

Negotiating the Convention on Cluster Munitions: Lessons Learnt

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The Convention on Cluster Munitions (“CCM”) is a remarkable achievement on disarmament, which is a particularly contentious area of international law. It established new legal norms on the production, stockpiling, and use of cluster munitions (“CMs”), and is admirably comprehensive in terms of protection, obliging states parties to provide CM victims with medical care, rehabilitation and psychological support.^[1]

This paper begins with a brief introduction to CMs. It then analyses certain features of the CCM’s negotiation process (“the Oslo Process”), and argues that they were instrumental to its successful conclusion. They are: (1) bringing non-state actors to the negotiating table; (2) deliberately reframing key issues; (3) the influence of external events leading up to the negotiations; and (4) the fact that negotiations were serial. These factors interacted with and reinforced each other; however, to facilitate the analysis, they are discussed individually. This paper concludes with a reflection of how the Oslo Process may act as a precedent for future disarmament negotiations.

1. Cluster Munitions: A Brief Introduction

CMs are generally defined as air- or ground-launched canisters that contain up to 650 submunitions (‘bomblets’).[2] They are designed to affect a greater surface area than many other conventional weapons by dispersing the bomblets over hundreds of metres, and are often created to penetrate a range of targets such as armour, materiel and personnel.[3] This renders CMs highly attractive as weapons.

However, these same features mark CMs as weapons which tend to violate international humanitarian law. Concerns about the hazards posed to civilians both at time of use and post-conflict were first raised in the 1960s.[4] Even as CM technology improved, many newer CM models continued failing to explode on impact as programmed.[5] It is unsurprising, therefore, that an international movement for a complete ban on CMs emerged.

Nevertheless, the CCM certainly could not have been won solely on the strength of advocacy. Part III analyses other factors which contributed to the CCM’s successful negotiation.

2. Factors Contributing to the Successful Negotiation of CCM

A. Parties at the Negotiating Table: The Inclusion of Non-State Actors

The strength of any international negotiation depends heavily on the parties involved.[6] Excluding certain actors risks weakening the outcome’s credibility and effectiveness, as key concerns may not have been considered and/or provided for. Involving parties affected by the subject matter of the negotiation is clearly vital; *a fortiori* when complex issues like disarmament are involved.

Both state and non-state actors (“NSAs”) were involved throughout the CCM negotiations. The former included

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major CM creators, stockpilers, and users; the latter, CM victims, international organisations like the International Committee of the Red Cross (“ICRC”), legal and military experts, and advocacy organisations. Bringing NSAs to the negotiating table was considered unorthodox then, given that the intention was to bind *states*. Nonetheless, this had numerous beneficial effects on the negotiation process. For one, even though certain tensions were unavoidable, the broad partnership created between the parties increased the pool of resources, data, and knowledge vital to enhancing understanding and reaching a consensus on the complex issues involved.[7] Disseminating reliable information on CMs was hence made possible, and this turned out to be crucial to obtaining the support of some of the largest stockpilers.[8]

Another benefit was that the CCM’s negotiation process was, and was perceived as being, genuinely representative, transparent, and credible throughout.[9] This helped to build momentum and support for the related negotiations (both peripheral and constituent) and the final agreement.

Cluster Munition Victims

One particularly important group of participants were the victims of CMs. Not only did their presence and testimonies at the conferences keep the focus squarely on humanitarian concerns as desired, their accounts of their experiences also helped to situate and reinforce data on the actual military utility of CMs. Some of the largest users and producers of CMs had strongly resisted existing data that contradicted their insistence on the legitimacy of CMs under international humanitarian law. However, by representing the impact of CMs on civilians, the victims presented concrete empirical evidence to the contrary, and served as a powerful visual reminder of the sanctity of the foundational principles of proportionality and discrimination in international humanitarian law. This in turn prompted detailed re-examination of the position taken by CM manufacturers and possessors as to the legitimacy and acceptability of CMs – and the eventual defection of major players like France and the United Kingdom (“U.K.”).[10]

The role of the CM victims is extremely intriguing – one could argue that their mere presence added another ‘conversation’ to the negotiating table.[11] The unspoken message they sent exerted a subtle psychological pressure on negotiating parties, and although this effect cannot be measured, it undeniably influenced the negotiation process.

Civil Society Organisations (“CSOs”)

Several CSOs involved in the CCM negotiations had actually worked together before on the Ottawa Process (a groundbreaking humanitarian treaty on landmines concluded in December 1997). The existing positive relationships and shared interests carried over into the Oslo Process, and encouraged coalition-building from the outset. Notably, these alliances were based on member similarity and relationships, which rendered them more stable, focused, and cohesive than the more common issue-based coalitions found in multilateral negotiations.[12] Accordingly, as their numbers grew, parties prioritising humanitarian issues enjoyed a steady increase in their influence over the negotiation process.[13] This tilted the power dynamics in their favour, notwithstanding the fact that some international superpowers were very resistant to the proposal to ban CMs. For example, coordinated lobbying by the Cluster Munitions Coalition (“CMC”) had a key role in wearing down the U.K.’s resistance to the CCM.[14]

B. Reframing

Reframing is a powerful tool for overcoming impasses in negotiations.[15] Prior to the Oslo Conference, CMs were treated at the international level as questions of arms regulation. Talks were framed from a military perspective, and the question of whether CMs should be permitted was answered with reference to their technical effectiveness and precision. An impasse naturally resulted from such a starting point, as there was too much uncertainty over the reliability of various CM models once deployed.[16] Moreover, approaching talks from a military angle meant that parties were forced by concerns about their national defence into a competitive bargaining position from the outset.[17] For instance, Russia refused to destroy her stockpiles because other states were intent on retaining a certain amount of CMs.[18]

However, during the CCM negotiations, the permissibility of CMs was reframed in humanitarian terms. The opening

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call itself already set the tone of the negotiations, with the Chairperson emphasising that the approach to be taken was a humanitarian one.[19] The humanitarian concepts, legal principles, and terminology used directed the participants' attention to the *impact* of CMs on civilians during and after armed conflicts and on the proven human cost of using CMs, rather than their military utility. This reframing deprioritised military concerns, allowing the positional bargaining to give way to a more cooperative discourse. Hence, military-based stalemates were circumvented even as military concerns remained near the fore. This consequently allowed the inclusion of articles which would previously not even have been considered, and which have been acknowledged as among the strongest in humanitarian treaties – e.g. Article 5, which obliges states parties to provide CM victims with medical care, rehabilitation, and psychological support.

Another beneficial effect of reframing was that baselines and objectives were clearly identified. This was particularly important given that the nature of the subject-matter of the negotiations was such that if the *humanitarian* priorities and objectives were not clearly delineated, the language of the negotiations would slide into military utilitarianism. Clearly, deliberately reframing the question of CMs' legitimacy was fundamental to the Oslo Process' success.

C. External Events Leading up to the 2007 Oslo Conference

The influence of events external to international negotiations is often under-discussed in analyses of international negotiations.[20] Yet the context surrounding a negotiation[21] will often exert significant, if subtle, influence on the negotiation process and outcome.[22] This “linkage theory” is highly pertinent to international negotiations concerning multiple issues and parties.[23] Links can form between external events and the subject matter of negotiations, and affect the parties and their stances. Here, several events leading up to the 2007 Oslo Conference can be directly linked to the initiation of the CCM negotiations and appear to have shaped the positions taken by the parties involved. Here, only key events are analysed.

The Ottawa Process

Under the linkage theory, positively-linked negotiations “can motivate or inspire another negotiation to commence and, once begun, can directly influence [the other] negotiation process...so that opportunity to achieve closure increases”.[24] This appears to hold true, considering the impact of the Ottawa Process on the Oslo Process. The Ottawa Process was a series of negotiations which culminated in December 1997 with the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction (“the Mine Ban Treaty”). Arguably, it laid the foundation for the CCM negotiations by serving as a model for the latter in many respects. It established informal trust networks between major civil society organizations which lasted beyond the conclusion of the Ottawa Process, as discussed above. It also provided those involved in the CM talks with a ‘roadmap’ on campaigning and media advocacy.[25] Finally, the text of the Mine Ban Treaty served as a valuable reference model for parties negotiating the CCM's text and scope, given the similarity of the issues and concerns involved.[26] Hence, it is arguable that the progression and success of the Ottawa Process had a substantial influence on the CCM negotiations.

A Series of Armed Conflicts

A series of armed conflicts in close succession also created a sense of urgency amongst a significant proportion of the international community regarding the legitimacy of CMs. The devastating civilian impact was evident in each conflict, clearly highlighting the indiscriminacy and unreliability of even the newer CM models.

While CMs had been used since World War 2, sustained concerns were raised about their legitimacy only from the 1990s. The trigger was the 1999 internal conflict between the Kosovo Liberation Army and the Yugoslav state. NATO launched CMs intending to halt ethnic cleansing carried out against Kosovar Albanians. However, this military objective failed. The inherent indiscriminacy of CMs was underscored: at least 75 civilian deaths were attributed to the CMs' launch,[27] and later analyses concluded that NATO's CMs caused approximately 152 post-conflict civilian deaths by failing to explode as programmed.[28] It was genuinely tragic, considering that these casualties were persons NATO had intended to save.

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Next was the 2003 Iraq conflict, which confirmed suspicions that submunition failure rates in operational use were in fact higher than the failure rates claimed by CM manufacturers and the militaries deploying them.[29] Finally, the use of massive quantities of CMs in the 2006 Israel-Lebanon conflict and the subsequent creation of *de facto* anti-personnel landmines further reinforced the hazards CMs posed to civilians.

Ironically, the destructive impact of the three conflicts had a beneficial effect insofar as it created a sense of shock and outrage in the international arena. They “raised the stakes and the possibilities”, spurring humanitarian advocates to push for sustained and better-coordinated work on banning CMs.[30] The 2003 Iraq conflict, for instance, provided the impetus to form the CMC,[31] a coalition which eventually spearheaded the CCM negotiations.

The 2003 Review Conference

The Oslo Process also arose in response to the disappointing outcome of the third review conference on the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (“the CCW”). In November 2003, states party to the CCW agreed to annex Protocol V, a legal instrument concerning explosive remnants of war, to the CCW. While Protocol V contained general measures for reducing the post-conflict impact of all forms of unexploded ordnance on civilians, it lacked provisions dealing specifically with CMs.[32] This was disappointing, given that CMs had by then been recognized as a class of weapons which posed an especially significant post-conflict hazard. However, this event also served to unify the fortnight-old CMC: the CMC made its debut statement at the November 2003 CCW meeting, urging states to agree on a global moratorium on the use, production, and trade of CMs until their humanitarian problems were successfully addressed.[33] The inadequacy of Protocol V also led certain states – Norway, in particular – to express concrete support for the CMC’s call. Clearly, this external event played a key role in initiating and gathering support for the later CCM negotiations.

D. Multiple Smaller Negotiations

The CCM was the culmination of a series of negotiations, collectively known as the Oslo Process. Breaking up the official negotiation process arguably facilitated deeper discussion and overall progress, as individual issues could be addressed systematically. For example, the opening Oslo Conference identified the broad humanitarian goals and desired overall scope of the treaty to be negotiated, while the Lima Conference which followed immediately after discussed specific foundational issues like definitions of CMs and the nature of victim assistance.[34]

Another benefit of staggering negotiations was that states could commit at their own time. The fourth negotiation, the Wellington Conference, proved the success of this technique: previously-resistant states like France, the U.K., and Germany expressly declared that they would formally commit to all subsequent CCM negotiations and the overall objective of prohibiting the use, stockpiling, production, and transfer of CMs because they were “[e]ncouraged by the work of...the previous Conferences in Vienna, Lima and Oslo”. [35]

Peripheral negotiations also contributed to the Oslo Process’ success, the All-Africa Regional Conference on Cluster Munitions in Livingstone being a noteworthy example. It convened expressly for purposes of “sound[ing] Africa’s support for a...comprehensive ban of [CMs]”. [36] Viewed in light of the fact that South Africa had the capacity to manufacture CMs, this announcement lent further momentum to the formal CCM negotiations. African states’ support for the CCM negotiations would later prove valuable when negotiating provisions on stockpile destruction, given the continent’s firsthand experience as a “dumping ground for weapons” [37] and in clearing up after wars. [38] Evidently, having a series of connected negotiations helped pave a smoother path to the signing of the CCM.

3. Conclusion

The Oslo Process has potential as a precedent for future international negotiations on disarmament topics, offering a feasible alternative to the UN-governed CCW forum. The CCM succeeded where the CCW failed because it consciously moved *away* from the negotiation model dominating international negotiations at the time. While the end result has some weaknesses, [39] this does not diminish the CCM’s significance and strength. Hence, future

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disarmament negotiations should consider employing the following negotiation strategies: deliberately reframing the subject-matter in humanitarian terms; engaging all affected parties; capitalizing on timing; and breaking up negotiations into a series of smaller agreements. Though not a guarantee of success, these techniques can facilitate mutually-beneficial negotiations on contentious issues.

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[1] Convention on Cluster Munitions, art.5 (30 May 2008).

[2] Dube, "Negotiating the Convention on Cluster Munitions: The role of African states" (2009) ISS Paper 187, p.1.

[3] Background paper to the Oslo Conference on Cluster Munitions, *Addressing the humanitarian impacts of cluster munitions: Key Issues* (22-23 February 2007).

[4] Prokosch, *The Technology of Killing: A Military and Political History of Antipersonnel Weapons* (Zed Books, 1995).

[5] See <http://www.icrc.org/eng/resources/documents/legal-fact-sheet/cluster-munitions-factsheet-230710.htm> (accessed 27 Feb 2013).

[6] See generally, Borrie and Randin, "Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action" UNIDIR (2005).

[7] "Protecting Civilians through the Convention on Cluster Munitions", Human Rights Watch, <<http://www.hrw.org/reports/2010/11/22/meeting-challenge>> (accessed 17 March 2013).

[8] Borrie and Thornton, "The Value of Diversity in Multilateral Disarmament Work" UNIDIR (2008).

[9] "Learn, Adapt, Succeed: Potential lessons from the Ottawa and Oslo processes for other disarmament and arms control challenges", The Geneva Forum, Disarmament Insight (19-20 November 2008), p.4.

[10] *Supra* n7.

[11] Vuckovic, a survivor of an encounter with an exploded submunition, pointed out, "[W]e Ban Advocates have a language that really reinforces our experiences and which is able to reach everyone – everyone can really understand what we are talking about." Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (UNDIR, 2009), p.4.

[12] Sened, "A Model of Coalition Formation: Theory and Evidence" (1996) 58(2) *Journal of Politics* 350; Cullen, Johnson, and Sakano, "Success through Commitment and Trust: The Soft Side of Strategic Alliance Management" (2000) 35(3) *Journal of World Business* 223; Crump, "Negotiation Process and Negotiation Context" (2011) 16 *International Negotiation* 197, p.216.

[13] *Supra* n7.

[14] Borrie, "How the Cluster Mmunition Ban Was Won: Oslo Treaty Negotiations conclude in Dublin" (August 2008) <<http://www.acronym.org.uk/dd/dd88/88jb.htm>> (accessed 18 March 2013).

[15] Putnam and Holmer, "Framing, Reframing, and Issue Development" (1992) *Communication and Negotiation* 128.

[16] Even though technical reliability is measurable under controlled environments, the actual effectiveness of individual component submunitions varies according to terrain and weather: Opening Statement by Støre, Minister of

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Foreign Affairs (Norway) (22 February 2007) <http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/speeches_foreign/2007/oslo-conference-on-cluster-munitions-222.html?id=454595> (accessed 20 February 2013), para.3.

[17] Mathews, "The 1980 Convention on Certain Conventional Weapons" (2001) *International Review of the Red Cross* 991, p.995; *supra* n9, p.5.

[18] *Supra* n7.

[19] *Supra* n16.

[20] Crump, "Negotiation Process and Negotiation Context" (2011) 16 *International Negotiation* 197, p.198.

[21] *Id*, pp.197-198.

[22] Putnam, "Diplomacy and Domestic Politics: The Logic of Two-level Games", (1988) 42(3) *International Organization* 427, p.434.

[23] John Odell observes that issue linkage is found in every negotiation except those that consider only a single issue: Odell, *Negotiating the World Economy* (Cornell University Press, 2000), p.37.

[24] *Supra* n20, p.212.

[25] *Supra* n14.

[26] Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (UNDIR, 2009), pp.312-313.

[27] Human Rights Watch, *Civilian Deaths in the NATO Air Campaign* (February 2000), p.30.

[28] Moyes, *Cluster Munitions in Kosovo: Analysis of Use, Contamination and Casualties* (Landmine Action, 2007), p.3.

[29] Mines Action Canada, *Explosive Remnants of War and Mines Other Than Anti-Personnel Mines: Global Survey 2003-2004* (Landmine Action, 2005), pp.86-7.

[30] *Supra* n266, p.51.

[31] Goose, "Cluster Munitions in the Crosshairs: In pursuit of a prohibition", in *Banning Landmines: Disarmament, Citizen Diplomacy and Human Security* (Lanham, Rowman & Littlefield, 2008), p.223.

[32] See text of Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003 <<http://www.icrc.org/ihl.nsf/FULL/610?OpenDocument>> (accessed 14 March 2013).

[33] *Supra* n311, p.236, note 14.

[34] Cluster Munition Coalition, Lima Conference - Peru, 23-25 May 2007 <<http://www.stopclustermunitions.org/calendar/?id=118>> (accessed 20 March 2013).

[35] Wellington Conference on Cluster Munitions, Declaration, 18-22 February 2008, <www.mfat.govt.nz/clustermunitionswellington/conference-documents/Wellington-declaration-final.pdf> (accessed 20 March 2013).

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[36] Minister Kabinga Pande, Opening statement by Zambia, Livingstone Conference on Cluster Munitions, 31 March–1 April 2008 (“LVC”).

[37] Sylwander, General statement delivered by UNICEF at the LVC.

[38] Mtonga, General Statement delivered by CMC at the LVC.

[39] Such as the interoperability provision, criticized by the CMC: *supra* n7.

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