

CLUSTER MUNITIONS: RECENT DEVELOPMENTS

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*Several months after the end of the conflict, Ahmed was walking with his nine-year-old brother when they were attracted by a shiny object. Ahmed picked it up and the cluster bomb exploded.*¹

I. Introduction

Cluster munitions (CMs) are one of the most effective and efficient weapons against a range of targets for armed forces.² However, their drawbacks (i.e., large area effects and high failure rates) which cause civilian casualties and property damage have consistently raised valid humanitarian concerns over the years.³ A recent effort to overcome these concerns produced the Convention on Cluster Munitions (CCM),⁴ which prohibits the use, development, production, stockpiling, and transfer of CMs. The CCM is the result of a dramatic rise in the number of States believing that the only way to stop unnecessary harm to civilians by CMs is their total abolition.⁵

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¹ *Victims' Stories*, HANDICAP INT'L UNITED STATES, <http://www.clusterbombs.us/victims-stories/> (describing twelve-year-old Ahmed Kamel's experiences and casualties due to unexploded ordnance (UXO) of cluster munitions in Iraq).

² Memorandum from Robert M. Gates, U.S. Sec'y of Def., to the Secretaries of the Military Departments et al., subject: DoD Policy on Cluster Munitions and Unintended Harm to Civilians 1 (June 19, 2008), available at <http://www.defense.gov/news/d20080709cmpolicy.pdf> [hereinafter Defense Policy Memorandum].

³ See Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 87 (2000–2001).

⁴ Convention on Cluster Munitions, *opened for signature* Dec. 3, 2008, 48 I.L.M. 357, <http://treaties.un.org/doc/Publication/CTC/26-6.pdf> [hereinafter CCM].

⁵ See Etian Barak, *None to Be Trusted: Israel's Use of Cluster Munitions in the Second Lebanon War and the Case for the Convention on Cluster Munitions*, 25 AM. U. INT'L L. REV. 423, 425 (2010).

While the CCM provides an absolute ban on CMs, a parallel effort to solve the problem by regulation⁶ attempted to strike a balance between military necessity and humanity. This effort aimed to regulate CMs with a new Protocol to the Certain Conventional Weapons Treaty (CCW),⁷ rather than eliminate them outright.⁸ However, the new process, led by the United States, ended with no agreement in the Fourth Review Conference of the CCW. As a result, the CCM remains the only international agreement specifically addressing CMs.

A major reason the CCM has fallen short in actually minimizing the dangers of CMs is the lack of participation of the major producer, stockpiler, and user states, including the United States.⁹ The United States argues that any meaningful and lasting agreement on the limitation of CMs⁷ unnecessary harm must include the major producers and suppliers.¹⁰ However, the CCM has already had a stigmatizing effect.¹¹ Whether or not because of the CCM, the United States has issued a national policy¹² on CMs, and has also supported regulating them under the auspices of the CCW¹³ to minimize the unintended harm to civilians caused by CMs.

United States policy heavily rests on the argument that CMs are legal weapons under current International Humanitarian Law (IHL).¹⁴ The

⁶ *Id.* at 429.

⁷ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter CCW].

⁸ See Barak, *supra* note 5, at 423.

⁹ See Jeff Abramson, *CCW Considers Limits on Cluster Munitions*, ARMS CONTROL TODAY, Oct. 2008, at 43 (arguing that ninety percent of world stockpiles are not covered by the CCM, according to the chairman of the Group of Governmental Experts on CMs).

¹⁰ See Melanie Khanna, Legal Advisor, U.S. Mission to the UN and Other Int'l Orgs. in Geneva, Opening Statement for the United States Delegation, Aug. 22, 2011, available at <http://geneva.usmission.gov/2011/08/23/ccw-protocol/>; see also Joseph Anzalone, *The Virtue of a Proportional Response: The United States Stance Against the Convention on Cluster Munitions*, 22 PACE INT'L L. REV. 204 (2010).

¹¹ See Jessica Corsi, *Towards Peace Through Legal Innovation: The Process and the Promise of the 2008 Cluster Munitions Convention*, 22 HARV. HUM. RTS. J. 145, 156 (2009) (arguing that opponent States of Convention on Cluster Munitions (CCM) will likely find it increasingly difficult to continue using CMs after ratification of the convention). See *Cluster Munitions Information Chart*, HUMAN RIGHTS WATCH (2010), <http://www.hrw.org/news/2009/07/17/cluster-munition-information-chart> (listing notable examples of policy and practice among current non-signatory states to the CCM).

¹² Defense Policy Memorandum, *supra* note 2, at 1.

¹³ See Khanna, *supra* note 10.

¹⁴ Defense Policy Memorandum, *supra* note 2, at 1.

credibility of this argument relies on the proper use of CMs. To evaluate it, one must not only know the U.S. stance, but also be aware of the latest developments and concerns about CMs. This article provides information to help practitioners understand the current state of the law with regard to CMs. Part II presents a short description and history of CMs, to include the problems they cause. Part III surveys the process of the CCM, its key provisions, and the U.S. policy on CMs after CCM. Part IV analyzes the recent developments to regulate CMs under the proposed CCW Draft Protocol, which also reflects U.S. policy. Part V concludes that U.S. Judge Advocates should keep in mind all humanitarian concerns and the latest developments regarding CMs while implementing national policy.

II. Background

A. How Cluster Munitions Work

In general terms,¹⁵ cluster munitions are weapons designed to disperse or release multiple explosive submunitions,¹⁶ targeting an area rather than a single point.¹⁷ They can be dropped by aircraft or delivered by artillery or missiles.¹⁸ After being launched or dropped, CMs do not explode, but break up into submunitions which cover a large area.¹⁹ These bomblets usually arm themselves as a result of rapid spinning during their descent.²⁰ Once armed, they explode either at a certain height above the ground, on impact, or after landing.²¹ Submunitions can be as small as “hockey pucks, tennis balls or soda cans.”²² Despite their

¹⁵ See Nout Van Woudenberg, *The Long and Winding Road Towards an Instrument on Cluster Munitions*, 12 J. CONFLICT & SECURITY L. 447, 454 (2008) (highlighting that there is no uniform definition of cluster munition).

¹⁶ See Bonnie Docherty, *The Time Is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 61 (2007); Tommaso Di Ruzza, *The Convention on Cluster Munitions: Towards a Balance Between Humanitarian and Military Considerations?*, 47 MIL. L. & L. WAR REV. 405, 407–08 (2008).

¹⁷ See Wiebe, *supra* note 3, at 85, 89 (making an analogy between cluster munitions and shotgun, “[a] cluster bomb ‘shotgun’ delivers hundreds of small exploding bomblets to a target . . . a unitary bomb ‘rifle’ fires a single, much larger ‘bullet’ at a target”).

¹⁸ *Id.* at 89.

¹⁹ See Van Woudenberg, *supra* note 15, at 450.

²⁰ Wiebe, *supra* note 3, at 89–90.

²¹ See Lieutenant Colonel Michael O. Lacey, *Cluster Munitions: Wonder Weapon or Humanitarian Horror?*, ARMY LAW., May 2009, at 28, 28.

²² Wiebe, *supra* note 3, at 89.

small size, submunitions are powerful and multi-talented,²³ and their known effective radius can be up to 150 meters.²⁴ Most CMs are designed to cover at least the size of an American football field.²⁵ However, the exact size of the footprint made by CMs varies, depending on altitude, wind, the number of CMs launched, and the amount of submunitions they contain.²⁶

Cluster munitions can engage “area targets that include massed formations of enemy forces, individual targets dispersed over a defined area, targets whose precise locations are not known, and time-sensitive or moving targets.”²⁷ Cluster munitions can also deliver anti-personnel shrapnel, anti-materiel shaped charges, and incendiary bombs in the same combined package.²⁸ These multiple effects make CMs very useful against forces comprised of both personnel and light armor simultaneously.²⁹ Additionally, they are relatively cheaper³⁰ and safer³¹ than other weapons. Since they can be delivered from fewer platforms to attack multiple targets, they reduce “the logistical burden and the exposure of forces to hostile fire.”³²

²³ See Daniel Joseph Raccuia, *The Convention on Cluster Munitions: An Incomplete Solution to the Cluster Munition Problem*, 44 VAND. J. TRANSNAT'L L. 465, 469 (2011).

²⁴ Wiebe, *supra* note 3, at 90.

²⁵ See Thomas Michael McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 47 (2002). The standard size for an American football field is 360 feet in length and 160 feet in width. See ROGER GOODELL, OFFICIAL PLAYING RULES AND CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE 1 (2011), available at http://static.nfl.com/static/content/public/image/rulebook/pdfs/4_Rule1_The_Field.pdf.

²⁶ See Wiebe, *supra* note 3, at 109–10 (giving example that “the U.S. Army’s Multiple Launch Rocket System can fire twelve rockets together, covering roughly sixty football fields in size. A fully loaded B-52 bomber, delivering forty cluster bombs, can cover over 27,000 football fields”); McDonnell, *supra* note 25, at 47 n.57.

²⁷ Defense Policy Memorandum, *supra* note 2, at 1.

²⁸ See Wiebe, *supra* note 3, at 109–10.

²⁹ See Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 235 (2001) (giving example of the U.S. Air Force’s BLU 97/B Combined Effects Bomb which combines “anti-armor, incendiary, and fragmentation effects”).

³⁰ See Karen Hulme, *Of Questionable Legality: The Military Use of Cluster Bombs in Iraq in 2003*, 42 CAN. Y.B. INT'L L. 143, 152 (2004) (providing cost of each submunition as approximately \$30 to \$60).

³¹ See Mark Hiznay, *Operational and Technical Aspects of Cluster Munitions*, DISARMAMENT FORUM, 4th Quarter 2006, at 15–16, available at <http://www.unidir.org/pdf/articles/pdf-art2530.pdf>.

³² *Id.*

B. Two Problems: Large Area Effects and High Failure Rates

Despite their value for armed forces, cluster munitions are the subject of debates in IHL due to their large area effects and high failure rates.³³ Especially when the target is located close to urban areas, as submunitions scatter some may injure or kill civilians and damage infrastructure needed for daily life.³⁴ Also, many submunitions do not explode as designed. Generally, some percentage of any ordnance fails to detonate, like firework duds, leaving unexploded ordnance (UXO) on the battlefield.³⁵ Official estimates for failure rates of older versions of submunitions are about 5 percent.³⁶ However, in practice, this rate may reach as high as 30 percent,³⁷ depending on such things as manufacturing defects, long storage spans, flight conditions, submunitions dispersal and arming failures, wrong landing angles, and soft terrain or vegetation (soft surfaces may not provide the resistance needed to deonate the bomblets).³⁸ Thus, submunitions may remain unexploded on the ground more frequently than normally estimated.³⁹

The size and color of unexploded submunitions may create other problems. While a large unexploded unitary bomb might be easily identifiable as dangerous, smaller submunitions are difficult to detect and can lie hidden in mud, water, or sand, or even hang from trees.⁴⁰ In effect, they become land mines.⁴¹ Visible submunitions also create danger. In order to aid clearance efforts, modern militaries paint their submunitions bright colors. Children confuse them with toys⁴² and

³³ See Wiebe, *supra* note 3, at 112.

³⁴ See Corsi, *supra* note 11, at 147.

³⁵ See Herthel, *supra* note 29, at 265, 266.

³⁶ See Hulme, *supra* note 30, at 149–52 (presenting example of CMs used in Iraq in 2003, such as 1970 model British-made RBL-755).

³⁷ See Docherty, *supra* note 16, at 63.

³⁸ See REA MCGRATH, CLUSTER BOMBS: THE MILITARY EFFECTIVENESS AND IMPACT ON CIVILIANS OF CLUSTER MUNITIONS 25–27 (2000), available at http://www.landmineaction.org/resources/Cluster_Bombs.pdf.

³⁹ See, e.g., John Borneman, *The State of War Crimes Following the Israeli-Hezbollah War*, 25 WINDSOR Y.B. ACCESS JUST. 273, 275 (2007) (estimating over 100,000 unexploded bomblets leftover from the Israel-Hezbollah war).

⁴⁰ See Docherty, *supra* note 16, at 63.

⁴¹ See Wiebe, *supra* note 3, at 90. *But see* Herthel, *supra* note 29, at 252–55 (distinguishing submunitions from mines).

⁴² See Docherty, *supra* note 16, at 63.

sometimes even adults confuse them with humanitarian aid packages.⁴³ As a result, unexploded submunitions are a great danger to civilians⁴⁴ and even sometimes to friendly soldiers.⁴⁵

These problems led to production of newer generation sensor-fuzed CMs, which include guidance systems and self-destruct or self-deactivate mechanisms.⁴⁶ The guidance systems are designed to sense and destroy armored vehicles without creating wide-area anti-personnel effects.⁴⁷ If CMs do not explode when intended, self-destruct or self-deactivate mechanisms prevent later harm to civilians.⁴⁸ However, this solution creates problems of its own,⁴⁹ and may also encourage more widespread use of CMs by soldiers who believe they are safer.⁵⁰

C. The Use of Cluster Munitions in History

British⁵¹ and German⁵² forces first used CMs in World War I. Several states used CMs in World War II.⁵³ During NATO operations in Yugoslavia in 1999, NATO forces delivered over 1,500 CMs containing

⁴³ See Karl C. Ching, *The Use of Cluster Munitions in the War on Terrorism*, 31 SUFFOLK TRANSANT'L L. REV. 127, 140 (2007–2008) (describing Afghan civilians mistaking submunitions for humanitarian food rations).

⁴⁴ See HANDICAP INT'L, FATAL FOOTPRINT: THE GLOBAL HUMAN IMPACT OF CLUSTER MUNITIONS 42 (2006), available at http://www.mineaction.org/downloads/1/Fatal_Footprint_HI_report_on_CM_casualties.1.pdf (showing that ninety-eight percent of registered victims of CMs are civilians, and children account for twenty-seven percent of casualties, according to a survey conducted in twenty-four different countries and regions).

⁴⁵ See Herthel, *supra* note 29, at 240 (noting the example of Operation Desert Storm during which “at least twenty-five U.S. military personnel were killed by improperly handling submunitions fired by [coalition] forces”).

⁴⁶ See Hiznay, *supra* note 31, at 16, 17.

⁴⁷ *Id.* at 17.

⁴⁸ *Id.*

⁴⁹ See McGrath, *supra* note 38, at 27 (explaining that “the self-destruct mechanism itself introduce one or more additional critical junctures in to the chain” and the “introduction of a potential self-destruct failure adds considerably to the danger of the non-functioned submunition”). Wiebe, *supra* note 3, at 118 (arguing that “any secondary system, once failed, has tendency to be especially sensitive to any disturbance or movement”).

⁵⁰ See Wiebe, *supra* note 3, at 119.

⁵¹ See Herthel, *supra* note 29, at 235.

⁵² See Barak, *supra* note 5, at 430.

⁵³ See HUM. RTS WATCH, FACT SHEET: TIMELINE OF CLUSTER MUNITIONS USE (2010) [hereinafter TIMELINE OF CLUSTER MUNITIONS USE], available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2010/07/timeline-of-use.pdf>.

nearly 300,000 submunitions.⁵⁴ The U.S. armed forces also deployed CMs in Vietnam, Iraq, and Afghanistan.⁵⁵

Cluster munitions are not used only by industrial powers or large militaries.⁵⁶ Relatively small States and non-state actors also stockpile and use CMs.⁵⁷ For example, Ethiopia and Eritrea used CMs against each other in 1998.⁵⁸ Hezbollah also used CMs against Israel in 2006.⁵⁹ Georgia deployed them against Russia in the 2008 conflict.⁶⁰ Thailand launched CMs on Cambodian territory during the February 2011 border conflict.⁶¹ Government forces loyal to the Libyan leader, Muammar Gaddafi, fired cluster munitions into residential areas in the western city of Misrata, Libya on the night of April 14, 2011.⁶²

D. The Road to Oslo

The Convention on Cluster Munitions follows several earlier attempts to ban CMs. First, CMs were one of the weapons attempted to be banned in the 1970s under what became the CCW.⁶³ However, major military powers, especially the United States and its allies, initially blocked any ban of or restriction on CMs.⁶⁴ A second attempt to restrict CMs occurred after the NATO bombing campaign against the Federal Republic of Yugoslavia resulted in a high rate of civilian casualties.⁶⁵

⁵⁴ Wiebe, *supra* note 3, at 85, 95.

⁵⁵ See TIMELINE OF CLUSTER MUNITIONS USE, *supra* note 53.

⁵⁶ See Raccuia, *supra* note 23, at 472–73.

⁵⁷ See TIMELINE OF CLUSTER MUNITIONS USE, *supra* note 53.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See *CMC Condemns Thai Use of Cluster Munitions in Cambodia*, CLUSTER MUNITION COALITION (Apr. 5, 2011), <http://www.stopclustermunitions.org/news/?id=3130>.

⁶² See U.N. Hum. Rts. Council, Report of the International Commission of Inquiry on Libya, 19th Sess., Mar. 2, 2012, 18, U.N. Doc. A/HRC/19/68. See also *Libya: Cluster Munitions Strike Misrata*, HUM. RTS. WATCH (Apr. 15, 2011), <http://www.hrw.org/news/2011/04/15/libya-cluster-munitions-strike-misrata>.

⁶³ Certain Conventional Weapons Treaty, *supra* note 7 (CCW and its five protocols prohibit or restrict the use of certain conventional weapons that are considered to cause excessive injuries and unnecessary suffering, or that have indiscriminate effects. The CCW itself is actually confined to general provisions as such scope, its entry into force process, while the separate five additional protocols regulate concerning conventional weapons). Barak, *supra* note 5, at 431 (indicating that Egypt, Mexico, Norway, Sweden, Switzerland, Yugoslavia, and Sudan support the proposal for outright ban of CMs).

⁶⁴ See Barak, *supra* note 5, at 432.

⁶⁵ *Id.*

This attempt brought about the Protocol on Explosive Remnants of War (Protocol V) to the CCW, which does not specifically address CMs.⁶⁶ However, several States and many NGOs did not consider this Protocol adequate to solve the problems associated with CMs, as it focused solely on post-conflict requirements and did not regulate the use of CMs during armed conflict.⁶⁷

Israel's use of CMs in 2006 in the Lebanon War drew the attention of the international community to the problem again. During the last week of the war, Israel launched numerous CMs, some U.S.-made, into southern Lebanon, in response to Hezbollah's use of over 100 cluster rockets.⁶⁸ Israel dispersed nearly four million submunitions over South Lebanon.⁶⁹ More than 153,942 unexploded submunitions were found between August 2006 and December 2008.⁷⁰ Unexploded submunitions killed 20 and wounded 197 people⁷¹ and contaminated 26 percent of Lebanon's cultivable land.⁷² The Israeli Government issued two official statements on its use of CMs in the Lebanon War. Both statements argued that international law did not prohibit the use of CMs, and that Israel had used CMs in accordance with IHL principles.⁷³

⁶⁶ Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Protocol V), Nov. 27, 2003, U.N. Doc. CCW/MSP/2003/2 [hereinafter Protocol V], available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/5484D315570AC857C12571DE005D6498/\\$file/Protocol+on+Explosive+Remnants+of+War.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/5484D315570AC857C12571DE005D6498/$file/Protocol+on+Explosive+Remnants+of+War.pdf). Eighty states have signed onto Protocol V as parties. Disarmament: States Parties, UNOG, [http://www.unog.ch/89256EE600585943/\(httpPages\)/3CE7CFC0AA4A7548C12571C00039CB0C?OpenDocument](http://www.unog.ch/89256EE600585943/(httpPages)/3CE7CFC0AA4A7548C12571C00039CB0C?OpenDocument) (last visited Nov. 21, 2012).

⁶⁷ See Barak, *supra* note 5, at 433 (arguing that this protocol's provisions "suffer from an over-abundance of ambiguities and weaknesses")

⁶⁸ See Anzalone, *supra* note 10, at 198.

⁶⁹ See Barak, *supra* note 5, at 439.

⁷⁰ See U.N. MINE ACTION COORDINATION CENTRE, SOUTH LEBANON, QUARTERLY REPORT OCTOBER-DECEMBER 2008, at 1 (2009), available at <http://www.mineaction.org/downloads/1/MACC%20SL%20Quarterly%20Report%20Oct%20-%20Dec%2008.pdf>.

⁷¹ *Id.* at 3.

⁷² See Anzalone, *supra* note 10, at 198; Jan Egeland, *Israel's 'Immoral' Use of Cluster Bombs in Lebanon Poses Major Threat—UN Aid Chief*, U.N. NEWS CENTRE (Aug. 30, 2006), <http://www.un.org/apps/news/story.asp?NewsID=19670&Cr=Leban&Cr1> (reporting that U.N. Under-Secretary-General says that "what [was] shocking and . . . completely immoral, [was] that 90 percent of the cluster bomb strikes occurred in the last 72 hours of the conflict when . . . there would be a resolution").

⁷³ See *Behind the Headlines: Legal and Operational Aspects of the Use of Cluster Munitions*, ISRAELI MINISTRY OF FOREIGN AFF. (Sep. 5, 2006), available at <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Legal+and+operational+as>

These debates after the Lebanon War “served as a catalyst” to the banning of CMs by international agreement.⁷⁴ In November 2006, NGOs⁷⁵ and states led by Norway called for a ban on CMs via a new protocol to the CCW.⁷⁶ However, due to the objections of Australia, China, India, Japan, Pakistan, the Russian Federation, the United Kingdom, and the United States, this attempt did not provide any resolution to the issue beyond an agreement to assemble a group of governmental experts to study the possibility of a new protocol on CMs.⁷⁷ Foreseeing a slow-moving process and that objections from major military powers would block the effort to ban CMs, Norway announced its intention to organize a conference to do so outside of the CCW.⁷⁸ Although the United States changed its position that no new agreement was necessary on CMs,⁷⁹ the road to Oslo was unavoidable.

III. The Convention on Cluster Munitions

A. The Oslo Process

Upon Norway’s call to develop a legally binding instrument on CMs, the first conference was held in Oslo on February 22, 2007.⁸⁰ Forty-nine States and various international organizations attended the Oslo Conference. However, many important producer states did not

pects+of+the+use+of+cluster+bombs+5-Sep-2006.htm; Opinion of the Military Advocate General Regarding Use of Cluster Munitions in Second Lebanon War, ISRAEL MINISTRY OF FOREIGN AFF. (Dec. 24, 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>.

⁷⁴ See Barak, *supra* note 5, at 428.

⁷⁵ *Id.* at 441 (such as Human Rights Watch and Landmine Action).

⁷⁶ Third Review Conference of the High Contracting Parties to CCW, Nov. 7–17, 2006, Documents of the Third Review Conference 41, CCW/CONF.III/11.

⁷⁷ Third Review Conference of the High Contracting Parties to CCW, Nov. 7–17, 2006, Final Declaration 6, CCW/CONF.III/11 [hereinafter Third Review Conference of the High Contracting Parties to CCW]. See *infra* Part IV.

⁷⁸ See Louis Maresca, *Introductory Note to the Convention on Cluster Munitions*, 48 INT’L LEGAL MATERIALS 354, 354 (2009).

⁷⁹ See Eliane Engeler, *U.S. Ready to Negotiate on Cluster Bombs*, ARMY TIMES (June 18, 2007), http://www.armytimes.com/news/2007/06/ap_clusterbombs_070618/ (quoting the head of the U.S. delegation to a CCW meeting as saying the U.S. had changed its position and now favored a negotiation within the framework of the CCW “due to the importance of this issue, concerns raised by other countries, and our own concerns about the humanitarian implications of these weapons”).

⁸⁰ See Van Woudenberg, *supra* note 15, at 477.

participate. These included China, India, Iran, Israel, Pakistan, the Russian Federation, and the United States.⁸¹

The major issues debated during the Conference were: (1) “the appropriate forum for work on cluster munitions—within the CCW or outside through the Oslo process,” (2) “technical solutions such as self-destruction mechanisms and accurate testing,” (3) “existing instruments of IHL versus elements of a new treaty,” and (4) the “nature and scope of commitments for future action.”⁸² However, in their final declaration, the Oslo Conference attendees committed themselves to complete a legally binding treaty by 2008 that would prohibit CMs.⁸³

After several conferences,⁸⁴ 107 States adopted the CCM,⁸⁵ and 93 states signed it on December 3, 2008.⁸⁶ While 111 States have joined the CCM, only 77 States have become party to it so far.⁸⁷ Although NGOs argue that participation in CCM is growing, this may not actually be the case, as only nine states that were not initially involved in the Oslo Process changed their positions and signed it, and only five of these have become parties to it.⁸⁸

⁸¹ *Id.*

⁸² REPORT: OSLO CONFERENCE ON CLUSTER MUNITIONS, 22–23 FEBRUARY 2007, CLUSTER MUNITION COALITION (2007), <http://www.stopclustermunitions.org/calendar/?id=1108>.

⁸³ See Oslo Conference on Cluster Munitions, 22–23 Feb. 2007, Declaration available at [http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20\(final\)%2023%20February%202007.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20(final)%2023%20February%202007.pdf).

⁸⁴ See LIMA CONFERENCE ON CLUSTER MUNITIONS, 23–25 MAY 2007, NORWEGIAN PEOPLE’S AID (Nov. 6, 2007), http://www.undp.org/cpr/documents/we_do/cpr_cluster_munitions.pdf; CLUSTER MUNITION COALITION, CMC REPORT ON THE VIENNA CONFERENCE ON CLUSTER MUNITIONS, DECEMBER. 5–7, 2007, available at <http://www.stop-clustermunitions.org/wp/wp-content/uploads/2008/05/report-on-the-vienna-conference-5-7-december.pdf>; CLUSTER MUNITION COALITION, REPORT FROM THE WELLINGTON CONFERENCE ON CLUSTER MUNITIONS, 18–22 FEBRUARY 2008 (2008), available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/05/wilpf-report-on-wellington-conference-18-22-february.pdf>.

⁸⁵ See Cluster Munitions, Dublin Diplomatic Conference 19–30 May 2008: Opening Statements, Ireland Dep’t of Foreign Aff. (2008), <http://www.clustermunitionsdublin.ie/general-statements.asp>.

⁸⁶ *Convention Status*, CONVENTION ON CLUSTER MUNITIONS—CCM, <http://www.clusterconvention.org/ratifications-and-signatures/> (last visited Nov. 21, 2012). The CCM became binding for State Parties on August 1, 2010.

⁸⁷ See Appendix (providing the current signatory and party states to the CCM).

⁸⁸ *Id.* These States are Antigua & Barbuda (party), Cyprus, Djibouti, Grenada (party), Haiti, Iraq, Saint Vincent, and Grenadines (party), Trinidad and Tobago (party), and Tunisia (party).

Non-state international organizations also played a major role in drafting and negotiating the CCM during the Oslo Process.⁸⁹ These brought “important perspectives to the discussions and were powerful factors in the success of the process and the Convention’s content.”⁹⁰ The Oslo Process showed that like-minded states, NGOs, and “other interested parties can achieve concrete legal results by removing themselves from consensus-based models in which the opposition of a few States can halt negotiations.”⁹¹ This treaty-making model is likely to provide solutions for long-standing international problems by generating new treaties.⁹²

B. Important Provisions of the Convention on Cluster Munitions

The Convention on Cluster Munitions prohibits using, developing, producing, otherwise acquiring, stockpiling, retaining, or transferring cluster munitions to anyone directly or indirectly.⁹³ It defines a “cluster munition” as a “conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms.”⁹⁴ It excludes the following three types of munitions from its definition:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) Each munition contains fewer than ten explosive submunitions;

⁸⁹ See Di Ruzza, *supra* note 16, at 407 (including the United Nations, ICRC and NGOs, especially the Cluster Munition Coalition). The Cluster Munition Coalition is an international coalition of nearly 350 civil society organizations, including large NGOs such as Amnesty International and Human Rights Watch working on changing government policy and practice on cluster munitions, as well as to raise public awareness of the problem. Cluster Munitions Coalition, *available at* <http://www.stopclustermunitions.org/the-coalition/members/> (last visited Dec. 16, 2011).

⁹⁰ Maresca, *supra* note 78, at 355.

⁹¹ Corsi, *supra* note 11, at 149.

⁹² *Id.* at 154–55.

⁹³ CCM, *supra* note 4, art. 1.

⁹⁴ *Id.* art. 2 (2).

- (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.⁹⁵

Article 3 requires State parties to destroy stockpiles of CMs “as soon as possible but not later than eight years after the entry into force of the Convention,” with an extension of up to four years being obtainable.⁹⁶ However, it permits “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.” Article 4 requires state parties to clear and destroy cluster munition remnants under their control within ten years.

Article 21, also called the interoperability provision, regulates relations between state parties and non-party states.⁹⁷ The draft CCM had not contained any provision about interoperability before the Dublin Conference. During the negotiations in Dublin, Germany—supported by a number of NATO members—proposed an amendment to enable parties to participate in joint military operations with states not parties to the treaty.⁹⁸ This was one of the issues that most divided the delegates at the Dublin Conference.⁹⁹ A ban on the participation of states in international operations would have hindered some militarily powerful States from signing the CCM.¹⁰⁰ Conversely, the absence of any limitation on participation in international military operations would have undermined

⁹⁵ See Maresca, *supra* note 78, at 356 n.6 (explaining that such weapons are excluded from the scope of the CCM because “they are unlikely to cause the kinds of problems traditionally associated with cluster munitions”).

⁹⁶ CCM, *supra* note 4, art. 3.

⁹⁷ *Id.* art. 21. See Di Ruzza, *supra* note 16, at 425.

⁹⁸ See Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Proposal by Germany, Supported by Denmark, France, Italy, Slovakia, Spain, the Czech Republic, and the United Kingdom for the Amendment of Article 1 (May 19, 2008), available at http://www.clustermunitionsdublin.ie/pdf/CCM13_001.pdf.

⁹⁹ See Di Ruzza, *supra* note 16, at 425.

¹⁰⁰ See Raccuia, *supra* note 23, at 293 (arguing that “convincing the major Western powers to join the Convention without such a provision would have given the CCM much more force, but was unrealistic given the importance of the NATO alliance”).

the ban on CMs.¹⁰¹ In the end, “the CCM adopted an intermediate solution.”¹⁰² According to Article 21, “State 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.”¹⁰³ On the other hand, this same article provides that interoperability does not allow a state party to develop, produce, acquire, stockpile, transfer, use, or “expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.”¹⁰⁴ This provision is quite important for the United States and NATO members while participating in joint military operations with States who are parties to the CCM.¹⁰⁵

C. The U.S. Policy on Cluster Munitions After the CCM

The United States attempts to strike a balance between humanitarian concerns and its security interests.¹⁰⁶ While recognizing the need to minimize the unintended harm to civilians by CMs, the U.S. Department of Defense (DoD) states that “cluster munitions are legitimate¹⁰⁷ weapons with clear military utility.”¹⁰⁸ According to the DoD, not only are CMs “effective weapons” but also they “can result in less collateral damage than unitary weapons.”¹⁰⁹ “Large-scale use of unitary weapons, as the only alternative to achieve military objectives, could result, in some cases, in unacceptable collateral damage . . .” when CMs would not. Therefore, “DoD recognizes that blanket elimination of cluster munitions

¹⁰¹ *Id.*

¹⁰² See Di Ruzza, *supra* note 16, at 425.

¹⁰³ CCM, *supra* note 4, art. 21(3).

¹⁰⁴ *Id.* art. 21(4).

¹⁰⁵ See Anzalone, *supra* note 10, at 203–04.

¹⁰⁶ See Defense Policy Memorandum, *supra* note 2, at 3; Steven Groves & Ted R. Bromund, *U.N. Convention on Certain Conventional Weapons: What the U.S. Should Do*, HERITAGE FOUNDATION (Dec. 16, 2011), <http://report.heritage.org/wm3434>; Anzalone, *supra* note 10, at 208.

¹⁰⁷ See Herthel, *supra* note 29, at 249–69; Ching, *supra* note 43, at 154; Anzalone, *supra* note 10, at 188–90; Lacey, *supra* note 21, at 33 (arguing that CMs do not violate IHL principles per se). *But see* Virgil Wiebe, *For Whom the Little Bells Toll: Recent Judgement by International Tribunals on the Legality of Cluster Munitions*, 35 PEPP. L. REV. 895, 899–03 (2008); Van Woudenberg, *supra* note 15, at 454–64 (arguing that CMs are illegal weapons under the IHL).

¹⁰⁸ Defense Policy Memorandum, *supra* note 2, at 1.

¹⁰⁹ *Id.*

is unacceptable due not only to negative military consequences but also due to potential negative consequences for civilians.”¹¹⁰

While the DoD argues that CMs are legal under IHL and may cause less collateral damage than unitary weapons, it restricts the use of CMs in order to reduce unintended harm to civilians.¹¹¹ It requires CMs employed after 2018 to have less than 1 percent UXO. Until 2018, CMs with UXO rates more than 1 percent may only be used with approval from the combatant commander.¹¹² The policy also restricts the transfer of CMs with UXO rates over 1 percent to foreign governments after 2018, with the understanding that states receiving such munitions before 2018 will not use them after 2018.

IV. Draft Protocol on Cluster Munitions to the CCW

States opposing a total ban on CMs initiated an alternative multinational process to the CCM under the auspices of the CCW in 2007.¹¹³ Led by the United States, these states sought regulation of CMs in accordance with a more balanced approach between humanitarian concerns and military considerations.¹¹⁴ Within this process, the Group of Governmental Experts of High Contracting Parties to the CCW drafted a protocol on cluster munitions,¹¹⁵ which was placed on the agenda of the Fourth Review Conference of the CCW in 2011.¹¹⁶ At the end of the Conference, the Draft Protocol was rejected because it had

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.* at 2.

¹¹² *Id.* See also JOINT CHIEF OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (JP 1-02), at 55 (Nov. 8, 2010) (as amended through January 15, 2012) (defining combatant commander as “a commander of one of the unified or specified combatant commands established by the President).

¹¹³ Third Review Conference of the High Contracting Parties to CCW, *supra* note 79, at 6.

¹¹⁴ See Barak, *supra* note 5, at 426.

¹¹⁵ See Group of Governmental Experts of the High Contracting Parties, Draft Protocol on Cluster Munitions Submitted by the Chairperson (Aug. 26, 2011) [hereinafter Draft Protocol], available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/65A1309ABEE8EF50C125792C0033A369/\\$file/ConfIV_PVI+draft_110826-B.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/65A1309ABEE8EF50C125792C0033A369/$file/ConfIV_PVI+draft_110826-B.pdf).

¹¹⁶ See *Fourth Review Conference of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Documents*, UNOG: UNITED NATIONS OFFICE AT GENEVA, [http://www.unog.ch/80256EE600585943/\(httpPages\)/43FD798E770CE5AC12578B20032B630?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/43FD798E770CE5AC12578B20032B630?OpenDocument) (last visited Nov. 22, 2012).

two different draft texts,¹¹⁷ because the CCW requires unanimous consent among the parties for a decision, and because some State parties (which were also parties to the CCM) opposed it, as did some NGOs.¹¹⁸ Regardless of its failure to become a legally binding agreement, the Draft Protocol is still important because it encapsulates recent international debates on CMs and may guide future domestic and international policy.

A. Cluster Munitions Produced Before January 1, 1980

The Draft Protocol would have prohibited using, acquiring, stockpiling, retaining,¹¹⁹ or transferring¹²⁰ any CMs produced before January 1, 1980, and would have required them to be removed or destroyed.¹²¹ This rule alone would “prohibit more CMs for the United States than the Oslo Convention has prohibited for all of its member States combined.”¹²² Additionally, Ukraine¹²³ and Russia¹²⁴ announced that this rule would ban millions of CMs in their stocks. The International Committee of the Red Cross (ICRC) welcomed this step;¹²⁵

¹¹⁷ See Permanent Missions of Austria, Mexico, and Norway, Cover Letter to the Draft Alternative Protocol on Cluster Munitions (June 2011), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/D60CB73BCC7BB5C8C12578CE0064B521/\\$file/Letter+&+Draft+Proposal_AustriaMexicoNorway.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/D60CB73BCC7BB5C8C12578CE0064B521/$file/Letter+&+Draft+Proposal_AustriaMexicoNorway.pdf) (stating Draft Alternative Protocol’s aim as “ensure that the outcome is complementary to and compatible with the commitments that have been taken by CCM signatory and ratifying states, of which a significant number are also High Contracting Parties to the CCW”).

¹¹⁸ See Groves, *supra* note 106, at 2.

¹¹⁹ Draft Protocol, *supra* note 115, art.4.

¹²⁰ *Id.* art. 7.

¹²¹ *Id.* art. 6(1).

¹²² Statement of Philip Spector, Head of United States Delegation, Fourth Review Conference of the Convention on Certain Conventional Weapons 2 (Nov. 14, 2011), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/AA39A701F5D863C9C1257965003B6737/\\$file/4thRevCon_USA_Rev2.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/AA39A701F5D863C9C1257965003B6737/$file/4thRevCon_USA_Rev2.pdf) (also stating that this rule would “prohibit over 2 million cluster munitions . . . of the total U.S. stockpile of more than 6 million cluster munitions”).

¹²³ See Statement of Mykola Maimeskul, Ambassador of Ukraine to the U.N. Office in Geneva, to the Fourth Review Conference of the Convention on Certain Conventional Weapons (Nov. 14, 2011), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/E5EEA813CB3CEBA5C1257957004A8FA1/\\$file/4thRevCon_UKRAINE.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/E5EEA813CB3CEBA5C1257957004A8FA1/$file/4thRevCon_UKRAINE.pdf).

¹²⁴ See Statement of Vladimir Yermakov, Deputy Head of the Russian Delegation, to the Fourth Review Conference of the Convention on Certain Conventional Weapons (Nov. 14, 2011), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/2809BB94361FE3B1C1257965004B00F8/\\$file/4thRevCon_RUSSIA_Rev2.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/2809BB94361FE3B1C1257965004B00F8/$file/4thRevCon_RUSSIA_Rev2.pdf).

¹²⁵ See Statement of Jakob Kellenberger, President, Int’l Comm. of the Red Cross to the Fourth Review Conference of the Convention on Certain Conventional Weapons (Nov.

however, other NGOs, such as the Cluster Munition Coalition, argued that this rule would not “have a significant impact on the ground in offering greater protections to civilians.”¹²⁶ They maintained that: (a) these more-than-thirty-year-old weapons had already reached or were nearing the end of their shelf-lives and would have had to be destroyed anyway; (b) the newer cluster munitions were the ones that militaries most desired to keep; and (c) most of the cluster munitions used in the past decade were produced after 1980.¹²⁷

B. Cluster Munitions Produced on or After January 1, 1980

The Draft Protocol would also have prohibited using, acquiring, stockpiling, retaining, producing, developing,¹²⁸ or transferring many CMs produced on or after January 1, 1980, and would have required their removal or destruction.¹²⁹ However, it would have excluded those CMs which possessed at least one of the “safeguards that effectively ensure that unexploded submunitions will no longer function as explosive submunitions.”¹³⁰ This rule also would have banned millions of American CMs.¹³¹ However, NGOs argued that it was insufficient, because it would have allowed the indefinite use of some notorious CMs, such as BLU97,¹³² M85, and 9N210,¹³³ whose safeguards reportedly do not work effectively, contrary to their producers’ claims.

15, 2011), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/C3DE092D8814F07BC1257965005C058B/\\$file/4thRevCon_ICRC.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/C3DE092D8814F07BC1257965005C058B/$file/4thRevCon_ICRC.pdf).

¹²⁶ Cluster Munition Coalition, General Statement to the CCW Fourth Review Conference (Nov. 15, 2011), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/487E02B97BDB3918C12579650036EA37/\\$file/4thRevCon_CLUSTERMUNITIONCOALITION.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/487E02B97BDB3918C12579650036EA37/$file/4thRevCon_CLUSTERMUNITIONCOALITION.pdf) [hereinafter CMC CCW Statement].

¹²⁷ *Id.*

¹²⁸ Draft Protocol, *supra* note 115, art. 5.

¹²⁹ *Id.* art. 6(1).

¹³⁰ *Id.* art. 5 and Technical Annex B.

¹³¹ Spector, *supra* note 122, at 3 (stating that “the ban on weapons produced after 1980 without safeguards would prohibit . . . the vast majority of its remaining operational stocks”).

¹³² See Kellenberger, *supra* note 125, at 1; Statement of Grethe Osten, Cluster Munition Coalition, to the CCW Fourth Review Conference (Nov. 17, 2011), available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2011/11/article-5-statement-17-nov.pdf> (stating that “the BLU97 has two fuzes. The secondary fuze is the ‘all-ways acting’ fuze. It was designed to ensure the submunition’s reliable function, but . . . the BLU97 still fails in huge numbers. And instead the all-ways acting fuze has a disturbing tendency to function as an anti-disturbance device. And this is the reason why BLU97 is one of the munitions most dreaded by disposal teams”).

In addition, the Draft Protocol would have permitted States to defer these prohibitions on CMs without safeguard mechanisms for up to twelve years after the Protocol's entry into force.¹³⁴ During this period, these CMs could only have been used after approval by a "State's highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority."¹³⁵ While proponents of the Draft Protocol argued that the deferral period was necessary for military reasons,¹³⁶ opponents criticized it for being too long¹³⁷ and permitting the continued use of CMs that parties had already agreed to ban.¹³⁸

C. One Percent Failure Rate Exemption of the Draft Protocol

The Draft Protocol would not have applied to any CMs that had failure rates of one percent or less, regardless of their production dates or safeguard mechanisms.¹³⁹ The United States argued that "this [1 percent] criteria is a specific, objective, measurable criteria that actually is, in many ways, more targeted to the humanitarian concerns . . . than even some of other criteria."¹⁴⁰ Human Rights Watch criticized an exemption based on failure rate for being "fatally flawed by its dependence on unverifiable national implementation measures," which dependence

¹³³ See HUM. RTS. WATCH, CLUSTER MUNITIONS AND THE CONVENTION ON CONVENTIONAL WEAPONS: MYTHS AND REALITIES 2 (2011) [hereinafter MYTHS AND REALITIES], available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2011/03/cluster-munitions-and-the-ccw-myths-and-realities.pdf> (maintaining that "post-conflict clearance of dud submunitions equipped with these [safeguard] features has demonstrated that they do not 'effectively ensure that unexploded submunitions no longer function.' If an agreement includes this loophole, states would still be able to produce, stockpile, and use cluster munitions with submunitions like the artillery and rocket delivered M85 self-destructing dual-purpose improved conventional munition used in Iraq, Lebanon, and Georgia, and the rocket delivered 9N210 submunition used in Georgia").

¹³⁴ Draft Protocol, *supra* note 115, art. 5(3).

¹³⁵ *Id.* art. 5(4).

¹³⁶ See *CCW Protocol on Cluster Munitions Would Have Immediate and Tangible Humanitarian Effect*, MISSION OF THE UNITED STATES, GENEVA, SWITZERLAND (Nov. 16, 2011), <http://geneva.usmission.gov/2011/11/17/ccw-protocol-2/> (statements by Harold Koh, Dep't of State Legal Advisor and Bill Lietzau, Deputy Assistant Sec'y of Def. on the U.S. Position on the Convention on Conventional Weapons Negotiations on Cluster Munitions Protocol) [hereinafter *CCW Protocol on Cluster Munitions*].

¹³⁷ See Kellenberger, *supra* note 125, at 1.

¹³⁸ See CMC CCW Statement, *supra* note 126, at 3.

¹³⁹ Draft Protocol, *supra* note 115, art. 5, Technical Annex A.

¹⁴⁰ Third Review Conference of the High Contracting Parties to CCW, *supra* note 136.

made it impossible “to certify global compliance with the norm.”¹⁴¹ Therefore, depending on national standards, certain types of CMs could be “considered to be prohibited by one State and exempted by another.”¹⁴²

D. Complementarity of the Draft Protocol

The Draft Protocol provisions above would provide less protection to civilians than the CCM’s strict ban on CMs.¹⁴³ Non-Governmental Organizations have argued that enacting a less protective international instrument after already having one with higher standards would endanger the “positive trend of ever greater protection for civilians under IHL,” and that this regression would be a “terrible precedent to set.”¹⁴⁴ They maintain that the Draft Protocol “could re-legitimize a weapon already prohibited by the CCM; revive acceptance of a technical approach to improving the weapon as opposed to a complete prohibition; weaken or delay the stigmatization of CMs being created by the CCM; and harm efforts to universalize the CCM, as some States would opt to join the lower standard of the CCW.”¹⁴⁵ Non-government organizations have also accused those state parties to CCM that actively participated in the Draft Protocol of violating their obligations by supporting lower standards than the CCM’s and by giving non-party states an excuse to stay out of the CCM indefinitely.¹⁴⁶

These critics, however, have ignored the fact that the Draft Protocol was designed to be complementary with the CCM.¹⁴⁷ First, the Draft Protocol would not undermine other applicable IHL rules and

¹⁴¹ MYTHS AND REALITIES, *supra* note 133, at 1–2.

¹⁴² *Id.* at 2.

¹⁴³ See Kellenberger, *supra* note 125, at 3; MYTHS AND REALITIES, *supra* note 133, at 1 (blaming Draft Protocol having too many “exceptions, loopholes, and deferral periods that concretely undermine any impact of an effective prohibition”).

¹⁴⁴ CMC CCW Statement, *supra* note 126, at 1; Kellenberger, *supra* note 125, at 3, HUM. RTS. WATCH, FROM GOOD TO BAD: THE THREAT POSED TO INTERNATIONAL LAW BY THE DRAFT CCW PROTOCOL ON CLUSTER MUNITIONS, MEMORANDUM TO DELEGATES TO THE FOURTH REVIEW CONFERENCE OF THE 1980 CONVENTION ON CONVENTIONAL WEAPONS 7 (2011), available at http://www.hrw.org/sites/default/files/related_material/CCWProtocol.pdf.

¹⁴⁵ MYTHS AND REALITIES, *supra* note 133, at 4.

¹⁴⁶ *Id.* at 5 (such as Australia, France, Germany, and Ireland).

¹⁴⁷ See Spector, *supra* note 122, at 3.

principles.¹⁴⁸ Second, it would not “affect any rights or obligations of that States Parties to” the CCM.¹⁴⁹ These provisions were particularly designed to disperse the notion that the Draft Protocol’s aim was to lessen the impact of the CCM.¹⁵⁰

However, despite the efforts of proponent states¹⁵¹ and new proposals to alleviate further concerns,¹⁵² the Fourth Review Conference could not produce a legally binding agreement.¹⁵³ Though CCM advocates count this as a victory, the result is that there is no international regulation at all on the vast majority of the world’s CMs.¹⁵⁴ Whatever concessions it has offered in the CCW process, the United States is free to implement its own national policy regarding CMs without further reference to the failed Draft Protocol.¹⁵⁵ It has declared that it will continue to implement its own voluntary policy to eliminate CMs with UXO rates over one percent by 2018, and encourages other countries to take similar steps.¹⁵⁶

¹⁴⁸ Draft Protocol, *supra* note 115, art. 3(1).

¹⁴⁹ *Id.* art. 1(3).

¹⁵⁰ See Spector, *supra* note 124, at 3.

¹⁵¹ The United States, Argentina, Belarus, China, and Estonia offered full support for the Draft Protocol. States also party to the CCM like Croatia, Germany, Italy, the Netherlands, Portugal, Sweden, and Switzerland acted as facilitators, and “they viewed the Draft Protocol as a step in the right direction, even if more needed to be done.” On the other hand, India, Israel, Pakistan, Russia, and Ukraine had some concerns while still supporting it. Cluster Munition Coalition, *Going Nowhere Slowly*, CCW NEWS 1–2, Nov. 24, 2011, available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2011/11/ccw-news-24-november.pdf>.

¹⁵² See Hum. Rts. Watch and Harvard Law Sch. Int’l Hum. Rts. Clinic, Cluster Munition Analysis of CCW Draft Protocol VI on Cluster Munitions (Nov. 22, 2011), available at http://www.hrw.org/sites/default/files/related_material/2011_Arms_CCW4draftchairtext3.pdf (tracking changes on Draft Protocol proposals).

¹⁵³ See Farrah Zughni, *Cluster Munitions Protocol Fails*, ARMS CONTROL TODAY (Dec. 2011), http://www.armscontrol.org/act/2011_12/Cluster_Munitions_Protocol_Fails.

¹⁵⁴ See Groves, *supra* note 106, at 2 (arguing that the outcome of the Fourth CCW Conference is in the interests of neither the United States nor the victims of UXO).

¹⁵⁵ *Id.* at 3.

¹⁵⁶ See *U.S. Deeply Disappointed by CCW’s Failure to Conclude Protocol on Cluster Munitions*, MISSION OF THE UNITED STATES, GENEVA, SWITZERLAND (Nov. 25, 2011), <http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-protocol-on-cluster-munitions/>.

V. Conclusion

The problems caused by CMs and attempts to resolve them have been discussed over the years, and it seems these discussions are not going to end soon. The outright prohibition on CMs by the CCM has discouraged major user and producer States from joining and ratifying it. Since these states possess 90 percent of the world's supply of CMs, their reluctance limits the desired humanitarian effect of the CCM, which therefore seems inadequate to solve the problems by itself.

Nevertheless, the CCM's stigmatizing effect has already started to change the policies of some non-party States, including the United States. Non-CCM states have attempted to enact a different international agreement under the auspices of the CCW to balance humanitarian concerns and the military utility of the weapons. Despite the United States' strong efforts, this initiative failed because of opposition from prominent NGOs and States party to the CCM.

For now the United States has not entered into any legally binding international agreement specifically banning CMs. Nevertheless, any argument that cluster munitions remain legal and serve a legitimate military purpose depends on careful legal assessment, while keeping in mind their military utility and balancing relevant humanitarian concerns.

Appendix

The Convention on Cluster Munitions Status

Country	Adopting States in Dublin*	Signature	Ratification/ Accession	Entry into force date
Afghanistan		03-Dec-08	08-Sept-1	1-Mar-12
Albania	30-May-08	03-Dec-08	16-Jun-09	1-Aug-10
Angola	30-May-08	03-Dec-08		
Antigua & Barbuda		16-Jul-10	23-Aug-10	1-Feb-11
Australia	30-May-08	03-Dec-08	08-Oct-12	01-Apr-13
Austria	30-May-08	03-Dec-08	02-Apr-09	1-Aug-10
Belgium	30-May-08	03-Dec-08	22-Dec-09	1-Aug-10
Benin	30-May-08	03-Dec-08		
Bolivia	30-May-08	03-Dec-08		
Bosnia and Herzegovina	30-May-08	03-Dec-08	07-Sep-10	1-Mar-11
Botswana	30-May-08	03-Dec-08	27-Jun-11	1-Dec-11
Bulgaria	30-May-08	03-Dec-08	06-Apr-11	1-Oct-11
Burkina Faso	30-May-08	03-Dec-08	16-Feb-10	1-Aug-10
Burundi	30-May-08	03-Dec-08	25-Sep-09	1-Aug-10
Cameroon	30-May-08	15-Dec-09	12-Jul-12	01-Jan-13
Canada	30-May-08	03-Dec-08		
Cape Verde		03-Dec-08	19-Oct-10	1-Apr-11
Central African Republic		03-Dec-08		
Chad	30-May-08	03-Dec-08		
Chile	30-May-08	03-Dec-08	16-Dec-10	1-Jun-11
Colombia	30-May-08	03-Dec-08		
Comoros	30-May-08	03-Dec-08	28-Jul-10	1-Jan-11
Congo, Democratic Republic of	30-May-08	18-Mar-09		
Congo, Republic of	30-May-08	03-Dec-08		
Cook Islands	30-May-08	03-Dec-08	23-Aug-11	1-Feb-12
Costa Rica	30-May-08	03-Dec-08	28-Apr-11	1-Oct-11
Côte d'Ivoire	30-May-08	04-Dec-08	12-Mar-12	01-Sep-12

Côte d'Ivoire	30-May-08	04-Dec-08	12-Mar-12	01-Sep-12
Croatia	30-May-08	03-Dec-08	17-Aug-09	1-Aug-10
Cyprus		23-Sept-09		
Czech Republic	30-May-08	03-Dec-08	22-Sep-11	1-Mar-12
Denmark	30-May-08	03-Dec-08	12-Feb-10	1-Aug-10
Djibouti		30-Jul-10		
Dominican Republic	30-May-08	10-Nov-09	20-Dec-11	1-Jun-12
Ecuador	30-May-08	03-Dec-08	11-May-10	1-Nov-10
El Salvador	30-May-08	03-Dec-08	10-Jan-11	1-Jul-11
Fiji	30-May-08	03-Dec-08	28-May-10	1-Nov-10
France	30-May-08	03-Dec-08	25-Sep-09	1-Aug-10
Gambia		03-Dec-08		
Germany	30-May-08	03-Dec-08	08-Jul-09	1-Aug-10
Ghana	30-May-08	03-Dec-08	03-Feb-11	1-Aug-11
Grenada			29-Jun-11	1-Dec-11
Guatemala	30-May-08	03-Dec-08	03-Nov-10	1-May-11
Guinea	30-May-08	03-Dec-08		
Guinea Bissau	30-May-08	03-Dec-08	29-Nov-10	1-May-11
Haiti		28-Oct-09		
The Holy See	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Honduras	30-May-08	03-Dec-08	21-Mar-12	01-Sep-12
Hungary	30-May-08	03-Dec-08	03-Jul-12	01-Jan-13
Iceland	30-May-08	03-Dec-08		
Indonesia	30-May-08	03-Dec-08		
Iraq		12-Nov-09		
Ireland	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Italy	30-May-08	03-Dec-08	21-Sep-11	1-Mar-12
Jamaica	30-May-08	12-Jun-09		
Japan	30-May-08	03-Dec-08	14-Jul-09	1-Aug-10

Kenya	30-May-08	03-Dec-08		
Lao PDR	30-May-08	03-Dec-08	18-Mar-09	1-Aug-10
Lebanon	30-May-08	03-Dec-08	05-Nov-10	1-May-11
Lesotho	30-May-08	03-Dec-08	28-May-10	1-Nov-10
Liberia		03-Dec-08		
Liechtenstein		03-Dec-08		
Lithuania	30-May-08	03-Dec-08	24-Mar-11	1-Sep-11
Luxembourg	30-May-08	03-Dec-08	10-Jul-09	1-Aug-10
Macedonia, FYR	30-May-08	03-Dec-08	08-Oct-09	1-Aug-10
Madagascar	30-May-08	03-Dec-08		
Malawi	30-May-08	03-Dec-08	7-Oct-09	1-Aug-10
Mali	30-May-08	03-Dec-08	30-Jun-10	1-Dec-10
Malta	30-May-08	03-Dec-08	24-Sep-09	1-Aug-10
Mauritania	30-May-08	19-Apr-10	1-Feb-12	1-Aug-12
Mexico	30-May-08	03-Dec-08	06-May-09	1-Aug-10
Moldova, Republic of	30-May-08	03-Dec-08	16-Feb-10	1-Aug-10
Monaco		03-Dec-08	21-Sep-10	1-Mar-11
Montenegro	30-May-08	03-Dec-08	25-Jan-10	1-Aug-10
Mozambique	30-May-08	03-Dec-08	14-Mar-11	1-Sep-11
Namibia		03-Dec-08		
Nauru		03-Dec-08		
Netherlands	30-May-08	03-Dec-08	23-Feb-11	1-Aug-11
New Zealand	30-May-08	03-Dec-08	22-Dec-09	1-Aug-10
Nicaragua	30-May-08	03-Dec-08	02-Nov-09	1-Aug-10
Niger	30-May-08	03-Dec-08	02-Jun-09	1-Aug-10
Nigeria	30-May-08	12-June-09		
Norway	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Palau	30-May-08	03-Dec-08		

Panama	30-May-08	03-Dec-08	29-Nov-10	1-May-11
Paraguay	30-May-08	03-Dec-08		
Peru	30-May-08	03-Dec-08	26-Sep-12	01-Mar-13
Philippines	30-May-08	03-Dec-08		
Portugal	30-May-08	03-Dec-08	09-Mar-11	1-Sep-11
Rwanda		03-Dec-08		
Saint Vincent and the Grenadines		23-Sept-09	29-Oct-10	1-Apr-10
Samoa	30-May-08	03-Dec-08	28-Apr-10	1-Oct-10
San Marino	30-May-08	03-Dec-08	10-Jul-09	1-Aug-10
São Tomé and Príncipe	30-May-08	03-Dec-08		
Senegal	30-May-08	03-Dec-08	3-Aug-11	1-Feb-12
Seychelles	30-May-08	13-Apr-10	20-May-10	1-Nov-10
Sierra Leone	30-May-08	03-Dec-08	03-Dec-08	1-Aug-10
Slovenia	30-May-08	03-Dec-08	19-Aug-09	1-Aug-10
Somalia		03-Dec-08		
South Africa	30-May-08	03-Dec-08		
Spain	30-May-08	03-Dec-08	17-Jun-09	1-Aug-10
Swaziland	30-May-08		13-Sep-11	01-Mar-12
Sweden	30-May-08	03-Dec-08	23-Apr-12	01-Oct-12
Switzerland	30-May-08	03-Dec-08	17-Jul-12	01-Jan-13
Tanzania	30-May-08	03-Dec-08		
Togo	30-May-08	03-Dec-08	22-Jun-12	01-Dec-12
Trinidad and Tobago			21-Sep-11	1-Mar-12
Tunisia		12-Jan-09	28-Sep-10	1-Mar-11
Uganda	30-May-08	03-Dec-08		
United Kingdom	30-May-08	03-Dec-08	4-May-10	1-Nov-10

Uruguay	30-May-08	03-Dec-08	24-Sep-09	1-Aug-10
Zambia	30-May-08	03-Dec-08	12-Aug-09	1-Aug-10

*States which adopted the CCM in Dublin, but have not signed it yet:

Morocco, Sudan, Argentina, Belize, Venezuela, Brunei Darussalam, Kyrgyzstan, Malaysia, Timor-Leste, Estonia, Finland, Serbia, Slovakia, Bahrain, Qatar, Papua New Guinea, and Vanuatu.