

# The Convention on Cluster Munitions: Towards a Balance between Humanitarian and Military Considerations?

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## **Introduction**

On 30 May 2008, in Dublin, a group of 107 States adopted the *Convention on Cluster Munitions* (CCM)<sup>1</sup> that introduced the prohibition to use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions that cause “unacceptable harm” to civilians.<sup>2</sup> The Dublin Conference was the final step of the so-called ‘Oslo Process’, the multilateral negotiations that began in the Norwegian state capital in 2007, continued in Lima and Vienna in the same year and then in Wellington and Dublin in 2008.<sup>3</sup> The negotiations

<sup>1</sup> A total of 127 States (including 20 Observers States) participated in the *Dublin Diplomatic Conference* (19-30 May 2008), see <http://www.clustermunitionsdublin.ie>.

<sup>2</sup> For the text of the CCM, see <http://treaties.un.org/doc/source/MTDSG/26-6.pdf> and <http://www.clusterconvention.org>.

<sup>3</sup> The Oslo process started with the Oslo Conference (22-23 February 2007), where 46 of the 49 participating states signed the *Declaration of the Oslo Conference on Cluster Munitions* of 23 February 2007, the fundamental document of the negotiations, in which the signatories committed themselves to: “1. Conclude by 2008 a legally binding international instrument that will: (i) prohibits 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 ensure 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”, <http://www.regjeringen.no/en/dep/ud/selected-topics/Humanitarian-efforts/clusterinitiative/conference.html?id=449312>. The Oslo Conference was followed by a series of Conferences that started in Lima (23-25 May 2007, attended by 68 States); Vienna (5-7 December 2007, attended by 138 States) and Wellington (18-22 February 2008, where 82 out of the total 107 attending States signed the *Declaration of the Wellington Conference on Cluster Munitions* on 22 February 2008, which provided the basis for the negotiations of a legally binding instrument at the Dublin Conference, <http://www.mfat.govt.nz/clustermunitionswellington>). The negotiations process involved regional Conferences in Africa (Livingstone, 31 March-1 April 2008 and Kampala, 29 September 2008), America (San José, 4-5 September 2007 and Quito, 6-7 November 2008), Asia (Phnom Penh, 15 March 2007 and Bangkok, 24-25 April 2008), Europe (Brussels, 30 October 2007 and Sofia, 18-19 September 2008) and the Middle East (Beirut, 11-12 November 2008). A group of 7 States (the ‘Core Group’) led the Oslo Process. It comprised Austria, Holy See, Ireland, Mexico,

were conducted outside of the 1980 *Convention on Certain Conventional Weapons* (CCW). International Organizations (including the United Nations and the European Union), the International Committee of the Red Cross (ICRC) and a coalition of non-governmental Organizations (the *Cluster Munition Coalition*)<sup>4</sup> played an active role in the Process. The instrument has been opened for signature in Oslo on 3 December 2008: on that day, 94 States signed the CCM and 4 ratified it.<sup>5</sup>

### **I. Cluster Munitions and Their Humanitarian and Socio-Economic Impact**

In general terms, cluster munitions are conventional *area weapons* composed by a container (also called ‘parent-munition’) designed to disperse or release multiple submunitions. They may be *non-explosive* (designed to dispense flares, smoke, pyrotechnics or chaff, etc.) and *explosive* (designed to strike a wide area (airports,

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New Zealand, Norway and Peru. See in general, J. Borrie, ‘How the Cluster Munition Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin’, No. 88 *Disarmament Diplomacy* 2008, pp. 40-53.

<sup>4</sup> The *Cluster Munition Coalition* (CMC) is an international coalition of nearly 300 civil society organizations, including NGOs, faith-based and professional organisations from more than 80 countries, working on, *inter alia*, disarmament, human rights and victim assistance, <http://www.stopclustermunitions.org>. Religious leaders and faith-based organizations played an important role in driving the Oslo Process. On 18 May 2008, Pope Benedict XVI encouraged the Participants in the Dublin Conference “to achieve a strong and credible international treaty”, [http://www.vatican.va/holy\\_father/benedict\\_xvi/angelus/2008/documents/hf\\_ben-xvi\\_ang\\_20080518\\_genova\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/angelus/2008/documents/hf_ben-xvi_ang_20080518_genova_en.html). Two inter-religious statements are also worth mentioning: the first is the *Call from People of Faith to Ban Cluster Bombs Now* of 19 April 2008, signed by 86 faith leaders from different religions, <http://storage.paxchristi.net/PUBLIC/2008-0394-engl-SD.pdf>; the second one is the *Statement of the European Faith Leaders Conference on Cluster Munitions: Total Ban on Cluster Munitions – A Moral Responsibility*, adopted at the conclusion of the Faith leaders Conference on Cluster Munitions (Sarajevo, 29-30 October 2008), <http://www.wcrp.org/initiatives/disarmament/cluster-munitions>.

<sup>5</sup> The States that have signed and ratified the CCM on 3 December 2008 are: Ireland, Norway, Holy See and Sierra Leone. A total of 122 States participated in the *Oslo Signing Conference*, see <http://www.osloccm.no>.

ports, etc.) or to attack fixed or moving targets across a wide area).<sup>6</sup>

From the first time they were used during World War II by Germany and the Soviet Union, to their most recent use during the 2008 armed conflict between the Russian Federation and Georgia, cluster munitions have been used by approximately 15 States in about 30 areas or armed conflicts worldwide. They were massively used, *inter alia*, in Cambodia (1969-1973), in the Lao People's Democratic Republic (1964-1973) and Vietnam (1965-1975). In recent years, their use in Iraq (1991 and 2003), in the Federal Republic of Yugoslavia (1999) and Lebanon (2006) caught the attention of the international public opinion.<sup>7</sup>

*Explosive* cluster munitions, by their very nature (at least the munitions produced and used until now, which are not equipped with guidance, self-destruction and self-deactivation systems) have had a severe impact on civilians<sup>8</sup> either *during conflicts*, due to their indiscriminate effects, or *after conflicts*, due to unexploded submunitions.

<sup>6</sup> According to the ICRC, to date, approximately 34 States have produced over 210 different types of cluster munitions (projectiles, bombs, rockets, missiles, dispensers, etc.). Nearly 75 States stockpile cluster munitions. About 15 States have transferred over 50 types of cluster munitions to at least 60 other States. See ICRC, *Cluster Munitions: What Are They and What is the Problem?*, Geneva, 2008, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/\\$File/Cluster-munition-factsheet.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/$File/Cluster-munition-factsheet.pdf).

<sup>7</sup> ICRC, *Cluster Munitions: Decades of Failure, Decades of Civilian Suffering*, Geneva, 2007, <http://www.redcross.ie/content/download/1721/8173/file/ICRC%20-%20Cluster%20Munitions%20-%20Decades%20of%20Failure%20Decades%20of%20Human%20Suffering.pdf>.

<sup>8</sup> According to the ICRC, to date, approximately 13.000 civilians have been killed or injured by cluster munitions and unexploded submunitions in at least 21 States worldwide. See ICRC, *Cluster Munition Victims: What is Known and What is Needed?*, Geneva, 2008, [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); and ICRC, *Explosive Remnants of War: The Lethal Legacy of Modern Armed Conflict*, Geneva, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/html/erw-factsheet-150807>.

## **II. The Legal Status of Cluster Munitions before the Oslo Process**

Prior to the CCM, international law did not contain provisions specifically prohibiting or limiting the use of cluster munitions.<sup>9</sup> At the same time, humanitarian law already provided general principles and rules prohibiting the use of weapons that have indiscriminate effects. On this basis, scholars have argued that cluster munitions would be contrary to customary humanitarian law as defined by the 1977 Additional Protocol I to the 1949 Geneva Conventions (AP I).<sup>10</sup> They would be contrary, *prima*

<sup>9</sup> Prior to the adoption of the CCM, at the national level, Belgium was the first State to enact a law banning cluster munitions in 2006, followed in 2007 by Austria. Norway and Hungary are observing a moratorium on their use since 2007. At the regional level, the European Parliament adopted three resolutions related to cluster munitions: European Parliament Resolution of 25 October 2007 towards a global treaty to ban all cluster munitions (P6\_TA(2007)0484), B6-0429/2007; European Parliament Resolution of 16 November 2006 on the Convention on the Prohibition of Biological and Toxin Weapons (BTWC), cluster bombs and conventional arms (P6\_TA(2006)0493), *O.J. C* 314 E, 21 December 2006, p. 327; and European Parliament Resolution of 28 October 2004 on cluster munitions (P6\_TA(2004)0048), *O.J. C* 174 E, 14 July 2005, p. 188.

<sup>10</sup> See, *inter alia*, A. Breitegger, 'Preventing Human Suffering During and After Conflict?: The Complementary Case for a Specific Convention on Cluster Munitions', Vol. 10 *Austrian Review of International and European Law* 2005, pp. 3-39; K. C. Ching, 'The Use of Cluster Munitions in the War on Terrorism', Vol. 31 *Suffolk Transnational Law Journal* 2007, pp. 127-163; B. Docherty, 'The Time Is Now: A Historical Argument for a Cluster Munitions Convention', Vol. 20 *Harvard Human Rights Journal* 2007, pp. 53-87; S. D. Goose, 'Cluster Munitions in the Crosshairs: in Pursuit of a Prohibition', in J. Williams, S. D. Goose & M. Wareham (eds.), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security* (Lanham, Rowman & Littlefield, 2008), pp. 217-239; T. J. Herthel, 'On the Chopping Block: Cluster Munitions and the Law of War', Vol. 51 *A.F.L. Rev.* 2001, pp. 229-269; K. Hulme, 'Of Questionable Legality: the Military Use of Cluster Bombs in Iraq in 2003', Vol. 42 *Canadian Yearbook of International Law* 2004, pp. 143-195; M. Krepon, 'Weapons Potentially Inhumane: The Case of Cluster Bombs', Vol. 52 *Foreign Affairs* 1974, pp. 595-611; J. MacClelland, 'Conventional Weapons: A Cluster of Developments', Vol. 54 *I.C.L.Q.* 2005, pp. 755-767; T. M. McDonnell, 'Cluster Bombs over Kosovo: A

*facie*, to: a) the principle of *distinction*, according to which belligerent parties must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and their attacks must only be directed at military objectives accordingly (art. 48); b) the ban on the use of weapons that have *indiscriminate* effects or incapable of distinguishing between civilians and combatants and between civilian objects and military objectives (art. 51.4); c) the principle of *proportionality*, that prohibits attacks that cause harm to civilians which would be excessive in relation to the concrete and direct military advantage anticipated (art. 51.5); d) and the principle of *precaution*, which requires States to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects (art. 57.2(a)ii).<sup>11</sup> In some cases, when unexploded submunitions have caused widespread, long-term and severe damage, it was argued that this was a violation of the principle of *protection of*

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Violation of International Law?', Vol. 44 *Arizona Law Review* 2002, pp. 31-129; E. Prokosch, 'Arguments for Restricting Cluster Weapons: Humanitarian Protection Versus "Military Necessity"', No. 299 *I.R.R.C./R.I.C.R.* 1994, pp. 183-193; *Id.*, *Cluster Weapons*, Papers in the Theory and Practice of Human Rights, University of Essex, No. 15, 1995, pp. 1-17; C. Trezza, *Munizioni a grappolo, Prospettive di una loro disciplina internazionale*, Policy Brief, Istituto per gli Studi di Politica Internazionale (ISPI), No. 70, 2008, pp. 1-4; United Nations Institute for Disarmament Research (UNIDIR), *The Humanitarian Impact of Cluster Munitions*, Geneva, 2008; X., 'Cluster Munitions', No. 4 *Disarmament Forum* 2006; and V. O. Wiebe, 'Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law', Vol. 22 *Michigan J.I.L.* 2000, pp. 85-167. See also, in general, J. M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005), Vol. I, pp. 244-250 and United Nations Secretariat (Office of Legal Affairs), *Survey on Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons*, Vol. I-II, UN Doc. A/9215, 7 November 1973.

<sup>11</sup> These principles and rules are of a customary nature. See, *inter alia*, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *I.C.J. Rep.* 1996, §75 and Henckaerts & Doswald-Beck, *supra* note 10, pp. 3-76.

*the natural environment* (art. 55.1).<sup>12</sup>

With regard to explosive remnants of war, the 2003 Additional Protocol V to the CCW (CCW P V) introduced general provisions on the clearing of contaminated areas, applicable to unexploded submunitions. However, the instrument does not contain provisions on weapons as such nor does it impose any obligation for clearance of remnants produced by States in the territory of a third State prior to entry into force of the instrument (art. 1.4).

### **III. International Jurisprudence and Reports**

The legality of the use of cluster munitions has been questioned by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Eritrea-Ethiopia Claims Commission (EECC) and by the United Nations Commission of Inquiry on Lebanon.<sup>13</sup> The European Court of Human Rights (ECtHR) dealt with the issue of the lethal consequences of cluster munition remnants in the *Behrami* case (*infra* IV.2.A). These bodies addressed a number of legal and operational aspects of the use of cluster munitions that are worth mentioning in order to understand the rationale behind the CCM and its impact on humanitarian law.

#### **1. The *Martić* Case**

In 2007, the ICTY found Milan Martić<sup>14</sup> guilty of war crimes

<sup>12</sup> In the Lao People's Democratic Republic there are between 8 and 25 million unexploded submunitions left over from US bombings (1964-1973) which contaminated 20 % of the villages of the country, approximately 1500 villages, 25 % of which are still contaminated today. See The Lao National Unexploded Ordinance Programme (UXO LAO), <http://www.uxolao.org>; C. Capati, 'The Tragedy of Cluster Bombs in Laos: An Argument for Inclusion in the Proposed International Ban on Landmines', Vol. 16 *Wisconsin International Law Journal* 1997, pp. 227-245; and R. Cave, A. Lawson & A. Sherriff, *Cluster Munitions in Albania and in Lao PDR: The Humanitarian and Socio-Economic Impact*, United Nations Institute for Disarmament Research (UNIDIR), Geneva, 2006.

<sup>13</sup> See, in general, V. O. Wiebe, 'For Whom the Little Bells toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions', Vol. 35 *Pepperdine Law Review* 2008, pp. 895-965.

<sup>14</sup> At the time of the events, Milan Martić was President of the self-



and crimes against humanity for ordering the launch of rockets with cluster bomb warheads (model M-87 Orkan) on downtown Zagreb on 2 and 3 May 1995, causing the death and injury of civilians.<sup>15</sup> In the *Martić* case, the ICTY declared the illegality of the use and not of cluster munitions *as such*. Two points of the decision seem particularly noteworthy. First, as to the *actus reus*, the judges held that the actual or presumed presence of military objectives in urban or densely populated areas, does not legitimate the use of cluster munitions that have indiscriminate effects.<sup>16</sup> Secondly, as to *mens rea*, the judges held that the awareness of the indiscriminate effects of cluster munitions when used in or near urban or densely populated areas indicates the intent to target civilians.<sup>17</sup> This, under the principle that the awareness of the indiscriminate effects of the means and methods of warfare used shows the intent to direct an attack against civilians.<sup>18</sup>

The *Martić* case clarified important aspects of the legal status of cluster munitions. However, the ICTY came to a different

proclaimed Republic of Serbian Krajina (Република Српска Крајина), a self-proclaimed Serbian entity within Croatia. Established in 1991, it was never recognized and was definitively incorporated into Croatia in 1998.

<sup>15</sup> ICTY, Trial Chamber, *Prosecutor v. Milan Martić*, IT-95-11-T, Judgement, 12 June 2007, §§ 459 *et seq.*

<sup>16</sup> ICTY, *supra* note 15. Following a similar line of reasoning, the legality of the use of cluster munitions in urban or densely populated areas was questioned (*ex post*) by the United States Air Force with regard to the 1991 Air Campaign against Iraq; U.S. Air Force Judge Advocate General, *Bullet Background Paper on International Legal Aspects Concerning the Use of Cluster Munitions*, 30 August 2001. See, *inter alia*, G. Bartolini, 'Air Operations Against Iraq (1991 and 2003)', in N. Ronzitti & G. Venturini (eds.), *International Humanitarian Law of Air Warfare* (Utrecht, Eleven, 2006), pp. 227-272.

<sup>17</sup> ICTY, *supra* note 15, §§ 69 and 472.

<sup>18</sup> ICTY, Appeals Chamber, *Prosecutor v. Stanislav Galić*, IT-98-29-A, Judgement, 30 November 2006, § 132 (which also contains a reference to the *Martić* case); ICTY, Appeals Chamber, *Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002, § 91; ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, 29 July 2004, § 106. Even in more general terms, according to art. 30.2 (b) ICC Statute, as to *mens rea*: "A person has intent where ... in relation to a consequence ... [he/she] means to cause that consequence or is aware that it will occur in the ordinary course of events".



conclusion with respect to the NATO 1999 Air Campaign in the Federal Republic of Yugoslavia. In this case, despite the use and the indiscriminate effects of cluster munitions, an *ad hoc* Committee advised against opening an investigation against NATO.<sup>19</sup> The method used by the Committee to ascertain both the facts and the applicable law has been criticized by scholars who in some cases denounced a *non liquet* of the ICTY.<sup>20</sup>

## 2. Eritrea-Ethiopia Claims Commission

The EECC has held Eritrea liable for the death and injury of civilians, including children, and for the damages to civilian objects (near a School located in the City centre) caused by two cluster munitions attacks on Mekele airport (located at approximately 7 km from the City centre)<sup>21</sup> on 5 June 1998. In this case, the Commission does not specifically question the military nature of the objective (Mekele airport), nor the choice of weapons (cluster munitions) or the fact that they were used near an urban area. Moreover, the Commission, unlike the ICTY in the *Martić* case, does not infer the intent to attack civilians and civilian objects from the use of cluster munitions. Eritrea's liability was based on the violation of the principle of precaution.<sup>22</sup>

<sup>19</sup> ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 3 June 2000, § 27, <http://www.un.org/icty/pressreal/nato061300.htm>.

<sup>20</sup> See, *inter alia*, P. Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, Vol. 12 *E.J.I.L.* 2001, pp. 503-529; A. Breitegger, 'The Landmark Martić Case and the Inconsistent Treatment of Cluster Munition Use by the Office of the Prosecutor of the ICTY', Vol. 21 *Humanitäres Völkerrecht* 2008, pp. 164-180; and N. Ronzitti, 'Is the Non Lique of the Final Report by the Committee Established to Review the NATO Bombing Against the FRY Acceptable?', No. 840 *I.R.R.C./R.I.C.R.* 2000, pp. 1017-1027.

<sup>21</sup> Eritrea-Ethiopia Claims Commission, *Partial Award, Central Front, Ethiopia's Claim 2*, 28 April 2008, § 113, [http://www.pca-cpa.org/upload/files/ET%20Partial%20Award\(1\).pdf](http://www.pca-cpa.org/upload/files/ET%20Partial%20Award(1).pdf).

<sup>22</sup> Eritrea-Ethiopia Claims Commission, *supra* note 21, §§ 108, 110 and 112.

### 3. The UN Commission of Inquiry on Lebanon

On 11 August 2006, the Human Rights Council (HRC) adopted Resolution S-2/1 on *The grave situation of human rights in Lebanon caused by Israeli military operations*, in which it expressed its intention to “establish urgently and immediately dispatch a high-level commission of inquiry”.<sup>23</sup> The Commission assembled in Geneva on 11 September and agreed to report to the HRC within two months. The Report provides an overview of the 33-day long conflict and addresses the qualification of and the law applicable to the conflict.<sup>24</sup>

The Commission addressed specifically the use of cluster munitions by the Israel Defence Forces (IDF) - 90 per cent of which were fired during the last 72 hours of the conflict - and found that “The use of cluster munitions by 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, thus causing great suffering, injury and death during and after the conflict”.<sup>25</sup> Moreover, considered the foreseeable high dud rate, the Commission stressed that “these weapons were used deliberately to turn large areas of fertile agricultural land into ‘no go’ areas for the civilian population”<sup>26</sup> and that “their use amounted to a *de facto* scattering of anti-personnel mines across wide tracts of Lebanese land”.<sup>27</sup>

On this basis, the Commission recommended to the HRC: “to promote urgent action to include cluster munitions to the list of weapons banned under international law”; and to: “request the relevant international bodies, including the Meetings of States Parties to the CCW and to the AMC, to address the legality of some

<sup>23</sup> UN Human Rights Council, Res. S-2/1, Special Session, UN Doc. A/HRC/S-2/1, 11 August 2006, § 7.

<sup>24</sup> *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, UN Doc. A/HRC/3/2, 23 November 2006.

<sup>25</sup> See *supra* note 24, § 337.

<sup>26</sup> See *supra* note 24, § 253.

<sup>27</sup> See *supra* note 24, § 259.

weapons particularly indiscriminate to the civilian population”.<sup>28</sup> More generally, the Commission recommended to the HRC, *inter alia*: “to promote and monitor the obligation to “respect and ensure respect” of the international humanitarian law by all parties in a conflict, including non-State actors”;<sup>29</sup> and: “to address and promote legal means for individuals to redress violations of human rights and humanitarian law during conflicts”.<sup>30</sup>

The Israeli Authorities issued two official statements to justify their use of cluster munitions arguing, first, that (at the time of the facts) international law and accepted practice did not prohibit the use of cluster munitions and, second, that the IDF’s use of cluster munitions was in accordance with international humanitarian law.<sup>31</sup>

#### **IV. The ‘Two Pillars’ of the Convention on Cluster Munitions**

The CCM can be divided into two ‘pillars’: a) the first concerns humanitarian and military issues; b) the second concerns victim assistance and human rights.

##### **1. The ‘First Pillar’**

The main provisions of the first ‘pillar’ of the CCM concern the ban of cluster munitions that cause “unacceptable harm” to civilians (art. 1), the relations with States not party to the Convention (art. 21) and the storage and stockpile destruction (art. 3).

<sup>28</sup> See *supra* note 24, J.

<sup>29</sup> See *supra* note 24, G.

<sup>30</sup> See *supra* note 24, M.

<sup>31</sup> Israel Ministry of Foreign Affairs, *Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Munitions*, 5 September 2006, <http://www.mfa.gov.il/MFA>; and Military Advocate General, Brig. Gen. Avihai Mendelblit, *Opinion Regarding Use of Cluster Munitions in Second Lebanon War*, 24 December 2007, <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Opinion%20of%20the%20Military%20Advocate%20General%20regarding%20use%20of%20cluster%20munitions%20in%20Second%20Lebanon%20War%2024>.

## A. The Ban on Cluster Munitions that Cause “Unacceptable Harm” to Civilians

For the purposes of the CCM, “cluster munition” means: “a conventional munition designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions” (art. 2.2). First of all, it should be noted that the CCM introduces a *partial ban* on cluster munitions. From the beginning of the Oslo Process, States have committed to the adoption of a legally binding instrument to ban cluster munitions that cause “unacceptable harm” to civilians.<sup>32</sup>

On this basis, the CCM introduced the prohibition to use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions (art. 1). However, there are three exceptions. The prohibition *does not* apply to: a) munitions or submunitions designed to dispense flares, smoke, pyrotechnics or chaff, or a munition designed exclusively for an air defence role (art. 2.2(a)); b) munitions or submunitions designed to produce electrical or electronic effects (art. 2.2(b)); and c) munitions that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, have all of the following five characteristics: (i) each munition contains fewer than ten explosive submunitions; (ii) each explosive submunition weighs more than four kilograms; (iii) each explosive submunition is designed to detect and engage a single target object; (iv) each explosive submunition is equipped with an electronic self-destruction mechanism; (v) each explosive submunition is equipped with an electronic self-deactivating feature.

In other words, the CCM bans *explosive* cluster munitions which are indiscriminate and inhumane by nature (almost all munitions produced and used until now) and allows the use of those that comply with the standard set by art. 2.2, which should make cluster munitions more accurate and reliable<sup>33</sup> and thus

<sup>32</sup> *Declaration of the Oslo Conference on Cluster Munitions*, *supra* note 3, p. 1 (i).

<sup>33</sup> In 2007, the ICRC called for a ban on “inaccurate and unreliable” cluster munitions. See *The ICRC’s Position on Cluster Munitions and the Need for Urgent Action*, Geneva, 25 October 2007, <http://www.icrc.org/Web/>

reduce the risk of incidental harm to civilians within the bounds of ‘acceptability’. This approach differentiates the CCM from the 1997 *Convention on anti-personnel mines* (AMC), which introduced a *total ban* on anti-personnel mines, regardless of the technical characteristics of the mines.

*i. The Notion of “Unacceptable Harm” to Civilians*

On the legal level, the notion of “unacceptable harm” to civilians is not readily understandable. The expression was initially used in the *Declaration of the Oslo Conference on cluster munitions*<sup>34</sup> to condemn the humanitarian and socio-economic impact of cluster munitions and was later reaffirmed in the Preamble to the CCM (PP 18). It subsequently influenced the lexicon of the general debate on cluster munitions. The United Nations themselves, in the position adopted in the 2007 Meeting of the High Contracting Parties to the CCW, called for the ban of cluster munitions that cause “unacceptable harm” to civilians.<sup>35</sup> The criterion of ‘acceptability’ is unprecedented in humanitarian law. The AP I, for instance, establishes that the harm caused to civilians must be “not excessive” in relation to the concrete and direct military advantage anticipated (art. 51.5).

As we have noted, the CCM bans cluster munitions that are indiscriminate by nature and are therefore contrary to the principles of distinction and proportionality and to the ban on the use of weapons that have indiscriminate effects. On this basis, in accordance with the ordinary meaning to be given to the terms in

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Eng/siteeng0.nsf/html/cluster-munitions-statement-251007. As specified by the ICRC: a) the term “inaccurate” is used to refer to submunitions that cannot be precisely targeted once they are released; b) the term “unreliable” describes the fact that large numbers of submunitions fail to explode on impact. ICRC, *Cluster Munitions: Why do We Need a New Treaty?*, Geneva, 2008, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/\\$File/Cluster-munition-treaty-factsheet.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/cluster-munitions-factsheet-010208/$File/Cluster-munition-treaty-factsheet.pdf).

<sup>34</sup> See *supra* note 3.

<sup>35</sup> 2007 Meeting of the High Contracting Parties to CCW, *UN Position on Cluster Munitions*, CCW/MSP/2007/3, 8 November 2007. This position was formally adopted at the UN Principals Meeting of the Inter-Agency Coordination Group on Mine Action, New York, 17 September 2007.

their context,<sup>36</sup> the expression “unacceptable harm” would refer to the indiscriminate effects of cluster munitions *banned* by the CCM. At the same time, in the light of the humanitarian object and purpose<sup>37</sup> of the CCM, the expression of “unacceptable harm” could be interpreted more broadly and applied to cluster munitions that are *not banned* by the CCM. These munitions, although not indiscriminate by nature, are nevertheless *area weapons*. At this point, it seems useful to ask whether the notion of “unacceptable harm” to civilians introduces a new test for determining the legality of cluster munition attacks in or near urban or densely populated areas.

In the first place, the notion of “unacceptable harm” to civilians would come into play with respect to the principle of proportionality. In this context, the harm caused to civilians that is excessive in relation to the concrete and direct military advantage anticipated would be unacceptable. In other words, the notion of “unacceptable harm” would coincide with that of “excessive harm” to civilians. Secondly, the notion of “unacceptable harm” to civilians would come into play with respect to the principle of precaution. In this context, the notion of “unacceptable harm” seems to introduce a significant innovation. In fact, it seems to go beyond the objective and comparative nature of the proportionality test to give greater emphasis to the “principles of humanity” recalled in the Preamble to the CCM (PP 17). In principle, the greater is the recognition of the value of human dignity and worth, the greater are the precautions to be taken and the fewer are the ‘acceptable harm’ to civilians: a harm may *not be excessive* in relation to the military advantage and, at the same time, be *unacceptable* in relation to the *principle of humanity*, which combines the “elementary considerations of humanity”<sup>38</sup> and the

<sup>36</sup> Art. 31.1 1969 VCLT.

<sup>37</sup> See *supra* note 36.

<sup>38</sup> First recognized in the Nuremberg International Military Tribunal (see *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (London, H.M.S.O., 1950), Part 22, p. 450), the “elementary considerations of humanity” were recalled by the ICJ in *Corfu Channel Case (UK v. Albania)*, 9 April 1949, *I.C.J. Rep.* 1949, p. 22, and in *Legality of the Threat or Use of Nuclear*

“principles of humanity” recalled in the ‘Martens clause’ (*infra* IV.1.A, *iv*) into one principle. In this case, precautions in attack should cover the risk of *either* causing harm that is *excessive* in relation to the military advantage anticipated, *or* causing harm that is *unacceptable* in relation to the principle of humanity.<sup>39</sup>

The notion of “unacceptable harm” is still legally vague and it is to be hoped that it will be clarified by international practice and jurisprudence. At the same time, it might already have some effect. For instance, the ‘cumulative effect’ of repeated attacks, addressed by the ICTY in the *Kupreskic et al.* case, could be regarded as an example of “unacceptable harm” to civilians.<sup>40</sup>

## *ii. Precautions in Cluster Munition Attacks*

In its first written formulation, which dates back to the 1907

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*Weapons*, *supra* note 11, §§ 79 *et seq.* See, in general, M. Sassòli & A. Bouvier (eds.), *How Does Law Protect in War?* (Geneva, ICRC, 1999), pp. 112-115.

<sup>39</sup> According to Jean Pictet, the principle of humanity means that: “capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible”; J. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht, Martinus Nijhoff, 1985), p. 62. The *principle of humanity* is also one of the fundamental principles of the Red Cross and Red Crescent Movement proclaimed in 1965 by the *20th International Conference of the Red Cross*. Formulated for the first time in 1955, “it demands that man shall be treated humanely under all circumstances”. See, in general, J. Pictet, *The Fundamental Principles of the Red Cross: Commentary*, Geneva, 1979, [http://www.icrc.org/Web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo\\_Final.3&View=defaultBody3](http://www.icrc.org/Web/eng/siteeng0.nsf/html/EA08067453343B76C1256D2600383BC4?OpenDocument&Style=Custo_Final.3&View=defaultBody3).

<sup>40</sup> ICTY, Trial Chamber, *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000, § 526: “In case of repeated attacks, all most of them falling within the grey area between indisputable legality and illegality, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity”. See, *inter alia*, N. Ronzitti, *Diritto internazionale dei conflitti armati* (Torino, Giappichelli, 2006), pp. 140-141.



Hague Convention IX, the principle of precaution requires States to take “all due measures” in order that civilians may suffer “as little harm as possible” (art. 2.3). In the formulation adopted by the API it requires States to take “all feasible precautions” in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects (art. 57.2(a)ii). The principle is recalled in the Preamble to the CCM (PP 20).

It seems relevant to ask what might be the “feasible precautions” to be taken in case of attack with cluster munitions. The first precaution seems to be to avoid attacking military objectives that are located in or near urban or densely populated areas. Under the AP I: “when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects” (art. 57.3). This precaution holds a special meaning in the case of the use of *area weapons*, which pose an increased risk to civilians. The CCW Protocol III on *Prohibitions or Restrictions on the Use of Incendiary Weapons*, for instance, forbids “in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons” (art. 2.2). Further confirmation is found in the international jurisprudence and reports that make explicit reference to cluster munitions (*supra* III). In particular, in the *Martić* case, the ICTY stated that: a) the actual or presumed presence of military objectives in urban or densely populated areas, does not legitimate the use of cluster munitions; b) the awareness of the indiscriminate effects of cluster munitions, when used in or near urban or densely populated areas, indicates the intent to target civilians (*supra* III.1).

In the current international scenario armed conflicts are often ‘asymmetric’ in nature and hostilities are conducted in or near urban or densely populated areas. Cluster munitions not banned by the CCM are nevertheless *area weapons* (*supra* I) and they do not seem suitable for attacks in or near urban or densely

populated areas. This, however, cannot be excluded *a priori*. As it has been noted in the legal literature: “If it is planned to attack a small military objective surrounded by densely populated civilian areas, the only legitimate *modus operandi* may be to resort to a surgical raid with precision-guided munitions”.<sup>41</sup> At this point, it seems useful to examine the role attributed by the CCM to military technology.

### *iii. The Role of Military Technology*

Even the more accurate and reliable cluster munitions, namely, those that comply with the standard set by art. 2.2 can potentially have *wide-area effects*. In the first place, the failure rates could be higher than expected.<sup>42</sup> Secondly, as it was pointed out in legal literature: “Accuracy is a key element of precision, but the terms are not synonymous. ... Precision strikes therefore require more than accurate weapon systems”.<sup>43</sup> In other words, the technical standard of weapons is one of the tests of the legality of an attack. As noted by the ICRC commentary on the AP I, the role of the *human responsibility* is pre-eminent with respect to that

<sup>41</sup> Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge, Cambridge University Press, 2004), p. 126.

<sup>42</sup> The failure rate of cluster munitions cannot exactly be predicted during the design and development process and can also depend on the actual environmental conditions in which they are used (wind, humidity, etc.). For instance, in Lebanon (2006), the IDF used the M85, self-destruct dual-purpose (anti-personnel and anti-armour) cluster munitions. According to the manufacturer, the Israel Military Industries Ltd. (IMI): “the M85 cluster device has hazardous dud rate of 0.06 % ... M85 devices are the most environmental friendly device in the world because they leave no environmental hazardous behind and only minute of hazardous duds”. See *IMI Report to the Australian Senate Standing Committee Inquiry into Cluster Munitions (Prohibition Bill)*, 14 February 2007, [http://www.aph.gov.au/SENATE/committee/fadt\\_ctte/completed\\_inquiries/2004-07/cluster\\_bill\\_2006/submissions/sub03.pdf](http://www.aph.gov.au/SENATE/committee/fadt_ctte/completed_inquiries/2004-07/cluster_bill_2006/submissions/sub03.pdf). However, the estimated failure rate of M85 in Lebanon (2006) was 10-15 %. Quite a substantial difference when applied to millions of submunitions. See United Nations Mine Action Co-ordination Centre in South Lebanon (UNMACC SL), *2007 Annual Report*, Beirut, 2007, <http://www.maccsl.org/reports/Annual%20Reports/2007%20Annual%20Report%20%20-%20FINAL.pdf>.

<sup>43</sup> M. N. Schmitt, ‘Precision Attack and International Humanitarian Law’, Vol. 87 *I.R.R.C./R.I.C.R.* 2005, p. 446.

of military technology and interpretation of the precautionary standard must “be a matter of common sense and good faith”<sup>44</sup> of planners and commanders, who should refrain from using *area weapons* in or near urban or densely populated areas, in order to spare the population as far as possible. In short, compliance with the standard set by art. 2.2 should make cluster munitions more accurate and reliable but not suitable, *as such*, for attacks in or near urban or densely populated areas.

*iv. The Progress of Military Technology and the Role of the Martens Clause*

Two further considerations are relevant in the light of the ‘Martens clause’, which is recalled in the Preamble to the CCM (PP 11).<sup>45</sup> As stressed by the International Court of Justice (ICJ), it “has proved to be an effective means of addressing the rapid evolution of military technology”.<sup>46</sup> The meaning of the ICJ’s words is twofold. First, the clause allows to determine the legality of the use of weapons, and their compliance with the *principle of humanity* (*supra* IV.1.A.i), even in the absence of provisions specifically prohibiting or limiting the use of those weapons *as such*. Secondly,

<sup>44</sup> Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht, Martinus Nijhoff, 1987), § 2198.

<sup>45</sup> According to PP 11: “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”. The clause derives its name from Fyodor Fyodorovich Martens (1845-1909), the Russian delegate at the 1899 Hague Peace Conference who proposed its introduction into the Preamble to 1907 HC II (PP 5). It was reaffirmed in the Preamble to 1907 HC IV (PP 8), in the four 1949 Geneva Conventions (art. 63, 62, 142 and 158, respectively), in the two 1977 Additional Protocols (art. 1.2 and PP 4, respectively) and in the Preamble to the CCW (PP 5). The clause is of a customary nature. See ICJ, *supra* note 11, § 79. See also, *inter alia*, P. Benvenuti, ‘La Clausola Martens e la tradizione classica del diritto naturale nella codificazione del diritto dei conflitti armati’, in G. Badiali *et al.* (eds.), *Scritti degli allievi in memoria di Giuseppe Barile* (Padova, CEDAM, 1995), pp. 171-224; and A. Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’, Vol. 11 *E.J.I.L.* 2000, pp. 187-216.

<sup>46</sup> ICJ, *supra* note 11, § 78.

in the light of the clause, States should use weapons that are most effective in avoiding or minimizing incidental harm to civilians.

Legal scholars are divided on the existence of a customary rule that would oblige States to acquire more advanced weapons or that would require States equipped with more advanced weapons to use them in all circumstances.<sup>47</sup> Moreover, a duty to acquire or use the more advanced munitions “would introduce an inadmissible discriminatory bias either in favour of, or against, more developed belligerent States equipped with expensive ordnance at the cutting edge of modern technology”.<sup>48</sup> Under humanitarian law, the sole limitation to the right of States to choose means of warfare would be the prohibition to use weapons which are indiscriminate by nature.<sup>49</sup>

This position, although grounded in positive humanitarian law, seems to underestimate the humanitarian concerns, and to overestimate the military necessity. As stressed by the ICJ, at the heart of principles and rules of law applicable in armed conflicts there is “the overriding consideration of humanity”<sup>50</sup> which makes the conduct of hostilities subject to strict requirements. This is also in line with the *1868 St. Petersburg Declaration*, according to which the main aim of humanitarian law is to fix the “technical limits at which the necessities of war ought to yield to

<sup>47</sup> See, *inter alia*, Dinstein, *supra* note 41; M. Sassòli & L. Cameron, ‘The Protection of Civilian Objects’, in N. Ronzitti & G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues* (Utrecht, Eleven, 2006), pp. 70-71. On the existence of a duty to acquire and use precision-guided munitions see, *inter alia*, S. W. Belt, ‘Missiles over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas’, Vol. 47 *Naval L. Rev.* 2000, p. 174; and D. L. Infield, ‘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?’, Vol. 26 *George Washington Journal of International Law and Economics* 1992, pp. 110-111.

<sup>48</sup> Dinstein, *supra* note 41. See also J. F. Murphy, ‘Some Legal (and Few Ethical) Dimensions of the Collateral Damage Resulting from the NATO’s Kosovo Campaign’, Vol. 31 *Israel Yearbook on Human Rights* 2002, p. 63; and Sassòli & Cameron, *supra* note 47.

<sup>49</sup> See, *inter alia*, Henckaerts & Doswald-Beck, *supra* note 10; and Schmitt, *supra* note 43, p. 446.

<sup>50</sup> ICJ, *supra* note 11, § 95.

the requirements of humanity”.<sup>51</sup>

In principle, the standard of “indiscriminate effects” is evolving along with technological advances in precision.<sup>52</sup> As we have note, more advanced weapons do not lead, *per se*, to legal attacks and less advanced weapons do not lead, *per se*, to illegal attacks (*supra* IV.1.A,ii). At the same time, the legality of attacks in or near urban or densely populated areas could depend on the precision of the weapons used. On this basis, States should be equipped with advanced weapons and use them in case of attack in or near urban or densely populated areas. This approach does not necessarily imply a discriminatory bias either in favour of, or against, more developed States. The objective of acquiring and using more advanced weapons should not be conceived in absolute terms, but according to the human and material capabilities of each State. In other words, more developed States could reduce the humanitarian and socio-economic impact of their weapons and assist, on a bilateral or multilateral basis, the less developed States to achieve *their* best standards. This approach to cooperation and assistance can improve the standard of protection of civilians and is consistent with the duty of States “to respect and to ensure respect” for humanitarian law (AP I, art. 1.1).

As to cluster munitions, the progress of military technology could render the *minimum standard* set by the CCM obsolete. Is amending art. 2.2 the only solution to ensure the best protection to civilians? The answer is not necessarily negative. In light of the Martens clause, States could already be taking into account the

<sup>51</sup> 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, PP 1; A. Roberts & R. Guelff, *Documents on the Laws of War* (Oxford, Oxford University Press, 2000), p. 53. In the Dublin Conference, the St. Petersburg Declaration was particularly emphasised by the ICRC (Opening Statement of 19 May 2008) and the United Kingdom (Closing Statement of 30 May 2008), <http://www.clustermunitionsdublin.ie/general-statements.asp>.

<sup>52</sup> As noted in legal literature: “as weaponry becomes more precise, interpretation of international humanitarian law is becoming increasingly demanding for an attacker. So long as such interpretations do not depart from the law or ignore the realities of military necessity, this too is to be welcomed”: Schmitt, *supra* note 43, p. 466.

progress of military technology and use more advanced cluster munitions even before any amendments are made to art. 2.2. Otherwise, humanitarian law would become crystallized on a specific technical standard and this could weaken the protection of civilians. In this light, the exchange of *know how* and military technology should be a key element of cooperation and assistance under the CCM (*infra* IV.2.C).

## **B. Relations with States not Party**

During the negotiations, a number of States, and in particular NATO members, expressed concerns to whether signatories to the accord could participate in joint military operations with States not party to the CCM that engage in activities prohibited by the CCM. The discussion on relations between States Parties and States not party raised the issue of the so-called ‘interoperability’.

Given its humanitarian and military implications, ‘interoperability’ was one of the issues that most divided the delegates at the Dublin Conference. A ban on the participation of States in international operations would have been unrealistic; it would have raised serious strategic concerns and would have hindered the approval process. Conversely, the absence of any limitation to the participation of States Parties in international military operations would have undermined the ban on cluster munitions. The CCM adopted an intermediate solution (art. 21). On the one hand: “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” (art. 21.3). On the other hand, within the framework of military cooperation and operations with States not party, each State Party is not allowed: “(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” (art. 21.4). This provision should allow members of

Strategic Alliances, and in particular NATO members, to adhere to the CCM. This rule is one of the most controversial points of the instrument and will require paying specific attention to its interpretation and implementation.

### **C. Storage and Stockpile Destruction**

The first ‘pillar’ of the CCM is completed by the rules governing munitions storage and stockpile destruction (art. 3) and the relations with States non-Parties (art. 21). On stockpile destruction the CCM has a second difference from the AMC. While the latter applies to munitions stockpiles under the jurisdiction *or* control of States Parties (art. 4), the CCM requires each State Party to separate all cluster munitions under its jurisdiction *and* control from munitions retained for operational use and mark them for the purpose of destruction (art. 3). This provision should allow members of Strategic Alliances, and in particular NATO members, to adhere to the CCM without undertaking the obligation to separate and destroy munitions stockpiles that are located in areas that are under their jurisdiction, but under the control of another NATO member. Stockpiles shall be destructed not later than eight years after the entry into force of the CCM (art. 3.2). States are entitled to submit a request for an extension of the deadline for a period of up to four years (art. 3.3). 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 (art. 3.6). Thus, the CCM envisages two phases, i.e. the separation (even only using tags and seals) and the destruction of munitions stockpiles that are not destined to activities allowed under the CCM.

### **D. Non-State Actors**

Use of cluster munitions by Non-State Actors (NSAs) has been recorded in a few cases.<sup>53</sup> However, the ever growing involvement

<sup>53</sup> According to Human Rights Watch, both identified and non-identified



of NSAs in today's armed conflicts, which are often of an *asymmetric* nature, poses serious problems for the implementation of international humanitarian law. The ban on cluster munitions that cause "unacceptable harm" to civilians would not be effective unless the risk of their use by NSAs is eliminated (e.g. stockpiles of cluster munitions banned under the CCM could fuel the illicit arms trade and the transfer of cluster munitions to NSAs). On this basis, in the Preamble to the CCM, States declare "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 the Convention (PP 13).

Non-governmental organizations are called too to promote the implementation of the CCM by NSAs. In this respect, there was an important precedent in the field of anti-personnel mines. In 2001, the international humanitarian organization 'Geneva Call' promoted the signing of the *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation on Mine Action* by NSAs.<sup>54</sup> To date, 35 NSAs from different regions of the world have signed the *Deed of Commitment* where they accepted "that international humanitarian law and human rights apply to and oblige all parties to armed conflict" (PP 3) and adhered "to a total ban on anti-personnel mines" (art. 1). This original way of promoting humanitarian law and human rights could be further developed for cluster munitions.

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NSAs used cluster munitions in 6 cases: Self-proclaimed Republic of Serbian Krajina (Croatia, 1991-1995); non-identified groups (Bosnia and Herzegovina, 1992-1995); non-identified groups (Kosovo, Albania, Bosnia and Herzegovina, 1999); North Union, Taliban (Afghanistan, 1996-2000); Hezbollah (Israel, 2006); non-identified groups (Nigeria, 2007). See Human Rights Watch, *Survey Overview of Cluster Munitions Policy and Practice*, No. 1, 2007, <http://hrw.org/backgrounders/arms/cluster0207/cluster0207web.pdf>.

<sup>54</sup> Geneva Call, *Deed of Commitment Under Geneva Call for Adherence to a Total ban on Anti-Personnel Mines and for Cooperation on Mine Action*, 4 October 2001, <http://www.genevacall.org/about/testi-mission/gc-deed-of-commitment.pdf>.

## 2. The ‘Second Pillar’

The main provisions of the second ‘pillar’ of the CCM concern the clearance and destruction of cluster munitions remnants and risk reduction education (art. 4), victim assistance (art. 5) and international cooperation and assistance (art. 6).

### **A. Clearance and Destruction of Cluster Munitions Remnants and Risk Reduction Education**

With regard to the remnants of war, each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munitions remnants located in contaminated area under its jurisdiction or control (art. 4.1). Clearance and destruction shall be completed not later than ten years after entry into force of the CCM (art. 4.1(a)). After entry into force of the CCM, such clearance and destruction must be completed not later than ten years after the end of the active hostilities during which such cluster munitions became remnants (art. 4.1(b)). States may submit a request for an extension of the deadline for a period of up to five years (art. 4.5). In cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of the CCM 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 CCM for the latter, 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 (art. 4.4). Like the CCW P V, the CCM did not introduce *retroactive* obligations for the clearance of areas that have been contaminated in the past and only promotes the assistance to affected States. Lastly, each State Party shall conduct risk reduction education to ensure awareness among civilians living in or around contaminated areas of the risks posed by such remnants (art. 4.2(e)).

In this context it is worth mentioning the *Behrami* case decided by the ECtHR in 2007.<sup>55</sup> The case refers to two children, Gadaf and

<sup>55</sup> ECtHR (Grand Chamber), *Agim Behrami and Bekir Behrami v. France*, Appl. No. 71412/01, 2 May 2007, Decision.

Bekim, the sons of A. Behrami. On 11 March 2000, the Behrami brothers were playing together with other children in an area of Mitrovica, in Kosovo, where they came across a number of cluster munition remnants produced by the 1999 NATO Air Campaign. One of the children threw an undetonated cluster bomb into the air, which exploded when it hit the ground killing Gadaf and seriously injuring Bekim. The applicants invoked art. 2 (*Right to life*) of the European Convention on Human Rights (ECHR). The ECtHR had to, first, define a criterion for the division of responsibilities between the United Nations Administration for Kosovo (UNMIK) and Member States and, second, the law applicable for the violation of the right to life caused by inaction (failure to demine). The Grand Chamber concluded that the mandate for supervising demining was taken over by the Organization of the United Nations,<sup>56</sup> which has a legal personality separate from that of Member States and was not a Contracting Party to the ECHR. Considering the jurisdiction, *ratione personae*, of the ECtHR, the application was declared inadmissible.<sup>57</sup> The issue of the division of the responsibility between the United Nations and its Member States is still being debated.<sup>58</sup> At the same time, the CCM, which

<sup>56</sup> More specifically, by the United Nations Mine Action Co-ordination Centre (UNMACC), created by the United Nations Administration for Kosovo (UNMIK) in 1999. The Kosovo Force (KFOR) was involved in demining as a service provider whose personnel acted on UNMIK's behalf. At the time of the facts, Kosovo was under the control of the KFOR, mandated under UNSC Res. 1244, 10 June 1999. Mitrovica was in the area controlled by a French-led KFOR brigade. On 22 March 2000, the UNMIK (mandated by the same Resolution) concluded that the death of Gadaf Behrami was an "unintentional homicide committed by imprudence". Agim Behrami complained to the Kosovo Claims Office that France had not respected the duty to demine according to UNSC Res. 1244. The claim was rejected on the ground that demining was under the responsibility of the UN, and not of France. See *Agim Behrami and Bekir Behrami v. France*, *supra* note 55, § 125.

<sup>57</sup> *Agim Behrami and Bekir Behrami v. France*, *supra* note 55, §§ 153 *et seq.*

<sup>58</sup> On 7 July 2008, Agim Behrami complained to the Human Rights Advisory Panel (HRAP) of the UNMIK. The HRAP has jurisdiction over complaints relating to alleged violations of human rights that have occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to continuing violations of human

provides obligations on clearance and destruction of remnants, and on victim assistance, should improve victims' access to reparation in cases similar to the *Behrami* case (*infra* IV.2.B and C).

## B. Victim Assistance

The CCM introduced victim assistance obligations for States. This is one of the most important aspects of the CCM, which goes beyond the standard set by the AMC, that does not provide victim assistance obligations.<sup>59</sup> The CCM provides a broad definition of victims and assistance. For the purposes of the convention, "cluster munition victims" are: "all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realization 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" (art. 2.1). This 'community approach' is particularly noteworthy. The humanitarian impact of cluster munitions falls on all the people who lose their lives or suffer injuries. The social and economic impacts, instead, fall on society and especially on the families and communities who suffer the loss of their members and have to care for those who suffered physical or psychological injury.<sup>60</sup>

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rights. The incident in which Gadaf Behrami was killed and Bekim Behrami was seriously injured occurred on 11 March 2000. On this basis, the HRAP decided that "apart from the question whether the omission complained of can be attributed to UNMIK, the complaint therefore lies outside the Panel's competence *ratione temporis*". See UNMIK Human Rights Advisory Panel, *Agim Behrami v. UNMIK*, No. 24/08, Decision, 17 October 2008, § 14.

<sup>59</sup> According to art. 6.3 AMC: "Each State Party in a position to do so shall provide assistance".

<sup>60</sup> A precedent for the "community approach" can be found in the Council of Europe's policy of assistance to victims of terrorist acts. See, for instance, the Guidelines on the Protection of Victims of Terrorist Acts of 2005, which include as a "victim of terrorist acts": "any person who has suffered direct physical or psychological harm as a result of a terrorist act as well as, in appropriate circumstances, their close family"; see Council Of Europe, *Guidelines on the Protection of Victims of Terrorist Acts*, 2 March 2005, I, 3.

### *i. The Role of States*

Each State Party, with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with humanitarian law and human rights law, adequately provide assistance, including medical care, rehabilitation and psychological support, social and economic inclusion (art. 5.1).<sup>61</sup> In fulfilling its obligations, each State Party shall, *inter alia*, adopt, implement and enforce necessary policies, legal and administrative measures (art. 5.2(b)), and develop a national plan and budget with a view to incorporating them within the national disability, development and human rights frameworks and mechanisms (art. 5.2(c)). States shall also designate a *focal point* within the Government for coordination of matters relating the assistance (art. 5.2(g)). The special needs of women, children and vulnerable groups shall be assessed and adequately addressed (PP 8, art. 5.1, 6.7 and 7.1(k)).

### *ii. The Role of the International Community*

States bear the primary responsibility for providing victim assistance. At the same time, the CCM emphasized the role of intergovernmental and non-governmental organizations, in line with the *principle of subsidiarity* and with the spirit of solidarity that should guide humanitarian action.

The CCM stresses the need “to coordinate adequately efforts undertaken in various *fora* to address the rights and needs of victims of various types of weapons” (PP 10). In this view, international, regional and bilateral cooperation should be the standard approach to victim assistance and it is strongly promoted by the CCM (*infra* IV.2.C). Each State Party has the right to seek and receive technical, material and financial assistance. 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 (art. 6.7). On this basis, each State Party

<sup>61</sup> The abovementioned Guidelines of the Council of Europe also include “spiritual assistance” among the emergency assistance to victims (II), see *supra* note 60.

may 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*, risk reduction education programmes and awareness activities to reduce the incidence of injuries or deaths caused by cluster munitions and remnants (art. 6.12(d) and (e)). States Parties giving and receiving assistance shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes (art. 6.12). Lastly, States not party to the CCM, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the ICRC, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organizations may be invited to attend the *Meeting of States Parties* (art. 11.3) and the *Review Conference* as observers (art. 12.3).

As to NGOs, they provide victim assistance throughout the world and in some cases their activities help to compensate for the lack of adequate public services. To some extent, the introduction of victim assistance obligations could be considered as a result of the active role played by the NGOs in the Oslo Process. States Parties to the CCM recognized the efforts made NGOs to end civilian suffering caused by cluster munitions (PP 17) and committed themselves to promote *pluralism* in victim assistance and to respect the specific role and contribution of all relevant actors (art. 5.2(c)).<sup>62</sup> NGOs are also expected to take an active

<sup>62</sup> In the Dublin Conference, the Holy See Delegation has particularly stressed the need for *pluralism* in victim assistance. In its Closing Statement of 30 May 2008, the Holy See provided the following interpretation of art. 5.2 (c): “when a State Party develops a national plan and budget to carry out assistance activities according to the Convention ‘with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms’, it shall guarantee the pluralism that is inherent in any democratic society and the diversity of relevant non-governmental actors. This respectful form of coordination of the various activities of governmental and non-governmental actors is in line with what the Preamble states (PP 10)”. See Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, *Summary Record of Fourth Session of the Plenary and Closing Ceremony of the Conference*, Doc. CCM/SR/4, 30 May 2008,

role in monitoring the implementation of the CCM. During the *Oslo Signing Conference*, for instance, some States proposed to create an Implementation Support Unit (ISU) within the Geneva International Centre for Humanitarian Demining (GICHD) like the ISU established in 2001 for the AMC.<sup>63</sup>

### C. Humanitarian Law and Human Rights Law

The CCM improved the standard of protection provided by both humanitarian law and human rights law and, to some extent, introduced a ‘point of contact’ between these two branches of international law. As to humanitarian law, the ban on cluster munitions that cause “unacceptable harm” to civilians consolidates the customary principles and rules prohibiting the use of means and methods of warfare that have indiscriminate effects. In addition, the notion of “unacceptable harm” seems to provide new elements for their interpretation and implementation in the light of the principle of humanity.

As to human rights law, the new instrument is even more pervasive. The CCM denounces the substantial impairment of the realization of human rights by the use of cluster munitions (art. 2.1) and requires States Parties to ensure assistance in accordance with humanitarian law and human rights law (art. 5.1). In general, cluster munition victims are considered as persons with disabilities and, *as such*, entitled to the rights recognized by the *Convention on the Rights of Persons with Disabilities*, recalled in the Preamble to the CCM as a sort of ‘loi-cadre’ *ratione personae* (PP 9). On this basis each State Party shall adopt, implement and enforce *ad hoc* policies, legal and administrative measures in view to coordinate the national disability, development and human rights

[http://www.clustermunitionsdublin.ie/pdf/Plenary4May30am\\_006.pdf](http://www.clustermunitionsdublin.ie/pdf/Plenary4May30am_006.pdf).

<sup>63</sup> For the *Oslo Signing Conference*, see *supra* note 5. On the establishment of the ISU for the AMC, see: 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, *Implementation Support for the Convention on the Prohibition of Anti-Personnel Mines*, Doc. APLC/MSP.3/2001/L.6, 29 August 2001, [http://www.apminebanconvention.org/fileadmin/pdf/mbc/MSP/3MSP/3MSP\\_Fina\\_%20Report\\_ISU\\_en.pdf](http://www.apminebanconvention.org/fileadmin/pdf/mbc/MSP/3MSP/3MSP_Fina_%20Report_ISU_en.pdf).



frameworks and mechanisms (art. 5.2). More precisely, national policies and measures should define the relationship between the *focal point* designated within the Government (art. 5.2(g)) and the national disability, development and human rights frameworks and mechanisms, in view to ensure the full realization of victims' rights, including the right to a remedy and to an adequate, effective and prompt reparation in case of their violations (*infra i* and *ii*).

The relation between humanitarian law and human rights law is the heart of a heated international debate.<sup>64</sup> The ICJ, in its Advisory Opinion on the *Legality of the threat or use of nuclear weapons* of 1996, considered humanitarian law to be a *lex specialis*, applicable during armed conflict.<sup>65</sup> Legal scholars have been divided over the Court's opinion. On the one hand, it could be interpreted in a formalistic way: human rights law is the *lex generalis*, humanitarian law is the *lex specialis* and, according to the Latin brocard, "*lex specialis derogat generali*". On the other hand, it could be interpreted in a more substantive way, in line with the AP I, under which civilians: "shall enjoy general protection against dangers arising from military operations" (art. 51.1). As stated by the HRC: "the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as a *lex specialis*".<sup>66</sup> Does

<sup>64</sup> In 1968, the *Teheran International Conference on Human Rights* adopted a resolution on *Human Rights in Armed Conflicts* requesting the General Assembly to invite the Secretary-General of the United Nations to study the need for additional humanitarian instruments or for possible revision of existing instruments to ensure the better protection of civilians in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare; International Conference on Human Rights (22 April-13 May 1968), Res. XXIII, 12 May 1968, § 1(b). The General Assembly adopted resolutions on respect for human rights in armed conflicts from 1968 to 1977 and in 1970 adopted the *Basic Principles for the Protection of Civilian Population in Armed Conflicts*; UNGA, Res. 2675(XXV), 9 December 1970.

<sup>65</sup> ICJ, *supra* note 11, § 25.

<sup>66</sup> Human Rights Council, Res. 9/9, *Protection of the Human Rights of Civilians in Armed Conflicts*, UN Doc. A/HRC/RES/9/9, PP 9. In this light, in 2004 the ICJ clarified that: "there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may

the *lex specialis* derogate, in specific circumstances, from the fundamental principles and rules of the *lex generali*? In principle, humanitarian law and human rights law are consistent with each other. They are both grounded on the faith “in the dignity and worth of the human person”, solemnly proclaimed in the *Charter of the United Nations* (PP 2) as the basic norm (*Grundnorm*) of international law. On this basis, serious violations of humanitarian law may also constitute a gross violation of human rights.<sup>67</sup> In addition, according to the *Statute of the International Criminal Court*, the interpretation of the law applicable in case of armed conflict must be consistent with internationally recognized human rights.<sup>68</sup> In other words, humanitarian law is, in specific circumstances, the *lex specialis*. But the adverb ‘*specialis*’ does not imply derogation from the fundamental principles and rules of the *lex generali*, but rather the necessity to adapt their implementation to extraordinary circumstances. In this case, *lex specialis non derogat generali*.<sup>69</sup>

The relation between humanitarian law and human rights law is still being debated.<sup>70</sup> At the same time, the CCM, in emphasizing

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be matters of both these branches of international law”. See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *I.C.J. Rep.* 2004, § 106.

<sup>67</sup> See the United Nations 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; UNGA Res. 60/147, 21 March 2006.

<sup>68</sup> See art. 21.3, *supra* note 18.

<sup>69</sup> A legal scholar proposed a “cumulative” (or *ratione materiae*) approach: “One may perhaps say that ‘human rights’ is the genus of which ‘humanitarian law’ is a species, but it seems desirable to retain a horizontal distinction, rather than to introduce a new, hierarchical one, as ‘human rights’ really concern rights enjoyed by all at all times, but essentially in peacetime, whereas ‘humanitarian rules’ concern rights protecting individuals in armed conflicts. It would appear appropriate, therefore, to view ‘human right’ and ‘humanitarian law’ as *ratione materiae* interrelated fields, both raising the level of behaviour towards individuals and both concerned with the rights and protection of individuals”. See I. D. De Lupis, *The Law of War* (Cambridge, Cambridge University Press, 1987), p. 131.

<sup>70</sup> Human rights law was directly applied by the European Court of Human Rights (ECtHR) in a case of non-international armed conflict, namely

the role of the principle of humanity and the subsequent responsibility to protect civilians in all situations, does not give arguments in favour of a formalistic approach. More in general, it seems to show the tendency of humanitarian law to evolve towards a *human rights-based approach* to the protection of civilians. This would be the result of the gradual establishment of a social and international order in which the fundamental rights and freedoms can be fully realized,<sup>71</sup> and in which human rights law is the ‘paradigm’ of the international law.

*i. The Right to Life*

All human rights are universal, indivisible and interdependent and interrelated. At the same time, within the rights protected under the law of war, there is *internal hierarchy*: some such rights may not be suspended in emergencies, whereas there may, in specific circumstances, be derogations from others. For the purposes of the CCM, two human rights are worth mentioning: the right to life and the right to development, which are both threatened by cluster munition use and remnants. As stated by the ICJ:

In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*,

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the conflict between Chechnya and the Russian Federation. In that case, the first applicant alleged that her two children were killed by Russian Agents. The three applicants complained that their right to life was violated by the attacks against the convoy by Russian military planes. The applicants’ main arguments were based on art. 2 ECHR on the right to life. According to the ECtHR: “even assuming that the military were pursuing a legitimate aim ... the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population”. It was thus found that: “there has been a violation of Article 2 of the Convention in respect of the responding State’s obligation to protect the right to life of the three applicants and of the two children of the first applicant”. See ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Appl. No. 57947-49/00, 24 February 2005, Judgement, §§ 199-200.

<sup>71</sup> According to art. 28 Universal Declaration of Human Rights: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. See <http://www.un.org/Overview/rights.html>.

namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>72</sup>

During an armed conflict, incidental losses of civilian life are not classified as an arbitrary deprivation of life if they are “not excessive” in relation to the military advantage (AP I, art. 51.5). As we have noted, the notion of “unacceptable harm” to civilians introduced by the CCM could be used as a new test for determining the legality of attacks in or near urban or densely populated areas. In this light, losses of civilian life may *not be excessive* in relation to the military advantage and, at the same time, be *unacceptable* in relation of the principle of humanity (*supra* IV.1.A, *i*) and thus be regarded as an arbitrary deprivation of life.

After an armed conflict, “cluster munition remnants kill or maim civilians, including women and children” (CCM, PP 3). In post-conflict situations, the right to life, although protected by human rights law, could be left in a ‘legal limbo’. The new instrument, in providing victim assistance obligations for States, including the adoption of *ad hoc* national legal and administrative measures, should favour the access to reparation for victims in cases similar to the *Behrami* case (*supra* IV.2.A).

## *ii. The Right to Development*

The right to development can be seriously affected by cluster munitions remnants. As emphasized by the United Nations Institute for Disarmament Research (UNIDIR): “Cluster munition use and contamination have an impact on the economy in a variety of ways. Aside from the damage to infrastructure and property, livelihood activities are interrupted or limited because of this damage or lack of safe access to resources”.<sup>73</sup> There is no

<sup>72</sup> ICJ, *supra* note 11, § 25.

<sup>73</sup> UNIDIR, *supra* note 10, p. 16. In Lebanon, for instance, according to the United Nations Mine Action Coordination Centre in South Lebanon (UNMACC SL), cluster munition remnants produced by the Israeli Defense Forces’ bombings contaminated at least 25 % of the total

development without clearance of remnants.

Under the *Declaration on the right to development* of 1986: “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”.<sup>74</sup> The human person is the central subject of development, which aims at the *integral* development of the human being and the constant improvement of the well-being of the entire population and of all individuals.<sup>75</sup> On this basis, the *Vienna World Conference on Human Rights* of 1993 called the international community to promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.<sup>76</sup>

The CCM clearly addressed the socio-economic impact of cluster munitions (PP 3 and art. 2.1). As we have noted, in fulfilling its obligation to assist victims, each State Party shall adopt legal and administrative measures with a view to incorporating them within the national development frameworks and mechanisms (art. 5.2(c)). In this light, States failure to clear and destruct cluster munition remnants would constitute a breach of, *either*

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cultivated area of South Lebanon. Agriculture constitutes nearly 70 % of the total household income in southern Lebanon and half of the working population earns its living entirely from this activity. See UNMACC SL, *supra* note 42; and United Nations Food and Agricultural Organization (FAO), *Lebanon: Damage and Early Recovery Needs Assessment of Agriculture, Fisheries and Forestry*, Rome, 2006.

<sup>74</sup> Art. 1.1 UNGA Res. 41/128, 4 December 1986.

<sup>75</sup> *Id.*, art. 2.1 and PP 2 and 5. On the content of the right to development see, in general, UN Economic and Social Council, *Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2000/5*, UN Doc. E/CN.4/2001/WG.18/2, 2 January 2001, §§ 3-36.

<sup>76</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/24, 13 October 1993, § 10. According to art. 6.2 International Covenant on Economic, Social and Cultural Rights (1966), States should adopt “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development”.

the obligation to clear and destruct remnants, *or* the duty to eliminate obstacles to development. Thus, cluster munition action should be included within the wider context of cooperation for development<sup>77</sup> and this integrated approach should be a key component of cooperation under the CCM (*infra* IV.2.D).

#### **D. International Cooperation and Assistance**

The second ‘pillar’ of the CCM is completed by the provisions relating to international cooperation and assistance. According to the CCM, States Parties has the right to seek and receive assistance (art. 6.1). Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions. Such assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organizations or institutions, non-governmental organization or institutions or on bilateral basis (art. 6.2).

As we have noted, cooperation and assistance should be the regular approach in implementing the CCM. It should be particularly focused on clearance and destruction of remnants (*supra* IV.2.A), and on victim assistance (*supra* IV.2.B), and on the exchange of *know how* and military technology (*supra* IV.1.A, *ii* and *iv*). Finally, the link between cluster munition action and development should become a key component of cooperation. The CCM lays the foundations for this new integrated approach to cooperation and urges each State Party in a position to do to provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties (art. 6.8) and to contribute to relevant trust funds in order to facilitate the provision of assistance (art. 6.9).

<sup>77</sup> In this view, the Guidelines on European Community Mine Action 2008-2013 provide a useful precedent. They emphasize the relationship between mine action and development and “provide a basis for building synergy within the peace/security and development/cooperation nexus”. See Commission of the European Communities, *Guidelines on European Community Mine Action 2008-2013*, Doc. SEC/2008/2913, 25 September 2008, § 3, [http://ec.europa.eu/external\\_relations/mine/docs/guidelines\\_08\\_13\\_en.pdf](http://ec.europa.eu/external_relations/mine/docs/guidelines_08_13_en.pdf).

## **V. Entry into Force, National Implementation Measures and Reservations**

The CCM will enter into force six months after the thirtieth instrument of ratification, acceptance, approval or accession has been deposited to the Secretary-General of the United Nations (UNSG) (art. 17.1 and 22). Each State Party shall take all appropriate legal, administrative and other measures to implement the CCM, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under the instrument undertaken by persons or on territory under its jurisdiction or control (art. 9). Each State Party shall promote the application of the instrument by all the people who are under its jurisdiction or control, including members of NSAs.

Moreover, each State Party, in accordance with the spirit of humanitarian law, is called to promote the implementation of the instrument. States Parties shall consult and cooperate with each other regarding the implementation of the CCM and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations (art. 8.1). Finally, articles of the CCM shall not be subject to reservations (art. 19) and this should eliminate the risk of any downward compromise.

## **Final Remarks**

The CCM is the result of a compromise between the competing demands of humanitarian concerns and military necessity. Some aspects of the instrument could be improved, especially with regard to stockpile destruction and relations with States not party,<sup>78</sup> which are very sensitive issues for members of Strategic Alliances, and in particular NATO members. At the same time, the new instrument finally addressed the humanitarian and socio-economic

<sup>78</sup> See, *inter alia*, P. Pillai, 'Adoption of the Convention on Cluster Munitions', *ASIL Insights*, 1 October 2008, <http://www.asil.org/search.cfm?displayPage=1079>; and N. Ronzitti, 'La Convenzione di Dublino: Eliminazione definitiva delle bombe a grappolo o solo un passo indietro?', *Affari Internazionali*, 3 June 2008, <http://www.affarinternazionali.it/articolo.asp?ID=841>.



impact of cluster munitions and introduced a new standard for the protection of civilians and victim assistance.

The CCM introduced a *partial ban* and *does not* prohibit the use of cluster munitions that meet the *minimum standard* set by art. 2.2. This approach requires States to take into account the progress of military technology in order to improve the protection of civilians and to avoid the crystallization of humanitarian law on a specific technical standard. The ban on cluster munitions that cause “unacceptable harm” to civilians consolidates the customary principles and rules prohibiting the use of means and methods of warfare that have indiscriminate effects. In addition, it seems to provide new elements for their interpretation and implementation in the light of the principle of humanity. As we have noted, the notion of “unacceptable harm” to civilians could be used to promote a higher standard for the precautions to be taken in attacks in or near urban or densely populated areas.

The CCM, is also an achievement for human rights law and, to some extent, it seems to lay the foundations for a *human rights-based approach* to humanitarian law. For the first time, a disarmament and humanitarian instrument has introduced victim assistance obligations for States, which are requested to adopt necessary policies, legal and administrative measures, and to coordinate national disability, development and human rights frameworks and mechanisms. In addition, the CCM promotes international cooperation and assistance, emphasizes the responsibility of the international community and recognizes the specific role and contribution of all relevant actors.

Cluster munitions producers or users (like Brazil, China, India, Israel, Pakistan, the Russian Federation and the United States) did not participate in the Oslo Process. However, aside from the strategic reasons that led these States to abstain from the negotiations, the CCM will likely have an impact on international military doctrine and practice. At international level, the new instrument could be a useful precedent for the negotiations on cluster munitions within the framework of the CCW, which are currently on hold, and where the Oslo Process can act as a complement and not as a substitute

for them. At national level, it cannot be ruled out that the major producers or users of cluster munitions that did not participate in the Oslo Process will become states-parties to the CCM, or will comply with its standards. For instance, the United States has already modified their national policy and has committed to start using more accurate and reliable munitions from 2018,<sup>79</sup> in line with the object and purpose of the CCM.

In more general terms, the CCM seems to confirm a growing trend of diplomacy in disarmament issues. In the past ten years, notwithstanding the difficulties in the sector, the APM and the CCM have been adopted after relatively short negotiations. The two instruments, although different in many respects, have five important elements in common. They: a) were negotiated outside the Conference on Disarmament; b) non-governmental organizations played an active role in supporting the work of governmental negotiators by providing proposals, scientific studies etc.; c) are driven by a strong humanitarian purpose; d) stress the relationship between humanitarian law and human rights law; e) stress the relationship between disarmament and development. These elements seem to indicate a constructive and ‘dynamic approach’ to disarmament issues and a model of cooperation between governmental and non-governmental players that could be further developed within the relevant international bodies and in particular the Conference on Disarmament.

Finally, the instrument adopted in Dublin might not completely satisfy the expectations of those who, especially in civil society, were calling for a *total ban* on cluster munitions, as in the case of anti-personnel mines. At the same time, the *partial ban* on cluster munitions is in line with the basic endeavour of humanitarian law, which aims to fix the technical limits at which the necessities of war ought to yield to the requirements of humanity.<sup>80</sup> In principle, the CCM can be regarded as a step forward on the long road towards banning inhumane weapons and, more in general, in

<sup>79</sup> US Department of Defense, *Policy on Cluster Munitions and Unintended Harm to Civilians*, 19 June 2008, <http://www.defenselink.mil/news/d20080709cmpolicy.pdf>.

<sup>80</sup> See *supra* note 51.

the gradual shift of humanity from the basic rule “silent enim leges inter arma”,<sup>81</sup> whose exception is a *minimum standard* for the protection of some categories of persons, to the basic rule “inter arma caritas”,<sup>82</sup> whose exception is a *minimum standard* for the legitimate use of force. The new instrument will allow a better balance between humanitarian and military considerations. And this is a significant contribution to the development of humanitarian law and human rights law, and international law as a whole.

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<sup>81</sup> That is: “laws fall silent in times of war”. See M. T. Cicero (106-43 BC), *Pro Tito Annio Milone ad iudicem oratio (Pro Milone)*, 52 BC, v, 11. In the 17<sup>th</sup> century, Hugo Grotius (1583-1645) pointed out that: “opposita inter se ius et arma”, that is, “war is irreconcilable with all law”. See Hugo Grotius, *De iure belli ac pacis*, 1625, Prolegomena, § 3.

<sup>82</sup> That is “in war, charity” or, also “in war, humanity”. See F. Siordet, *Inter arma caritas* (Geneva, ICRC, 1947). This is the traditional slogan of the Red Cross, together with the motto “*per humanitatem ad pacem*”, that is, “through humanity towards peace”.

### **Summary – The Convention on Cluster Munitions: Towards a Balance between Humanitarian and Military Considerations?**

On 30 May 2008, in Dublin, a group of 107 States adopted the Convention on Cluster Munitions (CCM) that introduces the prohibition to use, develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions that cause “unacceptable harm” to civilians. The instrument is the outcome of negotiations, the so-called ‘Oslo Process’, conducted outside the Conference on Disarmament and the Convention on Certain Conventional Weapons (CCW), and was opened for signature in Oslo on 3 December 2008. International Organizations (including the United Nations and the European Union), the International Committee of the Red Cross (ICRC) and a coalition of non-governmental organizations (the ‘Cluster Munition Coalition’) played an active role in the Process. The CCM introduced a partial ban on cluster munitions: it prohibits the use of cluster munitions that have indiscriminate effects and allows the use of more advanced munitions that meet the standard set by art. 2.2. The new instrument improved the standard of protection provided by both humanitarian law and human rights law and, to some extent, introduced a ‘point of contact’ between these branches of international law. As to humanitarian law, it consolidates the customary principles and rules prohibiting the use of means and methods of warfare that have indiscriminate effects and seems to introduce new elements for their interpretation and implementation in the light of the principle of humanity. As to human rights law, the new instrument is even more pervasive. It introduced victim assistance obligations and requires States to adopt appropriate policies, legal and administrative measures with a view to incorporating them within the national disability, development and human rights frameworks and mechanisms. Some aspects of the Convention could be improved, like the provisions on stockpile destruction and on the relations with States not party, which are sensitive issues for the Members of Strategic Alliances. At the same time, the CCM finally introduced ad hoc provisions limiting the use of cluster munitions and their humanitarian and socio-economic impact, and this can be regarded as a significant contribution to international law.

### **Résumé – La Convention sur les armes à sous-munitions: vers un équilibre entre les considérations humanitaires et militaires?**

Le 30 mai 2008, un groupe de 107 pays réunis à Dublin ont adopté la Convention sur les armes à sous-munitions (Convention on Cluster Munitions, CCM). La convention interdit aux états signataires d’employer, de mettre au point, produire, ou d’acquérir de quelque autre manière, de stocker, conserver ou transférer à quiconque, des armes à sous-munitions qui provoquent des souffrances humanitaires inacceptables. Cet instrument est le résultat de négociations appelées le “Processus d’Oslo”, conduites en dehors du cadre de la Conférence sur le Désarmement et le Traité sur certaines Armes

Conventionnelles (CCW). La convention a été officiellement ouverte à la signature le 3 décembre 2008 à Oslo. Des organisations internationales telles que notamment les Nations Unies, le Comité international de la Croix-Rouge (CICR) et une coalition d'organisations non-gouvernementales ("La Coalition contre les sous-munitions") ont joué un rôle essentiel dans ce processus. La CCM établit une distinction entre les armes à sous-munitions: elle interdit l'utilisation d'armes à sous-munitions qui produisent des effets indiscriminés mais autorise l'emploi de munitions plus avancées qui répondent aux conditions mentionnées dans son l'article 2 alinéa 2. Ce nouvel instrument améliore la protection du droit humanitaire et des droits de l'homme et crée dans une certaine mesure un "point de contact" entre ces deux branches du droit international. Dans le domaine du droit humanitaire, la convention renforce les règles et principes coutumiers qui interdisent l'usage de moyens et de méthodes de guerre produisant des effets indiscriminés, et semble introduire de nouveaux éléments utiles pour son interprétation et mise en œuvre à la lumière du principe d'humanité. La convention va plus loin encore dans le domaine des droits de l'homme. Elle crée des obligations en matière d'aide aux victimes et impose aux états d'élaborer une politique, une législation et les mesures administratives adéquates, en vue de l'intégrer dans des cadres et mécanismes nationaux en matière d'handicapés, de développement et des droits de l'homme. Certains aspects de la Convention sont perfectibles, notamment les dispositions ayant trait à la destruction des stocks et aux états qui ne sont pas parties à la Convention. Il s'agit là de sujets sensibles pour les membres des alliances stratégiques. En même temps, la CCM introduit finalement certaines dispositions pertinentes qui permettent de limiter l'emploi de bombes à sous-munitions et leurs conséquences humanitaires et socio-économiques, ce qui lui vaut d'être considérée comme une contribution déterminante au droit international.

### **Samenvatting – Het Verdrag inzake Clustermunitie: naar een evenwicht tussen humanitaire en militaire overwegingen?**

Op 30 mei 2008 nam een groep van 107 landen te Dublin het Verdrag inzake Clustermunitie (Convention on Cluster Munitions, CCM) aan. Het Verdrag verbiedt landen die zich erbij aansluiten om clustermunitie die onaanvaardbaar humanitair leed veroorzaakt in te zetten, te ontwikkelen, te produceren of anderszins te verwerven, op te slaan of over te dragen. Dit instrument vormt het resultaat van onderhandelingen, het zogenaamde "Oslo proces", die gevoerd werden buiten het kader van de Conference on Disarmament en de Convention on Certain Conventional Weapons (CCW). Het Verdrag werd te Oslo voor ondertekening opengesteld vanaf 3 december 2008. Internationale organisaties (waaronder de Verenigde Naties en de Europese Unie), het Internationale Comité van het Rode Kruis (ICRC) en een coalitie van non-gouvernementele organisaties (de "Cluster Munition Coalition") speelden een belangrijke rol in het proces. De CCM bevat een gedeeltelijk

verbod op clustermunitie: het verbiedt het gebruik van clustermunitie die niet-onderscheidende effecten heeft en staat het gebruik toe van meer geavanceerde munitie die aan de vereisten van art. 2 lid 2 voldoet. Het nieuwe instrument biedt een grotere bescherming zowel onder humanitair oorlogsrecht als de mensenrechten en creëert tot op zekere hoogte een “koppelvlak” tussen deze twee rechtsgebieden. Op het gebied van het humanitair oorlogsrecht versterkt het de gewoonterechtelijke beginselen en regels die het gebruik van middelen en methoden van oorlogvoering verbieden die niet-onderscheidende effecten hebben, en lijkt nieuwe elementen te introduceren voor de interpretatie en implementatie daarvan tegen de achtergrond van het beginsel van humaniteit. Op het gebied van de mensenrechten gaat het instrument nog verder. Het schept verplichtingen betreffende hulp aan slachtoffers en verplicht staten om toepasselijk beleid, wetgeving en administratieve maatregelen te maken met het oog op het integreren hiervan in nationale gehandicapten-, ontwikkelings- en mensenrechtenkaders en - mechanismen. Sommige aspecten van het Verdrag zijn voor verbetering vatbaar, zoals de bepalingen betreffende het vernietigen van voorraden en betrekkingen met staten die geen partij zijn. Dit zijn gevoelige onderwerpen voor leden van strategische allianties. Tegelijkertijd moet het als een belangrijke bijdrage aan het internationaal recht worden gezien dat de CCM eindelijk ad hoc bepalingen heeft geschapen die het gebruik van clustermunitie en hun humanitaire en sociaal-economische gevolgen beperken.

### **Zusammenfassung – Konvention über Streumunition: zu einem Gleichgewicht zwischen humanitären und militärischen Überlegungen?**

Am 30. Mai 2008 nahm eine Gruppe von 107 Ländern in Dublin die Konvention über Streumunition (Convention on Cluster Munitions, CCM) an. Die Konvention verbietet den Vertragsstaaten Streumunition, die inakzeptables humanitäres Leiden verursacht, einzusetzen, zu entwickeln, herzustellen, oder anderweitig zu erwerben, zu lagern oder weiterzugeben. Dieses Instrument ist das Ergebnis der Verhandlungen, des sogenannten Oslo-Prozesses, die außerhalb des Rahmens der Conference on Disarmament und der Convention on Certain Conventional Weapons (CCW) geführt wurden. Die Konvention wurde ab dem 3. Dezember 2008 in Oslo zur Unterzeichnung ausgelegt. Internationale Organisationen (worunter die Vereinten Nationen und die Europäische Union), das Internationale Komitee vom Roten Kreuz (IKRK) und eine Koalition von Nichtregierungsorganisationen (die “Cluster Munition Coalition“) haben im Prozess eine wichtige Rolle gespielt. Die CCM enthält ein partielles Verbot der Streumunition: sie verbietet die Anwendung von Streumunition, die unterschiedslos wirkt, und gestattet die Anwendung von mehr fortschrittlichen Munition, die allen Anforderungen des Art. 2, Absatz 2 entspricht. Das neue Instrument bietet einen größeren Schutz, sowohl im Rahmen des humanitären Kriegsrechts als im Rahmen der Menschenrechten und bildet in gewissem Maße eine “Kopplung“ zwischen diesen zwei Rechtsgebieten. Im Bereich des humanitären Kriegsrechts verstärkt es die gewohnheitsrechtlichen

Prinzipien und Regeln, die die Anwendung von Kriegsmitteln und -Methoden verbieten, wenn sie unterschiedslos wirken, und scheint neue Elemente für die Interpretation und die Implementierung davon vor dem Hintergrund des Humanitätsprinzips einzuführen. Im Bereich der Menschenrechte geht das Instrument noch weiter. Es führt zu Verpflichtungen hinsichtlich der Hilfe für die Opfer und verpflichtet die Staaten eine passende Politik, Gesetzgebung und Verwaltungsmaßnahmen zu schaffen im Hinblick auf der Integrierung in nationalen Behinderten-, Entwicklungs- und Menschenrechtskreise und -Mechanismen. Manche Aspekte der Konvention sind verbesserungsfähig, wie die Bestimmungen hinsichtlich der Vernichtung von Lagern und Beziehungen mit Nicht-Vertragsstaaten. Dies stellen heikle Themen für die Mitglieder der strategischen Bündnisse dar. Zugleich muss man es als einen wichtigen Beitrag zum internationalen Recht betrachten, dass die CCM schließlich ad hoc Bestimmungen geschaffen hat, die die Anwendung von Streumunition und ihre humanitären und sozialökonomischen Folgen einschränken.

### **Riassunto – La Convenzione sulle munizioni a grappolo: verso un equilibrio tra considerazioni umanitarie e militari?**

Il 30 maggio 2008 un gruppo di 107 Stati riuniti a Dublino ha adottato la Convenzione sulle munizioni a grappolo (CCM) che introduce il divieto di uso, sviluppo, produzione, ogni modalità di acquisto, stoccaggio, possesso e trasferimento a chiunque, diretto o indiretto, delle munizioni a grappolo che causano “danni inaccettabili” ai civili. Il nuovo strumento è il risultato di un negoziato internazionale, il cosiddetto ‘Processo di Oslo’, condotto al di fuori della Conferenza sul Disarmo e della Convenzione su determinate armi convenzionali (CCW), aperto alla firma il 3 dicembre 2008 ad Oslo. Le Organizzazioni internazionali (tra le quali le Nazioni Unite e l’Unione Europea), il Comitato internazionale della Croce Rossa e una coalizione di organizzazioni non governative (la ‘Cluster Munition Coalition’) hanno giocato un ruolo attivo nel Processo. La CCM introduce un divieto parziale della munizioni a grappolo: essa proibisce l’uso di munizioni a grappolo dagli effetti indiscriminati e consente l’uso delle munizioni più avanzate conformi allo standard fissato dall’art. 2.2. Il nuovo strumento migliora lo standard di protezione fornito sia dal diritto umanitario sia dai diritti umani e per certi aspetti pone un ‘punto di contatto’ tra queste due branche del diritto internazionale. Quanto al diritto umanitario, esso consolida i principi e le regole consuetudinarie che proibiscono i mezzi e i metodi di guerra che causano effetti indiscriminati e sembra inoltre introdurre nuovi elementi per la loro interpretazione e attuazione alla luce del principio di umanità. Quanto ai diritti umani, il nuovo strumento è ancora più incisivo. Esso introduce specifici obblighi di assistenza delle vittime in capo agli Stati i quali dovranno adottare appropriate politiche e misure legislative e amministrative e integrarle nelle strutture e nei meccanismi nazionali in materia di disabili, sviluppo e diritti umani. Alcuni aspetti della Convenzione possono essere migliorati, come le



norme sulla distruzione degli stock e sulla relazione con gli Stati non parte, questioni molto delicate per i membri di alleanze strategiche. Al tempo stesso, la CCM introduce finalmente una disciplina ad hoc per limitare l'uso delle munizioni a grappolo e il loro impatto umanitario e socio-economico, e ciò può essere accolto come un significativo contributo per il diritto internazionale.

### **Resumen – La Convención sobre Municiones en Racimo: hacia un equilibrio entre las consideraciones humanitarias y militares?**

El 30 de mayo de 2008, un grupo de 107 países reunidos en Dublín adoptaron la Convención sobre Municiones en Racimo (Convention on Cluster Munitions, CCM). Los Estados Partes a esta Convención se comprometen a nunca emplear, desarrollar, producir, adquirir de un modo u otro, almacenar, conservar o transferir a nadie, municiones en racimo que provocan situaciones de sufrimiento humano intolerable. La convención concluye las negociaciones llamadas el “Proceso de Oslo”, mantenidas fuera del marco de la Conferencia sobre el Desarme y la Convención internacional sobre algunas armas de fuego convencionales (CCW). La CCM ha sido abierta a las firmas el 3 de diciembre de 2008 en Oslo. Organizaciones internacionales como las Naciones Unidas, la Unión Europea, el Comité internacional de la Cruz Roja (CICR) y una coalición de organizaciones no gubernamentales (“Coalición contra las Municiones en Racimo”) han desempeñado un papel esencial en este proceso. La CCM establece una distinción entre las municiones en racimo: prohíbe el uso de armas de submuniciones de efectos indiscriminados y autoriza el empleo de municiones más avanzadas que responden a los requisitos definidos en su artículo 2.2. Este nuevo instrumento establece un nuevo estándar en la protección humanitaria y en los derechos humanos y en una cierta medida constituye un “punto de contacto” entre ambas ramas del derecho internacional. En lo que se refiere al derecho humanitario, la Convención refuerza las reglas y los principios consuetudinarios que prohíben el empleo de medios o métodos de guerra que produzcan efectos indiscriminados, y parece introducir nuevos elementos útiles para su interpretación y implementación, teniendo en cuenta el principio de la humanidad. La Convención va mucho más allá en el campo de los derechos humanos. Introduce obligaciones específicas de asistencia a víctimas, e impone a los Estados Partes que adopten una política, las medidas legales y administrativas necesarias, a fin de integrarla en las estructuras y los mecanismos nacionales existentes relativos a los minusválidos, al desarrollo y a los derechos humanos. Aún quedan algunos aspectos del Convenio por clarificar, más particularmente las disposiciones relativas a la destrucción de arsenales y a las relaciones con Estados no Parte de la convención, unas cuestiones muy delicadas para los miembros de las alianzas estratégicas. Por último, la CCM insta una disciplina adecuada para restringir el uso de municiones de racimo y sus consecuencias humanitarias y socio-económicas, por lo que se puede considerar como una contribución significativa al derecho internacional.