

TOWARDS PEACE THROUGH LEGAL INNOVATION: THE PROCESS AND THE PROMISE OF THE 2008 CLUSTER MUNITIONS CONVENTION

INTRODUCTION

One of the most hopeful new developments in international humanitarian law is embodied in the Convention on Cluster Munitions, the first treaty to ban cluster munitions. The text of the treaty was completed on May 30, 2008, and as of December 4, 2008, it has already been signed by 94 countries.¹ Cluster munitions are weapons that, when dropped from a plane or launched into the air, release dozens to hundreds of smaller submunitions that spread over a very wide area of land and leave many unexploded munitions behind. The recent conflict in Georgia demonstrated the continued use of cluster munitions and thus the ongoing need for regulating them.² By codifying progressive trends in international humanitarian law and international human rights law as well as providing legal innovations, the Convention on Cluster Munitions offers new solutions for changing warfare and the welfare of civilians caught in it. The process through which the treaty was negotiated and completed is also in itself useful and progressive, as it offers a model for achieving civil society, governmental, and intergovernmental legal partnerships outside of and parallel to the prevailing model of consensus-based negotiation.

This article outlines the history, content, and significance of the Convention on Cluster Munitions. The article begins with a brief description of cluster munitions and a sketch of the humanitarian harm inflicted by them over the last four decades of their use. It then addresses the history of the Convention on Cluster Munitions and how it successfully built on existing international law and utilized parallel multilateral treaty negotiation processes to yield desired results. It next turns to the content of the Convention, which is rich in linkages to international human rights law and provides for robust protections and groundbreaking legal commitments. Finally, this article examines the significance of the cluster munitions

1. Convention on Cluster Munitions, CCM/77, adopted May 30, 2008, available at <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf>. For a list of countries that have signed the convention, see <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> (last visited Dec. 30, 2008).

2. See, e.g., Bonnie Docherty, *Russian Attacks in Georgia Show Need for Convention on Cluster Munitions*, JURIST, Aug. 19, 2008, <http://jurist.law.pitt.edu/hotline/2008/08/russian-attacks-in-georgia-show-need.php>; Human Rights Watch, Georgia: Join Treaty Banning Cluster Munitions, Sept. 1, 2008, <http://www.hrw.org/english/docs/2008/09/01/georgi19722.htm>. Human Rights Watch documented the use of cluster munitions in the Russia-Georgia conflict and the civilian deaths and injuries that have occurred as a result of their use. Findings reported by their researchers working in the Gori district of Georgia, as well as photos of cluster munitions used in this conflict, can be found at their website, <http://www.hrw.org>. See, e.g., <http://www.hrw.org/en/news/2008/08/31/georgia-join-treaty-banning-cluster-munitions>. The European Union has called on Russia and Georgia to clear the cluster munition remnants left behind by this conflict. See, e.g., *EU Calls on Russia, Georgia to Clear Cluster Bombs*, EUBUSINESS, September 2, 2008, <http://www.eubusiness.com/news-eu/1220365022.62/>.

treaty, including its strengthening of key international humanitarian law (IHL) principles of discrimination and proportionality, the new obligations it places on user states, the potential to learn from and adapt the process that formed it, and the promising signs that—despite the recent use of cluster munitions and continued opposition to the ban by powerful user states—the norms embodied in the treaty have already begun to take hold.³

I. CLUSTER MUNITIONS AND THEIR HARMFUL EFFECTS ON CIVILIANS

Cluster munitions are weapons that present a global threat to civilians due to their widespread use and the fact that they remain dangerous long after the end of a conflict.⁴ Their use in armed conflict has been traced back to as early as 1943, including extensively in the Vietnam War.⁵ Cluster munitions are present in all regions: countries from Africa, the Americas, Asia, Europe, and the Middle East have used, produced, stockpiled, and transferred them, and some countries have transferred them to non-state armed groups.⁶ Their widespread use and stockpiling represent a continued threat to civilians, particularly to children, who are disproportionately likely to be harmed by cluster munitions.⁷

Cluster munitions possess certain features that make them distinct from other weapons and result in their posing a grave and ongoing threat to civilians. The frequently urban nature of modern warfare, which brings troops into populated areas, often exacerbates these problems. Cluster munitions can affect very wide areas of land—once deployed, the dozens to hundreds of submunitions inside the weapon can spread over a surface area that is often the size of a football field. This means that even when aimed at military targets, submunitions may disperse into nearby civilian areas. When deployed in populated areas, submunitions kill and injure civilians and damage homes, schools, businesses, farms, and other infrastructure nec-

3. See Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Summary Record of the Fourth Session of the Plenary and Closing Ceremony of the Conference, CCM/SR/4, June 18, 2008, available at http://www.clustermunitionsdublin.ie/pdf/Plenary4May30am_006.pdf [hereinafter Summary Record]; States Adopting the Convention on Cluster Munitions, http://www.clusterconvention.org/pages/pages_i/i_statesadopting.html (last visited November 15, 2008).

4. See HUMAN RIGHTS WATCH, FLOODING SOUTH LEBANON: ISRAEL'S USE OF CLUSTER MUNITIONS IN LEBANON IN JULY AND AUGUST 2006 19 (2006), available at <http://www.hrw.org/reports/2008/lebanon0208/lebanon0208web.pdf> [hereinafter HUMAN RIGHTS WATCH, FLOODING]; Bonnie Docherty, *The Time is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 61 (2007).

5. See Human Rights Watch, Fact Sheet: Timeline of Cluster Munitions Use (May 2008), http://www.hrw.org/pub/2008/arms/Timeline_Cluster_Use_05.08.pdf.

6. HUMAN RIGHTS WATCH, FLOODING, *supra* note 4, at 21 (stating that at least fourteen countries have used cluster munitions, at least thirty-four have produced them, at least seventy-six stockpile them, and that they have been used in at least thirty countries and territories and have been transferred by at least thirteen states to at least sixty other states and non-state armed groups).

7. See, e.g., Press Release, UNICEF, UNICEF Highlights the Horrific Impact of Cluster Munitions on Children as Governments Meet to Decide on Treaty Banning the Weapon (May 19, 2008), http://www.unicef.org/media/media_43982.html.

essary for daily life. Their high rate of failure often means that a large number of unexploded munitions remain lodged in homes, hanging from trees, and embedded in the ground.⁸ Because they litter civilian areas such as fields where people farm and roads on which people travel to work, they have a devastating impact on the ability of civilians to earn a livelihood or to rebuild their homes post-conflict.⁹ When these factors are assessed in their totality, it becomes clear that they cause indiscriminate and long-term harm that is difficult for civilians to avoid.

II. THE HISTORY OF THE CONVENTION ON CLUSTER MUNITIONS

For years, lawyers, scholars, advocates, politicians, and diplomats have called for a ban on cluster munitions. As early as 1974, several states attending the Conference of Government Experts on Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effect called for a ban on the use of cluster munitions. They renewed this call at a follow-up conference in 1976.¹⁰ Continuing in this vein, the United Nations Environment Programme (UNEP) issued a report in 1983 on the impact of cluster munitions and appealed for their regulation.¹¹ While the movement to ban anti-personnel landmines gained momentum, resulting in a total ban on their use, production, transfer, and stockpiling in 1997,¹² efforts to ban cluster munitions stalled.¹³ Meanwhile, the use of cluster munitions continued: the United States, France, and the United Kingdom used cluster munitions during the first Gulf War,¹⁴ NATO used them in the Kosovo

8. See, e.g., LANDMINE ACTION, FORESEEABLE HARM: THE USE AND IMPACT OF CLUSTER MUNITIONS IN LEBANON: 2006, at 5 (2006), available at <http://www.landmineaction.org/resources/Foreseeable%20Harm.pdf>. "Cluster munitions have hindered relief efforts and will impede work to rehabilitate communities. . . . Cluster munitions have seriously affected livelihoods by blocking water supplies, disrupting work to restore power lines and preventing excavation of rubble and reconstruction efforts." *Id.* at 7.

9. See, e.g., *id.*; see also Nancy Wright, Steel Rain Makes No Garden Grow: The Impact of Cluster Bombs on Human Rights, Humanitarian Assistance, and Socioeconomic Development Organizations (Mar. 22, 2006) (paper presented at the annual meeting of the International Studies Association).

10. See, e.g., LANDMINE ACTION, FAILURE TO PROTECT: A CASE FOR THE PROHIBITION OF CLUSTER MUNITIONS 5 (2006), available at http://www.mineaction.org/downloads/1/LMAUK_failure%20to%20protect.pdf; Rosy Cave, *Disarmament as Humanitarian Action? Comparing Negotiations on Anti-Personnel Mines and Explosive Remnants of War*, in DISARMAMENT AS HUMANITARIAN ACTION: FROM PERSPECTIVE TO PRACTICE 51, 52, 73 n.8 (United Nations Institute for Disarmament Research ed., 2006), available at <http://www.unidir.ch/pdf/articles/pdf-art2482.pdf>.

11. The Secretary-General, Problem of Remnants of War: Report of the Secretary-General, U.N. Doc. UNGA/A/38/383 (19 October 1983).

12. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction, adopted Sept. 18, 1997, 36 I.L.M. 1507.

13. While the movement to ban cluster munitions was not powerful during this time, human rights and humanitarian groups continued to monitor the threat and harm posed by cluster munitions. See, e.g., HUMAN RIGHTS WATCH, U.S. CLUSTER BOMBS FOR TURKEY? (1994), available at <http://www.hrw.org/reports/1994/turkey2/> (urging the United States not to sell cluster munitions to Turkey based on Turkey's failure to discriminate between civilians and military targets).

14. See Human Rights Watch, *supra* note 5, at 1.

conflict,¹⁵ and the United States used them in Afghanistan.¹⁶ These conflicts, however, had an unanticipated effect: they refocused the world's attention on the horrific effects that cluster munitions have on civilians,¹⁷ and the movement for banning cluster munitions was revived.

The efforts leading to the ban of cluster munitions began as calls for a moratorium on their use and for stronger regulation within already existing legal frameworks. Organizations such as the International Committee of the Red Cross ("ICRC"), the UK-based NGO Landmine Action,¹⁸ Human Rights Watch,¹⁹ and others sought to use the December 2001 United Nations Convention on Conventional Weapons ("CCW") treaty meeting to call for both a moratorium and for more robust legal regulations, such as a new protocol to address the issue. This strategy appeared logical and promising, given that the purpose of the CCW "is to ban or restrict the use of specific types of weapons that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately."²⁰ Because the CCW is a general treaty with protocols that provide specific weapons regulations, a protocol might have been able to address the problems caused by cluster munition use. Several states reacted favorably to civil society proposals to use the CCW framework for new legal developments, such as a requirement that weapons users provide or support post-conflict weapons clearance and a prohibition on the use of cluster munitions

15. See, e.g., Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?* 44 ARIZ. L. REV. 31 (2002); Human Rights Watch, Pentagon Report Whitewashes Civilian Deaths in Yugoslavia (Feb. 8, 2000), <http://hrw.org/english/docs/2000/02/08/serbia417.htm>; Norwegian Delegation to NATO, NATO Releases Data on Cluster Munitions to Serbia (Oct. 8, 2007), <http://www.norway-nato.org/news/Serbia+klase.htm>.

16. See, e.g., Human Rights Watch, Cluster Bombs in Afghanistan (Oct. 2001), <http://www.hrw.org/backgrounder/arms/cluster-bck1031.htm>.

17. During the 1990s and early 2000s, Human Rights Watch documented cluster munition use by several other countries and non-state armed groups. Recently, two judgments have held user states liable for civilian deaths caused by cluster munitions. See *Partial Award—Central Front—Ethiopia's Claim 2* (Eri. v. Eth.), 43 I.L.M. 1275, 1294–96 (Eritrea-Ethiopia Claims Comm'n 2004), available at [http://www.pca-cpa.org/upload/files/ET%20Partial%20Award\(1\).pdf](http://www.pca-cpa.org/upload/files/ET%20Partial%20Award(1).pdf) (holding Eritrea liable for the deaths of civilians killed in cluster munition strikes); *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, ¶¶ 456–73 (June 12, 2007), available at <http://www.un.org/icty/martic/trial/judgement/mar-tcjud070612e.pdf> (holding the former president of the former Republic of Serbian Krajina criminally liable for deaths and injuries resulting from cluster munition rocket attacks on Zagreb, Croatia on May 2 and 3, 1995). For a discussion of these cases, see Virgil Wiebe, *For Whom the Little Bells Toll: Recent Judgments by the International Tribunals on the Legality of Cluster Munitions*, 35 PEPP. L. REV. 895 (2007).

18. Louis Maresca, *A New Protocol on Explosive Remnants of War: The History and Negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons*, 856 INT'L REV. OF THE RED CROSS 815, 817 (2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692F2W/\\$File/irrc_856_Maresca.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692F2W/$File/irrc_856_Maresca.pdf).

19. Human Rights Watch, Statement at the Second Review Conference of the Convention on Conventional Weapons (Dec. 21, 2001), available at <http://hrw.org/backgrounder/arms/ccw1201.htm>.

20. 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, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523, available at http://lawofwar.org/cxconventional_weapons_convention.htm.

in civilian populated areas.²¹ As a result, the CCW Review Conference established a Group of Governmental Experts to examine these proposals and more concretely address the issue of explosive remnants of war. However, this process did not yield agreement on specific regulations of cluster munitions;²² powerful governments and known cluster munitions users and producers, such as the United States, Russia, Israel, Pakistan, India and China opposed putting new rules into place.²³ Early efforts by the Group of Governmental Experts did not deliver new regulations, but they used their initial report to recommend continuing the discussion and the development of a protocol in 2003.

In November 2003, various civil society groups came together to form the Cluster Munitions Coalition (“CMC”) to advocate for more comprehensive regulations.²⁴ Several state parties to the CCW were similarly frustrated by the long delays. At the Third Review Conference of the CCW, Sweden, joined by twenty-four states, put forth a declaration to ban cluster munitions that other participants ultimately blocked.²⁵ As a result of this impasse, like-minded states decided to establish a parallel process outside of the U.N. system to negotiate a total ban on cluster munitions. Norway spearheaded the effort, which came to be known as the Oslo Process, pledging to “take advantage of the political will now evident in many countries to prohibit cluster munitions that cause unacceptable humanitarian harm” and to work closely with interested states, U.N. agencies, the ICRC, and other humanitarian organizations.²⁶

The Oslo Process demonstrates that the treaty-making model pioneered by the movement to ban landmines can have broader application and that states and other interested parties can achieve concrete legal results by removing themselves from consensus-based models in which the opposition of a few states can halt negotiations. It also demonstrates the efficacy of committing to concretizing a norm within a certain timeframe: when states and other interested parties first came together in February of 2007, they committed themselves to finishing a legally binding instrument that would, *inter alia*, “prohibit the use, production, transfer and stockpiling of

21. See, e.g., RAE McGRATH, CLUSTER BOMBS: THE MILITARY EFFECTIVENESS AND IMPACT ON CIVILIANS OF CLUSTER MUNITIONS (ed. 2000), available at http://www.landmineaction.org/resources/Cluster_Bombs.pdf.

22. See Maresca, *supra* note 18, at 821 (“There was less agreement on specific restrictions on the design and use of weapons, in particular submunitions.”).

23. See *id.* (“Many governments, including Russia and the USA, also believed that the existing international humanitarian law on the targeting of weapons was adequate to deal with the ICRC’s concerns about submunitions. In their view, better implementation of the existing rules, rather than new rules, was needed.”).

24. See Cluster Munitions Coalition, The Problem, <http://www.stopclustermunitions.org/the-problem/> (last visited Nov. 8, 2008).

25. Declaration on Cluster Munitions (Nov. 17, 2006), available at [http://www.unog.ch/80256E DD006B8954/\(httpAssets\)/E4AC282AA43501A6C125723000605378/\\$file/Sweden+\(CM\).pdf](http://www.unog.ch/80256E DD006B8954/(httpAssets)/E4AC282AA43501A6C125723000605378/$file/Sweden+(CM).pdf).

26. Norway Takes the Initiative for a Ban on Cluster Munitions (Nov. 20, 2006), <http://www.norway.org/policy/news/ban+cluster+munitions.htm>.

cluster munitions . . . and 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” by the end of 2008.²⁷ After four meetings and one-and-a-half years of hard work and partnership between civil society, states, and intergovernmental organizations, 107 participant states, 20 observer states, and 12 non-state observers²⁸ met in Dublin, Ireland, between May 18 and May 30, and accomplished what the CCW did not: a complete ban on the use, stockpile, production, and transfer of cluster munitions.

III. THE SIGNIFICANCE OF THE CONVENTION ON CLUSTER MUNITIONS

The Convention on Cluster Munitions is momentous for several reasons. First, it advances the principles of discrimination and proportionality, key tenets of international humanitarian law (IHL). Second, it strengthens IHL by articulating stronger obligations on states that use cluster munitions. Third, it reinforces the linkages between international humanitarian law and international human rights law. Finally, the process by which it was achieved provides a model for treaty negotiation and for global change. The sum of these achievements is a remarkable treaty.

A. *Strengthening the Key Principles of International Humanitarian Law*

International humanitarian law delineates principles that parties to a conflict must obey in order to limit the harmful effects of an armed conflict,²⁹ with special attention paid to protecting civilians. Because IHL principles are general, the field is advanced when the international community articulates how a specific weapon violates IHL principles and how actors should alleviate this violation. In expounding how cluster munitions, as a category of weapons, fail to comply with the most basic and most important of IHL principles,³⁰ the Convention on Cluster Munitions represents an important step in mitigating the harms of conflict and thus ad-

27. Oslo Conference on Cluster Munitions, Declaration, Feb. 22–23, 2007, available at <http://www.clustermunitionsdublin.ie/oslo.asp>.

28. For a final list of conference participants, see Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, List of Delegates, CCM/INF/1, May 30, 2008, available at http://www.clustermunitionsdublin.ie/pdf/CCM_INF_1_ListofDelegates_Final.pdf.

29. Int'l Comm. of the Red Cross, What is International Humanitarian Law? (July 2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/humanitarian-law-factsheet/$File/What_is_IHL.pdf) (“International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict.”).

30. See, e.g., Convention on Cluster Munitions, *supra* note 1 (recognizing that the “right of parties to an armed conflict to choose methods or means of warfare is not unlimited,” and that parties to a conflict “shall at all times distinguish between the civilian population and combatants” and “accordingly direct their operations” to ensure that “constant care shall be taken to spare” civilians, who should “enjoy general protection against dangers arising from military operations.”).

vancing the field of international humanitarian law. Thus, the Convention on Cluster Munitions not only demonstrated the crystallization of IHL norms; it also strengthened their content and the likelihood of its implementation by providing detailed obligations.

The Convention on Cluster Munitions advances stronger standards for the key IHL principles of discrimination and proportionality by elucidating the ways in which cluster munitions violate these principles. One of the most important principles of the law of armed conflict is the requirement that parties to a conflict discriminate between military targets and civilians.³¹ The use of cluster munitions fails to discriminate both during and after an attack, especially when used in or near civilian populations. Cluster munitions spread dozens to hundreds of submunitions over a large area and leave many unexploded and still dangerous submunitions behind after each attack, which maim and kill anyone that comes across them, making them inherently indiscriminate.³² Because it focuses in part on this failure to discriminate,³³ the ban strengthens this key principle.

Related and equally important is the principle of proportionality, which prohibits any attack where the expected harm to civilians outweighs the concrete and direct military advantage to be gained from it.³⁴ Cluster munitions have, in most cases, been shown to cause more harm to civilians than to military targets and have been described as presumptively disproportionate when used in populated areas, particularly when their long-term effects are taken into account.³⁵ By focusing attention on the aftereffects of cluster munitions in evaluating their proportionality—a trend increasingly

31. The principle of discrimination means that intentionally targeting civilians, civilian populations, or civilian objects is forbidden; that weapons must be capable of being and must actually be directed at a specific military objective so that they distinguish civilians from military personnel both by design and in their use; and that military personnel are forbidden to undertake attacks expected to cause harm excessive to the concrete military advantage anticipated to result. This principle is codified in articles 51(2), 51(4), 51(5), and 52 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I], available at <http://www.unhcr.ch/html/menu3/b/93.htm>. It is also part of customary international law. See, e.g., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 1977 TO THE GENEVA CONVENTIONS OF 1949, at 615 (Yves Sandoz et. al. eds., 1987), available at <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>.

32. See, e.g., McDonnell, *supra* note 15; Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 87–88 (2000).

33. See, e.g., Convention on Cluster Munitions, *supra* note 1 (“Basing themselves on the principles and rules of international humanitarian law, in particular the principle that . . . the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives . . .”).

34. The proportionality principle is codified in Protocol I, *supra* note 31, at arts. 51(5)(b), 57(2)(a)(iii). It is also accepted as customary international law. See, e.g., [1 RULES] INT'L COMM. OF THE RED CROSS (ICRC), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46–50, 56–58 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

35. See, e.g., HUMAN RIGHTS WATCH, FLOODING, *supra* note 4, at 24.

common in international law³⁶—the Convention on Cluster Munitions strengthens and clarifies this principle of IHL and advances the idea that parties to a conflict must consider and address a weapon's long-term effects.³⁷

B. *Advancing IHL Principles Regarding User State Responsibility*

One of the most novel and noteworthy aspects of the Convention on Cluster Munitions is the responsibility it places on user states. This is provided in Article 4.4, which articulates that a state party is “strongly encouraged” to clear the remnants of cluster munitions that it has used or abandoned before the treaty has entered into force.³⁸ While at least one other weapons convention places a special responsibility for post-strike weapons clearance on the state that has used or abandoned them,³⁹ the Convention on Cluster Munitions is distinguishable in that it encourages states to clear cluster munitions that were used or abandoned before the treaty has entered into effect. This provision eases the clearance burden traditionally placed on states in control of the weapons-affected territory by directly implicating the states responsible for leaving behind the cluster munitions. In doing so, it offers hope for countries such as Laos, Vietnam, and Cambodia, where cluster munitions strikes deeply impacted socio-economic development and the capacity to clear remaining cluster munitions. Linking past use and present danger to contemporary user state obligations, this provision also strengthens the concept that states must consider the foreseeable and long-term effects of a weapon when evaluating its legality under IHL.

36. See Human Rights Watch & Harvard Law Sch. Int'l Human Rights Clinic, Cluster Munitions and the Proportionality Test: Memorandum to Delegates of the Convention on Conventional Weapons (Apr. 2008), available at <http://hrw.org/backgrounder/arms/arms0408/arms0408web.pdf>.

37. See, e.g., Convention on Cluster Munitions, *supra* note 1, Preamble (explaining that state parties were “{d}etermined 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” based on “the principles and rules of [IHL], in particular the principle that . . . parties to a conflict shall . . . direct their operations against military objectives only”). The Convention does not place time limits on mitigating the harm from cluster munitions. For example, the definition of “cluster munition victim” in article 2.1 is not restricted to persons injured during a strike. Also important in focusing attention on the long-term effects of cluster munitions is article 4.4, discussed *infra* at 38.

38. Convention on Cluster Munitions, *supra* note 1, at art. 4.4 (“This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party . . . and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party . . . (a) In such cases, upon entry . . . the former State Party is strongly encouraged to provide . . . assistance to the latter State Party . . . 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.”).

39. See, e.g., CCW Protocol V on Explosive Remnants of War arts. 3(1), 7(2), Nov. 27, 2003, U.N. Doc. CCW/MSP/2003/2 (entered into force Nov. 12, 2006) [hereinafter CCW Protocol V]; Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction art. 1.3, Jan. 13, 1993, 1015 U.N.T.S. 163.

Article 4.4(b) also strongly encourages states to share information vital for timely and comprehensive clearance, including the “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.”⁴⁰ Because user states are in the best position to provide such information, this provision addresses the information gap that often hinders efficient and effective clearance following a cluster munitions strike. The information-sharing component of Article 4.4(b) builds on existing international law, such as the annex of the CCW Protocol on Explosive Remnants of War, which denotes the recording and sharing of such information with the “parties in control of the affected area” as best practices.⁴¹ Because information-sharing should also be undertaken regarding cluster munitions used or abandoned prior to the treaty’s entry into force, the Convention on Cluster Munitions provides for effective solutions to decades-long problems.

C. Reinforcing the Linkages between IHL and International Human Rights Law

Another way the Convention on Cluster Munitions strengthens international legal norms is by integrating aspects of IHL and international human rights law. Scholars have begun to posit that IHL and international human rights law are merging into a single set of rules,⁴² and the Convention on Cluster Munitions certainly supports this thesis. The Convention on Cluster Munitions contains many references to human rights law, such as the Preamble’s commitment to “ensur[ing] the full realisation of the rights of all cluster munition victims” and to “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.”⁴³ The Preamble also recognizes “the need to provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups,”⁴⁴ thus incorporating such human rights sub-fields as children’s rights, gender-specific rights, and the rights of other vulnerable groups—a category broad enough to refer to multiple groups, such as refugees and those made vulnerable by ethnic, religious, or other types of persecution.

The provisions relating directly to cluster munition victims exemplify the treaty’s linkages between these two bodies of law. Article 2.1 defines cluster munition victims as “all persons who have been killed or suffered

40. Convention on Cluster Munitions, *supra* note 1, at art. 4.4(b).

41. CCW Protocol V, *supra* note 39, Technical Annex, arts. a(i), a(ii), a(iii), a(iv), c(iii).

42. See, e.g., INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW (Roberta Arnold & Noëlle Quéniévet eds., 2008).

43. Convention on Cluster Munitions, *supra* note 1, Preamble.

44. *Id.*

physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions,”⁴⁵ thus directly incorporating social and economic rights. Article 2.1 further strengthens the idea of group rights and potentially of reparations made to groups for group harm rather than individual harm by defining cluster munition victims as “includ[ing] those persons directly impacted by cluster munitions as well as their affected families and communities.”⁴⁶ This provision could help progress the field of reparations, as they are usually individually administered and limited to addressing individual harm suffered.

Article 5.1 (Victim Assistance) references “applicable international humanitarian and human rights law” when obligating state parties to care for “cluster munition victims in areas under its jurisdiction or control.”⁴⁷ Obligations to provide assistance span to remedies typically considered social and economic in nature, such as “medical care, rehabilitation and psychological support, as well as . . . social and economic inclusion.”⁴⁸ This article further requires state parties to adapt their laws and create timely national plans and budgets to achieve victim assistance; additionally, such laws and plans are to be incorporated “within the existing national disability, development and human rights frameworks and mechanisms.”⁴⁹ In this sense, the victim assistance provisions of the Convention on Cluster Munitions mirror the traditional human rights and responsibilities model, in which states have human rights obligations to persons within their jurisdiction or territory.

The Convention on Cluster Munitions demonstrates that IHL, when it takes a long-term view of a weapon’s effect, merges with the duties incumbent in human rights, including the social and economic duties states have to all persons within their jurisdiction. In doing so, the Convention on Cluster Munitions advances the meaning and content of both IHL and international human rights law.

D. *Providing a Model for Future Treaty Negotiations*

The success of the Convention on Cluster Munitions demonstrates that advocates need not settle for anything less than law that is competent, capable, and complete. When the traditional route of multilateral negotiations within existing treaty law failed to deliver a sufficiently robust convention, like-minded governments, international organizations, and civil society were able to form a parallel process that rapidly produced an impressive compact. The success of the Cluster Munitions Convention demonstrates

45. Convention on Cluster Munitions, *supra* note 1, at art. 2.1.

46. *Id.*

47. Convention on Cluster Munitions, *supra* note 1, at art. 5.1.

48. *Id.*

49. *Id.* at art. 5.2(c).

that the landmine negotiation model need not be merely a one-time occurrence. Rather, this process of a dedicated partnership between states and organizations working toward the common goal of developing a comprehensive treaty in time to save lives shows that states and civil society can turn impasses into wider opportunities and that international law continues to provide real solutions for long-standing problems. It further communicates that sea change accomplishments such as the ban on landmines can be viewed as replicable, an idea that should encourage large strides forward in the face of seeming deadlock.

CONCLUSION: UNIVERSALIZING THE STIGMA AGAINST CLUSTER MUNITIONS

Rarely in human history has a weapon become so stigmatized that a large sector of the international community decides that it must be completely banned in spite of opposition from powerful user states. How cluster munitions came to be in this category is the result of IHL catching up with the reality on the ground to fulfill its purpose and its promise. Because it takes place at a time when the stockpiles of the largest armies in the world are overflowing with these weapons, the success of the cluster munitions ban is a story of tremendous accomplishment by innumerable people who fought for this achievement over the years, including those who have been injured or lost their lives attempting to de-activate cluster munition duds.

There is evidence that the Convention on Cluster Munitions has already begun to take effect. Even before the final treaty negotiations, countries involved in the negotiations began to adopt national legislation banning cluster munitions and create timetables for the destruction of their cluster munition stockpiles,⁵⁰ demonstrating that the norm was taking hold even before the treaty's codification. In the final days of the treaty negotiations, Germany and France, who had declared that they would not destroy or decommission their cluster munitions, announced a schedule for their destruction.⁵¹ Additionally, governments have begun to take action that will discourage cluster munition use by states that did not participate in the Convention on Cluster Munitions process. For example, the United Kingdom has stated that it will ask the United States to remove its cluster munitions from U.K. territory, thereby extending the Convention's obligations to states outside of the treaty regime.⁵² Perhaps most importantly,

50. See, e.g., Nick Cumming-Bruce, *Austria Bans Cluster Munitions*, INT'L HERALD TRIB., Dec. 7, 2007, available at <http://www.iht.com/articles/2007/12/07/europe/cluster.php>.

51. See, e.g., Summary Record, *supra* note 3 ("France intended to sign the text in Oslo in December, and was committed to destroying the quasi-totality of its stockpiles before that time."); *Germany Pledges to Destroy Cluster Bomb Stocks*, DEUTSCHE WELLE, May 29, 2008, <http://www.dw-world.de/dw/article/0,2144,3371345,00.html>.

52. See Human Rights Watch, *Cluster Bomb Treaty Breaks New Ground*, (May 30, 2008), <http://hrw.org/english/docs/2008/05/30/18976.htm>.

the recent treaty signing ceremony in Oslo, held December 31, 2008, demonstrates that the treaty is well on its way to entry into force. Ninety-four countries have already signed the treaty, which remains open for signature. Such a large and early number of signatories bodes well for swift ratification and the treaty's subsequent entry into force following the 30th ratification.

Important countries that have long stood in opposition to a ban on cluster munitions have yet to change their positions. While a U.S. delegation was not present at the final Dublin negotiations, they were quick to release an official position on the treaty, stating, *inter alia*, that "cluster munitions are legitimate weapons . . . that can result in less collateral damage than unitary weapons."⁵³ Russia, also absent from the final negotiations, has recently flouted the ban, along with Georgia, by using cluster munitions in the Abkhazia and South Ossetia regions in August, 2008. However, the content of the Convention means that opposing countries will likely find it increasingly difficult to continue using cluster munitions once the treaty opens for signature at the end of 2008 and after it is ratified and enters into force. Article 21.2 of the Convention on Cluster Munitions requires state parties to "notify the governments of all States not party to this Convention . . . of its obligations under this Convention," and further states that each state party "shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions."⁵⁴ Because states are highly likely to engage in joint or multilateral military operations, and because a large number of states—including U.S. allies such as the United Kingdom, Canada, and Australia—are on the road to becoming state parties, it is likely that these joint operations will place both legal and practical constraints on non-state parties and result in the decreased use of cluster munitions.⁵⁵ If the ban on land mines is any indication, it is not only possible but probable that the stigmatizing norm that underpins the complete ban will become so universal that it will effectively influence the behavior of non-state parties. In this regard, the early signs that the norm is taking hold and the requirement that state parties influence non-state party allies bode well for the future and indicate that the strength of a total ban creates a powerful and universal stigma, a

53. Memorandum from the Secretary of Defense, DoD Policy on Cluster Munitions and Unintended Harm to Civilians (June 19, 2008), available at http://www.defenselink.mil/news/d20080709cm_policy.pdf.

54. Convention on Cluster Munitions, *supra* note 1, at art. 21.2.

55. See Human Rights Watch & Harvard Law Sch. Int'l Human Rights Clinic, Interoperability and the Prohibition on Assistance: Memorandum to Delegates of the Dublin Diplomatic Conference on Cluster Munitions (May 2008), available at http://www.hrw.org/pub/2008/arms/HRW_HLS_Interoperability_0508.pdf.

strong and effective legal regime, and, perhaps eventually, a more peaceful world.

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