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Explosive Road From Dublin: The Legal Flaws in the Convention to Ban Cluster Munitions and Recommendations for Their Cure.

Alexandra R. Harrington
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Alexandra R. Harrington, Esq.*

I – INTRODUCTION

In a popular Irish folk song, the hero leaves his boyhood home in the Irish countryside and takes the “rocky road to Dublin” in order to sail to a new life in a new country.¹ However hopeful the hero is throughout his journey, when he arrives at his destination he finds that it is not as hospitable as he had expected.² Despite its light-hearted beat, this song is oddly prophetic for an analysis of the Convention to Ban Cluster Munitions.

In May, 2008, the Convention to Ban Cluster Munitions (“Cluster Munitions Convention”) was adopted by a group of one-hundred and eleven states meeting in Dublin, Ireland.³ The reasons offered for the Cluster Munitions Convention by the states and non-governmental organizations that brought cluster munitions into the spotlight are indeed compelling on a purely humanitarian level. It is difficult to hear stories of young children dying or suffering life-altering injuries due to coming in contact with unexploded cluster munitions. It is equally difficult to hear of the obstacles which those civilians who have been injured by cluster munitions face in their communities and in

* B.A. Politics, B.A. History, New York University; J.D., Albany Law School of Union University; LL.M. in International Law, Albany Law School of Union University.
² Id.
their ability to support themselves. However, sympathy and outrage do not always combine to create a legal instrument that betters the lives of those it seeks to help or the world community, and the Cluster Munitions Convention is an unfortunate example of this. The goal of this article is to highlight the flaws of the Cluster Munitions Convention and offer recommendations for the cure of these flaws in alternate fora to the Cluster Munitions Convention.

Part II of this article provides a history of the Cluster Munitions Convention, as well as the statements of various state parties throughout the convention negotiating process. These statements are of particular importance in understanding that the compromises made to allow for the adoption of the Cluster Munitions Convention are grave breaches of the ideals of the state parties themselves. In this Part, emphasis will be placed on the motivating factors behind the Cluster Munitions Convention’s creation, amendment and adoption, as well as the way in which particular concerns of state parties were addressed during the negotiation process.

Because the Cluster Munitions Convention has separate military and humanitarian and human rights law components, its analysis will be broken down according to these designations, and recommendations will be made at the end of each applicable part. Part III of this article discusses the uniquely military aspects of the Cluster Munitions Convention. It then discusses the way in which individual states have addressed cluster munitions production, sale and use in recent years, as well as other applicable and similar weapons conventions. This Part compares these conventions to the Cluster Munitions Convention and uses these comparisons to demonstrate the weaknesses of the Cluster Munitions Convention. In this Part, it is argued that the best method to provide legal
protections against the use of “dumb” cluster munitions and to accomplish many of the
goals of the Cluster Munitions Convention is to amend Protocol V of the Convention on
Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be
Deemed Excessively Injurious or Have Indiscriminate Effects. This Part further
extrapolates that the most effective method of preventing the sale of “dumb” cluster
munitions is the creation of an industry and state collaborative agreement such as that
used in the Kimberley Process to combat the flow of conflict diamonds. It goes on to
provide a proposed framework for such a process.

Part IV discusses the humanitarian and “victim’s assistance” provisions of the
Cluster Munitions Convention in relation to existing international law, particularly the
International Covenant on Civil and Political Rights, the International Covenant on
Economic, Social and Civil Rights, the U.N. Convention on the Rights of the Child and
the Convention on Rights of Persons with Disabilities. It then profiles the current
national, regional and international assistance systems available for demining and
assistance to civilian victims of cluster munitions in affected areas. This Part
demonstrates the weaknesses of the Cluster Munitions Convention generally in light of
the already existing protections and aid schemes. It suggests that the most effective way
to ensure that civilian victims of cluster munitions receive adequate assistance and
safeguard the rights given them under international law is to strengthen the already
existing international conventions which give rise to these rights and allow for a remedy.
Ultimately, it is the author’s conclusion that the human rights protections offered in the

4 The term “civilian victims of cluster munitions” is used by the author to describe non-combatants who
have been injured by explosions of cluster munitions that occur after the cessation of hostilities. This term,
rather than the term “cluster munitions victim” as used in the Cluster Munitions Convention, is used
because it more accurately describes those who are the focus of legal and humanitarian efforts.
Cluster Munitions Convention are unnecessary if the international community enforces the extant protections afforded by international law. Without using these norms to their utmost capacities, the author argues that the Cluster Munitions Convention will have as little real-world impact as its human rights law predecessors. It is also argued that the terms of the Cluster Munitions Convention endangers the already existing aid schemes for demining and civilian victims’ assistance.

Part V summarizes the flaws in the Cluster Munitions Convention. It then restates the proposals contained in this article and the reasons for them. Finally, it concludes that there is still time to remedy the flaws of the Cluster Munitions Convention and advance the essential goals of it.

II – BACKGROUND

A. Cluster Munitions

Cluster munitions, also known as cluster bombs, have been in use militarily for well over a half-century.\(^5\) Unlike a conventional land mine, which must physically be placed in the ground in order to function,\(^6\) or a standard aerial bomb, cluster munitions are comprised of a multitude of small bombs – referred to as “bomblets.”\(^7\) Although cluster munitions are typically dropped from a fighter jet, they differ from a standard aerial bomb in that the bomblets are released from their casing after they are dropped,

\(^5\) See GUIDE TO CLUSTER MUNITIONS 26 – 28 (providing a concise history of cluster munitions use since World War II).
\(^7\) See Ressler and Wise, supra note 6; GUIDE TO CLUSTER MUNITIONS, GENEVA INTERNATIONAL CENTRE FOR HUMANITARIAN DEMINING, ch. 1 (2007) (hereinafter “GUIDE TO CLUSTER MUNITIONS”).
causing them to fall to the ground over a wider range of area than a standard aerial bomb could cover.\(^8\) It is also possible to deploy cluster munitions from a land-based source, although the majority of those cluster munitions discussed in this article and in general discourse regarding cluster munitions are aerially deployed.\(^9\) Examples of recent military campaigns where cluster munitions have been successfully deployed include Kosovo\(^10\) and Iraq.\(^11\) Much ire was drawn from the international community when Israel used cluster munitions during its 2006 hostilities with Lebanon – or perhaps more accurately terrorist forces in Lebanon – because many civilian deaths were the result of cluster munitions.\(^12\)

Until recently, the standard cluster bomb was what is now referred to as a “dumb” cluster bomb. As the name suggests, this form of cluster bomb lacked the ability to self-destruct or self-deactivate in the event that it did not detonate on impact or shortly thereafter.\(^13\) Not all unexploded cluster munitions will explode when touched after their deployment – however, a significant number of cluster munitions have exploded in the hands of civilians post-conflict.\(^14\) Much of the humanitarian impetus to ban cluster bombs has come from injuries and deaths associated with dumb cluster munitions found years or even decades after the conflict in a particular region has ceased.\(^15\)

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8 See id.
9 GUIDE TO CLUSTER MUNITIONS 11.
10 See Ressler and Wise, supra note 6; GUIDE TO CLUSTER MUNITIONS 11.
11 See Ressler and Wise, supra note 6; GUIDE TO CLUSTER MUNITIONS 11.
12 See Ressler and Wise, supra note 6.
14 GUIDE TO CLUSTER MUNITIONS 32 – 34.
In contrast to dumb cluster munitions stand the newer generations of cluster munitions, which have a minimal dud rate and contain features such as self-destruction mechanisms and self-deactivation mechanisms.\(^{16}\) These cluster munitions have become popular among large militaries, with several notable states requiring that their militaries use only cluster bombs with a small dud rate.\(^{17}\) Indeed, Congress has made it illegal for the United States to sell cluster munitions abroad unless the cluster munitions have a dud rate of less than or equal to 1%.\(^{18}\) Despite the Cluster Munitions Convention, cluster munitions are still an important option for regional and international peacekeeping operations and are also regarded as a vital tool in the military arsenals of several states.\(^{19}\)

**B. The Road to Dublin**

As with so many human rights and humanitarian law issues, the first entities to bring international focus on the use of cluster munitions and the civilian victims of cluster munitions were non-governmental organizations.\(^{20}\) The first issue raised by those seeking to ban cluster munitions was not and has not been their military effectiveness or the national, regional and international security interests advanced in having cluster munitions available in a military arsenal. Instead, the focus was and has consistently been

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\(^{16}\) See GUIDE TO CLUSTER MUNITIONS 17.

\(^{17}\) See infra Part III C.


\(^{19}\) See GUIDE TO CLUSTER MUNITIONS 29 – 30.

on the physical and economic affects experienced by civilian victims of cluster munitions.

In 2007, Norway became the first state to adopt the mantle of cluster munitions banning in the international arena. Following Norway’s commitment to creating an international law method to ban the use of cluster munitions, the issue gained further attention at the state level, and a conference of interested states was held in Vienna. At this conference, forty-six states agreed that a draft treaty to ban the use of cluster munitions and to provide assistance to the civilian victims of cluster munitions should be created. Throughout the next months, a series of conferences were held at the regional and international level with the goal of advancing the draft treaty. This process culminated in May, 2008, when one-hundred and eleven states gathered in Dublin and, after a series of negotiations, adopted the Cluster Munitions Convention. According to its terms, the Cluster Munitions Convention will open for state signature in December, 2008, although the municipal legal structure of most adopting states will require formal municipal ratification in order for the Cluster Munitions Convention to become binding under municipal law.

C. Objections and Compromises

23 Id.
26 See Convention on Cluster Munitions art. 15.
The vehement debates in Dublin centered on both the military and humanitarian law aspects of the draft Cluster Munitions Convention and demonstrate the disconnect in goals of states which have adopted the Cluster Munitions Convention. In many ways, the disconnect calls into question the true level of commitment to the entire Cluster Munitions Convention.

Essentially, this disconnect surrounded those states which have used cluster munitions effectively from a military and/or peacekeeping standpoint and those which are the site of unexploded cluster munitions, resulting in civilian victims of cluster munitions. States which are members of NATO and/or participate frequently in U.N. or other peacekeeping operations voiced severe concern over the Vienna draft of the Cluster Munitions Convention because its wording would likely have been interpreted to mean that a signatory state would violate its obligations under the Cluster Munitions Convention in the event that it had even tangential contact with a peacekeeping or other joint military endeavor which used or authorized the use of cluster munitions.27 Additionally, many states in this group objected to the definition of “cluster munitions” as being imprecise for the purpose of the Cluster Munitions Convention.28 There was a concerted effort to include terms in the definitions section of the Cluster Munitions

27 See DISCUSSION PAPER CLUSTER MUNITIONS AND INTER-OPERABILITY: THE OSLO-PROCESS DISCUSSION TEXT AND IMPLICATIONS FOR INTERNATIONAL OPERATIONS, AUSTRALIA, CANADA, CZECH REPUBLIC, DENMARK, FINLAND, FRANCE, GERMANY, ITALY, NETHERLANDS, SWEDEN, SWITZERLAND, UNITED KINGDOM; GENERAL STATEMENT, AUSTRALIA, DUBLIN DIPLOMATIC CONFERENCE ON CLUSTER MUNITIONS, available at http://www.clustermunitionsdublin.ie/general-statements.asp (last visited Jul. 11, 2008). Interestingly, the U.N. opined that, because its peacekeeping operations are, in its view, bound only to follow principles of customary international law, the contested provisions of the proposed Cluster Munitions Convention would have little effect on U.N. peacekeeping operations. See UNMAT STATEMENT RELATED TO INTEROPERABILITY, DUBLIN DIPLOMATIC CONFERENCE ON CLUSTER MUNITIONS, available at http://www.clustermunitionsdublin.ie/general-statements.asp (last visited Jul. 11, 2008).
Conventions that would have provided a more precise and legally cognizable definition of not only cluster munitions but also how they function.\textsuperscript{29} However, these proposals were ultimately rejected in favor of a narrow exception for certain classes of cluster munitions that have a “self-destruction” or “self-deactivation” mechanism, provided that several other limits are in-place as well.\textsuperscript{30}

Some states attempted to reverse statements in the Vienna draft convention that would have done away with the ability of a signatory state to use cluster munitions in further technological developments; this issue was lost for proponents of retaining the ability to use cluster munitions for technological advancement.\textsuperscript{31} The Cluster Munitions Convention did, however, take into account the need for signatory states to retain some cluster munitions training/demining lessons.\textsuperscript{32}

Procedurally, there was an intense debate regarding the time within which states would be required to phase out their use and ownership of cluster munitions completely.\textsuperscript{33} Ultimately, it was agreed that state parties would have eight years within which to phase out ownership and use of cluster munitions, although an additional procedure exists in the


\textsuperscript{30} See CONVENTION ON CLUSTER MUNITIONS art. 2

\textsuperscript{31} Id. art. 3 (6).

\textsuperscript{32} See CONVENTION ON CLUSTER MUNITIONS.

event that a state party cannot meet this obligation.\textsuperscript{34} It should be pointed out that the specifics of this allowance are sparse and the decision-making process at issue is rather arbitrary from a fairness and guaranteed outcome perspective.\textsuperscript{35}

States in which cluster munitions were used, as well as civilian victims of cluster munitions right’s groups and civilian victims themselves, were particularly adamant that the final Cluster Munitions Convention contain provisions for victims assistance.\textsuperscript{36} Statements made by the representatives of various state parties that fall into this category evince a belief that the Cluster Munitions Convention’s aim should be to assist civilian victims of cluster munitions and to assist in demining efforts.\textsuperscript{37} Although it was not directly stated during the negotiations, it was clear that, to these groups, the military impact and import – even to their own interests - of a complete ban on cluster munitions was secondary at best and nearly retributive at worst.\textsuperscript{38} Further, the author maintains that these negotiations were tellingly silent on the need for states that are home to civilian victims of cluster munitions and their families to adopt their own municipal legislation and social norms that would provide concrete and actionable rights and protections to for

\textsuperscript{34} \textit{Convention on Cluster Munitions} art. 3.
\textsuperscript{35} See id.
\textsuperscript{37} See id.
these classes of people. Additionally, the humanitarian and human rights law portions of the Cluster Munitions Convention negotiations were entirely silent on the impact of the Cluster Munitions Convention on the current demining and civilian victims of cluster munitions programs which involve adoptive states and states such as the United States, which has refused to adopt the Cluster Munitions Convention.

**III – Military Components of the Cluster Munitions Convention and a Proposed Solution**

**A. Military Components of the Cluster Munitions Convention**

In the Preamble to the Cluster Munitions Convention, the adoptive parties stress military, humanitarian and human rights law issues as the justification for the creation of the Cluster Munitions Convention. However, as these statements relate to the military aspects of the Cluster Munitions Convention, they are vague at best and potentially violative of the core concepts of state sovereignty that underlie the international legal system at worst. The Preamble demonstrates that the Cluster Munitions Convention does not allow for any instances in which cluster munitions could be deployed, which is troublesome given the position of a significant number of state parties that the option of participation in a peacekeeping or other joint military operation which uses cluster munitions is a key military right of any state. The boundaries of interfering with the national military entities and their rights to decide what weapons and measures are


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39 See id.
40 See id.
41 See generally CONVENTION ON CLUSTER MUNITIONS Preamble.
42 Id. para 2. (“Determined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.”).
sufficient for their own security purposes are called into question in the Preamble as well. The Preamble also attempts to bind “armed groups distinct from the armed forces of a State” to the terms of the Cluster Munitions Convention, an attempt that is both legally and practically impossible.

Although the Preamble recognizes the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or Have Indiscriminate Effects (“CCW”) and its protocols, it does not discuss the interrelation between the CCW and the Cluster Munitions Convention or explain the need for a separate Cluster Munitions Convention when the CCW and its protocols already exist. The final version of the Cluster Munitions Convention incorporates the concept of banning “the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians.” Whether and how a cluster munition might pose an acceptable or unacceptable level of harm to the civilian population is unclear throughout the terms of the Cluster Munitions Convention.

Article 1 of the Cluster Munitions Convention sets forth a broad ban on all aspects of the production and use of cluster munitions. This ban is non-derogable unless a state party exercises its right to withdraw from the Cluster Munitions Convention. Even then, the withdrawal provisions of the Cluster Munitions Convention allow a state party to

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43 See id. para. 4 (“Deeply concerned also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and determined to ensure their rapid destruction.”).

44 Id. para. 12 (“Resolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention.”).

45 Id. para 14.

46 Id. para 18 (emphasis added).

47 See generally CONVENTION ON CLUSTER MUNITIONS.

48 Id. art. 1 (1) (“Each State Party undertakes never under any circumstances to: (a) use cluster munitions; (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”).

49 Id. art. 20.
withdraw effectively with six months notice except that, where the state party is “engaged
in an armed conflict” at the expiration of the six month withdrawal period, the state party
will continue to be deemed bound by the full terms of the Cluster Munitions Convention
until the end of the “armed conflict.” 50 This again calls into question the place of state
sovereignty in the Cluster Munitions Convention and creates a situation where a State
Party’s ability to defend itself could be called into question due to the lack of cluster
munitions as part of its military arsenal. Although the CCW and Anti-Personnel
Landmines Convention contains similar provisions, this provision in the Cluster
Munitions Convention is particularly troublesome to the author because of the potential
military utility of cluster munitions during a conflict.

Under the Cluster Munitions Convention, the definition of “cluster munitions” is
rather generic: “a conventional munition that is designed to disperse or release explosive
submunitions each weighing less than 20 kilograms, and includes those explosive
submunitions.” 51 There are three exceptions to this definition, one for munitions that use
certain pyrotechnic and other lighted devices, 52 one for munitions “designed to produce
electrical or electronic effects,” 53 and one that provides that

1. Each munition contains fewer than ten explosive submunitions;
2. Each explosive submunition weighs more than four kilograms;
3. Each explosive submunition is designed to detect and engage a single target
4. Each explosive submunition is equipped with an electronic self-
   destruction mechanism;

50 Id.
51 Id. art. 2 (2).
52 Id. (a).
53 Convention on Cluster Munitions art. 2 (2)(b).
(v) Each explosive submunition is equipped with an electronic self-deactivating mechanism.\textsuperscript{54}

Although there currently are cluster munitions varieties which feature self-destruction and/or self-deactivation mechanisms, the above definition is extremely narrow and is written to essentially rule out the use of even more technologically advanced cluster munitions. Further, because the Cluster Munitions Convention only allows state parties to retain cluster munitions for the purposes of demining training activities, it forecloses the ability of states to create more advanced cluster munitions for future conflicts, taking into account the humanitarian concerns voiced by the parties to the Cluster Munitions Convention.

Signatories to the Cluster Munitions Convention must segregate the cluster munitions in their arsenals and destroy them within eight years of adopting the Cluster Munitions Convention unless an extension is granted or the state retains cluster munitions for training purposes.\textsuperscript{55} The amount of cluster munitions that a state party may retain in order to conduct training exercises is defined as: “not [to] exceed the minimum number absolutely necessary for these purposes.”\textsuperscript{56} The vagueness of this definition is legally troubling because it does not allow any interested party to know when a state has retained more cluster munitions than intended under the Cluster Munitions Convention.

In order to destroy cluster munitions, each state party is required to use existing destruction rules and the terms of the International Mine Action Standards.\textsuperscript{57} Should national rules and regulations not exist, the state party is required to promulgate them.\textsuperscript{58}

\textsuperscript{54} Id. (c).
\textsuperscript{55} CONVENTION ON CLUSTER MUNITIONS art. 3
\textsuperscript{56} Id. art. 3(6).
\textsuperscript{57} Id. arts. 3, 4.
\textsuperscript{58} Id. art. 3(1)
Additionally, although the Cluster Munitions Convention sets out a list of factors to be taken into consideration in the event that a state party seeks an extension of time to destroy its cluster munitions arsenal, the mechanisms through which a determination on the request are to be made remain exceptionally vague.\(^59\) This can be viewed as problematic, particularly in light of the potential for such decisions to become highly political in nature. The Cluster Munitions Convention is silent on the issue of consequences for state parties which cannot or do not fulfill their obligations under the cluster munitions destruction requirements.\(^60\)

Further, state parties known to have deployed cluster munitions within their jurisdiction are required to clear them within ten years of adopting the Cluster Munitions Convention.\(^61\) A set of factors to be taken into consideration by a state party during its cluster munitions clearance activities is provided and the clearance requirements are imputed to a state party regardless of whether it used the cluster munitions in its territory.\(^62\) When a state has used cluster munitions in the jurisdiction of another state, the using state is “strongly encouraged” to inform the receiving state as to the characteristics of the cluster munitions used and the areas of their deployment, as well as to provide other methods of assistance.\(^63\) As with the mandatory destruction period for cluster munitions, state parties may request an extension of the time during which they are required to perform cluster munitions clearance activities;\(^64\) similarly, there are articulated factors for

\(^59\) Id. art. 3 (4).
\(^60\) See generally id. art. 3.
\(^61\) Convention on Cluster Munitions art. 4.
\(^62\) Id. art. 4(4).
\(^63\) Id.
\(^64\) Id. art. 4(5).
such requests in the Cluster Munitions Convention, however the decision-making process is equally vague.\textsuperscript{65}

In terms of progress updates, each state party is required to provide the U.N. Secretary General with periodic updates and reports on its cluster munitions destruction and clearance activities.\textsuperscript{66} While directly related to the terms of the Cluster Munitions Convention, it is possible that some of these disclosures could pose a risk to the military and national security of the reporting state party.

Thus, the intent and terms of the military components of the Cluster Munitions Convention are at once restrictive and vague. They are restrictive in the overall ban of cluster munitions, their use for future technological research, and the ability of a state party to be involved in a peacekeeping or joint military operation that contemplates the use of or uses cluster munitions. They are vague in that details surrounding key concepts, timing requirements and extension grants are undefined and poorly articulated.

\textbf{B. Other Relevant International Conventions}

Multilateral conventions regarding the conduct of warfare and the treatment of civilians are not new to international law. The purposes of these conventions were and have been the protection of civilians and military forces during combat. Early examples of such agreements include the 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight\textsuperscript{67} and the 1907 Declaration

\textsuperscript{65} Id. art. 4(6).
\textsuperscript{66} Id. art. 7
\textsuperscript{67} See DECLARATION RENOUNCING THE USE, IN TIME OF WAR, OF EXPLOSIVE PROJECTILES UNDER 400 GRAMMES WEIGHT. Saint Petersburg, 29 November/ 11 December 1868.
Prohibiting the Discharge of Projectiles and Explosives from Balloons. These agreements soon became outdated as the terms and technology of warfare shifted during the Twentieth Century. Applicable modern military conventions are discussed below.

1. The CCW

The CCW was enacted by the international community in 1980, with several protocols amplifying its provisions to follow. The CCW seeks to provide civilians with protections during wartime that are different from the Geneva Convention protections in that they relate to the conduct of military activities on a tactical level. The Preamble to the CCW states that state parties understand “the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” While this is itself a somewhat statement, in the opinion of the author it is far more precise than the concept of “unacceptable harm” to civilians because it recognizes the realities of civilian and military life under wartime conditions.

Although the main body of the CCW is essentially a procedural mechanism, it contains several key points that differ from the Cluster Munitions Convention. First, state

68 See Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons. The Hague, 18 October 1907.
70 See generally 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 Preamble.
71 Id. para 3.
parties are free to withdraw from the CCW on one year’s notice.\textsuperscript{72} The CCW does state that, where a State Party withdraws from the CCW and is engaged in a conflict covered by the CCW’s terms, it is still bound by the terms of the CCW; however, state parties are only bound to the protocols they have signed onto and, as discussed below, no protocol has been signed by every signatory to the CCW itself.\textsuperscript{73} Overall, the CCW shares the same basic goals as the Cluster Munitions Convention vis a vis civilian protections during wartime.\textsuperscript{74} There are currently one hundred and five state parties that have acceded to the CCW, seventy-two of which have adopted the Cluster Munitions Convention.\textsuperscript{75} Six states have signed the CCW but have not acceded to it, three of which have adopted the Cluster Munitions Convention.\textsuperscript{76} There are thirty-seven U.N. member states that have not signed the CCW but have adopted the Cluster Munitions

\begin{footnotesize}
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\item \textsuperscript{72} Id. art. 9.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} See generally \textit{CONVENTION ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCERNIMATE EFFECTS.}
\item \textsuperscript{75} See \textit{STATES PARTIES, CONVENTION ON CERTAIN CONVENTIONAL WEAPONS, DISARMAMENT, UNITED NATIONS OFFICE AT GENEVA, \url{available at http://www.unog.ch/__80256ee600585943.nsf/(httpPages)/3cc7cfc0aa4a7548c12571c00039cb0c?OpenDocument&ExpandSection=1#_Section1} (last visited Jul. 7, 2008); 111 \textit{COUNTRIES ON BOARD, THE TREATY, CLUSTER MUNITION COALITION, \url{available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84} (last visited Jul. 7, 2008). Specifically, these states are: Albania, Argentina, Australia, Austria, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, the Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Finland, France, Germany, Guatemala, the Holy See, Honduras, Hungary, Ireland, Italy, Japan, the Lao People’s Democratic Republic, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Mali, Malta, Mexico, Moldova, Montenegro, Morocco, the Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Paraguay, Peru, the Philippines, Portugal, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Togo, Uganda, the United Kingdom, Uruguay, and Venezuela. Id.
\item \textsuperscript{76} \textit{SIGNATORIES TO THE CCW, CONVENTION ON CERTAIN CONVENTIONAL WEAPONS, DISARMAMENT, UNITED NATIONS OFFICE AT GENEVA, \url{available at http://www.unog.ch/__80256ee600585943.nsf/(httpPages)/3cc7cfc0aa4a7548c12571c00039cb0c?OpenDocument&ExpandSection=2#_Section2} (last visited Jul. 7, 2008); 111 \textit{COUNTRIES ON BOARD, THE TREATY, CLUSTER MUNITION COALITION, \url{available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84} (last visited Jul. 7, 2008). The states among this group that have adopted the Cluster Munitions Convention are: Iceland, Nigeria, and the Sudan. Id.}
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Convention.77 Thus, there is widespread international support for the CCW as a military tool.

In addition to the protocols to the CCW, Article 1 of the CCW was amended in 2004 to incorporate additional aspects of the Geneva Conventions into the definition of conflicts covered by the CCW and to specify that the CCW generally applies to domestic conflicts within state parties.78 The Protocol on Non-Detectable Fragments – more commonly known as Protocol I to the CCW – states that: “It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.”79

Protocol II – the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices – was enacted in 1980 and subsequently amended in 1996.80 As amended, Protocol II “relates to the use on land of the mines, booby-traps and other devices . . . including mines used to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland

77 STATES NOT PARTIES, CONVENTION ON CERTAIN CONVENTIONAL WEAPONS, DISARMAMENT, UNITED NATIONS OFFICE AT GENEVA, available at http://www.unog.ch/80256ee600585943.nsf/(httpPages)/3ce7cfc0aa4a7548c12571c00039cb0c?OpenDocument&ExpandSection=3%2C2%2C1#_Section3 (last visited Jul. 7, 2008); 111 COUNTRIES ON BOARD, THE TREATY, CLUSTER MunITION COALITION, available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84 (last visited Jul. 7, 2008).These states are: Angola, Bahrain, Belize, Botswana, Brunei Darussalam, Burundi, Chad, Comoros, Congo, the Cote D’Ivoire, the Democratic Republic of the Congo, Fiji, Ghana, Guinea, Guinea-Bissau, Indonesia, Jamaica, Kenya, Kyrgyzstan, Lebanon, Malawi, Malaysia, the Marshall Islands, Mauritania, Mozambique, Nepal, Palau, Papua New Guinea, Qatar, Samoa, San Marino, Sao Tome and Principe, Swaziland, Timor-Leste, the United Republic of Tanzania, Vanuatu, and Zambia. Id.
79 See PROTOCOL ON NON-DETECTABLE FRAGMENTS.
80 See CONVENTION ON CERTAIN CONVENTIONAL WEAPONS, DISARMAMENT, UNITED NATIONS OFFICE AT GENEVA, available at http://www.unog.ch/80256ee600585943/4f0def093b4860b4c1257180004b1b30?opendocument (last visited Jul. 7, 2008).
Protocol II is binding on state parties in the conduct of their international and domestic military campaigns, except in regard to quelling riots and maintaining security within a state. Protocol II encompasses several forms of mines, including “remotely-delivered mines.” Defined as “a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft,” remotely-delivered mines are governed by Article 6 of Protocol II. Article 6 prohibits the use of anti-personnel mines unless they confirm with certain self-destruction and self-deactivation mechanism requirements. It further prohibits the use of other remotely-delivered mines without self-destruction and self-deactivation mechanisms unless the use of such remotely-delivered mines is not “feasible.” Article 6 also features an advance warning system requirement for the use of “remotely-delivered mines that may affect the civilian population, unless circumstances do not permit.” Thus, Protocol II, as amended in 1996, provides protections that require the responsible use of remotely-delivered mines. Protocol II also features a detailed section on prohibited and acceptable transfers of weaponry by and between state parties. The acceptance of these provisions by the eighty-nine signatory states to the amended Protocol II indicates that there is international support for transfer restrictions on some weapons which are in line with certain provisions of the Kimberly Process Certification Scheme discussed in Part III.C. below.

82 Id. (4).
83 See id. art. 2 (2).
84 Id.
85 Id. art. 6.
86 Id. art. 6 (2).
87 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 6(3).
88 Id. art. 6(4).
89 See generally id.
90 Id. art. 8.
Amended Protocol II also features extensive provisions governing the use of covered weapons post-conflict – unless such reporting poses a security threat – demining requirements, and the provision of technological and other assistance to states in which covered weapons have been deployed. Of the eighty-nine states that have acceded to the amended Protocol II, sixty-one have adopted the Cluster Munitions Convention. Again, this demonstrates the state of acceptance of amended Protocol II as an international military guide.

Protocol III of the CCW was also enacted in 1980 and is formally known as the Protocol on Prohibition or Restrictions on the Use of Incendiary Weapons. Protocol IV – the Protocol on Blinding Laser Weapons – was adopted in 1995. Finally, Protocol V – the Protocol on Explosive Remnants of War – was adopted in 2003. Protocol V is of vital importance for the issue of cluster munitions use and control because, under its terms, cluster munitions would be covered as explosive remnants of war (“ERW”), both

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91 Id. art. 9
92 Id. art. 10.
93 PROTOCOL ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES art. 11.
94 STATES PARTIES, CONVENTION ON CERTAIN CONVENTIONAL WEAPONS, DISARMAMENT, UNITED NATIONS OFFICE AT GENEVA, available at http://www.unog.ch/_80256ee600585943.nsf/(httpPages)/3ce7cfc0aa4a7548c12571c00039cb0c?OpenDocument&ExpandSection=1#_Section1 (last visited Jul. 7, 2008); 111 COUNTRIES ON BOARD, THE TREATY, CLUSTER MUNITION COALITION, available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84 (last visited Jul. 7, 2008). These states are: Albania, Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chile, Costa Rica, Croatia, the Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Finland, France, Germany, Guatemala, the Holy See, Honduras, Hungary, Ireland, Italy, Japan, Liberia, Lithuania, Luxembourg, Madagascar, Mali, Malta, Moldova, Morocco, the Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Paraguay, Peru, the Philippines, Portugal, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Togo, the United Kingdom, Uruguay and Venezuela. Id.
95 See PROTOCOL ON PROHIBITION OR RESTRICTIONS ON THE USE OF INCENDIARY WEAPONS.
96 See PROTOCOL ON BLINDING LASER WEAPONS.
97 See PROTOCOL ON EXPLOSIVE REMNANTS OF WAR.
98 Id. art 2 (4).
as “explosive ordinances” and “unexploded ordinances.” Protocol V requires that state parties with ERWs located within their jurisdiction provide information and support to states in which they have deployed munitions which are ERWs, mark the location of ERWs for the benefit of the local population, and record and report information on the use and location of ERWs. Of the forty-three states that have currently acceded to Protocol V, thirty-six have also adopted the Cluster Munitions Convention.

2. Chemical and Biological Weapons Conventions

Biological weapons have been the subject of regulation by the international community since 1925. The most recent international agreement regarding curtailing the use of biological weapons was created in 1972 and is known as the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (“Biological Weapons
Convention”). The Biological Weapons Convention has not been amended, although the various meetings of experts and state party representatives have agreed to expand the terms and protections of the Biological Weapons Convention beyond its original text by interpretation. No part of the CCW attempts to regulate or enter into the field of prohibiting or regulating biological weapons, as these are not regarded as conventional forms of weapons within the scope of the CCW.

Likewise, chemical weapons are governed by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (“Chemical Weapons Convention”). The Chemical Weapons Convention, which is administered through the Organisation for the Prohibition of Chemical Weapons, again operates outside of the CCW framework because chemical weapons are not traditionally classified as conventional weapons. The Chemical Weapons Convention traces its history to the same 1925 convention as the Biological Weapons Convention does; the 1925 convention did not address conventional weapons at all.


109 See generally 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.

110 See CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION.


112 See id.

113 See CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION PREAMBLE PARAS 3, 4. The 1925 convention was formally known as the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Id.
Both the Chemical Weapons Convention and the Biological Weapons Convention state that they regulate entities that are of their nature different aspects of warfare and weaponry because of their duality of military and civilian uses.\textsuperscript{114} This duality permeates both conventions, especially the Chemical Weapons Conventions, and separates chemical and biological weapons from weapons such as cluster munitions.\textsuperscript{115}

Interestingly, the Chemical Weapons Convention contains extensive provisions regarding the transportation, production and transfer of licit and illicit chemicals.\textsuperscript{116} This is insightful because these provisions share many of the same ideas and goals as those contained in the Kimberley Process, providing some precedence for the idea of such regulations. In another Kimberley Process-esque area, the Chemical Weapons Convention places much of the onus for implementing its terms squarely on signatory states and provides set procedures for signatory states to follow when carrying out these requirements.\textsuperscript{117}

Reference to the Chemical Weapons Convention and the Biological Weapons Convention has been made in order to illustrate the kinds of weapons that the CCW does not and was not intended to cover. This is important to bear in mind when discussing the Cluster Munitions Conventions because, in contrast, Protocol V of the CCW does already address cluster munitions. Thus, there is no reason to go outside the extant framework of the CCW and its governing structure in order to address specific issues involving cluster munitions.

\textsuperscript{114} Id.; \textsc{Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.}

\textsuperscript{115} See id.

\textsuperscript{116} See generally \textsc{Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.}

\textsuperscript{117} Id. art. VII.
3. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction

This Convention, hereinafter referred to as the “Anti-Personnel Mine Convention,” was created in 1997 and, in structure and essential content, served as the paradigm for drafters of the Cluster Munitions Convention. The Anti-Personnel Mine Convention introduced victim’s assistance provisions and the concept of banning a form of military weaponry in the same agreement. Interestingly, the Anti-Personnel Mine Convention expressly recognizes Protocol II of the CCW in the Preamble, but does not state a military or humanitarian need to create an agreement outside of the CCW framework. However, the Anti-Personnel Mine Convention does state that parties will work “strenuously towards the promotion of its universalization in all relevant fora including . . . review conferences of the [CCW].”

The Anti-Personnel Mine Convention defines an anti-personnel mine as “a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.” Emphasis is placed on mines that are meant to target individual persons and not those driving in a vehicle over a land mine.

118 Anti-Personnel Landmine Convention, Disarmament, United Nations Office at Geneva, available at http://www.unog.ch/80256EE600585943/(httpPages)/CA826818C8330D2BC1257180004B1B2E?OpenDocument (last visited Jul. 11, 2008). Although it is not the goal of this article to critique the contents of the Anti-Personnel Mine Convention, it should be noted that reference to the convention does not imply the author’s agreement with the need to create such a convention outside the confines of the CCW’s protocol mechanism.


120 Id. Preamble para. 5.

121 Id. para 10.

122 Id. art.2 (1).

123 Id.
State parties to the Anti-Personnel Mine Convention are required to cease using, producing, or otherwise being involved in the production, use or acquisition of anti-personnel mines.\textsuperscript{124} The Anti-Personnel Mine Convention contains provisions mandating many of the same mine detection, destruction and clearance requirements as found in the Cluster Munitions Convention.\textsuperscript{125} The Anti-Personnel Mine Convention also features a ten year destruction requirement with the possibility of an extension in the event that certain factors are met,\textsuperscript{126} provisions for international assistance in mine clearance and victims assistance programs and funding,\textsuperscript{127} and reporting requirements to the U.N. Secretary General.\textsuperscript{128} Unlike the Cluster Munitions Convention, the Anti-Personnel Mine Convention contains provisions allowing for inspections of State Parties in the event that there is an allegation of impropriety in regards to the state’s actions under the terms of the Anti-Personnel Mine Convention.\textsuperscript{129} The Anti-Personnel Mine Convention contains the same limitations on withdrawal timing and the effect of engagement in armed conflict on the validity of withdrawal as set forth in the Cluster Munitions Convention.\textsuperscript{130} As stated above, however, it the author’s belief that this limitation is not as damaging to state military sovereignty as the limitation in the Cluster Munitions Convention because of the nature and potential utility of weapons involved in each convention. At the time of ratification, a number of states made declarations reserving their ability to participate in

\begin{footnotesize}
\begin{enumerate}
\item[124] Id., art. 1.
\item[125] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction arts 4 – 5.
\item[126] Id., art. 4.
\item[127] Id. art. 6.
\item[128] Id., art. 7.
\item[129] Id.
\item[130] Id., art. 20.
\end{enumerate}
\end{footnotesize}
peacekeeping and joint military operations that might use anti-personnel mines without violating the terms of the Anti-Personnel Mine Convention.\textsuperscript{131}

Discussion of the Anti-Personnel Mine Convention is important to any discussion of the Cluster Munitions Convention because many of the terms are substantially the same. It is also important to highlight a difference in the way that the CCW is addressed by the two conventions. The Anti-Personnel Mine Convention recognizes amended Protocol II of the CCW and seeks to advance the provisions of the convention through the already-existing CCW meeting process.\textsuperscript{132} Although the need for the Anti-Personnel Mine Convention to exist separate from the framework of the CCW and its protocols is questionable, at the very least this convention acknowledges the need to work within the CCW system when regulating conventional weapons at the international level. In contrast, the Cluster Munitions Convention merely acknowledges Protocol V of the CCW and states that it is the wish of the state parties “to enhance the protections of civilians from the effects of cluster munition remnants in post-conflict environments.”\textsuperscript{133}

The Anti-Personnel Mine Convention is discussed in this section for several additional reasons. First, many of the same non-governmental organizations and activists who championed the Cluster Munitions Convention were involved in the creation of the Anti-Personnel Mine Convention and see the Cluster Munitions Convention as its natural


\textsuperscript{132} \textit{CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL MINES AND THEIR DESTRUCTION PREAMBLE PARAS 5, 10}.

\textsuperscript{133} \textit{CONVENTION ON CLUSTER MunITIONS PREAMBLE para 14}.
outgrowth. While this might be the case from an historical perspective, it is important to understand that there are significant differences in the two conventions. It is also important to understand that the two conventions seek to ban weapons that, although classified as conventional, are different in military use. Military strategists and officials have built a strong case for differentiating between cluster munitions and anti-personnel mines in terms of military utility – an area in which cluster munitions serve a different and often more necessary and humane function than anti-personnel mines135 – and also in terms of longevity once deployed – an area in which cluster munitions again pose a lesser threat of overall danger and damage.136 Thus, while the Anti-Personnel Mine Convention has given the Cluster Munitions Convention many of its structural elements, there are significant differences between the two treaties that render the Anti-Personnel Mine Convention the inappropriate model on which to frame an attempt to regulate the use and production of cluster munitions.

C. Manufacturing and Purchasing of Cluster Munitions and the Kimberley Process

1. Manufacturing and Purchasing of Cluster Munitions

136 Id.
As of 2005, there were cluster munitions manufacturers located in thirty states throughout the world, namely Argentina, 137 Belgium, 138 Brazil, 139 Bulgaria, 140 Canada, 141 Chile, 142 China, 143 Egypt, 144 France, 145 Germany, 146 Greece, 147 India, 148 Iran, 149 Israel, 150 Italy, 151 the Netherlands, 152 Pakistan, 153 Poland, 154 Romania, 155 the Russian Federation, 156 Singapore, 157 Slovakia, 158 Sweden, 159 South Africa, 160 South Korea, 161 Spain, 162 Switzerland, 163 Turkey, 164 the United Kingdom 165 and the United States. 166 Fourteen of

138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id.
146 Id.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
160 Id.
161 Id.
162 Id.
163 Id.
164 Id.
165 Id.
these states have adopted the Cluster Munitions Convention. In contrast, twenty-seven of these states have acceded to the CCW generally. All of these states have acceded to amended Protocol II, and eleven states have acceded to Protocol V of the CCW.

According to data from 2005, at least forty-nine states have purchased cluster munitions in the recent past. Twenty states that have purchased cluster munitions have adopted the Cluster Munitions Convention. Twenty-nine states that have purchased...
cluster munitions have acceded to the CCW generally.\textsuperscript{173} Twenty-seven of these states have acceded to amended Protocol II of the CCW,\textsuperscript{174} while fifteen of these states have acceded to Protocol V of the CCW.\textsuperscript{175}

\textbf{2. Steps Already Taken Regarding Cluster Munitions}

In March, 2007, the United Kingdom banned the use of dumb cluster munitions by its military forces and committed to destroying its stock of these munitions.\textsuperscript{176} However, a bill to completely ban the use of cluster munitions by the British armed forces was defeated after its 2006 introduction in the House of Commons.\textsuperscript{177}

In 2001, Germany began destroying its supplies of cluster munitions and continues to do so in advance of the date on which the Cluster Munitions Convention enters into effect.\textsuperscript{178} By 2005, the official military policies of the United Kingdom and Germany included requirements that cluster munitions in their armories feature self-destruction and self-deactivation mechanisms, as well as a guaranteed dud rate equal to or

\textsuperscript{173} \textit{Id.} These states are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cuba, the Czech Republic, Denmark, Finland, Greece, Hungary, India, Italy, Jordan, Mongolia, Norway, Poland, Romania, Saudi Arabia, Slovakia, South Korea, the Sudan, Switzerland, Turkey, the United Kingdom, the United States, and the former Yugoslav Republic of Macedonia. \textit{Id.}

\textsuperscript{174} \textit{Id.} These states are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Finland, Greece, Hungary, India, Italy, Jordan, Norway, Pakistan, Poland, Romania, Slovakia, South Korea, Switzerland, Turkey, the United Kingdom, the United States, and the former Yugoslav Republic of Macedonia. \textit{Id.}

\textsuperscript{175} \textit{Id.} These states are: Austria, Australia, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Hungary, India, Italy, Norway, Slovakia, South Korea, Switzerland, Romania, and the former Yugoslav Republic of Macedonia. \textit{Id.}


\textsuperscript{177} \textit{See} Cluster Munitions (Prohibition of Development and Acquisition) Bill, Bill 42, 19 Dec. 2006, House of Commons, Presented by Nick Harvey.

lesser than one percent. Other states that have chosen to cease obtaining dumb cluster munitions include Denmark, Norway, Poland, South Africa, Switzerland and the United States. States that have decommissioned dumb cluster munitions include Belgium, Switzerland, Denmark, Norway, Sweden, Canada, France, and Poland. Additionally, Denmark, Germany, Greece, Italy and Norway have replaced their cluster munitions with cluster munitions that contain a self-destruct mechanism and the United States decided to add self-destruct mechanisms to five thousand of the cluster munitions in its extant stockpile. Further, in 2007, the United States enacted a law requiring all cluster munitions exported from the United States to have a dud ratio of one percent or less.

Those wishing to engage in trade in defense industry materials, such as cluster munitions, must also conform to a variety of federal laws and rules promulgated by several offices of the United States Department of State. Additionally, the United States has announced a phased withdrawal of cluster munitions with a dud rate of more than one percent from its arsenal, and will cease stockpiling these weapons by 2018.

3. The Kimberley Process Certification Scheme

180 Id.
181 Id. Belgium has passed legislation that bans a full spectrum of cluster munition varieties. See GUIDE TO CLUSTER MUNITIONS 19.
182 Id.
183 Id.
When revelations of the connection between diamonds and conflict financing came to light during the conflicts in Sierra Leone, Angola and the Democratic Republic of the Congo during the 1990s and early years of the 2000s were made public, the diamond industry was threatened with a severe economic backlash.\textsuperscript{187} Advertisement campaigns by several human rights organizations made consumers ponder the source of their diamonds and whether the purchase of a diamond would ultimately support a campaign of torture and murder.\textsuperscript{188} Eventually, the diamond industry and the international community recognized the import of the conflict diamond issue and began to work together on a legal framework which would offer reassurance to customers and stem the flow of conflict diamonds to the international market.\textsuperscript{189} The result of this alliance was the Kimberley Process Certification Scheme (“the Kimberley Process”).\textsuperscript{190}

Under the terms of the Kimberley Process, diamond producing, exporting and importing states have obligations to inspect the documentation that accompanies shipments of diamonds into, out of, and through their jurisdiction to ensure that it complies with specific rules and regulations.\textsuperscript{191} While the onus of inspection and either issuance or approval of a Kimberley Process Certificate which states that the diamonds in a particular shipment are in conformity with the Kimberley Process falls on the state, producers and members of the diamond industry are also charged with specific duties and responsibilities throughout the diamond production, sale and shipment cycle.\textsuperscript{192} Indeed,

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item See \textbf{KIMBERLEY PROCESS CERTIFICATION SCHEME}.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
as some, including the author, have argued, it is the symbiotic allocation of duties and responsibilities on states and the diamond industry which has led to the success of the Kimberley Process.\textsuperscript{193} As opposed to sanctions and embargoes, which are creations of the international community of states and inter-governmental organizations and tend to bypass members of the industries at issue other than to impose regulations on them, the Kimberley Process was created by industry and states together and vests industry with an interest in maintaining the terms of the agreement.\textsuperscript{194} There is perhaps no better demonstration of this than the ultimate punishment for states that fail to honor their obligations under the Kimberley Process. In such an event, the state is delisted as a Kimberley Process.\textsuperscript{195} Thus, the diamond industry within Kimberley Process member states has a vested interest in following the rules created by the Kimberley Process because of the consequences it will suffer if the state is found not to be in compliance with its obligations, even where the violation reflects fault on the part of the diamond industry as well as the state.\textsuperscript{196}

**D. Proposed Solution to the Military Issues Associated with Cluster Munitions**

As discussed above, the Cluster Munitions Convention suffers from many flaws that affect its desirability as a binding convention under international law and which will pose enforcement issues. It also poses a threat to the ability of militaries to use weapons that have demonstrable value in combat situations and effectively removes the possibility

\textsuperscript{193} See Harrington, supra note 189.
\textsuperscript{194} See KIMBERLEY PROCESS CERTIFICATION SCHEME
\textsuperscript{195} See id.
\textsuperscript{196} See id.
of technological developments for cluster munitions – including safety and precision advances. Additionally, the issue of cluster munitions will be taken up by future meetings of the CCW parties, raising the possibility that there will be two international agreements governing the same topic and reflecting different viewpoints on handling the issue.

In light of these issues and concerns, this article advocates for a two-prong system to be used in place of the Cluster Munitions Convention, which has not yet been signed into law and is not open for signature until December, 2008. The first prong involves amending the CCW and the second prong involves the creation of a Kimberley Process type agreement between the weapons industry and states in order to regulate the production of cluster munitions and further a research agenda which has enhanced civilian safety features for cluster munitions at its core.

1. CCW amendment

It is the author’s view that Protocol V is the most natural protocol to amend by including Protocol II’s provisions on remotely-delivered mines in a way that is tailored to cluster munitions.

Article 2 of Protocol V would be amended so that “explosive ordinance” would mean “conventional munitions containing explosives, with the exception of mines, booby traps and other devices . . . The term ‘explosive ordinance’ shall specifically be deemed to include cluster munitions unless the use of such a term would conflict with Article 5A of this Protocol.”197 The term “cluster munition” would be added to the definition section, proposed language is indicated by underlining.

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specifying that “cluster munition” shall mean a group of more than --- bomblets carried and deployed together for the purpose of disbursing the bomblets across a designated area during a military conflict. As set forth in Article 5A, acceptable forms of cluster munitions under this Protocol are those which contain self-detonating and/or self-destruction mechanisms and have a dud ratio of less than or equal to one percent. All other forms of cluster munitions shall be referred to as ‘dumb cluster munitions.’” This particular definition has been chosen because it best takes into account the reality of differences in dumb and technologically advanced cluster munitions. The precise number of bomblets required for qualification as a cluster munition has been left blank in order to facilitate a technical decision as to the appropriate number.

A new section would be included after Article 5 – for the purposes of this article, to be referred to as Article 5A. This Article would take from Article 3 of amended Protocol II and would read:

1. This article shall apply solely to cluster munitions and shall function in tandem with the provisions of this Protocol.

2. It shall be prohibited for any High Contracting Party to use or deploy cluster munitions which:
   a. Do not contain a functioning self-deactivation mechanism as part of their design; or
   b. Do not contain a self-detonating mechanism as part of their design; and
   c. Have a dud ratio of more than one (1) percent
   d. Provided, however, that these provisions shall not prohibit the use of cluster munitions which do not originally meet these specifications, however are subsequently refitted to meet these specifications.
   e. Further provided that no provision in this Article shall limit or prohibit the ability of a High Contracting Party or High Contracting Parties to use or deliberate the use or deployment of any form of cluster
munitions during the course of a peacekeeping or other joint military operation.

3. It shall be prohibited to use or deploy any form of cluster munitions indiscriminately, against a known civilian target or civilian population; provided that, in instances where an area or target would otherwise be classified as a civilian area or target but has been transformed into a military target, cluster munitions in compliance with Section 2 may be used or deployed. In the event that cluster munitions are used, High Contracting parties shall inform the local population of their use and potential presence in the specific area of deployment as soon as practical and when doing so will not cause a threat to the safety of the High Contracting Party and/or the civilian population at issue.

4. In the event that a High Contracting Party uses cluster munitions against an area within the jurisdiction of another state, regardless of its status as a High Contracting Party, the High Contracting Party shall notify the other state of the areas in which it used or deployed cluster munitions once hostilities have ceased; provided that the High Contracting Party shall be absolved of this requirement when doing so would result in a threat to the security of the High Contracting Party.

5. All transfers of cluster munitions by High Contracting Parties, and the producers, exporters, importers and sellers of cluster munitions which are located within their jurisdiction, shall be governed by the Cluster Munitions Certification Process attached hereto as Annex A.

The proposed amendments to Protocol V are relatively short and simple yet, in combination with the current provisions of Protocol V, they would accomplish the goals of setting boundaries on the use of dumb cluster munitions, while allowing modern cluster munitions to be available in situations which are militarily appropriate. They would also provide for recording, clearance and reporting requirements that advance many of the purposes of the Cluster Munitions Convention in a clear manner that does not place too steep a burden on the signatory states. Further, they incorporate the Kimberley Process-styled proposal that must constitute a separate agreement and be attached as an annex because non-state actors, such as weapons manufacturers, cannot themselves become parties to the CCW or its protocols.
2. The Cluster Munitions Certification Process

At first, the link between regulating the sale of diamonds to prevent conflict diamonds and attempting to restrict the use of dumb cluster munitions might seem tenuous from a practical and legal point of view. Unlike diamonds, which are luxury items intended for consumer enjoyment and longevity, cluster munitions are intended to have a finite lifespan and are created, purchased, and used with the intent to cause damage to another party. However, at the heart of the diamond market and the market for cluster munitions – or any other weapon – lies a nexus between the seller and the purchaser, and it is in this nexus that the impetus to make a Kimberley Process-styled agreement for cluster munitions can be located.

Weapons manufacturers create weaponry in order to meet consumer demand, which has become increasingly focused on technology and precision in weapons systems. A manufacturer that does not bring its products up to date in terms of technological developments risks being shut out of defense contracts unless the product it makes is sought after regardless of its technology. As demonstrated by the procurement and usage decisions of major military entities, the legitimate\textsuperscript{198} demand for cluster munitions currently centers on weapons which are precise and which feature self-destruction, self-deactivation, and other mechanisms that enhance the utility of these weapons from a tactical perspective and reduce the instances of unintended civilian injuries post-deployment. At the same time, cluster munitions consumer governments and militaries

\textsuperscript{198} The author acknowledges that there is and will likely continue to be a black market in all forms of weaponry. The proposals contained in this article are aimed at the licit market for weaponry, with the understanding that changes to the illicit weapons market would require the cooperation of international law enforcement entities and a different type of international convention.
have come under increasing pressure to cease using dumb cluster munitions for humanitarian reasons and tactical reasons, such as increased precision. And, with many cluster munitions consumer states operating demining and peacekeeping activities in areas which contain abandoned cluster munitions, abandoning the use of dumb cluster munitions has the additional benefits of reducing the amount of money necessary to clear cluster munitions in the future and reducing the threats to national and international military contingents which operate in areas of cluster munitions concentration.

Thus, motivating factors exist which would provide both cluster munitions manufacturers and consumers with the impetus to enter into what will be referred to as the Cluster Munitions Certification Process (“CMPC”). As detailed above, the CMPC would be an independent agreement that would be annexed to the proposed amended Protocol V of the CCW. Below is a proposal for the content and basic structure of the CMPC, subject to the addition of pertinent technical details. Additionally, the author envisions a rotating secretariat system as the method of organizing meetings of the participants, creating methods for investigating allegations of violations, and conducting participant reviews.

a. Proposed CMPC Text

Recognizing that cluster munitions have had and continue to have tactical utility in military settings, including peacekeeping operations and other joint military operations conducted for the benefit of civilian populations;

Recognizing that the current state of technology allows for the design and production of cluster munitions which feature self-deactivation mechanisms and self-destruction mechanisms and further recognizing that such cluster munitions have already been incorporated into the arsenals of existing military forces around the world
Recognizing that the current state of technology allows for the design and production of cluster munitions with a dud rate of less than or equal to one percent and further recognizing that such cluster munitions have already been incorporated into the arsenals of existing military forces around the world.

Recognizing that, in light of the technological developments available, cluster munitions known as “dumb” cluster munitions are of limited military utility.

Declaring their support for the protection of civilian populations from accidental contact with deployed cluster munitions while also reiterating the right of state parties to use cluster munitions in a manner consistent with amended Protocol V of the CCW.

Recommend the following provisions, to be collectively known as the “Cluster Munitions Certification Process”:

Article 1 - Definitions

CLUSTER MUNITION(S) shall mean a group of more than --- bomblets carried and deployed together for the purpose of disbursing the bomblets across a designated area during a military conflict. For the purposes of the Cluster Munitions Certification Process, any reference to a “cluster bomb” shall be the equivalent of a reference to a cluster munition.

CLUSTER MUNITIONS CERTIFICATE shall mean the certificate issued by applicable export authority in conformance with Article ---, and certifying that the relevant shipment of cluster munitions does not contain dumb cluster munitions.

CONTRACT shall mean a legally binding contractual agreement between a manufacturer and a purchasing state for the sale or exchange of cluster munitions, or a legally binding contractual agreement between a selling state and a purchasing state or a non-state purchaser for the sale or exchange of cluster munitions, subject to all applicable national, regional and/or international clearance or other requisite approval mechanisms. Nothing in the Cluster Munitions Certification Process shall be interpreted to supersede or preempt any such national, regional and/or international requirements which may be in effect at the time of signing or which may come into effect after the effective date of the Cluster Munitions Certification Process.

COUNTRY OF ORIGIN shall mean the country in which a cluster munition has been manufactured, provided, however, that such definition may be expanded by domestic legislation. In the event that a cluster munition is assembled from parts made in more than one state, the country of origin for the cluster munition shall be the country in which it was assembled.

DUMB CLUSTER MUNITION(S) shall mean cluster munitions which do not contain a self-deactivation mechanism and/or self-destruction mechanism and which have a dud rate of more than one percent.
EXPORT shall mean the physical leaving or removing of cluster munitions from any portion of the state in which a manufacturer is located or the territory of a selling state.

EXPORTING AUTHORITY shall mean the designated governmental office or entity tasked with regulating the sale and/or export of weapons and/or defense-related materials from the state in which the manufacturer is located or having jurisdiction within the selling state. In the event that a manufacturer has its principal place of business in one state and manufactures cluster munitions in another, exporting authority shall refer to the designated entities in both jurisdictions.

IMPORTING AUTHORITY shall mean the designated governmental office or entity tasked with regulating the purchase and/or import of weapons and/or defense-related materials into the purchasing state or the state in which a non-state purchaser is located for the purpose of jurisdiction.

MANUFACTURER shall mean a commercial or other entity which manufactures cluster munitions, regardless of its status as a privately owned entity, a combined state and privately owned entity, or a state owned entity. Nothing in the Cluster Munitions Certification Process shall apply to activities of a manufacturer that are not related to the manufacturing and/or sale of cluster munitions.

NON-STATE PURCHASER shall mean a quasi-state entity or a private entity, including an inter-governmental organization or an international organization, which has entered into a contract with a manufacturer or a selling state for the sale or exchange of cluster munitions.

NON-STATE SELLER shall mean a quasi-state entity or a private entity, including an inter-governmental organization or an international organization, which has entered into a contract with selling state or a non-state purchaser for the sale or exchange of cluster munitions.

PURCHASING STATE shall mean a state that has entered into a contract with a manufacturer or a selling state for the acquisition of cluster munitions.

SECONDARY TRANSFER shall mean the exchange of cluster munitions between states when the exchange does not involve a direct sale.

SELLING STATE shall mean a state that has entered into a contract with a purchasing state or a non-state purchaser for the sale of cluster munitions.

TRANSFER shall mean the transfer of control over cluster munitions from the manufacturer or selling state to the purchasing state or non-state purchaser. For the purposes of the Cluster Munitions Certification System, the transfer of cluster munitions shall include the physical shipment and/or transportation of cluster munitions as provided for in the contract, subject to the applicable approvals of governmental entities, including the exporting authority and the importing authority.

Article 2 – Agreement
The manufacturers, non-state purchasers and state parties to the Cluster Munitions Certification Process agree as follows:

1. In respect to the sale of cluster bombs, manufacturers agree not to enter into a contract for the sale of or to sell dumb cluster munitions to the state parties or non-state purchasers, regardless whether these entities are signatories to the Cluster Munitions Certification Process.

2. In respect to the purchase of cluster munitions, purchasing states and non-state purchasers agree not to enter into a contract for the purchase of or to purchase dumb cluster munitions from manufacturers, selling states or non-state sellers, regardless whether these entities are signatories to the Cluster Munitions Certification System.

3. In respect to the sale and/or exchange of cluster munitions, all state parties to the Cluster Munitions Certification Process agree that they shall promulgate the necessary laws and/or rules requiring the export authority to inspect all shipments of cluster munitions leaving their jurisdiction and require adequate documentation to ensure that the shipment does not contain dumb cluster munitions. Only after these steps are taken shall the export authority issue a Cluster Munitions Certification for the shipment.

4. In respect to the purchase and/or exchange of cluster munitions, all state parties to the Cluster Munitions Certification Process agree that they shall promulgate the necessary laws and/or rules requiring the import authority to inspect all shipments of cluster munitions arriving in their jurisdiction and require these shipments to be accompanied by a valid Cluster Munitions Certification from the relevant export authority. Only after the import authority has assured itself of the contents of the shipment and the validity of the Cluster Munitions Certification shall the import authority allow the shipment into the applicable jurisdiction.

**Article 3 – Cluster Munitions Certification**

Each export authority shall ensure that the Cluster Munitions Certifications it issues contain the following information:

[The specifics of the Cluster Munitions Certification would need to be provided by military experts.]

**Article 4 – Effect of Violation**

1. A state party to the Cluster Munitions Certification Process shall be delisted as a state party in the event that:

   a. It issues an improper, false or misleading Cluster Munitions Certification(s).
b. It fails to require the sale or exchange of cluster munitions to be subject to the provisions of the Cluster Munitions Certification Process.

c. It fails to require a valid Cluster Munitions Certificate or accepts a Cluster Munitions Certificate that it knows or suspects is improper, false, or misleading.

d. It fails to require purchases or exchanges of cluster munitions to be subject to the provisions of the Cluster Munitions Certification Process.

e. A manufacturer, non-state purchaser or non-state seller that is a signatory to the Cluster Munitions Certification Process and subject to its jurisdiction is found to have violated its obligations under the Cluster Munitions Certification Process.

2. A manufacturer shall be delisted from the Cluster Munitions Certification Process in the event that it is found to have violated its obligations under the Cluster Munitions Certification Process.

3. A non-state seller or non-state purchaser shall be delisted from the Cluster Munitions Certification Process in the event that it is found to have violated its obligations under the Cluster Munitions Certification Process.

4. A state party, manufacturer, non-state seller or non-state purchaser may be relisted as a part of the Cluster Munitions Certification Process in the event that it is found to have cured the violations which resulted in its delisting and agrees to be bound by the terms of the Cluster Munitions Certification Process.

b. Explanation of the Proposed Text

The proposed CMCP text uses the Kimberly Process document as a framework and alters the framework to fit the unique needs of the cluster munitions industry. It is relatively short because, unlike diamonds, most of the chain of weapons sales is relatively easy to define. Certainly, the proposal is for a voluntary agreement and, even where a state chooses to sign onto the CMCP, absent domestic legislation there is no way to compel weapons manufacturers operating within its jurisdiction to do the same. Likewise, a manufacturer cannot compel the state in which it is located to become a state party to the CMCP. However, this situation is very much similar to the Kimberley Process –
except for the allowance of manufacturers to become direct signatories – and the looseness of the Kimberley Process can be regarded as one of its strengths, in that states that are not committed to fulfilling its requirements can opt not to become a part of the process. Unlike a complete ban in cluster munitions, the CMCP allows states the flexibility of using modern cluster bombs while still agreeing to stop the sale, purchase and exchange of dumb cluster munitions. The proposed CMCP does not need to address issues of decommissioning dumb cluster munitions as these issues are addressed in the proposed amendment to Protocol V of the CCW.

Thus, the proposed CMCP is a vehicle through which states, weapons manufacturers and non-state actors can express their determination not to further the production, sale and purchase of cluster munitions. There is no penalty for non-signatories beyond public condemnation and the knowledge that those dealing with non-signatories are supporting the continued production, sale and purchase of dumb cluster munitions. This might appear to be a weak motivating force, however the Kimberley Process has shown that the effect of failing to join such an agreement, or of being delisted, is quite severe, especially in today’s climate of rapid exchange of information and public activism.

IV. HUMANITARIAN AND HUMAN RIGHTS LAW COMPONENTS OF THE CLUSTER MUNITIONS CONVENTION AND A PROPOSED SOLUTION

A. Humanitarian and Human Rights Law Components of the Cluster Munitions Convention
Despite the military components of the Cluster Munitions Convention, it is as much – if not more – of a treaty focused on the civilian victims of cluster munitions, humanitarian law, and human rights law. Indeed, the preamble to the Cluster Munitions Convention contains more statements which fall under these categories than which fall under the category of military law and policy. Some of these statements are perfunctory; however, some are important for a discussion of the overall contents of the Cluster Munitions Convention and alternatives to it.

The Preamble draws a connection between cluster munitions generally and economic and social development in areas which have seen conflict that included the use of cluster munitions.\textsuperscript{199} The Preamble makes repeated reference to creating and protecting rights “for all cluster munition victims,”\textsuperscript{200} including healthcare and rehabilitative services.\textsuperscript{201} It alludes to the Convention on the Rights of Persons with Disabilities, discussed below, but does not discuss the way in which the Cluster Munitions Convention is intended to work in relationship to the Convention on the Rights of Persons with Disabilities.\textsuperscript{202}

For the purposes of the Cluster Munitions Convention, the term “cluster munitions victim” is defined as “all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalization 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

\textsuperscript{199} CONVENTION ON CLUSTER MunITIONS Preamble para 3.  
\textsuperscript{200} Id. para 6.  
\textsuperscript{201} Id. para 7.  
\textsuperscript{202} Id. para 9.
The particular rights covered by this definition are not further elucidated and neither is the extent of affects which a person, family or community must assert in order to fall under this definition. Indeed, it is possible to read this definition to mean that the asserted rights only stem from “cluster munition use,” a phrase which itself is problematic because not all use of cluster munitions has injured civilians.

Humanitarian concerns are among the list of factors to be taken into account when a state party seeks an extension in the amount of time within which it must clear known cluster mines within its jurisdiction. As with the other extension factors, no particular weight is assigned to these concerns in the overall balancing of interests required for a extension to be granted. The primary area in which assistance to civilian victims of cluster munitions is addressed in Article 5 of the Cluster Munitions Convention. The core of this article requires that:

Each State Party with respect to cluster munitions victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age – and – gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.

A laundry list of requirements for the implementation of these requirements follows, including the amendment of national laws, providing a place for these requirements in the state’s budgetary framework, and the creation of apparatuses to address the needs of

203 Id. art 2(1).
204 Id.
205 Id.
206 CONVENTION ON CLUSTER MUNITIONS art 4(6)(h) (“[t]he humanitarian, social, economic and environmental implications of the proposed extension.”).
207 Id.
208 Id. art. 5.
209 Id. art 5(1).
cluster munitions victims.\textsuperscript{210} Although the Cluster Munitions Convention places a heavy burden on state parties to provide funding assistance to other state parties that are attempting to implement these provisions, it does not take into account the actual abilities of state parties to meet these requirements at a legal or fiscal level.\textsuperscript{211} The types of “assistance” to be given to states which are in need of help in order to implement these requirements is not specified, however, interestingly, the terms of the Cluster Munitions Convention fail to recognize the existing aid programs which do offer substantial assistance to states with civilian victims of cluster munitions and known areas of unexploded cluster munitions.\textsuperscript{212}

The Cluster Munitions Convention does contain a dispute settlement framework for instances in which disagreements occur between state parties.\textsuperscript{213} However, the Cluster Munitions Convention does not allow an individual citizen of a state party to seek redress at any level and is entirely mute on the issue.\textsuperscript{214}

B. Other Relevant International Conventions and Treaties

The conventions and treaties discussed below are specific to human rights law and are discussed to demonstrate that there are other available fora for civilian victims of cluster munitions to use to seek redress against their governments for discrimination. However, it must be noted that the CCW is based in large part on humanitarian law principles and that amended Protocol II and Protocol V of the CCW – as well as the

\textsuperscript{210} Id. art 5(2).
\textsuperscript{211} See generally id.
\textsuperscript{212} Id. arts. 6 (7), (9).
\textsuperscript{213} See id. art 8.
\textsuperscript{214} See generally Convention on Cluster Munitions.
proposed amendment to Protocol V of the CCW discussed above – feature extensive provisions which mandate detection and clearance of unexploded weapons.\footnote{215 See 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 ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF MINES, BOOBY-TRAPS AND OTHER DEVICES; 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 ON EXPLOSIVE REMNANTS OF WAR.}

\textit{1. The International Convention on Civil and Political Rights}

The International Convention on Civil and Political Rights (“ICCPR”) was adopted in 1966.\footnote{216 \textit{See INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, available at http://www2.ohchr.org/english/law/ccpr.htm (last visited Jul. 10, 2008).} \textit{Id.} art 16.} The ICCPR contains a provision that requires state parties to provide their citizens with a judicial method of seeking redress in the event that there is a violation of the rights guaranteed to citizens under the terms of the ICCPR.\footnote{217 \textit{Id.} art 2.} Article 16 of the ICCPR guarantees the right to recognition everywhere as a person before the law\footnote{218 \textit{Id.} art 16.} to all persons.\footnote{219 \textit{Id.} art 19.} Article 19 guarantees freedom of expression.\footnote{220 Disability per se is not one of the specifically enumerated grounds upon which discrimination is barred in the text of the ICCPR. \textit{See generally INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS.}} Together, these guarantees underlie many of the issues that advocacy groups for civilian victims of cluster munitions have raised as reasons for the need to have a Cluster Munitions Convention, and indeed are more expansive because they apply to all persons. There are other provisions which currently do not apply explicitly based on a person’s status as disabled\footnote{221 \textit{Id.}}; however, since it is possible to amend the ICCPR, this is an alternate venue for

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in which to seek equal rights not only for civilian victims of cluster munitions but also for
the disabled generally.

Currently, there are one hundred sixty-one states that have adopted the ICCPR,\textsuperscript{222}
one hundred of which are states that have adopted the Cluster Munitions Convention.\textsuperscript{223}States that have adopted the ICCPR include the United States and Israel, states that are
vital in any discussion of cluster munitions and yet have not participated in the
negotiations leading up to the Cluster Munitions Convention.\textsuperscript{224}

\textbf{2. The International Covenant on Economic, Social and Cultural Rights}

Article 6 of the ICESCR guarantees individuals the right to work and vests state
parties with the responsibility to provide all citizens with vocational and other training so
that citizens can enforce that right.\textsuperscript{225} In conjunction with this right, Article 7 provides
workers with rights in working conditions and situations, including the ability to work

\textsuperscript{222} See \textit{STATUS OF RATIFICATION, INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS, OFFICE
OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, available at
\textsuperscript{223} Id.; \textit{111 COUNTRIES ON BOARD, THE TREATY, CLUSTER MUNITION COALITION, available at
http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84} (last visited Jul. 7, 2008). These states
are: Albania, Angola, Argentina, Australia, Austria, Bahrain, Belgium, Belize, Benin, Bolivia, Bosnia and
Herzegovina, Botswana, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Chad, Chile,
Congo, Costa Rica, Cote D’Ivoire, Croatia, the Czech Republic, the Democratic Republic of the Congo,
Denmark, the Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Ghana,
Guatemala, Guinea, Guinea-Bissau, Honduras, Hungary, Iceland, Indonesia, Ireland, Italy, Japan,
Kenya, Kyrgyzstan, the Lao People’s Democratic Republic, Lebanon, Lesotho, Liberia, Lithuania,
Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritania, Mexico, Montenegro, Morocco,
Mozambique, Nepal, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama,
Paraguay, Peru, Philippines, Portugal, Samoa, San Marino, Sao Tome and Principe, Senegal, Serbia,
Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Swaziland, Sweden, Switzerland,
Tanzania, the former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Uganda, the United Kingdom,
Uruguay, Vanuatu, Venezuela and Zambia. Id.
\textsuperscript{224} See id.
\textsuperscript{225} \textit{INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS} art. 6.
without discrimination.\textsuperscript{226} Article 9 provides a universal right to social security, while Article 10 vests the family with numerous rights and protections, including children and provides that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.”\textsuperscript{227} Article 11 “recognizes the right of everyone to an adequate standard of living for himself and his family”\textsuperscript{228} and requires the state to take an active role in ensuring that this right is fulfilled, especially in regards to access to food and combating hunger.\textsuperscript{229} Article 12 enshrines “the right of everyone to the enjoyment of the highest attainable standard of physical and mental heath,” vesting state parties with the responsibility to enforce this right.\textsuperscript{230} Additionally, Article 13 of the ICESCR creates a right to education and requires the state to enforce this right at a staggered level depending upon one’s age.\textsuperscript{231} The ICESCR creates an extensive scheme of rights that address many of the areas in which advocates for civilian victims of cluster munitions argue the Cluster Munitions Convention is necessary.\textsuperscript{232} However, the ICESCR does so explicitly and in less vague language than the Cluster Munitions Convention.\textsuperscript{233} Although the ICESCR does not vest individuals with the right to bring complaints against governments to the Human Rights Council, the Human Rights Council has recently

\begin{flushleft}
\textsuperscript{226} Id. art 7.
\textsuperscript{227} Id. art. 10.
\textsuperscript{228} Id. art 11.
\textsuperscript{229} Id.
\textsuperscript{230} Id. art. 12.
\textsuperscript{231} INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS art 13.
\textsuperscript{232} See generally id.
\textsuperscript{233} See id.; cf. CONVENTION ON CLUSTER MUNITIONS.
\end{flushleft}
adopted a resolution that, if adopted by the U.N. General, would convey this
jurisdiction. 234

There are one hundred fifty-eight state parties to the ICESCR, 235 of which ninety-seven have adopted the Cluster Munitions Convention. 236 Thus, the majority of states that have adopted the Cluster Munitions Convention are already bound by the terms of the ICESCR.

3. The U.N. Convention on the Rights of the Child

The U.N. Convention on the Rights of the Child (“CRC”) was adopted in 1989. 237 Its goal is to provide universal rights and protections for children. 238 The CRC thus contains seminal rights that are guaranteed to children, as well as their parents/guardians, and responsibilities for both parents/guardians and state parties. 239

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236 Id.; 111 COUNTRIES ON BOARD, THE TREATY, CLUSTER MUNITION COALITION, available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84 (last visited Jul. 7, 2008). These states are: Albania, Angola, Argentina, Australia, Austria, Bahrain, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Chad, Chile, Congo, Costa Rica, Cote D’Ivoire, Croatia, the Czech Republic, the Democratic Republic of the Congo, Denmark, the Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Ghana, Guatemala, Guinea, Guinea-Bissau, Honduras, Hungary, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Kyrgyzstan, the Lao People’s Democratic Republic, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritania, Mexico, Moldova, Montenegro, Morocco, Nepal, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Portugal, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Swaziland, Sweden, Switzerland, Tanzania, the former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Uganda, the United Kingdom, Uruguay, Venezuela and Zambia. Id.
238 See id.
239 See id.
Article 2 of the CRC provides protection against discrimination toward children based on their status as disabled and also based on the disabled status of their parents or other legal guardians.\textsuperscript{240} To further the protections enshrined in the CRC, it requires that the best interests of the child be a “primary consideration” in all forms of interaction between the state and the child.\textsuperscript{241} State parties to the CRC are bound to “ensure to the maximum extent possible the survival and development of the child.”\textsuperscript{242} Children with disabilities – regardless of the disability or its source – are the subject of multiple protections under Article 23 of the CRC, which requires state parties to provide medical assistance as well as educational, financial and other assistance in order to ensure that a disabled child is made a part of his community.\textsuperscript{243} Article 27 of the CRC places the onus for ensuring that children enjoy an “adequate standard of living” on both parents/guardians and state parties to the CRC.\textsuperscript{244} Children are guaranteed the right to education under the CRC.\textsuperscript{245} State parties to the CRC are required to comply with reporting requirements,\textsuperscript{246} however there is no mechanism for a citizen to bring a formal legal complaint against a state party based on violations of the CRC.\textsuperscript{247} Amendments may be made to the CRC through a formalized procedure.\textsuperscript{248}

All states that have adopted the Cluster Munitions Conventions have ratified or otherwise acceded to the CRC.\textsuperscript{249} With the exception of Indonesia, the declarations and

\begin{itemize}
\item \textsuperscript{240}\textsc{Convention on the Rights of the Child} art. 2.
\item Id. art. 3.
\item Id. art 6.
\item Id. art 23.
\item Id. art 27.
\item Id. arts 28, 29.
\item \textsc{Convention on the Rights of the Child} art 44.
\item See generally id.
\item Id. art 50.
\item See 111 Countries on Board, The Treaty, Cluster Munition Coalition, \textit{available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84} (last visited Jul. 7, 2008); Status of
\end{itemize}
reservations made to the CRC by adoptive state parties of the Cluster Munitions Convention would not interfere with the exercise of the above-discussed rights and protections guaranteed to children.\textsuperscript{250} Thus, the CRC is another existing international convention, with a substantial body of scholarship and research behind it, which affords the sought-after protections to civilian victims of cluster munitions.

4. \textit{Convention on the Rights of Persons with Disabilities}

In 2007, the Convention on the Rights of Persons with Disabilities (“Disabilities Convention”) was opened for signature by interested state parties.\textsuperscript{251} The terms of the Disabilities Convention cover all of the concerns that have been expressed by advocates for civilian victims of cluster munitions in regards to protecting those who have suffered disabilities as a result of cluster munitions detonations.\textsuperscript{252} It is interesting to note that this convention was negotiated contemporaneously to the Cluster Munitions Convention, and yet there was no attempt to divorce the concerns of advocates for civilian victims of cluster munitions from a military treaty and attach them to the Disabilities Convention.\textsuperscript{253} It is also important to note that the protections guaranteed to those with disabilities under

\begin{footnotesize}


\textsuperscript{252} See \textit{Convention on the Rights of Persons with Disabilities}. Again, the author stresses that she is discussing this convention in the abstract. By discussing the terms of the Disabilities Convention, the author should not be seen as agreeing with its terms or necessity.

\textsuperscript{253} See generally \textit{Id.}; \textit{Convention on Cluster Munitions.}
\end{footnotesize}
the ICCPR, ICESCR, and CRC are restated in the Disabilities Convention. The Disabilities Convention itself does not create a mechanism through which citizens can bring grievances against their governments for violations of its terms. However, the Optional Protocol to the Convention on the Rights of Persons with Disabilities establishes a procedure through which citizens or groups can bring complaints to the Committee on the Rights of Persons with Disabilities. Thus, there already exists a convention that allows those civilians victims of cluster munitions who are disabled to seek redress for governmental discrimination. Importantly, the competence of the group to which the complaint is made is solely disability and discrimination-based law, rather than a body that is competent to hear a gamut of human rights law issues.

Eighty-seven states that have adopted the Cluster Munitions Convention have signed the Disabilities Convention. Of these states, nineteen have ratified the Disabilities Convention. Fifty-seven states that have adopted the Cluster Munitions

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254 See generally CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES.
255 Id.
256 Id.
257 See id.
258 See 111 COUNTRIES ON BOARD, THE TREATY, CLUSTER MUNITION COALITION, available at http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84 (last visited Jul. 7, 2008);
259 RATIFICATIONS, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, UN ENABLE, available at http://www.un.org/disabilities/default.asp?navid=18&pid=257 (last visited Jul. 10, 2008). These states are: Argentina, Australia, Austria, Bahrain, Belgium, Benin, Bolivia, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Chile, Comoros, Congo, Costa Rica, the Cote D’Ivoire, Croatia, the Czech Republic, Denmark, the Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Germany, Ghana, Guatemala, Guinea, Honduras, Hungary, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, the Lao People’s Democratic Republic, Lebanon, Liberia, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Mali, Malta, Mexico, Moldova, Montenegro, Morocco, Mozambique, Nepal, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, the Philippines, Portugal, Qatar, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Swaziland, Sweden, Uganda, the United Kingdom, Tanzania, Uruguay, Vanuatu and Zambia. Id.
260 Id. These states are: Croatia, Ecuador, El Salvador, Guinea, Honduras, Hungary, Jamaica, Kenya, Mali, Mexico, Niger, Panama, Peru, the Philippines, Qatar, San Marino, Slovenia, South Africa, and Spain. Id.
Convention have signed the Optional Protocol to the Disabilities Convention \( ^{260} \); fourteen of these states have ratified the Optional Protocol. \( ^{261} \)

**C. Current Financial and Technical Assistance for Demining and the Assistance of Civilian Victims of Cluster Munitions**

In addition to providing for assistance to civilian victims of cluster munitions, the other legal focus of the Cluster Munitions Convention is on the provision of financial and technical assistance for demining activities. \( ^{262} \) Financial and technical assistance for programs that aid civilian victims of cluster munitions are also provided for in the Cluster Munitions Convention. \( ^{263} \) And yet, these provisions are duplicative of current aid systems in use in all areas that contain unexploded cluster munitions remnants.

Individually, states spend millions of dollars annually to assist in the creation and operation of cluster munitions demining programs – as well as demining programs for ERW and land mines – in affected states across the world. \( ^{264} \) Together, these state-
sponsored demining programs share the expertise of advanced military systems with those in affected areas and also provide assistance to civilian victims of cluster munitions. Development programs that assist those in affected areas have also formed another layer of state-sponsored assistance.

On a regional level, the Organization of American States, Association of South East Asian Nations, and NATO – to name only some prominent groups – are either directly involved in demining and civilian victims of cluster munitions assistance programs or work with other bodies and groups to foster awareness of and planning for these issues. And, on the international level, the U.N. administers state-funded demining and assistance programs, including programs that are mandated with the missions of certain peacekeeping operations.

There has been no allegation that the programs already existing on the national, regional and international level are insufficient or inadequate to the demining and assistance needs of affected areas. Indeed, all evidence indicates that these programs have been and are highly successful. The Cluster Munitions Convention itself takes note of these systems and their utility in its requirements regarding state parties’ participation in and support of them. Thus, the demining and civilian victims of cluster munitions

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265 See id.
266 See id.
270 See supra notes 271 – 3.
272 CONVENTION ON CLUSTER MUNITIONS ARTS. 4, 6.
assistance provisions of the Cluster Munitions Convention are unnecessary because they seek to duplicate programs that are already in existence and highly successful. Further, it is possible to read the applicable provisions of the Cluster Munitions Convention as curtailing the access of affected states to demining and assistance programs administered, offered or funded by non-state parties to the Cluster Munitions Convention because it exhorts member states to seek financial and technical assistance from other member states.273 Given that the United States, which is one of the largest funding sources for demining and victims assistance programs, has not adopted the Cluster Munitions Convention – and all evidence indicates that it will not do so at any point in the foreseeable future – these provisions of the Cluster Munitions Convention threaten to harm those whom the Convention seeks to protect and assist.

D. A Proposed Solution

As demonstrated above, there are ample extant international conventions that protect civilian victims of cluster munitions – and their families – from discrimination, alienation from their status at law, and other forms of abuse. The ICCPR and the ICESCR are the oldest of these conventions and yet have evolved with changes in international law and politics in a way that makes them non-static options for redress of such grievances. The ICCPR exhorts state parties to bring their national laws into conformity with its provisions, including creating laws that provide citizens a forum to address grievances stemming from violations of the ICCPR. In the event that these apparatuses are not in place, or are in place but do not function in a manner contemplated by the ICCPR, there are domestic and international ways to bring attention to these flaws.

273 See id.
Although the ICESCR as written does not provide citizens of state parties with a forum for their grievances, the Human Rights Committee has referred an amendment to the U.N. General Assembly that, if passed, would create such a forum. The CRC does not have a citizen-grievance mechanism but does have an advanced state reporting apparatus and could be amended to create a citizen-grievance mechanism. And, the newly created Disabilities Convention offers protections to persons affected with all forms of disabilities, certainly including civilian victims of cluster munitions.

There is no suggestion that any of these conventions is legally deficient to offer assistance to civilian victims of cluster munitions and several offer citizens the ability to grieve their treatment that the Cluster Munitions Convention does not attempt. In light of this, the proposed solution to the issue of assisting civilian victims of cluster munitions and their families is to work within the frames provided by the ICCPR, ICESCR, CRC and Disabilities Convention and, if necessary, lobby for amendments that would give citizens enhanced grievance abilities. The rationale for this proposal is that, rather than enacting a new convention that is largely repetitious and suffers from an inability to offer citizens a method to grieve the actions of their governments, from a practical and legal standpoint it is more logical and expedient to use what already exists and amend it if necessary. Working within the framework of the ICCPR, ICESCR and CRC also avoids the stigma of attempting to advance new, third generation human rights, a classification which encounters a good deal of opposition in human rights discourse. Since these conventions are also clear on the rights that they create and reinforce, they offer a more solid definition and understanding of rights available to civilian victims of cluster
munitions and their families than offered by the vaguely worded definition of “cluster munitions victims” in the Cluster Munitions Convention.

In terms of financial and technical assistance, this article proposes that the status quo be maintained and that there be no attempt to codify such assistance for either the donor or the recipient. Creating international law that is unnecessary at best and threatens to undermine the existent and well-functioning assistance structure at worst does not advance the interests of civilian victims of cluster munitions, their families, or their governments.

V. CONCLUSION

The states that negotiated the Cluster Munitions Convention did so with a sense of enthusiasm that was commendable yet obscured the many problems contained in the Cluster Munitions Convention from the standpoint of military law, humanitarian law, and human rights law. This article has discussed these problems and offered several solutions instead of the Cluster Munitions Convention.

In terms of military law, this article has proposed the creation of an amendment to Protocol V of the CCW. This amended Protocol V would incorporate aspects of amended Protocol II of the CCW which are better suited to cluster munitions and would also create a distinction in the way in which dumb cluster munitions are treated at law. In conjunction with this proposed amendment, the article goes on to propose the creation of the Cluster Munitions Certification System, to be modeled on the Kimberley Process which has been used to combat the sale of and trade in conflict diamonds. The Cluster Munitions Certification System would make dumb cluster munitions the equivalent of
conflict diamonds in the laws of signatory states and manufacturers and would function because it is located at the intersection of state and manufacturer concerns. The goals of the military law proposals in this article are to ensure the military sovereignty of states in warfare while at the same time erecting mechanisms to regulate and stop the sale and use of dumb cluster munitions.

In terms of humanitarian and human rights law, this article proposes that, in place of the terms of the Cluster Munitions Convention, advocates for civilian victims of cluster munitions use already existing international law found in the ICCPR, ICESCR, CRC and, to a more limited extent, the Disabilities Convention rather than attempt to reinvent the proverbial wheel through the Cluster Munitions Convention. This article also proposes that there be no attempt to regulate or change the current status of national, regional and international assistance programs for demining activities and civilian victims of cluster munitions. Given the urgency with which advocates insisted on the creation of the Cluster Munitions Convention, it seems dangerous to suggest that the current functioning and lauded assistance programs be altered or threatened.

The international community – especially those states and other entities that brought about the Cluster Munitions Convention – thus finds itself in the same position as the main character in the song Rocky Road From Dublin when he reaches Dublin. Both have given up things that are important to them in order to make their way to Dublin and both intend for Dublin to be a stepping-stone to something that offers exciting potential for the future. Unlike the character in the song, however, the international community still has time to stop itself from taking a journey that will only lead to greater trouble.