
Convention on Cluster Munitions

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General operation and status of the Convention

Strengthening International Humanitarian Law

Submitted by the President*

The Third Meeting of States Parties (3MSP) to the CCM takes place in Oslo in September 2012. The 1MSP and 2MSP both took place in two heavily affected states, and thus focussed on implementation of the operative obligations of the Convention. In addition to continuing this essential focus, Norway as President of 3MSP wants to place additional emphasis on the Convention as a contribution to enhancing the protection of civilians and thus strengthening the body of International Humanitarian Law.

Background

1. The Conventions' implications and long-term effects with regard to functioning as a *preventive measure* through strengthening the body of the international humanitarian law are less visible and less tangible than the provisions on clearance, stockpile destruction and victim assistance. Implementation of the Convention's obligations to clear contaminated areas and assist cluster munitions victims are key in terms of preventing new victims and securing the rights of victims, but these tasks are limited in scope seen from a global perspective. Relatively few states are heavily affected by cluster munitions, and in many of these, programs to address the contamination are well established. The stockpile destruction obligations entail considerable efforts by those States Parties with large stockpiles, and this will be crucial in ensuring the prevention of new victims.
2. It may be challenging to verify that the CCM is effective as a preventive norm, because this argument is based on proof by absence. It is, however, a fact that cluster munitions were widely used in armed conflicts in the years leading up to the adoption of the CCM in 2008, and that use since has been reduced significantly, and has moreover been widely condemned. There are thus indications that the CCM established a watershed. This has been accentuated by reactions from alleged users to allegations of use, as well as condemnations of such use by the international community.

* Late submission.

3. The long-term force of the CCM lies in its contribution to the international normative framework protecting civilians from the effects of armed conflicts, as it has banned one specific category of weapons that only a few years ago were considered to be acceptable instruments of war. Without the CCM, it is reasonable to assume that use of cluster munitions would have increased, with severe consequences for civilians on a global scale.

Why focus on International Humanitarian Law?

4. The 3MSP constitutes an opportunity to explore and develop the role and impact of the CCM within the international humanitarian normative framework. Norway, as President of the 3MSP, would like to focus on how experiences of States Parties and other stakeholders (in implementing the Convention) may be used to promote this framework in response to current and emerging threats to civilians affected by armed conflicts, and to enhancing protection in situations of extensive armed violence in general. Norway would moreover encourage discussions on identifying current and emerging related issues as well as discussing the potential in using an approach based on humanitarian consequences when assessing utility and acceptability of weapons. Norway would like to encourage all States Parties and other participants to the 3MSP to focus on the normative aspects of the CCM in their general statements.

Humanitarian objectives up front

5. The objective of the Oslo process was to agree on an instrument that would make a real difference from a humanitarian point of view; a drastic reduction of new victims, prevention of weapons proliferation and assistance to survivors and affected persons and countries.

6. This objective had implications for how cluster munitions were defined in the Convention. Rather than a purely technical point of view, with emphasis on design, the definition was based on the *effects*, as seen from a humanitarian point of view. The *effect oriented* point of view led to identifying two main problems with cluster weapons: their indiscriminate effects during an attack because of the wide area effect, and the indiscriminate effects caused by unexploded sub-munitions after an attack. These elements were then accordingly addressed in the definition of a cluster munition combined with a ban on use, as well as in the obligations to clear contaminated areas and destroy stockpiles. Other less restrictive definitions based on technical requirements were rejected because they did not address the humanitarian problem.

CCM as an expression of IHL

7. The final preambular paragraph in the CCM reads as follows:

“Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and the rules that the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against military objectives only, that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects and that the civilian population and individual civilians enjoy general protection against dangers arising from military operations,”

A main obligation under IHL of any warring party is at all times to distinguish between military objectives and civilian objects or persons, and to only attack military objectives, in other words; to observe the *rule on distinction*.

8. Additional Protocol I to the Geneva Conventions lays down rules that specify in more detail what the obligation to distinguish between military targets and civilian objects and persons entails. It is thus prohibited to direct attacks against civilian persons or objects, as well as executing indiscriminate attacks. An indiscriminate attack is one that for example employs a means of combat (a weapon or ammunition) that cannot be directed against a specific military objective. The rule on distinction constitutes one of the principal justifications for a ban on cluster munitions. The recognition that the general rules on distinction in AP I did not suffice with regard to preventing the use of cluster munitions, constituted an overall driving force for negotiating and concluding the CCM. It was considered important to develop IHL further with regard to addressing the need for specific rules in relation to certain weapons and ammunition.

9. Additional Protocol I to the Geneva Conventions moreover lays down a prohibition against attacks that may be expected to cause damage to civilians to an extent that would be *excessive* in relation to the concrete and direct military advantage. The specific characteristics of cluster munitions, leaving dangerous duds for years and decades after the attack, are significant for this proportionality test. An attack that continues to cause harm for a lengthy time period *after* the conflict is over would always appear to be “excessive” because such harm cannot reasonably constitute a military advantage.

10. When civilians are killed or hurt in connection with armed conflict, it is both because of an absence of specific law as well as a lack of observance of existing rules. Notwithstanding the above-mentioned general rules of IHL, certain weapons have thus been explicitly banned. This is the case for chemical and biological weapons, anti personnel mines, cluster munitions, blinding lasers and undetectable fragments. While it may be possible, under certain circumstances, to use these weapons without violating the rules on distinction, it is recognized that the risk of prohibited use would be great if these weapons were part of available military armaments.

11. CCM has thus reaffirmed and further developed the general rules on distinction and proportionality, and has thus contributed to fulfilling humanitarian norms. Article 2 of the CCM, containing the definition of cluster munitions, explicitly refers to the justification for their prohibition by referring to the indiscriminate effects as well as the risks posed by unexploded sub-munitions.

12. We would encourage discussion on how the CCM has contributed to, and will contribute to in the future, the strengthening and reinforcement of the IHL rules on distinction and proportionality.

Moving beyond the threshold for IHL

13. The above-mentioned rule in Article 2 of the CCM, by pointing toward the risk of unexploded sub-munitions as a justification for the prohibition, takes into account that even in situations where IHL may no longer apply, for example in a post conflict situation, people need to be protected from the consequences of war.

14. Moreover, the CCM, like certain other treaties outlawing weapons that violate the rule on distinction (such as the prohibitions of biological and chemical weapons and anti personnel mines) apply, according to its Article 1, in *all circumstances*, regardless of whether the situation is qualified as an armed conflict or not. This is an extra protection in situations of strife or unrest where it is not clear whether the threshold of applying IHL has been reached, for example in situations of extensive armed violence in failing states.

15. We would encourage discussion on whether, and in what way, the CCM, as it applies in *all circumstances*, have implications for how the norms could be understood and implemented in other situations than those qualifying as armed conflict.

Conclusion

16. While the practical implementation measures regarding clearance and stockpile destruction and victim assistance remain core elements, it is important to place the Convention in the normative framework of IHL in which it belongs. States Parties and other participants to the 3MSP are therefore encouraged to discuss how the CCM could be used to increase focus on these core rules of IHL, and how they might be better implemented.
