

A convention beyond the Convention

Stigma, humanitarian standards and the Oslo Process



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The history of attempts to limit the methods and means of warfare illustrates that agreed conventions can have a wide-ranging standard setting function that goes far beyond their terms and signatories. The stigmatization of certain categories of weapons has been a very important outcome of past deliberations and international treaties.

States participating in the Oslo Process to prohibit cluster munitions that cause unacceptable harm to civilians have an historic opportunity to develop the legal protection afforded from the effects of certain weapons both during and after conflict. This report examines the past role of international debate about the means and methods of warfare in order to underscore this opportunity. It is argued that a strong and comprehensive treaty, that will provide a clear basis for monitoring of practice by States Parties and states not party alike, will provide the best basis for the protection of civilians and for furthering humanitarian conventions for the protection of civilians in the future.

Executive summary

The ongoing Oslo Process seeks to establish, by the end of 2008, a legally binding prohibition on the use, stockpiling, production and transfer of cluster munitions “that cause unacceptable harm to civilians.” The ‘treaty’ or ‘convention’ agreed in Dublin in May 2008 should represent the most significant achievement in humanitarian arms control in the last decade.

A central point of deliberation in the process to date has been whether it is necessary that all or most major user, stockpiler, and producer nations sign up to the agreed convention for it to result in improvement to the protection of civilians. To this end, some states have argued that the current ‘Draft Cluster Munitions Convention’ text should be weakened so as to make it more likely that states either not currently taking part in the Oslo process, or those expressing substantial reservations within it, will eventually sign up to the resulting convention. ‘Weakened’ in this context means that the prohibition would apply to a narrower range of weapon systems than currently set out in the draft text, it would be applied with less urgency, and the rules would be more tolerant of the use of cluster munitions by states not party to the treaty.

However, past efforts to limit the methods and means of warfare illustrate that treaties and conventions can play a wider ethical standard-setting function within the international community. Prohibition agreements have had relevance far beyond their formal terms and official signatories. The stigmatization of certain categories of weapons and methods of attack has been a very important outcome of past deliberations and international treaties.

For instance, the case of the Anti-Personnel Mine Ban Convention illustrates how a widely subscribed to prohibition can affect the practices of those outside the treaty. The history of attempts to prohibit chemical weapons illustrates how deliberations, declarations, and treaties can have implications beyond the formal restrictions agreed. The example of 20th century attempts to curtail the development and use of biological weapons demonstrates both the possibility of international agreements affecting the practices of non-signatories to pertinent conventions as well as the importance of these agreements beyond their formal provisions.¹ The last 60 years of debate about the appropriateness of nuclear weapons shows how a taboo can develop for the use of certain means of force that goes beyond international restrictions. However, this latter example also sounds a cautionary note by indicating the precarious standing of a stigmatization when the bounds of what should be prohibited are not clear or comprehensive (either in terms of the prohibited technologies, or the prohibited practices.)

Some of most destructive weapons have been rendered effectively out of use because of international ethical standards about what constitutes acceptable practice. When the possession and use of certain weapons is seen as incompatible with the identity a country wishes to foster in the international community, then this has contributed to restraint both during the preparation for and during the conduct of warfare. When NATO’s ISAF command instituted a policy of no-use of cluster munitions in Afghanistan it did so on the basis of concerns about the impact of these weapons on civilians.²

While the eventual international ethical standard given to cluster munitions will depend on many factors, a clear and categorical prohibition through the Oslo Process is more likely than a complicated and qualified one to contribute to the stigmatizing of these weapons.

In this regard, the current ‘Draft Cluster Munitions Convention’ text represents an important step forward. That this text provides no exemptions from the ban for ‘acceptable cluster munitions’ but only allows exclusions for items that are not considered to be ‘cluster munitions’ provides the sort of clear distinction needed for singling out this category of weapon from others. Likewise, the requirement for states in the Oslo Process to argue for what exclusions should be *allowed* rather than what should be *prohibited* provides a clear signal of the standing given to these weapons. To foster the stigmatization of cluster munitions, it is important that any further exclusions are limited in number and

scope and that, rather than providing opportunistic loopholes, they provide only for systems that are plausibly distinct from cluster munitions as they are widely understood.

In almost any likely future conflict scenarios, the use of cluster munitions as prohibited through the Oslo Process would undermine claims for the legitimacy of that use of force even by a state not party to the treaty. While major users of cluster munitions – such as the United States – show little interest in joining a prohibition in the near term, they may well find themselves influenced by the outcome of the Dublin Conference whether they are formally signed up to the resulting convention or not. History provides many reasons for thinking those states not party to the prohibition on cluster munitions – in particular those with open and accountable systems of government – will be affected by it in any case. Some have suggested this may be part of the reason why the US and others remaining outside the Oslo Process have engaged more actively in the CCW on cluster munitions in order to seek a protocol or other product that would legitimise their use. In practice though, this effort may actually only further stigmatise the weapon.

An important element in ensuring this outcome will be the ongoing work of States Parties and civil society to monitor practices by States Parties and states not party alike in relation to the provisions of the treaty. This monitoring and reporting function, both through formal and informal mechanisms, will play an important role in developing the stigma against these weapons. A treaty in clear terms will provide the best basis for that ongoing monitoring process.

Likewise, *those several states* within the Oslo Process but expressing significant reservations about its scope and terms face the prospect of being constrained in their practices whether they are formally signed up to the resulting convention or not.

In contrast, *the several dozens* of countries currently part of the Oslo Process and voicing their active commitment to securing a comprehensive prohibition have the chance to establish important humanitarian standards for the international community. This is a historical opportunity that should not be lost.

Introduction

Throughout recorded history, concerns have been raised about the acceptability of certain means and methods of warfare. For example, and with differing degrees of success, attempts have been made in the past to single out crossbows, firearms, poisons and other weapons as deplorable and unfit for use.³ In modern times, much of the state-level discussion about the appropriateness of specific weapons relates to their perceived permissibility under international humanitarian law (IHL). As stated in Article 35(1) of 1977 First Additional Protocol to the Geneva Conventions of 1949:

In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

In the recent past, certain weapons deemed to cause “unnecessary suffering,” “superfluous injury” or “indiscriminate effects” have been prohibited or regulated by States Parties to the UN Convention on Certain Conventional Weapons (CCW).⁴

While it has been over 30 years since concerns regarding the humanitarian consequences of cluster munition use were first cited in formal international discussions as grounds for these weapons being subject to some form of prohibition⁵, as yet, no specific international controls have been introduced for this category of weapons. This is likely soon to change as a result of the ongoing Oslo Process. This process is based on the 2007 Oslo Declaration which called for states to conclude by the end of 2008 a legally binding prohibition on the use, stockpiling, production and transfer of cluster munitions “that cause unacceptable harm to civilians.”

During the conferences of the Oslo Process, various questions have been asked of how best to achieve this aim. In particular, the extent to which major user, stockpiler, and producer nations need to sign up to the formal convention as finally agreed has been said by some to be a crucial factor in ensuring its humanitarian benefit. To this end, some states have argued that the Convention text should be weakened so as to make it more likely that states either not currently taking part in the process or within the process but expressing substantial reservations will eventually sign.

‘Weakened’ in this context means that the prohibition would apply to a narrower range of weapon systems, it would be applied with less urgency, and the rules would be more tolerant of the use of cluster munitions by states not party to the treaty.

History, however, would suggest caution regarding such an approach. Instead, past attempts to limit the methods and means of warfare illustrate that treaties and conventions can play a wider ethical standard setting function within the international community. Prohibition agreements have had relevance far beyond their formal terms and official signatories. The stigmatization of certain categories of weapons and methods of attack has been a very important outcome of past deliberations and international treaties.

In order to substantiate these claims about the past importance and future potential of stigma, this report examines lessons from a number of cases of weapons prohibitions; including those for landmines, chemical, biological, and nuclear weapons. The next section begins though by providing a background to the specific context of this report: the ongoing Oslo Process.

Preventing unacceptable harm to civilians

The Oslo Process has established a commitment by a majority of countries in the world to agree a prohibition on a type of weapon long singled out for its problematic humanitarian consequences. The first conference as part of this process took place in Oslo, Norway, in February 2007. This conference produced the Oslo Declaration that was endorsed by 46 of the 49 countries participating in the meeting. The Oslo Declaration included a commitment that states would:

1. Conclude by 2008 a legally binding international instrument that will:
 - i. prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and
 - ii. establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education and destruction of stockpiles of prohibited cluster munitions.

Subsequently, conferences in Lima, Peru (23–25 May 2007) and in Vienna, Austria (4–7 December 2007) produced a draft treaty text. The most recent conference in Wellington, New Zealand involved some 100 countries. By 28 April 2008, 92 countries had aligned themselves with the ‘Declaration of the Wellington Conference on Cluster Munitions’ that reaffirmed the central tenets of the Oslo Declaration and provided a commitment to undertake final negotiations of a treaty in Dublin in May 2008 on the basis of the strong draft convention circulated prior to Wellington.

Throughout this process, questions have been voiced about how the humanitarian goal underpinning the shared pledge to prohibit cluster munitions that cause unacceptable harm to civilians can be best realized. At the Wellington Conference, for example, issues regarding possible ‘transition periods’ for continued use of the banned weapons, ‘interoperability,’ and ‘inclusiveness’ were topics of significant contention in the plenary and in informal consultations. For each,

concerns have been raised about the current treaty text as summarised below. Concerns about the definition of cluster munitions and possible exceptions from the ban are dealt with later in this paper.

1. *Transition Period:* A number of states taking part in the Oslo Process stockpile weapons that may well fall foul of the eventual definition of a cluster munition to be prohibited under the treaty. The notion of a transition period between the agreement of the convention and the actual prohibition of cluster munition use has been proposed as one way of allowing states to procure alternative force options. Germany has been very active on this topic, issuing a Discussion Paper at the Wellington Conference that made the case for a step-by-step approach.⁶ That approach would entail first the immediate prohibition of “unreliable” and “inaccurate” cluster munitions that cause hazardous effects “equal to anti-personnel mines.” Remaining types defined as “reliable” and “accurate” or equipped with self-destruct and self-deactivation systems would then be phased out over a specified number of years. During interventions at the Wellington Conference, Germany elaborated the humanitarian justification for a transition period as a “real world” solution to some governments’ reliance on current stockpiles. In enabling those states to immediately accede to a new treaty while placing demands on them to phase out all cluster munitions as defined by the treaty, Germany has argued that the scope for the use of such weapons in combat would be less than if such states only signed the treaty when they were prepared for an immediate withdrawal of prohibited weapons from service. It is of course important to note that those states advocating a transition period for certain cluster munitions are effectively agreeing that they cause unacceptable harm and should be banned.
2. *Interoperability:* A number of countries have expressed concerns that the treaty text might hamper their ability to conduct military activities with those nations that do not become signatories to the prohibition.⁷ The United Kingdom, for

example, argued the current text “renders coalition and multinational operations, including UN chapter VII, NATO, EU operations, difficult or even untenable with those members of the coalition who are not states parties to the convention and deploy those types of cluster munition that could be prohibited under this treaty.”⁸ Canada likewise spoke to these concerns stating: “It would be no exaggeration to say that our ability to support a new Convention will depend on whether or not we can address the interoperability issue in a manner that ensures the continued viability of combined operations with non-party states.”⁹ The implication follows that without sufficient modification to the existing treaty text, some states will not be able to support it. To enable them to sign the convention, certain countries have called for a modification of Article 1(c) that requires a State Party not to: “Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.” This might be done, for instance, by introducing qualifying language regarding the meaning of assistance of the kind that did not appear in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.¹⁰

3. Inclusion: Concerns have been expressed by a number of states that an international instrument for the prohibition of a weapon is taking place outside the CCW. In line with these arguments, some countries have expressed reservations about the Oslo Process in relation to the participation of certain major user and stockpiling nations. Japan, for instance, intervened more than once during the Wellington Conference to argue for the need to make sure such states become signatories to any eventual convention. To achieve this, it has been proposed that compromise treaty language is needed. Proponents argue that this language needs to strike

a balance between humanitarian and military considerations – by which they mean greater weight should be given to the military considerations than they perceive to be the case at present. To this end, Japan tabled numerous proposed changes to the treaty text to introduce exemptions and qualifications.¹¹ A common conclusion from such arguments is that the definition of what is prohibited should be narrow rather than broad, allowing the continued use of greater number of existing weapon systems.

States raising these issues of possible ‘transition periods,’ of ‘interoperability,’ and inclusiveness offer justifications and positions that vary in significant ways. However, they all seem to share the underpinning premise that the eventual convention will provide benefit from a humanitarian perspective *only* to the extent that states – including certain apparently “more significant” ones – become signatories to the specific wording agreed.

The upshot of this is to call for changes to the current treaty text that would place less restrictive obligations on states, that would not apply to all cluster munitions as defined and that would come into force with less urgency. From a perspective that prioritises humanitarian protection, all of these proposed changes can be considered as weakening the current text.

The treaty will be formally negotiated at the Dublin Conference between 19–30 May 2008. The details of those negotiations and the eventual agreed text will have far-reaching implications for what the original commitment to prohibit “cluster munitions that cause unacceptable harm to civilians” means in practice. Whilst the strength of the norm produced by these deliberations will depend on many factors, the historical record suggests that the strength of the formal text will be critical to the stigmatization of cluster munitions and reform of practice.

The prohibition of weapons

The remainder of this report examines and takes issue with the premise noted in the previous section as underpinning many of the calls for a weakening of the existing Draft Cluster Munition Convention text. That premise is that conventions and treaties matter from a humanitarian perspective only to the extent that states become signatories to the specific text agreed. By contrast, this report argues that many past conventions have had repercussions:

- a) on states beyond those officially declared as States Parties;
- b) on practices beyond the formal restrictions imposed through their text.

The manner in which these further implications have been realized speaks to how standards for conduct are set in the international community. Instead of those standards simply deriving from voluntary state adherence to the legal terms of treaties and conventions, the conduct of states can be influenced through the establishment of norms for acceptable behaviour.

The importance of norms in the actions of states has been a subject of much discussion in recent years far beyond matters of disarmament and non-proliferation agreements. As part of what is often characterized as a sociological turn in the study of international affairs, the reasons behind state actions have been sought beyond a narrow conception of national interests or power.¹² As has been argued, for example, the growing prominence of multilateral humanitarian interventions confounds many of the traditional principles that are held to shape state behaviour.¹³ As well, it has been contended that relying on a narrow sense of national interests cannot explain the pattern of weapons procurement in many developing countries. These states acquire high-tech weaponry not necessarily because of strategic calculations, but because of identity considerations about what it means to be a modern state.¹⁴

As part of this moving beyond narrow conceptions of power and interest, the case has been made for the role of norms in behaviour. Norms can be thought of as

shared standards of right and wrong that influence behaviour by generating expectations for appropriate conduct.¹⁵ They offer individuals a sense of “who they are and what they can do in given situations.”¹⁶ The examples that follow highlight the varying role of norms and related stigmas in past humanitarian treaties. Later sections then consider what the lessons from these cases counsel for the current juncture of the Oslo Process.

Case: anti-personnel landmines

The “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction” (or “APM Ban Convention”) illustrates how a treaty can affect the actions of those states not formally declared State Parties.

Of all the examples of existing humanitarian treaties, the Oslo Process towards a prohibition on cluster munitions is most often likened to that undertaken for anti-personnel mines (APMs) a decade ago. The weapons are often seen as presenting a similar profile of humanitarian problems – including post-conflict civilian death and injury and deleterious effects on local communities. The Oslo Process shares with the Ottawa Process a collaborative engagement between states and members of international civil society.¹⁷ Also, both processes were born out of the failure of the CCW¹⁸ to take sufficient action as perceived by many states, non-governmental organizations (NGOs), and inter-governmental organizations.¹⁹

The 1997 APM Ban Convention prohibits the use, development, production, acquisition, stockpiling and transfer of all anti-personnel mines as defined in the treaty text. As opposed to Protocol II and Amended Protocol II of the CCW with respect to mines, the APM Ban Convention embodies a comprehensive prohibition, albeit on the more limited category of APMs within the larger category of ‘landmines.’ As of April 2008, there are 155 States Parties to the treaty. Despite this widespread uptake, major military powers such as the USA, Russia, China, India, and Pakistan remain outside. Instead, these governments argue that AP mines remain necessary,

militarily effective and discriminate in their effects if the right precautions regarding their placement, marking and removal are taken. This lack of universal inclusion might be taken as representing a major deficiency of the APM Ban Convention.

However, as various analysts have argued,²⁰ such an evaluation would ignore the contribution of the Convention in setting international standards. As Herby and Lawand have stated:

[M]ost of the [...] states that are not party to the Treaty are in practice respecting its prohibitions on their transfer, production and use. This can be attributed to the stigmatization of these weapons in the eyes of the public. In the increasingly rare cases where some of these states have used antipersonnel mines, reaction has been swift and vigorous, spearheaded by the ICBL (International Campaign to Ban Landmines).²¹

It is important to note, in this example, that the subsequent effectiveness of the treaty is attributed in part to the ongoing monitoring function played by civil society. Such monitoring provides a critical further strengthening of the normative function of the treaty. If the terms of the treaty are clear, such a mechanism provides a practical basis for identifying (or establishing) 'transgressions' by States Parties and states not party alike.

The wider stigmatization of anti-personnel mines was further illustrated with the following considerations:

- Many of the states not formally signed up to the APM Ban Convention have nonetheless agreed through their statements, agreements, and declarations to work towards the ultimate elimination of APMs. The consensus text from the Second Review Conference of the CCW wherein states affirmed '... their conviction that all States should strive towards the goal of the eventual elimination of antipersonnel mines globally'²² is one such instance;
- The conduct of some of those states not party to the APM Ban Convention has been in line with its terms. According to Herby and Lawand, the US, for instance, "has not used antipersonnel mines since 1991, exported them since 1992, or produced them since 1997;"
- Non-signatory nations such as Sri Lanka and Morocco have reported under the transparency provisions of Article 7 of the APM Convention;

- The export and shipment of APMs has been reduced dramatically, with 13 states not signed up to the Convention having initiated moratoria on their trade.

In addition, it would be possible to cite how once major producers no longer engage in such production.²³ Herby and Lawand posit that one reason for this pattern of behaviour is that non-signatory states "need to be seen and accepted as members in good standing of the international community."

Of course, whatever the extent of uniformity in certain areas of conduct, diversity among states remains. Any prohibition has boundaries on its scope that lead to disagreements about appropriate action. What distinguishes anti-personnel mines from anti-tank mines remains contentious.²⁴ The role of technical modifications, such as 'anti-handling devices' is another such topic. Furthermore, the US has sought to develop technical solutions to the problems of landmines by actively promoting new 'smart' self-destructing and non-lethal mines,²⁵ a policy reaffirmed in February 2004 by the Bush Administration. The APM Ban Convention makes no allowances for potential 'humane' or appropriate uses of anti-personnel landmines in particular situations; it simply deems these weapons unlawful. The attempt is being made by the US to differentiate the general category of 'landmines' into sub-categories such as 'smart' versus 'persistent' or 'long-lived' mines. NGOs have argued that use of so-called 'smart' mines would not result in affected communities feeling safer after conflict, would hamper demining efforts, and undermine the comprehensive prohibition of anti-personnel mines.²⁶

Such areas of contention serve to emphasise that norms are not simply standards set once and for all, but are actively negotiated over time. What is stigmatized as unacceptable can transform in response to technological and political developments. Looking to the future, Herby and Lawand proposed the current norm on APMs could be eroded either through

- a) states treating it as optional in light of its non-universal status or
- b) inconsistent practices in relation to the boundaries and terms of the Convention threatening its integrity.

In light of this, they recommend continuing vigilance in the policing of the Convention.

Case: chemical weapons

The history of attempts to prohibit chemical weapons illustrates how deliberations, declarations, and treaties can have implications beyond the formal restrictions agreed.

With a much longer history than APMs, the case of chemical weapons provides an important example of how categories of weapons can become stigmatized to such an extent that few even contemplate them as appropriate means of force. Despite the existence of offensive programmes by certain states participating in major conflicts during the 20th century – for example, in Korea, Europe and South East Asia – the use of these weapons has been quite limited. Typically, when use has taken place, then controversy has followed. Today, no state in the world declares itself to have an offensive chemical weapons programme.

In part, this stigma has stemmed from the long running identification of chemical weapons with poisons. Indeed, the historically constrained and often contentious use of poisons in conflict is perhaps the most powerful example how the means of warfare have not been unlimited in practice. The likelihood of death and the potential for indiscriminate casualties have been central justifications for the abhorrence of poisons for many centuries.

In the modern period of nation states, the formal prohibition of chemical weapons can be traced back to the Hague Conference of 1899. There, under Declaration II, the Contracting Powers agreed to, “abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases.”

Declaration II was not abided by during World War I. After the first use of chlorine gas in warfare by the Germans at Ypres in Belgium, persistent, lethal, and harassing chemical agents were deployed on a wide scale. Yet such weapons were treated as problematic at the time. Germany originally attempted to justify its use of chlorine through arguing it was not in violation of Declaration II because ‘cylinder dispensers’ rather than ‘projectiles’ were employed.²⁷ More significantly perhaps, within the militaries of Western Europe disagreement was voiced about the appropriateness of chemical weapons, in part, because of their perceived indiscriminate effects. Among the many new means of

killing developed during WWI, chemical weapons were set apart from many of the other means by much of the population of Europe.²⁸

After the war this differentiation continued. Both opponents and proponents of chemical warfare contended it was distinctive and particularly powerful.²⁹ Opponents portrayed this weaponry as inhumane in large part because of its supposedly indiscriminate effects. Proponents portrayed it as both enabling fewer casualties in war as well as being a class of equipment so destructive it could ensure complete victory (and thus had very high military utility.) The extent of funding of chemical weapons-related research and development during and after WWI in turn led to developments in bomber aircraft, pesticides and herbicides, and tear gas – all of which in turn facilitated the possible further development of chemical weapons.³⁰

At an international level of diplomacy, deliberations about the appropriateness of these weapons took place in forums such as the Paris Peace Conference and the Washington Naval Conference of 1921–1922. With the signing of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (or ‘Geneva Protocol’), those demanding additional constraints secured what in essence amounted to a ‘no-first-use’ pact.

Although the international agreements reached were significant at the time, the nature and extent of the stigma against this class of weaponry was also open to doubt. Who chemical weapons could be used against was one topic of controversy. The Hague Declaration was not applied to non-Contracting Powers and countries such as the UK and France added a similar stipulation to their support for the Geneva Protocol. In effect, these qualifications introduced a split between those nations it was acceptable to subject to chemical attack and those it was not. In addition, use against signatories to the Geneva Protocol was not always condemned. When Italian forces used chemical weapons against Ethiopia during 1935–36,³¹ only muted international condemnation followed.

Despite these considerations, with the exception of Japan in China, restraint with chemical weapons was widely evident in World War II. Even more than this, offensive capabilities were neglected and offensive

preparations limited in many countries. For example, the UK made chemical defensive preparations only shortly before war and had only limited capabilities during it. In only two instances – the use of mustard gas in the case of German invasion or as a retaliation for V-rocket bombings – did the British government seriously plan for the use of chemical weapons.³²

As Richard Price has argued, the repeated reinforcement of the stigma against them through international deliberations and public anxiety played an important role in shaping perceptions about their utility and acceptability within militaries and governments during WWII.³³ It was not simply the case that the history of past prohibitions was irrelevant because they were violated or weak because they were subject to qualification. Rather, over time the repeated portrayal of chemical weapons as abhorrent had wide ranging consequences for how their ultimate utility was conceived (e.g., in terms of their deterrence role or fit within existing military culture.)³⁴

It is notable that in the near total war situation that characterized WWII, chemical weapons were identified even then as distinct. Much of this was tied up with the international identity of states and what it meant to be a ‘civilised’ nation. In 1943, US President Roosevelt famously said of chemical weapons that “use of such weapons has been outlawed by the general opinion of civilized mankind.”³⁵

This orientation of ‘categorically unacceptable for a modern state’ became increasingly widespread after WWII, though again subject to negotiation.³⁶ For instance, it was not until the mid-1970s that the US ratified the 1925 Geneva Protocol, when it was accused of violating the international customary norm set by the Protocol because of US use of gas, napalm and herbicides in Vietnam.³⁷ However, the US government had also argued that these chemicals were outside the scope of the Protocol. This claim was made despite initial agreements in the 1930s that agents such as tear gas and herbicides were included within its scope.³⁸ American officials also argued that such weapons might provide a more humane option in certain settings.³⁹ When the US did ratify the Geneva Protocol in 1975, this was done with various provisos enabling harassing agents such as CS to be used in defensive military actions.

At the start of the 21st century, through their actions and statements, many governments have reinforced long-standing claims that chemical weapons are abhorrent and unacceptable. The 1993 Chemical Weapons Convention (CWC) places a wide-ranging prohibition on these weapons among its 183 Member States. That some countries might use, proliferate, possess or be suspected of possessing such weapons can (at least on some occasions) lead to a significant response in the international community. For example, that the Iraqi military employed chemical weapons to kill over 5,000 Iraqi Kurds in Halabja and elsewhere during 1988 was widely cited in the lead up to the 2003 Iraq war as an indicator the problematic nature of Saddam Hussein’s regime. Through such arguments, chemical weapons have been placed in an especially repugnant moral category.⁴⁰

The near universal status of the CWC and the taboo against chemical weapons has not completely ended controversy about the exact scope of the prohibition. For example, under an exemption provided in the CWC for the use of chemicals in “law enforcement”, some armed forces (for instance, in the US and Russia) are actively pursuing so-called incapacitating chemical agents for riot control. Some believe this exemption could well undermine attempts to stigmatize and eliminate chemical weapons *per se*.⁴¹

Case: biological weapons

The moral repugnance generally associated with biological weapons illustrates how restraints are exercised beyond the terms of the formal prohibitions and how those formal prohibitions can affect states not party to them.

The stigma of biological weapons shares much of the history and many of the dynamics associated with chemical weapons.

In past centuries and certainly during the 20th century, unease has been expressed from many quarters about deliberately spreading disease as a means of warfare. Those seeking to justify why these weapons should be deemed more morally repugnant than ‘conventional’ weapons that kill and maim have done so by arguing (as with chemical weapons) that their effects are particularly severe, their development perverts the

goals of medicine/science, they are likely to be devastating to civilian populations, and that ‘the public’ has a deep psychological aversion to them.

And yet, running alongside such condemnations, it is possible to identify instances of the use of what would be today be identified as biological weapons. During the siege of Kaffa, Tartars loaded the bodies of plague victims on catapults and threw them over the city walls. In the 18th century, Sir Jeffrey Amherst ordered British General Henry Bouquet to disseminate smallpox among tribes in the Ohio-Pennsylvania region using blankets of ill soldiers. During the American Civil War in the 19th century, Confederate soldiers poisoned wells with the carcasses of animals that had died of infectious diseases. It is also possible to identify state-based justifications for biological warfare programmes in the 20th century – including that research into biological weapons produced relatively humane weapons.⁴²

Such considerations suggest the constraints against biological warfare have never been absolute. As with chemical weapons, the long history of efforts to render biological weapons taboo has not been one of reference to objective and persevering criteria about what counts as inherently unacceptable. Rather such an evaluation has had to be repeatedly negotiated in response to changing situations.⁴³

And yet, despite the existence of offensive state programmes by major powers during the 20th century, the use and even preparation for biological warfare was limited overall.⁴⁴ During World War I, for instance, only Germany undertook serious steps to utilize the emerging scientific understanding of infectious disease for destructive ends for example. It made efforts to infect draft animals with glanders and anthrax. During World War II, few countries even made active preparations for deploying biological weapons. Outside of the Japanese in China, biological weapons were not used in World War II in any significant way. It was only after this war that major state offensive preparations began in earnest. Since then though, there have only been a few instances of alleged biowarfare.⁴⁵

Again as with chemical weapons, it is possible to argue that perceptions of the moral acceptability of biological weapons were not wholly separate from perceptions of their military utility. Rather, emerging norms about the status of these weapons affected the extent and nature

of funding of offensive programmes, calculations of the likely military retaliations and political ramifications that would result from their use, and the willingness of military commanders to incorporate them within their arsenals.⁴⁶

Also, as again with chemical weapons, despite attempts to promote biological weapons as an acceptable option by certain proponents, the 20th century witnessed the agreement of a categorical international prohibition. Article I of the 1972 Biological and Toxin Weapons Convention (BTWC) mandates that:

Each State Party to this Convention undertakes never in any circumstances to develop, produce or stockpile or otherwise acquire or retain:

1. Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.

The Preamble to the BTWC reads that the weaponisation of biological agents would be “repugnant to the conscience of mankind and that no effort should be spared” to minimize the possibility of this taking place.

As another parallel with chemical weapons, not all states have adhered to either the emerging norm against these weapons or their official treaty commitments. Despite being one of three depositors for the BTWC, the USSR continued (and indeed, massively expanded) its offensive biological weapons programme until the early 1990s. And yet despite such major infractions, today no state in the world claims to operate such a program. Within diplomatic and military circles, little credence is given to the suggestion that the category of biological weapons should not be treated as distinct and prohibited.⁴⁷ In short, they are taboo. As with the case of chemical weapons in the build up to the 2003 Iraq War, allegations made about Iraq’s possession of biological weapons were part of justifications for placing its government outside of the international community.⁴⁸

As is often the case with formal prohibitions, the boundary between what is permissible and what is not is a matter of uncertainty and contention with regard to the BTWC. The open-ended nature of Article I is at once both the Convention’s strength and its weakness. It has the strength of being flexible enough to accommodate

new technologies and it does not seek to limit the use of biological agents for benign purposes. However, it also has the major weakness of failing to elaborate just what is and is not permissible.⁴⁹ The BTWC draws on a number of terms such as ‘development’, ‘acquire’, ‘prophylactic’ and ‘protective.’ The meaning of these as they relate to determinations of the permissibility of particular activities (such as the permissibility of biodefence programmes⁵⁰) has been a matter of considerable contention since the inception of the Convention. The lack of verification procedures in BTWC and an implementation organisation comparable to the International Atomic Energy Agency or the Organisation for the Prohibition of Chemical Weapons has further weakened this convention.

Case: nuclear weapons

The history of debate about nuclear weapons illustrates how a taboo can develop for the use of certain means of force that goes beyond any treaty restrictions agreed. It also illustrates the precarious standing of a stigmatization when the bounds of what should be prohibited are not comprehensive.

Today, nuclear weapons are widely considered to constitute a special class of weaponry whose appropriateness is not simply a function of kiloton explosive power.⁵¹ They are not just ‘big bombs’ in the arsenals of certain states that may be suitable when significant firepower is called for. Instead, they are deemed distinctive and perhaps archetypal unconventional weapons.

As with the other cases mentioned in this report, however, this status has developed over time. Take the developing attitude to nuclear weapons in the US military and government, for example. As Tannenwald⁵² has argued, with the Allied fire-bombing of cities in Japan and Germany during WWII, the use of atomic bombs was not generally held by top US officials and commanders to represent a discontinuity from then existing practices. US Secretary of War Henry Stimson, for instance, commented that atomic bombs were “as legitimate as any other of the deadly explosive weapons.”⁵³ With the Korean War and the development of thermonuclear capabilities, however, this assessment was increasingly questioned within government circles and many sectors of the American

public. Despite his initial decision to bomb Hiroshima and Nagasaki, President Truman later contended to his senior policy makers that “you’ve got to understand that this isn’t a military weapon...It is used to wipe out women and children and unarmed people, and not for military uses. So we have got to treat it differently from rifles and cannon and ordinary things like that.”⁵⁴

As Farrell and Lambert argue, the need for a distinction between weapon types was not confined to politicians or members of the public. One could find traces of it in military forces, though the standing accorded to nuclear weapons has always been interlaced with institutional politics. So shortly after World War II:

Navy leaders also opposed counter-city targeting, ostensibly on moral and strategic grounds, but really to deflect budget cuts. In the “Revolt of the Admirals” in late 1949, senior Navy leaders publicly denounced nuclear attacks on cities as barbaric. A decade later, they strongly advocated the targeting of Soviet cities because the Navy was acquiring a highly inaccurate submarine-based nuclear weapons system that could hit little else.⁵⁵

While President Eisenhower fought against efforts to set nuclear weapons apart from other force options, a general repugnance was building in the public consciousness/conscience in the 1950s.⁵⁶

Tannenwald maintains that by the time of the Vietnam War little serious attention was given to the use of nuclear weapons by senior politicians. Although the targeting of Soviet cities remained in place throughout the Cold War and some military officials pressed for their limited use, nuclear weapons gradually became further and further designated as distinct options⁵⁷ that could only be justified as retaliatory measures in extreme situations. The use of these weapons became seen as incompatible with the identity that US leaders wished to foster about the US within the international community. While the 1968 Nuclear Non-Proliferation Treaty did not compel nuclear states (such as the US) to give up their arsenals immediately, by limiting their further transfer and proliferation it did underscore the international concern about the basic acceptability of these weapons.

The importance of stigma and identity factors is suggested by a couple of considerations. One, efforts

in the US and elsewhere to develop so-called ‘low yield’⁵⁸ nuclear weapons for battlefield encounters have yet to produce options deemed usable in practice. Even though some of these weapons could result in damage comparable to certain conventional explosive devices, they were and remain treated as distinct because of their designation as ‘nuclear.’ Two, limits and constraints evident in the practice of states cannot be accounted for by appeals to traditional balance of force explanations. So while it would have been possible for the US to utilise lower yield nuclear weapons during certain encounters in the 1991 Gulf War without fear of like for like retaliation, it did not do so.

Today an extensive range of treaties and agreements pertain to the general scope for the use of nuclear weapons. And yet, the taboo with regard to them is often limited to their *use* rather than ‘mere’ possession or development. States with or seeking to acquire such weapons do not portray them as abhorrent *per se* in the same way chemical or biological weapons are deemed as wholly abhorrent today.

Given the choice of certain states to retain nuclear weapons, the taboo associated with them is arguably up for negotiation today to an extent not so for some of the other weapons highlighted in this report. Historically, the situation today with nuclear weapons is comparable to the standing given to chemical and biological weapons after the 1925 Geneva Protocol.

In December 1994, the UN General Assembly requested that the International Court of Justice (ICJ) offer an advisory opinion on the question “is the threat or use of nuclear weapons in any circumstance permitted under international law?”⁵⁹ The ruling represented the first time such a major tribunal directly addressed the dangers and thereby the legality of nuclear weapons.

In relation to the themes of this report, what is of note from the proceedings of the ICJ is the manner in which certain nations argued for the permissibility of the use of nuclear weapons – and thus undercut the character of a taboo. The UK was one that argued against treating nuclear weapons *per se* as incompatible with the principles of humanitarian law in suggesting:

The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties.

In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.⁶⁰

As expressed here, the acceptability of nuclear weapons depends on a weighing of circumstantial and consequential considerations.⁶¹ Yet, the same weighing approach would not be taken by the British in relation to, say, the use of sarin gas or botulinum toxin despite the same underlying logic applying.

The ICJ decision can be interpreted as exhibiting tensions associated with at once regarding nuclear weapons as categorically suspect while also desiring to allow their use. The judges agreed that the existing rules of international law neither universally prohibited nor authorized the threat or use of nuclear weapons. As with other weapons, it was agreed that the use of nuclear weapons had to comply with the tenets of international law. To the central issue of permissibility though, by a vote of seven to seven decided through the second vote of the President of the Court, the judges ruled that:

the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

So while the threat or use of nuclear weapons was generally held to be against international law, the judges could not determine that it would *always* be unlawful. Just what would constitute “the very survival of a State would be at stake” was not defined in the ICJ opinion.

In reaching this judgment that use or threat of use of nuclear weapons is generally, but perhaps not always, contrary to international law, the ICJ judges followed an ambiguous approach. These weapons had “unique

characteristics” in relation to their “destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come”⁶² but still they had to be subject to similar contingent and contextual restrictions that apply to other weapons.⁶³ Responding to the claims forwarded by the UK and others regarding the relative acceptability of certain nuclear weapons in a limited range of hypothetical situations, the judges ruled that while the use of nuclear weapons seemed “scarcely reconcilable” with respect for international law they could not “conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.”⁶⁴

Table 1: conventions beyond Conventions – summary of points

Type	Major formal treaties	Key terms of restrictions	Definition of formally prohibited weapon	Current boundary disputes	conventions beyond Conventions
Anti-personnel landmines	<ul style="list-style-type: none"> 1996 Amended Protocol II of the Convention on Certain Conventional Weapons 1997 Anti-personnel Mine (APM) Convention 	<p>In APM Convention: Article 1: 1. Each State Party undertakes never under any circumstances: a) To use anti-personnel mines; b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.</p>	<p>In APM Convention Article 2: 1. "Anti-personnel mine" means 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. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped. 2. "Mine" means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.</p>	<ul style="list-style-type: none"> Distinction between anti-personnel and anti-vehicle mines Role of 'technical fixes' 	<ul style="list-style-type: none"> Trade in APMs dramatically reduced since 1997 Many non-State Parties to the APM Convention expressed goal to work towards the elimination of APMs. Non-signatory nations undertaking reporting requirements; The conduct of some of those outside the APM Convention in accord with it.
Chemical weapons	<ul style="list-style-type: none"> 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare 1993 Chemical Weapons Convention (CWC) 	<p>Article 1 of the CWC: 1. Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.</p>	<p>Article 2 of the CWC: 1. "Chemical Weapons" means the following, together or separately: (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes; (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).</p>	<ul style="list-style-type: none"> Role of chemical agents in 'law enforcement' Relation of scheduled agents to general purpose criterion Status of mid-spectrum biochemical agents vis-à-vis CWC and BTWC 	<ul style="list-style-type: none"> No state in the world claims to have a chemical warfare programme Extremely limited support for such weapons internationally Overall reluctance to develop, acquire, use such weapons for several decades

<p>Biological weapons</p>	<ul style="list-style-type: none"> ● 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare ● 1972 Biological and Toxin Weapons Convention (BWTC) 	<p>Article 1 of the BWTC: “Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain” certain agents, weapons, equipment and means of delivery</p>	<p>Article 1 of the BWTC: (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.</p>	<ul style="list-style-type: none"> ● Distinction between permissible and non-permissible research and offensive and defensive programmes ● Status of mid-spectrum biochemical agents vis-à-vis CWC and BTWC 	<ul style="list-style-type: none"> ● No state in the world claims to have a biological warfare programme ● Extremely limited support for such weapons internationally ● Overall reluctance to develop, acquire, use such weapons for several decades
<p>Nuclear weapons</p>	<ul style="list-style-type: none"> ● 1968 Nuclear Non-Proliferation Treaty (NPT) 	<p>From the NPT Article 1: Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.</p> <p>Article 2 Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.</p>	<p>n/a</p>	<p>n/a</p>	<ul style="list-style-type: none"> ● No use of atomic/nuclear weapons since WWII despite occasions for possible use ● No use of low yield nuclear weapons

Stigma and the prohibition of weapons

The first Additional Protocol to the Geneva Conventions prescribes that the right of states to choose the methods and means of warfare is not unlimited. In line with this, the previous section substantiated how, through their practices, states have not regarded their choices in weaponry as unlimited and it highlighted that such limitations have often been above and beyond what states have agreed to as part of formal international treaties. Table I (above, page 16–17) summarises many of the points made in the previous section with regard to the four types of weapons surveyed; including the relevant formal agreements and the importance of social conventions and moral norms.

The limitations observed in the practice of states in relation to armed conflict do not relate only to marginal force options of little possible utility. Indeed, across a range of particularly powerful weapon technologies – nuclear, chemical and biological weapons, often referred to as ‘weapons of mass destruction’ – it is possible to identify how state practices have been curtailed well beyond formally agreed limits.

Crucial to understanding the importance of norms and stigmas is their relation to conceptions of state identity. When the possession and use of certain weapons is seen as incompatible with the identity a country wishes to foster in the international community, then that assessment can contribute to restrained conduct in warfare. Moreover, concerns about identity can affect the calculations made in times of peace regarding the gains and drawbacks associated with pursuing the development of particular force options. As in the case of chemical and biological warfare capabilities in the build up to WWII, the stigma against certain categories can affect whether they are judged as compatible with ‘military culture.’ A perceived lack of such a fit can affect

what resources militaries dedicate to these options and, in turn, their ultimate utility. In such ways, norms and interests are not mutually exclusive. Instead, norms “enter into, and change, the cost-benefit calculations of interests [...] but they also help to constitute those interests, identities and practices in the first place. Interests and international norms may coincide, but this coincidence does not render norms superfluous.”⁶⁵

The two most basic elements in the development of norms and stigmas regarding weapons include:

1. Singling out certain weapons or classes of weapon from the rest, and
2. Having some basis for treating them as exceptional and requiring special consideration.

The singling out of a weapon is a first step in differentiating them from other means of force that result in death and injury. Past and current debate about whether weapons such as napalm, incendiary devices, ‘riot control’ agents, anti-plant chemicals, lachrymators agents (e.g. tear gas), and even smoke count as ‘chemical weapons’ illustrates the scope for disagreement and re-interpretation. Such questioning can undermine the possibility for establishing international normative standards. Further to this, without demands that a class of weapon be considered both distinct and exceptional, recognition as a distinct category might not translate into changes in practice.

Box 1 provides a comparison between the fate of two categories of weapons to underscore the contingencies and choices associated with how standards are established and negotiated.

BOX 1: CONTRASTING CATEGORIES AND STANDARDS

Chemical weapons

While chemical weapons have long been treated as suspect and have fairly recently been subjected to the wide ranging Chemical Weapons Convention (CWC), just what ought to properly fall within this category has been subject to debate over time. How weapons associated with 'riot control' should be labelled has been one such area of controversy.

The 1993 CWC prohibits the development, production, or retention of weapons that through their "chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans or animals." The CWC does, however, permit the use of agents for law enforcement purposes including domestic riot control. This provision has enabled the continuing use of tear gas and similar options by police forces around the world.

Yet the meaning of key terms (such as 'riot control agent' and 'law enforcement') pertinent in establishing exactly what is prohibited by the CWC were deliberately left ambiguous in its negotiation in order to reach a compromise text.⁶⁶ For instance, the US has insisted on its right to use riot control agents in what it refers to as 'military operations other than war' (such as peacekeeping missions) and to use such agents during particular situations in areas of conflict (for example, during prison riots in occupied territory). In large part because of the ambiguity of key terms of the CWC, opposing legal opinions exist about the permissibility of 'riot control agents' in circumstances that move between peacekeeping and active war-fighting. So while the category of chemical weapons is prohibited and widely stigmatized, just what makes for a chemical weapon and when exactly an exemption for their use might apply are subject to different interpretations.

The scope of exemptions made with regard to riot control agents is currently a matter of significant policy attention because of two sets of developments: 1) the increasing blurring of war-fighting and policing roles by militaries in recent interventions, and 2) the interest of some states in developing novel chemical agents for situations outside of warfare. The use of a fentanyl derivative in the October 2002 Moscow theater siege which left nearly 130 people dead illustrates how pharmaceutical agents are being developed and held as part of state arsenals. While previous 'incapacitating agents' (such as CS and CN) had effects that lasted a short time after exposure, countries including Russia and the US have been pursuing work in relation to what are referred to as 'non-lethal' pharmacological sedatives and calmatives (such as anaesthetic agents, antidepressants, and antipsychotics). These sit in the mid-spectrum between chemical and biological weapons. Generally, these biochemical agents target the central nervous systems and have effects that last well beyond the time of exposure.⁶⁷

Concern has been expressed that both sets of developments could lead to the deterioration of the much worked for stigma against 'chemical weapons' and thereby, that against poisons in conflict. The British Medical Association, for instance, recently stated that it is "fundamentally opposed to the use of any pharmaceutical agent as a weapon," in part because of fears this "could lead to weakening of the CWC and BTWC."⁶⁸

Explosive weapons

In contrast to the use of poisons and toxins, the use of explosive weapons as a category is not subject to specific prohibition instruments or necessarily even recognised as a distinct category of weapons in formal instruments. Explosive weapons include artillery shells, bombs, grenades, mortars and rockets all of which project blast and/or fragmentation out from a point of detonation.

No formal instruments currently group all explosive weapons together and treat them as a distinct category of weapons in need of particular consideration. And yet in practice there are ways in which explosive weapons are treated as distinct that could serve as the basis for a widely recognised categorical evaluation. The basis for this is implicit in the manner in which they are traditionally the tools of the military for the purpose of war-fighting and are not considered acceptable for domestic policing. Significantly also a robust hypothesis can be made that, in general, explosive weapons (even relatively small explosive weapons) are not considered necessary or appropriate for use amongst citizen populations to whom the users are directly accountable.⁶⁹

Such limitations in the practice of many countries suggest that these weapons are only considered appropriate under certain types of conditions. It would have been possible in the past for such practices to be codified and reinforced through international treaties associated with the category of 'explosive weapons.' This, however, has not taken place.

As with traditional and novel 'riot control' agents, the increasing blurring of war-fighting and policing roles in recent conflicts raises the question of how the long standing but little noted differential treatment of explosive violence as a particular means of armed violence will fare in the future.

Making norms matter

For all of the potential importance of norms for constraining or conditioning action, they do not determine practices in a straightforward manner. What it means to adhere to a norm, like what counts as following a rule, is always at some level to be worked out through negotiation and practice. Formalised standards cannot set out once and for all what is acceptable in practice in every circumstance. Furthermore, different norms can conflict with each other. As Zanders has argued in relation to constraints against chemical and biological warfare, international law itself consists of many competing doctrines (such as the right to self-defence and the need to limit the methods of war). This has meant the stigmas associated with weapons have formed over time in a complex manner.⁷⁰

Different suggestions have been offered to general questions over how norms become consequential or important.⁷¹ Within scholarly debates, there are discussions about whether a particular norm is followed because it fits into the hierarchical relations between the competing norms,⁷² or on the basis of its characteristics (e.g., its specificity),⁷³ or how it resonates with other existing norms.⁷⁴ Arguably though, any general account of why norms matter presents an idealised view that passes over how they influence behaviour within their particular social and political settings.

The upshot of these arguments is that the relevance of norms – what it means to follow or deviate from them as

well as what consequences are likely to result from their transgression – must be managed. In this sense, norms are not so much simple standards for guiding action, but resources drawn on to account for and give meaning to particular actions and situations (both potential and actual).

In this process of managing the meaning of norms, active engagement such as questioning whether actions are consistent with a norm, undertaken by stakeholders, is important in ensuring that standards do not deteriorate over time. For instance, Article IV of the Non-Proliferation Treaty states that:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.

This provision could have provided the basis for moving beyond the current stigmatization of the use of nuclear weapons to include their possession. However, it would be difficult to substantiate the claim that nuclear powers have or are likely in the near future to move towards the state of disarmament envisioned in the NPT. The lack of active attention given to the demands of Article IV is one reason why states have been able to ignore it with relatively little consequence.

The Dublin Conference and the future prohibition of cluster munitions

As mentioned previously, some countries during the conferences of the Oslo Process have voiced reservations about the ultimate effectiveness of a prohibition unless it includes most or all major user and stockpiling nations.

In contrast to such arguments, this report has documented how limits on the methods and means of warfare offered through treaties and conventions can play a wider ethical standard setting function across much of the international community. In the past, prohibitions of major categories of weapons have had relevance far beyond their formal terms and official signatories.

Those states taking part in the Dublin Conference have a historic opportunity to help foster strong standards for protecting civilians in armed conflict. The choices made as to exactly what kind of a prohibition is agreed will greatly affect how the spirit of the prohibition influences the practice of states both inside and outside the Oslo Process.

The terms of the treaty

The terms of the prohibition established through the Oslo Process cannot in isolation determine the eventual ethical standings given to cluster munitions internationally. Much will depend on how the prohibition is policed and promulgated in the future. Yet, the terms will act as basic resources for later actions and debates. A clear and comprehensive prohibition is more likely than a complicated and qualified one to contribute to the stigmatising of these weapons.⁷⁵ An important question for the Dublin Conference then is how the current draft treaty text fares in relation to matters of stigma.

In this regard, the ‘Draft Cluster Munitions Convention’ has a number of highly positive features. In a parallel manner to the BTWC and the CWC, the definition provides for exclusions in relation to a broad category. So Article 1 includes the provisions that

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;⁷⁶

Article 2 then elaborates key terms including that:

“Cluster munition” means a munition that is designed to disperse or release explosive sub-munitions, and includes those explosive sub-munitions. It does not mean the following:

- (a) a munition or sub-munition designed to dispense flares, smoke, pyrotechnics or chaff;
- (b) a munition or sub-munition designed to produce electrical or electronic effects;
- (c) ...

As such, the ‘Draft Cluster Munitions Convention’ text represents a categorical prohibition. Certain systems are currently excluded from the definition of a cluster munition, but no exceptions are made for particular types of cluster munitions.⁷⁷ In this regard, the text provides the sort of clear distinction needed for singling out this category of weapons from others. Coupled with broad prohibitions, this categorical approach can quite readily provide the basis for effective stigmatization.

Of course, much will depend on any further exclusions that may be introduced as part of Article 2(c) and any other such sub-articles. Should the current listing of two exclusions enlarge into twenty, for example, attempts to stigmatise cluster munitions as a category through reference to this convention would likely ring rather hollow.

The process of defining

In relation to stigma though perhaps just as important as *what* eventual definition is settled on is *how* the definition is being agreed. The current definition structure means that the burden of proof is on those that desire further exclusions. So, rather than starting

from a presumption of acceptability until definitely proven otherwise, the definition has a structure whereby items (i.e. weapons with submunitions) falling within the category of ‘cluster munitions’ are regarded as impermissible until proven otherwise.⁷⁸ That is, at this juncture in the Oslo Process they need to be ‘ruled in’ to the realm of the acceptable rather than ‘ruled out.’ This approach stands in sharp contrast to the manner in which clusters munitions have been treated within fora such as the CCW.

To elaborate, as formulated in Additional Protocol I (1977) of the Geneva Conventions, international humanitarian law (IHL) consists of rules such as the rule on superfluous injury and unnecessary suffering, the rule of distinction, the rule against indiscriminate attacks, the rule of proportionality, and the rule of feasible precautions.⁷⁹ The ‘weighing’ of military necessity against humanity, as set up in IHL, provides a rationalistic cost-benefit framework for evaluating weapons. Within this framework it is held that justification of a categorical ban requires convincing proof that the humanitarian impact will be judged ‘too great’ in any or all conflict circumstances. In past negotiations in the CCW as elsewhere,⁸⁰ even the hypothetical possibility that a certain weapon might be used in a manner appropriate under IHL has been enough to weaken attempts at establishing prohibitions.⁸¹

The current route for agreeing a definition within the Oslo Process challenges the case-by-case manner in which the rules of IHL are often applied to the evaluation of specific weapon types. Within the Vienna and Wellington meetings of the Oslo process, the definition structure has meant it has been for states to argue for what should be *retained* rather than what should be *withdrawn*. In other words, instead of requiring those concerned about humanitarian effects to make a negative case against these weapons, *the burden of proof has been with proponents to make a positive case.*

This reverse ‘prohibit until proven otherwise’ orientation is justified by the 40 or more years of concerns at the humanitarian effects of cluster munitions and the failure of state practice to rectify such concerns.⁸²

This orientation to risks (novel within arms control negotiations at least) underscores the depth of concern about cluster munitions and establishes a firm future ethical basis for treating them as exceptional compared to other force options.

The Dublin Conference

In the Dublin Conference, states should consider how modifications made to the current ‘Draft Cluster Munitions Convention’ would bear on the future standing of these weapons with the international community vis-à-vis their stigmatization. The current formulation of the text, as a categorical prohibition on cluster munitions, provides a clear message regarding their standing for states in the Oslo Process.

It follows that those interested in stigmatizing cluster munitions should attach significant importance to keeping the terms of the convention clear of complicating modifications that would weaken its potential moral force.

In this regard, whatever the short-term merits and drawbacks associated with introducing a transition period or qualifying language regarding the meaning of ‘assistance’ because of interoperability concerns, such measures threaten to undermine the broader stigmatizing potential of the convention. At least in the medium term, allowing states to retain weapons for a transition period that are formally considered unacceptable would significantly weaken the moral coherence of the treaty. Introducing qualifying language regarding assistance would open a space for the acceptability of cluster munitions (as defined by the convention) not currently in place for APMs.

One objection to such remarks is that without modifications for transition periods and interoperability certain countries might not sign up to the convention established at the Dublin conference. While the number and type of states agreeing to the convention will likely bear on its eventual force in international standard setting, this consideration also needs to be set against a central argument of this report: conventions can have a wide-ranging standard setting function that has implications far beyond their formal parties.

Those several countries currently part of the Oslo Process actively voicing concerns that ‘interoperability’ and ‘transition periods’ will affect whether they become signatories to the convention need to consider whether in practice they would contravene its provisions anyway. In almost any likely future conflict scenarios, the use of cluster munitions as prohibited through the Oslo Process would undermine claims for the legitimacy of that use of force even by a state not party to the treaty. This effect will be even stronger on any states that have participated in the process but then chosen not to become States Parties. The level of state, civil society and media scrutiny of any use of cluster munitions should ensure that the humanitarian impact of any such use is widely publicised and held up for evaluation. Thus, states are likely to find themselves constrained by outcomes of this process whether they are formally signed up to it or not.

In contrast, those several *dozens* of countries currently part of the Oslo Process voicing their active commitment to securing a comprehensive prohibition on cluster munitions have the opportunity to establish important humanitarian standards, both legal and normative, for the international community.

Notes

- 1 The protocol restricting the use of incendiary weapons, while not prohibiting the category of weapons has resulted in their use being significantly although not completely curtailed. By proscribing use of this weapon in areas of civilian concentration, this protocol can also be seen to have reinforced a norm against military attacks in populated areas.
- 2 General Pierre-Richard Kohn, head of operational planning for the International Security Assistance Force (ISAF) under NATO command, quoted by AFP, July 7, 2007: "...we are restraining ourselves, with the aim of sparing civilians ... That is why, for example, we do not use cluster bombs or other weapons which would allow us to clear an area." Additional information on this policy was recorded by Marc Garlasco, HRW Senior Military Analyst, interview with ISAF Judge Advocate General (JAG) Corps, ISAF Headquarters, Kabul, Afghanistan, July 23, 2007;
- 3 See, e.g., M. van Creveld, *Technology and War*, London: MacMillan, 1991; B. Rappert, *Controlling the Weapons of War: Politics, Persuasion and the Prohibition of Inhumanity* London: Routledge, 2007 and S. Croft, *Strategies of Arm Control*, Manchester: Manchester University Press, 1996, Chapter 1.
- 4 Its full name being the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.
- 5 Though the 1974 Conference of Government Experts at Lucerne and the 1976 Conference of Government Experts at Lugano both scrutinized these weapons. No formal mechanisms were put in place to control them. See Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law*, 22 Mich. J. Int'l L. 151-57
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- 12 Jeff Checkel 'The Constructivist Turn in International Relations Theory', *World Politics* January 50, no. 1 1998: 324-348.
- 13 Martha Finnemore, 'Constructing Norms of Humanitarian Intervention', in *The Culture of National Security*, ed. Peter Katzenstein (New York: Columbia University Press, 1996), 153-185 and Martha Finnemore, *National Interests and International Security* (Ithaca: NY: Cornell University Press, 1996).
- 14 Dana Eyre and Mark Schuman, 'Status, Norms and the Proliferation of Chemical Weapons', in *The Culture of National Security*, ed. Peter Katzenstein (New York: Columbia University Press, 1996).
- 15 Nina Tannenwald, 'The Nuclear Taboo', *International Organization* 53, no. 3 (1999), 436.
- 16 Theo Farrell and Terry Terriff, 'The Sources of Military Change', in *The Sources of Military Change*, eds. Theo Farrell and Terry Terriff (London: Lynne Rienner, 2002), 7.
- 17 Kenneth R. Rutherford. 'The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines' *World Politics* October 2000: 74-114 and Stuart Maslen and Richard Lloyd. 2004. *Mine Action After Diana: Progress in the Struggle Against Landmines* London: Pluto.
- 18 For quite some time as part of the CCW, member states debated whether restrictions should be placed on anti-personnel landmines because of their alleged indiscriminate effects. In 1983 various precautionary steps were required by member states to protect civilians against mines and booby-traps. In 1996, amid growing public concern about the destruction wrought by mines, further requirements were put in place stipulating standards for their detectability and longevity. Because these additional amendments to the Convention defined anti-personnel landmines as being 'primarily' designed to injure or kill, they did not prohibit mines that had not primarily been designed to inflict casualties (e.g., mines that 'primarily' marked out an area in order to restrict military movements). Moreover the unlimited deployment of so-called 'smart' deactivating mines was permissible. With such provisions, groups seeking to limit the placement of landmines would have to establish persuasive claims about their real purpose or their probable self-destruction rate (itself regarded as dependent on environmental conditions and placement practices).
- 19 See J. Goldblat, 'Anti-Personnel mines: From mere restrictions to a total ban', *Security Dialogue*, 1999, vol. 30, 9-23.
- 20 As in, e.g., Richard Price. 1998. "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" *International Organization* 52 (Summer) and Brinkert, Kerry and Kevin Hamilton. 2004. 'Clearing the Path to a Mine-Free World' In R. Matthew, B. McDonald, and K. Rutherford (eds.) *Landmines and Human Security* Albany: State University of New York Press.
- 21 Peter Herby and Kathleen Lawand. 2007. 'Establishing Norms' in *Banning Landmines* J Williams, S. Goose and M Wareham London: Rowman and Littlefield, 2008.
- 22 Final Declaration, Second Review Conference of the States Parties to the CCW, Geneva, doc. CCW/Conf.II/2, December 11-21, 2001, p. 11, para. 12. The Final Declaration of the 2006 Third Review Conference of the CCW was silent on this point.
- 23 Kenneth R. Rutherford. 2000. 'The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines' *World Politics*, October 2000: 109.
- 24 *Landmine Action, Civilian Footsteps*, London: Landmine Action, 2001.
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- 26 *Human Rights Watch, Human Rights Watch Position Paper on "Smart" (Self-Destructing) Landmines*, February 27 Washington, D.C.: Human Rights Watch, 2004.
- 27 See Legro, Jeffrey. *Cooperation under Fire*, Ithaca: Cornell University Press, 1995: Chapter 4.

- 28 See SIPRI. 1971 *The Problem of Chemical Biological Warfare* vol 4 (Stockholm: Almqvist and Wiksell)
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- 32 See Legro, Jeffrey. *Cooperation under Fire* Ithaca: Cornell University Press, 1995: Chapter 4.
- 33 Richard Price, *The Chemical Weapons Taboo* (Ithaca, NY: Cornell University Press, 1997).
- 34 Price, R. and N. Tannenwald. 1996. 'Norms and Deterrence' In Katzenstein, P. (ed.) *The culture of national security* New York: Columbia University Press
- 35 www.state.gov/t/ac/trt/4784.htm
- 36 Dando, M. *A New Form of Warfare*, Chapter 6.
- 37 While the US signed the Geneva Protocol in 1925, it only ratified it on 10 April 1975.
- 38 See Goldblat, J. 'Are Tear Gas and Herbicides Permitted Weapons?' *New Scientist* April (1970), 13-16.
- 39 Parks, H. 'Classification of Chemical and Biological Warfare' *University of Toledo Law Review* 13 (1982), 1145-72.
- 40 For a historical analysis of debates about the abhorrence of chemical weapons see R. Price, *The Chemical Weapons Taboo*, Ithaca: Cornell University Press, 1997.
- 41 For an in-depth discussion of these issues see Alan Pearson, Marie Chevrier and Mark Wheelis. (eds) 2007. *Incapacitating Biochemical Weapons* Landham, MD: Lexington Press.
- 42 Brian Balmer. 'Killing "Without The Distressing Preliminaries": Scientists' Defence of The British Biological Warfare Programme' *Minerva* 40 2002: 57-75.
- 43 J.P. Zanders, 'International norms against chemical and biological warfare', *Journal of Conflict & Security Law*, 2003, vol. 8(2), 391-410.
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- 46 *ibid.*
- 47 Though see Richard Falk, 'The Challenges of Biological Weaponry', in *Biological Warfare and Disarmament* ed Susan Wright London: Rowman & Littlefield, 2001 for critical analysis of the geopolitics of the BTWC.
- 48 See Rappert, Brian. *Controlling the Weapons of War: Politics, Persuasion and the Prohibition of Inhumanity* London: Routledge, 2006: Chapter 6.
- 49 The CWC, however, does contain three schedules of chemicals and precursors that identifies those which are subject to verification measures.
- 50 See Rappert, Brian. 2006. *Controlling the Weapons of War: Politics, Persuasion and the Prohibition of Inhumanity* London: Routledge: Chapter 6.
- 51 For recent and past arguments to this effect, see M. Hanson, 'Nuclear weapons as obstacles to international security', *International Relations*, 2002, vol. 16(3); R. Malcolmson, *Nuclear Fallacies*, Kingston: McGill-Queen's University 1995; J. Rotbalt (ed.), *Nuclear weapons: The road to zero*, Basingstoke: Macmillan, 1998.
- 52 N. Tannenwald, 'The nuclear taboo', *International Organization*, 1999, vol. 53, 433-468.
- 53 H. Stimson, 'The decision to use the bomb', *Harper's*, February 1947, 98 in Tannenwald, 'The Nuclear Taboo', 443.
- 54 P. Feaver, *Guarding the Guardians*, Ithaca, NY: Cornell University Press, 1992, 125 in T. Farrell and H. Lambert, 'Courting controversy', *Review of International Studies*, 2001, vol. 27, 315.
- 55 Farrell and Lambert, 'Courting controversy', 319.
- 56 J. Gaddi, *The Long Peace*, Oxford: Oxford University Press, 1983.
- 57 T. Schelling, *The Strategy of Conflict*, Cambridge, MA: Harvard University Press, 1960.
- 58 In the 0.01 kiloton – 1 kiloton range rather than the typical several hundred kilotons to several megaton range of current warheads.
- 59 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*.
- 60 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*.
- 61 This overall conditional and contextual approach was not shared by all the judges, three of who argued a sweeping prohibition could be supported. In a lengthy dissenting opinion, for instance, Judge Abdul Koroma argued 'In my considered opinion, the unlawfulness of the use of nuclear weapons is not predicated on the circumstances in which the use takes place, but rather on the unique and established characteristics of those weapons which under any circumstance would violate international law by their use' (see International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons – Dissenting Opinion of Judge Koroma*, Available HTTP: www.cornnet.nl/~akmalten/ukoroma.html) Whereas in the ICJ opinion nuclear weapons were categorized in a tension-ridden manner of being simultaneously unique and not unique, in this dissenting opinion there was no disputing they were 'not just another kind of weapon, they are considered the absolute weapon and are far more pervasive in terms of their destructive effects than any conventional weapon.' As he argued, the qualifications made in the ICJ opinion meant decisions about the legality of nuclear weapons were ultimately left to individual states, a situation that was both practically dangerous and 'legally reprehensible'.
- 62 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons – Dissenting Opinion of Judge Koroma*, Available HTTP: www.cornnet.nl/~akmalten/ukoroma.html, article 36.
- 63 This in the absence of any specific prohibitions on nuclear weapons per se.

- 64 See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Article 95 and also 94.
- 65 Tannenwald, 'The Nuclear Taboo', 463.
- 66 Harper, 'A call for a definition of method of warfare in relation to the Chemical Weapons Convention'.
- 67 See Person, A., M. Chevrier and Mark Wheelis. *Incapacitating Biochemical Agents* Plymouth: Lexington Books, 2007.
- 68 British Medical Association. *Drugs as Weapons* London: BMA, 2007.
- 69 See R. Moyes, forthcoming, *Explosive violence*, Landmine Action, London.
- 70 J.P. Zanders, 'International norms against chemical and biological warfare', *Journal of Conflict & Security Law*, 2003, vol. 8(2), 391-410.
- 71 Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* Ithaca, NY: Cornell University Press, 1998: 34.
- 72 Paul Kowert and Jeffrey Legro, 'Norms, Identity and their Limits', in *The Culture of National Security*, ed. Peter Katzenstein (New York: Columbia University Press, 1996).
- 73 See claims to this effects as well in Finnemore and Sikkink, 'International Norms Dynamics and Political Change' and Vaughn Shannon, 'Norms are What States Make of Them' *International Studies Quarterly* 44 (2000), 293-316.
- 74 Yet, in keeping with the rejection of positivist totalizing explanations, such conclusions are not treated as law-like predictions. See Price and Reus-Smit, 'Dangerous Liaisons?.'
- 75 On this matter see Hubert, Don. *The Landmine Ban*. Occasional Paper #42 Providence, RI: The Institute for International Studies, 2000.
- 76 www.clustermunitionsdublin.ie/documents.asp
- 77 As elaborated in *Remarks by Thomas Nash, Coordinator, Cluster Munition Coalition Geneva Forum Meeting of African States on Cluster Munitions*, 25 March 2008
- 78 For a statement of this logic see Brian Rappert and Richard Moyes. *Failure to Protect*. London: Landmine Action, 2006.
- 79 See ICRC, *Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that may become Explosive Remnants of War*. Group of Government Experts of States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects CCW/GGE/XI/WG.1/WP.7 28 July 2005.
- 80 As in the deliberations of the International Court of Justice regarding nuclear weapons.
- 81 See B. Rappert, *Controlling the Weapons of War: Politics, Persuasion and the Prohibition of Inhumanity* London: Routledge, 2007.
- 82 As documented in, for instance, Thomas Nash. *Foreseeable Harm*. London: Landmine Action, 2006; Brian Rappert and Richard Moyes. *Failure to Protect*. London: Landmine Action, 2006; Colin King, Ove Dullum, and Grethe Østern. *M85: A Reliability Analysis*. Oslo: Norwegian People's Aid, 2007.

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