, material or human resources assistance including, in appropriate circumstances, the undertaking of joint operations necessary to fulfill the provisions of this Article.

Article 8. Recording, retaining and transmission of information

1. High Contracting Parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use or abandonment of cluster munitions, to facilitate rapid marking and clearance, removal or destruction of cluster munition remnants, risk education and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.

2. High Contracting Parties and parties to an armed conflict which have used or abandoned cluster munitions which may become cluster munition remnants shall, without delay after cessation of active hostilities and as far as practicable, subject to these parties' legitimate security interests, make available such information to the party or parties in control of the affected area, bilaterally or through the United Nations or another mutually agreed third party or, upon request, to their relevant organisations which the party providing the information is satisfied are or will be undertaking risk education and marking and clearance, removal or destruction of cluster munition remnants in the affected area.

Article 9. Protection of humanitarian missions and organisations from the effects of cluster munitions

1. Each High Contracting Party and party to an armed conflict shall:

(a) Protect, as far as feasible, from the effects of cluster munition remnants, humanitarian missions and organisations that are or will be operating in the area under the control of the High Contracting Party or party to an armed conflict and with that party's consent.

(b) Upon request by such a humanitarian mission or organisation, provide, as far as feasible, information on the location of all cluster munition remnants that it is aware of in territory where the requesting humanitarian mission or organisation will operate or is operating.

2. The provisions of this Article are without prejudice to existing International Humanitarian Law or other international instruments as applicable or decisions by the Security Council of the United Nations which provide for a higher level of protection.

Article 10. Victim Assistance

1. High Contracting Parties and parties to an armed conflict shall, in accordance with domestic laws and procedures, as well as their obligations under applicable international law provide or facilitate the provision of appropriate and adequate assistance, including medical care, rehabilitation and psychological support, and assistance for social and economic inclusion to cluster munition victims in territories under their jurisdiction or control. Each High Contracting Party and party to an armed conflict shall make every effort to collect reliable data with respect to cluster munition victims.

2. High Contracting Parties shall not discriminate against or among cluster munition victims, or between cluster munition victims and other victims of armed conflict/ERW and other persons with disabilities. Differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs, taking into account age and gender sensitivities.

3. In order to fulfill its obligations under this Article, each High Contracting Party shall take, among others, the following measures, as appropriate:

- a. Assess the needs of cluster munition victims;
- b. Develop, implement and enforce national laws and policies;
- c. Develop, where it does not already exist, in accordance with national procedures, a national plan, with provision of adequate assistance, including timeframes to carry out these activities, with a view to incorporating them within applicable national health, disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors in the field of assistance and rehabilitation of victims of cluster munitions;
- d. Seek to mobilise national and international resources;
- e. Closely consult with and actively involve cluster munition victims and their representative organisations;
- f. Designate, in accordance with national procedures, a focal point within the government for coordination of matters relating to the implementation of this Article; and
- g. Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.

Article 11. Cooperation and assistance

1. In fulfilling its obligations under this Protocol, each High Contracting Party has the right to seek and receive assistance and each High Contracting Party in a position to do so shall, provide such assistance in accordance with the provisions of this Article.

2. Each High Contracting Party in a position to do so shall provide assistance for the marking and clearance, removal or destruction of cluster munition remnants, and for risk education to civilian populations and related activities inter alia through the United Nations system, other relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.

3. Each High Contracting Party in a position to do so shall provide assistance, including to develop national capacities, for the care and rehabilitation and social and economic reintegration of victims of cluster munitions and cluster munition remnants. Such assistance may be provided inter alia through the United Nations system, relevant international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organisations, or on a bilateral basis.

4. Where, after entry into force of this Protocol, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a High Contracting Party, each High Contracting Party in a position to do so shall urgently provide emergency assistance to the affected High Contracting Party.

5. Each High Contracting Party in a position to do so shall contribute to trust funds within the United Nations system, or other relevant trust funds, or by other means, to facilitate the provision of assistance under this Protocol.

6. Each High Contracting Party shall have the right to participate in the fullest possible exchange of equipment, material, services and scientific and technological information other than weapons related technology, necessary for the implementation of this Protocol. High Contracting Parties undertake to facilitate such exchanges in accordance with national legislation and shall not impose undue restrictions on the provision and receipt of clearance and other such equipment and related technological information for humanitarian purposes.

7. Each High Contracting Party in a position to do so shall, facilitate the development and use of technology and equipment for the detection and clearance of cluster munition remnants, including as appropriate through the use of trust funds established for that purpose or other means, in order to reduce the humanitarian impact of cluster munitions and cluster munition remnants.

8. Each High Contracting Party that seeks and receives assistance shall take all appropriate measures in order to facilitate the timely and effective implementation of this Protocol, in particular its humanitarian objectives, including through the timely collection and release of relevant data and information, and the facilitation of the entry and exit of assistance-related personnel, materiel and equipment, in a manner consistent with national laws and regulations, taking into consideration international best practices.

9. Each High Contracting Party undertakes to provide information to the relevant databases on mine action established within the United Nations system, especially information concerning various means and technologies of clearance of cluster munition remnants, lists of experts, expert agencies or national points of contact on clearance of cluster munition remnants and, on a voluntary basis, technical information on relevant types of explosive ordnance.

10. High Contracting Parties may submit requests for assistance substantiated by relevant information to the United Nations, to other appropriate bodies or to other states. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organisations and non-governmental organisations.

11. In implementing the provisions of this Article, High Contracting Parties shall make use of, where appropriate, existing mechanisms, tools and databases within the Convention on Certain Conventional Weapons framework and other relevant instruments and mechanisms.

12. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and in cooperation with the requesting High Contracting Party and other High Contracting Parties, recommend the appropriate provision of assistance. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required, including possible contributions from the trust funds established within the United Nations system.

13. High Contracting Parties in a position to provide assistance shall, where appropriate, cooperate to develop coordinated strategies for the effective and efficient provision of assistance.

Article 12. Consultations of High Contracting Parties

1. The High Contracting Parties undertake to consult and co-operate with each other on all issues related to the operation of this Protocol. For this purpose, Conferences of High Contracting Parties shall be held as agreed to by a majority, but no less than eighteen High Contracting Parties.

2. The work of the Conferences of High Contracting Parties shall include:

- (a) Review of the status and operation of this Protocol;
- (b) Consideration of matters pertaining to cooperation and assistance and national implementation of this Protocol, including national reporting or updating on an annual basis; and
- (c) Preparation for review conferences.

2bis. The High Contracting Parties shall provide annual reports on the implementation of this Protocol to the Depositary who shall circulate them to all High Contracting Parties in advance of the Conference.*

3. The costs of the Conference of High Contracting Parties shall be borne by the High Contracting Parties and States not parties participating in the Conference, in accordance with the United Nations scale of assessment adjusted appropriately.

* A High Contracting Party which has availed itself of a deferral period referred to in this Protocol is encouraged to provide a voluntary report on the implementation of the applicable Article during that deferral period.

Article 13. Compliance

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.
2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.
3. Each High Contracting Party shall require that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of this Protocol.
4. The High Contracting Parties undertake to consult each other and to co-operate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

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Abstract

Über einen Zeitraum von über 60 Jahren haben Streumunitionen unzählige Opfer unter der Zivilbevölkerung aufgrund der flächendeckenden Wirkung und Ungenauigkeit während bewaffneter Konflikte und aufgrund von Blindgängern, die oft lange nach dem Ende von Kampfhandlungen zurückbleiben, verursacht. Ursprünglich konzipiert, um großflächige und schnell bewegliche Ziele wie Flugfelder oder eine große Anzahl von gegnerischen Soldaten oder Panzern fernab von zivilen Zielen bekämpfen zu können, zeigt die Realität von Schäden an der Zivilbevölkerung in vorangegangenen bewaffneten Konflikten, dass Streumunitionen *de facto* nicht so eingesetzt wurden.

Daher stellt sich zunächst die Frage, warum generelle Regelungen des humanitären Völkerrechts und Protokoll V zur Konvention zu Konventionellen Waffen (KKW) sich als inadäquat erwiesen haben, um einen besseren Schutz der Zivilbevölkerung zu gewährleisten. Der Autor argumentiert, dass die generellen Regeln des humanitären Völkerrechts teils ungenügend (was auch für Protokoll V zur KKW gilt), teils nicht genügend umgesetzt wurden. Aus diesem Befund ergibt sich die zentrale These dieser Arbeit, dass ein spezifischer internationaler Abrüstungsvertrag mit einer starken humanitären Komponente zum besseren Schutz von Zivilisten notwendig war.

Eine solche humanitäre Komponente wird durch die Bezugnahme auf Menschenrechte erleichtert. Nicht zuletzt aufgrund der Eignung von Menschenrechten, für bereits geschehene Schädigungen Individuen Genugtuung zu verschaffen, sind Menschenrechte eine willkommene Ergänzung im Bereich der Abrüstung, der traditionell eher zukünftige Schäden verhindern will. Der Abschluss der Konvention zu Streumunitionen 2008 rechtfertigt diese menschenrechtliche Betrachtungsweise, denn im Vertragstext findet sich eine Bestimmung mit den bis dato umfassendsten Verpflichtungen hinsichtlich bereits bestehender Opfer von Streumunitionen.

In der Arbeit wird auch analysiert, warum für die Schaffung eines neuen Streumunitionsverbotsvertrages ein alternativer diplomatischer Prozess außerhalb des traditionellen Forums der KKW erforderlich war. Eine der zentralen Schlussfolgerungen auf diese Frage, aber auch für die gesamte Arbeit ist, dass Abrüstungsverhandlungen dort erfolgreicher sind, wo sich Verhandler statt von traditionell strategischen von humanitären Gesichtspunkten leiten lassen.

Lebenslauf

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