UNDERSTANDING INTERNATIONAL EFFORTS TO ADDRESS THE HUMANITARIAN IMPACTS OF CLUSTER MUNITIONS, 2003-08

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ABSTRACT: This thesis examines the evolution of international humanitarian concern culminating in adoption of a Convention on Cluster Munitions (CCM) banning these weapons in May 2008. It is based on systematic analysis of official documents, extensive interviews, participant-observation, and several bodies of international relations (IR) theory.

Part I explains the research methodology and discusses the theoretical context for the thesis. It is argued that several core assumptions of rationalist-materialist approaches to IR theory impede understanding of the CCM's emergence, and thus the thesis adopts an interpretivist framework. The four chapters of Part II analyse international efforts on cluster munitions including prior, failed attempts to restrict cluster munitions, the emergence of an international campaign from 2003, ensuing activity involving states, international organisations and civil society, and the CCM's eventual negotiation involving more than 100 states.

Part III marries this empirical account to theoretical analysis of four thesis propositions. It is concluded that non-state actor-engendered processes of evidence collection and analysis, learning and frame alignment were central to the Oslo process's emergence. The Oslo Declaration's particular humanitarian framing (to ban cluster munitions causing unacceptable harm to civilians) and the structure of the subsequent "define-and-ban" discourse permitted convergence between states over prohibiting these weapons. Nevertheless, they contain implications for other international efforts aimed at controlling means of armed violence.

CONTENTS

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LIST OF ACRONYMS

ANZ CMC	Aotearoa-New Zealand Cluster Munition Coalition
AFSC	American Friends Service Committee
AP mine	anti-personnel mine
AP II	Amended Protocol II (1996) of the CCW (on mines and booby-traps)
BAC	battle area clearance
CCM	Convention on Cluster Munitions (2008)
CCW	Convention on Certain Conventional Weapons (1980)
CD	Conference on Disarmament
CMC	Cluster Munition Coalition
D-N	deductive-nomological
DFID	(UK) Department for International Development
DPICM	Dual-Purpose Improved Conventional Munition
DPKO	UN Department of Peacekeeping Operations
ERW	explosive remnants of war
EU	European Union
FCO	(UK) Foreign and Commonwealth Office
FFI	Norwegian Defence Research Establishment
GGE	Group of Governmental Experts
GICHD	Geneva International Centre for Humanitarian Demining
HI	Handicap International
HRW	Human Rights Watch
IACG-MA	UN Inter-Agency Coordination Group for Mine Action
IASC	UN Inter-Agency Standing Committee
ICBL	International Campaign to Ban Landmines
ICF	Informed Consent Form

ICRC	International Committee of the Red Cross
IDF	Israel Defence Forces
IHL	international humanitarian law
IMAS	International Mine Action Standard
IO	international organisation
IR	international relations
MAC	Mines Action Canada
MACC	Mine Action Coordination Centre
MAG	Mines Advisory Group
MBT	Anti-personnel Mine Ban Convention (Mine Ban Treaty) (1997)
MCC	Mennonite Central Committee
MFA	Ministry of Foreign Affairs
MLRS	Multiple Launch Rocket System
MOTAPM	mines other than anti-personnel mines
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
NPA	Norwegian People's Aid
NRK	Norwegian Broadcasting Corporation
OCHA	UN Office for the Coordination of Humanitarian Affairs
ODA	UN Office for Disarmament Affairs
SIPRI	Stockholm International Peace Research Institute
TAN	transnational advocacy network
TCS	transnational civil society
UN	United Nations
UNDP	UN Development Programme
UNHCR	Office of the UN High Commissioner for Refugees

UNICEF UN Children's Fund

UNIDIR UN Institute for Disarmament Research

UNIFIL UN Interim Force in Lebanon

UNMACC SL UN Mine Action Coordination Centre, Southern Lebanon

UNMAS UN Mine Action Service

UK United Kingdom

US United States of America

UXO unexploded ordnance

VVAF Vietnam Veterans of America Foundation

CHAPTER 1: INTRODUCTION TO THE THESIS

1. Introduction

This thesis examines a contemporary historical case in which momentum developed toward a new international agreement—a treaty banning cluster munitions—after decades of diplomatic inaction, and in the face of opposition from powerful countries including the United States (US). As such, international efforts leading to agreement on the Convention on Cluster Munitions (CCM) constitute an empirical test of claims made by rival theories of international relations (IR) about how cooperation emerges in world politics, and associated predictions for success or failure in devising new regimes in view of the structural distribution of material forms of power within the international system. As a case, it also raises questions about what power "is" in this context as opposed to what is often taught in IR. Moreover, the thesis investigates which kinds of actors can be relevant in shaping the intersubjective space in which binding understandings are reached between states, and how that "framing" occurs.

On 30 May 2008, 107 countries adopted an international treaty on cluster munitions at the conclusion of negotiations in Dublin, Ireland. The new CCM defined cluster munitions as a category and banned them, as well as providing for a comprehensive range of other measures to address the hazards these weapons pose to civilians. Adoption of the treaty stemmed from a 15-month process in which a consortium of governments, international organisations (IOs) and civil society actors sought agreement to "prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians" (2007). Such a humanitarian framing differed from that of the usual forum for considering such issues, the 1980 UN

Convention on Certain Conventional Weapons (CCW), in which several major military powers made their opposition to a cluster munition ban of any kind abundantly clear.

Longstanding humanitarian concerns about cluster munitions had been brushed off or ignored for decades in the CCW and its predecessor conferences (Prokosch, 1995b). The CCW also failed to agree to negotiate any rules to restrict the weapon following the 2006 conflict in Southern Lebanon, in which all of the kinds of hazard to civilians that cluster munitions pose were starkly evident (7 November, 2006). Soon afterward, the Norwegian government—encouraged by IOs and civil society—instigated a diplomatic process toward a humanitarian agreement on cluster munitions outside the CCW. Among the effects of this Oslo process, it prompted those CCW member states least enthusiastic for cluster munition rules to permit work there. Nevertheless, the CCW's successive annual mandates (CCW, 2006b , CCW, 2007b) were much weaker than the February 2007 Oslo Declaration's aims.

The emergence of two global multilateral initiatives working simultaneously to restrict the same weapon system is highly unusual in the annals of modern international security negotiations. Moreover, the Oslo initiative flew in the face of the preferences of the world's most powerful states. Why, after decades of inaction, did these efforts emerge at all? And how is the CCM's eventual achievement to be understood?

In rationalist accounts about how the international "system" is structured, the CCM's emergence is of little significance as it represents an exception or blip rather than reflecting a novel pattern of outcomes. However, reflectivist scholars such as social constructivists and critical theorists have criticised realist, liberal and other rationalist theoretical accounts of how the international system functions for failing to account for

ideational factors, the influence of norms on state behaviour, or the significance of non-state actors in change. Constructivists have often compared the Oslo initiative with the Ottawa process a decade earlier to achieve the 1997 Anti-Personnel Mine Ban Convention, also known as the Mine Ban Treaty (MBT). Notably, both initiatives resulted in new multilateral agreements developed outside standing UN structures, which had become cumbersome and even served to obstruct growing stigma against the weapons concerned being translated into practical global action to enhance civilian protection. It follows that careful examination of the emergence and course of the international campaign against cluster munitions between 2003 and 2008 provides one way to test the varying theoretical claims of these perspectives.

2. Objectives of the thesis

This thesis aims to provide a grounded understanding of how and why the CCM came about, and in what ways the nature of international efforts to address the humanitarian effects of cluster munitions between 2003 and 2008 reflects or informs prevailing rationalist-materialist approaches to regime formation in IR. Methodologically, its goal is to provide a sufficient understanding in empirical terms of the conditions and factors resulting in the CCM's successful negotiation. The thesis draws extensively on primary historical evidence including documentary data and interviews with eyewitnesses in order to construct its analytical narrative.

3. Originality of the thesis

This thesis combines a wide range of different sources to describe and analyse the conditions and factors involved in the CCM's achievement. Such detailed analysis of other arms control processes has, in contrast, often taken many years to emerge, for

instance on the regimes banning chemical weapons (Price, 1997) and the comprehensive nuclear test ban treaty (Johnson, 2009), if it has emerged at all. In 2009, the United Nations (UN) published a study about international work to address the humanitarian impacts of cluster munitions (Borrie, 2009), and its research contributes to the descriptive narrative elements of this thesis. However, the two works differ in significant respects.

One way in which this thesis differs from *Unacceptable Harm* is that the latter was constructed as a history, and does not engage with established IR theory. In contrast, this thesis uses the available evidence to critically explore certain assumptions and claims in IR. Such analysis is of more than academic interest. The international system is undergoing continual change, and the growing roles of non-state influence on global agenda setting and normative development from "epistemic communities" of experts (Haas, 1992) or transnational advocacy networks (Keck and Sikkink, 1998) is widely noted. Understanding the dynamics at work in the shaping of recent international policy discourse has possible ramifications for addressing a range of contemporary international challenges.

During the research, I constructed a narrative based on my own notes, by triangulating the many interviews I carried out with people related to international efforts on cluster munitions, and by trawling hundreds of documents. This way, a detailed and relatively reliable picture of the Oslo process could be built up. It was, however, necessary to be more tentative with respect to interpreting the motives, statements and actions of a major state—the US—that, for various reasons, had a bearing on the Oslo process's fate despite shunning the initiative.

Few people had any inkling that the Wikileaks organisation would soon disclose tens of thousands of classified US State Department diplomatic cables (Keller, 2011). Of these, only a few dozen are strictly relevant to this thesis. Contextualised within the overall body of evidence about international efforts on cluster munitions in this thesis, these cables illuminate what policymakers in the US and its closest allies were thinking, saying and doing behind closed doors during the Oslo process. Beyond historical interest, this has theoretical implications because—as will become clear—the CCM's emergence was not only about frame alignment within the policy discourse about cluster munitions, it also concerned actively competing discourses. The Wikileaks cables lend weight to the case that the US manufactured military interoperability as an issue to stymie momentum amongst its allies toward a cluster munition ban treaty.

4. How the thesis was researched

Data collection for this thesis drew extensively from both published and unpublished documentation on cluster munitions including in the CCW and the Oslo process. It also drew on the internal records of some actors participating in these efforts such as the Cluster Munition Coalition (CMC), the International Committee of the Red Cross (ICRC), the UN and certain states, as well as documents from Wikileaks mentioned above. IR theoretical literature, where germane, was surveyed, including on the emergence of the MBT and the CCW. Nearly 90 semi-structured and unstructured research interviews were conducted with a sample of respondents relevant to international efforts on cluster munitions, most over a two-year period (see Appendices I and II). As noted above, my notes, audio recordings and other records from

participation in the CCW and Oslo processes and on cluster munition contamination in the field also contributed to the thesis.

Although the first state-led attempts to prohibit cluster munitions internationally occurred as long ago as 1974, this thesis is mainly concerned with the 2003-08 period. It was only in November 2003 that an international consortium of civil society actors—the CMC—was formed to campaign against cluster munitions. During the 2004-06 period, the attention of some states and IOs shifted toward cluster munitions, and those actors began to change how they regarded the weapon. Instigated by Norway, from February 2007 a large group of states participated in an initiative outside the CCW to develop humanitarian restrictions on cluster munitions. In May 2008 the Oslo process culminated in the CCM—the endpoint for the thesis—and the treaty was opened for state signature in Oslo that December.[1] (Attempts in the CCW to negotiate less ambitious cluster munition restrictions continued, only to end without result in late 2011 when more than 50 states—most of them CCM members—indicated they would not join consensus on the draft of a new agreement they felt would undermine the humanitarian standard the CCM established (Zughni, 2011).)

This thesis is founded upon a qualitative and constructivist methodology. This is because ideational factors such as norms, meanings and the collective reframing over time of previously widely-held assumptions about aspects of cluster munitions such as their reliability, military utility and the severity of their effects on civilians are central to understanding how the CCM came about. An eventual convergence of views resulting in the CCM required the changing of minds (sometimes repeatedly) of many policy

[1] The CCM entered into force internationally on 1 August 2010.

makers involved in the Oslo process. However, constructivist approaches, even those privileging the importance of civil society activists as norm entrepreneurs and agents of change, are not immune to difficulties in plausibly explaining how this happened in the face of the evidence. While civil society activists' influence was significant, the CCM negotiations also indicated its limits. In view of these shortcomings, which will be elaborated, this thesis is not exclusively constructivist in its theoretical standpoint.

There are a number of other ways in which this thesis restricts itself. It is focused primarily on the course of efforts at the international level on the humanitarian impacts of cluster munitions—particularly the Oslo process—although the Belgian, Norwegian and UK cases receive special attention in view of their significance. Nevertheless, how the CCM came about cannot be explained without paying some attention to the CCW, in which many of the same states, organisations and individuals operated, and which facilitated some of the ideational change this thesis examines. And, while the empirical narrative chapters of the thesis provide a synopsis of how the eventual CCM occurred, for space reasons it is limited in the degree of significant detail it can provide.

5. Structure of the thesis

Following this introduction, the thesis is structured into three parts. Part I consists of two chapters. Chapter 2 sets out the research design and methodology. It also describes how documentary data collection and interviews were carried out along with the nature of my participant observation in events pertinent to the CCW and Oslo processes. Methodological problems are discussed, as well as ethical issues associated with the research. Moreover, this chapter sets out the four propositions of the thesis.

Chapter 3 establishes the context for analysing the CCM's emergence. Because this was relatively recent, IR scholars are still digesting its implications. Given that overarching frameworks and assumptions of prevailing international relations theories contrast, the basic question underlying this chapter is: what would each predict about the initial conditions, main factors and outcome of international efforts to address the humanitarian impacts of cluster munitions? The main IR theory frameworks, including their purposes and problems, are explored as part of this review of the relevant literature. In this regard, the theoretical literature on the MBT's emergence is pertinent, and is explored before the cluster munition literature is discussed. Chapter 3 also sets out a framework for considering norm emergence and framing in the thesis.

Part II consists of four chapters examining international efforts to address the humanitarian impacts of cluster munitions. The first of these (Chapter 4) explains what cluster munitions are, and why these were viewed as causing humanitarian concern. The prevailing international legal and diplomatic regime as it pertained to cluster munitions pre-CCM is described. Prior international efforts to ban cluster munitions are examined, including why these failed.

Chapter 5 explores how and why international efforts on cluster munitions emerged from November 2003 to November 2006, at which point the five-yearly inter-state review of activities and goals of the CCW was held. This was a key juncture in view of efforts by non-state actors to build up the humanitarian hazards of cluster munitions as an issue, and persuade states to reframe how they regarded a weapon then widely viewed as legitimate. Belgium's decision to ban cluster munitions in early 2006 and large-scale use of the weapon in Southern Lebanon in July-August cast these

humanitarian issues into sharper relief. Frustration with obstacles in the CCW to a negotiation on new rules to protect civilians from cluster munitions in the lead up to November's review meeting saw Norway, itself a cluster munition possessor, decide to instigate a new international process outside the CCW to ban the weapon. Norway had support from some other small and medium-sized states, IOs and civil society activists.

Chapter 6 charts the emergence and evolution of two international processes on cluster munitions operating in parallel and, in some senses, as rivals. The Norwegian-sponsored "Oslo conference" in February 2007 launched an international process based on the humanitarian declaration mentioned earlier, with further conferences intended to culminate in a formal treaty negotiation in 2008. Meanwhile, the CCW review conference agreed a mandate of its own, one that initially fell short of a negotiation, but which would eventually draft a treaty proposal. This process occurred largely in response to some CCW member states' concerns about burgeoning international support for the Oslo process. In describing and analysing the period from November 2006 until April 2008, this chapter is oriented toward examining how and why Oslo process states' empirical and normative assumptions and goals about cluster munitions changed during this period with a view to the convergence amongst them eventually achieved on a ban in Dublin in May 2008.

Chapter 7 is concerned with the CCM's negotiation over a two-week period from 19 to 30 May 2008. This chapter examines the array of actors and their concerns as the Dublin Diplomatic Conference began, and contains a synopsis of the development of the treaty negotiation. Success was by no means assured, and resolving three issues would be critical to success. These issues were, in descending order:

defining cluster munitions (and therefore those weapons which would be banned); "interoperability" between future CCM members and likely non-state parties such as the US; and transition periods (if any) for continued use of the weapon. After tricky endgame negotiations, the CCM was achieved. The account in this thesis has implications for some contemporary theories about how and why the cluster munition was achieved, which focus solely on certain aspects of the effects debate such as acceptability or military utility of cluster munitions without considering the broader context of framing and meaning formation in the Oslo process, including the interoperability issue.

Part III consists of two additional chapters. Chapter 8 analyses each of the four propositions of the thesis introduced in Part I through the lens of the empirical evidence in Part II. The ninth and concluding chapter discusses key theoretical and policy conclusions emerging from the research. It is concluded that non-state actor-engendered processes of evidence collection and analysis, learning and frame alignment were central to the Oslo process's emergence, but do not on their own account for convergence of the views of states in the Dublin negotiations over a categorical ban of cluster munitions. This convergence was facilitated by several factors, especially the Oslo Declaration's particular humanitarian framing (to ban cluster munitions causing unacceptable harm to civilians) and the structure of the subsequent "define-and-ban" discourse. Instrumentalist thinking was not absent in state behaviour, but it was more constrained by normative and identity-related factors in the Oslo process than the CCW's efforts on cluster munitions.

PART I

CHAPTER 2. METHODOLOGY

1. Introduction

In this chapter, the methodology underpinning this thesis is outlined, including its research design and theoretical orientation. Sources and methods of data collection and analysis are reviewed. Also discussed are methodological and ethical issues encountered in the research.

2. Research design

2.1 Aim of the thesis

Based on a variety of qualitative evidence, this dissertation seeks to explain how and why the CCM emerged. The significance and provenance of the phrase "unacceptable harm" is explored in detail.[2] This is because a key issue was that cluster munitions were hard to define in a way that precisely described both their technical characteristics and humanitarian impacts, while ensuring sufficient ambiguity for governments with a broad range of views to coalesce around. The organisers of the Oslo conference in February 2007 dealt with this by producing a declaration on tackling the humanitarian problems caused by cluster munitions that hinged on the notion of "acceptability" as the primary criterion for determining which weapons would be proscribed. This Oslo Declaration (2007) did not settle the definition issue. Rather, it set parameters for establishing which cluster munitions cause unacceptable harm to civilians in the ensuing Oslo process. The humanitarian framing reflected in the Oslo

[2] For example, see Chapter 6 section 2.

Declaration did not suddenly materialise in February 2007, however, and it continued to evolve as Part II also shows. Focus is required on this discourse since it created the conditions for the eventual banning of the weapon in the CCM negotiations.

Specifically, the dissertation examines four propositions:

1. Changes in mutually constituted actor preferences and normative or ideational structures evolved to bring about the CCM, something not possible before the new millennium.
2. Although collective reframing had prior origins, it was more prominent after a civil society campaign emerged on cluster munitions from 2003.
3. Convergence over what constituted "unacceptable harm" to civilians from cluster munitions, a concept central to defining the scope of a ban, emerged dynamically and relatively late in the Oslo process.
4. The CCM's achievement cannot be explained fully by prevailing materialist-rationalist IR approaches, particularly neorealism.

The first three propositions are closely related, and are documented in Part II of the thesis before deeper analysis in Part III. The fourth proposition is examined through analysis of the relevant theoretical and policy literature in Part III following a critical literature review in Chapter 3.

2.2 Theoretical orientation

It is difficult to study a complex social phenomenon like international efforts on cluster munitions in a positivist "scientific" sense.[3] One issue is that standards for controlled experimentation and the falsification of knowledge demanded by positivist methodological orientations are based on simple, closed physical systems. While regularities in these closed systems are sometimes observable (based on the isolation and testing of variables) it does not follow that reductive approaches work in the open systems found in the social world in view of their complexity. Such systems require different approaches to achieving knowledge, and even of what effectively constitutes "knowledge", than the "covering law" or deductive-nomological (D-N) model used in the natural sciences (Almond and Genco, 1977 499-505).

One source of complexity in the human world is that many of its facets are socially constructed (Searle, 1995). Social construction extends not just to the intersubjective development of shared concepts, language and norms of behaviour, but to the very identities of actors in the social realm (Smith, 1998 303).[4] Over time, these

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[3] By positivism, it is meant a philosophical approach characterised by insistence that science can only deal with observable entities known directly to experience, and opposition to metaphysical speculation without concrete evidence. The positivist aims to construct general laws or theories expressing relationships between phenomena based on observation and experiment showing that the phenomena are or are not related in the predicted way. Explanation of phenomena depends on showing that they are instances of general laws or regularities. See pp. 269-70 of ABERCROMBIE, N., et al. (2000) *The Penguin Dictionary of Sociology*. 4th ed. London, Penguin.

[4] Intersubjectivity is a concept drawn from the phenomenonological view of human communication and interaction. "Intersubjective relations exist through the ways in which human actors engage in processes of mutual discovery and, in so doing, their identities are in a process of continual transformation." See p.345 of SMITH, M. J. (1998) *Social Science in Question.* London: Sage / Open University Press.

actors react, learn and adapt their behaviour based on changing internal cognitive states that may or may not be related to measurable external stimuli satisfying the criteria of positivist methodologies. Causation is hard to establish definitively, and correlations observed between social phenomena are often contestable by these standards.

A third issue is that human knowledge of the world is fallible and theory-laden as Kuhn, for instance, showed even in the context of "hard" natural sciences like physics (1996). There is always an interpretative dimension element in science, as meaning has to be understood and cannot be merely measured or counted (Sayer, 2000 17). Knowledge and language exist within social contexts, and people within these contexts negotiate those systems of meaning.

This can raise a subject-object problem for researchers because they are part of the object of analysis they are trying to explain or understand (Smith, 1998 352). Yet the positivist emphasis on simple, logically rigorous models with predictive qualities based upon the identification of regularities can, in effect, sweep under the carpet the assumptions that underpin what constitutes knowledge, and obscure critical examination of researchers' assumptions. In the social world, in particular, concepts of truth/falsity fail to provide a view of the relationship between knowledge and its object that is coherent, and knowledge is better evaluated in terms of its "practical adequacy" (Sayer, 1992 5-9). Moreover, the pursuit of D-N predictive models can have the effect of stripping out much of the data from complex, social phenomena describing their context and structure. Yet, it is what is distinctive about these phenomena that makes them of such interest to social scientists and policy makers.

Recognising these problems, this thesis is not positivist in its methodological orientation. It seeks to understand international efforts to address the humanitarian impacts of cluster munitions by analysing qualitative information in order to identify patterns and themes (understanding), rather than determining or testing purported causal laws of international behaviour on the basis of empirical regularities (explaining). As part of this approach, the research is influenced by a "critical realist" ontology drawn from the work of Bhaskar (1975), Sayer (1992 , 2000) and others (Archer et al., 1998).

In contrast to some post-positivist approaches like post-modernism, a critical realist ontology posits that the world exists independently of our senses, and despite the difficulties in investigating it, our knowledge about the world is not immune to empirical check (Sayer, 1992 5). A "stratified" ontology is proposed in which real, actual and empirical phenomena are distinguished, rather than "flat" ontologies populated either by the actual or empirical, or a conflation of the two (Sayer, 2000 12-13). Distinction is made between the objects of study in science that are in general invariant to our knowledge of them, such as atoms, and the theories and discourse about them, which are transitive in nature (Bhaskar, 1975 22).[5] Crucially, critical realism does not assume what is observed or actually happens at the level of events is all that is possible: other powers can be either activated, or remain dormant. Causation is not to be understood simplistically in terms of models of regular successions of observed events.

[5] As part of the social world, these transitive dimensions can, of course, also be object of scientific study, which is what epistemology is about.

2.3 Quantitative and qualitative approaches

This thesis is an intensive case study. It examines the substantial relations of connection between different statements of meaning concerning what constituted "(un)acceptable" cluster munitions. Most of the research data in the thesis is qualitative in nature, referring to essences of people, objects and situations (Miles and Huberman, 1994 9). Specifically, the information collected is mainly in the form of words, whether taken from written documents or transcriptions of spoken statements, speeches and research interviews, or notes from participant-observation. Analysis is concerned with filtering and processing this information (Rudestam and Newton, 2007 36) in order to establish insights into how the meaning of "unacceptable harm" evolved.

Some quantitative data (for instance, concerning submunition reliability rates (King et al., 2007)) did feature in international efforts on cluster munitions, and is of research interest due to its possible influence on the intersubjective meaning of those cluster munitions causing unacceptable harm. However, this dissertation is not concerned with quantitative analysis of cluster munition use or humanitarian hazard, or testing the validity of the quantitative data used in the discourse on cluster munitions.

Nor will the dissertation set out to establish the validity of meanings using formal quantitative techniques such as word frequency or network analysis. Such techniques can be of value, but a key problem these encounter is to illuminate the connections between differing units of analysis in the absence of an understanding of context and meaning. For example, the dissertation will show that a significant factor in the emergence of international efforts toward a humanitarian cluster munition treaty was an informal network of individuals, who in some cases shifted institutions and roles

over time. Despite ample evidence, and its importance in explaining how the CCM came about, this is not readily visible in network analysis of the influence of institutions in terms of citations or frequency of use of terms originating with them (Carpenter, 2011).

Another issue is that, if intersubjective meaning can evolve over time, it follows that until a measure of agreement or precision is achieved, a range of different words might be used that approximate or make reference to a set of contested meanings. Without a thorough understanding of the perspectives of those using such differing terms, it may be difficult to accurately map that set, let alone capture those words and their meanings systematically.

In view of the data and the aims of the research, a flexible research design was chosen. As data were gathered and analysed, aspects of the design such as the research propositions were revisited and revised as initial concepts and research questions underpinning the research grounded themselves in evidence or were discarded, a common practice in the social sciences (Strauss, 1987). The dissertation does not utilise methods of grounded theory explicitly, but draws upon the tradition to help in structuring the inquiry, including using techniques like coding of texts such as interview transcripts, and reflexive practice aimed at generating hypotheses and other insights from the data over the course of the research.

3. Documentary data collection

Document analysis and interviews, supplemented by comparison of several theoretical models of relevance to understanding international efforts to ban cluster munitions, were three of the main methods of data collection used to inform this thesis.

A fourth method, participant-observation, produced extensive notes and audio recordings of some pertinent events.

3.1 Documents

Several kinds of documentary data were prominent in the research:

- Documents associated with international talks on cluster munitions such as the diplomatic conferences of the 1970s, the CCW and the Oslo process. These sources included national statements of policy and speeches, diplomatic records of meetings, conference outcome documents, working papers and non-papers, non-governmental organisation (NGO) publications and media reports.
- The policy documents of IOs working in the humanitarian field, especially the ICRC and UN.
- Internal CMC correspondence including campaigning newsletters, advocacy documents and some e-mail messages concerning the evolution of the campaigning call.
- Academic and trade articles published in the weapons field including *Arms Control Today*, *Disarmament Forum, Foreign Affairs*, *Jane's* and various legally oriented journals.
- Mainstream media reports.
- Academic studies, including those examining analogous international processes such as the international landmine campaign.
- Selected US State Department cables released from 2010 by the Wikileaks organisation were also referred to.

3.2 Interviews

87 interviews were carried out between 2007 and 2010 as part of research for the thesis. Interview respondents fell into several categories, some overlapping:

- Diplomats and politicians of various nationalities involved in international work on cluster munitions in the CCW and Oslo process.
- Representatives of IOs including the ICRC and agencies within the UN family such as UNDP, the UN Mine Action Service (UNMAS) and Office for Disarmament Affairs (ODA).
- Members of NGOs campaigning on cluster munitions.
- People working in the humanitarian field to ameliorate the effects of cluster munitions and other forms of unexploded ordnance (UXO).
- Survivors of cluster munitions and members of their families.
- Analysts of international efforts on cluster munitions including academics, policy researchers and journalists.

The purpose of these interviews was to understand the perspectives of various actors involved in international work on cluster munitions. Triangulation of the accounts of differing actors helped in constructing an evidence-based analytical narrative, including correcting for misperceptions and inaccuracies extant because of the researcher's own participation in some events described, for instance, or because of the absence of reliable written accounts (Robson, 2002 371).

People interviewed as part of research for the thesis are listed in Appendix I. Before interviews commenced, it was anticipated that respondents would vary widely in

their sensitivities, and thus a system of informed consent was developed that allowed them to specify precisely how information from their interview could be used. Appendix II contains the consent document used, in very similar form, for all of the interviews, and this is discussed further in Sections 5 and 6.

3.2.1 Interview sample

The group of people interviewed for this research is not a statistically significant representative sample of a known population. It is very difficult to ascertain a probabilistic sampling frame for the set of all of those relevant to cluster munitions policy either in the period the dissertation examines, or leading up to it. Nor, as Sayer observed, is it necessarily appropriate for individuals interviewed in intensive study of a specific case to be typical members of a taxonomic group containing similar formal attributes (1992 244). In line with this, individuals of interest were selected as research proceeded and an understanding of the membership of a causal group developed.

Correspondingly, non-probabilistic methods were used to obtain an interview sample. Snowball sampling was deployed, which is a method built around referrals (Ruane, 2005 117). In view of the high degree of connectedness of many individuals involved in the CCW and Oslo process, this was judged to be a useful approach.

However, it was also recognised that snowball sampling, if used solely, might exclude interview selection of other respondents helpful in developing aspects of the research. In view of this, theoretical sampling was also used, which is sampling directed by the researcher's evolving theory for the purposes of making comparisons between and among samples of activities, populations and so on (Strauss, 1987 16-21). For example, interviews were carried out in October 2008 with a range of individuals in

local communities and working in practical UXO disposal in Southern Lebanon to see how perceptions of meaning about cluster munitions compared to those working at the international level. Analysts of past efforts to regulate anti-personnel weapons were also interviewed.

3.2.2 Interview structure

All interview requests were made to individuals directly, rather than to their organisations. Interviews were completely voluntary, and no financial reward was offered for participation in the research.

Interviews for this thesis were qualitative in type, and mostly unstructured in format. By this it is meant that, beyond a few relatively initial administrative and orienting questions at the beginning of the interview (e.g. "what is your job title?" and "Tell me how you initially became aware of cluster munitions?"), flexibility was permitted in how respondents offered their accounts. Interview questions asked were grounded in the context of the subjects being discussed in the interview, or of interest in terms of obtaining data for the research based on a rough list of topics, as well as probes to follow up on points mentioned or not mentioned by the respondent (Ruane, 2005 151). Such unstructured interviews are frequently used in qualitative research designs (Robson, 2002 270-272). This allowed my preconceptions to be challenged, and for qualitative data about the respondent's thoughts, perceptions and feelings to be collected. Respondents were not forced into an interview mode in which they could only answer in terms of a conceptual grid bestowed by the researcher (Sayer, 1992 245).

On occasion, small groups were interviewed. This was largely for practical reasons, for instance because the research was carried out on the margins of

respondents' other meetings and it was not possible to interview each person individually. While this created certain challenges (for instance, the potential for "groupthink", or respondents tailoring their responses to avoid conflict with others present) group interviews also had certain advantages. One advantage was that a larger number of respondents could be interviewed. Secondly, in certain cases the format allowed group internal dynamics to be observed. Thirdly, such situations sometimes highlighted differing understandings about social "facts" and meanings the respondents themselves may have been unaware of.

Barring technical problems, all interviews were recorded and stored as compressed audio files on a memory card, then transferred to my computer, on which these files were protected from unauthorised access by passwords. Appendix II describes the protocol used to handle issues including respondent confidentiality. Finally, all files were archived on a hard-drive in my physical safekeeping.

3.3 Literature review

3.3.1 Academic theoretical analysis

The thesis draws most on these domains of academic literature:

1. Orthodox positivist IR theory, and in particular neorealism and neoliberalism.
2. Post-positivist interpretivist theory, especially constructivism and critical theory.
3. Critical realist theory.
4. IR literature seeking to compare processes such the MBT and CCM campaigns, for instance within the rubric of humanitarian disarmament/arms control.

This literature is discussed in depth in Chapter 3, and in Part III.

3.3.2 Policy-level and legal analysis

Although not situated within explicit theoretical frameworks, a number of different forms of analysis of international activity on cluster munitions were published both during and shortly following the Oslo process. These are significant for their insights into thinking at the time among some of those involved in cluster munition efforts, those seeking to influence them, and some of those seeking to understand them. They reflect underlying conceptions of the policy issues at stake. In certain cases these analyses, like those of Goose (2008), Nash (2006) and Rappert (2008) were implicitly interpretivist in orientation. More recent policy studies have further contended explanations for the emergence of achievement of the CCM (Docherty, 2010) (Bolton and Nash, 2010) (Groves and Bromund, 2011), and some offered analysis of possible lessons shared from the Ottawa and Oslo processes (Atwood et al., 2009).

A good deal of the legally oriented literature analysing the formation of efforts to address the humanitarian impacts of cluster munitions over the last decade is also relevant. Boothby (2005 , 2009), Breitegger (2005), Maresca (2006), Nystuen (2009), Wiebe (2008) and Woudenberg (2008 , Woudenberg and Wormgoor, 2010) are prominent in this regard. In 2010, a detailed legal commentary of the CCM appeared, which currently is the most comprehensive analysis of the treaty text: it is a major resource in seeking to understand, for instance, the basis of argumentation for specific provisions of the CCM and their anticipated normative consequences (2010).

3.4 Participant-observation

Participant-observation is a research technique in which the researcher observes a social collectivity of which he or she is also a member (Abercrombie et al., 2000 256).

Participating in some of the events described in this thesis, I attempted to document them to the extent possible in notes, audio recordings, photographs and other materials in research for the thesis and for the UN Institute for Disarmament Research (UNIDIR). This method raises issues of various kinds. Perhaps the most serious issues are that participant-observation makes considerable demands on the researcher's powers of observation, and reflexivity so as to avoid unacceptable levels of bias. It is certainly not possible to produce objective or "untainted" data independent of the medium through which it was collected (that is, the researcher's perceptions). Participant-observation also makes replicating studies in any positivist sense problematic (May, 1997 153-55).

However, as noted above, critical realist ontology does not presuppose that events or relationships can be observed independently of theories or concepts, as human beings already conceptualise when acquiring sense-data from the world (Sayer, 1992 51-65). As such, sources accumulated over the course of participant-observation of international efforts on cluster munitions can—when appropriately triangulated with other sources—be useful both as records of events, and as impressions of the state of evolution of key meanings in the phenomenon being studied, especially how the humanitarian impacts of cluster munitions are perceived at different points in time.

4. Data analysis

4.1 Unit of analysis

This thesis is concerned with analysing how attitudes toward cluster munitions were reframed. In 2003 most states in the CCW viewed cluster munitions as legitimate and useful weapons: there seemed no serious prospect of a ban, as even proponents admitted (Goose, 2008). In May 2008, this ban was realised at the Dublin negotiations.

Attitudes toward cluster munitions must have changed over this five-year period for this ban to occur. It follows that, in this dissertation, the units of analysis—the most elementary part of the phenomenon to be studied (Franckfort-Nachmias and Nachmias, 1996 53)—are recorded statements, whether written or oral, pertaining to the meaning of the notion of cluster munitions that cause unacceptable harm. These statements constitute the evidence of cognitive changes about the acceptability of cluster munitions necessary to explaining how the CCM came about.

4.2 Approach to data analysis

Positivist research methodologies distinguish collecting empirical data about a given phenomenon (through experiment or observation) from the analytical processes of conceptualisation and abstraction from such data to form conclusions. It is now widely acknowledged that this division does not really exist in the social sciences since human beings unavoidably conceptualise sense-data collected from the world (see 3.4 above). But this model of how data collection and analysis proceeds remains highly influential. Even interpretivist-oriented frameworks for analysis of social phenomena like those of Strauss (1987) and Miles and Hubermann (1994) utilise its assumptions. For instance, while observing that data analysis often begins early on in the research, each divides collection and analysis into formally described consecutive phases of combined research activity, with Strauss, in particular, describing very detailed steps in "grounded theory" exploration in which theory and practical investigation proceed in tandem.

Critical realist methodology, meanwhile, lends priority to conceptualisation and abstraction in "carving up" and defining the objects of study, something useful in structuring the process of data analysis in this thesis. An abstract concept or abstraction

is a one-sided or partial aspect of a concrete object isolated in thought. The aim is to be in a position to carry out structural analysis in order to consider the relationship between structure and agency for causal groups, and seek substantial connections between phenomena rather than formal associations or regularities:

> "Where researchers are concerned with discourses and the meaningful qualities of social practices, understanding these is not a matter of abstraction followed by concrete synthesis, but of interpretation. However, realists would add that to interpret what actors mean we have to relate their discourse to its referents and contexts […] social reality is only partly text-like. Much of what happens does not depend on or correspond to actors' understandings; there are unintended consequences and unacknowledged conditions and things can happen to people regardless of their understandings" (Sayer, 2000 20).

Such frameworks help to elucidate the necessary elements in data analysis, and also encourage systematic rigor in organising and examining research data. Correspondingly, a system was developed during the research of coding for interview data, and for key-word searches of documentary data after converting and combining my research data into searchable computer databases. Coding is meant to compel the researcher to higher levels of abstraction in order to understand the relationships at the heart of the phenomenon being studied, although in practice it is impossible to entirely separate the researcher's innate analytical connections and informal hypotheses ("hunches") from those arrived at through formalised, coded processes.[6]

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[6] "Innate" in the sense that these connections and hypotheses reflect cognitive processes that, because of the operation of the human mind, cannot be examined, or compared with formally delineated methods of data analysis of the type mentioned in this section. In this way, the mind's internal, and partly subconscious processes for interpreting and analysing sense-data from the world can be seen, for the purposes of this discussion, as a "black box" since it is not known to what extent these cognitive process operate

Social research observations are mediated through concepts acquired in everyday life (May, 1997 154), and this must be continually borne in mind and challenged in the data analysis. Triangulation of sources was a particularly important tool used throughout work on the thesis. Its use was two-fold: first, in identifying and trying to ameliorate the effects of bias in evaluating data from participant observation, interview respondents and source documents. Second, triangulation was useful in filling in gaps in knowledge concerning the roles of critical actors, events and places.

5. Methodological problems

5.1 Data access

The Oslo process and the CCW were diplomatic processes structured around states. State representatives varied in their willingness to share information with others, including researchers. Some information relating to the internal communications and positions of governments remains nationally classified. In certain cases, interviews provided some insights into confidential matters, either not to be attributed or on a non-attributable basis. Some of this information could not be triangulated or assessed in terms of reliability, so was not used in the thesis.

This withstanding, in general I encountered a good level of access to international meetings on cluster munitions in my role as a UN researcher, although this did not usually extend to direct observation of private caucuses of state actors such as

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according to principles of deductive logic or the method of induction. “Innate” as used above does not refer to the nature of specific properties or modules in the human mind as debated in disciplines such as evolutionary psychology.

the Oslo process core-group or the so-called Like-minded states. Sometimes, participation as an observer in campaigning meetings of NGOs was permitted.

The thesis draws on roughly 60 selected US State Department cables released by Wikileaks. These leaked messages, which appear to constitute only a small fraction of those US diplomatic communications pertaining to cluster munitions from 2003 to 2008, offered glimpses into the mindsets of US policy makers and their interlocutors in a range of governments. These documents have to be treated with particular caution, however. Their release created great controversy: it is understood that officials in some countries are not permitted to read these documents, and certain major libraries have blocked access (Lipton, 2010). Not least, there remain questions about how representative or reliable these communications are. As such, any findings based upon them must be regarded as tentative since scholars have observed that

> "these cables offer only a partial picture of foreign-policy decision-making…WikiLeaks has published cables and memos only from the State Department…other bureaucracies—the National Security Council, the Defense Department—also shape U.S. foreign policy. The WikiLeaks cables are a source—they should not be the sole source for anything" (Drezner, 2010).

5.2 Bias

Two types of bias of particular relevance in this research are those of respondent and researcher bias. Forms of respondent bias amongst those interviewed for the research may range from obstructive behaviour and withholding of information (for instance, because the respondent views the research as a threat) to "good bunny syndrome" in which respondents, in effect, say what they feel the researcher wants to hear. Researcher bias concerns what the investigator brings to the situation in terms of

assumptions and preconceptions, which may in some way affect how they behave in a research setting (Robson, 2002 172). This can undermine the study's internal validity.

A number of different tactics have been used to try to address the potential for serious bias. Prolonged involvement in the research setting was combined with an ongoing commitment to critical reflexivity, which developed in particular as postgraduate training in research methods commenced. In particular, I acknowledge my own views on the subject matter, as a participant in the Oslo initiative, an observer of the CCW's work, and a researcher and commentator on the humanitarian problems created by cluster munitions. In addition, I am conscious of my identity as a Western male with inevitable cultural biases.

Alongside this, multiple sources and types of data collection were used in the research with a view to enhancing its rigor, and member checking of research findings supplemented this triangulation. Peer debriefing and support were also helpful in unearthing bias, both in the course of data collection in the Oslo process and afterwards through symposia in which research in this area was discussed (Atwood et al., 2009), and in researching policy and legal oriented publications in the company of other researchers in the cluster munitions field (Nystuen and Casey-Maslen, 2010).

5.3 Validity

Validity concerns the relevance, accuracy and precision of a research design (Sarantakos, 2005 83). Specifically, the nature of the evidence of changes in meaning within the phenomenon being studied raises issues for internal (or causal) validity. Internal validity in this context means being able to demonstrate through use of

evidence that a ban treaty on cluster munitions occurred because of changes in how acceptable the weapon was perceived to be internationally.

Positivist research orientations have emphasised measurements of validity more readily appropriate to fixed research designs processing quantitative data within nomothetic causal models (Ruane, 2005 77). There is considerable debate about the extent of their applicability to flexible designs with qualitative data (Robson, 2002 176). In these flexible designs there is an absence of standard means to assure validity and reliability, and many (like this thesis) are idiographic in that they are primarily dedicated to understanding specific cases rather than elaborating rules of causality across different phenomena.

A widespread view among researchers working with flexible designs is that ensuring research is performed in a professional, accurate and systematic manner open to critical scrutiny is the best standard of validity possible under the circumstances. Various scholars have offered general criteria for doing so. For example, Sarantakos has suggested cumulative, communicative and argumentative benchmarks for validation (2005 86-88). Miles and Huberman (who locate themselves broadly within critical realism) have elaborated "tactics" intended to ensure that the process of research is consistent over time and across different researchers and methods, the idea being that conclusions reached are more likely to be valid and reliable without committing the researcher to performing validity tests of a kind inappropriate to the phenomena being studied (1994 277-80).

For reasons discussed above, external validity (whether the findings in this study can be safely generalised to other settings or groups) can be an issue depending on the

predictive claims made for the research's findings. The phenomena this thesis examines are socially and historically situated. It is not possible to replicate these conditions by experiment or other means. The purpose of this thesis is to understand how competing ideas and meanings converged to the point at which cluster munitions were banned, rather than proving causal regularities with predictive properties for other phenomena. This, in turn, raises questions about what Miles and Huberman describe as the pragmatic validity of the research—what the conclusions of the research are for (1994 280). This is addressed in Chapter 9.

6. Ethical issues

6.1 Interviewing ethics

Interviewing for the research raised issues of informed consent, confidentiality (ensuring the privacy of the researched) and required consideration of the consequences of the research for interview respondents (Bulmer, 2008 150-153). While the majority of respondents were familiar with the concept of informed consent, ensuring confidentiality was not necessarily a straightforward matter as the level of comfort about attribution in the research varied among respondents. There was also the risk that "the openness and intimacy of the interview may be seductive and lead subjects to disclose information they may later regret" (Kvale, 1996 116).

This needed to be taken account of in planning interviews, and of structuring a method to handle the data gathered from interview respondents. A deontological (duty ethics) position was adopted based on the view that an interview inquiry is a "moral enterprise" (Kvale, 1996 109). As Nielsen observed, deontological postures have shortcomings in certain contingencies (1998). But principles such as honesty and

respect for the person interviewed were considered of supreme importance in this research context, especially since improper attribution of respondents could have serious negative consequences for them.

A basis for dealing with these ethical issues entailed developing an interview protocol based on an informed consent document co-signed by interviewer and respondent (see Appendix II). Because of the variety of interviewees and their potential concerns about ethical aspects of the conduct of the research and how this might pertain to them, the form was designed in such a way as to allow respondents the final say in how the information they have provided is to be used, by allowing them to choose from options varying in restrictiveness printed on the form. Respondents were always provided with a copy of this form for their records, and were also offered a copy of their interview audio file.[7] Though none did, respondents were told they could withdraw from the research at any time by contacting me using the coordinates on the informed consent form. Transcripts were not shared with respondents: as Oliver observed, transcription is an act of interpretive encoding by the researcher, and so is then no longer the interviewee's "property" but the researcher's (2003 62-3).

6.2 Ethics in analysis and reporting

A second ethical issue concerns the accurate and professional reporting of results throughout the dissertation. It entails a commitment to avoiding misrepresentation, whether deliberate or unintentional, in data gathering, data interpretation, and to reporting of issues such as errors, distortions or other problems.

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[7] Around one-quarter of interview respondents availed themselves of this offer.

Although conscious of my obligations as a researcher to maintain professional ethical standards of reporting (Ruane, 2005 27-8), which extends to diligently presenting an honest and realistic account of the research and its findings (Sarantakos, 2005 396-7), this was potentially a tricky issue. Over the course of the research, I became increasingly aware that my own privileged vantage point as a researcher exacerbated the temptation to pass judgement on certain events or the validity of certain meanings in a manner that would exceed what the empirical evidence (itself to varying degrees subjective, as noted in 3.4 above) would bear.

As discussed earlier, methods such as triangulation can be of use in such instances. But triangulation in itself was not sufficient in all cases. Therefore the thesis does not, in some instances, seek to provide answers to certain questions, for instance what, precisely, led the UK Prime Minister to decide to join the CCM during its negotiation, why Japan effectively reversed its position on banning cluster munitions between mid-2007 and mid-2008, or who first coined the phrase "unacceptable harm". While there are various views on these questions and many others besides, restraint was felt to be key. This was on the one hand because new evidence could cast light on these questions, and on the other because claiming to "know" could in itself help to create or embed errors or distortions.

CHAPTER 3: THEORISING THE CCM'S EMERGENCE

1. Introduction

This Chapter examines how the current theoretical literature in international relations (IR) informs efforts to understand the emergence of a treaty banning cluster munitions. This is with a view to the proposition in this thesis that the CCM's adoption cannot be fully explained by prevailing (rationalist) approaches in IR theory. Also, some further terms and understandings found in the thesis are outlined.

2. Why theorise about cluster munitions?

A number of IR approaches seek to explain the creation of new regimes. Certain of these theories extend to the construction of the MBT; an initiative the Oslo process resembled in many ways and which it has been suggested represented the model for the cluster munition ban (Abramson, 2008). Why, then, do international efforts on cluster munitions from 2003 to 2008 deserve specific research attention?

One reason to study the process by which the CCM came about is that the confluence of factors resulting in it may not be as similar as generally thought to the earlier MBT.[8] This would have implications for current theories purporting to explain the cluster munition ban process's dynamics by extending features of theorisation about the MBT's emergence. Social constructivist scholars, in particular, have proposed such accounts, and have used this as a basis to critique neorealism and neoliberalism.

[8] In this thesis, both landmines and AP mines are used as terms, depending on the context. International campaigning and the Ottawa process focused preponderantly on AP mines, but the scope of the prohibition was not narrowed to exclude other kinds of mine such as anti-vehicle mines until MBT negotiations in September 1997.

Like the MBT process, the Oslo process emerged as a freestanding international initiative because of perceived obstacles in the CCW. Yet international activity on cluster munitions differed from that on landmines in several respects. Aside from differences in the nature of the weapon under scrutiny and the international political context, the Oslo process occurred in parallel to the CCW's work rather than following it. The composition of the core group of states steering the two processes differed. Also, lessons learned and adapted from the MBT campaign and subsequent work in the CCW on explosive remnants of war (ERW) influenced both supporters and likely opponents of any further like-minded international humanitarian initiatives (Atwood et al., 2009). Logically, the results of such learning (Finnemore, 1993 , Haas, 1992) could not have been present in the earlier international landmine campaign.

Thus, a related reason for examining the CCM's emergence is that it may permit testing of claims about the wider applicability of explanations for the emergence of new international regimes based on the MBT case. Such claims vary in their extent. Certain scholars have argued that the nature of the state-civil society partnership seen in the MBT process was an important precedent and sign of things to come (Rutherford, 1999 , Williams, 1997). Others, like some British policy makers following the MBT negotiation, viewed its achievement as a fluke precipitated by a mixture of factors such as the particular characteristics of AP mines, the spirit of the times, and historical circumstance (Princess Diana's death just before the Oslo negotiations) (Maslen, 2004b 6). Between these extremes, several scholars identified distinctive characteristics of the landmine campaign they concluded were probably necessary—or at least would enhance—the effectiveness of future campaigns to regulate or prohibit weapons (Hubert, 2000 , Rutherford, 2000 , Price, 2007 , Petrova, 2007b).

A third, related reason to examine how and why the CCM came about is because IR scholars have already begun to try to use it to justify broader theories of international behaviour. In particular, the CCM's emergence is classed in some recent IR literature as an example of "humanitarian disarmament/arms control" (Cooper, 2011 , Krause, 2011 , Mathur, 2011). Certain state policymakers have also used the term "humanitarian disarmament" since the conclusion of the Oslo process (Støre, 2010). Nevertheless, while there is evidence to suggest that at least some actors in the Oslo process were motivated by humanitarian concerns, it is not clear that these coincided with any explicit broader agenda to promote a humanitarian basis for all multilateral arms control activity or "controlling the means of violence" (Cooper and Mutimer, 2011).

Nor does it necessarily follow that humanitarian disarmament has analytical value as a categorisation despite the phrase's use as a slogan, especially as humanitarian motivations for arms regulation are by no means new (Rutherford, 1999), or confined to cluster munitions (Mathews and McCormack, 1999). Examining the emergence of the CCM based on detailed evidence of its dynamics and features helps to clarify whether such categorisations really apply.

Lastly, understanding international efforts on cluster munitions is important because findings about the dynamics of the CCM's emergence could help multilateral practitioners in practical ways. Academics and practitioners often have divergent goals, expectations from the evidence and differing levels of theoretical interest. Nevertheless, this thesis seeks to link evidence about the dynamics and emergence of the CCM gathered through detailed research with insights from the social sciences. As such, it is a case study containing certain implications (some tentative) for future humanitarian

regime building, rather than purporting to be a specific model for policy action or a general theory seeking corroborating examples. Such findings could help multilateral practitioners improve the design and performance of future humanitarian and disarmament endeavours.

Having established why this thesis seeks to develop an understanding of how and why the CCM happened, the next section looks at predominant theories concerning how regime-related outcomes are patterned at the international level—characterised here as materialist-rationalist—and how well these "fit" against the characteristics of international efforts on cluster munitions. Firstly, key assumptions of realist, neorealist and neoliberal materialist-rationalist IR theoretical approaches are explored. The point of this analysis is not in order to claim that neorealist or neoliberal theories lack any power to explain the CCM's emergence. Rather, the argument is that the common ontology these approaches share constrains these theories from shedding light on to what really brought about the CCM because certain key mutually constituting aspects of international dynamics are excluded or inadequately conceptualised. Although there is a range of issues to explore in this regard, this Chapter focuses on three challenges for rational choice models of international behaviour (instrumental rationality or "logic of consequences") described as the *what*, *how* and *who* problems.

Secondly, some ontological differences between theories of structural aspects of international behaviour based on "logic of consequences" with those incorporating elements of "logic of appropriateness" (Olsen, 2007) are examined. In particular, the focus is on conventional and critical variants of constructivism in view of the theoretical interest of these IR approaches in processes like the Oslo initiative. Constructivism has

served to orient much of the IR literature seeking to account for the emergence of the MBT and the CCM toward certain assumptions, methods and conceptual understandings. Consistent with conventional constructivism, much of the IR literature now emerging on cluster munitions is mildly subjectivist while often using "soft-positivist"-style research methods (Garcia, 2011 , Petrova, 2010 , Wisotzki, 2009). Most of it owes a special epistemological debt to analyses of the landmine ban campaign of the 1990s. Because of its salience to this thesis, section 4.1 of the Chapter briefly surveys the IR literature on landmines before moving specifically to cluster munitions.

Normative and ideational theorising—for instance about the ability of actors in the international environment to learn, modify their identities, and on the roles, stages and influence of transnational civil society initiatives—appear to be promising aids to understanding how the CCM emerged. Certain of these contributions constitute a useful basis for orienting the analytical narrative in Part II of the thesis, in particular work by Finnemore (1993 , 1998), Keck and Sikkink (1998 , 1998), Rutherford (2000) and Snow (1986) explored in section 5. In Part III, these contributions also help to evaluate characteristics of international efforts on cluster munitions alongside other transnational advocacy initiatives. If efforts to deal with the humanitarian effects of cluster munitions between 2003 and 2008 fit with theorisation about norm emergence above, it suggests these ideationally-based theories could have utility in predicting the characteristics of effective campaigning on other issues of international concern, even if predictions about outcomes cannot be supported.

3. The material and the ideational in international politics

The idea that states exist in an environment of anarchy in which their survival is ultimately at stake is central to dominant forms of explanation for behaviour in international politics. Each state seeks to increase its material (for instance, military or economic) power as a rational response to this situation. Beyond sharing core assumptions of anarchy and the capacity of actors to arrive at rational choices, however, significant differences exist between materialist-rationalist theories of international behaviour, as shown by briefly comparing realism, neorealism and neoliberalism.

3.1 Realism and neorealism

Explaining the interactions of states as reflections of the fear and uncertainty deriving from differences in material power between them has a long history (Lebow, 2010), and include Thucydides' account of the Peloponnesian War (1972), Machiavelli (1532), Hobbes (1651) and Morgenthau (1948). To all so-called realists, the state is the principal actor in international relations. Notions of "self-help" and sovereignty are central. Since the purpose of statecraft is national survival in an anarchic and hostile environment, the acquisition of power is the proper, rational and inevitable goal of foreign policy. Yet this can create a security dilemma for states as efforts to obtain absolute gains in power comes at the expense of others, which many be destabilising and exacerbate conflict (Booth and Wheeler, 2008 1-18).

Despite realism's assumption that power has a material basis in its distribution, power is a slippery concept. For example, classical realists and Waltzian structural realists or neorealists (see below) assume a "power as resources" approach in which elements of national power such as military strength or economic assets are most

relevant, and are key to calculating any balance of power between states. However, this conception of power is often criticised as too simplistic, bound as it is to other assumptions such as a utilitarian logic of consequences that, in some contexts, fails to reflect how the interactions of states really seem to be structured (Baldwin, 2002). Realist conceptions of what power is also do not usually take into account how actors in the international environment constitute their identities and thus preferences. Barnett and Duvall, for example, have classified several different varieties of "power", including "socially diffuse production of subjectivity in systems of meaning and signification" (2005 43). These differing dimensions of power are not all material in nature.

An important divide exists between classical realists and neorealists over the question of why states want power. In the view of classical realists like Morgenthau, it is because the desire for power is hard-wired into human nature. For neorealists, states seek power because the structure of the international system forces them to pursue it (hence, *structural* realism) in view of differences in material distribution that, in an anarchic self-help environment, have the potential to threaten their survival. "Structural change affects the behaviour of states and the outcomes their interactions produce" (Waltz, 2000 39).

Neorealism's picture of ceaseless security competition between states is based on five basic assumptions (Mearsheimer, 2010 79-80). Firstly, great powers (which are states) are the main actors in an anarchic international system; secondly, all states possess some offensive military capability; thirdly, states can never be certain about the intentions of other states—whether those states are content with the status quo, or wish

to revise it. The fourth basic assumption is that survival is the main goal of all states. Lastly, states are rational actors, in that they are capable of sound strategies to maximise their survival prospects.

Neorealism became particularly influential during the Cold War, and spawned defensive and offensive varieties. Defensive realists like Waltz (1979) argued that systemic factors usually limit how much power states can gain, which serves to dampen security competition. Offensive realists like Mearsheimer argued that it makes strategic sense for states to gain as much power as they can and pursue hegemony if possible, which can intensify security competition (2010 78). Both varieties of neorealism stress that states will move, either singly or in combination, to balance other states' attempts to maximise their relative military and political power. Thus, stable and lasting cooperation between states or effective international institutions are unlikely, since states will continue to realign themselves in pursuit of their self-interest and security.

3.2 Liberal institutionalism

Although analytically powerful in some situations, it became clear by the 1970s that parsimonious realist political theories of antagonistic state behaviour intended to ensure self-survival under conditions of anarchy failed to convincingly account for a variety of instances in which international cooperation emerged and was being apparently being sustained. Liberal IR perspectives had long existed in various forms (Dunne, 2008), but a new rationalist-materialist variant, liberal institutionalism (or neoliberalism), increased in influence in the IR field from this time.

Specifically, materialist-rationalist IR scholars had become divided over the question of the value of regimes: "Realists say no; institutionalists say yes"

(Mearsheimer, 1994/95 7). (Regime remains a contested concept, but it is considered by Krasner and others—in a widely used formulation—to be principles, norms, rules and decision-making procedures amongst states (1982 185). As such, regimes represent more than short-term expressions of utilitarian self-interest amongst states.) Traditional structuralists such as neorealists took issue with the utility of regimes, arguing that "in addition to obscuring the dominant, dynamic, underlying politics and being value-biased, the concept has no explanatory value" (Smith, 1987 262). For instance, Gray argued that, when push came to shove in starkly competitive security dilemma scenarios, arms control regime regimes are doomed to failure in the longer run because they are either unimportant, or state competition makes meaningful arms limitation impossible since the stakes for their survival are so high (1992).

In contrast to traditional structuralists, modified structuralists like neoliberals suggested that the emergence of a hegemonic state able to exert its power over others in the international system could create a measure of stability, including providing for the emergence of regimes amongst states with non-zero sum beneficial consequences that would sustain this cooperation. A central hypothesis of hegemonic stability theory was that stable regimes, particularly in international economic relations, depend upon a hegemon to establish norms and rules and then superintend the functioning of these by enlightened use of its capabilities to encourage other members to work within the regime (Evans and Newnham, 1998 220).

If power is the prime currency of neorealist analysis, neoliberalism is more concerned with the interests of actors in an increasingly complex and interdependent international system. There are increasing linkages in this system among states and non-

state actors of various kinds; new kinds of international issues emerge that blur traditional boundaries of "high" matters of state and national security versus, for instance, economic security and public health; there is recognition that there are multiple means of interaction among actors across national boundaries, and military force seems to be declining in utility as a tool of statecraft (Lamy, 2008 132).

However, alongside these features, neoliberal regime theory posits many of the same assumptions as structural realism, especially that states are rational actors and that fear and uncertainty can make cooperation important and difficult under international anarchy (Jervis, 1999 43). Where these differ is over how normal cooperation among states is: many neoliberals argue cooperation is becoming easier to achieve, in particular because of the growth of international institutions (Sterling-Folker, 2010 119). Such regimes can affect state behaviour in situations in which "Pareto-optimal outcomes could not be achieved through uncoordinated individual calculations of self-interest" (Krasner, 1982 191). In other words, regimes can (although not necessarily do) act as an intervening variable between basic causal variables and related behaviour and outcomes.

Neoliberal scholars sought to examine whether and how such international regimes or institutions improve the flow of information between states about each others' capabilities and intentions, or reduce coordination problems between them on matters in which cooperation could yield absolute utility gains, including on matters of national security. Keohane, for instance, argued that institutions matter because these can play roles like facilitating information exchange, monitoring compliance, enabling issue linkage, defining cheating, and offering salient solutions to inter-state problems

(Katzenstein et al., 1998 662). Such propositions also raised the question of whether the roles and identities of some regimes exceed simply being conduits for state interaction: do these regimes or institutions constitute international actors of consequence to the structure of the international environment? The view also emerged among some neoliberal and other IR scholars that, as well as formal institutions such as IOs like the UN, "international regimes" could be less formal arrangements (Katzenstein et al., 1998 660)—further distinguishing neoliberals from neorealists.

Although they arrive at rival claims about patterns of conflict and cooperation in world politics due to differing assumptions about the characteristics and effects of anarchy (Barnett, 2008 162), a key feature shared by neorealist and neoliberal theory is the treatment of states as utility-maximising rational egoists with fixed preferences for the purposes of decision making (Hasenclever et al., 1996 183). Such assumptions have enabled the widespread use of rational choice models (derived largely from economic theorising) to try to explain how actors maximise their interests under a given set of constraints (Dunne et al., 2010 349). This form of rational choice analysis has even extended into the domestic realm in terms of the impact of the preferences of domestic actors within states on the latter's interests as pursued in international contexts such as trade negotiations (Putnam, 1988).

Such utility-based analyses, some stemming from the use of game theory (Axelrod, 1984), have led many neoliberals to argue that the greatest obstacle to successful international cooperation is cheating or non-compliance among states in international regimes (Lamy, 2008 132). They tend to regard these risks as potentially manageable, contingent on various factors within those environments. In contrast,

neorealists are pessimistic: they accept that international institutions can have utility, but doubt these possess autonomy beyond being tools of statecraft of transient expediency (Jervis, 1999 43). To neorealists, the major obstacle to lasting inter-state cooperation is not just actual cheating, but the broader problem of uncertainty.

This so-called "neo-neo debate" between neorealists and neoliberals over the significance of IOs and regimes in influencing state behaviour represented an intra-paradigm debate between approaches sharing an epistemology. And, it has been noted that neoliberals and neorealists tend to study differing aspects of international politics anyway, with the former interested in political economy, environmental and human rights issues, and the latter focused on security and military issues (Lamy, 2008 135). However, as Smith noted in examining how regime theory applied to the global nuclear non-proliferation architecture, by defining a regime as a structure designed to facilitate international agreement functional regime theory "answers specifically why states continue to cooperate with a regime, but it disregards the larger question of why regimes arise at all in international politics" (Smith, 1987 275). In this regard, the next section looks at three specific challenges for materialist-rationalist explanations in considering international security regime formation.

3.3 Three problems for materialist-rationalist IR theories on regime formation

Three general problems for materialist-rationalist IR approaches of particular relevance to this thesis concern *how, what* and *who*. Later in this chapter, these critiques are related to the landmine and cluster munition IR literature.

The *how* problem with materialist-rationalist explanations of international regime formation is that these fail to account for how actor preferences are constituted.

Most simply describe initial preferences and then hold these stable or fixed as variables. A common related assumption is that the material distribution of power in the international "system" is sufficient, in effect, to account for preference change, something analogous to the behaviouralist assumption that measurable external material stimuli cause all behaviour. However, it is not at all clear that these gross simplifications explain state behaviour in an anarchical environment characterised by some measure of interdependence, and by non-material factors such as ideas and norms. For instance, while Waltz's structural realist theory accounted quite well for superpower stability in the bi-polar Cold War system, it failed to predict or adequately explain the Cold War's end, which stemmed in part from ideational changes among certain Soviet leaders that led the Soviet Union's posture to dramatically change.

Second, there is the issue of *what* power is in the international environment. For example, "power as resources" is an important concept to structural and classical realists because material elements of national power such as military strength or economic assets are central to states' calculations of their relative positions in any balance of power. In neoliberal interest-based models of behaviour, there is usually the assumption that states rank their order of decision preferences along lines of maximisation of expected utility. Implicit in realist, neorealist and neoliberal theorising about these concepts is that actors within the international system recognise and assess them according to common or "objective" understandings.

Criticism has arisen from various quarters about materialist-rationalist treatments of actor preferences and objectivist viewpoints on the "rules of the game" in international anarchy. International society theorists (also known as the "English

School"), for instance, argued that international anarchy is a social and not a Hobbesian condition. States co-exist in an anarchical society rather simply a system, and law and expectation are important factors in their relations in this environment alongside purely power-driven considerations (Jackson and Sørensen, 2010 130).

By comparison, Wendt (1992) argued that anarchy is what states make of it: even the bedrock condition of international anarchy is mutually constituted since the beliefs of actors about the environment in which they operate guide their behaviour. Those actors can have differing beliefs constituted by their respective identities (shaped in part by their past histories of interaction), and thus may have different conceptions of interest and rankings of preference. This in turn undermines the idea of a default picture of utility maximisation that all actors hold in common often assumed in rational choice theory—that they all recognise the international structure in the same way and devise their strategies accordingly. And, even if actors do hold the same picture, it does not correspond that a default exists; just that the process by which this (possibly mutually constituted) picture came about has been omitted from the analysis.

Another major challenge for any theorising about transnational relations concerns *who* matters as an international actor. Neorealists regard states as the only meaningful international agents in terms of the international environment's structure, as non-state actors depend for their existence on states' underlying power distribution. (Neorealists and some neoliberals argue that NGOs and IOs only flourish within the security that states provide.) Neoliberals are interested in examining the roles and level of autonomy of IOs in the context of the operation of regimes, and consider that IOs can affect state preference formation over the long run. But these approaches struggle with

cases like the landmine and cluster munition ban campaigns because salient actors such as individuals, networks of experts and transnational civil society advocacy networks of NGOs remain largely invisible in them.

Because materialist-rationalist explanations do not tend to take these non-state/non-IO actors in account, it follows that these are also are unable to account entirely for situations in which such actors demonstrably set agendas and influence meanings—even those of states—in the construction of new regimes. One response from scholars has been to dismiss such influence as the effects of persuasion and not power (Barnett and Duvall, 2005). Yet persuasion can be considered to be power when new norms or conventions of behaviour adopted by a sufficient number of states are adopted as a result of it. This persuasion/power can have structural consequences in that the behaviour even of un-cooperative states is constrained because they calculate that to violate such norms would be overly costly for them. In sum, better explanations are needed than materialist-rationalist IR approaches can provide within the constraints of their core assumptions.

3.4 The constructivist turn

If materialist-rationalist theories of political behaviour still predominate in IR, this does not mean their assumptions are unchallenged. Interpretivist approaches such as international society and some liberal theories have always considered ideational and normative factors to be of influence in international relations, usually with the important proviso that states are always firmly in charge. Neorealists, though, remained unconvinced they had found much evidence of these factors as constituting determinants of state policy and behaviour.

The fall of the Berlin Wall and the rapid end of the Cold War surprised IR theorists, as almost none had predicted these developments. It prompted rationalists such as Keohane and Goldstein to consider ideas as variables affecting the solutions to games, which they sought to incorporate into a neoliberal institutional framework (1993). Such attempts attracted a mixed reception. Ruggie and Kratchowil had already argued that insufficient attention was paid in regime theory to how actor expectations are formed, and that it is difficult to integrate principles and norms into rationalist analysis despite their significance (1986). Now, support strengthened for this view that the materialist assumptions of materialist-rationalist analysis, and neorealism in particular, prevented it from explaining rapid changes observed in core national security issues for the kinds of reason discussed in the preceding section, among others (Katzenstein et al., 1998 672).

Keohane famously described this fourth emerging "great" debate in IR theory as a conflict between rationalism and reflectivism (1988). By reflectivism, Keohane meant the rejection of rational choice methods and the positivist approach to knowledge generation dominant in the IR discipline, especially in North America. However, the debate is more finely shaded than such a positivist/post-positivist duality, especially as reflectivism encompassed many approaches including constructivism, culturalism, feminism, critical theory and poststructuralism (Dunne et al., 2010 349). These approaches vary widely in their postures on the possibility of knowledge and which research methods are appropriate.

One way in which to contrast these "post-positivist" approaches to international behaviour is to distinguish them as having either subjective or discursive conceptions of

security (Buzan and Hansen, 2009 32-25). Subjectivist approaches to security (typified by conventional constructivism) seek to supplement materialist security analysis by incorporating non-material factors like history, norms and actor (mis-) perception.

IR approaches treating security as a discursive concept are critical of the idea of any objective conception of security of the kind found in realist or neorealist analysis, and of subjective conceptions deriving from it. As Booth argued: "Mainstream strategic studies derive from a particular social context, the interests of a particular referent group, and the world-view of a distinct political theory. The resultant discourse is constructed from these ideas" (2007 150). It follows that the ways in which power is expressed in language and ideas has to be unravelled, as in the Copenhagen School's emphasis on security as a contested concept (Buzan and Wæver, 1997), and other discursive approaches influenced by the post-Marxist theory of the Frankfurt School including "critical" variants of constructivism discussed below (Hopf, 1998 181).

Constructivism emerged as a prominent "reflectivist" approach, although it is unlike realism, neorealism and neoliberalism, which are theories about the structure of international politics based on rationalist-materialist ontology. In other words, these are attempts to explain both the behaviour of individual states and the characteristics of the international system as a whole (Krasner, 1992 39).[9] Neoliberals in addition seek to explain whether institutions matter in explaining state behaviour, or whether the latter can be deduced solely from the material distribution of power (Griffiths, 1999 185).

[9] Krasner added, "The ontological given for realism is that sovereign states are the constitutive components of the international system. Sovereignty is a political order based on territorial control."

In contrast, constructivism is a social rather than a political theory, and is broadly concerned with conceptualising the relationship between agents and structure (Farrell, 2002 50). Constructivism has three core ontological propositions. Firstly, it posits that normative or ideational structures are important, alongside material structures. Secondly, identities constitute interests and actions. Thirdly, agents and structures are mutually constituted.

In this way, constructivism is better contrasted with rational choice theory than neorealism and neoliberalism per se, which each subscribe to rational choice as an analytical framework but arrive at differing claims about patterns of conflict and cooperation at the international level. In a similar way, constructivists adhere to the core observation that reality is a social construction, but there are many different varieties of constructivism drawing upon different analytical traditions. "Constructivists, for instance, have different arguments regarding the rise of sovereignty and the impact of human rights norms on states. In order to generate substantive claims, scholars must delineate who are the principal actors, what are their interests and capacities, and what is the content of the normative structures" (Barnett, 2008 162). Constructivist researchers can (and do) reach different views on these matters, which can lead to differing analytical outcomes.

Constructivists argue that norms are of particular significance because structures in international politics are socially and not just materially constructed. (Norms are defined in section 5.) Social structures are defined by shared understandings, expectations or knowledge, and include material resources. Material resources only acquire meaning for human action through the structure of shared knowledge in which

they are embedded, mediated by norms, identities and practices (Hopf, 1998 174). For instance, British possession of nuclear weapons is less threatening to the US than North Korea's nuclear weapons because Britain is a US friend and ally (Wendt, 1995 73).

While concurring with the English School that international anarchy is a social condition, constructivists argue in contrast that anarchy is not objectively defined. Instead, anarchy is constituted intersubjectively, with ideas and norms as dynamic factors alongside material power affecting, among other things, preference formation among states. States do not always do what is instrumentally rational, but usually act according to a "logic of appropriateness" in which what others think is important (Fierke, 2010 181):

> "To act appropriately is to proceed according to the institutionalised practices of a collectivity and mutual understandings of what is true, reasonable, natural, right, and good. Actors seek to fulfil the obligations and duties encapsulated in a role, an identity, and a membership in a political community. Rules are followed because they are perceived to be adequate for the task at hand and to have normative validity" (Olsen, 2007 3).

Thus, a contrast exists between the rationalist-materialist ontology of neorealism and neoliberalism, and that of constructivism. The former ontology is atomist and "bottom-up": undifferentiated, individual state actors determine international politics within an anarchical international system. The constructivists' social ontology is "top-down", in which individual actors together both constitute their environment, and are constituted by it. Ideas and norms are important because these shape identities, notions of appropriate behaviour and, in turn, choices. Preferences only seem fixed if seen in snapshot.

Ontologically at least, rational choice theory and constructivist intersubjectivity are not directly opposed. In principle it is possible to model the evolution of actor preferences within a rational choice framework, provided it reflects the influence of ideas, norms and notions of actor identity (which, in such frameworks, would be treated as enduring—fixed—variables) (Goldstein and Keohane, 1993). In practice, it can be difficult to assess appropriate weighting of these factors in some rational choice models, or even to keep these factors separated.

Another issue is that direct evidence of the content of the internal cognitive processes of actors and the course of their intersubjective understandings is often hard to capture in a way that explains causation in a positivist sense. This second issue, in particular, is a challenge for constructivists as well as materialist-rationalists. Indeed, the appropriate types of methods to analyse behaviour in a mutually constituted international system divide constructivists.

3.5 Other critical post-positivist approaches

So-called conventional constructivists have adopted research methods, assumptions and hypotheses familiar to positivist IR research. The foundationalism of positivism retains importance in their methodologies, even if in minimal or contingent form. Conventional constructivists expect to uncover differences, identities and multiple understandings in the social phenomena they study, but assume that a set of conditions can be specified in which one can expect to see one identity or another (Hopf, 1998 183). Wendt (1995 72), for instance, shares the five basic assumptions of neorealists like Mearsheimer (see above), and argues that constructivist ontology as expressed by

him is compatible with the positivist epistemology of natural science.[10] Theorists behind one of the most influential constructivist studies even deny using "any special interpretivist methodology" (Jepperson et al., 1996 67).

Other constructivists, such as Price and Reus-Smit, agree that it reasonable to use positivist-type methods in IR research, provided only "Small-t truth claims" are made about the world after sustained empirical analysis of aspects of it (1998 272). They argue that this kind of constructivist inquiry can trace a middle-line between positivist law-like generalisation and critical theorists' scepticism that social inquiry into reality can be independent of power relationships that include the inquirer herself.

Hopf described critical theory as aiming to explode myths associated with identity formation, whereas conventional constructivists instead try to treat those identities as possible causes of action (1998 184). However, many critical theorists, including critical constructivist, feminist and deconstructionist scholars, regard conventional constructivist scholarship as old positivist wine in new bottles. For all of its interest in social institutions and intersubjectivity, the conventional constructivist project still rests on a positivist foundation of the real being only the observable, and the observable being separable from the observer. This "soft-positivism" is inconsistent in its follow-through when considering the kinds of knowledge that study of social phenomena generates. Moreover, it is argued, "this ostensible school of security,

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[10] Wendt argued that post-positivists, "despite their epistemological relativism, generally play by the rules of science in their empirical practice". See p.373 of WENDT, A. (1999) *Social Theory of International Politics.* (Cambridge Studies in International Relations) Cambridge: Cambridge University Press. Wendt added that post-positivists are "tacit realists" referring to critical realism, from which he developed his own theory of international politics.

deriving from a method rather than a political theory, reflects the political assumptions of the theorist rather than the political implications of a distinct theory" (Booth, 2007 153).

Critical theorists and poststructuralists draw differing conclusions from this conviction. Postmodernist theory underlines the pointlessness of attempts at knowledge generation in a reality inseparable from subjective discourse. In contrast, through critical inquiry into existing international practices and discourses, critical theorists hope to bring about positive change in world politics by exposing the ways in which power is used, who has it, and who does not—but should—have it. Scholars of the so-called Copenhagen School, for instance, apply this type of inquiry to matters such as the emergence of security identities (Buzan and Wæver, 1997), and critical security studies scholars have examined various aspects of human security and armed violence (Krause and Williams, 1997) as well as "deconstructing hegemonic framings of the arms limitation problem" (Cooper, 2006 374).

Critical and poststructuralist approaches view security as a discursive, contested concept, one that is re-made according to who is able to create or influence meaning. In this way, influence over the development of intersubjective meaning is a significant element of power. This is a point highly relevant to the analysis in this thesis of the evolution of the meaning of unacceptable harm in the CCM's emergence, which was a mutually constituted understanding arrived at in a contested process in which states had to be educated, persuaded and had particular contributions of their own to integrate into emerging collective assessments.

Wæver described a "boundary of negativity" in the "great" rationalist-reflectivist IR debate. Some variants of post-structuralism such as deconstructionism are, to many in IR's mainstream, well outside this boundary, while critical theory-derived approaches arguably sometimes hover over it (2010 313). Meanwhile, realists and neorealists also have critiqued reflectivist approaches to IR theorising—criticisms they seek to apply not only to more radical discursive approaches but to conventional constructivists as well. Writing in the mid-1990s, Mearsheimer suggested that approaches influenced by critical theory in the broad sense provided "few insights on why discourses rise and fall" in the domain of security: "critical theorists occasionally point to particular factors that might lead to changes in international relations discourse. In such cases, however, they usually end up arguing that changes in the material world drive changes in discourse" (1994/95 42).

Since Mearsheimer's critique, a number of studies have sought to rectify this on issues as diverse as the acceptability of nuclear and chemical weapons (Price and Tannenwald, 1996) and changing notions of humanitarian constraint on state behaviour in conflict (Finnemore, 1996a). Transnational campaigning to ban landmines and, most recently, on cluster munitions have also been studied. These are discussed next.

4. IR literature on landmines and cluster munitions

In view of the rapid emergence and recent conclusion of the Oslo process, IR theoretical analysis has only begun to turn explicitly to how and why the CCM emerged, and what it could mean for international regime emergence more broadly. Moreover, earlier theorising about efforts leading to the MBT influences much of the IR literature there is on cluster munitions. Correspondingly, that literature is explored

before moving on to literature specifically theorising about international efforts on cluster munitions.

4.1 Landmines

IR scholars do not appear to have predicted the emergence of the Ottawa process—let alone its culmination in an AP mine ban treaty. In 1995, just two years before the negotiation of the MBT, for instance, an edited volume appeared that encompassed a range of perspectives including those of various academics, diplomats and military lawyers engaged in the CCW, and ICRC and HRW representatives (Cahill, 1995). None of the volume's contributors regarded a comprehensive ban on AP mines as feasible, at least without interim steps agreed in the CCW over a time-scale of several years. Noting civil society calls for a ban, one contributor argued to the contrary, for example, that there could be "no quick fixes when it comes to land mines" (Falk, 1995 86).

By the end of September 2007, however, negotiation and adoption of the MBT had occurred. Somehow, the preferences of some of the kinds of actor resistant to an international ban on AP mines had transformed—and quite rapidly at that. Pointing to ideational and normative factors as key in understanding this, several scholars set forth explanations for the MBT's emergence based on theorisation of ideational and normative change in which non-state actors played meaningful roles. Price (1998), Rutherford (1999 , 2000 , Rutherford et al., 2003) and Lawson (2002) each owed a debt to the earlier work of Adler (1992), Haas (1992), Katzenstein (1996), Wendt (1992 , 1999), Ruggie (1998), Finnemore and Sikkink (1998) and others. (These scholars had demonstrated the importance of socially constructed factors such as culture, morality

and norms in various national and international security contexts.) Hubert (2000), Lawson (Cameron et al., 1998), Mekata (2000) and Rutherford (Brem and Rutherford, 2001 , 2011) also contributed to production of relatively thick supporting descriptive accounts based on their personal involvement in the Ottawa process.

The precise nature of these accounts varied over how the MBT came about. Nevertheless, for various reasons—some of which broadly align with the how, who and what categories of criticism outlined earlier in this Chapter—these scholars concluded that a materialist-rationalist ontology did not capture some key factors necessary to understanding the MBT's emergence. Consistent with the generic how argument, materialist-rationalist-based explanations fell short because these did not account for how ideas introduced and promoted about the AP mines' lack of acceptability were eventually broadly adopted, or were linked to the identities of actors in the Ottawa process. Although utilitarian calculations by states were by no means absent in this process, on the whole it more closely resembled a context in which decision-making reflected logic of appropriateness rather than one of a utilitarian one of consequences in which actors (states) could be regarded as having fixed preferences.

According to these scholars, the international landmine ban campaign also exposed deficiencies in materialist-rationalist explanations of international behaviour due to whom it does not identify as an actor. NGOs acted independently of the material distribution of state power in order to get landmines on the norm setting agenda, and thus are actors of explanatory consequence. Moreover, the ICBL's partnership with small and middle power states encouraged the latter to disregard that power distribution in pursuit of an AP mine ban treaty (Rutherford, 2000 108).

To paraphrase Wendt (1992), the problem of AP mines was what states made of it; many states making of it what global civil society persuaded them to through advocacy and evidence. Eventually enough states saw banning the weapon as the appropriate thing to do as moral entrepreneurs seeking to de-legitimise the weapon influenced their preferences. A developing "norm bandwagon" effect (Finnemore and Sikkink, 1998 893) possibly also had an influence. In other words, non-state actors can affect contexts in which state preference formation and decision making occur. Even though they lacked material power, NGOs in the ICBL influenced meanings arrived at intersubjectively among states.

This touches on the *what* critique mentioned earlier over the question of the precise nature of power in the context of regime formation. Scholars of the landmine campaign claimed, in effect, that to understand the MBT's emergence, non-material forms of leverage over state behaviour such as learning, socialisation and persuasion need to be considered (Rutherford, 2000 79), placing them at odds with neorealist or neoliberal explanations. It is worth noting that constructivists largely had to infer the neorealist and neoliberal stances they critiqued (Rutherford, 2000 106-08) since with only a few exceptions (Lenarcic, 1998) constructivists had MBT inquiry to themselves. Perhaps it was obvious to materialist-rationalists that their parsimonious theories of political behaviour focused on states (neorealism) or states and IOs (neoliberalism) were unlikely to provide a complete understanding of the MBT's emergence.

Nevertheless, realist or neorealist oriented counter-attacks against conventional constructivist theorising about the Ottawa process and its implications did come. For example, one assertion heard among some CCW diplomats in Geneva was that AP

mines were banned not because of any significant identity transformation among states, but simply because states came to realise that the weapon no longer possessed military utility in view of technological advances. This echoed a general thesis about arms control developed earlier by neorealists such as Gray (1992).

It was also noted that while 100 states adopted the treaty text in September 1997, the US stood aside, and several other materially powerful states such as China, India, Israel, Pakistan and Russia did not participate in the negotiations at all. Thus, another line of argument ran that, regardless of any ideas, norms and identity transformation within the like-minded Ottawa process, outside this bubble the situation remained one in which neorealist conceptions of power held sway. In effect, these non-material factors were not enough to affect the great powers' security calculations about the continued importance of these weapons to their national interests, and they remained opposed to the treaty (Rutherford, 2011 14-17). Neorealists could also argue that the MBT's emergence was a unique outcome, not a recurrent phenomenon modifying the nature of the overall pattern of outcomes reflecting the material distribution of power in the international system neorealism predicts.

Constructivist explanations for the success of the Ottawa process also came under attack from critical theorists and from other discursive approaches to security. For example, Anderson criticised what he perceived as the rosy nature of analysis suggesting the MBT represented a democratising change in the nature of international law making, instead viewing it as a step in the development of global transnational elites at the expense of genuinely democratic, local, processes (2000). Beier contended that casting AP mines as "bad" weapons in the MBT campaign anthropomorphised

them, something unhelpful for further arms regulation and dealing with the effects of the revolution in military affairs (2011). Extending Price's observation that the example of the MBT focused particular attention on activist agency in recent efforts at international standard-setting (Price, 2003) in so-called transnational civil society scholarship, Cottrell voiced fears that such emphasis was excessive. In contrast, he drew attention to concomitant structural factors, concluding that the regime would not have come about without the existence of the CCW (2009).

Cottrell's central thesis that the MBT effectively replaced the CCW's revised Protocol on mines and booby traps is highly debatable.[11] Nevertheless, Cottrell's concern about the relative importance of structure and agency is pertinent to cluster munitions as well as landmines. This is because an unanswered question from research into the landmine campaign concerns the extent to which its characteristics are unique to that initiative, or are replicable features. Some prominent individuals involved in the Ottawa process argued it represented an important precedent in view of the roles the ICBL played as a change agent (Williams, 1997), thus privileging NGO agency in particular. In general, IR scholars have been more cautious—even if some saw the landmine campaign as a promising emancipatory development (Cooper, 2006 374). In speaking on why advocacy efforts by "moral entrepreneurs" to establish new international norms succeed or fail to the MBT Tenth Anniversary Conference in Oslo, for example, Price focused on the characteristics of norm entrepreneurs and techniques they use. However, Price focused to a greater extent on factors affecting receptivity

[11] CCW AP II regulates not only AP mines, but "mines other than anti-personnel mines" (MOTAPM) in addition to prohibiting the use of booby traps. Many MBT state parties have also acceded to this treaty, which as of 11 October 2011 had 97 member states.

including features of advocacy targets (especially states) and of the international environment more generally, as well as the nature of the issues themselves (2007).

International efforts on cluster munitions may thus offer further data on the relationship between structure and agency in norm-promoting transnational initiatives that could shed light on the relative importance of activist agency.

4.2 Cluster munitions

Explicit theoretical analysis of the dynamics of international efforts on cluster munitions was relatively rare until the Oslo process concluded in 2008. Until then, the bulk of peer-reviewed analysis published on cluster munitions was legally or historically oriented, or was situated in policy research rather than in formal academic IR (see Chapter 2 section 3 for a brief overview).

Petrova's work is a prominent exception. Her examination of NGO advocacy on cluster munitions (Petrova, 2007a) as well as the influence of Belgium and Norway on the development of new international norms on AP mines and cluster munitions (2007b) were conventional constructivist in flavour, and were based on detailed research including interviews with policy makers and civil society activists in several countries. Petrova's work indicated a high degree of crossover of individuals in government and civil society in Belgium and Norway from landmine to cluster munition campaigning, and some recurrent political dynamics. However, Petrova's studies from this period concluded in scope before the Oslo process reached fruition.

Soon after the Dublin negotiations, Rappert and Moyes analysed the notion of unacceptable harm in the Oslo process and its alleged implications for regulating other explosive weapons, in part based on earlier work published by Rappert (2006 , 2005a ,

2008 , 2009b). They were discursive in perspective, viewing cluster munitions as objects of a subjective and socially mediated discourse deconstructed through analysis and argumentation—a process eventually resulting in the weapon's de-legitimisation. Both authors had been involved in international research and campaigning on cluster munitions, and drew on their respective experiences although other scholars soon contested aspects of their analysis (Rosert, 2009). Subsequently, Moyes and Rappert clarified some elements, especially concerning the nature of the definition of cluster munitions developed in the CCM's negotiation (for which Moyes had been the CMC's main spokesperson) (2009a). They later argued for the relevance of aspects of their analysis to domains such as enhancing civilian protection from explosive weapons (2010), something others such as Di Ruzza (2008), Borrie and Brehm (2011) also suggested.

A comprehensive historical account of international efforts to ban cluster munitions exists (Borrie, 2009), building on work published over several years (2007a , 2007b , 2008 , Borrie and Thornton, 2008), but it is not situated within a formal IR theory framework. Nor are most earlier texts about international developments in the field of anti-personnel weapons regimes by SIPRI (1973 , 1975 , 1978 , 1979), Krepon (1974), Prokosch (1975 , 1976 , 1995b , 1995a) and Wiebe (2003).

A number of legal analyses have been produced concerning cluster munition restriction (Boothby, 2005 , Breitegger, 2005 , Maresca, 2006 , Nystuen, 2009 , Wiebe, 2008 , Woudenberg and Wormgoor, 2010) including a detailed multi-author commentary on the CCM published in 2010 (Nystuen and Casey-Maslen, 2010). However, these studies also have little to say about IR theory, although some of these

studies conclude that over time the CCM will have a normative effect de-legitimising cluster munition use and possession beyond the treaty's membership. This implies recognition of intersubjective factors alongside positivistic aspects of international law.

A number of IR scholars have begun to publish their explanations for the CCM's emergence. Although these studies appear largely to share a social constructionist ontology, there are significant differences in emphasis. For example, Wisotzki (2009) and Garcia (2011) each argued that the Oslo process succeeded because it built up the impression amongst many states that cluster munitions were highly prone to indiscriminate use, which de-legitimised these to the point they could be banned. Such an interpretation has developed support from certain scholars working in the nuclear weapons field (Lewis, 2009 , Berry et al., 2010). Petrova, in contrast argued the major motivating factor behind the CCM was that:

> "Whereas perceptions of military utility are not indefinitely malleable, in the cases of anti-personnel landmines and cluster munitions, they have nevertheless undergone a change from widely held assumptions about their military necessity and effectiveness to a view that they are outdated weapons of limited military utility" (Petrova, 2010 5).

Both lines of argumentation are plausible. However, as will be shown, utility and acceptability arguments were not rival concepts isolated from one another. Rather, these utility and acceptability considerations were intrinsically linked aspects of the same contestation in which changes of generally accepted meaning about one could affect the other. It is only possible to understand the CCM's emergence by recognising this dynamic. Significantly, CMC activists themselves considered that they needed to address these multiple lines of contestation coherently in view of the connections between them:

> "An initial point of entry for critical thinking about cluster munitions within the CMC was the purported military utility of cluster munitions. Predominantly it was always the humanitarian harm side of the effects equation which was campaigned on. It's simply not true that states decided cluster munitions have no military utility, or that they were persuaded so totally. Spain, for instance, produced electronically-fused cluster munitions, and stated [late in the Oslo process] that getting rid of such useful, current weapons was very costly for them."[12]

Bolton and Nash analysed aspects of international efforts on cluster munitions, drawing in part from the latter's experience as CMC coordinator (2010), arguing that:

> "Rather than trying to win the game on the terrain of military utility, where states would always have an abstract and hypothetical advantage, the [CMC's] response was to question and criticise military utility and to demand concrete examples of military benefit actually derived from use of cluster munitions and, in the absence of such examples, continually to gather evidence of humanitarian harm. This approach was also underpinned by the inclusion of survivors and other individuals from affected communities" (2010 180).

Bolton and Nash's article also lends some consideration to structural factors enabling the Oslo process to emerge, including the CCW. However, their analysis of cluster munition reframing among states is cursory, and they do not define what constitutes this reframing.

Scholars influenced by critical theory (Krause, 2011 , Mathur, 2011) and Copenhagen School securitisation concepts (Cooper, 2011) have raised issues about the significance of international humanitarian treaties established on cluster munitions and AP mines by placing them within constructs such as humanitarian arms control. Cooper,

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[12] Interview with Thomas Nash (CMC), 24 November 2011.

for example, wrote that "the current regime of truth constructed around humanitarian arms control is not only extraordinarily ahistorical but is one that depends on a rather partial understanding of the way the relationship between power, ethics, and specific models of economy have been expressed throughout the history of arms regulation" (2011 141). Yet humanitarian arguments in arms negotiations have a long history dating back to at least the nineteenth century (Bring, 1987). In negotiations between states these humanitarian concerns were usually subordinated to national security concerns such as balanced arms reductions, verification, compliance and risk of loss of national security or other sensitive information prior to the MBT (Mathews and McCormack, 1999), which is one reason why the MBT is significant.

Cooper also suggested that the AP mine and cluster munition bans had as much to do with factors such as developments in military technology and the nature of the arms trade as they did with humanitarian NGO efforts. In this conception, the Ottawa and Oslo processes are examples of "arms control from below within the logic of militarism from above" (Cooper and Mutimer, 2011 16). Seen in terms of the agent-structure debate, activist agency to convince some states to outlaw certain weapons worked because it went with the grain of broader international developments, not because it transformed them. In particular, the increasing emphasis on humanitarian protection and bringing about democratising change through Western-led military interventions from the 1990s onward—wars of choice rather than Cold War existential survival—were significant systemic shifts.

5. The CCM and theorising about the meaning of unacceptable harm

Two areas in which reflectivist theorising offers insights are now explored in view of their particular salience to this thesis: the significance of ideational and identity-related factors in norm emergence, and the roles and influence of non-state actors, including those constituting transnational advocacy networks (TANs). This helps to orient the inquiry since both were features of the CCM's eventual emergence, which must be accounted for if the cluster munition ban treaty process is to be understood. Such theorising indicates what aspects of collective reframing and ideational change should look like.

5.1 Norms

As discussed earlier, quite a lot of the behaviour of states resembles that of a logic of appropriateness rather than of utilitarian consequences. This is because even though politically anarchical, the international environment contains social structures in the form of norms, rules and institutions. These are "social facts, which result from the collective intentionality of people or groups within society. Social structures matter because they define expectations for behaviour" (Park, 2004 84). IR theorists have proposed various definitions of norms (Shannon, 2000 294-295). In essence, a norm is "a standard of appropriate behaviour for actors with a given identity" (Finnemore and Sikkink, 1998 891).

Realists and neorealists deny norms have much direct causal weight for state behaviour in instrumental terms, though there is the possibility left open that norms are factors in the constitution of state identity. Neoliberals mainly register norms in terms of specific longer-term interests in institutional cheating or compliance. In constructivism,

norms have influence even in the absence of material interest, and states can learn standards of appropriate behaviour from sources including each other, IOs (Finnemore, 1993) and from "epistemic communities" of people with knowledge-based claims to expertise, for instance as has been shown in the case of nuclear arms control (Adler, 1992). In international policy coordination, "control over knowledge and information is an important dimension of power […] the diffusion of new ideas and information can lead to new patterns of behaviour" (Haas, 1992 3). As we will be seen further below, constructivists and other reflectivists also view civil society activists as norm entrepreneurs able to influence patterns of state behaviour, of which the CCM's emergence is one case.

The evidence for the existence and influence of norms is indirect, just as it is for many motivations for political action (Finnemore and Sikkink, 1998 892). Specifically, norms are distinguishable because these have an impact on behaviour: "norms can be found at the nexus of two social phenomena—material practices (behaviours) and knowledge practices (discourses that communicate beliefs regarding what behaviours are considered appropriate and what are not)" (Lawson, 2002 23). As Finnemore observed, "norms make similar behavioural claims on dissimilar actors, they create coordinated patterns of behaviour that we can study and about which we can theorise" (1996a 157-8).

What this thesis seeks to do is understand the factors at work in coordination of the patterns of behaviour and discourse of states leading to the CCM, namely a new shared assessment about cluster munitions' legitimacy/acceptability. An important point is that a definitive causative relationship (the existence of *x* norm caused *y* behaviour) is

not going to be produced by studying normative emergence in the context of cluster munitions. For instance, it is not possible to exclude other forms of motivation in decision-making (Shannon, 2000 297-298). Strictly speaking, the most ambitious knowledge claims that are possible regard understanding international efforts on cluster munitions, rather than explaining them in a positivist D-N model sense. Correspondingly, in this thesis state behaviour based on rationalist-materialist power or interest maximisation calculations are not excluded, it is just that these motivations for behaviour are insufficient without an appreciation of intersubjective, normative elements too.

There is no simple answer to the question of how many actors must share an assessment before it can be considered a norm. Nevertheless, Finnemore and Sikkink have theorised that norms have "life cycles" in which each stage—norm emergence, cascading and internalisation—has specific characteristics. Only the first two stages fall within the time frame of this thesis. In the norm emergence stage, norm entrepreneurs

> "attempt to convince a critical mass of states (norm leaders) to embrace new norms. The second [cascading] stage is characterised more by a dynamic of imitation as the norm leaders attempt to socialise other states to become norm followers. The exact motivation for this second stage where the norm "cascades" through the rest of the population (in this case, of states) may vary" (1998 895).

Looking at the number of states participating in the Oslo initiative it could be argued that a norm cascade occurred from the second half of 2007. Between the end of the Oslo's process's Lima conference in May 2007 and the next Oslo meeting of the initiative in Vienna in December, state participation doubled. 138 governments participated in the Vienna conference and, as described in Chapter 6, strong CMC,

ICRC and UN humanitarian argumentation created momentum amongst numerous states for a broad ban on cluster munitions. Meanwhile, attendance at the CCW remained stable at a much lower numbers (usually less than 50 states), and accession to that treaty did not significantly increase during the Oslo process period.

A weakness of this view, though, is that the Oslo Declaration's normative goal to ban cluster munitions causing unacceptable harm was a deliberately ambiguous one. That Declaration established parameters for subsequent Oslo process discourse, but as Part II of the thesis will show, in mid-2007 both the important concepts of cluster munitions and unacceptable harm had yet to be determined. In other words, it was not necessarily clear at the time what the emerging norm was precisely, even to those calling most stridently for a prohibition of some kind.

Tracing variations in relevant material practices and discourses ought to shed light on the nature of changes in assessments about cluster munitions' acceptability occurring between 2003 and 2008. At the beginning of this period, even a modest Swiss proposal in the CCW for international agreement to fit self-destruct mechanisms to future cluster munitions proved highly divisive (Maresca, 2004 821). Less than five years later, in May 2008, 107 states adopted CCM banning the weapon categorically. Something happened in that period to change the normative assessments of a majority of the world's states about this weapon:

(1) Prior assessment state (2003):

Cluster munitions are acceptable/legitimate weapons provided they are used in conformity with existing international humanitarian law (IHL).

(2) New normative state (by 30 May 2008):

Cluster munitions should be prohibited because these are weapons prone to indiscriminate use, and therefore are unacceptable.

To understand this change, this thesis will examine the three related propositions specified in Chapter 2.2.1. Now it is time to turn to clarifying some of the terms used in these propositions, and to setting out a framework that, along with the understandings above, will allow for theory and evidence to be compared.

5.2 Non-state actors

There are many forms of non-state actor, only some of which are relevant to this thesis. Of those that are, international or regional organisations are understood to be entities established by inter-governmental agreement. Adopting Ahmed and Potter's description, by NGO it is meant any IO not established by inter-governmental agreement. Moreover, an NGO "cannot be profit-making; it cannot advocate the use of violence; it cannot be a school, a university or a political party…neither government agencies nor corporations are NGOs" (2006 8).[13] Thus, the UN is considered to be an IO. By this description, the ICRC is an NGO—though Ahmed and Potter make a specific exception, describing it as a private humanitarian agency. In this thesis, the distinction matters less than the point that the ICRC displayed a specific identity of its own: it never belonged to the CMC, nor did it behave identically to UN agencies.

It is not clear how whether all of the constituent organisations of the CMC fit within Ahmed and Potter's definition of an NGO. These organisations ranged from religious charities such as the Mennonite Central Committee (MCC) to professionalised

[13] Such a definition excludes, for instance, Textron Corporation, which attended some CCW meetings on cluster munitions as an observer between 2003 and 2008.

research and advocacy outfits such as Human Rights Watch (HRW) and specialist private humanitarian agencies including Norwegian People's Aid (NPA), and Handicap International (HI) chapters in various countries. Individually, are these NGOs international or domestic? This question is dealt with here by noting that their umbrella network, the CMC, undoubtedly was international in its focus, and by extension that made its members international too. Before the CMC's establishment in November 2003, these NGOs' interest in global restrictions on cluster munitions (for instance, via the CCW) also effectively made them international, even if some were located within specific domestic contexts.

In materialist-rationalist explanations, IOs and NGOs are not supposed to matter in influencing states perceptions and behaviour at the international level. However, it has been demonstrated that they sometimes do. International bureaucracies including those of the UN display identities and pursue normative objectives independent of their ostensible roles in neoliberal theory as mechanisms for coordinating interests of states, or as reflections of the material distribution of power in realism (Finnemore, 1993), and can even develop bureaucratic pathologies of various kinds (Barnett and Finnemore, 1999). And a considerable literature has developed beyond the MBT example concerning the influence of NGOs on state behaviour in, for instance, the development of international human rights and environmental standards, conflict diamonds, ending use of child soldiers and the International Criminal Court's founding (Busby, 2010 , Carpenter, 2007 , Florini, 2000 , Hubert, 2007 , Keck and Sikkink, 1998).

Keck and Sikkink's work on transnational advocacy networks of NGO activists "distinguishable largely by the centrality of principled ideas or values in motivating

their formation" is significant in this respect as it describes the CMC. Such TANs "are bound together by shared values, a common discourse, and dense exchange of information and services" (1999 89). In their campaigns, TANs seek to develop a common frame of meaning that facilitates their goals (1998 7), both internally among their constituent organisations, and externally in favourably influencing state and IO behaviour. According to Keck and Sikkink, it follows that TANs can be analysed in terms of their relationships—"how connections are established and maintained among network actors and between activities and their allies and opponents" (1998 7)—as well as the resources making the campaign possible, and institutional structures. Something else distinguishable is the ability of TANs to exert boomerang effects; that is, creating new international sources of pressure on governments when domestic advocacy toward a given normative goal in that state is at an impasse (1998 12-14).

Although Keck and Sikkink's research pre-dated detailed analysis of the MBT, their theorising is widely considered relevant to the process of agenda setting through norm diffusion that NGOs facilitated in that initiative within the ICBL network (Price, 2003 , Rutherford, 2000). As Rutherford argued, NGOs in the ICBL prompted states to address the landmine issue in a particular way, eventually culminating in the MBT (2000 76). While there are some substantive differences between international efforts to ban cluster munitions and AP mines as noted earlier, it is argued that NGOs had equivalent influence in the CCM's emergence.

An important proviso is that the CMC and its constituent NGOs were not alone in influencing how cluster munitions were framed internationally. Outside experts, for instance personnel from parts of the UN such as UNDP, UNMAS and UNIDIR, the

ICRC, GICHD, private explosive ordnance consultants and journalists also contributed to changes how in cluster munitions were thought of. They presented evidence in the form of studies and presentations, facilitating discussions involving state representatives at varying levels of formality, and provided arguments for humanitarian restrictions on the weapon in view of its effects.

The CCW and the MBT implementation processes incubated this "epistemic community" by producing research and policy advice on cluster munitions long before the Oslo process emerged. An epistemic community is a network motivated primarily by shared causal ideas about the effects of cluster munitions rather than shared principles or values (Keck and Sikkink, 1998 30). Haas described epistemic communities as holding in common a set of principled and causal beliefs, possessing a shared notion of validity and a shared policy enterprise:

> "Their authoritative claim to policy-relevant knowledge in a particular domain is based on their recognised expertise within that domain. These features distinguish epistemic communities from other groups often involved in policy coordination […] Epistemic communities need not be made up of natural scientists; they can consist of social scientists or individuals from any discipline or profession who have a sufficiently strong claim to a body of knowledge that is valued by society" (Haas, 1992 16).

One way of thinking about the distinction between the TAN and the epistemic community on cluster munitions is as follows: NGO activists advocated that cluster munitions should be restricted because they posed unacceptable hazard to civilians, then sought evidence and argumentation to support this claim. By comparison, the epistemic community's research (for instance, into unexploded submunitions or through cluster munition testing) led them to such a view. As we shall see, the value-led views of the

TAN and the causal idea-led views of the epistemic community on cluster munitions tended to be—but were not always—complementary during the period from 2003 to 2008. Yet both were important to international efforts on cluster munitions by influencing the meaning of unacceptable harm, which culminated in the CCM's cluster munition definition.

Meanwhile, contextual considerations must also be kept to the fore, especially in view of criticisms mentioned earlier of scholarship on TANs privileging activist agency to an excessive degree (Cottrell, 2009 , Price, 2003). One important question, for instance, is why certain states and their representatives were receptive to humanitarian arguments for banning cluster munitions. This may have had as much to do with their assessments of the behaviour or intentions of other states or, as Cooper (2011) argued, with changes in structural factors such as technology or humanitarian wars of choice as it did with NGO activist agency of the evaluations of any epistemic community of experts.

To ground the inquiry, let us briefly explore the important aspects of Keck and Sikkink's general description of NGO roles in norm emergence. This includes what framing means. Also, the distinctive phases on which the features of international efforts on cluster munitions can be mapped in Part III are introduced.

5.3 Stages in collective reframing

By framing, Keck and Sikkink mean "conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action" drawing on work in sociology (McAdam et al., 1996). In particular, they were influenced by Snow and Benford's research (1986 , 2000),

which derived from Goffman (1974). Snow and Benford break down a broader definition of framing—or "schemata of interpretation"—(1986 464) into four types of frame alignment (or "convergence" referred to in the third proposition of this thesis). These are:

- *Bridging:* the linkage of two or more ideologically congruent but structurally unconnected frames regarding a particular interest or problem (467).
- *Amplification:* clarification and invigoration of an interpretive frame that bears on a particular issue, problem or set of events (469) such as particular values.
- *Extension or grafting:* portraying objectives or activities as attending to or being congruent with the values and interests of potential adherents (472).
- *Transformation, keying or reframing:* systematic alteration redefining activities, events, and biographies that are already meaningful from the standpoint of some primary framework to something else (474).

Snow and Benford describe these frame alignment processes in terms of the internal dynamics of micromobilisation in social movements such as US peace groups. In comparison, while continuing to assume its relevance to the internal dynamics of TANs and constituent NGOs, Keck and Sikkink expand the scope of this conception of framing/reframing to include interactions between TANs and states in which the latter are frame alignment targets. Specifically, they carry these ideas over to theorise the following stages of TAN influence:

1. Issue creation and attention/agenda setting;

2. Influence on discursive positions of states and regional and international organisations;
3. Influence on institutional procedures;
4. Influence on policy change in "target actors", which may be states, international or regional organisations, or private actors;
5. Influence on state behaviour.

Keck and Sikkink caution that these stages are descriptive and not prescriptive: TAN influence on normative emergence can vary due to a variety of factors. Moreover, other scholars have noted that some TANs (such as the anti-globalisation movement) can orient and organise themselves in ways that differ from those conceived of in Benford and Snow-inspired frame analysis (Chesters, 2004). Nevertheless, if the first three propositions of this thesis are valid, then it should be possible to see evidence of these stages of TAN influence in international efforts on cluster munitions between 2003 to 2008 (see Chapter 8).

In a related vein, Price emphasised the importance of norm grafting; arguing that in order to maximise their credibility and influence over states, activists usually seek to relate their goals to existing norms of appropriate behaviour. For example:

> "The laws of war and international humanitarian law are the background against which efforts to ban weapons such as landmines have been made intelligible. Two central concepts from these traditions that are relevant to this issue are civilian discrimination and unnecessary suffering…AP landmines constitute a particularly wretched transgression of the norm of discrimination" (Price, 1998 628).

This fits with Snow and Benford's point about norm extension. Moreover, it suggests there should be evidence in international efforts on cluster munitions of the MBT and such IHL principles being used as grafting sources.

Meanwhile, a number of recent studies have extended analysis of activist networks. Such scholarship has even extended to network analysis *of* activist networks to try to understand why TANs emerge on some issues and not others. Using quantitative techniques to measure citations referring to NGO policy reports or statements allows pictures of the hubs and nodes of these networks to be constructed, Carpenter's work is noteworthy in view of her focus on the domains of armed violence, IHL and arms control (2007 , 2011 , 2011). Analysing a range of arms regulation-related issues including cluster munitions in this way, she concluded that the ICRC and HRW act on their central positions in such networks to "gate-keep" which issues receive priority in terms of TAN campaigning. "Agenda-vetting is thus a tool of influence used by organisations whose agenda matters most for constructing intersubjective understandings of an issue area" (2011 99).

One potential implication of Carpenter's analysis is that unless and until the ICRC and HRW can be persuaded to promote restrictions or prohibitions on particular weapons, the relevant TAN stands little chance of developing much international traction. However, such a conclusion should be regarded with caution since the NGO is the unit of analysis in Carpenter's study. Using Carpenter's method, it is difficult to perceive the role of influential individuals, who can—and did—move between NGOs or IOs, and within (or into) the policy-making apparatuses of states. A second proviso is that while the number of web citations of a given NGO is a potentially useful indicator

of influence, it does not necessarily equate with gate-keeping power. Some documents or other forms of discourse are not widely circulated or published, yet can influence those with disproportionate influence in international processes. The assumption that the influence of a document is directly in proportion to its number of citations is a familiar one for academics, but it is not yet proven that it carries over to the world of civil society agenda setting.

Carpenter herself noted that her findings were correlations, and that further research was needed (2011 99). Beside further network analysis, a detailed narrative picture of what occurred in at least several of the issue contexts she covers is probably required for the quantitative findings to be understood in context. Nevertheless, it suggests two issues of interest for this thesis. Firstly, Carpenter's work suggested, "the decisions of central nodes in networks are at least as important for understanding norm emergence as are dynamics between those nodes and states" (2011 99). Secondly, it suggested that successful framing of cluster munitions as an unacceptable humanitarian hazard correlated with ICRC and HRW support. If these actors are not visible, it casts some doubt over civil society influence over states to any great extent on norm emergence on cluster munitions.

6. Conclusion

This Chapter introduced key theoretical terms, concepts and the orientation used in this thesis. In particular, it explored differences between major theoretical approaches concerning how the international environment is structured, with emphasis in the discussion on neorealism and neoliberalism on the rationalist-materialist end of the spectrum, and constructivism and critical theory influenced approaches in the direction

of reflectivism. Three problems for rationalist-materialist approaches in understanding certain phenomena in contemporary regime emergence were discussed, both generically and as they impinge upon the CCM and MBT cases—analysis developed in greater depth in Part III of the thesis.

These *how*, *who* and *what* problems are by no means the only issues with rationalist-materialist explanations for the emergence of recent regimes like those banning weapons. Nevertheless, that such problems are recurrent across differing processes is potentially significant as it suggests the presence of certain shortcomings in the dominant rationalist-materialist paradigm. Rationalist-materialists can argue that ignoring variables such as the influence of norms, non-material forms of power or non-state actors is permissible because their accounts of the structure of international relations retain predictive, or at least explanatory, reach. Outcomes counter to this prevailing pattern like the MBT may occasionally happen, but the presence of one swallow does not make it springtime, in other words. But such parsimoniousness looks suspect when more swallows appear counter to their models, and this cannot be adequately explained or even satisfactorily investigated because the clues as to how it happened cannot be integrated—only discounted or ignored.

This, of course, leaves the question the thesis is centrally concerned with: of how international efforts on cluster munitions are to be understood. Here, the cluster munition literature as surveyed in this Chapter points to some differences between scholars over how the CCM emerged, including differing emphases on declining acceptability of cluster munitions in humanitarian terms versus decreasing military utility as causes. Parts II and III of the thesis offer a more detailed account than such

explanations have hitherto provided, one indicating that reality was not as simple as this, nor the CCM's achievement as mono-causal. At an ideational level, changes in thinking about the acceptability and military utility of cluster munitions were dynamically linked. Moreover, these were changes that had to be brought about by someone or something—these did not occur inevitably or spontaneously. At a practical level, there were emergent problems (namely interoperability) not substantively related to either issue that had to be solved in order to achieve a widely adhered-to treaty.

These factors and their inter-relationships are a necessary part of theorising if the emergence of the CCM is to be understood in context. Two important reflectivist concepts, those of norms and of framing, were introduced in order in this Chapter in order to help to achieve such an understanding. These concepts orient the research toward features of particular interest in Part II's detailed case examination of international efforts on cluster munitions. Later, in Part III of the thesis, these concepts are explored further as part of its theoretical analysis.

PART II

1. Introduction

Part II of the thesis is a detailed examination of efforts to confront the humanitarian effects of cluster munitions. Concerns about these weapons had been expressed at the international level since the large-scale use of cluster bombs in South East Asia in the 1960s. But these concerns were largely ignored until sufficient evidence amassed this millennium of the weapons' effects on civilians—in particular of the post-conflict effects of unexploded submunitions.

Politically, a key problem for advocates of greater controls over cluster munitions was that these weapons were hard to define in a way that precisely described both their technical characteristics and humanitarian impacts, while ensuring sufficient ambiguity for states with a broad range of views to coalesce around. Yet defining cluster munitions as a category in a way that achieved these requirements would be critical to the scope and strength of any regulations or prohibition. It was achieved—not without difficulty—in the Oslo process in late May 2008. In four chapters, Part II shows how and why that occurred, with particular reference to the notion of categorising cluster munitions that cause unacceptable harm.

2. What are cluster munitions?

Cluster munitions are weapons that saturate areas with explosive force by means of submunitions, sometimes described as bomblets.[14] These weapons pose danger to

[14] In Article 2 of the CCM, submunitions and bomblets are defined differently, the purpose being to capture both munitions "dispersed or released from a cluster munition" and those "dispersed or released from a dispenser". This distinction was made late in the

civilians because they are prone to indiscriminate effect at time of use, and because they create a hazardous residue of unexploded submunitions.

Arriving at this understanding took many decades, and was an uneven process in which most progress toward it was made only this millennium after evidence accumulated about the effects of cluster munition use. From their early deployment during the Second World War, weapons describable as cluster munitions were usually shrouded in secrecy, incidents of their use often went unreported by users and those targeted with them, and their actual effects in operational conditions were poorly understood (Borrie et al., 2010 2-6). Nevertheless, even in the early days of multilateral talks about anti-personnel weapons in the 1970s, government experts had a specific idea about what they referred to when they talked about cluster warheads, cluster bomb units or cluster bombs (Blix, 1974 28, Krepon, 1974 596-7, SIPRI, 1975 53).[15] They referred to weapons with explosive fragmentation submunitions (not simply blast or shaped-charge munitions), and only those producing small-calibred fragments. In the field of military ordnance, however, cluster munitions traditionally constituted a broad category, which from their early development encompassed types deploying submunitions other than conventional high explosive including incendiaries and even bacteriological and chemical payloads (Prokosch, 1995a 4).

Oslo process at the Dublin negotiations, and in common usage "submunition" and "bomblet" were (and still are) used interchangeably.

[15] This is clear not only from the reports of government experts produced during this period described later in the Chapter, but from what some of these experts contributed to the open, published literature, and other researchers published based on interviews with military personnel.

Cluster munitions are containers or dispensers from which submunitions are scattered. While most individual cluster munitions contain dozens or hundreds of submunitions, a single dispenser system may contain thousands. Submunitions are generally the dangerous parts of a cluster munition because these small devices are designed to explode on impact or after time-delay and cause damage through blast and fragmentation. Older submunitions, like those used in South East Asia in the 1960s and early 1970s, were mainly anti-personnel in effect. From the 1970s, so-called Dual-Purpose Improved Conventional Munitions (DPICMs) appeared, which also contained an anti-armour shaped charge. Initially developed by NATO countries, DPICMs were subsequently widely copied.

Explosive submunitions can be delivered in cluster munitions dropped, dispensed or launched from aircraft. Or, as has been the case in recent decades, cluster munitions may be surface-launched before dispersing their submunition loads. Beside artillery shells containing submunitions, systems are used that deploy submunitions from rockets, mortar shells and cruise missiles.

3. The nature of international concern about cluster munitions

There are three basic types of humanitarian concern about cluster munitions. Firstly, at time of use cluster munitions are intended to saturate a zone with explosive submunitions that cannot be individually targeted at military objectives, or away from civilians in the vicinity. Secondly, because of cluster munitions' area effect, it follows that their failed submunitions may disperse over a significant area, remaining in streets, ditches, bombed buildings and other structures, or agricultural lands. Massive numbers of submunitions can be dispersed very quickly, which means that even low rates of

failure in operation can result in considerable absolute numbers of duds remaining on or in the ground. Moreover, actual failure rates are always higher than theoretical failure rates because of a wide variety of operational factors. Sometimes cluster munitions fail to dispense their cargo of submunitions altogether, which poses a different kind of hazard. A third concern, as indicated by Hizbullah launching of cluster munition rockets from Southern Lebanon into Northern Israel in 2006 (Dullum, 2008 89), is the wide proliferation of these weapons, including to non-state armed groups.

These three concerns about cluster munitions did not develop simultaneously. Initially, the concern about problems at time of use assumed primacy. It will be seen that initial government proposals to prohibit "cluster warheads" in the 1970s (Sweden, 1974) were based as much on trying to protect combatants from "unnecessary suffering" as they were about the weapons being indiscriminate in effect. This was largely because technical advances enabled detonating submunitions to create smaller, more numerous high-velocity fragments (Prokosch, 1995a 5): it was feared that these would create complex and difficult-to-treat injuries in soldiers. Because US bombing of Laos and Cambodia was conducted in secret between 1964 and 1973 (there was little international reporting of conditions in these countries during this period), the large-scale use of cluster munitions in populated areas and the post-conflict effects of large numbers of unexploded submunitions on civilians were poorly understood by most governments until much later.

Thus, there is an important distinction between failed attempts in the 1970s to ban cluster munitions and the international campaign from 2003. By then there was

considerable post-conflict evidence of the effects of cluster munitions use on civilians in many places as a basis on which to appeal for support to curb the weapon.

4. Actors involved in cluster munition policy

The CCM is a social construction, meaning that it was brought about through "the process of social interaction and transmission of social meanings. Social constructions do not exist in nature but have come about through acts of human creation" (Dunne et al., 2010 350). The CCM's achievement, and the emergence and course of the Oslo process leading to it, reflected changes in the postures and policies of people representing the interests and positions of states, IOs and civil society groups. Thus, the use of labels such as state (for instance, "New Zealand" or "Peru") or organisation ("ICRC" or "CMC") encountered in this thesis does not imply they were cognitively unified entities: as will be seen, some often clearly were not. Instead these labels are shorthand in the context of specific situations or environments. Nevertheless, in formal terms treaties are negotiated and agreed by states, and state representatives were prone to the influence of others such as researchers, activists, cluster munition survivors and humanitarian deminers. So, it is necessary to briefly outline the various kinds of actor involved in international efforts on cluster munitions between 2003 and 2008 and the degree of their influence on policy.

The nation-state is the basic unit of multilateral diplomacy, particularly in the domain of security policy in which states may perceive their crucial national interests and even survival to be at stake. This remains true both in the CCW, in which decision making adheres to a consensus practice (one state can thwart an agreement for all), and in the freestanding Oslo process, which adopted procedural rules for the Dublin

negotiations that provided, if necessary, for voting (Smyth, 2010). Only states have a vote over decisions concerning international security treaties.

While in theory the international community encapsulates nearly 200 states, in practice on cluster munitions it meant a sub-set of them. As of early 2011, the CCW framework treaty had 113 state parties, but at the beginning of the period this dissertation is concerned with it had approximately 100 members, a number that grew slowly. The number of states actively participating in CCW meetings in Geneva was even smaller: at its five-yearly review conference in 2001, for example, 65 member countries attended, along with four signatory states, observed by 18 states not party to the CCW (2001 4). In 2006, participating member states had grown slightly to 76 (CCW, 2006b 9). Attendance at the CCW's expert groups and annual meetings was usually lower—by roughly 25 percent.

The CCW was not the only inter-state forum in which states could raise cluster munition concerns. The traditional UN regional group system was weak where conventional weapons were concerned (as compared with the Conference on Disarmament (CD), or caucuses in the Biological or Chemical Weapons Conventions), and usually only met in the CCW context to nominate regional candidates for positions such as meeting presidents and vice-presidents. However, cluster munitions were periodically discussed at a working level among national bureaucrats from EU countries at coordination meetings on disarmament and United Nations (CODUN) matters in Brussels. And, after the Oslo process commenced there is evidence that the US used NATO coordination channels to disseminate its concerns to its alliance partners, including to Norway—an Oslo process core group member. The US also communicated

bilaterally with military partners not party to NATO, including Australia, Canada and Japan. Later in the Oslo process, regional meetings would be organised, in some cases with the assistance of regional organisations such as the African Union and ASEAN, although these entities played little further role on an issue that tended to divide states within regions rather than offer them something to rally behind.

Unlike the CCW, the Oslo process was, in principle, open to any state to participate in. In practice, however, it began with approximately 46 states (those countries adhering to the Oslo Declaration in February 2007), peaking at nearly 130 at the Vienna Conference the following December. State participation then stabilised, with 111 adhering to the February 2008 Wellington Declaration, a prerequisite for participation in the Dublin negotiations on the CCM in May 2008.

Attendance at Oslo process conferences thus grew to be numerically greater than the CCW, with many non-industrialised as well as cluster munition-affected countries taking part. This was a key point of distinction: while all of the largest users and producers of cluster munitions belonged to the CCW, few affected countries bothered to join it. Instead, some—such as Laos and Lebanon—would play active parts in the Oslo process. Many countries, and most Western ones, participated in both the CCW and Oslo process with the notable exception of the US, which shunned the latter.

International organisations (IOs) would play significant roles in multilateral efforts on cluster munitions (Borrie, 2009 227-48). However, neither the UN nor the Red Cross movement were monolithic entities, and their respective internal dynamics help to explain why at some times their views were more influential than at others. The ICRC was at the forefront of the Red Cross and Red Crescent Movement in its

involvement in weapons issues because of its mandate focusing on alleviating the humanitarian effects of armed conflict. As Chapter 4 will show, the ICRC would facilitate many of the earlier international discussions on cluster munitions.

One major obstacle to elevating cluster munitions to be an institutional priority within the ICRC was that weapons issues were viewed in-house as legal matters, and handled as such. The Arms Unit of the ICRC's Legal Division toiled for several years from the late 1990s to facilitate multilateral progress on dealing with cluster munitions—largely in the context of ERW. Its efforts really drew attention within the Movement as a consequence of the 2006 summer war in Southern Lebanon, when the ICRC's pre-eminent Division—Operations—the ICRC President, and national Red Cross societies also grew alarmed about cluster munitions' humanitarian effects and threw more institutional weight behind dealing with the issue.

If the internal dynamics of the ICRC were complicated, then those of the UN were byzantine in complexity. The UN had experience with cluster munitions at an operational level because of its experience in coordinating post-conflict operations cluster munition-affected places such as Afghanistan, Cambodia, Kosovo, Laos and Lebanon. Primary responsibility for policy coordination sat with the UN Mine Action Service (UNMAS) within the Department for Peacekeeping Operations (DPKO). However, a number of UN agencies were involved in activities and programs related to alleviating aspects of the effects of UXO including the UN Development Programme (UNDP), the Children's Fund (UNICEF) and the High Commission for Refugees (UNHCR). UN Research bodies such as its Institute for Disarmament Research (UNIDIR) conducted research relevant to cluster munitions.

Within the UN Secretariat, there were Offices for the Coordination of Humanitarian Affairs (OCHA) and Disarmament Affairs (ODA). ODA provided secretariat support for the CCW, and was particularly cautious in seeking to protect that multilateral forum from criticism or reputational damage. It meant that uniform UN positions were difficult and time-consuming to achieve within the UN Mine Action Team (UNMAT) mechanism. Sometimes, the field agencies preferred to dispense with system-wide coordination and make their own statements and undertake their own activities concerning cluster munitions—a tension that would eventually come to a head in the UN's inter-agency process in early 2008 (Borrie, 2009 242-8).

A dilemma for both the ICRC and UN between 2003 and 2008 concerned how to balance their respective commitments to the CCW—a UN-administered IHL and disarmament process—with achieving humanitarian goals on cluster munitions likely only achievable outside it. This was not such an issue for civil society NGOs. In principle, this third class of actor encompassed not only hundreds of humanitarian pressure groups such as HRW, Oxfam and HI individually and as members within the umbrella of the CMC, but others such as business interests and academics. In practice, business interests tended to be brought to bear at a national level (see Chapter 5 for discussion of Belgium), although Textron, an American cluster munition producer, attended the CCW as an observer during the Oslo process, and tried (without success) to become an observer to the Dublin negotiations. Academics tended to line up with the NGOs calling for new humanitarian measures, and some participated in the CMC as NGO representatives.

Despite their greater freedom to speak out strongly and often critically about states' policies on cluster munitions than IOs, CMC staff and those of its foremost member NGOs faced an ongoing balancing act. The CMC's goal of an international humanitarian treaty could only ultimately be met by influencing the postures and policies of state representatives, initially in forums like the CCW: harsh criticism could be counter-productive, and lose the Coalition credibility and the trust of government interlocutors. At the same time, campaigners recognised that overly cosy relationships with diplomats and other national policy makers—even in sympathetic states—could detract from holding governments to account on cluster munitions and in devising robust responses to their humanitarian hazards. Partly for these reasons, CMC members in many countries assiduously cultivated their national parliamentarians and domestic media, as means of putting pressure on governments through "naming, framing, blaming and shaming" (Ahmed and Potter, 2006 37).

Moreover, as will be seen in Chapters 4 and 5, in 2003 the CMC was the kernel of a much larger and heterogeneous network of civil society actors that would arise, in particular, in the period from 2006 to 2008 as inter-state work on cluster munitions became a reality. This growth in the Coalition's membership would be accompanied by growing pains as new NGOs (and new personalities) were integrated and made their perspectives known on the problem of cluster munitions and the most appropriate solutions. Although the personalities leading the Coalition throughout the 2003 to 2008 were a reasonably consistent group, their views and the CMC's central call and tactics continued to evolve. This is important: the energy and creative thinking of the CMC, along with that of UN entities and the ICRC, would infuse thinking of governments in the Oslo process and, in particular, its steering "core group" of states.

CHAPTER 4: THE CONTEXT FOR INTERNATIONAL EFFORTS ON CLUSTER MUNITIONS

1. Introduction

This Chapter analyses the evolution of international concern about cluster munitions until 2003. Although the scope of this thesis is primarily concerned with the period from 2003 to 2008, it is not possible to understand the emergence of those efforts without this context.

Notably, with the exception of Mennonite and Quaker activists, concerns expressed until the late 1990s about the effects of cluster munitions tended to revolve around their effects at time of use, including on combatants. However, emphasis of humanitarian concern would then shift during the 1999-2003 period toward the post-conflict effects of unexploded submunitions on civilians, for two main reasons. Firstly, NATO's air operations over the Former Republic of Yugoslavia (billed as a humanitarian intervention) would lead to greater international awareness and concern about the hazards cluster munitions pose to civilian populations. Secondly, from the later 1990s more became known about scale of the effects of UXO of many kinds, in part because of more systematic data collection connected with implementation of the MBT, which entered into force internationally in 1999.

The MBT involved civil society organisations closely, and NGOs developed their own mechanisms to systematically monitor treaty implementation (Wareham, 2006). To enable the safe use of previously contaminated land, humanitarian demining entails the removal of all UXO—not only AP mines—and such efforts also created a clearer picture of the effects of other ERW such as failed submunitions. This greater

knowledge contributed to momentum for negotiations in the CCW resulting in agreement on new rules in late 2003 intended to reduce the incidence of future explosive remnants of war (ERW). As such, the CCW process provided a platform on which the UN, ICRC and civil society could raise their particular concerns about cluster munitions with states. For these reasons, the MBT and CCW's evolution are important elements of this chapter. First, however, the legal landscape of generic (that is, non weapon-specific) humanitarian law rules is discussed in order to provide context for these processes and how they relate to cluster munitions.

2. Generic IHL and disarmament rules pertaining to cluster munitions

No treaty specifically banned or regulated the use of cluster munitions until the CCM's adoption in May 2008. Nevertheless, IHL rules regulate the use of all weapons: "these rules restrict how weapons may be used and outline measures which need to be taken so as to limit their impact on civilians and civilian objects" (ICRC, 2007c 1). Additional Protocol I (1977) of the Geneva Conventions (1974-1977 Diplomatic Conference of Geneva, 1977a) formulates many of these rules within one legal instrument, and is widely adhered to. Moreover, "many of its provisions reflect customary law and are therefore applicable to all the parties in an armed conflict, irrespective of whether or not they have formally ratified the protocol" (Maresca, 2006 28).

In the view of the ICRC—the recognised guardian of IHL—four principal rules elucidated in 1977 Additional Protocol I relate to cluster munition use: the rule of distinction (Art. 48); the rule against indiscriminate attacks (Art. 51(4) and (5)(a)); the

rule of proportionality (Art. 51 (5)(b)), and the rule on feasible precautions (Art. 57) (2007c):

- The *rule of distinction* states that "in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."
- The *rule against indiscriminate attacks* defines such attacks as "those which are not directed at a specific military objective"; "those which employ a method or means of combat which cannot be directed at a specific military objective"; or "those which employ a methods or means of combat the effects of which cannot be limited as required by this Protocol".
- These rules are, in effect, moderated by the *proportionality rule* also established in Article 51. As stated there, it prohibits any "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." It has been noted, however, "There is no miraculous mathematic rule that can help in making an assessment of proportionality" (ICRC, 2007b 57). Moreover, military commanders launching attacks are responsible for making proportionality calculations, and can only make these on the (imperfect) information available to them at the time.

- Belligerents are obliged to take constant care to spare the civilian population in the course of their military operations, as set out in the *rule on feasible precautions*, including taking care "in the choice of means and methods of attack".

ICRC experts observed that cluster munitions "raise important concerns under all of these rules" (Maresca, 2006 29).[16] Until the emergence of the Oslo process, however, legal experts were divided over whether cluster munitions should be subject to specific regulation. Some observed that the indiscriminate use of cluster munitions is already inconsistent with Additional Protocol I's obligations set out above (Boothby, 2005 2).

Historically, military forces have conducted little or no systematic post-assessment of the effects on civilians of attacks they characterise as being against military objectives, however. Consequently, belligerents' adherence to the proportionality rule is, in practice, often difficult to discern with precision. It meant that in forums like the diplomatic conferences of the 1970s and, later, in the CCW, proportionality became a "catch-all" that enabled states to argue against specific rules on weapons such as cluster munitions. They could claim weapon-specific rules were unnecessary and that instead the proportionality rule should be more faithfully applied, without specifying benchmarks for how assessing such application in evidentiary terms.

[16] Overarching these rules is the "general" rule in Article 51 of 1977 Additional Protocol I that the "civilian population and individual civilians shall enjoy general protection against dangers arising from military operations".

The post-conflict effects of ERW on civilians confronted government experts working in the CCW during the last decade with a practical question about cluster munitions, which had emerged as a particularly hazardous form of UXO: what does the presence of dangerous unexploded submunitions mean in relation to the reference to "expected…incidental loss of civilian life" in Article 51? Does it apply only to the few hours after an attack, or for several weeks or even years? One view was that:

> "If an attack continues to produce civilian harm for a lengthy time period after the attack, this would appear to have a direct bearing on whether or not such an attack would be "excessive". Use of cluster munitions may be expected to cause incidental loss of civilian life for years, even decades (if areas are not cleared) after the attacks. It seems unlikely that there will be any military advantage from damage that occurs after the conflict is over. In any case…the military advantage must be concrete and immediate" (Nystuen, 2009 140).

Moreover, experts in favour of specific rules on cluster munitions noted that the objections of others to such rules based on the adequacy of the general principles of Additional Protocol I would also apply to biological and chemical weapons, and AP mines. Yet all of these had been prohibited: "Against this background it does not seem out of place to specifically prohibit cluster munitions" (Nystuen, 2009 142). And, it is telling that soon after the emergence of the Oslo process in 2007, those states previously arguing that generic IHL rules were adequate began negotiations in the CCW on their own rules to specifically regulate cluster munitions. Whether the evidence of post-conflict impacts of cluster munition use on civilians was the major factor in change of tune of these states is unclear. It indicated, however, that their prior legal arguments

against new rules on the weapon were less than wholly based on enduring legal principle.

3. Use of cluster munitions and failed attempts to ban them

The precise origins of cluster munitions remain unclear. According to one study, the UK came up with the idea of dropping a group of smaller bombs from a larger casing for incendiary bombing during the First World War (Prokosch, 1995a 1). Both Axis and Allied forces used cluster munitions in the Second World War. The US military used both fragmentation and incendiary cluster bomb types against Japanese in the Pacific War (Prokosch, 1995a 1). The German air force, the *Luftwaffe*, used SD-2 submunitions—often referred to as butterfly bombs[17]—against Soviet forces on the Eastern Front in 1943, and the Soviets began fielding their own systems around the same time. The *Luftwaffe* also bombed towns on the east coast of England with SD-2s the same year, which caused considerable hazard to British civilians (King, 2000 10-11).

Despite these consequences, militaries of various countries saw the cluster bomb as a weapon with potential. The US copied the *Luftwaffe*'s butterfly bombs, and nestled these replicas in a container named the M-28 deployed in the Korean War in the early 1950s, and later from the skies above Indochina in the 1960s (Prokosch, 1995a 1). For their part, the Soviets kept their Second World War air-delivered cluster munition system, the OKT 1.5, in service until recently, using it extensively during the Soviet invasion and occupation of Afghanistan from 1979 (Dullum, 2008 11).

[17] The butterfly bomb was around the size of a fist, and was stabilised and braked in the air by a four-winged device that was the origin of its name.

The development of cluster munitions after the Second World War reflected a broad trend that, as war was waged on a scale that was ever larger and more industrialised, militaries wanted weapons that could kill more efficiently and over a larger area. Prokosch traced the development of wound ballistics science and weapons design in the post-war period in the US, and showed that the Korean War made the US military leadership concerned that its existing advantages in technology, equipment and training would be nullified by "human wave" attacks by Chinese and North Korean troops. Research and development efforts into a range of new anti-personnel weapons were redoubled, including mines, incendiary weapons such as napalm, improved assault rifles, grenades and what would eventually be known as cluster munitions (Prokosch, 1995b). Improvements in munition fragmentation into smaller, more uniformly sized fragments radiating outward at higher velocity were key to several of these developments.

A new generation of US anti-personnel weapons emerged in time to see widespread use in conflict in Indochina in the 1960s and 1970s, with devastating consequences for civilians in Vietnam, Cambodia and Laos. In early 1965, for example, the US began systematically bombing North Vietnam in "Operation Rolling Thunder". By the end of the following year word had begun to filter out of the tightly controlled country from visitors like pacifist David Dellinger of the US destruction of urban centres using munitions such as cluster bombs (1986 73-4). By now, the US arsenal of fragmentation bombs included munitions such as the CBU-24, each of which deployed hundreds of submunitions (Dullum, 2008 92). The use of just one CBU-24 released up to 200,000 steel balls saturating a wide area at high velocity (Prokosch, 1995b 83-85).

Cluster munitions like the CBU-24 became symbols of the Indochina conflict for anti-war protesters in North America and Europe. Honeywell Inc., a leading producer of the CBU-24, became a target of demonstrations, stockholder resolutions, consumer boycotts and other forms of protest in the US and other countries (SIPRI, 1978 222). But on the whole, concern among peace groups about the effects of cluster bombs were either studiously ignored or vigorously shrugged off by the US government. Writing in 1974, Michael Krepon observed:

> "It is a fair conclusion that military officers in the Pentagon downplayed the question of CBUs to deflect political channels from making an issue of their use, as they had done with napalm. CBUs were categorised and explained as a standard weapon, to be taken off the shelf—"conventional ironmongery" (1974 600).

Reflecting on this in the mid-1990s, Prokosch concluded that a "major increase in antipersonnel battlefield lethality had been accomplished with no public debate and relatively little subsequent protest". He added, "The "success" of the CBU-24 would lead to a proliferation of cluster technologies to other countries" (Prokosch, 1995b 98).

By the end of the 1960s, the US and its allies fielded a range of new anti-personnel weapons. These included napalm and other incendiary weapons, high-velocity rifles, "beehive" flechette bombs, command-detonated explosive devices (including so-called Claymore mines), air-delivered mines and a variety of cluster bombs and bomblet dispensers to disperse many explosive submunition models. At the time, these cluster munitions went by many different names including "anti-personnel bombs" and "pellet bombs" (Blix, 1974 21). Detailed information about their characteristics and precise effects were often hard to come by from those governments possessing them. However, the notion of "cluster bombs" appeared to be well

understood, as international discussions among government experts at meetings in Switzerland in the 1970s would show.

4.1. The Swiss diplomatic conferences and ICRC meetings

International momentum grew from the 1960s for the reaffirmation and further development of the humanitarian rules applicable to armed conflict. The rise of non-international armed conflicts and increasing resort to guerrilla warfare as in Vietnam also raised many challenges for application of these rules, not least for the protection of civilians. In February 1969, the ICRC convened a meeting of experts to discuss this. One of the preliminary documents the ICRC put before the experts invited their opinions on whether "fragmentation bombs" were a cause of needless suffering (Karlshoven, 1975 79). That September, the 21st International Conference of the Red Cross passed a resolution (Red Cross, 1969 98-99) asking the ICRC to propose new IHL rules and government experts to consider these. The initiative was followed up in UN General Assembly resolutions on the topic (UNGA, 1969) that set in motion international diplomatic work to this end (SIPRI, 1973 134-5).

Anti-personnel weapons were subsequently discussed in a series of international conferences during the 1970s. There was, from 1974, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened in Geneva by the Swiss government, and mandated by the UN. The Diplomatic Conference's primary task was not weapon-specific at all, but to consider two draft protocols relating respectively to the protection of victims of international armed conflicts (Additional Protocol I) (1974-1977 Diplomatic Conference of Geneva, 1977a) and non-international armed conflicts (Additional

Protocol II) (1974-1977 Diplomatic Conference of Geneva, 1977b), and intended to supplement the fourth Geneva Convention (1949). These Additional Protocols would eventually be agreed in 1977. As part of work during the four sessions of this Diplomatic Conference between 1974 and 1977, an Ad Hoc Committee on Conventional Weapons also met to look at specific weapons-related restrictions or prohibitions.

In early 1974, Sweden and six other countries[18] submitted a working paper to the Diplomatic Conference calling for prohibitions or restrictions on several types of anti-personnel weapons (Sweden, 1974). The proposal was prompted by their concerns that a number of the weapons used in Indochina violated IHL principles against causing unnecessary suffering, and the prohibition on indiscriminate attack (Blix, 1974 21). Among the proposals within the working paper was a call for a new international legal rule: "Cluster warheads with bomblets which act through the ejection of a great number of small calibred fragments or pellets are prohibited for use" (9). This call was prompted by work among a group of military and medical experts the Swedish government had convened early in the 1970s (Wulff, 1973).

Sweden and other governments participating in the Diplomatic Conference proposed that its expert group's work and proposals be discussed (among other proposals offered by governments) by an ICRC-convened group of international experts. "Confronted with this massive support for the idea, the ICRC thereupon expressed its readiness to act upon the recommendation" (Karlshoven, 1975 82). This

[18] Egypt, Mexico, Norway, Sudan, Switzerland and Yugoslavia.

ICRC expert group included representatives from 19 governments but not the US—the main user of cluster munitions—which refused to participate.

The ICRC expert group produced a report in 1973 on "weapons that may cause unnecessary suffering or have indiscriminate effects" (ICRC, 1973). The report reviewed existing legal bans or limits on the use of specific weapons, and framed some categories of weapons in terms of their level of indiscriminateness and degrees of suffering or injury caused. It was couched in cautious language, stressing that the report's purpose was not to "present proposals for the prohibition or restriction of the use of any of the weapons or weapon systems discussed". The report did note: "It is obvious that the trend towards weapons which fragment into vast numbers of small fragments, and are susceptible of covering large areas, increases the risk of multiple injuries and the possibility that civilians will be affected" (ICRC, 1973 71).

The ICRC report was discussed at a three-week government expert conference in Lucerne, Switzerland in September-October 1974. It was the first time that "the humanitarian issues raised by certain specific weapons, other than nuclear, chemical or biological weapons, had been discussed at an international level since the 1930s" (SIPRI, 1975 47). Many of those so-called experts attending were delegates from the Diplomatic Conference, who had encouraged the ICRC to hold a meeting to help to remedy their own lack of technical expertise in the first place. This time the US participated, among delegations from 49 states and national liberation movements as well as experts from the Stockholm International Peace Research Institute (SIPRI) and the World Health Organisation.

Reactions as expressed at the Lucerne conference were mixed, both to the ICRC

report itself, and to proposals like those of Sweden and its co-sponsors on banning or restricting weapons such as "cluster warheads" (Sweden, 1974 9). Instead, aspects of the Swedish-led proposal were rounded upon by the US and a number of European states, to the extent that the Lucerne conference's report observed that "the Conference seemed to be divided into two camps, with certain experts describing effects of weapons and proposing the prohibition or limitation of their use, while other experts contested these descriptions and even the utility thereof" (ICRC, 1974 61).

The ICRC expert meeting's president observed that there seemed little prospect of the Lucerne meeting leading to new treaty rules on conventional weapons for the time being (SIPRI, 1975 59). However, it was agreed that a further ICRC governmental expert meeting be held in early 1976. That conference, held in Lugano, showed that, if anything, earlier polarisation over anti-personnel fragmentation weapons had intensified. Discussions and proposals soon moved on to other topics such as marking the location of minefields and prohibiting attacks on civilian areas using incendiary weapons, and on military objectives within these areas, unless feasible precautions were taken (ICRC, 1976). It appears that Sweden and other countries behind the 1974 proposal lost interest in pursuing a prohibition on cluster warheads that would not attract support from the largest-scale users such as the US, as well as other NATO countries beginning to field so-called "improved" cluster munitions like the British-manufactured BL-755 bomb.

4.2. The CCW's creation

Reports of the ICRC expert meetings' discussions were duly transmitted to the Geneva Diplomatic Conference's Ad Hoc Committee. However, the latter could not

agree on restrictions or prohibitions on specific conventional weapons by the time its work concluded in 1977 (Roberts and Guelff, 2000 515). The Diplomatic Conference recommended convening of a separate, subsequent UN conference to carry the torch on weapon-specific issues and, if possible, to try to achieve some agreement.

This UN Conference convened in two sessions, in September 1979 and around a year later in 1980. It succeeded in negotiating a treaty with a tortuous title reflecting its difficult conception, gestation and birth—the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or Have Indiscriminate Effect (CCW, 1980). Beside a framework treaty containing the CCW's general provisions, three protocols on specific weapons were agreed. The lineage of each of these protocols could be traced back to the Lugano conference—on non-detectable fragments (Protocol I), landmines (II) and incendiary weapons (III).[19]

4.3. Continued use of cluster munitions

Sweden and other governments had argued in their proposal to the mid-1970s Swiss conferences that achieving agreement to ban or restrict "use of fragmentation weapons which typically are employed against a very large area, with the substantial risk for indiscriminate effects that such use entails" would raise "great difficulties" (Sweden, 1974 8). So, they had instead focused their call for a ban on anti-personnel weapons that contain a "cluster of bomblets" as "less difficult" (Sweden, 1974 8). At that time, they appeared to consider that a distinction could be made between anti-personnel and anti-materiel weapons, at least in terms of primary effect. But the new

[19] To become a member of the CCW, a state must accede to at least two of its protocols.

Western submunitions beginning to enter service during the 1970s in preparation for defence against a possible Warsaw Pact invasion in Europe (Dullum, 2008) were already making such a distinction moot. DPICM submunitions combined together into a single explosive device the anti-personnel area effect of previous cluster weapons that some considered potentially indiscriminate with an anti-armour capability all militaries agreed was legitimate and essential. Possessor governments now described their cluster munitions in ways that emphasised their new capability against modern armour. Nevertheless, these remained anti-personnel weapons because of their fragmentation effect (ICRC, 1974 53-4).

War between NATO and the Warsaw Pact never came. However, cluster munitions and their designs proliferated well beyond NATO and Warsaw Pact member states, including to Israel (producer of the M-85 submunition), Yugoslavia (maker of the KB-1, a DPICM copy) and China (which produced the MZD-2, itself a derivative of the KB-1). In 1978, research indicated that only five models of cluster bomb design were in production or in development outside the US; in contrast, in 1994, *Jane's* listed 64 types in 14 countries, only nine of which were US models (Prokosch, 1995a 8). In 2010, the civil society *Cluster Munition Monitor* estimated that a total of 34 countries have produced more than 200 cluster munition designs (14).

Cluster munitions have been used during armed conflict in 39 countries and disputed territories since the Second World War. The armed forces of at least 18 governments are known to have used cluster munitions, with the US the most frequent user. However, when the CCW was adopted in 1980 it was not the US but the Soviet Union using these weapons on the largest scale, following its invasion of Afghanistan

the previous year. The UK deployed BL-755 cluster bombs against Argentine forces in the Falklands-Malvinas in 1982. During the 1980s cluster munitions were also used in Lebanon (by Israel), Grenada (by the US), and in Chad (by France and Libya).

In August 1990, Iraq invaded Kuwait: in the subsequent US-led military campaign to oust Iraqi forces, members of the international coalition fired or dropped cluster munitions in large quantities on Saudi Arabian, Kuwaiti and Iraqi territory. In Iraq and Kuwait, for example, about one quarter of the total number of airdropped weapons dropped were cluster bombs, totalling 62,000 cluster munitions according to (Petrova, 2007a 75). Some of these submunitions were newer DPICM designs, but many were of older types such as the 1960s-era Mk-118 "Rockeye", which may have failed at rates of as high as 40 percent (King, 2000 14). In addition, some 100,000 artillery shells and 10,000 ground-launched rockets with DPICM payloads were expended by Coalition forces, bringing the total number of submunitions dispersed to between 24 and 30 million: "Assuming a dud rate of 5 percent, the number of individual live submunitions left on the battlefield, and in other areas of Iraq and Kuwait, can be reasonably estimated to be, at a minimum, 1.2 to 1.5 million" (HRW, 1999b).

While not rivalling the scale of cluster munitions use in the 1991 Persian Gulf conflict, use of these weapons also occurred during the 1990s in Angola (1992-94), Nagorno-Karabakh and Azerbaijan (1992-94), Bosnia and Herzegovina (1992-95), Tajikistan (1992-97), Chechnya (1994-96), Croatia (1995), Sudan (1996-99), Sierra Leone (1997), Ethiopia and Eritrea (1998), Albania (1998-99), and the Democratic Republic of the Congo (from 1999).

Such cluster munition use usually attracted little comment internationally, and was hardly discussed in the CCW. This would begin to change, however, from the end of the decade as the effects from use of cluster munitions in Kosovo led to a resurgence of humanitarian concern among NGOs and in the ICRC. In addition, evidence—much of it collected in the context of work eradicating AP mines—was by now accumulating about the post-conflict problems posed by unexploded submunitions in various contexts.

4.4. The ban on anti-personnel mines

AP mines had been of concern for Sweden and other countries from the early 1970s, in addition to cluster warheads, flechettes and other weapons. Years later, states negotiating the CCW would adopt a 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). However, as legal commentators observed, reaction to the new CCW and its protocols "was subdued and few States chose to adhere to them. Most of the attention concentrated on the continuing, if restricted, legality of the use of incendiary weapons, or the need to address the use of fuel–air explosives". Moreover, Protocol II's effect was "miniscule" in practice as the limits it placed on landmines were modest, and it did not apply to non-international conflicts in which such weapons were often used (Roberts and Guelff, 2000 645).

From 1980 until the early 1990s little of note happened in the CCW. Globally, however, the humanitarian effects of landmines, and AP mines in particular, worsened. Cheap, usually low-tech and easy to produce in large numbers, AP mines were attractive and expedient weapons for governments and armed non-state groups alike.

However, as "victim-actuated" devices, these mines were incapable of discriminating between combatants and civilians, with people in war-torn states such as Afghanistan, Angola and Cambodia among the worst affected—and casualties in dozens of other countries around the world. The persistence of mines in the ground after conflicts ended (and frequently after belligerents had lost track of where the mines were that their forces had sown) posed a deadly risk to people going about their daily lives and created hazards for reconstruction and development. Rural communities were particularly vulnerable to AP mines, which hindered both agriculture and safe movement.

In early 1992, six NGOs concerned about the effects of landmines—HI, HRW, Medico International, Mines Advisory Group (MAG), Physicians for Human Rights, and the Vietnam Veterans of America Foundation (VVAF)—began to plan a coordinated campaign against the weapon. These efforts would grow into the International Campaign to Ban Landmines (ICBL), which today continues to play an important role in monitoring implementation of the treaty banning AP mines it helped to achieve in 1997. Moreover, HI and HRW would later play roles in the cluster munition campaign, eventually joined by the ICBL itself.

In 1992, however, a treaty banning AP mines still seemed like a distant—and perhaps impossible—objective to most people. But in December 1993 France, on behalf of the CCW's states parties, asked the UN Secretary-General to convene a conference to review the treaty's operation (1994 2-3). The French government wanted to strengthen measures for states' compliance with the CCW. But its initiative also created an opportunity for the ICBL to exploit, as France's request set in motion a sequence of UN expert preparatory work, which would draw attention to several other issues for the

CCW to consider as priorities. These preparatory sessions discussed strengthening restrictions on the use of AP mines and, in particular, those without neutralising and self-destruction mechanisms (Maslen, 2004a 19).

Around this time the ICRC also became much more active at a policy level on AP mines, largely as a result of prompting from staff within its Medical Division who were challenged and appalled by the injuries sustained by victims of AP mines on the border between Afghanistan and Pakistan, and Thailand's border with Cambodia.[20] They began to analyse and classify the wounds, and established that people injured by these mines required a longer hospital stay, more medical operations, more blood for transfusion and were left with more severe disabilities as compared with other conventional weapon injuries. This evidence of the true nature and severity of such wounds was published in the *British Medical Journal* (Coupland and Korver, 1991). An editorial in the same edition was the first written call for a ban on landmines (McGrath and Stover, 1991).

This and other medical evidence helped to provide an empirical basis to back up growing international concern and momentum toward addressing the humanitarian effects of AP mines (Jeffrey, 1996). As it had done earlier in parallel with the 1970s Diplomatic Conference, the ICRC set about holding expert meetings, this time focused on AP mines. Until 1994, though, the ICRC's position fell well short of any call for a prohibition, calling only for the incorporation of self-destruct mechanisms in AP mines so that they did not persist after conflict had ended, and thus endanger civilians.

Eventually the ICRC would join in the call of NGOs for a total ban on the

[20] Communication with Dr. Robin Coupland (ICRC), 12 February 2009.

weapon. In February 1994, the ICRC's President announced that "from a humanitarian point of view", a "worldwide ban on anti-personnel mines" was "the only truly effective solution" (Maresca and Maslen, 2000 264-265)—but only after much internal debate within the organisation (Maslen, 2004a 20). Eventually, in June 1994, the ICRC hired policy staff to dedicate to CCW and landmine issues. Their experience from the landmine campaign would later be brought to bear on cluster munitions.

Support for a ban on landmines could also increasingly be seen from parts of the UN, including from the Secretary-General (1994). The attitudes of many governments were changing too, in part reframed by the attention to the issue from IOs and civil society actors: a UN General Assembly resolution in December 1994 called for the eventual elimination of landmines, and was passed without a vote (1995). Moreover, in March 1995 Belgium led the world in banning AP mines through a national law.

Whatever the purported (and increasingly contested) military utility of AP mines for military commanders, it was becoming increasingly understood that the indiscriminate nature of the weapon made it unacceptable in at least some, if not all, circumstances (Gard, 1998 154)[21]. A year later, an ICRC-commissioned study about the military utility of landmines appeared, which examined their actual use and effectiveness in 26 conflicts since the Second World War. It concluded that any military benefits of AP mines were "far outweighed by the appalling humanitarian consequences of their use in actual conflicts" adding: "On this basis their prohibition and elimination should be pursued as a matter of utmost urgency by governments and the entire

[21] Curiously, Gard mentioned cluster munition systems such as the M-26 MLRS as alternatives to AP mines to fulfill battlefield area denial functions.

international community" (ICRC, 1996 73).

It was difficult to translate such awareness into momentum in the consensus-driven CCW, which had struck various difficulties in its review conference preparation process. This review conference would ultimately meet in more than one session—in Vienna in September and October 1995, and in Geneva in January and late April 1996. In addition to a new protocol on blinding lasers, the review conference produced a new "amended" Protocol II (AP II) on mines and booby-traps and other devices. Characteristic of multilateral disarmament and arms control negotiations, AP II's negotiation:

> "was almost exclusively interstate (although NGOs had already become well engaged with the issue). The negotiations were "top-down" as the negotiations reflected the international power structure with the US, Russia and China leading the negotiations. State sovereignty reigned as decision-making was made on the basis of consensus. This allowed states to prevent the emergence of substantive changes to the status quo, which hamstrung those states that pushed for tangible reforms to the anaemic regulation of landmines in the 1980 Convention" (Dolan and Hunt, 1998 392).

AP II fell short of the expectations of many humanitarian actors in failing to prohibit AP mines, a weapon by now widely seen as inherently indiscriminate. The ICRC, for its part, described the new protocol as "woefully inadequate" (Maresca and Maslen, 2000 445-6). Meanwhile, ordinary people all over the world were becoming more concerned as effective public communication and campaigning by the ICBL and ICRC, including testimony from landmine survivors and images of their injuries, increasingly hit home (Lavoyer and Maresca, 1999 515-517).

The international campaign to ban landmines now intensified. By May 1996,

more than 40 states, many of them party to the CCW, expressed support for a total international AP mine ban. A small number of states began to associate together in support of achieving such a ban, and this became a "core group" comprised of Austria, Belgium, Canada, Germany, Ireland, Mexico, Netherlands, Norway, the Philippines, South Africa and Switzerland (and would later expand to include others) just as, more than a decade later, another core group would arise to drive the Oslo process on cluster munitions. Throughout 1996, members of delegations from these states met with NGOs in the back rooms of Geneva to discuss how to move forward.

The problem—now the CCW had produced its outcome—was that no obvious forum existed for achieving an AP mine ban. In principle there was the 61-member CD in Geneva, but there were fears that the requirement for consensus in that body would also make achievement of any landmine ban impossible. Moreover, the CD had (and still has, after prolonged deadlock since 1998) a long list of other priorities for negotiation.[22]

Canada's decision to change its position on landmines and join in discussions with other pro-ban states and NGOs to find a humanitarian solution to the landmine crisis was especially significant. Together with counterparts from Norway and South Africa, Canadian diplomats would be a major force within the Ottawa core group. In October 1996 Canada hosted an international conference in Ottawa entitled "Towards a Global Ban on AP Mines", which brought together 50 states pledging their support for a total ban, along with 24 observer states. At this conference, Canada's foreign minister, Lloyd Axworthy, challenged participating states to negotiate a ban treaty within a year.

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[22] As of June 2012, the CD had 65 member states.

Axworthy also offered, on behalf of the Canadian government, to host its signing ceremony in Ottawa in December 1997 (Dolan and Hunt, 1998 403).

Although the Ottawa process involved the UN, and especially its field agencies, negotiation of the MBT would occur outside the CCW and CD, the traditional UN frameworks for weapons regulation. Beside this, several other interrelated factors made the Ottawa process distinctive. Firstly, rather than a process dominated by the largest users and producers of AP mines, a core group of predominantly medium-and small-sized states steered it. Secondly, accumulating empirical evidence about the humanitarian hazards created by AP mines helped to swing debate in the Ottawa process away from traditional inter-governmental discourse focused on the military utility of landmines as seen in the CCW. Thirdly, a strong civil society campaign in the form of the ICBL used this evidence to raise public attention to the humanitarian problems created by the weapon and to stigmatise its use. Many of the organisations involved in the ICBL "had years of field experience with the treatment and rehabilitation of mine victims. They were able to provide first-hand knowledge of the impact of such weapons, while few, if any, states were in a position to provide detailed information about the problem on a worldwide or even regional scale" (Lavoyer and Maresca, 1999 521).

Moreover, NGOs enabled mine survivors themselves to play roles. The public involvement of Diana, Princess of Wales, from January 1997 was to bring particular media attention to the ban campaign. Nevertheless, NGOs setting the agenda, framing solutions, building networks and coalitions, and employing tactics of persuasion and pressure on governments to change their positions and practices on landmines had

begun long before (Hubert, 2000)—the fourth factor. Fifthly, the Ottawa process's objective was straightforward, ambitious, and couched in humanitarian and not arms control terms—ban AP mines because of the indiscriminate harm and superfluous injury and suffering they caused.

The importance of reframing an arms control issue in humanitarian terms cannot be underestimated. Such a call stood in stark contrast to the patchwork outcome of CCW AP II, which had reflected the determination of many states to retain mines in their arsenals while, if possible, restricting the ability of potential adversaries rather than concerns about vulnerable human beings being maimed or killed. A humanitarian call resonated with politicians and their electorates in many countries. Lastly, there was also a certain degree of providence in the Ottawa process. For example, changes of government in France and in the UK in early 1997 resulted in policy changes that were helpful as bureaucrats' entrenched positions were overruled by politicians in the final treaty negotiations (Maslen, 2004b 2).

After a frenetic period of conferences, regional meetings, lobbying and intense diplomacy in Africa, Asia, Europe and the Americas for almost a year from the October 1996 Ottawa conference, delegations from 85 states gathered on 1 September 1997 in Oslo to negotiate the MBT. Negotiations proceeded on the basis of a 10-page text that had been husbanded by Austria, and which was now presided over by South Africa. Some major users of AP mines such as China, India, Israel, Pakistan and Russia stayed away. But the US, which throughout the first part of 1997 had sought to have the issue taken up in the CD in Geneva instead of joining the Ottawa process, announced on 18 August that it had decided to participate in the Oslo negotiations.

The involvement of the US was a coup for its neighbour, Canada. And, it was undoubtedly a comfort to many US allies participating in the Oslo negotiations. But US involvement was also a risk: unlike almost all other delegations participating in Oslo, the US had not joined the June 1997 Brussels Declaration. This Declaration had committed the 97 states subscribing to it to agree on a "comprehensive ban on the use, stockpiling, production and transfer of anti-personnel landmines" as well as stockpile destruction and mine clearance assistance (Maslen, 2004a 377). Crucially, the US delegation did not want a comprehensive prohibition on AP mines—it pursued exceptions in order to retain its minefields along the boundary between the two Koreas, and to permit the explosive "anti-handling devices" attached to some US anti-tank mines that, in effect, meant they functioned as AP mines.

During the 1997 Oslo conference, the US used a range of means at its disposal to have its way, among them a request for extension of the meeting by a day (which was granted), during which there was intense bilateral lobbying of many states by senior US politicians and diplomats to back its proposals. Nevertheless, these proposals found little support in a changed environment in which international opinion now saw AP mines as repugnant, and which many of those delegates participating in Oslo thought would detract from the Ottawa process's objective to comprehensively ban AP mines. On 18 September, "the US delegation announced to the plenary that it was withdrawing its proposals as it had been unable to garner the necessary support for them. ... [T]he Convention was formally adopted to a round of enthusiastic applause from States and NGOs alike" (Maslen, 2004a 43).

Although the US made it clear it would not join the new treaty, many US military

allies did adopt the MBT—among them Australia, Canada, France, Germany, Japan and the UK. Tragically, Diana, Princess of Wales—the public figure who had come to personify the international landmine campaign—was killed in a car accident in Paris in late August, the weekend before the Oslo Diplomatic Conference commenced. According to one account, behind the scenes in Oslo and in London throughout the Oslo conference, "British officials would grumble that they were forced to negotiate with one hand tied behind their backs for fear of being savaged by the press for scuppering 'Diana's treaty'" (Maslen, 2004b 6). Nearly 11 years later, the UK would also heed a broader political imperative to join the CCM in Dublin in May 2008, but for quite different (and less tragic) reasons.

The MBT prohibited a wide range of activities related to AP mines. It banned the development, production, stockpiling, transfer and use of the weapon under any circumstances, and it was prohibited "to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention" (article 1, paragraph 1). This combination of weapons prohibition and humanitarian measures was seen as unique. Moreover, the MBT also contained provisions for mine clearance within deadlines. The treaty's commitment to assisting AP mine victims was a novel and significant element in terms of international legal rules on weapons (Rutherford, 2001 42), and it also provided for international assistance and cooperation.

Significantly, the MBT's definition of an AP mine was clearer and stronger than CCW AP II's article 2, which talked about "a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons" (CCW, 1996). The MBT did away with the word "primarily"—

thus removing any ambiguity. This, in combination with the latter phrase referring to the effects of the weapon, can be seen as a direct precursor to the 2007 Oslo Declaration's effects-based orientation toward banning cluster munitions that cause unacceptable harm to civilians.

4. The resurgence of international concerns about cluster munitions

4.1 Cluster munition use from Kosovo to Afghanistan

NATO air operations over the former Yugoslavia in 1999 resulted in a significant number of civilian deaths from cluster munition use (HRW, 1999b , Maslen, 2000). For instance, the airport at Niš—Serbia's third largest city—was repeatedly targeted in NATO air strikes with an array of weapons including BLU-97 cluster submunitions, which killed 14 civilians and seriously injured 27 on 7 May (NPA, 2007 23), a strike for which NATO subsequently apologised. Bombing also created an unexploded ordnance problem in Kosovo and Serbia, in the former case documented by a UN-coordinated clearance operation in the province from 2000 (UNMAS, 2002).

NATO's bombing campaign was publicly billed by Western leaders as a humanitarian intervention to protect civilians (NATO, 1999), even if the reality was more complicated (Rieff, 2002 39). It meant that the casualties in Kosovo from cluster bombs were inflicted on a population that NATO had come to save, and in other parts of Yugoslavia among civilians that NATO said it was not attacking. As a result, the NATO intervention pushed the effects of cluster munitions back into the public eye and attracted intense criticism. Such outrage died away "all too quickly" as one NGO representative observed, just as public interest had faded following the 1991 Gulf War (Goose, 2008 221). However, because the situation in Kosovo following the conflict

allowed data to be systematically collected about the humanitarian effects of cluster munition use, it would enable the UN, ICRC and NGOs to eventually spell out the problems with these weapons more clearly.

This accumulating humanitarian evidence would indicate that even when deployed in the Balkans by modern, professional military forces well acquainted with IHL rules and applying them scrupulously, cluster munitions were highly problematic weapons (McDonnell, 2002). Moreover, it would eventually contribute to calling into question their military utility, especially as it transpired that "More NATO troops were killed by unexploded NATO submunitions after the conflict than were killed by Serb forces during the war" (Moyes, 2007 46).

Whether IHL considerations were really gaining in importance for states during this period is the subject of ongoing debate. Nevertheless, the high profile success of the Ottawa process and international attention drawn to "humanitarian" military intervention contributed to renewed state and civil society interest in IHL rules to enhance civilian protection from hazards like UXO. In 1999, the CCW was the obvious international forum to remedy those humanitarian problems. CCW member states were beginning to prepare for the treaty's second review conference to be held in late 2001. But in 1999 there was no international campaign against cluster munitions, and only the ICRC and a handful of NGOs such as HRW and MCC were devoting attention to the issue.

At that time, in view of their limited resources, the interest and focus of most campaigning groups cognisant of the humanitarian problems of cluster munitions was on the new MBT and its implementation and consolidation. Yet these were also the

most likely civil society groups to take up the issue of cluster munitions and seek to persuade CCW member governments to act, because of their familiarity with UXO hazards. Thus, an ongoing tension until 2003—and indeed for much of the international campaign against cluster munitions that would follow—would be in managing the competing demands of implementing work on AP mines with achieving a new norm on cluster munitions. Indeed, some of these groups such as Landmine Action (a British NGO) and the Italian Campaign Against Landmines initially saw MOTAPM as the next priority rather than cluster munitions.

The MCC sought an outright ban on cluster munitions, but this pacifist organisation was a voice from the distant margins in the CCW. Another American NGO, HRW, possessed more credibility there, and distributed a memorandum to CCW delegates in mid-1999 calling for a moratorium on use of cluster munitions until humanitarian concerns about the weapon's indiscriminate effects were "adequately addressed" through specific international rules (HRW, 1999a). But HRW was reluctant to push restrictions on cluster munitions too far: HRW advocates were trying in private to engage the US and other governments about reducing the submunition failure rate at that time. And, as the post-conflict UXO contamination picture in Kosovo developed, HRW advocates saw a space opening up for problems associated with cluster munitions to be raised in the CCW in the context of munitions that have failed to function as intended, or which have been abandoned—ERW.

Nor was HRW alone in this view. A Mines Action Canada (MAC) internal paper in March 2001 examined the idea of a campaign against cluster bombs, and recommended that MAC take "a strong, public position in favour of a moratorium on

production, sale, transfer and use of cluster bombs as soon as possible" and support work to address the weapon's humanitarian effects through the CCW (2001 15). And, by now, an extensive picture of the global landmine problem was emerging as part of civil society monitoring of the MBT through projects such as *Landmine Monitor* (Wareham, 2006). NGOs with experience in the Ottawa process and attending the CCW's meetings could see that the so-called "experts of governments" in the CCW often knew very little about the field realities of dealing—or living—with mines and UXO, and that these problems were greater in scale and more widespread than generally understood there (Cave, 2006b 57).

If Kosovo was a wake-up call, reports of the effects of cluster munition use elsewhere during this period, such as in Chechnya by the Russians, raised further concern (Peachey and Wiebe, 2000). Cluster bombs were also dropped in the war between Eritrea and Ethiopia: in one incident on 9 May 2000 the Ethiopian air force cluster bombed the Korokon refugee camp in Western Eritrea with British-manufactured BL-755s leading to extensive contamination (Moyes et al., 2002 50-3).

This accumulating evidence, and the experience of the MBT, led some diplomats in Geneva and in capitals to begin thinking about how the CCW could be turned to humanitarian goals in the UXO field, and to see it recover from what they perceived as a loss in the CCW's credibility following the AP II outcome. From 1999, lunch meetings involving diplomats from countries such as Austria, Belgium, Canada, Ireland, Mexico, the Netherlands, New Zealand, Norway, Peru, South Africa, Sweden and Switzerland (sometimes along with the ICRC) began turning over issues related to how,

in particular, ERW and MOTAPM could be framed effectively in the CCW setting.[23]

In September 2000 the ICRC hosted a Meeting of Experts in Nyon, near Geneva, on ERW. The Nyon meeting was a key event, elevating the post-conflict impacts of ERW from a like-minded concern to that of a CCW priority in a discourse that included submunitions. Among the proposals the ICRC put to participants in the meeting, it asked the CCW's members to work to ban the use of submunitions against military objectives within concentrations of civilians. Had such a prohibition been in force, it might have prevented NATO from attacking the airport in Niš the preceding year.

The ICRC also argued that, "in order to reduce the risk to civilians in future conflicts, cluster bomblets and other submunitions should be fitted with mechanisms which will ensure their self-destruction immediately after the device fails to explode upon impact as designed" (Maslen, 2000 37). NGOs at the meeting went further. In presenting a report on cluster bombs (McGrath, 2000), the UK Working Group on Landmines' representative called for a moratorium on the use of cluster munitions "until ways were found to reduce their post-conflict impact" (ICRC, 2000a 10).

The reactions of some major cluster munition stockpiling states present were not favourable. The ICRC's published summary of the meeting reported: "Many participants felt that a moratorium would be difficult to achieve in light of the fact that cluster bomb submunitions had a clear military utility. However, explosive remnants of war served no military purpose and action should be taken to deal with this problem" (ICRC, 2000a 15). Nevertheless, Nyon crystallised the major issues concerning both the post-conflict impacts of ERW as a whole, and submunitions in particular. One

[23] I participated in these meetings as a New Zealand diplomat.

participant felt that "the Oslo process grew out of the CCW, and the CCW work on this really grew out of the Nyon meeting. ... [E]ven in that meeting, we were talking about clusters".[24] Nyon also confirmed that when debate strayed from post-conflict ERW impacts due to munitions failing to function as intended to deeper questions about the acceptability of cluster munitions, it made user states palpably uncomfortable.

The ICRC presented a detailed report of the Nyon meeting to the CCW in December 2000, and proposed an ERW protocol. This proposal contained amongst its elements the ICRC's call for a prohibition on the use of submunitions in concentrations of civilians, and submunition self-destruct (ICRC, 2000b). The Swiss government, meanwhile, circulated a working paper calling for fusing mechanisms in submunitions to ensure self-deactivation and self-destruction to a standard of at least 98% (Switzerland, 2000). To one observer, "While a positive step in the sense of 'getting the ball rolling', the 98% solution also had a self-serving air—Swiss military experts claimed informally that Swiss submunitions had a dud rate of no higher than 2%" (Wiebe, 2003 101).

In this sense, the discourse on cluster munitions as it was emerging in the CCW hinged upon distinctions between supposed "good" and "bad" submunitions. These distinctions were based on asserted but unproven technical criteria like self-destruct, self-deactivation or self-neutralisation features. This "good versus bad" mindset would dominate the way cluster munitions were viewed by most governments in the CCW and, indeed, in the ICRC and among some NGOs, until later in the decade.

US use of cluster bombs in late 2001 contributed further to Afghanistan's already

[24] Interview with Stephen D. Goose (HRW), 21 November 2008.

extensive UXO and mine problem left over from the earlier Soviet occupation, which included unexploded submunitions. HRW researchers working in Afghanistan after the 2001 conflict reported that between October 2001 and March 2002, US forces dropped about 1,228 cluster bombs (about 5% of the 26,000 US bombs dropped during that time period) containing 248,056 submunitions. HRW "found ample evidence that cluster bombs caused civilian harm" and that at least 25 civilians died and many more were injured during cluster strikes in or near populated areas, which illuminated "common and recurrent problems with these weapons" and "fundamental flaws that require additional changes and new international regulation" (2002 1-3). And submunition failure rates again appeared to be significant, leaving lethal, unexploded submunitions for civilians to encounter.

4.2 CCW negotiations on explosive remnants of war

Dutch diplomats took an active interest in guiding work toward an agreement on ERW, stemming "from both the Netherlands' traditionally active role in the humanitarian field and its direct involvement in the Kosovo campaign" (Sanders, 2004). In December 2000, they circulated a paper in the CCW co-sponsored by 26 national delegations, which called for further discussions of ERW in 2001 in the lead-up to the review conference (Netherlands et al., 2000).

The Netherlands' goal was to achieve agreement to negotiate an ERW protocol. To try to develop support among CCW states to this end, the Dutch hosted an informal meeting of governments and the ICRC in The Hague in late March 2001 (Netherlands, 2001). NGOs were not invited, and some speculated that their exclusion was due to the unhappiness of certain large states with the results of international work on AP mines,

which had slipped from their control in the consensus-based environment of the CCW and resulted in the MBT (Wiebe, 2003 102). The Dutch wanted buy-in from the large military states in the CCW, which were after all the major producers of ERW in many conflict situations.

The Dutch and others got their wish. In December 2001, during the Afghanistan bombing campaign, the CCW review conference adopted a mandate for work in the ensuing five-year period by consensus that included ERW, among other issues such as reducing the humanitarian impact of MOTAPM and trying to improve treaty compliance (Maresca, 2004 821). The Dutch were appointed to coordinate the CCW's ERW new Group of Governmental Experts (GGE). This GGE was mandated to "consider all factors, appropriate measures and proposals", including the following:

1. "factors and types of munitions that could cause humanitarian problems after a conflict;
2. technical improvements and other measures for relevant types of munitions, including sub-munitions, which could reduce the risk of such munitions becoming ERW;
3. the adequacy of existing International Humanitarian Law in minimising post-conflict risks of ERW, both to civilians and to the military" (CCW, 2001 13).

As such, the ERW mandate represented a compromise. It was much better than nothing in terms of relevance to the problems caused by cluster munitions. Nevertheless, within the ambit of ERW only the post-conflict impacts of submunitions would be tackled, and not the alleged hazards cluster munitions posed to civilians at time of use through specific restrictions.

The ERW mandate did reflect the fact that a growing number of states were

becoming sensitive to the effects of cluster munitions on civilians, though. It was set against the reluctance of the users and largest possessors of cluster munitions for weapon-specific work of any kind in an environment in which the consensus practice ruled. At this time there was virtually no talk among states of outlawing cluster munitions as the CCW's objective—it was simply not regarded as realistic.[25]

Nor was a comprehensive ban a call heard from most NGOs. Their emphasis instead was on "things to lessen the danger to civilians" such as technical improvements to submunition reliability and a prohibition on cluster munition use in populated areas as positive steps for governments to take.[26] There was even opposition from certain NGOs to a ban: for instance, VVAF (which had played a significant role in establishing the ICBL) said there was no case that banning submunitions would reduce civilian casualties, and would just increase demand for and thus production of unitary explosive warheads (VVAF, 2001).

Despite the limitations of the ERW mandate, its sole reference to submunitions would still be of use over the next five-year period to those trying to sustain and build up momentum to address the humanitarian impacts of cluster munitions in more ambitious terms. Chaired by the Netherlands—a state that on the whole welcomed greater civil society participation in the CCW's work—the ERW negotiations would enable NGOs, ICRC, UN and the Geneva International Centre for Humanitarian Demining (GICHD) to feed information about the humanitarian effects of cluster munitions into the CCW (Wiebe, 2003 103-4).

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[25] Interview with Paul Hannon (MAC), 4 June 2008.

[26] Interview with Stephen D. Goose (HRW), 21 November 2008.

As negotiations toward an ERW protocol progressed in the CCW in 2002 and 2003, state support grew there for the development of generic rules on clearance of ERW, information sharing to facilitate clearance and risk education, and warnings to civilian populations. But this work also confirmed the impression many participants had gathered in Nyon that agreement among all of the CCW's members on weapon-specific measures would not be forthcoming. Those delegations opposed to such measures wielded various arguments. China, Pakistan and others in the developing world objected to the potential cost of technical improvements in order to improve submunition reliability. And many governments including Russia and the US insisted that better implementation of existing IHL rules, rather than new rules, was the solution (Maresca, 2004 821).

Although the CCW's consensus practice gave these nay-saying states the upper hand, the credibility of their arguments against weapon-specific restrictions on cluster munitions were being undermined by reports of the weapon's effects on civilians in the Afghanistan war. It was a similar story in March and April 2003 when UK and US forces invaded Iraq, although this conflict differed from Afghanistan in that advancing forces fired many ground-launched cluster munitions rather than dropping cluster bombs from aircraft. In particular, US forces made extensive use of their Multiple Launch Rocket System (MLRS), which could rapidly deliver volleys of rockets delivering thousands of explosive submunitions onto a given location from over the horizon. And, in southern Iraq, the British fired artillery projectiles containing Israeli-manufactured M-85 submunitions.

Another difference was that, this time, NGOs explicitly warned the international

community ahead of the invasion of the problems cluster munition use would cause. HRW stated in March 2003:

> "The use of cluster munitions in Iraq will result in grave dangers to civilians and friendly combatants. Based on experiences in the Persian Gulf War in 1991, Yugoslavia/Kosovo in 1999, and Afghanistan in 2001 and 2002, these dangers are both foreseeable and preventable" (2003a 2).

The 2003 Iraq conflict would also strengthen belief among NGOs that submunition failure rates in operational use were significantly higher than the failure rates claimed by cluster munition manufacturers and the militaries deploying them (Landmine Action et al., 2005 86-7). Moreover, HRW researchers subsequently found that US and UK forces repeatedly used cluster munitions in attacks on Iraqi positions in residential neighbourhoods, often as part of unobserved counter-battery fire. HRW concluded: "Since Iraqi forces often occupied populated areas on the edges of towns, the attacks left thousands of duds in urban neighbourhoods and villages near the major cities of Iraq" (2003b 104-5).

In late April 2003, the Irish government and the NGO Pax Christi co-hosted a conference in Dublin on the challenges to development posed by ERW. The meeting brought together invited governments, IOs and civil society and was intended to give the CCW negotiations a boost toward completion (Pax Christi Ireland, 2003). But, in view of what had just occurred in Iraq, the attention of many present in Dublin had turned toward what could be done specifically about cluster munitions. In a side meeting on the margins of the Dublin ERW conference, representatives of ten NGOs decided to establish a coalition in the near future to work on ERW and cluster munition

issues, in a manner analogous to that of the ICBL.[27] As one participant later recalled, it was because:

> "it had become very evident that NGOs were operating mainly in emergency response mode on cluster munitions, sounding alarm bells whenever they were used in major conflicts, but that biannual outrage would not suffice. The time had come—with Kosovo, Afghanistan, Iraq, and CCW deliberations having raised the stakes and the possibilities—to establish expanded, sustained, proactive, and coordinated NGO work on cluster munitions" (Goose, 2008 223).

Top priority for governments supportive of an ERW protocol, meanwhile, was securing a successful conclusion to the CCW's negotiations in Geneva. This they eventually achieved on 28 November. Protocol V, as the new legal instrument was known, contained a package of generic post-conflict measures to reduce the humanitarian impact on civilians of UXO of all kinds (CCW, 2003). But the new treaty did not contain specific measures on cluster munitions despite their particular post-conflict hazard. Nor did Protocol V contain any provisions to deal with the problems created by cluster munitions at time of use, like issues associated with targeting. And, when Protocol V eventually entered into force, it was not retroactive in application: its provisions on areas already affected by unexploded submunitions and other ERW prior to that time (such as Afghanistan, Kosovo, Iraq and Laos) are only voluntary.[28]

Moreover, in 2004 and 2005 it would become apparent that the post-conflict impacts of ERW as encapsulated in Protocol V were the low-hanging fruit in the 2001

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[27] I participated in this meeting.

[28] CCW Protocol V entered into force internationally on 12 November 2006.

CCW Review conference's work mandate. Subsequent efforts on MOTAPM would founder in the face of Russian and Chinese opposition. And Pakistan, Russia and the US, in particular, still saw no need for legally binding rules to result from the ERW-track discussions about topics that Dutch diplomats had separated from post-conflict ERW in order to facilitate agreement on the eventual Protocol V. This continuing track related to specific preventive measures to stop ERW from occurring and IHL rules applicable to specific weapons such as submunitions. Meanwhile, Protocol V "engendered little enthusiasm from the NGO community, even among those like HRW that had put a great deal of work into it. The instrument had been put through the CCW grinder, and too little emerged on the other side" (Goose, 2008 223).

4.3 The CMC's formation

Making its debut statement at the November 2003 CCW meeting was a fortnight-old NGO coalition conceived in April of that year and launched in The Hague with initial financial assistance from the Dutch government, among others. The Cluster Munition Coalition (CMC), as it was called, noted its member NGOs' disappointment that the new ERW protocol "does not deal with cluster submunitions and other preventive measures" (Pax Christi Netherlands, 2003 58-9). The CMC's call echoed HRW's urging for states to agree a global moratorium on the use, production and trade of all cluster munitions until their humanitarian problems were successfully addressed (Goose, 2008 236).

The CMC described itself as a "Coalition" rather than a "Campaign" in contrast to the ICBL, to which many of the CMC's member NGOs also belonged. "Coalition" was chosen because "Campaign implies that we've got lots of organisations very active on it

on a daily basis"—and the CMC was clearly going to depend for the foreseeable future on the willingness of member NGOs to put in time and resources.[29] Beside HRW, these initial member NGOs were Austrian Aid for Mine Victims, the Belgian and French chapters of HI, International Physicians for the Prevention of Nuclear War (Russia), Landmine Action, the Nepalese Campaign to Ban Landmines, Pax Christi Netherlands, the Landmine Struggle Unit (an Egypt-based NGO, later known as Protection) and MCC. Among those NGOs in the forefront were HRW, Landmine Action, MAC (which was funded to work on ERW research and had lent staff time to setting up CMC in its initial phase), and Pax Christi Netherlands.

But at this stage the CMC was not much more than a shell. The Coalition had a name, a logo and some member NGOs, but it did not have a coordinator or any full-time staff. It had a general work plan,[30] but not a detailed campaigning strategy. Obtaining attention and resources from its member organisations, let alone governments concerned about cluster munitions, would be key for the CMC between 2003 and 2006. These actors had a variety of different interests and priorities. Thus, a related task would be to frame the humanitarian issues that cluster munitions posed in a manner that established the CMC as a credible voice, and created convergence and created momentum toward new international rules on the weapon. These would be challenging, formative years for the CMC,[31] important for cementing many of the features of civil society campaigning for a cluster munition ban during the Oslo process, and for influencing how states framed new responses to the hazards to civilians that the weapons caused.

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[29] Interview with Stephen D. Goose (HRW), 21 November 2008.

[30] Personal communication from Stephen D. Goose (HRW), 7 September 2009.

[31] Interview with Paul Hannon (MAC), 4 June 2008.

CHAPTER 5: THE REFRAMING OF INTERNATIONAL EFFORTS ON CLUSTER MUNITIONS, 2003-2006

1. Introduction

The CCW adopted Protocol V in November 2003, the same month the CMC was launched. In the three-year period that followed, there were few early signs that new international rules on cluster munitions were imminent. Governments concerned about the effects of these weapons on civilians mostly remained cautious in their public statements. And, as yet, many of these expressions of view lacked intellectual or political coherence.

Meanwhile, the CMC was not yet established as a credible and influential advocate on cluster munitions. Funding for CMC campaigning on cluster munitions was hard to come by. Moreover, experienced hands in the CMC's Steering Committee like representatives from HRW and MAC were often preoccupied with issues of MBT implementation. Notably, such work included the annual *Landmine Monitor* report, which was time consuming and resource intensive. And, as 2003 drew to an end, it was unclear both to external observers and some within the Coalition what precisely it was calling for in order to tackle the humanitarian problems it claimed that cluster munitions cause.

In fact, for three main reasons the period from 2003 to 2006 would lay the groundwork for the emergence of an international process to ban cluster munitions. Firstly, a network of engaged individuals and organisations emerged, some of it re-activated after work on banning AP mines a decade earlier. Secondly, this was a fertile period in terms of the cognitive framing required to capitalise upon growing

appreciation of cluster munitions' humanitarian hazards, and transform that into political momentum toward specific objectives. Such framing was largely spearheaded by individuals affiliated with the CMC and a broader community of "experts" interested in the effects of cluster munitions. Taken together, this loose network was more inclined than the majority of CCW state representatives to look outside that forum for ways in which to address the humanitarian impacts of the weapon such as a prohibition.

By mid-2006, evidence and argumentation to support the case for prohibiting at least some cluster munitions was persuasive enough to have begun to take hold with a few governments active in the CCW and, in particular, Norway. Thirdly, and in very different ways, certain states including Belgium, Norway and Israel (through its massive use of cluster munitions in Southern Lebanon) undertook national level actions during this period that served to lend momentum toward a cluster munition ban treaty. All of these developments are examined in this section, concluding with the 2006 CCW review conference and the Norwegian government's initiation of what would become known as the Oslo process.

2. The early evolution of CMC thinking and its call for action

In March 2004, NGOs concerned about the humanitarian impacts of cluster munitions met in Copenhagen, Denmark, at a conference organised by the NGO DanChurchAid and Danish parliamentarians. This event, entitled "Cluster bombs: Effective Weapon or Humanitarian Foe?" was intended to enable the new CMC's members to develop a campaigning strategy, as well as to create some domestic pressure on the Danish government (which possessed a stock of cluster munitions) to take a more proactive humanitarian role on the weapon in the CCW.

The Copenhagen conference discussions about the CMC's campaigning call, objectives, and strategy were of particular interest. Many disparate views were voiced.[32] On the one hand there were participants who sought a comprehensive prohibition on cluster munitions. On the other there were those NGOs with some of the most experience participating in the CCW like HRW, Landmine Action and MAC, which were not prepared to support a ban call. HRW argued, in effect, that it was difficult to argue for more specific IHL rules when existing generic obligations had not been implemented properly by any of the users of cluster munitions, including the US, UK and the Netherlands (DanChurchAid, 2004 25). These NGOs still hewed to a moratorium position.

Yet the CMC's three-part call (Quesnay, 2003 1), which had been declared only the preceding November, was already beginning to look anachronistic. One part called for increased resources for assistance to communities and individuals affected by unexploded cluster munitions and all other ERW. A second element called for users of cluster munitions and other munitions that produce ERW to accept special responsibility for clearance, warnings, risk education, provision of information and victim assistance. In effect, these calls had been largely met through the agreement of CCW Protocol V. Those steering the CMC's development were aware this would likely be the case; they hoped that support by governments for the relatively uncontroversial objectives of the ERW protocol might also serve to supplement CMC resources for work on cluster munitions. Also, as governments became accustomed to the CMC's voice on ERW-related issues, this would provide it some additional credibility with

[32] Interview with Thomas Nash (CMC), 24 July 2008.

governments on tackling cluster munitions.

The third, primary element of the Coalition's call—"No use, production or trade of cluster munitions until their humanitarian problems have been resolved" (Pax Christi Netherlands, 2003 41)—was far from being achieved. Moreover, the formulation of the call papered over some fundamental questions about what the humanitarian problems were precisely, and (more challengingly for the cohesion of the CMC's membership) to what extent these problems really could be addressed through technical fixes to try to ensure lower submunition failure rates or selective legal measures like a prohibition on their use within concentrations of civilians. In other words, the CMC's member NGOs were engaged in their own debate on "good" versus "bad" (or "worst culprit") cluster munitions; a major difference between their talks and those in the CCW being that some individuals within the Coalition would quickly see the limits of such a discourse, and seek to replace it with more ambitious ideas.

As 2004 began, the CMC was also more a virtual than actual organisation. Landmine Action was an obvious contender to act as interim point-of-contact to coordinate the CMC as it had launched its "Clear-up! Campaign" on ERW and submunitions in early 2003 (Landmine Action, 2003 8). But Landmine Action lacked the funds to continue such advocacy after Copenhagen. Instead, because MAC had the financial resources and the willingness to do so, one of its employees, Thomas Nash, gradually assumed an increasing number of the day-to-day responsibilities as interim point-of-contact for the CMC's activities from his base in Ottawa.[33]

At this time, some of those individuals prominent in steering the CMC viewed the

[33] Interview with Paul Hannon (MAC), 4 June 2008.

ambiguity of the Coalition's call as useful in engaging governments reluctant to take a lead on cluster munitions as a specific issue.[34] To Nash, in contrast, the equivocal nature of the CMC's cluster munition-specific call was a growing obstacle, since it was not self-evident what it meant at a time when the CMC was trying to attract NGOs to its banner and begin to build relationships with governments, especially those states in the CCW that might be persuaded to pursue complementary objectives.[35] To be effective, those the CMC sought to influence needed to know what the Coalition stood for achieving. And those within the CMC needed a clearer sense of the game plan (whatever that was to be) and their roles within it, Nash believed.

Nash found a kindred spirit in a Landmine Action policy researcher, Richard Moyes. Moyes and Nash became acquainted while undertaking ERW policy research (Landmine Action et al., 2005). Gradually the two men began to shape some of the intellectual framework behind what they thought the CMC could and should be doing during a period in 2004 and 2005 when the CMC was not receiving much intellectual or strategic direction from its Steering Committee (which was loosely organised at that stage), and while the CCW was drifting on the cluster munition issue. They were helped in their thinking by others such as Brian Rappert, an American academic working in Britain interested in the ethical issues surrounding weapon technologies.[36]

One of Moyes's early contributions was to erode Landmine Action's reluctance to go beyond a position endorsing a moratorium and technical improvements to

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[34] Personal communication with Stephen D. Goose (HRW), 7 September 2009.

[35] Conversation with Thomas Nash (CMC), 23 March 2009.

[36] Interview with Thomas Nash (CMC), 24 July 2008.

submunition reliability.[37] Based on their ERW research work, Moyes and Nash were already by now sceptical of low submunition failure rates claimed by cluster munition manufacturers and user governments—a view Moyes would forcefully bring to bear on Norwegian government experts later in the context of 2006 tests of Norway's cargo ammunition stockpile (see section 4).

Moyes and Nash were not alone in this view. Rae McGrath had played a prominent role in landmine campaigning in the 1990s and had written and presented one of the reports on cluster munitions at the September 2000 ICRC Nyon expert meeting. In 2004, Nash asked McGrath if he would present the case to governments for specific work in the CCW on cluster munitions in a side event at the CCW to be held in November. As part of his preparatory thinking, McGrath circulated a discussion paper to others within the campaign in October 2004 that argued against the CMC continuing down the road of "technical fixes" like submunition reliability (McGrath, 2004a). In 11 pages, McGrath set out the essentials of a civil society strategy whose elements—amassing and disseminating reliable and up-to-date evidence; developing strong and accurate arguments based on this; educating the public and engaging the media; and encouraging public debate encompassing governments, the military and cluster munition manufacturers—were all eventual hallmarks of the CMC, as they had been of the ICBL in the Ottawa process.

Significantly, McGrath's paper articulated the logic of moving away from a "worst culprits" approach on submunitions, which HRW (2004 8), MAC and others were articulating at the time. Indeed the CMC had even established a "technical

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[37] Ibid.

working group" whose task it was to consider a list of the so-called "worst culprits" (DanChurchAid, 2004). In contrast, McGrath thought that even if nil post-conflict impact could ever be achieved, cluster munitions were unacceptable on the grounds of their indiscriminate effect and so should be banned outright.

There is little evidence to indicate that McGrath had much impact on the CMC Steering Committee. Collectively, it took the approach that the CMC should stay the course on the established campaign call. However, McGrath's presentation to a packed room of CCW delegates in Geneva on 11 November, entitled "Cluster Munitions—Weapons of Deadly Convenience" had an incendiary effect. Focusing on use of ground-launched cluster munitions by British military forces, McGrath dissected his own government's position and the situation in the CCW in direct terms, and concluded:

> "So here we are, back at the CCW, and if you are particularly optimistic you might hope that a solution could be found through this process. But the CCW is a diplomatic charade—this is the forum which talked endlessly and each year promised progress while landmines devastated communities throughout the world. Let's be honest, with so much invested in cluster munitions systems by the major arms producing nations represented here, what should we expect? [...]
>
> We should ask ourselves—since it would seem to be in the interests of the user forces to have weapons which work as designed—why half a century of development and combat testing has not resulted in a reliable cluster munition system? The answer must be that the concept has weaknesses which cannot be overcome and, even if the perfect cluster munition with a near-to 0% failure rate was designed, it would still be indiscriminate by design and by effect and, therefore, illegal.
>
> These weapons must go the way of anti-personnel mines—it's time that civil society took

the issue out of the hands of the CCW" (2004b 7-8).

McGrath's call to take the cluster munition issue out of the CCW was not a viable one for the time being, especially as few (if any) governments at that time would seriously contemplate it. But it served notice on CCW delegates that the CMC would henceforth concentrate on cluster munitions rather than the ERW elements of the CMC's three-part call. It also had an important impact on Nash, who had chaired the briefing, and Moyes, who was in the audience. Both now felt the CMC was on the right track in challenging governments more directly to account for their policies on cluster munitions.[38]

Like McGrath, Nash and Moyes had each reached the conclusion that "we need to push the hard angle, which says cluster munitions violate IHL even if they don't generate ERW—otherwise countries will happily say they are working on better bombs that don't generate ERW and they can say that until the cows come home while still killing civilians" (Nash, 2004). They knew this thinking lent itself logically toward a cluster munition ban, even if the political space available internationally, as widely conceived both by governments and in the CMC's Steering Committee, still did not.

In a paper it submitted to the CCW's working group on ERW at the end of November, the CMC argued "The only 100% reliable way to eliminate the humanitarian impact of these weapons is by removing them from military stockpiles and never using them" (2004). And the CMC used the word "ban" in the working paper with regard to submunitions that lacked a self-destruct or self-deactivation mechanism, or possessed an all-ways acting fuse, or had an unreliable fusing and arming system. But this

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[38] Ibid.

recommendation was a reformulation of the Coalition's existing call rather than a change to it, and the paper's other recommendations all related to guidance on proper use of the weapon to achieve conformity with IHL rules. At the end of 2004, there simply seemed no prospect of a comprehensive ban on cluster munitions in an environment in which some states saw no further need for work on them at all, even if (with the benefit of hindsight) "more and more were embracing the notion that inaccurate and unreliable submunitions were unacceptable" (Goose, 2008 224).

To help the CMC identify a clearer common strategic direction, one of the Steering Committee's member NGOs, Pax Christi Netherlands, asked Rappert (a participant-observer of the Coalition since its origins) to circulate within the CMC a discussion paper on future campaigning strategies after consultations with CMC member organisations and others outside the Coalition. This July 2005 paper made no recommendations and did not marry the disparate views within the Coalition (Rappert, 2005b). But it did form a useful basis for future internal CMC discussions on campaigning. Moreover, it was helpful to Nash and others in figuring out what was being done at the individual NGO member level, and what needed to be done to build the Coalition further.

A second report by Rappert was to contribute significantly to changing thinking about cluster munitions. Landmine Action published *Out of Balance* (Rappert, 2005a) in November 2005, and it swiftly demolished belief among NGOs and even some CCW delegates that claims by cluster munition users to be taking every feasible precaution could be taken at face value. *Out of Balance* followed presentation of a working paper by British defence officials to the CCW in March 2005 on the military utility of cluster

munitions. Essentially, this was the UK's response to arguments heard in the CCW that cluster munition use was unacceptable in humanitarian terms. In defending its continued use of the weapon, the UK government said it was "committed to improving the technical aspects of its cluster munitions in order to reduce the likelihood of them becoming explosive remnants of war" (2005 3). The UK also said that it accepted that its "air-dropped cluster bombs have a failure rate that is unacceptably high"—that is, the BL-755 and RBL-755, the two models in British use, and these would be taken out of service "in coming years" so that by 2015 "all UK submunitions will contain a self-destruct mechanism reducing their failure rate to less than 1%" (3).

On the face of it, the UK's position as set out in its paper appeared constructive. However, the UK's policy was riddled with contradictions; specifically, the claim that an appropriate balance had been struck between military necessity (in terms of when, why and how UK forces used cluster munitions) and humanitarian concerns, despite evidence from multiple recent conflicts in which the UK's cluster munitions had created hazards to civilians that were entirely foreseeable. Rappert suspected that British officials did not know what they were talking about. He was also concerned that NGOs in the CMC, including Landmine Action, were too willing to accept that humanitarian issues around the use of cluster munitions could simply be taken care of by clarifying existing IHL—a concern linked to an IHL questionnaire exercise underway in the CCW (see section 5).[39]

Consequently, Rappert combed through years of British government documents and parliamentary statements regarding cluster munitions. He found that the UK

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[39] Interview with Brian Rappert (University of Exeter), 23 July 2008.

government had undertaken no practical assessments or gathered any information of its own on the humanitarian impact of cluster munitions. UK officials also selectively cited others' humanitarian data in order to support their official statements. Rappert also formed the view that the UK had sought to discredit external data that cast it in a bad light (despite having no comparable data of its own) such as submunition failure rates. And, for all of its confident statements in the CCW, the British government had not provided any substantive evidence for how UK forces evaluated and controlled the impact of cluster munitions during operations. Rappert concluded:

> "This analysis suggests that over the last 15 years the UK government has done little or nothing to gauge the humanitarian impact of these weapons. As a result, where government officials have determined that "an appropriate balance has been struck" it would appear that they have been working from a fundamentally inadequate base of evidence. Without this evidence, half of the "balance" is necessarily and substantially being misevaluated... [I]n the absence of evidence, the Government systematically gives preference to the military at the expense of increasing risk to the civilian population" (Rappert, 2005a 2).

The Independent newspaper ran a full front-page story about the report (Russell, 2005), and *Out of Balance* attracted considerable attention in the UK. *The Independent*'s story noted that *Out of Balance* prompted renewed concerns among British parliamentarians as the report's conclusions implied that their inquiries to the UK government over many years about the risks of its cluster munitions on civilians and corresponding IHL safeguards had, in effect, been fobbed off. (Some of these parliamentarians would retain an interest in the evolution of British policy on cluster munitions over succeeding years, and be helpful to UK-based NGOs in lobbying the

UK government during the Oslo process.) *The Lancet*, a prominent British medical journal, noted its astonishment that "a wilful lack of evidence is considered an acceptable basis [by the UK] for the strict implementation of international humanitarian law" (2005b). The upshot was that although the Landmine Action report was met with "stony silence"[40] at the CCW and the UK delegation studiously avoided engagement, Moyes, Nash and Rappert felt they were at last beginning to shift the burden of proof on to cluster munition users and possessors.

In concrete terms, nothing further had been achieved in the CCW beyond the generic post-conflict measures agreed in Protocol V, even if indirect discussions on cluster munitions continued. Moreover, because of the CCW's consensus practice, a treaty to address the humanitarian impacts of cluster munitions—whether improving submunition reliability or pledging no use in populated areas—might never be achieved as long as even a single state held out against commencing a negotiation. At no time was this prospect as glaringly obvious as at the end of 2005 after China and Russia rejected a proposal negotiated in the CCW over the two preceding years for a new MOTAPM protocol (CCW, 2006a 1-2).[41]

Now, after two years of existence, the CMC and its constituent NGO members increasingly turned to the next five-yearly CCW review conference to be held in

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[40] Personal communication with Brian Rappert (University of Exeter), 25 March 2009.

[41] The CCW's report was negotiated by consensus. For this reason it contained no explicit reference to the rejection of an agreement on MOTAPM. But, unlike the other agenda items for the CCW's work mentioned in the report, it did not specify what would happen on MOTAPM henceforth—reflecting the lack of agreement over continued consultations.

November 2006 as a "make-or-break" point for that process.[42] This proved to be tactically astute—and was an important contribution by ICBL veterans like Goose in particular, who had counselled against yielding to the urge to try to circumvent the CCW earlier. In the meantime, the CMC had begun working to persuade governments that cluster munitions caused humanitarian problems, and planting seeds of doubt amongst them about whether clarification of existing IHL would really be sufficient in addressing these hazards (Nash, 2006 37-38). Constructing the CCW review conference in advance to be a "point of failure" was also an objective around which the diverse actors within the CMC could unite, though "from an internal perspective, it's partly treading water a little bit [because of] the fact that NGO policy formulations at that time were a bit vague" as one activist put it.[43]

Meanwhile, in the autumn of 2005 Norway elected a new government. This "Red–Green" coalition committed itself to international efforts to ban cluster bombs, although it remained to be seen how Norway would give substance to its humanitarian ambitions. The consequences of the Lebanon conflict in 2006 (see section 5) would also add to frustration about the pace of work in the CCW and give momentum to an outside process. Israel's use of massive quantities of ground-launched cluster munitions, in particular, reinforced the hazards to civilians of these weapons in the eyes of publics and their politicians in many countries. But before either of these things manifested themselves, something else occurred that, like the later Lebanon conflict, took almost everyone in the CCW by surprise: in early 2006 Belgium set an international precedent

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[42] Interview with Stephen D. Goose (HRW), 21 November 2008.

[43] Interview with Richard Moyes (Landmine Action), 3 July 2008.

by passing a national law banning cluster munitions.

3. Belgium bans cluster munitions

Belgium's banning of cluster munitions is of interest for three reasons. Firstly, it again established the country as a pioneer, as more than a decade earlier, Belgium was the first state in the world to pass a national law banning AP mines on 2 March 1995 after sustained lobbying by NGOs such as Handicap International (HI) Belgium and skilful manoeuvring in the country's national parliament. Belgium's military had initially been dead set against such an AP mine ban, but progressively modified its position under pressure and did not try to mobilise an opposing lobby (Petrova, 2007b 7).[44]

The 1995 landmine law, passed for humanitarian reasons, entailed political and diplomatic risks for Belgium as a member of the NATO alliance, in which many partners were determined at that time to retain AP mines. Memories of their country's leadership in banning AP mines in 1995 therefore instilled a sense of humanitarian pride in many Belgian parliamentarians, and would be a factor in the later process to pass a law prohibiting cluster munitions. Secondly, the Belgian case would illustrate the challenges to be overcome in defining cluster munitions in any international treaty. Thirdly, it indicated that control over meaning—how cluster munitions were labelled and described—would be of profound importance for efforts to restrict them internationally.

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[44] Actually, the law was not a total ban as it did not prohibit stockpiling of AP mines and would only cover a five-year period unless extended. But it boosted international campaigning for a treaty to eradicate the use of the weapon, which the Ottawa process eventually achieved in 1997. The MBT, when eventually implemented into Belgian law, superseded the time limit in the earlier law.

On 2 February 2005, all HI sections called for a global ban on cluster munitions. It put HI well out in front of CMC's call for a moratorium on use until humanitarian issues could be addressed. It also reflected frustrations within the CMC about the nature of its moratorium-based call, although the public line was that these calls were not inconsistent with one another, since a ban could be seen as the mechanism to ensure "the humanitarian concerns have been addressed" as per the requirement set out in the CMC call.[45]

A month later, HI Belgium appealed to the Belgian Senate to work toward such a ban and a few weeks after that, on 7 April, they held briefings in partnership with HRW and another NGO, Netwerk Vlaanderen, entitled "Cluster Munitions: as Wrong as Landmines—European banks and firms involved in cluster munitions" aimed at financial institutions and the media. The speakers urged governments to get rid of cluster munitions, and banks and private companies to divest themselves from companies involved in their production. The two briefings attracted a lot of media attention in Belgium in newspapers, on radio and on television, and two Belgian arms companies, Forges de Zeebrugge and Mecar, immediately denied involvement in the production of "fragmentation bombs or any other weapon of that kind" (2005a).

The 7 April briefings led HI Belgium into tense exchanges with Belgium's arms producers throughout the remainder of 2005 and early 2006. They also piqued the interest of Belgian parliamentarians. In mid-April, Philippe Mahoux, a leading Socialist senator formerly with the NGO Médecins sans Frontières, tabled draft legislation to ban the production, maintenance, trade, distribution, import and transportation of

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[45] Conversation with Thomas Nash (CMC), 27 March 2009.

"fragmentation bombs". The draft bill used the term *bombes à fragmentation*, which was a poor French translation of cluster bombs in wide use in the press at that time. And, to staff at HI Belgium who only learned of Mahoux's presentation of a draft bill from a press release, the text of the draft bill struck them as vague. HI Belgium contacted Mahoux's office to try to help them revise the draft bill text, with a definition of cluster munitions based on the draft International Mine Action Standards (IMAS).

Hearings in the Senate's Defence and Foreign Affairs Commission were held on 28 June. HI Belgium representatives spoke, advocating for a cluster munition ban. Defence officials came to the Senate hearings with a box of different kinds of submunitions, and in essence tried to show that the cluster munition issue was very complicated—and therefore not amenable to a prohibition approach.[46] Instead, they argued for an exclusion from the Mahoux bill for those submunitions with self-destruct or self-neutralisation mechanisms because this would make it easier for Belgium to meet its international commitments, especially to NATO (Petrova, 2007b 10). It was not enough to persuade the Senate however, especially as the bill also had the support of one of Mahoux's political rivals in the Senate, Isabelle Durant of Ecolo (a francophone Green party in Belgium), who had also been briefed along with Mahoux's people by HI Belgium on the need to clarify what a cluster munition was in the draft bill, and the reasons for a ban.[47] Durant's support was crucial in the Commission accepting that the term *bombes à fragmentation* should be replaced by the IMAS definition of *sous-munition* (submunition) at that time: "any munition that, to perform its tasks, separates from a parent munition" (UNMAS, 2003 35).

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[46] Author's interview with Stan Brabant (HI Belgium), 2 September 2008.

[47] E-mail from Stan Brabant (HI Belgium), 17 March 2009.

Temporarily beaten back, Belgian defence officials tried again a week later to persuade the Commission to adopt a more restrictive definition. But these efforts did not succeed. Instead, the Senate unanimously adopted a revised text banning the use, "carrying", production, maintenance, trade, distribution, import and transportation of submunitions two days later on 7 July, and forwarded the bill to the House of Representatives, Belgium's other national legislative chamber.

The same day, the European Parliament adopted a resolution calling for a ban on investments in landmines and cluster munitions, which drew further media and public attention (2005). Then, on 16 July, the head of Forges de Zeebrugge—one of the companies named in the April NGO briefing—was interviewed on state-owned television, asking to be heard in Belgium's Parliament on the cluster munition bill. The interview signalled that the defence industry, which had not even been invited to the Senate's mid-year hearings, was mobilising. By November, when the House of Representatives' Defence Commission were due to consider the Mahoux bill, Forges de Zeebrugge and other arms companies were lobbying hard against a ban law using the threat of job losses in Wallonia, where most of them were based, as an argument they knew would resonate with parliamentarians (Petrova, 2007b 11). In contrast, the Ministry of Defence stood back from the debate. Thus, the draft bill that had sailed through the Senate comparatively easily was to become a controversial showdown between those forces in the House of Representatives arguing that the weapon was unacceptable on humanitarian grounds, and those concerned about the economic impacts of ban legislation for Belgium.

On 23 November 2005, the House of Representatives' Defence Commission

decided to hold a hearing on 19 December with the arms industry, Ministry of Foreign Affairs and NGOs. At this hearing, industry lobbied for an exception to the ban bill to exclude cluster munitions containing fewer than 10 submunitions and a failure rate less than 1%. But NGOs, especially HI Belgium (which argued that the industry's proposal would not solve the problem of civilian casualties from submunitions), were well prepared. A media trip to Kosovo that HI Belgium organised shortly before the hearings to show the effects of cluster munitions on the population meant that the controversy in parliament attracted wide media coverage focusing on humanitarian impacts, and strengthened the hand of those calling for the ban. Moreover, a petition against cluster munitions HI launched earlier in the year had by now attracted more than 200,000 signatures (a number that increased to 300,000 by the time the law was eventually passed in February 2006). Joint briefings with foreign NGOs underlined international support and efforts in other European countries to a similar end.

The CMC, for its part, mobilised its network of members through a number of action alerts asking them to write to lawmakers in Belgium, ensuring they heard the global nature of the civil society call for action. This "NGO mobilisation was highly instrumental in maintaining parliamentary support for the law" (Petrova, 2007b 11) and as a result the amendments proposed by the arms industry failed.

Nevertheless, passing the Mahoux bill proved to be a struggle that continued throughout the winter. An attempt to put the draft legislation to a vote in the House of Representatives on 25 January 2006 was prevented by filibustering from the political far right, which had aligned itself with the arms industry's concerns. On 9 February Forges de Zeebrugge workers demonstrated against a ban on cluster munitions. And throughout

February the arms industry and NGOs supporting a ban sparred with each other in the media.

Belgium's legislators settled the matter by passing not one but two laws on cluster munitions. On 16 February the House of Representatives adopted the Mahoux bill without amendment (112 in favour, 2 against and 22 abstentions), but a week later the leaders of the four major political parties tabled another bill to clarify the first law's scope.[48] This legislation, which was passed on 30 March in the House of Representatives and in the Senate on 3 May, excluded non-explosive submunitions (like those for smoke or electronic counter-measures) and:

> "systems that contain several munitions only designed to pierce and destroy armoured vehicles, that can only be used to that end without any possibility to indiscriminately saturate combat zones, including by the obligatory control of their trajectory and destination, and that, if applicable, can only explode at the moment of the impact, and in any case cannot explode by the presence, proximity or contact of a person" (Handicap International Belgium, 2007 2).

Was this really a cluster munition ban? One analyst observed that "Despite (or rather because of) this vagueness, the new law made possible the achievement of consensus on the issue of cluster munitions nationally in a way consistent with Belgian domestic political culture (Petrova, 2007b 12)." In other words, it was something that NGOs, the arms industry, unions and the military could all live with.

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[48] These political parties were the Dutch-speaking socialists (Socialistische Partij Anders), the French-speaking socialists (Parti Socialiste), the Dutch-speaking "liberal" right-wing (Vlaamse Liberalen en Democraten) and French-speaking "liberal" right-wing (Mouvement Réformateur). E-mail exchange with Stan Brabant (HI Belgium), 30 March 2009.

The Belgian experience also underlined that while stigmatising the notion of cluster munitions in view of their humanitarian impact might be relatively straightforward, defining the weapon for the purposes of a ban was not. In presenting the Belgian legislation as a triumph in international fora such as the CCW in the first half of 2006, HI Belgium and the CMC would obviously accentuate the positive rather than draw attention to the definitional exclusions. However, it indicated challenges for any international process on addressing the humanitarian impacts of cluster munitions, whether in the CCW or outside it.

In the end, the CCM would contain a formulation not dissimilar to the Belgian law in excluding non-explosive submunitions and so-called "sensor-fused" or "advanced" submunitions. In contrast with the Belgian law, the definition achieved in Dublin in May 2008 would not be at all vague. Nevertheless, achieving clarity would require some highly unorthodox elements such as a weight criterion to close possible loopholes in the international ban.

4. Cluster munition developments in Norway

One government watching Belgium's decision to ban cluster munitions with particular interest was Norway. Until 2006, Norway's government delegation had—like most others participating in the CCW talks in Geneva—sought to differentiate between "good" and "bad" cluster munitions on the basis of presumptions about their relative accuracy and reliability. And Norway was a cluster munition possessor.

In contrast to Belgium, Norway would not seek to ban cluster munitions at the national level. Instead, Norway emerged as chief instigator of an international process to tackle the weapon through a humanitarian treaty. How Norway moved into such a

role requires some explanation, especially as it illustrated a reframing of the acceptability of cluster munitions among key Norwegian policy makers, a process brought about through their contacts with civil society.

Prior to 2003, Norway had long-standing humanitarian concerns about anti-personnel weapons of various kinds, including cluster munitions. For example, Norway co-sponsored Sweden's 1974 proposal on anti-personnel weapons (Sweden, 1974). Norway's NATO membership and border with Russia, however, meant that Norwegian defence policymakers came to see ground-launched DPICM systems as important defensive weapons in its arsenal. Moreover, in the event of conflict with Russia, they believed Norway's NATO allies would have to come to its aid, which converged with their traditional concern that Norway be seen to pull its weight both militarily and diplomatically in the Alliance.

Nevertheless, Norwegian society had a strong humanitarian tradition with roots in Protestant missionary work and relief (Petrova, 2007b 16-17). And Norway's resources as a humanitarian donor—afforded in large part by its relatively newfound oil wealth—gave it significant clout by the standards of the world's less-populous states. Moreover, NATO's intervention in Kosovo in 1999 against Serbia occurred while Norway's role in banning AP mines was still fresh in the public consciousness, especially as the MBT's final negotiations had taken place in Oslo in September 1997. The presence of mines in Kosovo, and the problem of unexploded ordnance there largely created by the use of air-dropped cluster munitions by NATO, served to regenerate public stigma in Norway

about the latter weapon's humanitarian acceptability.[49]

In the middle of June 2001, Norway's national parliament, the *Storting*, passed a motion for Norway to actively support international efforts toward a prohibition of cluster bombs (Statsministerens Kontor, 2001 62). In June 2001, "international efforts" meant the CCW in Geneva. Two months later, on 14 August, Norway's Foreign Ministry wrote to the *Storting* to report that although there was no proposal for a prohibition of cluster bombs on the table at the CCW, its diplomats were participating actively in discussions toward negotiating a protocol on ERW, and it could not be excluded that a restriction or ban on cluster bombs might be an outcome (Statsministerens Kontor, 2001 63). Later that year, Norway also decided that its air force contribution in support of the US campaign to topple the Taliban in Afghanistan would not use cluster munitions (Norwegian Ministry of Defence, 2002).

However, in October 2001, Jens Stoltenberg's Labour government was replaced by a centrist minority government led by Kjell Magne Bondevik, a conservative. Bondevik's new government did not have much enthusiasm for leading the international charge on new rules for cluster munitions beyond retaining the *Storting*'s confidence, on which it depended.

Controversy about cluster munitions might eventually have receded in Norway, but an incident in October 2002 returned the issue to domestic prominence. At Hjerkinn, in central Norway, the Norwegian military operated a large test firing ground, which Norway permitted other NATO countries to use. Cluster bombs dropped by Dutch and

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[49] Interview with Christian Ruge (Retina Consulting), 27 August 2008.

Norwegian F-16 strike jets on 7 October missed their targets.[50] Four days later Norway's defence forces informed the press that explosive ordnance disposal teams were commencing the task of surveying and clearing unexploded submunitions resulting from the incident (2002). There was a strong reaction to the Hjerkinn incident in the media and when news reached the *Storting*. Had not the Norwegian military stopped using cluster bombs? Why, then, were they being used on Norwegian soil, especially in one of the country's most scenic areas? The conservative government's Defence Minister Kristin Krohn Devold was targeted for criticism as it became apparent that neither she nor Norway's central Defence Headquarters had been made aware of the exercise involving cluster bombs.

One result of the Hjerkinn incident was that Norway's Defence Headquarters issued a directive on 25 October that any use of cluster bombs on Norwegian soil was prohibited with immediate effect. In future, the use of any air-delivered cluster munitions in peacetime training and exercises would need the Defence Ministry's explicit, prior approval (Norway, 2003 1-2). There were also hearings in the *Storting* in January 2003 about the incident, in which military representatives were called upon to present their views, as well as others such the Norwegian Red Cross (NRC)'s Secretary General at the time, Jan Egeland, and NPA (2003).

The *Storting* hearings generated criticism of the government among opposition parliamentarians and in the media, and also some confusion. That is because when defence officials and military people referred to cluster munitions or cluster bombs,

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[50] One of the cluster bombs was an US-manufactured CBU-87 containing BLU-97 submunitions; the other was a British BL-755.

what they were talking about was air-delivered cluster weapons, not ground-launched systems. Ground-launched "cargo ammunition" was portrayed by the Norwegian military as different from cluster munitions, and its representatives at the hearings made much of the stringency of dud rate testing for newer weapons like these in the Norwegian arsenal. Conversely, older air-delivered cluster munitions such as Rockeye and those containing BLU-97 submunitions were portrayed as "bad stuff"[51]: later that year Norway's own stockpile of old Rockeye air-delivered cluster bombs was to be scrapped. A Norwegian working paper submitted to the CCW in November 2003 explained that this was "because of their low level of precision and high dud rate...Furthermore, the [Norwegian government's instructions to the defence forces] state that cluster munitions with high dud rates/without self-destruct mechanisms shall under no circumstances be acquired by the Norwegian armed forces" (Norway, 2003 1-2).

In the same paper, Norway's government proposed regulations on the use of cluster munitions, as, in its view, existing IHL rules "do not provide sufficient protection for the civilian population against the humanitarian consequences related to ERW" (2003 3). In sum, while air-delivered cluster munitions were on the way out, it was clear that in 2003 the Norwegian government had no plans to remove their ground-launched cluster munitions from service.

Some staff at NPA—a large development NGO—and the NRC became convinced that the good versus bad submunitions discourse was not useful or realistic. Nor did they have much confidence in the CCW's ability to effectively tackle the humanitarian

[51] Interview with Grethe Østern (NPA), 26 August 2008.

hazards of cluster munitions, especially in view of the Protocol V outcome. So, they cultivated Norwegian opposition politicians in the *Storting*, and tried to build dialogue on cluster munitions with their contacts on landmines in the foreign affairs bureaucracy.[52] Such low-intensity pressure began to have an impact on policy by the middle of 2005. NGOs briefed Norwegian parliamentarians on cluster munitions in June, and the centrist Agrarian Party included the issue in its policy platform for the upcoming elections (Petrova, 2007b 25).

A decision by the Norwegian Government Petroleum's Fund's Advisory Council on Ethics concerning cluster munitions also contributed to this pressure. Since the early 1990s, the Norwegian state had received substantial revenue from its oil industry, some of which was invested in the Government Petroleum Fund—making that fund one of the world's largest public funds investing internationally.[53] In November 2004, the Norwegian government adopted ethical guidelines for the Fund containing mechanisms for negative screening of companies and ad hoc exclusions from the Fund's portfolio. The guidelines also contained criteria for exclusion of companies that produced weapons, which may through normal use violate humanitarian principles of proportionality and distinction (Norwegian Government Pension Fund, 2005). Importantly, the Fund's Advisory Council on Ethics overseeing implementation of the guidelines did not limit itself to recommending that the Norwegian government disinvest in companies producing weapons already banned by international treaty such as AP mines. Certain weapons not clearly prohibited under international law—cluster

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[52] Interview with Per Nergaard (NPA), 4 July 2008.

[53] In 2006, the Government Petroleum Fund changed its name to the Norwegian Pension Fund–Global.

munitions—might also be considered to violate fundamental humanitarian principles.

On this basis, the Advisory Council recommended on 16 June 2005 that companies producing key components of cluster weapons be excluded from the Fund's investment "universe" (Etikkradet, 2005).[54] Significantly, the Advisory Council decided that not all cluster weapons fell within its criteria for exclusion. Certain "advanced munitions"—later referred to in the Oslo process as sensor-fused submunitions—were exempted from the Council's recommendation as:

> "the bomblets are target seeking and made to detonate only when they hit armoured vehicles, they were deemed to be of limited risk to civilians during hostilities. The weapon was therefore not classified as an "area weapon" designed to hit randomly over a large area. Moreover, this weapon type contains better fuse mechanisms resulting in lower failure rates, thereby posing less danger to civilians after hostilities. For these reasons, advanced munitions were not considered to be in violation of fundamental humanitarian principles" (Nystuen, 2006 214).

The Norwegian government adopted the recommendation soon afterward and excluded these cluster munition producers from the Fund.

The direct effects of the June 2005 Advisory Council recommendation were not at all great, and had reputational rather than financial consequences for those corporations named in it. But its impact was nevertheless significant. Firstly, it contributed to the stigmatisation of cluster munitions as a nasty, questionable type of weapon, and the

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[54] Among those companies the Council advised should be specifically excluded from the Fund were large arms manufacturers such as General Dynamics Corporation, Raytheon, Lockheed Martin, Alliant Techsystems, the European Aeronautic Defence and Space Company (EADS) and Thales.

recommendation could be cited by others growing increasingly uneasy about their own national policies on production, possession or use of cluster munitions, like in Belgium.[55] Secondly, the recommendation served to expose an emerging gap in the Norwegian government's policies. By the Advisory Council's criteria and description of cluster munitions, the Norwegian military's own stocks of cargo ammunition could raise similar concerns under the IHL principle of distinction as the cluster munitions produced by companies that had been excluded from the Fund. Thirdly, the distinction made in the Advisory Council's recommendation would serve later in the Oslo process as an example of a basis for distinction between "unacceptable" cluster munitions and sensor-fused submunitions.

As far as the principle of distinction was concerned, however, Norway's defence forces argued that cargo ammunition out-performed air-delivered cluster munitions at time of use because artillery shells containing submunitions would go where they were targeted—unlike the cluster bombs that went askew in Hjerkinn in October 2002. This, of course, failed to address the question of the area effect of the weapon. But, increasingly, the central issue around which changes to Norway's policy on cluster munitions would turn concerned submunition failure rates—how many would remain after an attack "and therefore continue to constitute a danger to the civilian population" (Etikkradet, 2005). Confident in its belief that Norway's stock of cargo ammunition had a "less than 1% failure rate", the Norwegian delegation to the CCW in July 2004 announced that Norway had introduced a national "maximum limit of acceptable dud rate of submunitions of 1 per cent" (King et al., 2007 34).

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[55] Interview with Stan Brabant (HI Belgium), 2 September 2008.

Norway's 1% policy sounded good in theory. To NGOs with field experience in submunition contamination such as NPA and Landmine Action, though, such a failure rate claim (which was also coming from other quarters in the CCW, such as the UK (2005 1)) sounded too good to be true. As Landmine Action was to observe later during the Oslo process:

> "there are strong grounds for suspecting that the 1% standard has been made up in an arbitrary manner without any consideration of either how it related to reality of civilian harm (the problem that it purportedly solves) and without consideration of how it would be interrogated. The most probable explanation is that the standard has been set because producers and users have determined that 1% is the lowest failure rate reasonably achievable under test conditions and therefore it sets a sufficiently challenging target for them. This approach would not seem to be consistent with a strong commitment to addressing civilian harm from cluster munitions" (King et al., 2007 38).

How could such claims of 99% submunition reliability actually be tested in a manner that adequately satisfied concerns about the government's objectivity? And, just as importantly, how could this be squared with calls from opposition politicians and NGOs for cluster munitions to be banned?

Parliamentary elections in mid-September 2005 provided the opportunity to both re-examine Norway's domestic position on cluster munitions and prod it into more action on the international stage. A "Red–Green" coalition comprised of the Labour, Socialist Left Party and the Centre (or Agrarian) Party gained a small majority in the *Storting*, and were asked by Norway's King to form a government. Difficult negotiations ensued during October 2005 between the three parties in order to agree on a common governing platform. The outcome was the Soria Moria Declaration, which

among its elements contained a commitment to "work for the introduction of an international ban on cluster bombs" (2005c).

Norway's first majority governing coalition since 1985 contained a number of supporters of international efforts to address the impacts of cluster munitions. The new Deputy Minister of Defence, Espen Barth Eide, had earlier held a senior position in the Norwegian Institute of International Affairs. The incoming Minister of International Development, Erik Solheim, was a prominent landmine ban supporter, and had in his youth worked for HI, which was now active in the CMC (Petrova, 2007b 25). And the incoming Foreign Minister, Jonas Gahr Støre, had headed the NRC in the years prior to the parliamentary election. In that role Støre had been sensitised to the humanitarian impacts of cluster munitions. Norway's diplomats were thus instructed to take the moral high ground in the CCW on the humanitarian effects of cluster munitions and the need to start efforts to tackle them through international restrictions. But, the 1% failure rate doctrine remained in place at home. Moreover, it was still not clear in statements from the relevant ministers and senior officials in the new government whether cargo ammunition constituted cluster munitions.

Buoyed by Belgium's decision in February 2006 to ban cluster munitions, NPA called on the Norwegian government to follow the Belgian example, including on cargo ammunition. Privately, however, NPA told the government it could live with a moratorium for the time being and, like the CMC of which it was a member, it focused on encouraging Norway to lead other states on the cluster munition issue.

The government's response was to establish what was, in effect, a special project on cluster munitions in March 2006. The project's establishment signaled that

governing politicians were behind the cluster munition issue and that it was to be treated as foreign policy priority. It also created a weight of expectation on Norwegian officials for progress during a period in which prospects for a negotiating process on a protocol to ban or even meaningfully restrict cluster munitions in the CCW did not look bright. These officials realised that making good on the Red–Green coalition government's commitment to the cluster munition issue could well mean going outside the CCW process.[56]

Meanwhile, in collaboration with the Norwegian media, NPA pushed the new government to clear up questions about the military's cargo ammunition and the 1% failure rate policy. Outside experts confirmed that the two types of cargo ammunition in Norway's arsenal were cluster munitions.[57] Each carried submunitions equipped with self-destruct devices, which were supposed to detonate the bomblets in all cases. The DM-642 carried a submunition designated as the DM-1383, while the DM-662 carried submunitions designated as DM-1385. These DM-1385s were actually Israeli-made M-85 submunitions, but renamed by the German manufacturer of the artillery shell dispensing the submunitions (King et al., 2007 11).

Thus, as it turned out, much of Norway's cargo ammunition was basically identical to the L20A1 shells containing M-85 bomblets that the UK had used in Iraq in March and April 2003 (Moyes and Rappert, 2006 12-13) which, according to HRW, along with US ground launched cluster munition use in Iraq in 2003 represented a major threats to civilians during the war" (2003b 6). Norwegian television ran with this news,

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[56] Interview with Ambassador Steffen Kongstad (Norwegian MFA), 27 August 2008.

[57] Interviews with Grethe Østern (NPA), 26 August 2008, and Tormod Strand (NRK), 28 August 2008.

and NPA and other NGOs undertook an aggressive campaign in the media ridiculing the government's position.[58] Eventually, on 13 June, the Norwegian Minister of Defence wrote to the five largest Norwegian NGOs (including NPA) to announce a temporary moratorium on the use of ground-launched cargo ammunition until new tests of its stockpile and a full evaluation could be carried out in late September.

Reporting this capitulation to its NGO partners in the CMC, NPA wrote, "For NGOs in other countries where the same types of cluster munitions are in stock, it will be very important to be able to refer to this doubt and moratorium in Norway. The doubt about the failure rate of the Norwegian stockpile of cluster munitions should also be a strong signal to countries toying with the idea of an international ban focusing on an acceptable failure rate."[59] There was therefore great interest in what this further testing of Norway's cargo ammunition would turn up. By now, it was an open secret among NGOs and governments in the CCW that British Army testing of its L20A1 cargo ammunition at Hjerkinn in 2005 (with Norwegian Army assistance) had resulted in a failure rate in excess of 2%.

A humanitarian standard for cluster munitions based on a percentage failure rate struck NPA and Landmine Action as arbitrary and perhaps even politically irresponsible, especially tests in ideal, controlled conditions utterly dissimilar from operational use. Instead, Østern and Nergaard viewed the upcoming Norwegian cargo ammunition stockpile testing process as a hoop to jump through on the way to a Norwegian ban policy (as, privately some people within the Norwegian government did

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[58] Interview with Tormod Strand (NRK), 28 August 2008.

[59] "Norwegian moratorium on cluster munitions", e-mail from Grethe Østern and Per Nergaard (NPA) to the CMC list server, 13 June 2006. Copy on file.

too). But they felt it could be a dangerous red herring if governments fixated on the 1% failure rate as a panacea for the humanitarian hazards the weapon caused instead of seeking a ban of some kind.

For their part, Norwegian military scientists were confident that the 1% failure rate could be achieved. But they realised that to fail by even a few tenths of a percent would likely result in NGO allegations of a government whitewash. Consequently, they were keen to engage with NGOs and include them as active observers in the testing process. Representatives of Norway's Ministry of Defence, the Army General Staff and scientists from the Norwegian Defence Research Establishment (FFI) began to meet with NGOs including NPA and Landmine Action from mid-2006 to brief them and answer questions, and even invited them to the upcoming tests to be held in Hjerkinn.[60] However, almost immediately the military's confidence in the 1% failure would begin to be undermined when conflict broke out in Southern Lebanon in July 2006.

5. Consequences for Norway from the Southern Lebanon conflict

In July 2006, armed conflict broke out between Israel and Hizbullah, the latter a non-state armed group operating from Southern Lebanon, whose political wing was represented in Lebanon's parliament and in its governing cabinet. During the 34-day conflict, in which the Israel Defence Forces (IDF) bombed throughout Lebanon and made forays over the UN-monitored "Blue Line" into the south of the country, both the IDF and Hizbullah used cluster munitions. Israel's air force dropped cluster bombs—most of them long-expired Vietnam War-era BLU-61 and BLU-63 models manufactured in the US and donated to Israel in the 1970s (Moyes and Nash, 2005 7-

[60] Interview with Colin King (C. King Consulting), 30 September 2008.

10). Hizbullah fired cluster munitions, some carrying MZD-2 submunitions (HRW, 2007 46–7, 83–4 and 121) among the 3,970 rockets it targeted at Israel during the conflict, 901 of them into urban areas (Langton, 2007 210). And, Israel's military forces fired large quantities of explosive submunitions into Southern Lebanon during the last three days of the conflict from ground-launched artillery and rocket systems.

The use of cluster munitions and their humanitarian consequences in Southern Lebanon underlined the issues that use of these weapons raises under international law. Hizbullah deliberately targeted civilians in its rocket attacks (HRW, 2007 9). The IDF blanketed Southern Lebanon with massive numbers of submunitions, some of which failed to function as intended and were thus of great hazard to civilians returning to the area from the north, as well as those emerging from their homes. It led a UN Human Rights Council Commission of Inquiry to later report among its findings concerning IDF cluster munition use that "in view of the foreseeable high dud rate, their use amounted to a de facto scattering of anti-personnel mines across wide tracts of Lebanese land" (2006 5). The use of cluster munitions in the conflict added weight to the arguments of those, including some states, the ICRC as well as the CMC and its constituent organisations, that action was needed to address these hazards, both at time of use and post-conflict, through an international treaty. Moreover, the 2006 conflict indicated the likely shape of things to come if proliferation of cluster munitions continued—increasing access to and use by non-state armed groups in ways violating IHL.

Long before the war, the UN had established a Mine Action Coordination Centre (MACC) in Tyre to help address Lebanon's mine and UXO problems from previous

conflicts. It meant the UN was in an even more central position than in Kosovo to gather evidence of the post-conflict effects of unexploded submunitions.[61] In addition to the old air-dropped submunitions from the 1970s there were left unexploded the newer American-made M-42, M-73 and Israeli M-85 DPICMs in large numbers. More surprisingly, there appeared to be substantial numbers of dud M-85s equipped with self-destruct. MACC staff found hundreds littering the street outside a hospital in the town of Tibnan, for example.[62] The Israeli M-85s were essentially identical to the DM-1385 submunitions possessed by Norway and the UK's M-85s. Clearly, the self-destruct feature had not worked properly here.

Word soon spread to the Norwegian military via NGOs carrying out clearance in Southern Lebanon such as NPA about the extent of the contamination there, including from those submunitions with self-destruct. The FFI's scientists were incredulous. However, Norway's own careful tests at Hjerkinn on 18 September of 192 DM-662 artillery projectiles containing 9,408 DM-1385 submunitions—the most comprehensive ever carried out in Norway—also perplexed them. Conditions were perfect, and the munitions were in an excellent state. Nevertheless, there were 104 submunition duds, which gave an average failure rate of 1.11%—just above the Norway's self-imposed maximum failure rate.[63]

With the results of the latest Hjerkinn tests not yet public knowledge, the FFI

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[61] Interview with John Flanagan (UNMAS), 4 June 2008.

[62] Interview with Tekimiti Gilbert (UNMACC SL), 9 October 2008.

[63] This average failure rate includes testing results of the DM-642 rounds containing DM-1383 submunitions. These met the 1% standard, and so the failure rate for DM-1385 submunitions is actually higher than 1.11%.

accepted NPA's invitation to go to see the submunitions that had contaminated Southern Lebanon at firsthand. In late October, FFI scientist Ove Dullum and NPA staff from Oslo met with Chris Clark, the head of the UNMACC in Tyre. Dullum recalled:

> "It was hard to accept it initially. I had an argument with Chris Clark down there on the first day when we arrived. [...] I said we had done very thorough tests and we found that it [the failure rate] was just 1 per cent. But he still said that it was much more than that. And we went out and looked and I had to admit that Chris was right. It was much more than 1 per cent or 1.5 per cent."[64]

After carrying out various checks, Dullum formed the impression that the average failure rate for M-85s with self-destruct devices as used in Southern Lebanon was in the region of 5–10%. As Dullum and NPA examined data from the best-documented cluster munition strike sites there they found the failure rate tended to be at this estimate's upper range. At this time, the M-85 was generally seen, in terms of the quality of its design and construction and because of its self-destruct feature, as the best of the best; and, although the Israeli M-85 lots fired were marginally older, this was the same submunition that had been tested in Norway.

There could be only one logical conclusion: reliability testing could not be depended upon, because as Landmine Action had earlier told Norwegian policy makers, it was evidently not "anchored in reality"[65]. If the actual rate of submunitions left unexploded in combat was of an order of magnitude greater than in testing, which was what the evidence Dullum could see indeed showed, then Norwegian use of cargo

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[64] Interview with Ove Dullum (FFI), 25 August 2008.

[65] E-mail, "Testing of M-85 submunitions: Comments from Richard Moyes", August 2006. Copy on file.

ammunition in combat would also result in many hazardous, unexploded duds despite the M-85's vaunted self-destruct mechanism. Cluster munitions would always pose a significant post-use risk because of this high actual dud rate and violate the IHL principle of distinction. Norway's cargo ammunition could not be used.

The conflict in Southern Lebanon and its aftermath of hundreds of thousands of unexploded submunitions of various kinds accelerated the process in Norway toward instigating international efforts toward a humanitarian cluster munition treaty. As part of this, it served to short-circuit debate about the results of the late September tests only exceeding the government's target by a few tenths of a per cent. Those results, along with accumulating evidence, including NPA's and Dullum's examination of submunitions in Southern Lebanon, now merely confirmed what the Norwegian government had already decided, which was revealed publicly as early as 24 October in an answer by Foreign Minister Støre to a written question in the *Storting*, to "take the lead—together with other like-minded countries and international humanitarian actors—to put in place an international prohibition against cluster munitions" (2006).

On 3 November, the Norwegian Foreign and Defence Ministers held a joint press conference in Oslo. The focus was on Norway's new national policy—to extend the temporary moratorium on use of the nation's cluster munitions until an international ban could be achieved. It was explained that "The Norwegian moratorium is important in itself, but it is also important in terms of giving Norway the necessary international credibility now that the Government has decided to work for a ban on cluster munitions that cause great humanitarian suffering" (Norwegian Ministry of Foreign Affairs, 2006a). They added that:

> "The aim is an international ban against the types of cluster munitions that cause unacceptable humanitarian harm. This is important both for humanitarian reasons and in order to facilitate reconstruction and development. The use of this type of munitions must be stopped before it becomes even more extensive, with all the unforeseeable consequences this could have" (2006a).

The transformation of Norwegian national policy was now largely complete. Norway's air-delivered cluster munitions had been scrapped. The Norwegian military's ground-launched cluster munitions—which it had insisted, until challenged, did not even fall into the same weapon category—would now be effectively withdrawn from service. And Norway's government had staked out that it would undertake what the NGOs and parliamentarians had been pushing it to do since the middle of 2001; take the lead on an international ban campaign, with the diplomatic and political risks that this held in store. Moreover, Norway had clearly signaled that the path to a cluster munition ban might not be by means of the CCW, which the following week would commence its five-yearly review conference in Geneva. In political terms, this was the genesis of the Oslo process.

6. Developments in the CCW, up to and including the 2006 review conference

The conflict in Southern Lebanon provided irrefutable evidence that cluster munitions, even when used by a professionally trained army intimately familiar with IHL requirements like the IDF, are deeply problematic weapons in terms of their impact on civilians. If there was any doubt about the scale of the unexploded submunition problem there, the UN dispelled this by sending the UNMACC SL's Director to Geneva to present video, photographs and testimony in a packed briefing meeting on the CCW's margins.

Many CCW member states, with encouragement from the ICRC and the CMC, pressed their wish for a negotiating mandate to deal with the humanitarian effects of cluster bombs (Austria et al., 2006). Referring to their "atrocious, inhumane effects", UN Secretary-General Kofi Annan now called on CCW member states to freeze the use of cluster munitions against military assets located in or near populated areas, to stop transferring cluster munitions known to be inaccurate or unreliable and to dispose of them. Annan also asked states to develop technical requirements for new weapons in order to reduce their risk to civilian populations (UN Secretary-General, 2006).

The UN's Emergency Relief Coordinator, the Norwegian, Jan Egeland, went further. From Southern Lebanon, Egeland told the media that "Ultimately, as long as there is no effective ban [on cluster munitions], these weapons will continue to disproportionately affect civilians, maiming and killing women, children and other vulnerable groups" (UN Emergency Relief Coordinator, 2006). Egeland reiterated an earlier call made by the UN's Inter-Agency Standing Committee in 2003 for a freeze on the use of cluster munition use, but he dropped the subsequent phrase "until effective legal instruments that resolve humanitarian concerns are in place". This made it seem the same as a ban call.

Southern Lebanon's aftermath moved cluster munitions to centre stage in the CCW. But CCW discussions had become increasingly divided between 2004 and 2006. This was underlined by the wide spectrum of reactions to the report of an IHL questionnaire exercise carried out by Australian legal academics in the CCW and presented in March 2006 (McCormack et al.). Some states such as China, India, Israel, Pakistan, Russia, UK and the US maintained that existing IHL rules were adequate, and

that no new international law with specific regard to cluster munitions was needed. A growing second group of states, UN agencies and the ICRC as well as the CMC and its member NGOs argued that the Southern Lebanon conflict showed further rules were necessary (Borrie, 2009 125-127).

There was initial optimism in this second group that a CCW negotiating mandate might now be possible to achieve at the review conference, an expectation that grew during the first fortnight of the three-week meeting. These states were encouraged on the meeting's eve when a letter from British International Development Minister Hilary Benn to his cabinet colleagues leaked to the media, which called into question British policies on the use and possession of cluster munitions in view of their humanitarian impacts (Cracknell and Oakeshott, 2006). And, at least 25 of the CCW's 100 state parties lent their support to a joint statement at the CCW review conference to do something about cluster munitions (Sweden et al., 2006).[66]

However, in a move that seemed to be intended to cap pressure for a cluster munition negotiation mandate, in the review meeting's final week the UK's CCW delegation insisted on a weak, delaying text for the review conference's draft Final Document. Appearing to act on behalf of its P-5 cohorts and a few others such as India and Pakistan, the UK took the lead in defending against attempts by Mexico, Canada and others to secure a negotiating mandate. The less ambitious mandate eventually agreed was instead for an intersessional meeting of the CCW in 2007 to:

"consider further the application and implementation of existing international

[66] At this time, the CCW had 100 member states. This number increased by 14 states in the five-year period to the CCW's next review meeting in late 2011.

humanitarian law to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions, including the factors affecting their reliability and their technical and design characteristics, with a view to minimizing the humanitarian impact of these munitions" (CCW, 2006b 6).

Mexico disassociated itself from the outcome, although it did not block consensus on the Final Document. Some of the UK's EU colleagues were also clearly displeased, as it undid their work for more robust language on cluster munitions as part of a joint proposal on ERW.

Technically, the 2006 review conference was successful in that it achieved a final document. But it also contributed to an emerging view among many governments and in civil society that efforts to address the specific effects of cluster weapons on civilians might be strung along perpetually in the CCW without tangible results. And, the mandate agreed on cluster munitions dispelled hope that states like China and Russia might act more constructively on cluster munitions in those talks, particularly as they had not wavered in their opposition to new rules on MOTAPM and blocked moves toward such an agreement at the review conference.

7. Conclusion: initiation of the Oslo conference

As seen above, Norwegian policy makers figured that the path to humanitarian rules on cluster munitions might not be best achieved through the CCW. By the final week of the 2006 review conference they could see the writing on the wall for efforts there in 2007. During the review meeting's second-to-last day, Norway's Foreign Minister announced in Oslo:

"Norway will organise an international conference in Oslo to start a process towards an

> international ban on cluster munitions that have unacceptable humanitarian consequences. […] We must take advantage of the political will now evident in many countries to prohibit cluster munitions that cause unacceptable humanitarian harm. The time is ripe to establish broad cooperation on a concerted effort to achieve a ban". (Norwegian Ministry of Foreign Affairs, 2006b)[67]

It was formal proof that Norway sought an alternative process outside the CCW to deal with cluster munitions irrespective of the review conference's final outcome.

Although the years from 2004 to 2006 were difficult for NGOs on cluster munitions, this period was necessary for framing the humanitarian problems of these weapons and devising a rationale to underpin efforts toward their elimination. Significantly, this logic depended upon humanitarian evidence that was, in several respects, at odds with user and manufacturer claims about cluster munitions. In the face of such accumulating evidence and increasingly sophisticated argument, doubts spread amongst a cross-section of states in the CCW about the acceptability of these weapons—doubts confirmed by use in the Southern Lebanon conflict and lack of change in the postures of major CCW states opposed to negotiating specific restrictions. Learning, persuasion and socialisation were key features of this process of frame alignment, to the point at which, in November 2006, Norway's government felt confident enough to launch an initiative intended to appeal to the humanitarian identities of these concerned states (a group swelling in size) in the form of the Oslo conference.

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[67] Although dated 17 November, this press release actually became widely available the preceding afternoon.

CHAPTER 6: THE OSLO PROCESS

1. The Oslo process is launched

Norway's announcement that it would host an international conference on cluster munitions meant that, for the first time, there was the prospect of a diplomatic process prohibiting these weapons (Norway, 2006). As seen in previous chapters, the CMC and some of its leading constituent NGOs played important roles in efforts to put cluster munitions on the international agenda and begin to frame cluster munitions in terms of their humanitarian problems and solutions. However, NGOs also found a receptive audience amongst Norwegian Ministers and some of their officials. Nor was the process of frame alignment by any means total, even within the CMC, as this Chapter shows. And, while NGOs clamoured loudest for action, less strident ICRC and UN pressure lent additional credibility to calls for states to deal with cluster munitions.

During 2006, Norwegian officials looked for signs of the elements they believed would be essential to a viable, freestanding international process to address the humanitarian impacts of cluster munitions. The first was evidence of the CMC's potential to be an adequate partner in terms of global advocacy and the means to create pressure in differing national environments in support of a treaty. Early meetings in 2006 with the CMC in Geneva, London and in Oslo were positive. However, these contacts indicated to the Norwegians that the Coalition required more resources, and needed to do further work to develop its central messages and means of communication. Norway (along with other governments such as Switzerland) began to fund the CMC

and some of its members in order to develop such capacity, and to produce reports presenting evidence of cluster munitions' humanitarian impact.[68]

The second sign Norwegian officials looked for were other states willing to form a core group of similar mind to work with Norway on pursuing a cluster munition treaty. Such a steering group would be essential, they believed, in helping to carry the burden of leading an international process, and achieving political buy-in from a broader constituency of states. Thirdly, Norwegian officials felt that having the humanitarian high ground was essential: in the case of landmines this had been straightforward, as the CCW had run its course before the Ottawa process had commenced (see Chapter 4). This was not the case on cluster munitions, and the Norwegian government did not want to be seen to be sabotaging the CCW, even if it had serious doubts about that forum's ability to deliver a substantial result in humanitarian terms.[69]

In ongoing contacts between the CMC, representatives of similarly inclined states, ICRC and UN personnel over the course of 2006, scenarios were discussed concerning how the CCW review conference might play out.[70] CMC efforts in the media and in its campaigning to set the review conference up as a make-or-break moment suited Norway. Although Norway announced the Oslo conference anyway, as

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[68] Interviews with Norwegian MFA officials: 27 August, 3 September 2008.

[69] Notes of remarks by Ambassador Steffen Kongstad, Diana Princess of Wales Memorial Fund Meeting on Cluster Munitions, London (13-14 March, 2006). Copy on file.

[70] These included a Geneva Forum seminar in Geneva on 12 March 2006, and a Diana Princess of Wales Memorial Fund Meeting on Cluster Munitions in London from 13 to 14 March.

it transpired the CCW's failure on cluster munitions was not as clear-cut as it might have been due to the last ditch efforts of the UK delegation to broker a mandate deal. And it led the US CCW head of delegation to announce that Washington was "disappointed" with Norway, and that a cluster munition process outside the CCW would undermine humanitarian law (US, 2006).

US displeasure also implied that bypassing the CCW could be a costly endeavour for Norway in terms of its relationship with its largest military ally. In this regard, US diplomatic cables released after the Oslo process by the Wikileaks organisation reveal that Norwegian officials were robust—brusque even—in response to US criticism during the Oslo process (US Embassy - Oslo, 2007 , 2008a , 2008b). These cables suggest that the foremost bilateral priority for the US around this time was for the F-35 Joint Strike Fighter to be selected by the cash-rich Norwegian government over European competitors. A July 2008 US cable containing a confidential assessment of "weasily" (sic) Norwegian Deputy Defence Minister Espen Barth Eide indicated that US officials clearly understood this pro-CCM politician would be an important principal in the eventual procurement decision (US Embassy - Oslo, 2008c). It meant that although American officials frequently harped about Norwegian decision-makers in their diplomatic cables on the Oslo process (US Embassy - Oslo, 2008a , 2007 , 2008b), banning cluster munitions does not appear to have become a major sticking point at the highest bilateral levels.

Once the Oslo conference was announced, other challenges hove into focus for Norway's bureaucrats. Even for a country with its financial resources, organising an international conference from scratch would be a major undertaking. Another issue was

the diplomatic management of the meeting itself, so Norway solicited for help representatives of several other states active in calls for a cluster munition negotiation in the CCW and who had participated in informal meetings of states in Geneva with its officials during 2006. Ambassadors Pablo Macedo of Mexico and Don MacKay of New Zealand—both experienced diplomatic operators and conference chairpersons, with capable (if small) support teams of their own—were key individuals in this respect. These diplomats, along with representatives of Austria, Ireland and Sweden, were to form a first proto-"core group" coalescing around Norway. Other interested states included Belgium, the Holy See, Lebanon and Peru.

The Swedish-led 25-state declaration at the November 2006 CCW review conference provided the basis for an initial list of (hopefully) like-minded governments to invite to the Oslo conference, to be held on 22 and 23 February 2007.[71] But it left the question of which other governments should be invited—and which would be prepared to come—since the intent of the conference was not to involve every state at this stage, but instead to gather critical mass to start the process rolling. Many countries affected by the post-conflict effects of cluster munitions were not members of the CCW, and the support of, and buy-in from, such states would be important in establishing the legitimacy of any humanitarian treaty resulting from the initiative.[72] And, what about the US's negative statement made in November about Norway's initiative?

On the whole, most other Western states seemed positive about the Oslo conference although many regarded it as a leap in the dark. For some, including even

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[71] Interview with Annette Abelsen (Norwegian MFA), 3 September 2008.

[72] Interview with Ambassador Steffen Kongstad (Norwegian MFA), 27 August 2008.

the UK, it made sense to be inside the conference room in Oslo because it certainly looked better to the outside world to be involved, and offered the prospect of influence, if not outright control, over the outcome.[73] The Norwegians were aware of this, but British participation was needed, they felt. Besides, in view of the close military relationship between the UK and US, British involvement in the conference would make other European NATO states more comfortable about participating, they thought. As Norway's Foreign Minister put it, "having the UK on the inside makes it harder [for others] to say you are doing something anti-NATO and anti-allies, let's be frank about it".[74]

6.1 The CMC's updated call

Civil society was also busily preparing for the Oslo conference. The CMC held a global campaign meeting in Geneva in November 2006 before the CCW review conference—the first since Copenhagen in 2004. Several campaigning developments were afoot at the national level. For instance, inspired by Belgium's legislation, parliamentary initiatives were underway in other European countries such as Austria (which would pass national legislation banning cluster munitions in early 2008) and France, stoked by ongoing interest in the issue in the European Parliament. Also, most of the NGOs active in the CMC were active on MBT issues (and members of the ICBL), and it was apparent that the prospect of a possible cluster munition ban process outside the CCW led by Norway, which was a major player in the MBT's implementation, had piqued the interest of many landmine campaigners working at the

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[73] Interview with British official (anonymity protected).

[74] Interview with Jonas Gahr Støre (Norwegian Foreign Minister), 29 August 2008.

national level. As one of them put it, a lot of campaigners "were anxious at this point to take on new challenges and saw this as something that they really wanted to do".[75]

Within the landmine ban movement, there were numerous campaigners who were willing and able to become members of the new CMC and start work on mobilising their own governments on this issue. While sharing many strategic leaders from among their member NGOs, the activities of the CMC and ICBL had usually been very separate at the working level, and this in part reflected their different situations. The ICBL had a mainstream diplomatic process to contribute to through the MBT whereas the CMC was seeking to prompt a new diplomatic process, the objectives of which were not yet entirely clear to all. The arrangement decided in 2003, when NGOs decided not to add the cluster munition issue to the ICBL's plate but instead to set up the CMC (see preceding Chapter), now began to change.

In December 2006, after a decision by the ICBL's leadership, the ICBL added cluster munitions to its mandate and soon secured dedicated funding from the Norwegian government to hire staff to focus on cluster munition advocacy. This was not uncontroversial within the ICBL's membership, but those working to propel the CMC forward welcomed the additional staff time from 2007 focused on mobilising campaigners on cluster munitions. The ICBL's objective was to support the CMC and to work as a member within it—a coalition within a coalition.

During the Oslo process, the CMC would be able to draw on the expertise and experience of some of the leaders of the landmine ban movement both from NGOs (figures such as Brabant, Goose, Hannon, McGrath and Mary Wareham), and those

[75] Interview with Stephen D. Goose (HRW), 21 November 2008.

from friendly governments like Norway. The relationship between a new generation of central figures within the CMC and the veteran leaders of the ICBL who had emerged during the 1990s was not always free of tension, as they sometimes had differing ideas about best approaches for strategy and advocacy.[76]

The CMC's leadership recognised that a freestanding international initiative on cluster munitions would mean the Coalition would have to transform itself in order to contribute to the Oslo initiative, and thus to have a say in any outcome. As a senior campaigner observed, "The CMC has always been a very top-heavy Coalition ... In Washington terms we would call it an "inside the Beltway" coalition. You know, you are talking to leaders and you are not doing a lot of grassroots mobilising".[77] Some of those in the CMC's leadership active in the landmine campaign perceived the CMC's relative lack of grassroots national campaigns as its greatest weakness. A decade previously, the ICBL had constituted national campaigns built up in dozens of countries over several years, and coordinated by a small team of organisers at the international level. But on cluster munitions the scope of the problem was much more limited and not always seen as distinct from the landmine problem in the minds of the public and media. Besides, there might not be time for a mass public mobilisation campaign in view of the pace the Norwegians had told the CMC's leadership they wanted to move at—to complete a treaty by the end of 2008.

Some within the CMC's leadership considered there were additional contrasts with the landmine campaign in the 1990s. Certainly the international political landscape

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[76] Personal communication with Samantha Rennie (Diana Memorial Fund), 16 July 2009.

[77] Interview with Stephen D. Goose (HRW), 21 November 2008.

was radically altered by the attacks of 11 September 2001 and other international shocks that countered the sense of optimism and possibility of the 1990s after the fall of the Berlin Wall. In February 2003, over one million people surged through the streets of London in protest against a war in Iraq, yet a month later, the invasion went ahead. The failure of this protest led many UK-based NGOs (and the foundations supporting them) to reassess the value of mass mobilisation in changing government policy, including the CMC.[78] In this new environment and with an issue that did not have the same global profile as landmines, a more targeted form of political mobilisation drawing on the media and public relations techniques of successful political and commercial campaigns might be more appropriate. This was not to abandon grass roots mobilisation and a civil society campaign driven from the bottom up by its members, but rather to recognise that the power of those members could be amplified through the strategic use of the media and public events targeted at specific individual decision-makers and around particular events. This campaigning approach also reflected the growing trend of the "professionalisation" of many NGOs.[79]

The CMC would develop in its own manner during the Oslo process. While the ICBL executive team in the Ottawa process period was largely comprised of those campaigners its individual member campaigns could spare, in contrast the CMC would emulate the model the ICBL later evolved toward of adding staff dedicated to the international campaign and the Coalition itself, rather than being representatives at the same time of one of its members. The first of these staff started at the CMC in

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[78] Personal communication with Samantha Rennie (Diana Memorial Fund), 16 July 2009.

[79] Personal communication with Thomas Nash (CMC), 6 July 2009.

September 2006. Others would follow in 2007, including a fulltime campaigning officer from May.[80]

The CMC's Steering Committee members met in early January 2007 to plan their strategy. CMC goals as set out in the "Kentwell Plan" were to be focused on:

> "1. Success of Norwegian initiative as the only viable international process on cluster munitions
>
> a. Establishment of government core group
>
> b. Cluster munition treaty text developed, negotiating process established, and negotiations concluded in 2 years or less
>
> 2. National steps taken on cluster munitions
>
> 3. Public awareness raised on cluster munitions" (Nash, 2007b 2).

Detailed measures were set out for coordinating CMC members' activities, support to national campaigning and for provision of advocacy materials. 2004 and 2005 had been years of CMC education and raising external awareness, and in 2006 its advocacy had focused on the CCW review conference as a break point. Now the CMC restructured its management structures in order to speed up day-to-day decision making, primarily through appointment of co-chairs; three senior people committed to ongoing leadership responsibility.[81] In addition to Simon Conway, (Landmine Action's Director) and Goose, Grethe Østern of NPA was appointed. Beside Moyes and Nash, the co-chairs would play the most consistent roles over the Oslo process in terms of directing frame alignment activities within the CMC.

The matter of the CMC's call for action on cluster munitions was a pressing

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[80] Interview with Laura Cheeseman (CMC), 1 September 2008.

[81] Personal communication with Stephen D. Goose (HRW), 7 September 2009.

issue. Although, in practice, CMC representatives talked of banning the weapon in getting the Coalition's aims across to policymakers, its call remained the one agreed in November 2003. In view of the events of the previous year, in particular, pressure was growing from member NGOs such as HI Belgium and HI France, NPA and Landmine Action for the call to be updated with an unequivocal demand for a ban. HRW and MAC resisted however, preferring a formulation calling for a ban on inaccurate and unreliable cluster munitions. These NGOs thought the latter formulation was the more persuasive campaigning call in terms of attracting support from states.

The contest was between two contrasting views of how to address the humanitarian impacts of cluster munitions. On the one hand there was a "define and ban" approach, and on the other was a "split cluster munitions into categories" approach. Moyes, Nash and some others felt strongly that pursuing the latter course, which in effect was what the technical discussions in the CCW had been about for years, would be difficult to campaign on and lead to failure.[82] The compromise agreed was that the Coalition's call was re-expressed as follows:

> "The CMC is committed to protecting civilians from the effects of cluster munitions
>
> The CMC calls for a prohibition on cluster munitions that cause unacceptable harm to civilians
>
> The CMC continues to call for:
>
> 1. No use, production or trade of cluster munitions until their humanitarian problems have been resolved.
>
> 2. Increased resources for assistance to communities and individuals affected by unexploded cluster munitions and all other explosive remnants of war.

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[82] Conversation with Thomas Nash (CMC), 8 April 2009.

3. Special responsibility for users of cluster munitions and other munitions that become ERW."

This formulation introduced the notion of unacceptable harm into the CMC's call for the first time. The call still stopped short of a categorical prohibition on cluster munitions, but the new structuring moved the Coalition's existing public objective on cluster munitions closer to it. The Kentwell meeting's report claimed this call "binds together the nuances present within Steering Committee members' positions" and noted that "CMC members will maintain full flexibility to campaign on the basis of a total prohibition of cluster munitions" (Nash, 2007b). Nevertheless, unpublished minutes from the Kentwell meeting indicated that no one present liked the updated call much (CMC, 2007c), and it would be revisited after the Oslo conference. As such, it was an interim step.

6.2 The framing of the Oslo Declaration

In November 2006, Foreign Minister Støre had made it clear in his announcement about the Oslo conference that he saw partnership with IOs and civil society as important ingredients (2006a). Now the Norwegians invited these actors to work with them in several ways. In late January, representatives of NGOs, the ICRC and UNIDIR travelled to Oslo to discuss preparations for the Oslo conference with the Norwegians, and a representative from the Irish Foreign Ministry, Declan Smyth, was also present.[83] Discussions included what the Oslo conference should produce as its output.

Norwegian diplomats wanted three outcomes from the Oslo conference. Firstly, it needed to result in a clear political commitment from governments. Secondly, the commitment and the humanitarian difference a humanitarian treaty would make needed

[83] Personal communication with Rosy Cave (UNIDIR), 30 January 2007.

to be communicated in media-friendly terms. Thirdly, the conference needed to agree on what would happen next.[84] The Oslo conference was just the beginning of a process, and further milestones should be marked out and agreed by governments at that meeting. This would mean persuading other governments to host further conferences, which in turn meant a timetable toward achievement of a treaty on cluster munitions—and its specific aims—would be required.

The logical means to focus minds was a conference declaration, on which work began. Early drafts of an "Oslo Action Plan on Cluster Munitions" emulated UN General Assembly resolutions. However, over the course of February in the lead up to the Oslo Conference the declaration became plainer in language—and briefer—as it was circulated informally among the January group and interested governments, and honed by Kongstad and his Mexican colleague Macedo to the point to which they hoped "it would be impossible for many countries not to support it".[85] The formulation of the brief, eventual declaration would be key to the Oslo conference's success. At the core of all of the drafts, and the eventual declaration agreed in the Oslo conference, was a deliberate ambiguity; the goal of prohibiting the "use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians".

The precise origins of the phrase "unacceptable harm" are unclear. As mentioned above, the CMC deployed the phrase in its CMC's campaigning call updated in January 2007. Earlier, the Norwegian Foreign Minister and diplomats used the phrase in announcing the Oslo conference, and its letter of invitation identified the goal of "an

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[84] Conversation with Annette Abelsen (Norwegian MFA), 17 April 2009.

[85] Interview with Ambassador Steffen Kongstad (Norwegian MFA), 27 August 2008.

international ban on those cluster munitions that have an unacceptable humanitarian impact" (Støre, 2006). HRW used the phrase in a statement during the CCW review conference (HRW, 2006).

That the "unacceptable harm" phrasing was comparatively recent in origin, however, is significant. NGOs, states and IOs had, for years, used the word "unacceptable" in connection with aspects of cluster munition use, but usually in the sense that use contravened civilised norms of behaviour, or in referring to submunition unreliability (Moyes, 2006). "Unacceptable harm" suggested something different, though: it shifted emphasis from the acceptability of use toward the acceptability (or lack thereof) of the *effects* of use.

The distinction was a subtle one, but it made an important difference. Acceptability of use played into the type of discourse seen in the CCW because it primarily focused on the intent of the user and could thus be countered by arguing better compliance with generic IHL was needed, not new weapon specific rules. The goal of a ban on cluster munitions causing unacceptable harm, however, prompted different questions: *which* cluster munitions cause unacceptable harm? What, for that matter, constituted unacceptable harm? The notion of unacceptable harm opened up a space for the introduction of evidence from the field about the actual effects of cluster munitions—evidence that provided means to critically evaluate the claims of users and manufacturers about their weapons.

6.3 The Oslo conference

Norwegian officials were initially concerned that participation at the Oslo conference would be under-subscribed. However, these fears proved unfounded. Instead

of a rough minimum of 30 governments the Norwegian government hoped would come, representatives of 49 governments attended.[86] Some of these governments were not original invitees in view on their national postures on cluster munitions expressed in the CCW (Japan and Poland, for instance, had each repeatedly stressed the importance and legitimacy of their stocks of cluster munitions) but strenuously insisted on taking part. The US was nowhere to be seen, but the Norwegians had expected that, to the point that it does not appear that a formal invitation was sent to Washington. Like Brazil, China, India, Israel, Pakistan and Russia—all cluster munition possessors—the US would shun the Oslo process throughout its course.

Governments such as Austria, the Holy See, Ireland, Mexico and New Zealand had, in practical terms, already committed themselves to supporting the Oslo initiative—although Norway, for now, carried the vast share of political risk. Positive signals could reasonably be expected to a greater or lesser degree from a second group of governments such as Afghanistan, Angola, Belgium, Bosnia and Herzegovina, Chile, Colombia, Croatia, Costa Rica, Guatemala, Iceland, Lebanon, Lithuania, Luxembourg, Malta, Mozambique, Peru, Portugal, Serbia and Slovenia.

This left a large group whose intentions were harder to predict. It included many of Norway's NATO allies, and others such as Argentina, Japan, Jordan, Indonesia and South Africa. France, Germany and the UK were especially important, and collectively could perhaps tip over the conference if they rejected its outcome because many others would be likely to follow their lead. Moreover, while Belgium, Sweden and Switzerland

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[86] See Appendix III for a list of participating countries. The CMC, ICRC, UN OCHA, UNIDIR, UNDP, UNHCR and UNICEF also took part, as well as individual invited participants.

had been helpful to Norway in the lead-up to the conference, there were signs that, for various reasons, they would find being part of an Oslo core group difficult. While nationally Norway had moved beyond believing in reliability rates as a basis for demonstrating the acceptability of cluster munitions, both the Swedish and Swiss governments appeared set on ensuring that their own cluster munition arsenals were retained at the end of any process on the basis of their submunitions' minimal alleged failure rates (Sweden, 2007). And, a general election in Sweden in September 2006 saw its Social Democrat-led government fall, to be replaced by a centre–right coalition of four parties less sympathetic to Sweden taking a prominent role in international efforts on cluster munitions.

The Norwegian Foreign Minister opened the Oslo conference on the morning of Thursday, 22 February, in a session open to the media. Støre delivered a carefully nuanced speech to delegates sprinkled with buzz phrases diplomats liked to hear, such as "the right dose of realism and pragmatism" (Norway, 2007a). While talking about bringing to an end "unacceptable human suffering" from cluster munitions, and halting or no longer using such weapons "that cause such indiscriminate suffering", nowhere did Støre explicitly mention a prohibition or a ban on which opposition to the Oslo initiative might latch. Instead, he said, "Here is our objective: To reach agreement on a plan for developing and implementing a new instrument of international humanitarian law that addresses all the unacceptable consequences of cluster munitions by 2008".

Notably, the UN and the ICRC threw their moral authority with states behind the Oslo initiative's humanitarian aims. The ICRC argued that the Oslo conference's participants "should avoid divisive debates about the forum in which those results could

best be achieved" (ICRC, 2007d). It reflected the feeling within the ICRC that Oslo represented greater hope for meaningful restrictions or prohibitions on cluster munitions than the CCW's endless talks in Geneva. UNDP linked efforts to address the impacts of cluster munitions on civilians with the UN's Millennium Development Goals and recalled the UN Secretary-General's November 2006 statement on cluster munitions. It added, "UNDP and other UN agencies strongly feel that it is time for the international community to urgently agree on effective legal instruments to prohibit cluster munitions that cause unacceptable harm to civilians" (UNDP, 2007). This could be seen as consistent with the Secretary General's message to the CCW review conference, which called for a freeze on cluster munition use until the weapon's humanitarian hazards were addressed. But the formulation also offered wriggle-room that could extend to support by UN agencies for a cluster munition ban.

Meanwhile, the "unacceptable harm" formulation in the draft declaration was the subject of negotiation on the margins on the conference amongst state diplomats. The biggest issue was over which weapons it covered. Would these cover sensor-equipped munitions sometimes characterised as submunitions point-targeting armoured vehicles within an area? What about DPICM submunitions, which many states including a number within NATO possessed, as did others like Japan and South Africa—with or without self-destruct or self-neutralisation functions? Given the chance, many of the cluster munition possessor states at the Oslo conference would have liked to establish exclusions of various kinds before any future negotiation commenced.

Many other states participating in the conference not have cluster munitions in their national arsenals. For some of these states, a complete ban on anything that

resembled a cluster munition was ostensibly desirable. In order to successfully tread this fine line, Norwegian diplomats had to convince the spectrum of states interested in the content of the Oslo Declaration that the ambiguity in the objective of banning "cluster munitions that cause unacceptable harm to civilians" was a constructive one, to be settled in the course of the subsequent process to develop a treaty, and not substantially improvable before the end of the Oslo conference.

Concern among some European states such as the UK was heightened because there was a difference in the language of Norway's conference invitation letter—it talked about "those" cluster munitions that cause unacceptable harm—and the draft declaration distributed at the Oslo Conference, which dropped the word "those"[87] and thus created the possibility that all cluster munitions might be prohibited.[88] The conference co-chairs therefore had to try to satisfy nervousness about this, in addition to the Oslo initiative's existence in parallel to the CCW. However, as a senior New Zealand diplomat recalled, "the obvious attraction was the self-evident/circular/internally reinforcing nature of the formulation which made it impossible to argue against in principle. It [eventually] made it very difficult politically for countries to stand outside the process, since how could you justify harm which is "unacceptable"?"[89]

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[87] Operative paragraph 1 of the draft Oslo Declaration said that states would commit themselves to "Conclude by 2008 a legally binding international instrument to (i) prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians". See (2007) *The Oslo Declaration*. NORWAY et al. 23 February. Government of Norway.

[88] Interview with Ambassador John Duncan (UK FCO), 30 June 2008, and personal communication, 4 August 2009.

[89] Personal communication from Don MacKay (New Zealand MFA), 1 December 2011.

Norway held firm against changes to the Declaration proposed from various quarters. Consequently, as one civil society campaigner observed, "There was a good measure of drama and uncertainty over the course of the conference as no one was sure on the final day how many of the governments present would endorse the Oslo Declaration, and how many would bail out; some were clearly getting last-minute instructions" (Goose, 2008 226-7). Some campaigners figured the Declaration exercise would lose Canada, Denmark, France, Germany, Italy, South Africa and the UK.

By late on the Oslo conference's final morning, delegates from many NATO countries were in the corridors "running around, making phone calls, forming groups then dispersing rapidly, talking nervously, waving papers, throwing arms, shaking heads" (Derlicka, 2007). In London, for instance, last-minute consultations were underway between the three leading departments on cluster munition-related issues—the Foreign Office, Ministry of Defence and DFID—with DFID's Minister Hilary Benn trying to persuade his counterparts from the other two agencies that the UK should join the Declaration. It was the Canadian delegation that spoke in the Oslo conference first to announce Canada's support, followed by Italy, Lebanon, Finland and the UK. One by one representatives of 46 countries representing most regions of the world raised their nameplates to announce they would join the Oslo Declaration. Only three states stood aside—Japan, Poland and Romania.

Some governments explained their support for the Oslo Declaration with carefully stated provisos. Many Western states referred to the importance of "all relevant fora" mentioned in the Declaration, which was code for the CCW. Unsurprisingly, most NATO states referred to the need to determine what were cluster

munitions that cause unacceptable harm. And, in a foretaste of another issue that would be contentious in the Oslo process, the UK opined that "a transition period will be required in the final instrument itself" (UK, 2007) during which cluster munition possessors could hold on to their banned weapons until they had arranged for alternatives.

Nevertheless, an international process had now unequivocally begun. Importantly for efforts to follow in the Oslo process, the concerns leading to the February 2007 conference in Norway had translated into a clear objective by means of the Declaration. Moreover, it did not try to pre-negotiate key understandings crucial to achieving this such as defining those cluster munitions causing unacceptable harm. The challenge of defining those cluster munitions would, henceforth, become increasingly prominent as debate intensified in further international meetings—the next one scheduled for Lima, Peru, in late May.

After the Oslo conference, Belgium, Sweden and Switzerland gravitated away from the emerging core group. Norway had moved beyond believing in reliability rates as a basis for demonstrating the acceptability of cluster munitions. But the Swedish and Swiss governments wanted to ensure that their own cluster munition arsenals were retained at the end of any process on the basis of their submunitions' minimal alleged failure rates. A general election in Sweden in September 2006 saw its Social Democrat-led government fall, to be replaced by a centre–right political coalition less sympathetic to Sweden taking a leading role on international efforts on cluster munitions. Belgium, after banning cluster munitions early, appeared to give diplomatic priority to working within the EU and not blazing a trail internationally (Petrova, 2007 15). The core group

settled around seven governments—Austria, Ireland, the Holy See, Mexico, New Zealand, Norway and Peru.

2. Oslo's aftermath

The Oslo Declaration bridged two seemingly contradictory political imperatives. On one hand, it stipulated a goal—ban cluster munitions—for the states, IOs and NGOs participating in what immediately became widely referred to as the Oslo process. This goal was ambitious, clear and concise, and as such was suitable for international campaigning. Yet the unacceptable harm framing contained an inherent ambiguity about which cluster munitions were causing unacceptable harm precisely, and there was pressure from various quarters to define this as soon as possible. There would be those, like the CMC, advocating a broad prohibition. Equally there would be users and stockpiling countries keen to exempt weapons in their arsenals from the prohibition.

Diplomats from the core group delegations were also aware that pressure would likely mount on them to relinquish their steering role over the emergent process to states like France, Germany and the UK. However, they had now come through a baptism of fire together, diplomatically speaking, and a significant degree of trust had been built between them. They would, moreover, see a great deal more of each other over coming months in the lead-up to the Lima meeting in order to prepare the way for next steps, particularly in small group meetings in Geneva.[90]

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[90] There is not space in this thesis to introduce more than a handful of the personalities in the core group, or staff from IOs or NGOs involved to varying degrees in its work. For an overview, see pp.163-164 of BORRIE, J. (2009) *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won.* Geneva, Switzerland: United Nations Institute for Disarmament Research.

The core group faced two immediate issues. The first was to grow the initiative beyond the 46 states of the Oslo Declaration. At the Oslo conference there had been a numerical bias toward industrialised, Western states, and a goal for the initiative would be to build support in all regions of the world. The voices of cluster munition affected countries were perceived as especially important in lending legitimacy to the Oslo process. Civil society's network of campaigners, UNDP's offices around the world and the ICRC and national societies within the Red Cross and Red Crescent Movement could lend momentum to this, alongside the core group states' diplomatic efforts. Relinquishing responsibility to large Western states for steering the process forward would likely extinguish any appeal the Oslo process might hold for countries from the global South, and not only for ideological reasons: it could be argued, with historical justification, that doing so would place the cluster munition foxes in charge of the chicken coop, and lead to a weak outcome in humanitarian terms.

The second issue concerned elaborating a strategy for the Oslo process. Strategic issues had been discussed among states supportive of the Norwegian-initiated process before the Oslo conference. Now the states of the core group began turning their minds (with input from others) to how an eventual treaty might look, and how to prepare states in the Oslo process for migrating toward that. It was evident that everything would hinge upon the general scope of the treaty's obligations and how these were packaged—and in particular, how cluster munitions were defined.

Moreover, the unacceptable harm formulation's ambiguity could eventually backfire. Preoccupation with dividing cluster munitions into "acceptable" and "unacceptable" categories might paralyse the Oslo process. Beyond the Oslo

Declaration, there was no consensus among core group states over how to define cluster munitions or—at that stage—even over how to structure the process of framing that definition. Indeed, the core group never presented (or sought to present) a united front on matters of substance such as the content of definitions, and in time the differences of view of its partner governments became more apparent.[91] Instead, the core group acted as a bureau in which member states supported each other to propel the Oslo process, and fend off challenges to its humanitarian objectives, on which they were all agreed.

2.1 Settling the CMC's call

Meanwhile, for the CMC there was the thorny internal question of how the Oslo Declaration equated precisely with the CMC's own call for action on cluster munitions to deal with.[92] During the weekend following the Oslo conference, the CMC's Steering Committee met in Oslo to chew over formulation of the Coalition's call once again.[93] The Kentwell call stated "The CMC calls for a prohibition on cluster munitions that cause unacceptable harm to civilians": the upshot of the Oslo Declaration was that now, on paper at least, so too did 46 states. Nash and others on the Steering Committee, including Handicap International (HI) France's Jean-Baptiste Richardier, NPA's Østern, as well as Conway and Moyes from Landmine Action, felt the CMC should now position itself to create a discourse in the Oslo process in which it was increasingly accepted that all cluster munitions as commonly characterised cause unacceptable harm and as such should be banned. There should also be a change of emphasis in the CMC's

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[91] The same was true of the other major issue by the time of the Dublin negotiations, the issue of interoperability in the CCM.

[92] Interview with Thomas Nash (CMC), 24 November 2011.

[93] Personal communication with Thomas Nash (CMC), 15 July 2009.

call, away from urging measures such as national moratoria on cluster munition use, and instead toward the achievement of the prospective new "Oslo Treaty".

Other members of the Steering Committee, namely Goose (HRW) and Hannon (MAC), did not agree. They felt that the Kentwell call was still sufficiently flexible to allow individual CMC members to advocate as they saw fit on cluster munitions, and feared the unveiling of a new CMC message would undermine its credibility by seeming to shift the Coalition's objective as soon as states had caught up.

Personal correspondence between individuals on the Steering Committee during this period over the CMC's call revealed they agreed on its substance—a ban on all weapons that saturate areas with explosive force by means of submunitions.[94] The real difference was still over how this issue was framed. Those wanting to make the prohibition in the CMC's call more explicit linked it (consciously or otherwise) to issues about the Coalition's central identity. The CMC's "soul" was what it stood for; that is, its call on states.

Certainly, as veterans of the Ottawa process, Goose and Hannon were well aware that clear goals and campaign messaging were important factors in mobilising support and media interest. This was not unrelated to their awareness that a civil society campaign's currency in government-dominated processes, whether in the CCW or in the context of the Oslo initiative, depended on its credibility; hence their concerns about the call's consistency. It pointed Goose toward a particular tactical question concerning further changes to the CMC call: how different would it really be from the one agreed in Kentwell? No different, in Goose's view. So it would be better not to change the CMC

[94] Copies on file.

call and risk confusion and criticism from those whose behaviour the Coalition was trying to influence.

Goose's argument had prevailed in the past within the CMC, but would suffice no longer. The end result of internal CMC negotiations within the Steering Committee over about five weeks following Oslo was another compromise, crafted by Richardier and Nash, to reflect the respective viewpoints within the group. The decision, which Nash communicated to CMC members in a message on the Coalition's e-mail list server, read as follows:

> "The Cluster Munition Coalition calls for the conclusion of an international treaty banning cluster munitions by 2008. Cluster munitions are understood to be unreliable and inaccurate weapons that are prone to indiscriminate use and that pose severe and lasting risks to civilians from unexploded submunitions. Therefore the CMC urges all States to:
>
> - join the international process launched in Oslo in February 2007 toward an effective and comprehensive treaty;
>
> - take immediate national steps to stop the use, production and transfer of cluster munitions;
>
> - commit resources and capacities to assist communities and individuals affected by cluster munitions" (Nash, 2007a).

The deal done within the Steering Committee was that this language would be regarded as an "update" and not a new call, consistent with HRW and MAC representatives' views. Although it distorted the actual situation somewhat, Nash's message to the CMC duly noted this understanding.

The CMC's wider membership welcomed the updated call. Many of these member NGOs were already calling for a ban, and had thought the CMC was too. In this sense, the precise phraseology of the campaign call did not change what the

Coalition's members believed or advocated to others. On the other hand, it reflected an evolution in the responses of the CMC's leadership in how to frame cluster munitions for audiences outside the campaign (especially states) as opposed to within it.

The call "update" contained tactical benefits for the Oslo core group and the CMC. It contributed to the impression that the Oslo Declaration was positioned in the political middle ground as a response to the impacts on civilians of cluster munitions, with the CMC in a maximalist role. Moreover, civil society lobbying for banning "unreliable and inaccurate weapons that are prone to indiscriminate use and that pose severe and lasting risks to civilians from unexploded submunitions" could help to counterbalance the attempts many expected to come from Lima onward to split the cluster munition category along the lines of unproven technical "improvements" such as self-destruct.

In its preparations for the Lima meeting, the CMC subsequently developed "19 Principles" concerning what any treaty on cluster munitions must include, and this included a basic understanding of cluster munitions that did not exclude from its scope submunitions with self-destruct or a claimed reliability standard. The CMC's first treaty principle called for "a prohibition on the use, production, transfer and stockpiling of cluster munitions, as defined" (CMC, 2007a)—a manifestation of a "define, ban, then exclude" approach rather than a "split-the-category" approach to cluster munitions.

2.2 The Montreux meeting of experts

The "inaccurate and unreliable" language in the new call reflected not only HRW's views, but also the phraseology of the ICRC's position

> "• to immediately end the use of inaccurate and unreliable cluster munitions;

> • to prohibit the targeting of cluster munitions against any military objective located in a populated area;
>
> • to eliminate stocks of inaccurate and unreliable cluster munitions and pending their destruction, not to transfer such weapons to other countries" (ICRC, 2006b).

On the eve of the 2006 CCW review conference, the ICRC publicly offered to host an international meeting of experts in 2007 to discuss future IHL rules that would better protect civilians from the effects of cluster munitions (ICRC, 2006a)[95]. This expert meeting, held in Montreux from 18 to 20 April, was the first real opportunity to collectively wrestle with substantive issues related to the content of such law in the post-Oslo conference environment. The meeting brought together diplomatic and military experts from governments, including those of major military powers not participating in the Oslo process. Significantly, people able to speak authoritatively about the effects of cluster munitions were also invited, including from the UN and NGOs belonging to the CMC.[96]

As such, the gathering allowed the substantive arguments of those advocating a ban of some kind to be evaluated alongside user and manufacturers' cases that the current humanitarian regime or technical fixes would be sufficient. In this regard, the head of the UNMACC based in Southern Lebanon showed further evidence that state-

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[95] The ICRC was aware of Norway's plans due to its participation in "Group of Interested State" lunches with Norwegian diplomats and others in Geneva over the course of 2006.

[96] Government experts attended from Afghanistan, Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, India, Ireland, Israel, Japan, Kenya, Latvia, Lebanon, Lithuania, Mexico, Netherlands, New Zealand, Norway, Pakistan, Russia, Serbia, South Africa, Sweden, Switzerland, UK and the US. NGO and international agency experts from the CMC, HI Belgium, HRW, ICRC, MAC, NPA, NRC, UN ODA, UNDP and UNMAS participated. I attended as UNIDIR's representative.

of-the-art Israeli manufactured M-85 submunitions equipped with self-destruct features failed in significant numbers during the conflict the previous summer. Norwegian government military scientists presented additional proof, based on rigorous testing of Norway's own M-85 submunitions, that user and manufacturer reliability claims were wildly optimistic (Dullum, 2007). Worse yet for state delegations advocating a technical approach based on percentage reliability, their representatives' arguments withered under critical cross-examination by NGOs and core group state diplomats. Indeed, NGOs such as NPA and Landmine Action had discussed submunition testing for months with the Norwegian defence establishment (see Chapter 5), and now exploited their knowledge to the full.

In Montreux, states arguing most strongly for continued retention and use of cluster munitions like China, Russia and the US failed to make a credible case for the legitimacy of these weapons. While Norway, the UN and others presented data on submunition reliability and humanitarian harm, these delegations offered rhetoric, and were unwilling or unable to support it with comparable empirical evidence. It contrasted starkly with CCW meetings in which states were almost never subjected to uncomfortable levels of critical scrutiny. The Montreux meeting report, finalised several months later, was diplomatic about this (ICRC, 2007b). Nevertheless, the expert meeting had already served its purpose: it indicated the burden of proof was shifting from the shoulders of those trying to show the weapons caused unacceptable harm to those claiming cluster munitions did not do so. In addition, it contributed to frame alignment amongst at least some of the participants, including state representatives previously unfamiliar with the detailed arguments behind unacceptable harm.

On the face of it, shifting of the burden of proof helped the Oslo process. However, it was matched by a sobering realisation for the core group diplomat responsible for facilitating discussions in the Oslo initiative on scope and definitions, MacKay of New Zealand. Dealing with cluster munitions now seemed "a whole lot harder" than he had hoped when the Oslo process was initiated.[97] For diplomats like MacKay, the evaporation of confidence in reliability as a criterion for splitting cluster munitions into acceptable and unacceptable categories seemed to represent a major challenge for achieving eventual agreement on what, eventually, a treaty would ban.

Another significant development at the Montreux meeting was the unveiling of a "non-paper" by Germany, later submitted to the CCW (German Delegation at the ICRC Expert Meeting, 2007). This non-paper contained the draft text of a proposed new CCW protocol on cluster munitions. Its provisions were consistent with Germany's declared intent to phase out cluster munitions intended to saturate an area with explosive submunitions and replace them with advanced alternative weapons. Although welcomed as a sign of Germany's political commitment to dealing with cluster munitions, the proposal also drew sharp criticism from NGOs and various states for its perceived lack of ambition or clarity on key issues such as scope (CMC, 2007d). If Germany had introduced this proposal for a protocol only a few years earlier into the CCW, it likely would have been enthusiastically hailed by those states and some of the NGOs calling for cluster munition measures.[98] Now, the proposal and reactions to it just served to underline the significant differences in approach—even among states subscribing to the

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[97] Interview with Ambassador Don MacKay (New Zealand MFA), 13 May 2008.

[98] Personal communication with Louis Maresca (ICRC), 8 April 2009.

Oslo Declaration including Germany. And its varied reception warned of the difficulties ahead in achieving convergence in either the Oslo process or CCW.

Many of those governments subscribing to the Oslo Declaration at the February conference (or subsequently), and especially Australia, Canada, Japan and most European NATO members, faced an uncomfortable prospect. Somehow they would have to balance public concern about cluster munitions and their commitment to the aspirations of the Oslo Declaration with the operational concerns of their military forces and US disapproval. Many did not want a comprehensive ban—therefore they (like the core group and NGOs) recognised that defining cluster munitions causing unacceptable harm to civilians lay at the heart of the matter in the Oslo process. But some appeared to hope (as Germany did, for instance) that their involvement in both processes would help to keep the Oslo process's ambitions within acceptable bounds for them, and create pressure for agreement on lesser measures in the CCW in 2008—the forum they still preferred—that would stand a chance of attracting those major users and producers of cluster munitions remaining outside the Oslo initiative (Germany, 2007 3-4).

Over the course of 2007, a loose group of roughly 15 so-called "Like-minded" states emerged, mainly consisting of military allies of the US, with Denmark, France, Germany, Japan, the Netherlands and the UK especially active.[99] At one end of the spectrum among the Like-minded were states like Finland and Japan, which appeared deeply attached to retaining many, if not all, of their existing cluster munition arsenals.

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[99] The composition of this group never became fixed, but generally the Like-minded refers to Australia, Canada, Czech Republic, Denmark, Finland, France, Japan, Germany, Italy, Netherlands, Slovakia, Spain, Sweden, Switzerland and the UK, with observers in the Oslo process such as Poland and Romania sometimes participating in its discussions.

At the other end were states such as Australia and Canada, which neither stockpiled nor used cluster munitions.

Overlapping concerns motivated the Like-minded. Their first major concern was that an eventual ban on cluster munitions causing unacceptable harm would encapsulate more sophisticated cluster munition-like weapons they employed (or would like to employ), for instance those using sensor-fusing technologies. And, as the Oslo process developed, many of the Like-minded expressed worry that a new cluster munition norm which, for political reasons, would probably be difficult for them to resist joining, would create legal and operational headaches in terms of interoperability with major allies not party to the treaty—a concern the US encouraged (Goose, 2007), and which would become a major issue by the time of the Dublin negotiations in May 2008. The biggest concern to unite them, however, was frustration about their collective inability to steer the Oslo process, an issue that would grow over the course of the Lima and Vienna conferences, and come to a head in February 2008 in Wellington.

2.3 The Lima conference

The Peruvian government hosted the next meeting of the Oslo process in Lima from 23 to 25 May. Nearly 70 states attended, including 27 participating for the first time, particularly from the Latin American and Caribbean regions.[100] It soon became apparent that these states were generally more concerned with the humanitarian

[100] According to one report of the Lima conference, 67 states participated fully (listed in Appendix III). See HARRISON, K. (2007) *Report on the Lima Conference on Cluster Munitions, 23-25 May 2007.* Geneva: Women's International League for Peace and Freedom, p. 31.

problems cluster munitions posed than in ensuring exclusions for advanced weapons systems most did not possess.

Immediately before the Lima conference, the core group distributed a document to participating delegations that it called the first "Chair's Discussion Text" of a treaty banning cluster munitions (Peru, 2007). Drafting on the text had been going on within the core group since March, which had met several times in Geneva. The paper sketched out what a treaty might look like, and drew heavily from the structure of the MBT including provisions for stockpile destruction, clearance of contaminated areas, and victim assistance. However, the text was deliberately not referred to as a draft convention by the core group, which was keen to avoid starting to draft and negotiate at this stage of the Oslo process. Instead, the text was intended to facilitate discussions on key issues such as the scope of the prohibition and definitions in Lima—"not so much a negotiating conference as an extensive brainstorming session" as one participant described it (Woudenberg, 2008 33).

On the whole, the Lima conference went smoothly. However, differences over definitions manifested themselves at the outset in a dispute on the conference floor over the agenda. Keen to define cluster munitions that cause unacceptable harm to civilians as soon as possible and led by France, Australia, Canada, and many European members of NATO called for these discussions to be moved up the agenda (from the final day) to be the first substantive order of business. While these were logical concerns from the perspective of those supporting France, it may have unintentionally conveyed the impression that they did not share others' emphasis on humanitarian priorities—a

perspective not popular with developing countries and those affected by cluster munitions (Harrison, 2007). A compromise was eventually found.

Beside the substantive issues it canvassed, the Lima conference avoided a damaging and highly public split among states in the Oslo Process on definitions. Emphasis on thematic discussion rather than textual drafting, maintained through skilled chairing, helped. So too did the bias in participation toward developing countries. Moreover, good intentions were gradually being matched with evidence of changing national practice. Hungary, for instance, declared a national moratorium on the use of cluster munitions at the meeting, and Peru announced an initiative to try to create the world's first cluster munition-free zone in Latin America (Harrison, 2007 17).

2.4 CCW talks commence

CCW governmental experts met in Geneva in June 2007 in line with their mandate agreed the previous November. This one-week meeting covered much of the same ground as the ICRC Montreux expert meeting, although in less depth. It was a step forward for discussions in the CCW. However, the views expressed in these talks by major cluster munition users and producers further highlighted the difficulty of developing enough momentum there to address the humanitarian impact of this weapon through a comprehensive legal instrument.

Nevertheless, some sort of shift was underway following the Montreux expert meeting. In CCW informal consultations in Geneva before the June GGE session, the US and Russia softened their statements and even made approving (though non-specific) noises about the prospect of a CCW mandate for work of some kind on cluster munitions (Boese, 2007). These changes of tone were choreographed between Moscow

and Washington (US Embassy - Moscow, 2007). US diplomatic cables released by Wikileaks also reveal difficult bilateral meetings between Norwegian and US officials in this period. In May, American diplomats in Oslo reported that Norwegian defence and foreign affairs officials

> "would like to ensure that any treaty reflects a balance between humanitarian concerns and military and political utility. They asked for details and facts on military utility as they do not feel that the explanations they have received on military utility are convincing. They also stressed that arguments over the cost of replacing older cluster munitions are not a military utility argument. Basically they are responding to our repeated claims that cluster munitions have military utility by asking us to prove it" (US Embassy - Oslo, 2007a).

Failing to receive this information from the US, Norwegian officials dismissed Washington's concerns about the Lima text in a later bilateral in October (US Embassy - Oslo, 2007b).

In early June, after lengthy negotiations, EU members submitted a joint proposal to the CCW for a negotiating mandate for a treaty by the end of 2008 to prohibit cluster munitions "that cause unacceptable harm to civilians and [which] includes provisions on cooperation and assistance" (Germany on behalf of the EU, 2007). It echoed aspects of the Oslo Declaration. Meanwhile, the day before the commencement of the June GGE, the US delegation told journalists that it now supported launching negotiations in the CCW on a global treaty to reduce civilian casualties from cluster bombs, but did not back a ban on the weapons (Reuters, 2007).

During the ensuing CCW meeting, the US outlined "practical steps" that "merit examination". However, the US limited these to post-conflict effects and argued that the threat cluster munitions pose to civilians "is episodic, manageable within current

response mechanisms and, on a global scale, less harmful than threat[s] posed by other types of unexploded munitions" (2007c 6-7). Omitted was any reference to hazards to civilians cluster munitions pose at time of use, or the likely humanitarian consequences of their further proliferation. And, while the US said it supported initiation of a CCW negotiation, it was careful to clarify that it had "taken no position as to the outcome of the negotiations" (2007b). To some, the apparent change to the US position looked like a tactic intended to prevent mass defections to an "Oslo Treaty" in the awareness that it would be politically impossible for Oslo process supporters not to support a CCW negotiating mandate on cluster munitions. After all, the CCW's prior failure to negotiate was the rationale for their efforts.

Despite movement by the US and others, the June expert meeting's recommendations could not wholly paper over the differences apparent in the CCW. It recommended that the November meeting make some sort of decision about whether and how the CCW would address the humanitarian impacts of cluster munitions. But the report's heavily qualified language did not offer a clear pointer about what that decision should be (CCW, 2007a).

State Department cables from this period disclosed by Wikileaks indicate the US tried to respond to broadening international participation in the Oslo process that included some of its friends and allies. From January, US diplomats undertook demarches in multiple foreign capitals outlining the US position that the CCW was the only venue for any work on cluster munitions (talks that until the preceding November, the US had itself opposed), and that cluster munitions remained essential weapons. South Korea was quick to lend its support to the US position (US Embassy - Seoul,

2007). So too did the government of Finland, although Finnish officials alluded to increased media scrutiny in the Nordic media due to the Oslo conference and the Southern Lebanon conflict: "The result in Finland has been accusations that the [government] is now substituting one internationally reviled weapon with another" (US Embassy - Helsinki, 2007). This pressure perhaps contributed to Finland later deciding to participate in the Dublin negotiations on the CCM.

Japan's evolving position, reported over no less than ten US Tokyo embassy cables in 2007 and 2008, was perhaps the most extraordinary (US Embassy - Tokyo, 2007e , 2007c , 2007d , 2007a , 2007b , 2008e , 2008b , 2008c , 2008a , 2008d).[101] These cables portray an ally seeking to placate US officials' concerns while under increasing pressure from the Japanese media, NGOs under the CMC umbrella, and parliamentarians in the *Diet* to give up cluster munitions. Throughout 2007, Japanese Foreign Ministry officials urged US-Japanese cooperation in the CCW to head off the Oslo process. In fact, Japan increasingly followed the lead of the major NATO European states instead of the US. After briefing US officials on how to lobby their own *Diet* parliamentarians against the Oslo process on national security grounds only a month earlier (US Embassy - Tokyo, 2008a), by June 2008 Japanese officials had completely reversed their position. Now they argued the CCM would have no impact on US or Japan's own capacity to defend the country against attack (US Embassy - Tokyo, 2008b).

[101] More cables may be released.

3. Voices of the affected

There was a strong desire among Oslo core group states, the CMC and IO partners such as UNDP to bring more attention to the humanitarian and developmental dimensions of the consequences of cluster munition use. The Oslo process was, after all, a humanitarian initiative trying to distinguish itself from the circular discourse in the CCW. And, the Montreux ICRC meeting had shown that evidence of the effects of cluster munitions could counter the arguments of major military powers such as the US.

An attendant concern for the core group was the long-perceived gap between the Lima conference and its next meeting in Vienna, the latter to be hosted by the Austrian government in December 2007. There were fears that political momentum in the Oslo process might stagnate or—worse yet—dissipate over those months. Realisation was growing in the core group, based on the Lima talks and ongoing internal discussions, about just how much work needed to be done to arrive at a robust treaty within the timeframe called for by the Oslo Declaration.

During the years leading up to the Oslo process, evidence of the hazards to civilians from cluster munitions presented by the ICRC, UN and NGOs had contributed toward reframing how these weapons were seen by states like Norway.[102] Norway, among other governments, in turn funded research carried out by NGOs and the UN as part of efforts to build international campaigning capacity and contribute to momentum

[102] For instance, in September 2007, a senior Norwegian diplomat argued: "The humanitarian suffering caused by the use of cluster munitions has been a well-known and well-documented problem for years." (2007) *The Belgrade Conference of States Affected by Cluster Munitions, 3-4 October 2007: The International Process Towards a New Convention Prohibiting Cluster Munitions - Opening Statement by Ambassador Steffen Kongstad*, Norway. Belgrade.

for a humanitarian treaty once the Oslo conference was imminent. Some of this research now began to emerge, such as HI Belgium-coordinated surveying of the global effects of cluster munitions on civilians, which followed in the path of other global surveys into the effects of mines and UXO. HI Belgium launched a preliminary report in November 2006 in order to add to CMC pressure on the CCW review conference (HI (Belgium), 2006), and because of the recent Southern Lebanon conflict it received a lot of media attention (Norton-Taylor, 2006 , Sengupta, 2006).

Just before the Lima conference seven months later, HI Belgium followed its preliminary report with a more comprehensive version, reiterating the astounding conclusion that:

> "civilians are almost the sole victims of cluster munitions at almost 98 percent of casualties. The vast majority of cluster submunitions casualties confirmed by this report were among the poor in their country, area or region, and often among the poorest. […] Statistical evidence of at least 13,306 recorded and confirmed cluster munitions casualties was compiled. This does not include extrapolations or estimates. A conservative estimate indicates that there are at least 55,000 cluster submunition casualties but this figure could be as high as 100,000 cluster submunition casualties" (2007 136).

Even the upper estimate paled in magnitude with the likely total number of victims of AP mines.[103] However, the total numbers were not seen as the point. Rather, this proportion of civilian casualties from cluster munitions was arguably of special concern under humanitarian law, since it suggested that, if not inherently indiscriminate, cluster munitions were—historically—highly prone to indiscriminate use.

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[103] Precise figures for mines and UXO will never be known, for various reasons.

The HI Belgium report lent weight to the CMC argument that the most effective humanitarian response was to ban the weapons responsible since user and manufacturer claims were so starkly belied. This framing—and the evidence associated with it—gave impetus to the view that the problem of the hazards to civilians from cluster munitions was a solvable one. Many states previously not engaged in the cluster munition issue became interested in the Oslo process around this time, especially in the global South.

Adding to this, in September the Norwegian government used the occasion of high profile diplomatic and public events it organised to commemorate the tenth anniversary of the Oslo negotiations on the MBT to promote the initiative on cluster munitions. Many representatives of developing countries were present for these events in Oslo, at which Norway's Foreign Minister argued, "I see no reason why the very same states that adopted the Landmine Convention shouldn't join us in our effort to reach agreement on a realistic ban on those cluster munitions that cause unacceptable humanitarian consequences. Now we are 80 states—can we grow to more than 150?" (Støre, 2007).

Couched in humanitarian terms like this, it made perfect sense to many MBT member governments to support the Oslo process by attending the upcoming Vienna conference in December. A meeting of Latin American states held in Costa Rica that same month built support for the Oslo process in the region, building a sense of Latin American solidarity and isolating Brazil, which was shunning the Oslo process.[104] And, in November at the MBT's eighth annual meeting of states parties held in Jordan, the

[104] Personal communication with Thomas Nash (CMC), 15 July 2009.

CMC lobbied member governments to affirm the aims of the Oslo Declaration and participate in Vienna.

Another event during the autumn of 2007 was the Belgrade Conference of States Affected by Cluster Munitions, held from 3 to 4 October. Although a smaller scale international meeting, the Belgrade gathering was politically at least as significant as the one in Lima in cementing the humanitarian credentials of the Oslo process. Organised by the Serbian government and UNDP with support from Norway and the CMC, the conference's objective was to ensure that perspectives from those affected by cluster munitions were heard (Jeremić, 2007). During the one-and-a-half day meeting, participants discussed victim assistance, cluster munitions clearance, international cooperation and assistance, stockpile destruction and proliferation issues. 37 governments attended, including 22 countries affected by cluster munitions, as well as various entities of the UN, the ICRC and a strong NGO presence coordinated by the CMC, which played a major role.

The Belgrade conference was especially important for the opportunity it gave to survivors of cluster munitions to make their voices heard and, in the words of one, to "strongly promote our needs within the Oslo process" (Dikic, 2007 1). These survivors were to become the first of the Ban Advocates, an initiative devised by HI Belgium to parallel the contribution landmine survivors had made to the Ottawa process. Belgrade's outcome was, in effect, an endorsement by affected states (many of them not members of the CCW) of the Oslo initiative's legitimacy in tackling such concerns and of their support for a comprehensive ban on cluster munitions. A European regional conference

in Brussels on cluster munition victim assistance and stockpile destruction on 30 October subsequently strengthened this sense of legitimacy.

4. Old arguments and a new mandate in the CCW

Meanwhile, in November 2007 the CCW's annual Meeting of States Parties achieved consensus on a mandate to "negotiate a proposal to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations" (CCW, 2007b 9). The mandate authorised seven weeks of CCW expert meetings in Geneva throughout 2008. This was especially important to the Like-minded states: the new CCW mandate ensured the continued engagement of major users and producers outside the Oslo process on cluster munition-specific measures, especially the US—at least as long as the Oslo process lasted. It also helped to deflect accusations that the Oslo process undermined the CCW, to which the Like-minded states were sensitive. And, it kept the CCW in play as an alternative should the Oslo process's final ambitions on scope of a cluster munition prohibition prove too rich for individual Like-minded states to stomach.

The US delegation, for its part, hailed the updated CCW mandate as a success (2007a). When set alongside the Oslo Declaration the CCW mandate was weaker in almost every way, for example agreeing to "negotiate a proposal" rather than a legally binding protocol. It was also clear that states like Russia and China went along reluctantly: Russia informed the meeting in writing of its "lingering doubts about the specific "product" of future work, and it continues to believe that the practical basis for starting the negotiations process is not very well developed" (2007b 2). Russia still rejected the need for new rules or restrictions on use, any prohibitions on cluster

munition types, or the need for technical improvements (2007a). Over the following months in CCW expert work, it became clear that others, such as China, India, Pakistan and the Republic of Korea, shared similar views.

While the "unacceptable harm" framing of cluster munitions increasingly seemed to resonate with states more broadly, major cluster munition users and producers in the CCW remained opposed, and the new mandate was their response. A continued CCW process made sense from a wide range of tactical and political perspectives—for states opposed to any new measures to protect civilians from cluster munitions, as well as those already engaged in the Oslo process The CCW's agreement on a mandate to negotiate a proposal, therefore, did not mark a shift in substance of the views of the CCW's membership as a whole on the need to negotiate a cluster munition ban.

5. How to define cluster munitions

The issue of how to go about defining cluster munitions became a pressing one as the next meeting named in the Oslo Declaration, to be held in Vienna in December, approached. In the lead-up to February's Oslo conference, representatives of the CMC and organisations on its Steering Committee had worked closely with Norwegian officials and the emergent core group to develop ideas that led to the conference's agenda and the Oslo Declaration. But it was not the case in Lima and afterward. Nash, Moyes and others in the CMC's leadership circle concerned with definitions became increasingly worried as the Vienna conference approached that the core group was keeping the CMC in the dark about how the meeting's definitions discussions would be handled. These talks would be critical in setting the parameters for eventual negotiations

in Dublin.[105] The structure of work on definitions that the core group adopted would be an important test of the resonance of the framing adopted by the CMC of cluster munitions as something to be defined categorically, and then banned.

The Lima text had presented an extremely broad definition, which essentially only excluded certain types of weapons with sophisticated submunitions using sensor-fusing technology (Peru, 2007 2). Despite criticism from some Like-minded states, this approach remained as viable as ever after Lima, the CMC felt. In addition, the "define, ban, then exclude" approach was consistent with the proposed definition of a cluster munition the CMC itself developed in internal meetings in Belgrade following the October Belgrade conference,[106] and with its strategy of putting the "burden of proof" onto weapon possessors to demonstrate acceptability (CMC, 2007b).

Nash and his colleagues in the CMC's Steering Committee were aware also that several attempts had been made within the core group during 2007 to settle how to conceptualise cluster munitions in text without a result. The CMC's fear was that the core group would buckle under pressure from the Like-minded and, in effect, revert to a "good" versus "bad" cluster munition approach in the revised discussion text it was preparing for Vienna. So Nash and Moyes took it upon themselves to lobby the core

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[105] Interview with Richard Moyes (Landmine Action), 3 July 2008.

[106] At this meeting, the CMC's experts (including Colin King) decided to define a cluster munition as "a weapon comprising multiple explosive submunitions which are dispensed from a container. An explosive submunition is a munition designed to be dispensed in multiple quantities from a container and to detonate prior to, on, or after impact." This definition thus made no exception for submunitions with self-destruct, self-deactivation or self-neutralising features; those based on a specified reliability rate; so-called "direct fire" submunitions; cluster munitions based solely on a limit on the number of submunitions, or sensor-fuzed submunitions. The definition did exclude non-explosive or inert submunitions, and pyrotechnic submunitions such as smoke, flare or illuminating submunitions.

group in the lead-up to the Vienna conference to ensure that it stuck with what they saw as the right way to frame how to define cluster munitions. Nash made the case for the "define, ban then exclude" approach to the core group's members on 26 October in an email drafted with help from Moyes, arguing that any other approach

> "would dramatically weaken the prospects for a treaty that would be both meaningful from a humanitarian perspective and gain wide support from key countries and civil society. We hope then that any revised text will stick to the approach set out in Oslo and Lima and not to take an approach that would split the category of cluster munitions. […] The Oslo and Lima approach—the approach we advocate—would make it less likely for those states to secure such broad exceptions because they would be required to provide a higher level of evidence to justify their claims" (Nash, 2007c).

How to frame scope and definition talks presented a particular conundrum for MacKay, who was responsible for these issues in Vienna. Referring to the Lima formulation, he said, "One of the problems about defining this, obviously, is how do you structure the discussion? If you don't have a structured discussion you're lost".[107] By now familiar with CMC representatives' case for define-and-ban,[108] MacKay eventually concluded (like Moyes and Nash) that "the easier way of structuring the discussion is to structure it in terms of what's out and what's in".[109] "We also discussed it in the core group. I do recall though that Thomas [Nash] and Richard [Moyes] were concerned that we have a definition/approach that could be sold as a "total ban" in the

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[107] Interview with Ambassador Don MacKay (New Zealand MFA), 13 May 2008.

[108] Personal communication with Don MacKay (retired), 1 December 2011.

[109] Interview with Ambassador Don MacKay (New Zealand MFA), 13 May 2008.

NGO community, and it was important that we gave them that. We were always very mindful of their concerns."[110]

MacKay's decision was to have major ramifications for the remainder of the Oslo process. The define-and ban approach required particular discipline and patience from states to systematically work through the evidence and argumentation for and against specific exclusions to the prohibiting definition of a cluster munition. This patience it turned out, was difficult for some of the Like-minded to summon up

The Vienna discussion text, like the Lima discussion paper before it, adopted the format of a preamble section followed by specific operative articles reflecting the general manner in which the final product of eventual negotiations would be presented in treaty form. Article 1 of the draft Lima and Vienna discussion paper texts each contained the general obligations and scope of the exercise—what the eventual treaty is supposed to ban or otherwise do. Article 2 defined what the treaty was talking about. In Lima, the approach taken was to say in article 1, in effect, "because of their unacceptable harm, we're going to ban what's defined as a prohibited cluster munition below in article 2". Thus, the Like-minded interpreted the Lima discussion text to mean the Oslo process would eventually agree a treaty banning a subset of cluster munitions.

The Vienna text distributed on behalf of the core group by the Austrian government three weeks before the Vienna conference commenced on 5 December took a different tack. Article 1 no longer contained the "unacceptable harm" touchstone language from the Oslo Declaration. Instead, it simply stated a general obligation

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[110] Personal communication with Don MacKay (retired), 1 December 2011.

"never under any circumstances" to use or possess cluster munitions. Moreover, in article 2:

> "For the purposes of this Convention, "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) ...
>
> (b) ...
>
> (c) ..." (Austria, 2007 1).

These new provisions worried the Like-minded. Now, the illusion of a potential safety net had vanished from beneath the Oslo process for those seeking to hold on to cluster munitions like the M-85 in their arsenals, or even more advanced submunitions with sensor-fused technology some saw as alternatives. The discussion in Vienna would proceed from the starting point that all weapons with submunitions, as broadly sketched, would be banned unless those pursuing exceptions could persuasively make their case to fill in the "dot, dot, dots", as they were referred to by many delegations.

The CMC, in contrast, was very happy with the article 2 discussion text language, arguing "This definition is a vast improvement over the Lima text. It adopts the correct approach in beginning with a general prohibition and then calling for an explicit delineation of any potential weapons that do not fall under the definition" (CMC, 2007e 2).

6. The Vienna conference

The core group sought to definitively characterise the Oslo initiative as a humanitarian endeavour, rather than as an arms control process, at the Vienna

Conference, and to advance substantive discussions in all areas. Their third aim was to try to ensure that the greatest possible number of states participated.[111] On this score, any concerns that the CCW's 2008 mandate on cluster munitions might have undermined international momentum behind the Oslo process were dispelled: 138 states registered with the Austrian government to participate in Vienna. It was almost double the number attending the Lima conference six months earlier.

Delegations from a majority of these states—many from the developing world, and some coming up to speed on the specifics of cluster munitions—did not see why all cluster munitions should not be banned as a matter of principle, as AP mines were. Moreover, Austria's national parliament passed domestic legislation outlawing cluster munitions (as it defined them nationally) the same week (Cumming-Bruce, 2007), which added further momentum to this "Teetotal" view, as those in the core group had begun to describe it among themselves.[112] Meanwhile, as the sheer number of delegations attending the Vienna conference dawned on the 15 or so states of the Like-minded, they began to fear simply being swept aside by a large number of countries that, to their minds, neither possessed cluster munitions nor had a real understanding of them, and therefore lacked legitimate negotiating "equity".[113]

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[111] Interview with Ambassador Wolfgang Petritsch (Austrian MFA), 7 February 2008. Petritsch chaired the Vienna Conference.

[112] Interview with Ambassador Don MacKay (New Zealand MFA), 13 May 2008. Note that the Teetotal group did not describe itself in this way—it was merely a badge of convenience used by the core group. Probably coined by Irish or New Zealand diplomats in the core group, "teetotal" was a colloquial reference to historical temperance movements advocating the total prohibition of alcohol, even in moderate (and presumably not unacceptably harmful) types and quantities.

[113] Interview with head of delegation of a European state, 2008 (anonymity protected).

General obligations, scope of application and definitions were allocated a half-day for discussion (facilitated by MacKay) on the Vienna conference's second day. Some of the Like-minded states went on the offensive in these definitions talks, which in view of their importance were permitted to run over time.[114] France, Switzerland, the Netherlands and the UK (2007b) were particularly forceful in reiterating their view that not all cluster munitions have unacceptable consequences for civilians, arguing that concepts of accuracy and reliability should be benchmarks for what is deemed acceptable or not. These states cited ICRC formulations concerning inaccurate and unreliable submunitions in support of their views. The ICRC responded sharply: it told the conference that the way in which it used the terms "inaccurate" and "unreliable" were as descriptions of the unacceptable characteristics of cluster munitions—not criteria for creating exceptions. These characteristics, the ICRC delegation said, applied to the vast majority of existing cluster munitions, and virtually all used to date, which in its view should all be banned on humanitarian grounds (ICRC, 2007a).

The Like-minded states had not anticipated the ICRC's response. However, it was widely noted by other delegations, and Vienna marked the point in the Oslo process at which a spectrum of Teetotal states, with delegates from Costa Rica, Indonesia, Lebanon and Zambia at the forefront, began to cohere and evolve in opposition to the Like-minded. If anything, these states were even more whole-hearted in their framing of cluster munitions as wholly unacceptable than the CMC itself would prove to be, for instance over submunitions using sensor-fused technologies. More than 50 African

[114] Interview with Ambassador Wolfgang Petritsch (Austrian MFA), 7 February 2008.

states participated in Vienna, and they were particularly vocal, with encouragement from Zambian CMC campaigners.

Despite the disagreements over articles 1 and 2, the Vienna conference made useful progress in clarifying aspects of the definition debate, and article 2 exclusion discussions avoided meltdown. MacKay spent the bulk of his time on the podium as Friend of the Chair in facilitating an emerging collective view on less problematic exclusions such as mines (already covered by other treaties), flare, smoke and chaff munitions, and submunitions that are inert post impact. Discussion of various proposals for other exemptions for explosive submunitions based on reliability, low number per container or sensor-fusing technologies (most of them put forward by states among the Like-minded) did not command wide agreement, but were disagreements able to be set aside for the time being. Nevertheless, it led to unhappiness among the Like-minded. They vowed in a meeting amongst themselves at the conclusion of the Vienna conference to force negotiation in Wellington of the issues that mattered to them such as definitions, military interoperability and transition periods, even though there was no unanimity among them on these topics (Borrie, 2009 191).[115]

Vienna is chiefly remembered by many of its participants, however, for the presentation of a report on the reliability of the Israeli M-85 submunition produced by NPA, Colin King (an independent explosive ordnance disposal consultant), and the Norwegian FFI (2007). The report was based on carefully collected evidence and analysis of failure rates of M-85 submunitions with self-destruct fired by Israel into

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[115] I was nearby, and several representatives of Likeminded country delegations later shared with me their impressions of the meeting following its conclusion.

Southern Lebanon in real operational conditions in 2006, and drew also from Norwegian government data on its tests on virtually identical submunitions in Hjerkinn. The report's findings suggested a consistent dud rate not of 1%, but of ten times that (5). It systematically debunked the notion put forward by some possessors of cluster munitions with such features that a distinction could be made between hazardous (i.e. "bad") and non-hazardous (i.e. "good") submunition duds, and showed flaws inherent in the failure rate approach. Rather, the report's authors argued that the M-85 study demonstrated, based on real world experience, that "All duds are inherently hazardous both to deminers and to the post-conflict civilian populations that are left to deal with them" (7).

Overall, the report and King's clear explanation of how cluster munitions work and how submunitions can fail made a strong impression on many of those represented in the Vienna conference hall—especially from developing countries—and complemented the arguments of the ICRC and UN field agencies. Although Like-minded states such as Slovakia, Switzerland, and the UK continued to argue for the acceptability of submunitions with mechanical self-destruct features after Vienna, the M-85 study effectively delivered the knock-out blow that won the burden of proof battle; cementing the Oslo process approach on definitions as it now was, rather than in terms of "good" versus "bad" submunitions.

The M-85 report and its impact also showed how active and well-organised civil society were becoming, coordinated by the CMC. The excitement of campaigners from many countries about the aims of the Oslo Declaration, financial support from Norway, Austria and Ireland and the appointment during 2007 of further CMC staff including

media specialists enlarged what the CMC and its members could do. NGOs engaged on every element of the discussion text tabled by Austria and the other core group states at the Vienna conference (Harrison, 2008 20-1).

Meanwhile, Washington kept up its diplomatic demarches about the Oslo initiative to Like-minded and other governments. Although US efforts in the CCW focused on "splitting-the-category" in a manner advantageous to its arsenal of cluster munitions even before the nature of any new CCW rules was outlined, its concerns about the Oslo process increasingly revolved around another issue after Montreux usually referred to in the Oslo process as "interoperability", and possibly reflecting a "sensitive but unclassified" paper entitled "Potential Effects of Criminalizing NATO Interoperability" circulated by US embassies to allies a few months later (US, 2007). After the Vienna conference, interoperability increasingly rivaled defining cluster munitions as the paramount issue in the draft treaty text.

7. From Vienna to Wellington

At the end of 2007, both the Oslo process and the CCW were poised for new phases of activity. Still less than a year old, the Oslo process faced the challenge of imminent transition from oral discussions about substantive aspects of a treaty based on papers prepared by members of the Oslo core group, to formal negotiations on the provisions of a treaty.

Between the Vienna and Wellington conferences, the core group changed the name of the Vienna discussion text into a "draft Cluster Munitions Convention" (New Zealand, 2008a) in order to tip expectations toward a final eventual outcome they hoped would culminate in formal negotiations in Dublin in May 2008—and not before.

Specifically, Wellington's product was intended to be a document to which governments would have to subscribe if they wished to take part in Dublin. The prospective "Wellington Declaration" (New Zealand, 2008a) would indicate that those subscribing to it accepted some basic ground rules for Dublin, such as rules of procedure for the negotiations and which text would be the basis for work.[116] And, the Wellington Declaration (if agreed) would be an important tool with which campaigners could persuade governments to negotiate.

Meanwhile, January 2008's first session of CCW work on cluster munitions was a hive of activity. Both the Like-minded and those delegations hostile to the Oslo process recognised the prospect of leverage over it if the CCW could steal a march on the Dublin negotiations by defining cluster munitions. Most states would want to use the same concepts and terminology agreed in one negotiation for the other since enacting domestic legislation to implement any eventual new international rules on cluster munitions would be complicated with two different definitions of the weapon in use. Discussions in the CCW on defining cluster munitions could thus exert an influence on the content of the draft treaty text negotiated in Dublin. In view of the CCW's history and membership, the risk this presented to the Oslo Declaration's aims was of a downward pull on the high humanitarian standards civil society and many states hoped that the treaty negotiation in Dublin would achieve.

Russia led CCW military expert talks aimed at agreeing a definition of cluster munitions. This newfound Russian vigor concerned Ireland, the CCW's Friend of the

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[116] This echoed the June 1997 Brussels Declaration preceding the Oslo negotiations on the MBT.

Chair on definitions as well as a member of the Oslo core group, to the extent that the Irish delegation intervened with national proposals of their own (2008a). The Irish also tried to persuade the Danish CCW Chair to remove reference in the meeting's draft procedural report to the draft definition "as agreed by the Group of Governmental Experts" (CCW, 2008). As nonsensical as the notion was of a draft definition containing dozens of square brackets being in any sense "agreed", the Irish wanted to ensure that the Like-minded or others could not claim it was a working definition the Oslo process should therefore take up.[117] In the end, the language stayed in the report, but with a proviso added that it "Future work will also take into account other proposals, including proposals presented at this and previous sessions". This formulation was sufficient to blunt any particular impact it might have in Wellington the following month, when 122 states convened for the penultimate conference of the Oslo process.[118]

8. The Wellington conference

It soon became apparent at the Wellington conference from 18 to 22 February that some states—Australia, Canada, Finland, France, Germany, Japan and the UK, in particular—were determined to have their proposals taken up into the draft convention text, whatever the core group said about textual negotiation being for Dublin. The Like-minded were not helped in their aims, however, by the methodical and seemingly unhurried way in which MacKay managed definition and scope discussions, both in the main conference and in informal consultations. In explanatory notes New Zealand

[117] Interview with James C. O'Shea (Irish MFA), 28 July 2008.

[118] See Appendix III for a list of participating states.

circulated with the draft Convention text in late January, the core group had pointedly observed that:

> "At the Vienna Conference, a range of views were expressed on what might constitute a cluster munition causing unacceptable harm to civilians. Some States suggested that exemptions to the definition of "cluster munition" should be based on the concepts of reliability and accuracy, although there no specific proposals on how such an approach could be implemented, nor on how concepts of reliability or accuracy could be objectively quantified" (New Zealand, 2008b 2).

Now, MacKay presided over an evaluation of these concepts involving any delegation interested, including those of observers such as international organisations and the CMC. As discussion proceeded, many delegations in Wellington gathered the impression that the exclusion proposals put forward by the sub-set of the Like-minded with cluster munitions resembled attempts to use the exclusion slot in 2(c) as a way to carve out what were, in fact, broad exceptions from a cluster munition ban. Moreover, evidence to support arguments for most of these exclusion proposals was shown to be weak or non-existent, even for Swiss (2008) and UK proposals[119] aimed at excluding M-85-type submunitions equipped with self-destruct. This was the case especially after another presentation to the conference by Colin King on the M-85 reliability report launched the previous December in Vienna, and carefully prepared cross-examination by CMC representatives (Moyes, 2008).

In contrast to the technically oriented "split-the-category" approach still pursued in various proposals of Like-minded countries, the CMC argued that scope for

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[119] My notes of the Wellington meeting. UK proposals were included in the Wellington compendium.

exclusion should only cater to weapons with submunitions that did not have the effects of cluster munitions. To justify exclusion of a weapon, a proponent would need to show that it was not really a cluster munition; that it did not, in effect, saturate an area with explosive submunitions. In this regard, an internal CMC briefing paper prepared by Landmine Action before the Wellington conference noted:

> "For almost all of the proposed exclusions […] there is lack of agreement about the current status and reliability of data. […] overriding everything else, the critical policy point is that the burden of proof is on the would be users to demonstrate that these exclusions are really a solid basis for protecting civilians. The burden of proof goes beyond making unsubstantiated assertions" (Moyes, 2008 7).

This emerging distinction between exclusions (justifiable clarifications for rational reasons consistent with the Oslo Declaration's aims) and exceptions (exclusions sought by key stockpiling countries not consistent with the aims of the Oslo Declaration or with the body of collected empirical evidence) was not widely understood. It would later contribute to concern in Dublin among some Teetotal states and within the CMC's campaigning base over the definition as it emerged.

By mid-week, Like-minded tactics had shifted from replacing provisions in the draft Convention text with competing proposals of their own to trying to have all of their respective proposals taken up as different options under each article. The Like-minded delegations also now concentrated as much pressure as they could on MacKay, the Conference's chair, to concede to their demands, including threatening to immediately abandon the Oslo process if these were not met (US Embassy - Canberra,

2008a). (The UK head of delegation described this tactic as "shock and recover"[120].) However, this also underlined to the wider conference that the Like-minded were not united on issues of substance beyond their common concern about the Oslo process failing to safeguard their respective national proposals.

The CMC, meanwhile, made no changes to the draft convention text its central lobbying message in Wellington (CMC, 2008c). As the week went on, the CMC view attracted support from self-styled "Friends of the Affected"; an amorphous group of states mainly from the global South[121] coordinated by Lebanon. In turn, the CMC assisted the Friends of the Affected by providing them an advance copy of its own internal "traffic-light" memo outlining the positions of all delegations on key issues as red, green or amber.[122]

The Friends of the Affected were annoyed at the perceived high-handedness of the Like-minded in pursuing their concerns,[123] and presented a paper to MacKay on behalf of about 30 countries on the meeting's margins asking him not to cave in to pressure to change the draft Convention text.[124] Despite the risk of excessive political polarisation developing, this situation suited the core group since the Friends of the Affected acted as a (partial) political counter-weight to the Like-minded. At the same

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[120] Interview with Ambassador John Duncan (UK FCO), 30 June 2008.

[121] The "Friends of the Affected" was a cross-regional sub-group of the very broad Teetotal group, and it included Cambodia, Chile, Costa Rica, Croatia, Indonesia, Laos, Morocco, Sierra Leone and Zambia.

[122] Document on file with author. This paper was annotated and updated by the CMC throughout the Wellington Conference.

[123] Interview with Ahmad Arafa (Lebanese MFA), 11 May 2009.

[124] Document on file with author.

time, core group delegations believed that differences on specific exclusions to the cluster munition definition now apparent among themselves would reinforce their claim that they were not trying to pre-negotiate the CCM in a particular manner.

The core group's response to the Like-minded was that all proposals (including those of core group states)[125] be assembled into a compendium text, which would be distributed in the Dublin negotiations. It would not have equal status with the draft Convention text, the basis for work to be agreed in the Wellington Declaration. This fell short of what Like-minded states such as Australia, France, Germany, Japan and the UK insisted upon. However, by Thursday, members of the Like-minded hinted they would agree to the compendium solution, and the Wellington Declaration. It meant the Like-minded would not get what they wanted in terms of incorporation of their proposals into the draft convention text. Neither would the text be changed in ways that ran counter to their interests, however, and the various proposals of the Like-minded would be visible and on-the-record. Ultimately, textual proposals from 20 countries were included in Addendum 1, as the compendium was formally known (Various, 2008a).[126]

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[125] Norway, for example, believed certain weapons with sensor-fused submunitions should be excluded from the CCM definition of cluster munitions on the basis of their effects. (See NORWAY (2008b) Intervention by Norway on Article 2, Definitions (19 February 2008). *Wellington Conference on Cluster Munitions*. Wellington.) Austria in contrast was becoming more Teetotal in its approach to any exclusions for submunitions beyond the ones "designed to dispense flares, smoke, pyrotechnics or chaff" or producing "electrical or electronic effects". (See AUSTRIA (2007) Vienna Discussion Text (November 14, 2007). *Vienna Conference on Cluster Munitions*. Vienna, Foreign Ministry of Austria.) The Irish, for their part, were increasingly concerned that a major loophole in the definition might develop that allowed for bomblets (that is, submunitions scattered from aircraft mounted dispensers, rather than parent munitions).

[126] From the Like-minded the compendium would include proposals originating from or co- sponsored by Australia, Canada, the Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, Slovakia, Spain, Sweden, Switzerland and the UK. From

Despite Like-minded pressure, the Wellington conference confirmed the define-and-ban framing of cluster munitions over the split-the-category approach. And, it further undermined any basis for excluding explosive submunitions on the sole basis of alleged percentage reliability or self-destruct features. This went significantly further than some countries signing on to the Oslo Declaration had envisaged a year earlier, since it would—if developed to its logical conclusion in Dublin—bite into the operational stocks of munitions of a number of countries in the Oslo process. In Dublin, the UK and a few of the other Like-minded producing cluster munitions such as Slovakia, Spain and Switzerland would continue to propose the technical criteria above as bases for exclusion of specific weapon systems they possessed (see next Chapter). But by the end of the Wellington Conference these proposals were not widely seen as credible.

The real question now concerned whether submunitions using sensor-fused technologies would be prohibited, or whether they would be excluded from the prohibition (Austcare and HI (France), 2008). Some CMC constituents already argued these should be banned, a view that found sympathy with the Teetotal states, most of which were unable to afford such advanced weapons anyway.

Wellington also marked the point at which interoperability overtook defining cluster munitions as the most politically contentious issue within the Oslo process, and potentially the most damaging to prospects for a treaty in Dublin. A conference paper on the subject presented by Australia and others drew heavily from the "restricted" US

Teetotal states there were proposals from Indonesia, Lesotho, Mozambique and Peru. The ICRC, UN Mine Action Team and CMC also submitted suggestions supplementing their statements and room papers.

memo the previous October (Australia et al., 2008). US diplomatic cables from this period also reported continued discussions in capitals such as Canberra, Tokyo on the significance of the issue for Washington DC (US Embassy - Tokyo, 2008a , US Embassy - Dublin, 2008b , US Embassy - Canberra, 2008b), although in substantive terms it was not clear why this treaty's provisions should be so different from others such as the MBT, the International Criminal Court or, indeed, the 1977 Geneva Protocols, to which the US was also not a party.

To other states on the receiving end of US demarches, such as Norway, interoperability was at most a red herring—a particularly fishy one too at this late stage in the Oslo process in view of progress on the rest of the draft treaty. Here, apparently, was a brand new deal-breaker issue to deal with; one for which the Like-minded states most concerned had, as yet, few proposals how to solve, because the US had apparently not communicated to them an acceptable way to settle it.[127]

8.1 Civil society at the Wellington conference

That the Wellington conference was successful was largely because the core group had held its nerve and made an astute calculation about what those states at the emergent ideological poles in the Oslo process—the Teetotal states (including the Friends of the Affected) versus the Like-minded—could all live with. The Teetotal

[127] This finding is based on what I was told by several state representatives on the margins of the Oslo process, and later in research interviews (on a non-attributable basis). Wikileaks cables available to me at the time of research for this thesis also indicated Australia, Canada and Ireland put requests to US authorities for guidance as the Dublin negotiations approached, to no avail. Of course, this is not proof that there was no US response. However, it tentatively corroborates the accounts of these interview respondents in the absence of contrary evidence.

states had been at least in part motivated and briefed by a geographically diverse group of CMC campaigners who had spent their week focused on the effort. Among the CMC's other contributions, one of the most substantive had been the progress its experts made in chipping away at the various arguments of those states calling for measures such as exclusions from the cluster munition definition and transition periods, and contributing to other important provisions of the treaty such as clearance, stockpile destruction and especially victim assistance. These efforts would all pay off in Dublin. However, Wellington was also the scene of a crisis within the CMC reflecting different visions about the ways in which the campaign on cluster munitions should be pursued.

Organising civil society for the Wellington conference had been a major undertaking for the CMC and the Aotearoa-New Zealand (ANZ-)CMC in particular. Indeed, the ANZ-CMC had taken the lead on planning of events and media coverage to a greater degree than local NGOs in any previous Oslo process conference. However, it meant that differences in expectations and interpretations of advocacy and media strategy emerged over the course of the Wellington Conference between some campaigners and the CMC's executive team.

CMC representatives were seated in the conference hall, but space was limited. The CMC also participated in the Chair's open-ended consultations, but there it was represented by its front bench of experts drawn predominantly from the Steering Committee. Yet, in its sponsorship programme for campaigners, the CMC had focused on those NGO participants who were effective lobbyists and could engage in detailed discussions with delegates from their regions on the key issues. There was not necessarily a lot for some of these NGO representatives to do beyond lobbying those

governments they were assigned to work on when opportunities occasionally presented. And, for a few campaigners, listening to technical debates or hovering around outside the conference was frustrating in view of the great effort involved for them to even get to New Zealand.

CMC campaigners sensed the tension between states at the Wellington conference. Some therefore saw more direct forms of advocacy as appropriate; "naming and shaming"[128] through the media and civil society actions making use of campaigners who wanted to do more than follow discussions and lobby delegates and create additional pressure on the governments they saw as unhelpful to the process (that is, the Like-minded).[129] The result was that at the same time as CMC representatives engaged in the discourse of diplomacy with governments in the conference room and informal consultations, others, including survivors, waved placards at delegates emerging from the conference building with messages like "UK, France, Japan, Germany, Denmark: Shame on you!" (ANZ-CMC, 2008 2). Some in the Like-minded already grumbled that the core group and NGOs were joined at the hip, and such actions fed suspicion about a conspiracy to stitch them up, as did clapping allegedly heard in certain conference hall sessions in response to those statements NGOs approved of. For their part, the CMC's executive team professed to being surprised by the demonstrations; others within the campaign argued that this kind of activity had been part of the CMC's Wellington planning all along.[130]

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[128] Interview with Mary Wareham (ANZ-CMC), 23 June 2010.

[129] Ibid.

[130] Ibid.

Called ostensibly as a brainstorm by campaigners on preparations for Dublin, an internal CMC meeting of Steering Committee members and some others at lunchtime on the Thursday of the conference instead led to a venting of criticism. Mentioned among these criticisms: the CMC had become too chummy with governments (despite very robust press releases criticising them on issues like interoperability, and national campaigns in France, Germany and the UK aggressively lobbying and critiquing the positions of their governments) (CMC, 2008b). This criticism reflected anxieties about what the Coalition could usefully do to lend momentum to a positive outcome for the Wellington conference at this stage, which seemingly hung in the balance.

Tensions dissipated somewhat on the Friday as the Wellington Declaration was widely endorsed by states and successfully wrapped up. At a meeting of campaigners the following day, representatives of both schools of thought—the "negotiators" and the "confrontationalists"—stood by their tactics. Nevertheless, the Wellington conference's successful outcome made it difficult to dispute that CMC advocacy appeared to be delivering results. At the same time, the episode indicated to the CMC's leadership a need for a tighter, single coordination structure and detailed game plan for the campaigners in Dublin that leveraged their various skills and did not leave them waiting around for something to happen. It was recognised that a huge amount of CMC preparation was required for Dublin, and the Coalition began internally re-organising itself to this end.

Overall, the end of the Wellington conference marked a new phase for the CMC. There were still regional conferences like those in Mexico City and Livingstone—where the CMC relied on its African and Latin American campaigners to forge even stronger

and more effective allies amongst government negotiators from these countries—to take place before Dublin. And, a CCW meeting in April 2008 gave campaigners a chance to re-engage with Like-minded states' delegates. Psychologically, however, minds were now focusing on the upcoming Dublin negotiation, and correspondingly what impact the CMC could have in ensuring that the outcome matched its campaigning call and the Oslo Declaration's aims.

The Wellington conference also underlined another challenge due to the CMC's rapid expansion and transformation between late 2006 and early 2008. At the heart of the CMC was a loose group of expert individuals that roughly (although not exactly) coincided with the Steering Committee's membership, and had a tacit hierarchy with its Steering Committee co-chairs supervising, and being advised by, the Coordinator and his team. With its increase in tempo and tension, the Wellington conference had displayed shortcomings in how the CMC's leadership understood and responded to its constituents' expectations. In the same way as government negotiators dealt with their competing constituents amongst ministries of defence and foreign affairs, keeping campaigners' expectations synchronised with CMC negotiating tactics would not be easy as deals began to be struck in the Dublin negotiations in May.

9. Conclusions

In just one year from the adoption of the Oslo Declaration, the transformation in the Norwegian instigated initiative for a humanitarian treaty on cluster munitions was profound. The Oslo process had developed from what many states had seen as a shot in the dark to an endeavour in which more than 120 states participated. It was now poised for actual treaty negotiation—despite various obstacles thrown up in its path by major

military powers shunning the initiative through machinations in the CCW, and US emphasis on the risks of a treaty for military relations with friends and allies daring to adopt a cluster munition ban. A significant proportion of the globe's states were engaged in talks on the hazards cluster munitions pose to civilians for the first time, and the majority of these states were persuaded that the weapon should be banned.

In particular, the Wellington conference ultimately succeeded in preparing the groundwork for the Dublin CCM negotiations. Although a difficult meeting, in Wellington the core group withstood the "shock and recover" tactics of the Like-minded. This was important for the credibility of the Oslo process with the Teetotal states. Nevertheless, the Wellington conference also exposed differences in approach within the core group; Norway, for instance was becoming more active in promoting a position that differed from Austria and Mexico on the scope of the category of weapons to be prohibited under the treaty. Submunitions that attack targets within an area by means of technical features like sensor fusing should not be defined as cluster munitions, in Norway's view. These contrasting views underlined that convergence over the meaning of cluster munitions causing unacceptable harm to civilians still did not exist within the Oslo process even after the Wellington conference concluded.

CHAPTER 7: CONVERGENCE—NEGOTIATING THE CONVENTION ON CLUSTER MUNITIONS

1. From Wellington to Dublin

After the February 2008 Wellington conference, the focus of actors within the Oslo process turned to preparations for the approaching negotiations on the CCM, to be held in Dublin in the second half of May. As Ireland assumed the mantle of chairing the CCM negotiations, the core group's role in steering the Oslo process began to fade. Nevertheless, representatives of most core group delegations would play specific roles in Dublin as "Friends" of the President on thematic issues or as Vice Presidents at the request of the President of the Conference, Ambassador Dáithí O'Ceallaigh.

The core group did continue to coordinate closely on intensified bilateral and regional efforts to lobby other states to sign up to the Wellington Declaration and attend the Dublin negotiations. 40 African states were persuaded to join the Livingstone Declaration in Zambia on 1 April in support of the Oslo process and the adoption of a humanitarian treaty on cluster munitions (Zambia, 2008). Mexico hosted a conference of 22 Latin American and Caribbean states in mid-April. A week later, the ICRC convened a workshop in Bangkok for around ten states from the Association of South East Asian Nations to engage them on cluster munition issues to encourage their participation in Dublin. And, a Global Day of Action on 19 April coordinated by the CMC in more than 50 countries underlined civil society's wide-ranging advocacy efforts with states during this period (HRW, 2009 6).

After a rapid start in January 2008, by April prospects in the CCW to address cluster munitions had become increasingly uncertain in the face of few new signs of

flexibility from China, Russia and others shunning the Oslo process. Moreover, a US government internal policy review underway on cluster munitions had several months left to run (US Secretary of Defense, 2008), which further limited CCW momentum. Meanwhile, no prospect of the US participating in the Dublin negotiations eventuated, despite increased interest from some legislators in both houses of Congress. US officials continued to be negative about the Oslo process in their public statements and private consultations with friends and allies in the lead-up to the Dublin negotiations. After the Wellington conference the US claimed, for example, "NGOs were allowed to heckle state delegations in plenary and surrounding venues, using funds provided by one state participant [Norway, presumably] to attack the positions of other state participants. Is this the kind of international system that any administration wants to work in?" Such remarks may have been based on reports passed to US diplomats from Like-minded states like Australia (US Embassy - Canberra, 2008c).

However, interoperability was the chief issue US policymakers emphasised. In general terms, interoperability in the CCM context meant the ability of forces or agents of various states or IOs to operate jointly in performing tasks, missions or operations (Arntsen, 2010 542) primarily of a military nature. A senior State Department official publicly warned, "cooperation within NATO is in the crosshairs of the Oslo treaty" (Kidd, 2008). Yet, there were no indications that the Like-minded would shy away from participating in the Dublin conference. Indeed, in the absence of US participation, it was increasingly obvious that Washington's allies would have to try to ensure that its concerns were met in the final negotiated text.

1.1 The state of the draft convention text

The draft text of the cluster munition treaty the core group initially distributed after the Vienna conference in December 2007 was, following the meeting in Wellington, just over 14 typewritten pages long. Its content and structure constituted the basis for negotiation in Dublin. The final CCM agreed on 30 May would be four pages longer and contain an additional article on "Relations with States not party to this Convention", which constituted the Oslo process's solution to the interoperability problem. Arriving at the four paragraphs of article 21 was so contentious it would become the focus of the Dublin negotiation's endgame.

The pre-Dublin document contained a preamble section and 22 operative articles. The preamble was nearly two pages in length, and would become a half-page longer in the course of the Dublin meeting. The toughest drafting issues for the negotiation immediately followed the preamble. One issue concerned article 1 on general scope, linked as it was to interoperability, and because of the need to ensure the treaty did not leave a loophole for explosive bomblets dispersed from aircraft dispensers. Then there were the definitions in article 2 to be settled, particularly exclusions (or clarifications) for certain weapons with submunitions that might be permitted in paragraph 2(c). Transition periods were a third major issue, one to a large extent depending on what the definition of a cluster munition would cover—and what would therefore be banned—and to some extent dependent on how article 1 would finally look.

Interoperability and the cluster munition definition were the issues that eventually took the most time and effort to solve in Dublin and over which the fate of

the negotiation hinged. But there were several other significant outstanding issues to be settled. The initial foundation for textual work, the Lima discussion text in May 2007, had largely been based on the MBT. But after a decade of experience in MBT implementation improvements were possible, and the ICBL (as a CMC member) played an important role in identifying and lending thought as to how these could be reflected in a cluster munition treaty.

Some other issues familiar to MBT implementation also featured: timelines for stockpile destruction (article 3) and clearance (article 4) would have to balance the desires of those wanting the most time possible for practical and financial reasons with the humanitarian imperative of the Oslo Declaration to protect civilians. Some states, especially among the Like-minded, wanted to retain some submunitions they said would be for training explosive ordnance disposal personnel, and for devising counter-measures. While this sounded reasonable in principle, a similar provision in the MBT had seen some states, like Japan, retain tens of thousands of AP mines, which the ICBL and some MBT states parties argued was against that treaty's spirit and a situation that should absolutely be avoided on cluster munitions.

Even article 5 on victim assistance, about which so many states fundamentally agreed, was not trouble-free. Negotiated in light of the Convention on the Rights of Persons with Disabilities (2006) and a decade of MBT implementation, this draft article contained recognition that victim assistance "is not only about medical treatment or rehabilitation, but is in fact an issue of human rights" (Rutherford et al., 2008 7). However, the Holy See was opposed to mentioning the Disabilities Convention, even in the cluster munition treaty preamble, because of its provisions on reproductive rights.

And, until Dublin, states that had used cluster munitions such as France, Germany and the UK had liability-related concerns about the breadth of the definition of cluster munition victims in article 2 because it included affected families and communities in addition to "those persons directly impacted by cluster munitions" (Ireland, 2008b).

Beyond article 5, there were also some modifications to be negotiated to the articles on international cooperation and assistance (article 6), transparency measures (article 7), facilitations and clarification of compliance (article 8) and national implementation measures (article 9).

1.2 The Like-minded, and Teetotals

At the conclusion of the Wellington conference, the Irish President-Designate for the Dublin Diplomatic Conference offered reassurance from the podium that all proposals by states would be considered in the negotiations[131], even if these were described as "other proposals" under rule 31 of the rules of procedure rather than being in the "basic proposal". O'Ceallaigh's position was that "there was no difference between Article 30 and Article 31 of the rules of procedure, that there was a basic text on the table but that once we got to Dublin the text proposals and so on—they were not the property of the core group, they were the property of the conference."[132] MacKay felt similarly: his view was that "the status of the compendium is completely irrelevant. Either we'll get a deal in Dublin or we won't, but the compendium is not actually going to affect that."[133] Perhaps due to the bruising nature of the Wellington conference, not

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[131] My notes from the Wellington Conference on Cluster Munitions.

[132] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 12 June 2008.

[133] Interview with Ambassador Don MacKay (New Zealand MFA), 30 July 2008.

all of the Like-minded states were initially willing to believe such reassurances: several put their own spin on the relationship between the draft convention text and their own proposals in their Wellington closing statements. The UK, for example, said, "In our view, the Draft Convention Text together with the Compendium of proposals can now form a balanced basis for work in Dublin" (2008 1).[134]

Soon after the Wellington conference, the US Embassy in Canberra reported Australian officials' view of that meeting in a confidential cable to Washington also circulated widely to other US diplomatic posts:

> "The practical processes of the meeting and draft Rules of Procedure presented nearly untenable issues to many of the Like-minded Group. During the meeting, proposed changes to the Convention from NGOs were incorporated, but input provided by other participants was collected only as annexes. On the fourth day of meetings, draft Rules of Procedure were distributed limiting future consideration to only the draft Cluster Munitions Convention (Rule 30), essentially excluding the suggested changes in the annexes proposed by participating states. Australia and other like-minded countries believe that this rule was included in bad faith." (US Embassy - Canberra, 2008c).

In fact, the Dublin rules of procedure reflected draft standard rules for UN conferences as well as the precedents of several recent diplomatic conferences for the adoption of new instruments of humanitarian law including the MBT (Smyth, 2010 28-9). The cable's allegations reflected fears amongst the Like-minded delegations that they were being pushed down a slippery slope toward a total ban on cluster munitions; one that would be politically costly to walk away from, but impossible to sign up to if it

[134] Underlining is from the UK statement.

did not clearly relate the scope of the treaty's prohibitions to their continued military cooperation with the US.

The same cable from Canberra relayed Australia's request for US "assistance"—guidance—on a Canadian suggestion for interoperability language offered during an informal consultation session at the Wellington conference. The cable's reporting of this Australian request implied that the US still had not offered solutions to its interoperability concerns to friends and allies, even as the US continued to stress the seriousness of that issue for it. Soon afterward, in early March 2008, US diplomats demarched Canadian defence and foreign affairs officials in Ottawa about Canada's interoperability suggestions. US diplomats were not pleased at the Canadian delegation's explanations (several of which were reported). The embassy claimed that Canada's Oslo process "delegation head may be attempting to burnish his own credentials with anti-landmine and anti-CM activists than to pursue inter-agency agreed-upon Canadian national interests." Rather ominously, the cable's author added, "Canadian engagement in the […] CCW and the OP merits continued close scrutiny" (US Embassy - Ottawa, 2008a).

A subsequent US cable from Ottawa just before the Dublin negotiations reported "Canada has moved towards alignment with the US on CM interoperability over the past few months. However […] Ottawa recommends […] an expert pull-aside at the May 13 briefing in order to bolster Canadian support for the US position" (US Embassy - Ottawa, 2008b). The pull aside worked: Canada's head of delegation, Earl Turcotte, along with the UK, would take the toughest line on interoperability provisions in the Dublin negotiation's final endgame.

Even the interoperability issue failed to constitute a common concern for the Like-minded states to all rally around, however, in view of their differing political and military relationships with the US. If there continued to be a rallying call it was dissatisfaction about the nature of the Oslo process to date—common ground that was about to evaporate as the formal CCM negotiations commenced and the Like-minded states' different views on substance became starker. Nevertheless, a range of evidence including interview data used in this thesis, statements of Like-minded delegations and US diplomatic cables from the early 2008 period released by Wikileaks suggest that even now the Like-minded focused on the core group as the main obstacle to their influence over the development of a draft cluster munition ban treaty. Only belatedly did the Like-minded delegations begin to recognise that the biggest counter-weight to their aspirations was actually not a coherent group at all, but the Teetotal majority of states within the Oslo process.

The Teetotals were mainly developing and affected countries, and these states instinctively or on principle opposed the views of the Like-minded on exclusions to the definition for any explosive submunitions, transition periods or, by Dublin, even interoperability provisions. Numerically, the African states (with a few exceptions like Egypt and Morocco) were the largest bloc. South Africa's position is also of note. South Africa was at the forefront of the Ottawa process to ban anti-personnel mines in the 1990s. Probably out of regional solidarity, on cluster munitions South Africa generally acquiesced to the Teetotal view preponderant in the African region. As a cluster munition stockpiler and one time producer, though, South Africa did not seek an international leadership role in the Oslo process.

In general, to be Teetotal was effectively the default position among developing countries unless that country was a cluster munition possessor: most Latin American, Caribbean states and Pacific Island states, and others among the Asians (notably Laos, the Philippines and Indonesia) and the Middle East were associated with the Teetotal movement. Austria, because of its expansive domestic law banning cluster munitions, also fit into this group, as did the Holy See.

Until Wellington, the Like-minded tended to dismiss those with Teetotal views as lacking expertise or political equity in a treaty negotiation on a weapon that few of the Teetotal had. But many other actors in the Oslo process saw the views of those states as a source of negotiating equity just as important as perceived status as a user or stockpiler of cluster munitions. Some of them, like Laos and Lebanon, were living with the effects of the weapon at first hand, after all. Many other states had suffered from the widespread use of landmines and those located in areas prone to conflict, in particular, wanted to prevent such a problem from happening in the future with unexploded submunitions.

The CMC, ICRC and UN field agencies put considerable effort into educating Teetotal states with briefings, position papers and other materials on which to represent alternative views on the draft convention text aimed at keeping the bar high in humanitarian terms. Meanwhile, although the Friends of the Affected would like to have met in the run-up to Dublin in order to coordinate positions, many of their delegations were capital- rather than Geneva-based, and lacked the financial resources to do so. It meant that the Friends of the Affected would be not be a particular force in Dublin, although key members such as Lebanon, Zambia and Costa Rica maintained

often supported each others' positions on the conference floor.[135]

Overall, most state delegations engaged in the Oslo process appear to have regarded their work as entering a new phase, with a need for greater focus on securing their national prerogatives in the outcome. The Like-minded, the core group and other affiliations did not dissolve completely, but these bonds had loosened considerably by 19 May when the Dublin conference commenced, with 107 states participating.[136] Whether that loosening was enough to enable the compromise necessary for a negotiating outcome consistent with the Oslo Declaration was a question that remained to be answered. However, as negotiations commenced at Croke Park in Dublin there seemed to be genuine commitment amongst most of those delegations present to achieving a treaty banning cluster munitions causing unacceptable harm to civilians, a sense the conference's President, Ambassador O'Ceallaigh, shared.[137]

To try to achieve convergence on a final treaty text, the Irish leaned heavily on their Friends of the President. These were individuals with no formal office, but on whom consultations would depend for various parts of the draft convention, and they answered directly to O'Ceallaigh. The idea was that they would hand over to him treaty text, based on their consultations, by the end of the first week. They included MacKay on the cluster munition definition, Kongstad from Norway on stockpile destruction (article 3), an Irish soldier, Jim Burke, on other article 2 definitions and article 4 on clearance. Later, others such as South Africa and Australia would also be drafted in to

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[135] Interview with Ahmad Arafa (Lebanese MFA), 11 May 2009.

[136] See Appendix III for a list.

[137] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 12 June 2008.

consulting on parts of the draft convention. If the Friends could not produce text likely to command agreement among all concerned, it would be up to O'Ceallaigh to sort out.

2. Defining cluster munitions

MacKay and his helpers stuck to the define-and-ban approach on what constituted a cluster munition, and thus the scope of the ban. His decision to hand off responsibility for other article 2 definitions to focus on this question proved sensible because his method was time-consuming and attritional in nature—of continued, methodical probing of delegations' positions following on from Vienna and Wellington.[138] MacKay heard out all of the arguments for and against various proposals to exclude submunitions from the definition, and cross-examined their proponents about the humanitarian effects with the input of others in the room. Worried about running out of time, MacKay often called on former British army explosive ordnance expert Colin King to give his technical assessment in the latter's capacity as an independent consultant, to help him cut through delegations' rhetoric.

Inconveniently for some of the Like-minded, and as he had done in Wellington, MacKay insisted on open informal consultations, in which observers such as the ICRC, the UN and NGOs were present and active in the discussions. These observer delegations could not propose formal amendments to text, but the Friends could—and often did—take their comments into account, especially as these tended to attract the support of other delegations. MacKay was adamant that he did not want negotiations to be in a "smoke-filled room" from which some states felt excluded, and in which others

[138] Interview with Ambassador Don MacKay (New Zealand MFA), 13 May 2008.

inside the small-group negotiation felt freer to maintain unhelpful positions.[139]

To structure discussions, MacKay circulated "elements" papers that set out the concepts in the various proposals submitted during the Oslo process for examination.[140] Several proposals remained in play as a basis for the exclusion of certain submunitions in article 2, paragraph 2(c). They included proposed exclusions based on the number of submunitions per weapon, direct fire, self-destruct and self-neutralisation capability and sensor fusing (Various, 2008a). Many in the room believed that most of these proposals for exclusion failed to stand up to scrutiny in humanitarian terms and were instead fronts for individual delegations' attempts to justify retaining the weapons they had in stockpiles and, as such, were simply straight exceptions from the ban. MacKay's consultations subjected the proposals to cross-examination that exposed shortcomings in some of the arguments of both the Like-minded and the Teetotal states in a very public manner.

Like-minded coordination openly began to fall apart as negotiations advanced on specifics that took care of some delegations' concerns and not others. But a group of around half-a-dozen Teetotal states also very active in the negotiation, including Costa Rica, Kenya, Jamaica, Lebanon, Mexico and Zambia, also had to be handled with special care. These states felt uncomfortable in MacKay's informal consultations to be negotiating on a provision for exclusions they were in principle opposed to. MacKay was therefore careful from time to time to acknowledge in the consultations that the

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[139] Interview with Ambassador Don MacKay (New Zealand MFA), 30 July 2008. Of course, by 2008, "smoke-filled rooms" in both Ireland (and New Zealand) were designated "smoke-free" by law.

[140] There were are least two such room papers; one circulated by the Friend of the President on Definitions on 19 May, and the other circulated on 21 May. Papers on file.

willingness of these states to discuss exclusions did not constitute their agreement. Nevertheless, MacKay later observed: "by discussing [exclusions from the definition] as an abstract concept, it gradually assumed form and substance and concretized. And the more you discussed and again kept going back to the Oslo Declaration—to what this was all about—the more the Teetotallers had to come round to accept that the definition wasn't actually going to be a Teetotaller definition."[141]

On Wednesday of the first week of the Dublin conference, UK Prime Minister Gordon Brown's spokesperson made a public announcement in London (Wintour and Norton-Taylor, 2008), which had a positive bearing on the definitions work:

> "The Prime Minister had issued instructions to our negotiators in Dublin that we should work intensively to ban cluster bombs that cause unacceptable harm to civilians. We had already gone further than other permanent members of the Security Council by banning two types of cluster bombs, neither of which had a self-destruct or de-activation mechanism. The Prime Minister had asked the Ministry of Defence to assess the remaining munitions to ensure there was no risk to civilians."[142]

The statement communicated that the UK supported the Dublin negotiation at the highest political level. And, as it was clear by now that the M-85 submunition did pose risk to civilians, it held out the prospect that the UK would give up the M-85 as part of a treaty outcome. It contributed to a collective sense of progress on article 2. Landmine Action and Oxfam GB immediately issued a media release saying "Britain has at last come in from the cold", adding, "now we expect the UK to give up the M-85 and M-73" (2008).

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[141] Interview with Ambassador Don MacKay (New Zealand MFA), 30 July 2008.
[142] Full text of statement on file.

By the following day, MacKay felt that he was ready to transmit negotiated text to the President. To mollify the Teetotal states the paper duly noted "there is also a formal proposal to delete 2(c)" (MacKay, 2008). But the proposal MacKay believed stood a chance of agreement was cumulative, which meant a submunition would have to meet all of the criteria—not just one, like possessing a self-destruct feature. If agreed, it would outlaw weapons including Britain's M-85 and M-73 submunitions. And the chapeau of MacKay's paragraph 2(c), which mentioned "area effect and the risk of unexploded ordnance contamination" from cluster munition use, was of considerable importance in linking the technical characteristics listed below it to an effects-based determinant (Docherty et al., 2010 194). It could be argued on this basis that a weapon meeting all of these criteria could still be banned if it caused such effect, something the CMC's front bench of representatives in the definitions consultations would point out to their campaigning base in the face of criticism of the outcome (see next section).

MacKay's text did not yet fix all issues with the cluster munition definition. It omitted a key element that the French wanted in order to meet concerns about their APACHE runway-attack weapon being caught in the prohibition. France wanted an upper weight criterion in the definition, which would serve as a basis for APACHE's exclusion. A proposal Norway had made in the consultations on 21 May for both upper and lower weight criteria (and which the CMC supported) suited France (Norway, 2008a). But MacKay had not included a weight criterion in his text for the President simply because, although no outright opposition was raised, he felt some delegations in the consultations seemed confused about what it was for and the case had not been

made conclusively enough.[143] In fact, it had been the subject of little discussion.[144] This made the French very concerned.[145] The upshot was that Norway reintroduced its proposal, along with an explanatory paper, early in the Dublin conference's second week. The clear explanation it provided eased the inclusion of weight criteria into later versions of the article 2 text.

2.1 "NO exceptions, NO delays and NO loopholes"

The rapidity of the process leading to MacKay's text for the President on article 2, paragraph 2(c) created a difficult situation within the CMC. As in Wellington, the CMC fielded a team of knowledgeable representatives in consultations, which included the three Co-Chairs, Moyes and Nash. Moyes in particular, exploited MacKay's consultations to peel away the reasoning behind the proposals of the Like-minded for self-destruct and direct-fire exclusions, in order to try to expose their rationale as unconvincing in humanitarian terms. Moyes wanted to try to steer the negotiations toward rejecting suggested criteria for exclusion such as numbers, self-destruct or direct-fire—as some others in the consultations were also doing—and to argue that the defining characteristic of cluster munitions is that they distribute explosive force across an area.[146] In conceptual terms such a characterisation laid the groundwork for excluding weapon systems like the SMArt 155 and similar munitions but captured everything else discussed in the Oslo process.

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[143] Interview with Ambassador Don MacKay (New Zealand MFA), 30 July 2008.

[144] My Conference notes.

[145] Interview with French Ministry of Defence official (anonymity protected), 29 July 2008.

[146] Interview with Richard Moyes (Landmine Action), 3 July 2008.

The CMC's experts on definitions believed that to just sit in the Dublin negotiation's informal consultations and maintain the position that there should simply be no paragraph 2(c) would marginalise them from the negotiation and skew the outcome toward those calling for such exclusions, even if no 2(c) would have been the CMC's preferred outcome.[147] And they hoped, through argument, to pull states they regarded as on the fence such as Australia and Canada away from the Like-minded the CMC regarded as in the "red zone"—something Moyes had explained to campaigners before the start of the week in a presentation given during a detailed orientation session for all those on the CMC delegation (Moyes, 2008). Similar presentations had also been given to states during the regional conferences prior to Dublin.

The CMC team's efforts to chip 2(c) exclusion proposals away to a bare minimum through evidence and argument in the conference room were not necessarily well understood by all of the Coalition's campaigners outside it. Many NGO campaigners were attending an international diplomatic conference for the first time and, because of space limitations, most relied on daily briefings and gossip to gain a picture of what was happening behind the consultation room doors. Surprised at how quickly the parameters of a definition of cluster munitions had come together in the first week, some campaigners became upset that their CMC front-benchers had "given away" too much after receiving a briefing from lead negotiators Goose, Moyes, Nash and Østern at the end of negotiations on Tuesday afternoon about the Norwegian proposal and the support it had garnered from many states, such as Australia, Canada, and France. The Coalition's negotiating team portrayed the Norwegian proposal as a major step forward.

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[147] Ibid.

But it seemed to some campaigners to be at odds with the CMC's slogan of "NO exceptions, NO delays and NO loopholes", displayed on a huge banner in the CMC campaign headquarters in Croke Park.

It was a moment of crisis for the campaign, which instead might reasonably have been expected to be one of triumph for it. Norway's proposal and the expected text from MacKay were actually more than the CMC's experts on definitions had dared to hope for—even if they disliked certain aspects of it like the UK's baffling insistence on exclusion of munitions "designed exclusively for an air defence role" added at the last minute to article 2, paragraph 2(a). If agreed, the definition would outlaw practically all of the weapons with submunitions in service of those states possessing them, including M-85-style weapons, direct-fire cluster munition weapons containing the M-73, the Spanish and Swedish cluster munitions with electronic fail-safe mechanisms, and others. Buried in the specifics of the negotiations, themselves euphoric at the implications of MacKay's expected recommendation to the President, and running on adrenaline from two days of negotiations and weeks of intensive preparations, the CMC front-benchers had simply assumed grassroots campaigners would see things as they did.

However, many of the CMC's grassroots campaigners had been working tirelessly over many months with the Teetotal delegations in order to build up capacity of these states to argue for a robust prohibition in the treaty. Now, it seemed, the campaign's opposition to exclusions had simply been overruled by the campaign's frontbenchers for expediency's sake. Those campaigners were concerned the anticipated outcome would not look like a ban on cluster munitions to the Teetotal delegations they had

painstakingly cultivated; states opposed to *any* exclusions under article 2, paragraph 2(c).

Although able to point to the CMC's public, written observations on the draft convention text before the Dublin conference (2008a), the CMC's frontbenchers recognised that further discussion could inflame matters. Moyes and Nash met with campaigners the following day to absorb the full force of their criticism—also announcing a day later that there would be a campaign meeting on the coming Saturday to determine coalition-wide positions on the negotiation's endgame and what the CMC could and could not support as an outcome. The two men did their best to demonstrate that the CMC's negotiators were listening to their grassroots. (One outcome was that Nash read out a statement the next day in the definitions consultations that the CMC would "fully support" the proposal known to be coming that day from some Teetotal states calling for the deletion of any article 2, paragraph 2(c).)[148]

The CMC's unity was preserved at a critical time. Nevertheless, this tough meeting reminded the CMC's leadership of the acute level of anxiety among campaigners and the many delegations in the negotiations those campaigners were lobbying and gathering information from that the Dublin conference succeed in living up to the aim of a cluster munition ban treaty.[149]

3. Dublin at the halfway mark

By the end of the first week of the Dublin negotiations, a possible outcome was beginning to take shape. Monday's proceedings had commenced with strong indications

[148] Conversation with Thomas Nash (CMC), 21 July 2009.

[149] Interview with Richard Moyes (Landmine Action), 3 July 2008.

of political support from many quarters, including the ICRC and UN (2008 , UN Mine Action Team, 2008). Further political-level announcements followed from states such as France and the UK about their commitment to the aims of the Oslo Declaration and an outcome of the negotiations over the week's course. For example, as well as the statement from the UK Prime Minister, France's Defence Minister announced the decision to unilaterally abolish its stockpile of M-26 cluster munition rockets (Agence France Presse, 2008). Good progress was made in the Committee of the Whole on less controversial aspects of the draft convention text and, of those issues delegated to Friends of the President, some had been able to return to the President by Friday to offer text they thought could command agreement as part of a wider negotiating package. O'Ceallaigh was in a position to present "Presidency Text" to the conference's plenary that Friday morning on articles 9 through 16, and from articles 20 to 22 along with some preamble language, the cluster munition victim definition and text from article 5 on victim assistance.

Meanwhile, article 2 cluster munition definition work under MacKay had made astonishing progress—perhaps too astonishing, as the definition would have to be revisited after the weekend to accommodate France. Spain would also lead a last ditch (but unsuccessful) effort to exclude submunitions with electronic fusing from the emerging prohibition. And, while of singular importance in terms of directing the scope of what the treaty would ban, the cluster munition definition was only one of more than a dozen definitions, most having been passed to Burke.

Burke's biggest challenge concerned the meanings of "explosive bomblets" and "dispensers." A long-standing Irish concern was that a cluster munition treaty might

inadvertently create a loophole that encouraged the development (or redevelopment) of weapon systems deploying vast numbers of explosive devices from a container aboard an aircraft, as used in the South East Asia conflict by the US (Prokosch, 1995b 105). Such contraptions might not fall within the definition of a cluster munition in the CCM.[150] This issue was not resolved until the second week because of UK concerns. The UK possessed a rocket system that dispersed M-73 submunitions from rockets fired from pods fitted to attack helicopters. Rockets containing submunitions were only one of the types that could be fired, however, and the British did not want a treaty agreed in Dublin to inadvertently ban the entire CRV-7 system because it was considered a dispenser, with its rockets being considered explosive bomblets.[151]

At least transition periods were now out of the question, the Irish thought. In a Committee of the Whole session that O'Ceallaigh convened with all delegations on Friday morning to work through the draft treaty article by article, he raised transition period proposals made earlier by Germany, Slovakia and Switzerland. After a cascade of nearly 60 interventions all opposed to transition periods of any kind, little doubt was left that these proposals were far from any prospect of agreement (Various, 2008c).

Germany nevertheless worked behind the scenes over the weekend to try to influence the President to include transition periods in his final text.[152] This was due

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[150] Interview with Lt. Col Jim Burke (Irish Defence Forces), 25 July 2008.

[151] The UK's concerns were addressed by the inclusion in the "explosive bomblet" definition in article 2, paragraph 13 of the words "which are not self-propelled", thereby excluding rockets. Meanwhile, a new paragraph was added to article 1 of the treaty text on its general scope stating that its ban "applies, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft".

[152] Interview with James C. O'Shea (Irish MFA), 28 July 2008.

less to any national concern on Germany's part, than because German officials thought transition periods would ease the way for major cluster munition possessors to join the treaty later.[153] The Irish did seriously consider their inclusion, but further consultations early in the second week indicated no flexibility from the Teetotal states (Various, 2008d).

The transition periods episode handed Teetotal states an important psychological victory for them at a time when it was becoming certain to the President's team that Teetotal preferences would not prevail in other significant respects of the treaty. This numerical majority in the Dublin negotiations would not have its way in expunging all exclusions from the definition under paragraph 2(c)—although they had succeeded in banning the M-85, M-73, Swedish BK-90, Spanish MAT-120 and a host of other cluster munitions that some thought would never be banned. And the suspicion of many Teetotal delegations about interoperability provisions would have to be overcome, as the Like-minded were adamant that such a provision was a vital precondition for their support for a ban treaty.

The Dublin conference was also running out of time. The President needed a text in his hand that he thought stood a shot at agreement by early Tuesday of the second week of negotiations—as he told delegations (Various, 2008f). Based on that text, the President would then have to nudge delegations into endgame compromises on the several articles outstanding including clearance, stockpile destruction, transparency (a treaty provision which concerns reporting requirements), along with some definitions. O'Ceallaigh was not too worried about these; he and his team knew the biggest

[153] Interview with Albrecht von Wittke (German MFA), 15 December 2008.

headache for the endgame would be interoperability.[154]

4. Interoperability

If the Irish were not already fully aware of the potential for interoperability to prevent agreement on the CCM on the basis of the Wellington Conference, American diplomatic demarches before the Dublin negotiations drove the point home (US Embassy - Dublin, 2008a , 2008b). All the Irish could do was to reassure US officials that, presiding over treaty negotiations, Ireland would do its best to reach an outcome acceptable to those countries participating in Dublin. Despite repeated Irish requests for "advice from Washington on convention language that might make Articles 1(b) and 1(c) acceptable to the US Government", as of 8 May none appears to have been offered (2008a). This meant the pressure was on the Like-minded states allied with the US to ensure Washington's concerns were met. Two days into the negotiation, US officials in Washington thumped the tub publicly about the draft convention text, claiming that as drafted its language related to scope and interoperability (based on MBT article 1) would even prevent delivery of humanitarian aid by US military forces (US State Department Office of the Spokesman, 2008).

Norway wanted the job of Friend of the President to run the interoperability consultations.[155] Although a NATO ally, Norway's views were in contrast to its alliance partners on this issue in the Oslo process, however. O'Ceallaigh and his Irish colleagues felt that installing Norway as interoperability Friend would be unacceptable to the Like-minded, and that with a number of core group states already in Friend roles he should

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[154] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 10 July 2008.

[155] Various interviews with Norwegian MFA officials (2008) (anonymity protected).

look further afield. The Irish asked Switzerland instead. Switzerland was one of the Like-minded; it possessed the M-85 submunition with self-destruct, and was very concerned about transition periods. Yet because of its military neutrality, Switzerland did not share the strong interoperability concerns of most other Like-minded—although, on the flip side, that could lead to criticism that the Swiss were not in a position to properly understand interoperability problems. Nevertheless, putting one of the Like-minded in the Friend role largely eliminated the potential for further accusations from them of bias against their interests. Ambassador Christine Schraner Burgener (the nominated Friend in question) later recalled of interoperability, "I didn't realise at that moment how difficult it was".[156]

Schraner took a different approach to her first-week consultations in Dublin than MacKay did in his open informals on the definition. In part this was due to the nature of the issue: definitions were of relevance to all states in the cluster munition treaty negotiations because those weapons defined as cluster munitions would be what the treaty banned. In contrast, interoperability was arguably of key importance for only a limited number; but these states presented the issue of a legally workable solution on interoperability as a prerequisite for them signing and ratifying the CCM.

The delegations represented in the interoperability negotiations may be described as falling within three concentric rings. In principle, within the largest, outermost ring fell all countries involved in joint multinational operations, whether UN-led, or under the auspices of a regional organisation like the African Union in which

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[156] Interview with Ambassador Christine Schraner Burgener (Swiss MFA), 15 October 2008.

non-states parties to a cluster munition ban treaty might operate alongside state parties.

In practice, although the Like-minded had made the point in Vienna and Wellington that all states should be concerned about impact on multinational operations, interest was rather more circumscribed. Within the middle ring was a subset of countries largely consisting of US allies like those in NATO: these governments worried about draft article 1, paragraph 1(c)'s implications for their joint operations with the US, because it stated:

> "1. Each State Party undertakes never under any circumstances to:
>
> (a) Use cluster munitions;
>
> (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
>
> (c) Assist encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention" (Ireland, 2008b).

Australia and other Like-minded states had underlined in their discussion paper from Wellington their concern as to what exactly "assist, encourage or induce" would mean for countries dependent, for instance, on US fire support in military operations for a weapon used in very different ways than AP mines (Australia et al., 2008). It meant the middle ring delegations were most active in pushing for interoperability provisions in Schraner's consultations that would create explicit exemptions from state liability, as well as from individual criminal liability for their national personnel.

In the third, innermost ring was a small subset of those countries of the middle ring—the UK, in particular—concerned about the ramifications of the cluster munition ban treaty for the hosting of foreign military bases (especially US ones) on territory

under their jurisdiction or control.

Differences in how MacKay and Schraner conducted their respective consultations also reflected their differing tactical approaches. MacKay's definitions meetings in the large room had the potential to become slightly rambunctious. But this atmosphere played to MacKay's approach of covering an exclusion in the discussion, pulling back, and running over it again—each time shaving away at the problem or flattening resistance a little more until an outcome had been achieved. If MacKay came at discussing definitions from the perspective of a barrister's cross-examination, Schraner applied her experience as a court mediator of trying to bring a representative group of the parties to mutual agreement in a smaller, more informal setting.[157] So, although Schraner's first interoperability consultation on the Tuesday of the first week in Dublin was open to all delegations, she subsequently worked in a smaller—and what she hoped was a roughly representative—group of 22 people or less in a small room.[158]

Schraner's decision to embark on smaller group work was not popular in the wider conference among those not involved in the interoperability consultations. However, with parallel work underway during much of the first week in the Committee of the Whole, and on provisions such as definitions, stockpile destruction and victim assistance, many delegations were hard pressed to cover interoperability as well. Schraner, for her part, was not opposed to others joining her consultations, but wanted to cultivate an atmosphere with a focus on the specific legal issues. These discussions were to be dominated by Australia, Canada, Japan and the UK's military lawyers

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[157] Ibid.

[158] Personal communication from Ambassador Christine Schraner Burgener (Swiss MFA), 8 August 2009.

because Schraner and her Swiss team wanted to listen first to what language would solve their concerns on interoperability, and then use this as a basis for a more political negotiation.[159]

Some progress was made. Discussions about proposals for interoperability provisions to be inserted into article 1 led to a widely held sense that re-drafting general scope provisions could create more problems than it solved. The CMC and states in the consultations such as Austria, Jamaica and Zambia fought against any attempts they perceived as weakening the general prohibitions in article 1, and active Like-minded such as Australia, Canada, Germany and the UK did not want to lend the impression they were trying to do that—a lesson they had learnt from Wellington. Thus, it was settled that a new, general provision on interoperability elsewhere in the treaty would be preferable (Schraner Burgener, 2008b), although it was not until Tuesday night in the second week that O'Ceallaigh and his team decided the draft article on "Relations between States Parties and States not party to this Convention" should be placed near the end of the treaty as draft article 21.

By the end of Schraner's first week consultations it was apparent that the outermost ring of states' concerns could be accommodated. Then there was the strong wish of the Like-minded to safeguard their military personnel from liability in joint operations with forces of states not party to the treaty in which cluster munitions were used—the middle ring. By early in the second week, the Like-minded seemed reasonably comfortable with the text of draft article 21 as it pertained to this concern. But there remained the basing problem. Concerns about the interoperability draft article

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[159] Personal communication from Reto Wollenmann (Swiss MFA), 27 May 2009.

as regards hosting of foreign bases also affected Italy, Japan and Central and East European members of NATO to varying degrees. France, meanwhile, had no US bases on its soil, and the terms of Germany's agreements with Washington over bases in its territory were such that Berlin did not exercise legal jurisdiction over them. It seemed that at this stage these states were trying to act in solidarity with the UK on interoperability, rather than possessing serious remaining concerns of their own on hosting—since both would want British cover within NATO for joining the CCM.

Solving British concerns seemed a rather intractable challenge. While US military bases on UK territory, which included places like Diego Garcia in the Indian Ocean, as well as on mainland Britain, were—in practice—US-controlled, the British government was legally responsible for them. US military forces would likely have cluster munitions stockpiled in some of these hosted bases, which could put the UK in violation of the CCM if it became a state party. To resolve the hosting problem the UK wanted a provision in the third paragraph of the interoperability article stipulating that a state party to the cluster munition treaty would be able to "host States not party to this Convention which engage in activities described in Article 1"—that draft article being the list of the treaty's prohibitions. It reflected the UK government's view that the US was unlikely to join a cluster munition ban treaty any time soon.

The hosting formulation was duly included in Schraner's proposal for the Committee of the Whole at the end of week one (Schraner Burgener, 2008c), which a large number of delegations opposed (Various, 2008f 7-10). Perhaps because so many of the states participating in the Dublin conference were not directly involved in the Swiss consultations, "hosting" was widely perceived among the Teetotal states as

tantamount to a get-out clause from the treaty's prohibitions, and clearly a US-oriented exception.[160]

There were other problems too (Borrie, 2009 290-1), though by Tuesday of the second week Schraner and her team had run out of time and she handed the issue back to the President by means of her Friend paper, which did not contain references to hosting (Schraner Burgener, 2008a). This text was circulated in the Committee of the Whole meeting that afternoon although O'Ceallaigh told delegations he did not propose to discuss it there at that time (Various, 2008h) since he knew it would require further negotiation.[161] Hosting would require a political solution.

5. The endgame

On Tuesday afternoon of the second week of negotiations, President O'Ceallaigh told the conference he would resume direct responsibility for the draft Convention text. Several issues—notably finalising definitions and interoperability—remained to be resolved, but both MacKay and Schraner Burgener had told the President they felt they had gone as far as they could within the formats of their consultations.[162]

O'Ceallaigh informed the Conference that he intended to use the next 24 hours for bilateral consultations with delegations: at some point in the evening he would give everyone his "composite text" (Various, 2008h 5). He and his team carefully kept their worries about interoperability to themselves: they now felt confident that a treaty would be achieved with or without the British. But they also had many reasons to believe that

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[160] Personal communication with Reto Wollenmann (Swiss MFA), 27 May 2009.
[161] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 10 July 2008.
[162] Ibid.

if the UK were not on board it would make it harder for other Like-minded states with stockpiles of cluster munitions and US alliance commitments to join—and those states were anxious. However, having asked the UK for greater flexibility on hosting there was little more the President could do.

At 16h30, the President and his team began their bilateral meetings. In all, there were more than 30 bilateral meetings over the course of the late afternoon and evening of 27 May. By 21h00 the Presidency had met with delegations including (roughly in order) Zambia, Canada, France, the UK, Norway, Costa Rica, South Africa, Mexico, Germany, Japan, Argentina, the CMC, Indonesia, the ICRC, Australia and Finland. According to O'Ceallaigh, the Irish asked every delegation the same specific questions: could they accept the text on interoperability? Could they accept the proposal on definitions (updated that week by MacKay with the Norwegian weight criterion to address French concerns, and with inclusion of dispensers in article 1 by Burke)? Third, could they accept the outcome on transition periods? Lastly, the Irish asked if they had any problems elsewhere in the text.[163] Taking the podium, O'Ceallaigh told delegates to return to their lodgings for the night, as he would not present a complete draft text of a cluster munition convention until the next morning (Various, 2008e).

The President did not yet have a complete draft text the Irish were confident had a shot at adoption by consensus in the conference. So, they continued their bilateral consultations in the backrooms, talks that would last until almost midnight. Among those consulted were New Zealand, Austria, Switzerland, Italy (an important meeting, in view of Italy's problems on hosting), Slovakia (which produced a submunition with

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[163] Ibid. Other interview respondents involved in the bilaterals corroborated this.

mechanical self-destruct and was unhappy with article 2, paragraph 2(c)) and Spain.

The Irish were also watching the UK delegation closely. Earlier that evening, the head of the UK delegation hinted to O'Ceallaigh that a major British policy announcement was imminent, though before that there were a few areas where the UK's expectations needed to be met. Ambassador Duncan implied that the UK now recognised the game was up for transition periods, but would still not budge from insistence on hosting language in the interoperability draft article. And the British still seemed concerned about a lesser issue: wording in article 4 on clearance that related to the article's obligations on retroactive responsibility for cluster munition user states—a bone of contention between the British and some of the states of the Friends of the Affected (Lebanon, in particular) in Dublin.

Now, as Tuesday night grew late the UK indicated it would be prepared to drop its unpopular proposal to insert hosting language into Schraner Burgener's "final, final" interoperability language (Schraner Burgener, 2008a). This change of heart can be interpreted in different ways. It could be seen at face value—as a late and agonising British concession. However, when the UK's alleged difficulties with Schraner Burgener's interoperability language are seen alongside the seeming evaporation of its other major concerns in the negotiation on Tuesday evening, it suggests that privately the UK government had already made up its mind it would join the treaty. Britain's delegation in Dublin was holding out for the best possible deal, but not it would seem at the cost of tipping the negotiation over.

It is more likely that the crucial political decision had, in effect, been taken in the UK in the middle of the first week. A continual stream of stories in the British media in

the lead-up to and during the negotiations had been primed and pumped by the CMC, Landmine Action and Oxfam GB, and British political decision makers sensed an important political opportunity, as the 21 May statement from 10 Downing Street indicated. It was then that the UK effectively stood on the political threshold requiring it to choose between joining a cluster munition ban treaty—in which case it could try to claim its stake in leadership in a humanitarian victory with the British public—or walk away from the negotiations with all of the accusations that would bring. Yet the negotiations seemed to be on an acceptable trajectory. The UK had stuck with the process, very publicly and at Prime Ministerial level, which would make an exit even more difficult and politically costly.

The British announcement, when it came, was a further message of commitment from Prime Minister Brown. A news story appeared on *The Guardian* website late on Tuesday night reporting that the British government "is preparing to scrap Britain's entire arsenal of cluster bombs" (Norton-Taylor, 2008).[164] This was confirmed on Wednesday when Brown announced that "In order to secure as strong a Convention as possible in the last hours of negotiation we have issued instructions that we should support a ban on all cluster bombs, including those currently in service by the UK" (2008). According to the Irish, they would only learn about the content of that high-level British announcement after their bilateral consultations finished that Tuesday night, though they must have strongly suspected.

At midnight, when O'Ceallaigh ended his bilateral consultations, he sat with his team to compare notes on the night's negotiations. Among the choices they had to make

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[164] This story was printed in *The Guardian*'s newsstand edition the next morning.

were what the lower weight threshold in article 2, paragraph 2(c)(ii) should be (they decided on 4kg), finalising the wording of the third paragraph in article 21 on interoperability, and whether the final text should have a transition period (no, was the decision). Finally, they all felt that, after such intensive consultations, this was as close as the conference was ever going to get to a text that could command consensus.

There seemed no sense in prolonging the negotiations further even if more time had been available. As one of the President's team recalled: "I think we had a fairly good idea at that stage, based on the bilaterals, that it could be very difficult to do anything [to significantly change the Presidency texts]—that if you went to one side or the other there was a serious risk of unravelling everything"[165]. The Irish were still uncertain that the package they had in mind would secure consensus support the next day, even though they had increasing confidence now that the British would join.[166] Other countries, after all, still potentially had difficulties, and had not sent the kinds of positive political signals the UK had.

O'Ceallaigh presented his consolidated treaty text to the assembled conference at ten o'clock on Wednesday morning after consulting with his bureau of eight vice presidents (Chile, France, Hungary, Lebanon, Mauritania, Mexico, Norway and Zambia) and Friends (including Austria, New Zealand, Switzerland, South Africa and Australia).[167] In 18 minutes, the President ran through his consolidated treaty text article by article to the Committee of the Whole. He remarked that about two-thirds of the

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[165] Interview with James C. O'Shea (Irish MFA), 28 July 2008.

[166] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 10 July 2008.

[167] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 12 June 2008.

articles in his text were identical to the various Presidency texts he had already forwarded to the conference's Plenary following discussions in the Committee of the Whole; the rest reflected its discussions, his Friends' consultations, or bilateral consultations O'Ceallaigh or members of his team had undertaken. He said:

> "I would ask delegations to consider the text carefully. And I ask everyone to reflect on how far all in this room—how far we all—have come in the last 18 months. The headline definition of a cluster munition in this text will lead to the prohibition of all cluster munitions that cause unacceptable harm to civilians. It will involve the removal of all cluster munitions from national stocks for a large number of states here represented in this room. The provision on relations with states not party to this Convention will be difficult for some, but for others it is not enough."[168]

Concerning article 1 on general scope, O'Ceallaigh noted a change to the wording on the exclusion of mines from the purview of the CCM, and the addition of the part on aerial dispensers to avoid a loophole (left unspoken was that the UK had now agreed to this). On the article 2 he said, "The main definition, that of a cluster munition, which was already quite demanding, had been added to by the inclusion of criteria regarding weight, which my consultations showed to enjoy broad support".[169] With regard to article 4 on clearance and the recent difficulties between Lebanon and the UK in particular, O'Ceallaigh said of his consultations and those of Burke as the relevant Friend, "While consensus was not achieved among all delegations the text in the draft represents in our view the best compromise available".[170] (Events would prove this assessment wrong.)

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[168] My transcription of the President's verbatim remarks to the Committee of the Whole, 28 May 2008.

[169] Ibid.

[170] Ibid.

Eventually the President came to the new article 21 on interoperability, within which he noted a "small addition"[171]: this was to add "and operations" alongside military cooperation in its third paragraph, so that it read:

> "Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not parties to this Convention that might engage in activities prohibited to a State party" (Ireland, 2008c 18).

And, after reiterating some of his opening remarks, O'Ceallaigh mentioned—as if in passing—that there were no transition periods in the text. Then he asked all delegations to consider the paper carefully, and seek instructions from their capitals on whether they could accept it at the Committee of the Whole in the afternoon. The President's text was simultaneously made available on the conference's website so that authorities in capitals could examine it immediately.

6. Final endgame

The President and his team had now expended what was probably their only shot at concluding the treaty negotiation. Many Teetotal states still opposed any paragraph 2(c) exemption in the cluster munition definition on principle. Moreover, some Teetotal delegations still struggled to understand the weight criterion concept reinserted into the definition as part of cumulative criteria for exclusion. At the same time, some delegations would have to come to terms with the fact that paragraph 2(c) would exclude—based on their effects—certain submunitions using sensor-fused technologies such as the German SMArt 155 and the French-Swedish BONUS systems from the

[171] Ibid.

definition of a cluster munition, and hence from a ban. On the other hand, cluster munitions as a category were to be banned, and there were no transition periods.

Over the course of Wednesday, O'Ceallaigh and his military colleague Burke met with the overwhelmingly Teetotal African and Latin American regional groups to try to sell the President's text. These meetings left O'Ceallaigh less than certain that all of these states would support adoption of the Convention.[172] But now there was another problem: CMC campaigners at the Dublin conference were unhappy about the text's interoperability formulation. In view of the evident strength of the rest of the paper in humanitarian terms, in private most within the CMC agreed that the campaign should not repudiate it over the interoperability article's precise wording. But their representatives—Conway, Goose and Nash—thought it might be possible to persuade O'Ceallaigh to make changes the CMC believed would improve it and further specify the prohibition on assistance to prohibited activities by a non-state party in article 1. In view of difficulties within the campaign over the definition in the first week of the negotiations "It was very important for campaigners to know that we were still fighting right up until the very last minute to strengthen the text in article 21", Nash later said.[173]

Specifically, the CMC wanted to limit the provisions of article 21 paragraph 3 to just one part of Article 1—paragraph 1(c). And the CMC did not like the "Notwithstanding" at paragraph 3's beginning, aiming to replace it with "Without prejudice to",[174] the same formulation Norway had tried (without success) to have

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[172] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 10 July 2008.

[173] Conversation with Thomas Nash (CMC), 21 July 2009.

[174] Personal communication with Thomas Nash (CMC), 20 May 2009.

included in the interoperability proposal evolving throughout Schraner's consultations the previous week. At root was their concern to make it as clear as possible that article 1's prohibitions took precedence over article 21, paragraph 3. Goose and Nash thought that their earlier conversations with the Canadian and UK heads of delegation indicated some flexibility in that regard.[175] If the CMC could secure agreement from these two states, which had been among the toughest on interoperability, perhaps the President could be persuaded to amend paragraph 3. The CMC also noted that interoperability had not been discussed in the Committee of the Whole since the conference's opening day apart from brief statements by O'Ceallaigh and Schraner, which had hinted at later open-ended discussions that never arrived, and which alone might provide procedural grounds for such a revision.[176]

O'Ceallaigh went to a small room, in which the CMC's Conway, Nash and Goose waited along with the Canadian and UK heads of delegation, and the Irish team's chief legal expert. Nash pitched the proposed changes, but CMC representatives discovered contrary to their expectations that the UK and Canada were not prepared to accept further amendments to the text the President had already put on the table. Duncan said he felt that although the Presidency text demanded some difficult compromises for the UK, it could go along with the package, and that civil society should be very happy with it all things considered. Turcotte was more direct in his response to the CMC: "This was essentially a red line for Canada. I think I used the words "red line". My instructions

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[175] Interview with Stephen D. Goose (HRW), 21 November 2008.

[176] Personal communication with Thomas Nash (CMC), 21 July 2009.

were expressly clear".[177] In Canada's view, the President's text struck the right balance: one that offered protection to civilians, which would at the same time enable the prospective treaty's member states to continue to engage in combined military operations with non-party states.[178]

O'Ceallaigh now said that no further changes to the Presidency text would be entertained, convinced at this stage that if he re-opened it "we were in trouble".[179] This result was a blow for CMC representatives—unhappy with the closed nature of the interoperability consultations throughout the Dublin conference, which in their view had seemed neither fair nor transparent.[180] They felt Article 21 paragraph 3 was a clumsy solution with the potential to allow states to evade their obligations to uphold the spirit and purpose of the CCM's prohibitions. Despite this, they calculated—and so, importantly, did the Irish—that a treaty categorically banning cluster munitions was still something the CMC should support. This was significant, because although an observer in the negotiations, the CMC's clout with some Teetotal states and its influence with the media and parliamentarians in many countries could, if used to oppose the President's text, create problems for its adoption.

By 17h the President urgently needed to convene the promised Committee of the Whole session. The conference clock had been stopped and more than a hundred delegations had been waiting for several hours. On the way there, however, O'Ceallaigh encountered another problem. Throughout the negotiations, his colleague Burke had

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[177] Interview with Earl Turcotte (Canadian MFA), 25 July 2008.

[178] Personal communication with Earl Turcotte (Canadian MFA), 3 August 2009.

[179] Interview with Ambassador Dáithí O'Ceallaigh (Irish MFA), 10 July 2008.

[180] Interview with Stephen D. Goose (HRW), 21 November 2008.

struggled to bridge the differences between the Like-minded such as France, Germany, Italy and the UK with Lebanon on certain aspects of clearance in article 4, paragraph 4. This provision related to

> "cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants, that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter" (Ireland, 2008c 7).

The issue at hand concerned whether the past user state was obliged to provide assistance to the other state once both joined the treaty. Lebanon felt that if affected states were obliged to take on the treaty's obligations such as clearance, then user states should also bear some aspects of it, and it wanted states joining the cluster munition ban treaty to be "strongly encouraged" to provide assistance.[181] This would not be a mandatory obligation, it was plain, but a modest, symbolic victory for Lebanon and other affected countries. The UK's retroactivity concerns largely taken care of by the word "encouraged", the British nevertheless had opposed "strongly" because they thought it would just be poor drafting. There was, the UK said, no real difference between the two formulations in practical terms.

The Lebanese delegation approached O'Ceallaigh now to tell him that Lebanon would not agree to the draft Convention unless the word "strongly" was added to the provisions in article 4 so as to give more weight to calls for assistance from past user states for clearance of cluster munition remnants and risk reduction education. It was a sticky moment in view of Lebanon's prominent role in the Oslo process. Lebanon

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[181] Interview with Ahmad Arafa (Lebanese MFA), 11 May 2009.

denouncing the CCM at the hour of its agreement would create a disastrous impression among many participating states and in the media. Conferring on the spot with the Lebanese and British delegations, O'Ceallaigh asked the UK to flex just a tiny bit more. After consulting by telephone with his authorities in London, the UK's lead negotiator agreed. It meant the President now had to sell this change to his text in the Committee of the Whole, when moments before he had adamantly refuse to amend it in his consultations with Canada, the CMC and the UK.

7. The CCM's adoption

Visibly nervous as he seated himself at the podium, O'Ceallaigh called the Committee of the Whole meeting to order. Without further ado, he asked the Deputy Foreign Minister of Zambia to speak, following protocol about seniority in speaking order. O'Ceallaigh hoped that this influential government in the Africa group would speak in support of his text. While talking in generally supportive terms, however, Zambia did not endorse the draft as a final product. So O'Ceallaigh spoke again, noting that agreement was now needed:

> "The Presidency Paper before us represents my assessment at this point of where the best balance of interests and compromise consistent with the Oslo Declaration now lies. It is a package of elements that entails concession for all sides but remains nevertheless an extremely ambitious Convention text that meets the objectives we set ourselves in Oslo in February last year".[182]

Zambia took the floor again, this time on behalf of the Africa group. Now Zambia made it clear that the Africans could endorse the package, although they remained unhappy with elements of the text. Zambia sternly warned that the Africans would

[182] My transcription of the President's verbatim remarks to the Committee of the Whole, afternoon of 28 May 2008.

reconsider if others opened up the text. A cascade of CCM endorsements ensued with New Zealand, Canada, Mexico, South Africa, Switzerland, France, the Philippines and Indonesia echoing support for the "ambitious, detailed and balanced text".[183] Spotting his moment, O'Ceallaigh intervened again to alter article 4, paragraph 4(a) to make a "correction" and insert the word "strongly" agreed with the Lebanese and British.[184] No one objected.

More than two hours of statements endorsing the CCM followed from states, the UN, the ICRC and the CMC. Finally, early that evening, O'Ceallaigh concluded the Committee of the Whole and reconvened the meeting in a five-minute long Plenary so that negotiators at the Dublin conference could take the decision to return to Croke Park the day after next—on Friday, 30 May 2008—to formally confirm Wednesday's adoption of the Convention (Various, 2008g), which it did. The world now had a new humanitarian treaty categorically banning cluster munitions (Various, 2008b 5).

8. Conclusion

This Chapter's examination of the Dublin negotiations on the CCM underlines the difficulty and complexity of international negotiations, even those in a setting in which states are predisposed toward achieving agreement. In Dublin, procedural games of the sort sometimes seen in other multilateral security-related fora such as the CD and CCW were largely absent. And all states were agreed as negotiations commenced that at least some of the weapons generally regarded as cluster munitions were unacceptable and so should be outlawed. Yet the negotiations could still have failed, for example if these had

[183] Ibid.

[184] Ibid.

become overly polarised between the Teetotal states and those nations holding out for exemptions from the definition of cluster munitions.

The biggest threat to an outcome turned out to be the interoperability issue. A humdrum technical and legal exercise for military lawyers in other contexts became one of ominous importance late in the Oslo process largely due to the alleged concerns of a state—the US—not even participating in it. Interoperability had little directly to do with the legitimacy of cluster munitions per se, and it did not challenge evidence emerging about their hazards to civilians or the desirability of curbs on them. Instead, the US in effect posed a question to its friends and allies: how are you all going to make your security obligations work, since we won't be CCM members? By focusing on such alleged difficulties, rather than attacking humanitarian objectives like those expressed in the Oslo Declaration, US policy makers painted a picture of themselves as responsible realists on cluster munitions, and those at the core of the Oslo process as irresponsible utopians meddling with international security and stability.

Such insinuations were hard to banish entirely, and thus interoperability came to have a bearing on the outcome of the CCM negotiations because of its impact on the perceptions of some Like-minded states, in particular. This is of importance, as will be seen in the next Chapter, because it underlines that explanations based solely on the argument that cluster munitions were de-legitimised are not in themselves entirely sufficient to account for the CCM's emergence. Nor, historically speaking, was the de-legitimisation of cluster munitions smoothly continuous. Efforts to stigmatise these weapons passed through several stages, each reversible and with its own risks and obstacles. Part III deepens this examination.

PART III

CHAPTER 8: FRAMING INTERNATIONAL EFFORTS ON CLUSTER MUNITIONS

1. Introduction

In the mid-1990s, Martha Finnemore observed that the problem of how states defend their interests is the focus of the most attention in political science, yet it is only part of what international politics is about. "Before states can pursue their interests, they have to figure out what those interests are" (1996b ix). In 2003 most states did not really understand the problems associated with cluster munitions, or how to respond to them. An important related question concerns which factors affect the constitution and pursuit of those interests—including which actors, not all of them necessarily states.

Part II of the thesis described how and why the preferences of policy makers in many nations (including some cluster munition users and stockpilers) were influenced, and aligned into a collective framing. Specifically, their outlooks altered from a state at the turn of the new millennium in which cluster munitions were regarded as legitimate weapons to one only a few years later in which these were viewed as inherently problematic. The generation of humanitarian evidence about cluster munitions, its use in argumentation aimed at undercutting the legitimacy and utility of these weapons, and enhanced receptivity amongst states to these arguments due to contemporary international circumstances were all contributing factors. Ideational and normative factors were also significant: although aspirational and sometimes observed in the breach, the civilian protection dimensions of the IHL regime helped to orient states' intersubjective understandings about appropriateness. This orientation played out in

differing ways in the Oslo process and CCW work on cluster munitions in view of differences in the nature of their respective discourses.

Analysing this evidence of reframing and its possible implications for broader understandings about how new international regimes are constituted is the subject of this Chapter. But reframing is part of the story. It does not ultimately account for how states "got to yes" on the CCM's consensus adoption without other factors also discussed below.

The next section examines the proposition in Part I of the thesis that changes in actor preferences and normative/ideational structures became mutually constituting between 2003 and 2008. This is an important matter to settle, as theories about the CCM's emergence tend to involve two common simplifications. The first is to portray the CCM's emergence as a simple causal relationship between an independent and dependent variable: for example, cluster munitions were banned because they became de-legitimised to the point they were widely viewed as unacceptable. There is more than a grain of truth in this. However, it fails to illuminate *why* de-legitimisation occurred, or why it necessarily resulted in a legally binding treaty.

Associated with this simplification is dichotomisation of structure and agency in some theorising. One of these poles represents the view that international campaigning on cluster munitions resulted in a treaty because the structure of the early 21st century international security environment facilitated it. Conversely, there is the view that a ban on cluster munitions was a triumph for activist agency, and NGO "power" in particular. However, couching structure and agency as either dominant or subordinate aspects of the CCW's emergence is too simplistic, as will be shown. Related to this, section 3

considers how prominent civil society actually was in this process of collective reframing of cluster munitions. In particular, how strong is the evidence that the NGOs really shaped state behaviour? And what about other non-state actors?

Section 4 considers convergence within the Oslo process over the key substantive issue—of defining cluster munitions as a category, and therefore what would be banned in view of the definition's structure. There is distinction to be drawn between processes of frame alignment about the general nature of the cluster munition "problem" and the specific characteristics of convergence over an agreed category of weapons to be banned. Chapter 7 showed that despite early frame alignment, contestation over defining cluster munitions continued until at least midway through the Dublin negotiations.

Convergence in Dublin was also the product of other factors. The meaning of cluster munitions as unacceptable means of warfare was profoundly shaped by the Oslo process discourse and the slippery slope toward prohibition it created based on the Oslo Declaration. There were also instrumentalist bargaining elements to achieving convergence consistent with utilitarian models of negotiating behaviour. It is clear from interviews with O'Ceallaigh and his team, for instance, that an overall bargaining outcome was a concern in their minds during the CCM endgame on issues such as the cluster munition definition exclusions, transition periods and article 4's provisions (see Chapter 7).

Moreover, adoption of the CCM would, in the Dublin negotiation's final endgame, also depend on convergence on military interoperability. Interoperability had become crucial to the broad acceptability of the overall package of measures in the

President's text to states in the treaty negotiation. In this regard, the research in this thesis tentatively suggests that the US actively constructed interoperability as a problem issue for states allied to it participating in the Oslo process. This, it is suggested, could be viewed as a competing or attempted counter-framing to that of banning cluster munitions causing unacceptable harm, one intended to shift emphasis away from a humanitarian ban solution to lesser technical standards due to purported national security risks for those friends and allies of the US thinking of joining a new ban treaty it would probably shun. Setting interoperability to one side, or treating it simply in terms of an outcome of utilitarian bargaining, does not do justice to understanding how this had a bearing on the CCM's emergence.

A US counter-framing contains implications for published theories to date explaining international efforts to address the humanitarian impacts of cluster munitions. Most of these theories regard the CCM's emergence as resulting from erosion of widespread assumptions about either the military utility *or* acceptability of cluster munitions, as outcomes of learning and normative bandwagoning behind leader states. Here, a slightly different conclusion is suggested. First, military utility and humanitarian acceptability actually represented differing emphases in considering the effects of cluster munitions rather than competing alternatives. These two aspects can be thought of as in tension; a tension that resonated differently in the Oslo and CCW processes due to the contrasting ways in which discourse about cluster munitions was structured within them, as mentioned above.

Second, the military interoperability issue presented certain Like-minded states in the Oslo process with a dilemma. In effect, this choice was to choose to join a new

standard widely judged appropriate in moral and humanitarian terms, but which could have negative material consequences for their military relations with the US. Most of the Like-minded chose to join in adopting the CCM. Yet it was never their only option: these states could have adopted national policies reflecting their belief that cluster munitions were no longer acceptable rather than joining the ban treaty. Or, as a grouping, they could have abandoned the Oslo process in order to work solely in the CCW on regulating cluster munitions as the US was doing, and would have preferred they do too. Thus, on its own, de-legitimisation of the weapon does not seem to account entirely for why the CCM was so widely adopted on 30 May 2008. Issues of humanitarian identity also exerted effects on policy makers such as the UK, France, Germany and Japan to remain in the Oslo process, and ultimately to join the CCM.

Section 5 revisits the proposition first examined in Chapter 3 that the CCM's achievement is not explained fully by rationalist-materialist theoretical approaches prevalent in the IR literature. In this section, Chapter 3's *how*, *what* and *who* problems for materialist-rationalist approaches are related specifically to the CCM's emergence with reference to examples from Part II. This prepares the way for the conclusions of the thesis in Chapter 9.

2. Changes in actor preferences and normative/ideational structures evolved to bring about the CCM in 2008

In this thesis it is argued that changes in mutually constituted actor preferences and normative or ideational structures evolved to bring about the CCM, something not possible before the new millennium. As noted earlier in the thesis, consciously neorealist and neoliberal explanations for the CCM's emergence are currently rather

thin on the ground. It is possible, nevertheless, to argue that broader and deeper features of the material structure of the international environment drove the CCM's emergence. In situations such as multipolarity, neorealism allows for the possibility that small and medium-sized powers could successfully pursue their interests counter to the international power structure by exploiting the balance of power between larger, militarily more-capable states. In mature anarchy, a hegemonic power may find its power constrained, for instance due to competing or conflicting priorities or divided attention (a phenomenon reflected in Paul Kennedy's often-cited concept of "imperial overstretch") (1987), which could permit less powerful states to achieve their ends counter to the material balance of power. However, these outcomes are viewed by neorealists as context specific blips rather than trends, and are often both reversible and, indeed, reversed as the stark realities of the distribution of material power reassert themselves over the longer run.

In neoliberalism, the main purpose of any international regime is to facilitate more efficient coordination and cooperation between states, with the accumulation of these structures creating a rational way to reduce uncertainty (the "shadow of the future"). In this way the emergence of the CCM could be seen as the product of the aggregated interactions of states with overlapping preferences moving them closer to Pareto efficiency and thus the new structure. In both neorealist and neoliberal conceptions, agent behaviour takes place within the constraints of existing structure, and there is little or no scope for transformation due to agency in the rules governing the structure of the international "system".

Arguing from a differing perspective, certain critical theory-influenced scholars suggest that agency played a role in the emergence of regimes such as the MBT and CCM, but did so only because deeper, tectonic shifts in the structure of international relations permitted this. They point to purported advances in military technology, changes in the nature of war fighting, and adjustments to strategic context (the end of the Cold War and collapse of stable bipolarity) and political climate (aversion of publics in Western countries to major battlefield casualties among their forces, increased concern about civilian protection in war) (Beier, 2011 , Cooper, 2011 , Cooper and Mutimer, 2011). Their analyses complement a strain of argument pre-dating the MBT that contends the structure of IHL discourse permits only obsolete or unimportant weapons to be regulated or prohibited (Jochnick and Normand, 1994). It follows that AP mines and cluster munitions were strategically marginal or obsolete weapons and, as such, outliers rather than real achievements in dismantling militarism. As such, the CCM's emergence may say little about broader trends in international behaviour.

In this way, it could also be argued that activism on cluster munitions at the international level was on a small scale and had little visible impact until states were socialised by exogenous structural factors to pay attention. This only really began to occur from the late 1990s despite protests against cluster munition producers in the 1960s and 1970s, and prior Mennonite lobbying of sceptical CCW delegates for a ban.[185] Such structural factors included the MBT and the CCW's Protocol V on ERW, broader legal developments such as the push toward the 2006 Disabilities Convention, obstacles to broader multilateral arms control progress diverting attention to

[185] Interview with Titus Peachey, (MCC), 3 December 2008.

"humanitarian" bases for arms restriction, alongside increased international sensitivity about the acceptability of civilian casualties in conflict because of "humanitarian" military interventions from the 1990s.

However, it is important to note that such structural factors were themselves social constructions shaped by activist agency in at least some cases. Indeed, some of those individuals, states and organisations central to international campaigning on cluster munitions were involved in the formation of these aspects of the structure of the international environment. In other words, agency shaped the structures that affected agency on cluster munitions. Distinguishing structure from agency thus often becomes difficult to do on close inspection in examining the CCM's emergence.

In fact, Part II of this thesis is full of instances in which efforts to deal with cluster munitions were mutually constituted. Mutually constitution refers in this thesis to a continuous or intermittent feedback loop between structural conditions, and the agency of the various relevant actors in the international environment as pertaining the legitimacy of use and possession of cluster munitions. For example, as Chapter 4 showed, certain states indicated their humanitarian concern about cluster munitions in formal prohibition proposals as early as 1974. However, these proposals were dismissed by the major military powers including the US and UK. It could, of course, be argued that the inability of the 1974 Swedish-led proposal was due to the bi-polar Cold War international system. Without excluding this explanation, there are three compelling and more specific reasons to consider.

The first reason is that policy discourse in the 1970s Geneva Diplomatic Conferences and the ICRC meetings pertaining to cluster munitions revolved around

their military utility. States' humanitarian concerns were primarily couched in IHL vocabulary. That discourse between diplomats, military people and their lawyers privileged contingent scenarios in the application of generic IHL principles such as proportionality, discrimination in attack and feasible precaution—principles that at that time were prominent issues in the context of negotiation of 1977 Additional Protocol I to the Geneva Conventions. Discourse was oriented toward application of these generic principles rather than new weapon-specific rules.

Secondly, as Western militaries brought a new generation of DPICM submunition-based weapons into service with a view to repelling potential Warsaw Pact ground attack in Europe, there was an arms control dimension: the overall conventional weapons balance tended to weigh against humanitarian arguments for scrapping cluster munitions, which were regarded largely as last-ditch and state-of-the-art defensive arms.

Alongside these emphases in international talks, a third reason is that solid evidence on which to support proposals for prohibition of cluster munitions was lacking. It was not even widely understood what cluster munitions were: before the mid-1970s relatively few states—and none of the co-sponsors of Sweden's proposals—possessed them. With few exceptions, the effects on civilians of US cluster bombing of North Vietnam, Laos and Cambodia were not widely reported. Moreover, the case made for specific regulation of cluster munitions in the 1974 Swedish-led proposal was based mainly on the effects of "cluster warheads" on combatants at-time-of-use—effects the co-sponsors of the proposal could not demonstrate.

Once Sweden lost interest in its proposal to ban cluster warheads and other anti-personnel weapons, international efforts on cluster munitions largely faded away.

Resurgence in these efforts would await *both* structural changes in the international system, and new forms of activist agency that (as it happened) looked to the example of the landmine campaign. In the post-Cold War environment, states in the West indeed became more sensitive to a "responsibility to protect" civilian populations (particularly after the wars in the Balkans during the 1990s), although ironically these purported humanitarian interventions tended to contribute to cluster munition hazards to civilians. The new environment also permitted IOs and NGOs to collect evidence about a range of humanitarian and developmental challenges, among these the post-conflict effects of mines and ERW on civilians. As shown in Chapter 5, Kosovo's aftermath marked a significant development in this regard, and UNDP and other agencies were by this time publicising the effects of unexploded submunitions in formerly closed countries such as Laos. Once the effects of these weapons were viewed through humanitarian or developmental prisms, it raised questions of acceptability and morality that the CCW and its predecessor conferences had previously skirted.

Civilian deaths from NATO cluster munitions in Kosovo and Serbia created a brief flurry of international concern sufficient for certain states to again raise questions in the CCW from 1999 about their legitimate uses. Public attention ebbed away, as it would again after US use of cluster munitions in its 2001 air attacks in Afghanistan and the 2003 Iraq invasion. And, because the pattern of harm to civilians from cluster munitions across differing contexts was as yet not widely understood, this potential for harm was at first assumed to be overwhelmingly a post-conflict issue, even by experts. It took some time for the loose epistemic community of interested UXO experts, researchers, IO policy staff and NGO activists to reach common understandings about

how the problems of cluster munitions—post-conflict, time-of-use and proliferation—fit together, let alone learn how to lobby states effectively, as Chapter 5 showed.

These challenges of collecting evidence and integrating it into a coherent framing cannot be underestimated. It would take until 2006 before the process of learning amongst state representatives, "experts" and NGO advocates reached the point at which states seriously began to consider an international negotiation of some kind to address the effects of cluster munitions on civilians. And initially, it was assumed by almost all interested states following the ERW negotiations that the CCW was the default forum for action.

This relates to a second example of mutual constitution, one that demonstrates that seeking to assess the relative roles of structure and agency presented dilemmas for participants in international efforts on cluster munitions, as well as for subsequent scholars. As related in Chapter 5, Belgium banned cluster munitions in early 2006, and Norway had a new government willing to allocate significant resources to push for some sort of international ban on the weapons. One way of seeing the dilemma Norway faced was over whether structural conditions and activist agency had reached a point of mutual constitution at which it could facilitate a humanitarian process on cluster munitions that would stand a reasonable prospect of success. Should Norway poke its head above the parapet?

From the point of view of structure, 2006 was a key year because of Norway's domestic election cycle (which meant an international process would need to start soon), and the CCW's five-yearly review meeting in November. From the perspective of agency, Norwegian policy makers were trying ascertain whether the CMC and

sympathetic IOs such as the ICRC and relevant parts of the UN were adequately strong partners. The latter Norway would need for their credibility with states and substantive expertise; the CMC was crucial in order to create pressure on governments by means of its members' national campaigns and international advocacy team to participate in and support any Norwegian-led international process. Norway ultimately did decide to play a leadership role in championing a freestanding international treaty process on cluster munitions. But it was controversial, even within Norway's bureaucracy: to some, it seemed a risky thing to do.

It also soon became apparent that a number of the states adhering to the Oslo Declaration, foremost amongst them France, Germany, Sweden and the UK, saw themselves as supervising the Oslo process to ensure it did not prohibit weapons they possessed which others considered to be cluster munitions or otherwise "get out of hand" (US Embassy - Stockholm, 2007). In this regard the drafting of the brief Oslo Declaration with its unacceptable harm framing was a tactical masterstroke. It left open the question of which cluster munitions cause unacceptable harm to civilians, while allowing the nascent core group and the CMC to present the process as having a clear ban goal. And, it positioned possessor states participating in the Oslo process at the top edge of a slippery slope. Answering the question *which* cluster munitions should be banned would necessitate the users and stockpilers of these weapons in the Oslo process to engage in a discourse predicated on the assumption that at least some cluster munitions were unacceptable.

The Oslo Declaration altered the orientation of discourse from the CCW's emphasis on effects of cluster munitions in terms of their military utility, to emphasis on

effects in terms of actual consequences. It would all depend on how this Oslo process discourse was structured, along with two attendant factors. Firstly, could those calling for prohibition of cluster munitions marshal sufficient evidence and argument to prevail in that discourse? Secondly, could the core group resist diplomatic pressure to pursue the split-the-category type approach to defining cluster munitions of the kind historically seen in CCW discourse?

A split-the-category type of discourse was by now being replicated in CCW talks in line with its post-2006 mandates concerning the weapon, and it allowed states resistant to restrictions on cluster munitions to dictate the pace and nature of work. This is why the core group's decision before the December 2007 Vienna conference to stick with the define-and-ban approach to defining cluster munitions in the Oslo process was significant. The discursive structure of those talks, which continued to the negotiations in Dublin six months later, created an environment in which actor identities and preferences in the Oslo process could be influenced on the nature and extent of the ban. The way in which these talks were structured was more permissive than the CCW as to who could take part, and which evidence could be presented.

As importantly, the Oslo process definitions discourse was more rigorous in its cross-examination of evidence. In this respect, the ICRC's expert meeting in Montreux in April 2007 set the standard for this in bringing together pro-ban actors with some of the large military powers asserting the continued legitimacy of these weapons while shunning the new Oslo process. Montreux showed that it was possible to use evidence and critical argument to shift the burden of proof toward users, manufacturers and stockpilers.

MacKay's Socratic style of facilitation oriented toward a define-and-ban approach suited those chipping away at proposed exclusions like self-destruct and percentage reliability rates such as the CMC, ICRC and Teetotal states. It frustrated Like-minded state representatives unable to rest on their assertions about the acceptability of their weapons. With the debate not framed in terms of "good" and "bad" models of submunition but on effects, these delegations found themselves unable to use their usual lines of argument to develop firm footholds for munitions such as the M-85 with self-destruct or even electronically-fused submunitions such as the Spanish MAT-120.[186] And, in the process it exposed dissonance between the stated support of these delegations for the aim of the Oslo process and their behaviour aimed at safeguarding their weapons and military relationships—something NGOs exploited through the CMC's national campaigns.

Importantly, others were watching and learning. These others included a large number of states joining the Oslo process for humanitarian reasons after the Oslo conference. Some of these states possessed stockpiles of cluster munitions, but many did not. A number of them assumed (encouraged by CMC campaigners) that the Oslo Declaration represented an explicit ban goal for all cluster munitions, without necessarily realising upon joining the Oslo process that the weapon category remained to be defined. Survivor testimony and coherent presentations of humanitarian evidence like the analysis of M-85 reliability presented in Vienna and Wellington had a major

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[186] MAT-120 mortar-fired cluster munitions were targeted against civilians in the Libyan town of Misrata in 2011 by forces supporting Qaddafi, and appeared to exhibit significant failure rates despite Spain's claims for the weapons during the Oslo process. See CHIVERS, C. J. (2011) *Down the Rabbit Hole: Qaddafi's Cluster Munitions and the Age of Internet Claims.* [Web blog] New York Times, [cited 24 June 2011].

impact on these delegations, and helped them to align as Teetotal states in favour of a broad definition of cluster munitions with as few exclusions as possible. The Oslo process discourse thus provided a way for states to calibrate their normative expectations and negotiating tactics. This framing of cluster munitions as "unacceptable" as a category provided an important counterweight to the Like-minded.

This compounded difficulty for the countries of the Like-minded, especially as these countries had little to unite them beyond dissatisfaction with process once the Dublin negotiations commenced. Diplomats from these states decried Oslo process dynamics, for instance in Wellington, because of the pressure it put on their delegations to drop key reservations about the developing text such as definitional exclusions, transition periods and (increasingly) interoperability "red lines". The particularly tough part was that the Oslo Declaration goal was increasingly the "brand" their parliamentarians and government ministers in capitals wanted to be associated with—especially with direct domestic lobbying from NGOs and media coverage in "battleground states" (a CMC term) like the UK, and even from other parliamentarians groomed by campaigners in the UK House of Lords.

Leaked US diplomatic cables indicate that officials in some Like-minded states were concerned about the pull of the Oslo process on their political decision makers (US Embassy - Helsinki, 2007 , US Embassy - Paris, 2008 , US Embassy - Tokyo, 2008). The slippery slope some of the Like-minded diplomats had feared from the outset of the Oslo process was indeed a real one. Participation in the initiative had advantages in the short term, and it was possible to present the illusion of significant influence in order to justify this to the US. But participation also engendered changes in

moral self-identity amongst policy makers as they came to be associated with the Oslo process, and made it harder for them to credibly argue that their states would really walk away if not all of their major demands were met.

Although shunning the Oslo process, the US nevertheless observed the initiative unfold closely —including receiving reports from diplomatic interlocutors from amongst some Like-minded countries like Australia, Canada, Japan and the UK. The leaked US cables discussed in Part II indicate that despite their assurances to US diplomats, policy makers in those states saw advantage in participating in both the Oslo process and CCW work, and were increasingly committed—in appropriate company—to a humanitarian treaty. Apparently alarmed by the momentum growing in the Oslo process, the US met in confidential bilateral talks with the Russians in Moscow in mid-2007 (US Embassy - Moscow, 2007). Montreux had represented a defeat for this states, and the two countries agreed to permit CCW negotiations on cluster munitions the following year. Soon afterward their delegations began to hint about this change of heart in public.

It was around this time, as far as is known, that the US also began to draw the attention of its allies to issues around military interoperability. The US framed interoperability as an important issue of concern, but suggested no potential solutions. Indeed, as the Dublin negotiations drew closer, leaked US diplomatic cables reported requests from various interlocutors, for instance, in Australia, Canada and Ireland, for the US's guidance on how it wished to see interoperability dealt with in a cluster munition treaty. Although the leaked cables to which there is public access is almost certainly only a small subset of US diplomatic traffic on cluster munitions during that

period, no indications are discernible that advice from US officials was ever forthcoming. Given the present state of knowledge, it leaves open the strong possibility that having constructed this counter-framing of a cluster munition ban as an important national security concern, the US deliberately withheld such advice in order to create obstacles to successful negotiation of the CCM. Why the US government would have withheld its advice remains speculative. Perhaps Bush administration officials felt the US had little to gain from providing such advice, and thus possibly easing the way for a treaty they did not want to emerge at all.

8.3 Civil society played prominent roles in the collective reframing of cluster munitions, and thereby shaped state behaviour

Part II of this thesis indicated civil society concern about the humanitarian harm caused by cluster munitions since the South East Asia War in the 1960s. However, these concerns did not result in international restrictions cluster munitions, or in adjusting the nature of the inter-state discourse about the effects of the weapon. This would require greater evidence of post-conflict cluster munition hazards to civilians introduced from the late 1990s, and a consortium of NGOs oriented toward international campaigning on cluster munitions emerging from late 2003. By late 2005, the CMC would be in a position to have an increasingly prominent influence on state attitudes and behaviour concerning cluster munitions.

The CMC's formation in November 2003 had a number of consequences. First, although initially skeletal in terms of staff and resource, the CMC provided a focal point for civil society activity. Growing from an initial group of around 10 NGOs involved in setting the CMC up during 2003, by late 2006 the CMC had 170 member NGOs in 48

countries (Nash, 2006 36). Moreover, the CMC's establishment indicated a new level of commitment from established NGOs in the CCW context such as HRW, HI, MAC, NPA and Landmine Action—even if this commitment was more potential than actual to begin with. The CMC resembled a network more than an advocacy coalition until 2005 as activists themselves later admitted (Moyes and Nash, 2011 17). Nevertheless, the CMC's founding signalled to states that NGO concern and pressure on them would be less sporadic in nature henceforth: a second impact. A third impact came of the CMC and those of its member NGOs frequently present at Geneva multilateral meetings encouraging diplomats to consider cluster munitions as a logical next step beyond agreements on ERW and MOTAPM in the CCW, and MBT implementation. This persuasion was a gradual process, and until 2006 it was as much about engaging state representatives by means of side-events, bilateral briefings and publications as it concerned directly lobbying them.

As mentioned in section 8.2, during the period from late 2003 to mid-2006 almost all of the states at that time prepared to consider negotiations on cluster munition restrictions thought in terms of the CCW's work agenda post-2006 rather than another Ottawa-style process. Within the CMC there was also the concern that cluster munition campaigning should not detract from civil society commitment to monitoring and contributing to MBT implementation. There was also some puzzlement amongst activists about how to develop an effective international campaign on cluster munitions that reconciled its contrasting time-of-use and post-conflict dimensions.

Hence, the fourth impact of the CMC's formation: it prompted those individuals in a position to do so to try to develop coherent conceptual schemata for addressing the

humanitarian impacts of the weapon. The central issue was how to "frame" the problem of cluster munitions in a way that could be easily understood, and make an international treaty seem possible and, indeed, even inevitable. For those in the CMC thinking hardest about these questions, the view took hold over time that the most compelling approach to cluster munitions was also the most ambitious: to frame the weapons as civilian hazards requiring a comprehensive ban solution. McGrath had argued this coherently as early as 2004, (though it had little direct effect on states or the CMC steering group's policies at that time) and it was the view of Moyes, Nash, Rappert, and Østern—who applied this thinking in lobbying the Norwegian government to take an international lead.

The CMC's roles in the context of the CCM's regime emergence are described well by Keck and Sikkink's work characterising the potential roles and extent of TAN influence, which was based on research into other, earlier international processes. Theorising by Hubert (2000 , 2007), Lawson (2002) and Rutherford (1999 , 2000) drew upon this work to analyse ICBL framing efforts and advocacy in the MBT campaigning and to argue that this TAN influenced small- and medium-sized state behaviour. Consistent with Keck and Sikkink's model (and as illustrated by Part II of this thesis), the CMC:

- Contributed to framing international debate about cluster munitions and getting humanitarian issues about the weapon on to the international agenda;
- Encouraged discursive commitments from states and other policy actors;
- Caused procedural change at the international and domestic level;
- Affected policy; and

- Influenced behaviour in target actors.

Table 1 overleaf provides specific examples of each of these types of TAN influence.

Table 1: Examples of CMC (TAN) influence on state behaviour

Keck and Sikkink (1998) description	**CMC-related example**
Framing debates and getting issues on the agenda	• Presentation of humanitarian evidence of harm to civilians from cluster munitions, much of it post-conflict in nature, is gathered by NGOs (Chapters 4-7). • CMC framing that "Cluster munitions don't do what they're supposed to do" in terms of either accuracy or reliability effects gained hold over the 2003-08 period (Chapters 4-7).
Encouraging discursive commitments from states and other policy actors	• CMC encouraged Norwegian government to step forward to lead a freestanding international process toward a humanitarian treaty on cluster munitions (Chapter 5). • CMC encouraged Swedish-led 26 country declaration on cluster munitions in CCW in late 2006: this declaration paved the way for many states to attend the Oslo conference since it seemed consistent with humanitarian concerns these states found themselves expressing (Chapter 5). • CMC lobbied states (especially non-CCW members) to join Oslo process (Chapters 5, 6, 7). • CMC lobbied states to join the February 2008 Wellington Declaration, and attend the Dublin negotiations in May (Chapters 6 and 7).
Causing procedural change at international and domestic levels	• CMC appeared as a (sufficiently) credible civil society partner for Norway and other states seeking a humanitarian treaty on cluster munitions (Chapter 5). • CMC built up the 2006 CCW review conference as a make-or-break event for the relevance of that forum for dealing with cluster munitions (Chapter 5).
Affecting policy	• CMC put pressure on Oslo core group states to pursue define-and-ban approach to defining cluster munitions rather than splitting the category (Chapter 6). • CMC policy arguments against exclusions from cluster munition definition and exceptions such as transition periods were taken up by Teetotal states in Oslo negotiations (Chapters 6 and 7). • CMC advocacy and policy arguments on issues related to disability rights and victim assistance resulted in more elaborate relevant provisions in the CCM than in preceding treaties such as the MBT (Chapter 7).
Influencing behaviour in target actors	• NPA / CMC pressure in 2005-06 on Norwegian government to test its cluster munitions in a transparent manner pushed Norwegian government policy toward calling for an international ban (Chapter 5). • HI Belgium, with support from other CMC members, successfully lobbied Belgian lawmakers to prohibit cluster munitions in early 2006 (Chapter 5). • Oxfam GB / Landmine Action / CMC spearheaded civil society, media and parliamentarian pressure on UK government to join CCM at Dublin negotiations, which involve it making concessions, for instance over banning of direct fire submunitions (Chapter 7).

However, it is important to recognise that the CMC and its TAN constituents were not the only non-state transnational network interested in cluster munitions. There was also the network of individuals from IOs, humanitarian agencies such as the ICRC, researchers and academics. This community engaged in learning in new patterns of reasoning early in the period about the effects of cluster munitions, and in the course of this process helped other international actors to learn also through knowledge diffusion of various kinds. It predated the CMC, and was at least partially constituted of knowledgeable practitioners working with an increasingly detailed global picture of post-conflict mine and ERW contamination that included technical reports from the GICHD (2002 , 2005 , 2007), UN inter-agency mine action assessments in specific post-conflict environments, ICRC analysis (ICRC, 2000a , King, 2000 , Maslen, 2000) and surveys of socio-economic impact such as UNIDIR's Albania-Laos study (Cave, 2006a).

This network of knowledgeable practitioners interested in cluster munition effects meets most of the criteria for entities Haas described as epistemic communities (1992). It shared a set of normative and principled beliefs providing a value-based rationale for the social action of community members—in this case humanitarian concern about the effects of cluster munitions on civilians. Secondly, this community shared causal beliefs derived from their analyses of practices leading or contributing to the central problems of cluster munitions, which then served as the basis for elucidating multiple linkages between possible policy actions and desired outcomes. In particular, the collective view developed that the post-conflict effects of unexploded submunitions constituted a pattern of harm evident across different spatial and temporal contexts,

which strongly suggested coordinated international action to ameliorate or prevent further harm.

Moreover, Haas theorised that an epistemic community on a given issue shares notions of validity ("intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise" (1992 3)). In this regard, the epistemic community was characterised by its emphasis on consideration of the effects of cluster munitions arrived at by empirical evidence and logical argument rather than self-serving contingent scenarios created to rationalise cluster munition possession. This community also shared an awareness of the shortcomings of the status quo oriented discourse amongst users and stockpilers in the CCW.

An epistemic community also possesses a common policy enterprise; "a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence" (Haas, 1992 3). This shared policy enterprise was not to ban cluster munitions; rather it was to reduce their deleterious impacts on civilians. Over the 2003-2008 period, members of this community met at side events on the margins of the CCW and Oslo processes, as well as in many direct contacts between individuals. On the whole, its constituents remained more open to the possibility that technical fixes and changes in user practices might adequately address the humanitarian hazards cluster munitions posed for longer than the CMC's lead activists did. Such views altered over time, though, until by the ICRC Montreux expert meeting in April 2007 most of these technical, legal or policy experts had concluded that only the

weapons' prohibition would prevent future humanitarian consequences like those resulting from the 2006 Southern Lebanon conflict.

Certain individuals working for NGOs (for instance from HRW, Landmine Action, and the CMC's executive team) oriented toward empirical and policy research worked closely with some of the constituents of this epistemic community. Just as the CMC did, this network of experts had an interest in engaging with states representatives, initially from sympathetic CCW member states in view of talks in that forum such as Austria, Belgium, Canada, Ireland, Mexico, the Netherlands, New Zealand, Norway, Switzerland and Sweden. Diffusion of its learning outcomes through engagement with state representatives helps to explain considerable continuity evident in the use of evidence and argumentation between work on mines, ERW and cluster munitions, the extent of contact between CMC campaigners, and their command of empirical research and familiarity with argumentation concerning the humanitarian legitimacy of those weapons.

It also lent credibility to the CMC's claims that experts from entities such as the GICHD, ICRC and UN bodies such as UNDP, UNICEF, UNIDIR or UNMAS expressed similar concerns and complementary arguments. And, experts from these institutions were able to facilitate contacts between diverse actors on cluster munitions in the context of field visits to cluster munition-affected areas, workshops (such as the ICRC's Montreux expert meeting and the Geneva Forum-UNIDIR events) and side events on the margins of MBT and CCW conferences in ways that benefited the CMC, but which it could not do itself. As Norwegian submunition testing and then the Oslo process occurred, this community expanded to include the input of certain state experts.

It means that the CMC was not in alone in influencing states, especially when it concerned knowledge diffusion. Moreover, CMC activists learnt and otherwise benefited from that epistemic community in their advocacy and research, and it contributed to their emergent framing of cluster munitions as "weapons that could be considered unacceptable" (Moyes, 2006 4). In view of such evidence that international campaigning was a process about intersubjective meaning in which the CMC was also subject to the input of other actors, it further underlines that collective reframing was mutually constituted. This is significant because prior theorising about the influence of TANs like those in the international landmine campaign has sometimes implied a one-way street in TANs exerting influence over how other actors frame issues but not *vice versa* (see Chapter 2).

Beside the influence of an epistemic community, examples are also discernible of the impact of state actors on TAN behaviour in cluster munition efforts. From 2005, for instance, the CMC viewed the Norwegian government as a partner to be cultivated as a potential champion in international efforts, and so the Coalition was keen to prove itself as a credible civil society partner in order to maximise the likelihood of Norwegian support for a global treaty campaign. This meant trying to engender a high level of consultation hopefully leading to trust. And, as Part II of the thesis showed, between 2003 and 2008 there was an ongoing internal CMC debate about the nature of its campaigning call. It put those advocating a strong ban call at odds with others (such as HRW and MAC) concerned about the saleability and credibility of such a call with sufficient states for an international campaign to be successful once launched. If the CMC was not actually influenced by state behaviour, then its foremost activists were

certainly acutely conscious of the potential; a perception that, in turn actually affected CMC internal strategy and decision-making.

Meanwhile, of course, states also affected other states' framing of cluster munitions. Norway, which was a cluster munition possessor, member state of NATO and a country with sophisticated technical military capacity, was an influential state during the Oslo process, not only in the core group and among Teetotal states, but even some of the Like-minded. Once Norway instigated the Oslo process (encouraged, of course, by civil society), its military establishment swung behind the government's desire for an international ban because its own submunition testing revealed failure rates it considered unacceptable. These diplomats, soldiers and defence scientists were instrumental in making the case for prohibition in military-military contacts with other cluster munition possessors such as France, Germany and the UK often suspicious or dismissive of NGOs.[187]

In view of this, it must be concluded that collective reframing at an international level about the utility and acceptability of cluster munitions was more complicated than just being a product of TAN influence on state behaviour. Nevertheless, this is not inconsistent with the proposition that the CMC influenced state behaviour in each of the ways described by Keck and Sikkink.

A substantial criticism of some explanations for the MBT is that they over-privilege activist agency. Are limits discernible on civil society activist agency in the emergence of CCM? The answer is emphatically yes. Two differing examples illustrate this. The first concerns the CMC's influence over the Oslo core group. In view of the

[187] Interview with French military official (anonymity protected), 29 July 2008.

CMC's strong partnership with Norway (and Norwegian diplomats' belief that civil society pressure was vital to creating the conditions for negotiation of a robust cluster munition ban treaty, especially through national-level lobbying of target states), it might be expected that the core group consulted closely with the CMC throughout the Oslo process. However, the CMC's leadership was sometimes frustrated at what they perceived as a lack of communication with them by the core group as a whole. As seen in Chapter 6, in mid-2007 CMC activists became concerned over which discursive structure (split-the-category or define-and-ban) the core group would deploy to try to manage definitional discussions in Vienna and the remainder of the Oslo process. After lobbying members of the core group by e-mail and telephone in the autumn of 2007, there was little more that the CMC could do. Core group diplomats acknowledged the lobbying and said they were mindful of NGO concerns, but denied it had a significant bearing on their decision to pursue a define-and-ban approach.[188]

On that occasion, a decision of importance for the course of the Oslo process swung the CMC's way. Had the Dublin negotiations been predicated on sorting good cluster munitions from bad primarily on the basis of technical criteria rather than evidence of humanitarian effect, then the eventual prohibition would likely have been much weaker. As Chapter 7 related, however, the CMC was not so fortunate in the final endgame on article 21 interoperability provisions. In the last hours of the negotiations of the CCM, attempts by CMC campaigners to convince the Irish President to amend article 21 paragraph 3 of his composite text were opposed by Canada and the UK, and thus dismissed by O'Ceallaigh.

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[188] Personal communication from Ambassador Don MacKay (retired), 1 December 2011.

These two examples suggest that while civil society can have considerable influence on state policy makers by helping them to learn, and to lean certain ways in their decisions in cases where these states lack strong or very certain preferences, there are at least two contexts in which their influence is more limited. The first is in situations in which states are concerned that others will perceive their actions as overly influenced by NGOs. Core group states were especially sensitive to claims that they were "in bed" with the CMC, and that the structure of the Oslo process was somehow rigged to undermine the Like-minded states' abilities to influence outcomes. Yet core group diplomats also knew that their governments would be—and were—subjected to criticism and diplomatic pressure from states inside the Oslo process (the Like-minded) and outside it (the US) for behaviour at odds with the expectations of these actors.

The second context, as illustrated in the interoperability final endgame example, is one in which states have identified issues on which they have clear preferences, and learning is not involved. In such cases it seems very difficult for civil society actors to exert leverage, including through direct persuasion attempts. This suggests that for TANs to influence state behaviour they need to focus a high proportion of their effort on the pre-bargaining phases of negotiations since, over time, these actors are more likely to be able to influence identity formation and the development of negotiating positions that way.

This is not to say that NGOs cannot influence state behaviour at all during negotiations. NGO lobbying of Downing Street during the later stages of the Oslo process was an example of a distinctive tactic to influence state behaviour—one not

described by Keck and Sikkink. This tactic could be described as a reverse boomerang. By way of explanation,

> "domestic NGOs may directly seek international allies to try to bring pressure on their states from outside. This is the 'boomerang' pattern of influence characteristic of transnational networks where the target of their activity is to change a state's behaviour" (Keck and Sikkink, 1999 93).

CMC members certainly deployed the boomerang tactic. However, in the case of attempts to ensure the UK would adopt the emerging CCM text, NGOs directly lobbied susceptible domestic political policymakers at a bleak time for the Brown government's longer-term electoral future—Labour Party defeat in a domestic by-election. What was offered was the prospect of the UK being able to publicly proclaim some measure of leadership in the CCM process. This was a tempting prospect for Downing Street, and the UK Prime Minister's statements of commitment to the CCM in the middle of the first week and in the second week of the Dublin negotiations in effect overruled his officials' negotiating instructions on specific aspects of the draft CCM text. Thus, it can be described as a *reverse* boomerang tactic because British and international NGOs brought about targeted domestic pressure on a state to change its behaviour in an international negotiation. This was the opposite of a boomerang.

In sum, collective reframing of cluster munitions as a weapon with unacceptable humanitarian consequences amongst states occurred after the CMC emerged as network in late 2003, and especially after it transformed into a campaign with a ban aim, even if nature of this prohibition goal had still to be precisely determined. There is ample evidence that CMC and the constituent NGOs in this TAN contributed to this collective reframing. However, beside the CMC's influence there was also a discernible epistemic community oriented toward characterising and addressing the effects of cluster

munitions. And, states themselves played roles in collective reframing once they had learnt new patterns of reasoning concerning cluster munitions, evidence and argumentation that called into question previously held assumptions about the acceptability and even utility of these weapons. These actors also had an influence on TAN framing and behaviour in a process that, to a large degree, was mutually constituted.

4. Convergence over what constituted "unacceptable harm" to civilians from cluster munitions emerged dynamically and late in the Oslo process

In Chapter 3, a change in collective assessments of cluster munitions at the international level between 2003 and 2008 was described. (Collective here refers to a shift in viewpoint within a cross-section of states in the international community, not global consensus). The prior assessment state was that cluster munitions are acceptable or legitimate weapons provided they are used in conformity with IHL. The new normative situation amongst states in the Oslo process by the end of the Dublin negotiations was that cluster munitions should be prohibited as unacceptable weapons. Even major users and stockpilers of cluster munitions shunning the Oslo initiative such as Russia and the US became willing, by the end of 2007, to negotiate (much weaker) multilateral rules on cluster munitions (CCW, 2007b).

A number of explanations for the CCM's emergence over this period are based on the notion of snowballing de-legitimisation of cluster munitions at the international level. However, this generalisation requires caution. For instance, for most of the 2003-08 period it was not clear which weapons were cluster munitions since no agreed definition existed at the international level (GICHD, 2007). In other words, what

weapons were actually being de-legitimised?[189] Meanwhile, utilitarian bargaining between states can account for at least some aspects of the definition of cluster munitions emerging from the Dublin negotiations. (One example of this was the exclusion of air defence weapons with submunitions at the insistence of the UK, apparently in order to exclude its "Starstreak" missile system (Docherty et al., 2010 192-3).) Moreover, de-legitimisation on its own is descriptive, and does not elaborate the precise mechanisms to account for how the preferences of states were shaped in order to permit a broad category of cluster munitions to be banned. After all, this category encompassed weapons some national delegations had struggled hard to exclude from any prohibition throughout the Oslo initiative such as DPICM submunitions equipped with self-destruct mechanisms.

There were different stages of de-legitimisation in international efforts on cluster munitions. Issue emergence and processes of frame alignment were closely associated, and these are discussed below with the proviso that they preceded convergence, which might not have occurred but for additional factors.

4.1 Frame alignment

Scholars of transnational civil society activism have argued that frame alignment microprocesses within social movement organisations and TANs shed light on understanding the nature and behaviour of these entities. In the cluster munition context, this frame alignment model can also be extended to thinking about the behaviour of

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[189] Paraphrasing US Supreme Court Justice Potter Stewart on a threshold test for hard-core pornography (Jacobellis vs Ohio, 1964), one senior Mexican diplomat attending the Montreux ICRC expert meeting in April 2007 described the conundrum as akin to defining pornography: very difficult, even if "I know it when I see it".

state representatives, as well individuals within the TAN and epistemic community on the effects of these weapons.

To briefly recap, framing as meant in this thesis refers to conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.[190] (Legally binding treaties like the CCM are one form of shared understanding.) It follows that "frame alignment is a necessary condition for movement participation, whatever its nature or intensity" (Snow et al., 1986 464). In the context of their work on social movement organisations, Snow and his colleagues were particularly interested in "the various interactive and communicative processes that affect frame alignment" (464), which they call micromobilisation processes.

One type of alignment is frame bridging, which is the linkage of two or more ideologically congruent but structurally unconnected frames regarding a particular interest or problem. Linkage of the humanitarian logic to outlaw AP mines with banning cluster munitions was a prominent form of frame bridging in international efforts on cluster munitions. In this regard, it was not coincidental that many of the states participating in the Oslo process were supporters of the international MBT regime.

Initially during the 2004-06 period, frame bridging was difficult to do because of differences seen in the technical characteristics, roles and effects of these weapons. It took time for those concerned about cluster munitions to learn to become more adept in

[190] Of course, people are not blank slates in terms of their interpretative schemata for locating, perceiving, identifying and labelling occurrences within their life space and the world at large. In view of this, all framing is to some extent reframing.

using evidence and argumentation in mutually supporting ways that underlined similarities with the AP mine issue despite such differences.

This frame bridging was not universally successful even within the NGO community. Some NGOs involved in the landmine campaign such as MAG and the Halo Trust stood aside from campaigning on cluster munitions to focus on mine action-related activities. VVAF appears to have been the only landmine NGO to actually reject the notion of a ban on cluster munitions (VVAF, 2001), although this policy predated the CMC's emergence or subsequent frame alignment amongst NGOs or states. Mostly, objections to associating with campaigning on restrictions on cluster munitions (for example, the ICBL) were tactical and temporary and nature, not the result of incompatible framings of the issue. Nevertheless, a majority of the NGOs prominent within the CMC from its formation were those also active in AP mine ban campaigning. Post-conflict evidence generated by mine action related work motivated both these actors and the constituents of an emergent epistemic community on the effects of cluster munitions (as discussed in the previous section) as well as IOs including the ICRC and UN field agencies.

Just as significantly, the network of trust built up amongst individuals from a range of different entities including governments, IOs and NGOs in the Ottawa process fostered frame bridging between the landmine ban and efforts on cluster munitions. This network's constituents articulated complementary arguments and messages from the perspective of humanitarian protection. Once the Oslo process started, leader states such as Norway even argued there was "no reason why the very same states that adopted the Landmine Convention shouldn't join us in our effort to reach agreement on

a realistic ban on those cluster munitions that cause unacceptable humanitarian consequences" (Støre, 2007 6).

Frame amplification is a second category of alignment process. This is the clarification and invigoration of an interpretive frame that bears on a particular issue, problem or set of events. Snow and his colleagues identified two forms of frame amplification: those pertaining to beliefs and values respectively. Both are relevant to international efforts on cluster munitions. In this regard, values can be "construed as modes of conduct or states of existence that are thought to be worthy of protection and promotion" (Snow et al., 1986 469).

The value elevated in this context related to the view in IHL that civilians are persons deserving of special protection from the effects of hostilities. This value is held to be axiomatic to the purpose and operation of IHL, although it is sometimes observed in the breach in hostilities.[191] Most states claim to adhere to the notion that although civilian suffering is probably inevitable in armed conflict users of military force should not deploy weapons that put these people at particular, foreseeable risk. This was one initial justification for the CCW's establishment, for instance, and later for the MBT as Chapter 4 showed. Negotiations on ERW and MOTAPM in the CCW after 2001 increased the sensitivity of member states to being seen as aligned with this value, and this was reflected in their rhetoric in that forum—perhaps reflecting wider trends in the civilian protection debate (Barnett and Weiss, 2008). The CCW forum provided cluster munition activists a means to exploit this state rhetoric, and to introduce contradicting

[191] Reasons for breaches range from accident to negligence to deliberate targeting of civilians. See SLIM, H. (2007) *Killing Civilians: Method, Madness and Morality in War.* London: Hurst & Company.

evidence in support of a related belief amplification: that sufficient evidence of a persistent pattern of harm to civilians from cluster munitions existed across different spatial and temporal contexts.

The pattern of harm indicated cluster munitions were just the kind of weapons to put civilians at that kind of risk in view of their area footprint and submunition failures. (Beliefs here are "ideational elements that cognitively support or impede action in pursuit of desired values" (Snow et al., 1986 469-70).) As seen in Chapter 5, this belief amplification emerged initially amongst NGOs and the epistemic community interested in the effects of cluster munitions, in view of their accumulating knowledge. It put pressure on the contrary, established belief that humanitarian hazards from cluster munitions were sporadic rather than systematic, for which implementation of existing IHL was sufficient for civilian protection. However, if the hazards to civilians were in fact inherent to use of this weapon, then it exposed a conflict with values related to civilian protection discussed above if states failed to take action to ameliorate or prevent these effects. This tension exposed between the specific forms of value and belief amplification discussed above would complement another technique of frame alignment seen between 2003 and 2008—that of frame extension.

Frame extension is the portrayal of objectives or activities as attending to or congruent with the values and interests of potential adherents. Alternatively, in analysing MBT's emergence Price described this phenomenon as norm grafting, arguing that "Because of the existence of a viable chemical weapons taboo, even if not consciously invoked, a ban on landmines seemed a far less outrageous possibility to the denizens of international society than would otherwise have been the case" (Price, 1998

629). There was little reference to the chemical (or biological) weapons taboos in the context of subsequent efforts on cluster munitions, but the principle holds. One frame extension-related argument that proponents of a humanitarian treaty on cluster munitions invoked was that, in view of the actual (rather than presumed) effects of cluster munitions under operational conditions, these weapons were not as effective as militaries had been led to believe—or had bothered, in most cases, to inquire about (Rappert, 2005a). These weapons did not do what they were supposed to do—something that should affect users' cost-benefit calculations about their possession and deployment. Moving away from cluster munitions could also have moral and political benefits for states claiming their military interventions related to human rights or civilian protection: it was hard for users to claim humanitarian motives if their means and methods of warfare created a foreseeable, elevated hazard to the populations they were allegedly intervening to protect (Borrie and Cave, 2006).

There was, of course, also the MBT example and, to some extent, the CCW's ERW Protocol to build upon. As well as the arguments underlying frame bridging between the logic of AP mine and cluster munition bans discussed earlier, it was argued throughout the 2003-08 period that it was in states' interests to extend and embed these kinds of humanitarian norm because it reinforced the IHL regime in general. Deployment of this argument by the CMC, ICRC, UN and eventually the Oslo core group depended upon the target audience though, since some states participating in the Oslo initiative (such as Lebanon) were not MBT or CCW members. Protocol V on ERW (CCW, 2003), in particular, was widely regarded as weak, and its membership was initially limited. Nevertheless, it suited activists—and states especially nervous about bypassing the CCW—to argue that a cluster munitions agreement was a logical

corollary to Protocol V as unexploded submunitions were a form of ERW: these remnants were of special risk to civilians, and since Protocol V did not contain submunition specific measures or restrictions on use, a further agreement on cluster munitions would complement it (CMC, 2004).

A fourth kind of frame alignment is frame transformation or "keying". This is systematic alteration of the views of participants in a way that fundamentally redefines activities, events and biographies already meaningful from the standpoint of some other primary framework. There are two variants of frame transformation. The first variant, domain-specific frame transformation, pertains to "fairly self-contained but substantial changes in the way a particular domain of life is framed, such that a domain previously taken for granted is reframed as problematic and in need of repair, or a domain seen as normative and acceptable is reframed as an injustice that warrants change" (Snow et al., 1986 474). Global interpretive frame transformation, the second variant, is "a kind of thoroughgoing conversion that has been depicted as a change in one's "sense of ultimate grounding"" (Snow et al., 1986 475).

Domain-specific transformation was a feature of collective reframing on cluster munitions during the 2003-08 period: states were "keyed" from a situation in which hazards to civilians from the weapon were seen as exceptional, to viewing these as a cause of systematic and elevated humanitarian risk for the reasons discussed above. In contrast, there is little evidence to indicate state decision-makers' outlooks and behaviour were fundamentally redefined, or indeed that activists saw such fundamental transformation as necessary to achieving their humanitarian ends on cluster munitions. Rather, the other examples of frame alignment discussed in this section, for which

considerable evidence does exist, are sufficient to account for how the Oslo initiative emerged and why these states participated in it.

A significant point is that framing is not a discrete or a one-way process; it can involve many dynamic sub-processes, and framings can come undone, or be overturned by other schemata of interpretation as bases for action—including counter-framings. This is important in considering the de-legitimisation of cluster munitions since the concept can imply a one-way street, when in fact those arguing for some sort of international ban found that even once some state representatives appeared to have accepted a humanitarian framing, preventing back-sliding was sometimes a continual struggle. For example, the US's counter-framing of the cluster munition problem founded upon technical fixes to submunitions—and, later, emphasising interoperability concerns—affected the behaviour of national delegations engaged in the Oslo process in differing ways, and to a varying degree over time depending on their particular circumstances and perceptions.

Frame alignment as discussed above typified concurrent ways in which humanitarian concerns about the effects of cluster munitions were put on the international agenda over the 2003-07 period by prompting changes in viewpoint amongst state policymakers individually and in aggregate, and eventually why so many states participated in the February 2007 Oslo conference. Frame alignment processes along these lines continued throughout the period of the Oslo initiative, including in persuading additional states to participate. However, such frame alignment does not explain sufficiently how, once within the process, states finally converged around a common understanding of those precise weapons to be categorised as cluster munitions

and banned in CCM Article 2. In other words, frame alignment sheds light on the types of cognitive change that brought the Oslo process about, but not its outcome.

4.2 Convergence over cluster munitions that cause unacceptable harm

The Oslo Declaration and the manner in which the core group subsequently structured and managed collective discussions about what defined cluster munitions created the mechanism by which convergence on a shared meaning of "cluster munitions that cause unacceptable harm" (Norway, 2007b) was achieved in the CCM negotiations. This was the means by which reframed views about cluster munitions and a shift in the burden of proof on cluster munitions were eventually fashioned into agreement about what precisely a cluster munition treaty should entail.

Specifically, the wording of the Oslo Declaration embedded the presumption that at least some cluster munitions were unacceptable weapons in view of their humanitarian effects. This presumption created a slippery slope for the adherents to the Declaration; the define-and-ban approach toppled them down it. Over the course of the Oslo initiative, states proposing exclusions for specific cluster munitions found it difficult to justify their claims about the reliability and accuracy of submunitions they did not want covered within a ban in the face of evidence of harm from similar weapons in operational use, and thus to reverse a slide toward a comprehensive categorical prohibition. At the same time, representatives of these states found it difficult to reject such an outcome because the Oslo Declaration's humanitarian goal was morally appealing, and spoke to aspects of their perceived national moral self-identities. In some countries such as France, UK and Japan, NGO campaigning and media and

parliamentary interest raised the prospect that abandoning the Oslo process could also incur domestic political costs.

By focusing attention on the humanitarian risks of cluster munitions, and exposing defects in prior assumptions about their reliability, the "unacceptable harm" discourse exacerbated doubts about the legitimacy of these weapons within the Oslo process. Despite its political and intellectual logic, however, there was no certainty during the process that a prohibition treaty would result from the Oslo initiative. Indeed, this incremental process of de-legitimisation could have been reversed. Rival CCW efforts on cluster munitions always lurked as a potential drag on (or alternative to) a cluster munition ban treaty. And, at the outset of Dublin negotiations there remained major outstanding issues associated with establishing the category of weapons to be banned, in particular over proposed exclusions for submunitions with so-called self-destruct, self-neutralisation or self-deactivation features, and submunitions using sensor technologies, as well as possible transition periods.

Moreover, the CCM would be a package of various measures—not just a definition—and linkages made by states between various issues within (or beyond) the negotiation could prevent agreement over the nature of the ban agreement (Borrie, 2009 253-6). In particular, there was interoperability. Although interoperability issues are dealt with in other international agreements (Arntsen, 2010 544), there is tentative evidence to suggest that in the Oslo process interoperability became a major challenge for some states because the US government constructed it to be so as arguments for technological fixes to the humanitarian problems associated with cluster munitions began to look demonstrably weaker. By May 2008, instead of emphasising the US line

taken since mid-2007 that technical changes to submunitions would be sufficient to address humanitarian risk, a senior US official stressed that "that measures adopted by the Oslo process could very much endanger our ability to operate and to cooperate with other militaries and other governments around the world" (US State Department Office of the Spokesman, 2008).

Such linkages need to be kept in mind in considering the nature of convergence over "unacceptable harm" in the Oslo process. Finding a workable compromise on interoperability language between concerned states such as Australia, Canada, Italy, Japan and especially the UK delayed the CCM's agreement in Dublin after text for Article 2 paragraph 2(c) defining cluster munitions was essentially settled. In other words, adoption of the CCM and convergence of states' views on "unacceptable harm" were related, but not exactly the same thing. And, of course, convergence over the unacceptable harm framing only existed within the Oslo process eventually adopting the CCM, and not universally in the international environment—as the existence of rival talks in the CCW attested.

5. The CCM's achievement is not explained fully by rationalist-materialist theoretical approaches prevalent in the IR literature

The final proposition of this thesis is that prevailing rationalist-materialist approaches to inter-state cooperation cannot fully explain the CCM's achievement. To this end, Chapter 3 explored three types of problem with prevailing materialist-rationalist IR approaches in accounting for some multilateral regime emergence because certain of their core assumptions constrain the factors admitted into their explanations. For the sake of clarity, these constraints were described as *how, who* and *what*

problems. Moreover, each arose in the context of the emergence of the MBT regime, which is also relevant to understanding the Oslo initiative and the CCM's emergence in view of some similarities. These problems are now considered further in the specific context of the CCM's emergence.

5.1 How: Materialist-rationalist IR approaches fail to account for the reconstitution of state preferences

The *how* problem with materialist-rationalist explanations of international behaviour in the context of the CCM's emergence is that these fail to account for how actor preferences were constituted. The assumption that states had fixed preferences creates an obstacle to understanding what occurred on cluster munitions between 2003 and 2008. Even during the two weeks of the Dublin negotiations, states involved in bargaining over aspects of the text adapted their preferences. For example, the UK delegation found its negotiating instructions on specific issues in the draft Convention text such as aspects of article 2 and article 21 overruled by authorities in London as Britain's political leaders decided that the benefits of being seen to lead on a cluster munition ban treaty outweighed these concerns. In other words, the UK decided that it preferred a successful CCM outcome to obtaining its way on particular points it had previously indicated were "red lines". The UK's re-ordering of its preferences was significant: according to those interviewed for this thesis, the UK's public, high-level indications of commitment to the CCM outcome influenced other US allies in the negotiations such as Australia, Canada, France, Germany and Japan.

Such changes in preference about the desired ranking of outcomes were not limited to the CCM negotiations themselves. Rather, these changes were indicative of a

dynamic in which dealing with this weapon became an issue associated with the humanitarian identities of states in addition to questions of material-based power or bargaining throughout the 2003-08 period. This is because processes of frame alignment and then, during the Oslo process, the Oslo Declaration, the define-and-ban discourse, CMC lobbying and media interest served to expose gaps between some states' rhetoric about their humanitarian aims and values and their behaviour.

To remain consistent with their values as self-perceived responsible humanitarian powers, states with difficulties with the developing draft Convention text faced the choice of adjusting their preferences if they could not provide support for their proposals, or of exiting the process and thus appearing to act in a manner inconsistent with those espoused values. This is why the most prominent concern of the Like-minded—and the only issue on which these diverse states really agreed—was that they disliked the core group's steering of the Oslo process, because the manner of its discourse put the Like-minded in this difficult situation. Gaps between the humanitarian rhetoric and behaviour of many states in the Teetotal movement was not similarly tested because fewer of these countries were cluster munition possessors or inter-operated with the US military to the same degree as members of the Like-minded.

In contrast, in the CCW, there was not equivalent pressure on states to frame their preferences with a particular view to enhancing civilian protection, even from late 2007 when it belatedly agreed to begin drafting a proposal on cluster munitions. Rather, CCW work was based upon "striking a balance between military and humanitarian considerations" (CCW, 2007b 9). What this balance was, of course, existed in the eye of the beholder. Tellingly, the CCW discourse did not compel cluster munition possessors

to justify their claims for alleged "solutions" like self-destruct features or 99% reliability with humanitarian evidence—even if Russia, US and others felt compelled now to finally discuss alleged hazards to civilians from the weapon.

Another issue previously described with prevailing approaches to state preferences are assumptions that states always have them, and that these preferences are rational, which both neorealism and neoliberalism subscribe to. Chapters 4 and 5 indicate, in contrast, that states' collective assessment about cluster munitions in 2003 was largely inherited from the IHL discourse dating back to the 1970s that privileged manufacturer and user claims about the versatility and legitimacy of these weapons over rational assessments involving real evidence of effect and critical cross-examination.

Accumulating evidence of a persistent pattern of harm from unexploded submunitions and the formation of the CMC revealed two things, however. Firstly, the members of the CCW knew relatively little about cluster munition effects—even those states possessing the weapons. Few of the states most affected by the post-conflict humanitarian and developmental effects of unexploded submunitions, such as Afghanistan, Laos, Lebanon and Vietnam had joined, or took part, in CCW talks, even on ERW. Secondly, CCW member states did not actually know what to do (if anything) to address the humanitarian hazards beyond CCW Protocol V, except that the idea of a prohibition worried many of them. Thus the significance of the wording of the eventual Oslo Declaration: this did not require states to have converged on a firm preference beyond a general commitment to outlawing unacceptable cluster munitions, which was difficult even for possessor states like those in NATO to argue with in view of their

self-conceptions as powers diligent in their humanitarian responsibilities to minimise civilian suffering in conflict.

Learning was a key feature both in the emergence of the humanitarian impacts of cluster munitions as an issue, and then in the discourse facilitated by the core group during the Oslo initiative. Learning contributed to preference (re-) formation. The ICRC's Montreux Meeting of Experts also demonstrated the importance of knowledge acquisition, critical discourse and persuasion. In Montreux the realisation dawned among some government representatives that technical modifications to cluster munitions could only ever be a partial solution. The dynamics of this meeting also underlined that the main facilitators of learning prior to the Vienna Conference were NGOs as part of the CMC, and an epistemic community of knowledgeable practitioners of various kinds interested in ascertaining the real effects of cluster munitions that included UN entities and ICRC experts. While states were able to furnish international meetings with national experts on all manner of technical issues such as manufacture, fuse design or weapon deployment, there were few state experts knowledgeable in the actual effects of the weapons.

Epistemic community and TAN learning processes cross-fertilised, and by mid-decade began to feature state involvement. Norway is a significant case in this respect. For reasons explained in Chapter 3, Norway's humanitarian identity meant Norwegian policymakers were sensitive to concerns about the impact of cluster munitions on civilians, even though the country stockpiled cluster munitions. This, along with Norway's political culture, the "cargo ammunition" testing debate and effective NGO campaigning resulted in sustained collaboration involving Norwegian defence scientists,

NGO activists and independent munitions experts to learn more about the actual effects of cluster munitions. Their M-85 report presented in December 2007 to the Vienna conference was the nearest to a smoking gun about the hazards cluster munitions pose to civilians in the Oslo initiative, and influenced the viewpoints of many participating states striving to master definition and scope issues. In this way, a state prompted to learn about the real effects of cluster munition use itself became highly influential in aligning the cognitive frames of representatives of other states in the Oslo process through the use of evidence and logical argument, in conjunction with non-state experts.

These ideational effects such as state learning, and the development of intersubjective meaning through the Oslo process discourse are vital to understanding the CCM's emergence. Yet they are not properly accounted for in terms of an international environment in which states have fixed preferences.

8.5.2 Who: non-state actors are largely invisible in materialist-rationalist approaches but were important drivers of ideational change on cluster munitions

Despite the state-civil society partnerships evident in both the international landmine and cluster munition campaigns, the MBT and CCM were negotiated by states, and are treaties for states to implement. Yet the CCM's emergence showed that non-state actors can affect the structure of that system by helping states to achieve outcomes that might otherwise elude them. In this way, both TANs like the CMC and epistemic communities of knowledge-based practitioners are actors of consequence in understanding structural changes to the international environment such as the CCM regime.

In neorealism, however, only states are consequential actors in terms of the structure of international relations. Neoliberal approaches assume roles and identities for IOs; indeed, functionalist regime theory sometimes describes the operation of international institutions (for example, implementation of the MBT regime) quite well (Bryden, 2010). Nevertheless, as Smith pointed out, "by defining a regime as a structure designed to facilitate international agreement, the functional theory answers specifically why states continue to cooperate with a regime, but it disregards the larger question of why regimes arise at all in international politics" (Smith, 1987 275). As in the case of AP mines, it is not possible to account for the emergence of the multilateral regime prohibiting cluster munitions—the CCM—without recognising non-state actors as drivers of the ideational changes necessary for states to align around this goal. NGOs and epistemic experts brought the issue of the humanitarian impacts of cluster munition impacts to international attention through their research and advocacy, and helped states to frame this issue in a way that it appeared both urgent and solvable.

Consider for a moment what an explanation for the CCM's emergence would resemble if non-state actors were excluded from it. This explanation would be likely to hinge on one of two factors. The first is that the CCM happened because Norway instigated an inter-state process to ban cluster munitions. At a superficial level, this explanation corresponds with what happened. However, it does not account for why an unpropitious situation only a few years before the Oslo conference became a propitious one to the extent that Norway did launch an initiative. International concern at the humanitarian problem created by cluster munition use in the 2006 Southern Lebanon conflict was, as shown in Part II, not in itself transformative: prior concern following use of cluster munitions in Kosovo, Afghanistan and Iraq had not prompted states to

negotiate new international rules. Meanwhile, other major exogenous events of the period—Belgium's national laws prohibiting cluster munitions, and the overturning within the Norwegian government of belief in a safe percentage failure rate for submunitions and decision to lead an international treaty campaign—are inexplicable without awareness of the influence of NGO advocacy and the work of an internationally-based epistemic community concerned with charting and addressing the effects of the weapon.

This is not to say that civil society agency *caused* the CCM, which is an important point to bear in mind in terms of the other kind of possible explanation for the treaty's emergence excluding NGOs. In essence, this is a structure-led explanation, in which the CCM occurred with a minimum of agency necessary because international conditions were ripe: states receptive to banning cluster munitions discovered the door was open to do so. Whether this kind of explanation is based on changed post-Cold War international conditions, the MBT "model" or constraints on US hegemony late in George W. Bush's presidency following the disastrous Iraq invasion, there really seems to be little empirical evidence to support it. The most evidence for a momentous change in structural conditions was that from the late 1990s there was an upswing in post-conflict humanitarian evidence about the hazards of cluster munitions. Far from such evidence receiving attention matching its eventual significance, states were slow to grasp its implications. Perhaps that was because the humanitarian evidence was not primarily collected or analysed by states (although they often funded the research); again, it was non-state actors. And, once such humanitarian evidence was in, these non-state actors had to teach states what it suggested about cluster munitions, and persuade them to act upon the knowledge in constructive ways.

8.5.3 What: material power-based analyses do not account for how and why the CCM came about

Power in the material sense is central to realist and neorealist approaches to explaining how the international system is structured, as discussed in Chapter 3. Aspects of the material distribution of power such as military and economic capacity are, in these forms of analysis, key markers for states in the system to assess one another's relative levels of strength, and therefore guide decisions with a view to preserving their survival and enhancing their power within anarchy. Neorealism does not predict that individual outcomes will always accord with the international material power distribution; instead, over time, the pattern of outcomes will reflect it. Whatever the evidence of variable factors such as ideas, norms and learning—or for that matter the influence of non-state actors—in the larger scheme these effects will wash out to leave a pattern of outcomes more or less reflecting the prevailing material distribution of power amongst states. In this way, even if the CCM's emergence did not align with great power interests, it can be treated as a blip rather than a harbinger by neorealists.

It is not my purpose to try to debunk such a view directly, especially as this thesis deals primarily with the outcome of one process rather than a pattern of them. And, material power realities—the concerns of the US in particular—undoubtedly did influence the behaviour of some states in the Oslo process on aspects such as the scope of the CCM and interoperability. But, in view of the evidence presented in Part II, it is hard to deny that the outcome of the Oslo process was not one that the militarily or economically most powerful states participating in it desired at the beginning of the initiative, let alone those shunning it.

The CCM required states to give up weapons that, in several cases, constituted significant elements of national arsenals. That such states including France, Germany, Japan, Norway and the UK agreed to adopt the CCM (and, later, accede to it) is best understood through changes in their identities as "responsible" humanitarian powers over the course of the period. These changes were not the result of material power per se, but of what Barnett and Duvall described as productive power, which concerns "discourse, the social processes and the systems of knowledge through which meaning is produced, fixed, lived, experienced, and transformed" (Barnett and Duvall, 2005 55). The CCM's emergence is best understood as a struggle for power over meaning.

Barnett and Duvall's comprehensive treatment of power nevertheless appears to exclude the idea of transnational civil society power in the MBT and later CCM contexts. That is because, in their analysis, "social relations of joint action through mutual agreement and interactions in which one actor is able to convince another actor to alter voluntarily and freely its beliefs, interests, or action" is persuasion, and thus falls outside a useful conception of power (Barnett and Duvall, 2005 42). This arbitrary distinction is not satisfactory, at least in the case of cluster munitions. As Part II showed, both the CMC and an epistemic community of experts in international efforts on cluster munitions contributed to the productive power Barnett and Duvall described. In a contest over meaning like defining-and-banning cluster munitions, distinctions between productive power and persuasion based on the referent seem rather thin indeed when the results are mutually constituted. But it is at least clear that non-material forms of power were significant to the CCM's emergence.

Thus, while differences in material power between states in the CCW and Oslo

processes on cluster munitions did impact on the CCM's emergence, these are not sufficient to account for it. It also poses the question of how extensive a pattern of outcomes needs to be for these outcomes to be considered more than blips.

There is also the power context itself to be considered. Despite initial hopes of a peace dividend following the Cold War's end, the period since the mid-1990s has been unpropitious for disarmament and arms control in general. Amongst the only legally binding multilateral agreements reached to restrict weapons were those to a greater or lesser extent those characterised by humanitarian concerns, learning, and state socialisation guided by civil society agenda setting—the MBT, ERW protocol and CCM.

These successes have paved the way for efforts to bring about collective reframing of other aspects of controlling the means of violence, which are at differing stages of development. These aspects include work on regulating small arms and light weapons, armed violence and development, negotiations on an Arms Trade Treaty (Garcia, 2011), enhancing civilian protection from the use of explosive weapons in populated areas (Borrie and Brehm, 2011), counting casualties in war (Dardagan et al., 2010), and even efforts to create a resurgence in nuclear disarmament by framing nuclear weapons in terms of humanitarian cost (Lewis, 2009 , Burroughs, 2010 , Borrie and Caughley, 2012). Whether these initiatives will, taken together, ultimately challenge neorealist assumptions about the material power-based structure of the international "system" remains to be seen. But their very existence raises questions about what constitutes a pattern of outcomes in materialist-rationalist IR discourse.

CHAPTER 9: CONCLUSIONS—UNDERSTANDING INTERNATIONAL EFFORTS ON CLUSTER MUNITIONS

1. A contest over meaning

How should international efforts to address the humanitarian impacts of cluster munitions from 2003 to 2008 be understood? In this thesis, examination of this question was structured around four propositions. Cumulatively these propositions reveal international efforts primarily as a contest over meaning rather than a power struggle in material terms, although material power considerations were not absent.

Firstly, changes in mutually constituted actor preferences—collective reframing—evolved to bring about the CCM, something not possible before the new millennium. Broadly speaking, changing attitudes to protecting civilians in conflict, the accumulation of post-conflict evidence of the civilian hazards of cluster munitions, and new forms of activist agency (inspired, at least in part, by the landmine campaign of the 1990s) were catalysts in the de-legitimisation of the weapon.

At root, achieving a legally binding agreement banning cluster munitions entailed the changing of minds among decision makers in a significant proportion of the world's states. Initially this occurred through processes of learning and frame "alignment" that moved an initially modest group of perhaps 25 to 30 states from acceptance that existing IHL rules were sufficient to deal with cluster munition effects to a situation in which they considered that these weapons required specific regulation. By the point at which the Oslo Declaration was adopted in February 2007, this group of states had expanded to 46. This new assessment state represented an intermediate point

in the de-legitimisation of cluster munitions between the initial assessment state and the categorical ban in the CCM eventual agreed in May 2008.

The structure of the discourse in the Oslo process differed from that of the CCW. The assumption embedded in the Oslo Declaration that at least some cluster munitions were unacceptable and should be banned as an outcome of the Oslo initiative, and the define-and-ban discourse, turned out to be potent combination. It served to expose dissonance between the identities of Oslo process states as responsible humanitarian powers versus their policies on cluster munitions by use of humanitarian evidence of the actual effects of cluster munitions, and critical argument. The discourse compelled states to adjust their preferences to remain consistent with their identities—adjustment that brought them closer to a categorical ban over the course of the initiative. It was the slippery slope that some of the Like-minded delegations had indeed feared.

Non-state actors, especially the CMC and the ICRC, were at the forefront of this discourse. Indeed, non-state actors played major roles in international efforts to de-legitimise cluster munitions throughout the 2003-08 period, something that relates to the second proposition of the thesis. While most accounts of the CCM's emergence note the partnership between states, IOs and civil society (often in the same breath as a different international campaign, that to ban AP mines in the 1990s), this phrase perhaps does not do justice to civil society and IO contributions on cluster munitions. If these actors had not worked to put the humanitarian impacts of cluster munitions on the international agenda or sought to influence the preferences of selected states such as Norway, there would have been no Oslo process or CCM.

Two points are crucial here. The first is that the period between 2003 and 2007 was one of collective reframing and alignment not only involving states, but also NGOs themselves as they integrated humanitarian evidence and argument into a coherent suite of tools to campaign with, as shown by the evolution of the CMC's call. An epistemic community of "experts" of various kinds and interested in understanding the effects of cluster munitions existed independently of the CMC, and it contributed to CMC and state thinking (and vice versa). The second point is that most state policymakers neither understood the actual effects of cluster munition use, nor had they developed firm, defensible national preferences on what do—if anything at all—about it until this period. Some states were more receptive than others to the reframing efforts of NGOs and an epistemic community interested in the effects of cluster munitions. Awareness raising, education and persuasion involving these actors contributed to the initial process of frame alignment among interested states during 2005 and 2006. Frame alignment activities continued throughout the Oslo initiative period too, as the define-and-ban discourse developed and additional states joined in the process.

The "classic" period of frame alignment between 2003 and the Oslo conference in February 2007 did not influence all states uniformly. The moral imperative of addressing the impacts of cluster munitions on civilians through an international ban of some kind resonated with many small and medium-sized states, especially those with strong self-conceptions as "responsible" humanitarian powers, as well as some states affected by the weapon. Although several major stockpiler-producer nations such as China, India, Israel, Pakistan, Russia and the US initially resisted talks on cluster munitions in the CCW and then shunned the Oslo initiative, the process of frame alignment nevertheless affected their behaviour too. CCW agreement in late 2006 to

discuss cluster munitions the following year was prompted by their concerns at prospect of an outside process. When the Oslo initiative gathered momentum in 2007, the CCW minimalists decided to agree—reluctantly—to negotiate on cluster munitions.

The CCW's late 2007 consensus mandate to "negotiate a proposal" on binding cluster munition regulations revolved around potential technical improvements to submunitions. The appeal of technical fixes, however, already palled to many countries educated by the Oslo process discourse and the ICRC Montreux meeting. This helps to explain why the US came to emphasise the interoperability issue as an obstacle to a comprehensive cluster munition ban after Montreux. Promoting concern about the consequences of CCM adoption for military relations with the US was a framing that might serve to distract attention from the weakness of evidence to support the merit of technical fixes such as reliability or self-destruct, while making these look like reasonable compromises short of a categorical ban, and the pro-ban folks seem dangerous utopians.

Thus, it can be argued that frame alignment moved all states concerned with cluster munitions (or efforts afoot to prohibit cluster munitions) to a situation by 2007 in which they accepted some cluster munitions should be regulated. Despite this, frame alignment and the defensive counter-moves it inspired among minimalist states are not sufficient to account for the CCM's eventual adoption. What was it about the Oslo process that permitted it to succeed when the CCW's efforts lingered on (and, in November 2011, to eventually sputter out)? One factor was the relatively like-minded nature[192] of the Oslo process compared with the CCW talks. However, on close

[192] Not to be confused with the Like-minded group.

examination it is clear that the Oslo initiative did become quite polarised between the Like-minded and the Teetotals, and so this factor can be over-emphasised. Another factor was the unequivocal humanitarian aim of the Oslo Declaration. However, as discussed, the aim of banning cluster munitions causing unacceptable harm was actually deliberately rather ambiguous—it was one of the tasks of the Oslo process to establish what this meant.

A major distinctive factor was the define-and-ban discourse. This discourse contrasted with the split-the-category approach in the CCW and all preceding international talks. These had primarily revolved around vaunted technical characteristics and contingent, hypothetical scenarios. All states in the CCW had to agree, as Rappert pointed out, to "rule in" weapons they considered cluster munitions requiring regulation (2008). In humanitarian protection terms it proved impossible to make much headway with such an approach while a consensus practice applied. In the CCM's development, in contrast, conventional munitions "designed to disperse or release explosive submunitions" (article 2) could only be "ruled out" via exclusions from the definition agreed after open ventilation of views; discussions that included IOs and civil society versed in the effects of the weapons on people in real conditions.

It means the period from the Oslo conference in February 2007 merits treatment as a phase in the de-legitimisation of cluster munitions distinct from that of frame alignment. Such frame alignment brought states to one or both of two differing international tables, but it did not resolve differences in their specific preferences concerning which cluster munitions were legitimate or not. The define-and-ban discourse was the means used to address this in the Oslo process. Proposals for

exclusion needed to demonstrate that the weapons in question "avoid indiscriminate area effects and the risks posed by unexploded submunitions" (article 2). As if this did not raise the bar high, in the Dublin negotiations it was settled that the various exclusions in article 2 paragraph 2(c) would be cumulative, thus putting practically all cluster munitions in service beyond the reach of states joining the CCM.

It must be stressed that there was nothing inevitable about a define-and-ban structure for the Oslo process discourse on categorising cluster munitions. The Oslo Declaration did not specifically state the requirement for it, and a split-the-category approach could have been pursued instead—although as the CCW's experience showed, the scope of any prohibition would almost certainly have been much less ambitious.

The define-and-ban discourse was a conscious choice of the Oslo core group. As Part III showed, there were at least three points in the process when decisions by core group countries had strategic consequences for define-and-ban. The first occasion was prior to the Vienna conference, when the core group—after such a degree of studied thought that the CMC became concerned—reconfirmed define-and-ban over a split-the-category approach to facilitating definition discussions. The second point was at the Wellington conference in February 2008: the core group (and New Zealand, in particular) managed to resist Like-minded pressure to include the various exclusion proposals in the draft Convention text. The third point concerned Ireland, as the President of the Dublin negotiations, excluding the possibility of adopting the CCM without consensus. Ireland was careful not to do so, and this ambiguity probably helped to restrain countries among the Like-minded such as the UK from pursuing a strategy of brinkmanship too readily, since recourse to a vote over definitions would likely run

against UK interests, and banish any illusion the UK was a humanitarian leader in the Oslo process.

The define-and-ban discourse altered the orientation of debate about cluster munitions at an inter-state level from "are they useful or not?" to "are they acceptable or not?" As explained in Chapter 3, these differing questions did not mean they dealt with differing things; rather, it represented a pendulum swing in emphasis from the intended or anticipated effects of cluster munitions to the actual effects. Cluster munitions were banned because the view took hold amongst states in the Oslo process that these were unacceptable weapons, not useless ones.

The problem for self-styled humanitarian powers possessing cluster munitions was that a weapon could not be used if likely to be unacceptable in humanitarian effect. Thus acceptability has a direct bearing on utility. Norway realised this as early as 2006 due to its submunition testing and the situation in Southern Lebanon. So, in its own way, had Germany: even before the Oslo process commenced Germany had decided to develop alternatives to explosive submunitions in view of their unintended effects. Thus, arguments around acceptability and utility were never separate discourses, and in the Oslo process they were even more intertwined than in the CCW because of the former process's define-and-ban orientation.

As shown in Part II, the define-and-ban discourse promoted convergence over what constituted "unacceptable harm" but this took time, and emerged late in the Oslo process—in the Dublin negotiations. This is the third proposition of the thesis. Alongside this, it was not until Dublin that a solution was found to deal with the issues

around interoperability, a problem that might have brought down the negotiations despite convergence over the category of weapons constituting cluster munitions.

2. Theoretical conclusions, and some implications for further research

The fourth proposition of the thesis was that the CCM's achievement is not explained fully by prevailing materialist-rationalist IR approaches, particularly neorealism. This does not mean that states' calculations of material power were absent from the process leading to the CCM's emergence. For example, it could be argued that involvement of certain countries like Lebanon or Laos in the Oslo process was because these states saw utility in a process that promised diversion of material resources to them, and might reduce the potential for their future international isolation. Moreover, as noted, bargaining amongst states was a feature of the development of the treaty, for instance on aspects of definitions, on interoperability and even on inclusion of individual words in article 4 in the final endgame. Significantly, however, these forms of state behaviour took place against a backdrop couched to a large extent in logic of appropriateness in which identity and norms were influential factors. This helped to constrain some state behaviour, as discussed earlier, and shaped preferences over outcomes in ways not easily predicted by instrumental rationality.

The way in which the CCM emerged lends credence to March and Olsen's argument that "real life" in international regime development is more complicated than an environment in which logic of consequences *or* of appropriateness applies. Instead, most actions probably involve both:

> "History is created by a complicated ecology of local events and locally adaptive actions. As individuals, groups, organisations, and institutions seek to act intelligently and learn in a

> changing world involving others similarly trying to adapt, they create connections that subordinate individual intentions to their interactions. The locally adaptive actions that constitute that ecology are themselves based on subtle intertwinings of rational action based on expectations of consequences and rule-based action seeking to fulfil identities within environments that influence but do not uniquely dictate actions. Expectations, preferences, identities, and meanings are affected by human interaction and experience. They co-evolve with the actions they produce" (March and Olsen, 1998 968-9).

Processes of frame alignment and the Oslo process's define-and-ban discourse were mechanisms for this co-evolution on the legitimacy or acceptability of cluster munitions, within which all of these factors were mutually constituted.

Such a finding does not sit especially well with the conceptions of functional rationality-derived state behaviour bringing about or changing international institutions. Nor does it lend itself toward explaining a phenomenon like the CCM's emergence founded in terms of the categorisation of variables and causal regularities. But, as shown, rationalist-materialist notions of states as opportunistic, calculating egoists interacting in a history-free world fail to make the reasons for, and processes of, CCM regime formation explicable. Specifically, how did states' preferences come about—since these did not emanate solely from within, or from their inter-state interactions? Who influenced formation of these preferences? (Non-state actors of various kinds, as well as states.) What was power in the context of the CCM regime's formation?

The case of cluster munitions largely bears out the analyses of Keck and Sikkink about the roles and influence of NGO activism seen in other norm building campaigns they examined during the 1990s, for instance on human rights, environmental protection and curbing violence against women. The same is true, by extension, of analysis of the

landmine campaign using their framework by Hubert (2000 , 2007), Lawson (2002) and others. Even in the domain of weapons restriction, TANs "have considerable importance in bringing transformative and mobilising ideas into the international system" (Keck and Sikkink, 1998 217).

Nevertheless, this thesis suggests that theories of TAN internal dynamics and influence on states derived from Keck and Sikkink could be further modified to integrate the effects of other forms of civil society actor, in particular epistemic communities of the sort seen in cluster munition efforts. This in turn implies that claims made about activist agency's nature in recent examples of international norm emergence should be re-examined. For example, though significant the work of the epistemic community on cluster munitions was lower than in domains such as climate change. One question of interest in the context of the Ottawa process is to what extent an epistemic community existed on the effects of landmines, and whether this preceded or followed organised activism by NGOs. Answering this question could lead to a better understanding of how the MBT emerged, and the dynamics IR scholars should seek to identify in future processes of norm emergence.

Moreover, all complex social phenomena feature instances of chance and serendipity, and international efforts on cluster munitions do not appear to have been an exception. Whether this has any impact on underlying structures of international politics is a difficult question to answer. Efforts at mining various forms of data to examine aggregated connections and alleged regularities such as network analysis of the centrality of given actors to agenda setting already has generated interesting findings, like those of Carpenter (2011) suggesting the ICRC and HRW have gate-keeping

functions over the international advocacy agenda on conventional weapons issues. In view of the existence of an epistemic community on the effects of cluster munitions and of a network of individuals carried over from landmine campaigning work, further research might usefully examine the influence of individuals as hubs within policy networks, and compare this with findings at the institutional level. If the analysis on cluster munitions in this thesis is an indication, it could show connections between people and ideas hitherto unsuspected at the level of IR theoretical examination.

This thesis indicates that the movement resulting in a cluster munition ban treaty incorporated aspects of utilitarian interest, mutually constituted shared understandings and commitments in turn depending on cognitive "buy-in" from a wide range of individuals. IR has paid considerable theoretical attention to the first two aspects above. The latter remains relatively under-theorised. Keck and Sikkink hypothesised that the issues around which TANs have organised most effectively have been those "involving bodily harm to vulnerable individuals, especially when there is a short and clear causal chain (or story) about who bears responsibility" or gross legal inequity (1999 98), and by extension this has been true too of states on the AP mines, ERW and cluster munition issues.

One possible implication of this is that "humanitarian" or "fairness" oriented framings of global problems may help to cut through some of the myriad obstacles for individual policy actors to even try to establish higher international standards of human emancipation. Perhaps it is not a coincidence that compassion for the suffering of others and a strong dislike of unfairness appear to be "hard-wired" into normal human beings (Seabright, 2004 , de Waal, 2005 , Pinker, 2002 , Fine, 2006). Researchers such as

Tversky and Kahnemann showed by experiment that the framing of a problem triggers different cognitive systems of decision-making (1981 , 1986 , Kahneman, 2003). Psychological experiments have demonstrated, for instance, that people are often willing to punish perceived cheaters even if it is at personal cost to them (Sanfey et al., 2003). Normal human characteristics such as empathy may make it easier for very different actors to see banning a weapon or acting against a phenomenon like genocide (Slovic, 2007) as the "right thing to do". While these "gut instincts" (Gigerenzer, 2007) do not rule utilitarian considerations out of the picture, further research into their influence might offer a richer portrayal of why international regimes emerge (or fail to) than approaches based on narrower conceptions of rationality or appropriateness in sociological terms do at present.

4. Conclusions for policy practitioners

Chapter 2 of the thesis discussed pragmatic validity—"what the study does for its participants, both researchers and researched" (Miles and Huberman, 1994 280). In the preceding sections, the study's conclusions with respect to the state of IR theory and implications for further research were discussed. What pragmatic validity does this thesis have for policy practitioners in the field of international regime building?

The first conclusion is that efforts to change the positions and policies of states begin with individuals. For much of the period until states began to bandwagon (for example, regionally as in the case of Latin American and African declarations), modifying the preferences of states first entailed alteration in the views of individual policy makers. This is in itself obvious, but it has a number of less obvious elements to it borne out by the evidence presented in this thesis. It indicates that changing policy

makers' minds requires robust critical argumentation, in turn resting on some body of evidence with a basis in "real world" observation, and the posing of an alternative narrative or explanation for the given phenomenon (in this sense, the phenomenon being the effects of cluster munitions). This analysis of international efforts on cluster munitions emphasised the humanitarian nature of evidence as crucial, but in other contexts it does not necessarily follow that such evidence would have to be wholly or even partly humanitarian in nature. What is likely more important is that whatever its nature, this evidence be internally and externally valid, and able to stand up to open scrutiny.

Although it may not be the case in the early stages of framing, those pointing out an existing, problematic situation must presently offer a solution or effective response that goes beyond characterising the issue. The unacceptable harm framing did this: the US's interoperability counter-framing (which posed a problem for US friends and allies in the Oslo process without suggesting a solution) did not.

The perceived viability of such a solution is of course important—but a critical point is that perceptions of viability can alter over time, as they did on cluster munitions. As noted, no state representatives acquainted with the problems of cluster munitions in 2003 (and few of them even in 2006) appeared to consider a ban on the weapon as feasible in the foreseeable future. Meanwhile, the evolution of the CMC's call from a moratorium to a ban call reflected differences within the Coalition concerning the tactics of a viable call. Until the Oslo process, NGOs such as HRW and MAC feared that an explicit and comprehensive cluster munition ban call might undermine the Coalition's credibility with states: a balance had to be found between

ambition, and being too far out in front. The balance shifted over the course of the 2003-08 period, while the views of state policy makers within the Oslo process itself became more ambitious as a ban (in appropriate company) seemed to become more viable.

This underlines a second conclusion, which is that policy practitioners—even moral entrepreneurs—need considerable flexibility in the course of their efforts concerning their instrumental preferences; that is, how to achieve what they are seeking to achieve including the messages, tactics and partners they work with. This is tricky for TANs, because the process of aligning around common aims and approaches can be difficult and time consuming for these entities constituted of NGOs with potentially diverse identities and concerns. In Wellington and in Dublin, the CMC encountered internal difficulties in terms of reconciling their leadership's strategy and tactics with the less pragmatic views of some in the Campaign's grassroots. It can also be an issue for state representatives too: for example, a concern for MacKay as facilitator on definitions in the Dublin negotiations was the position he was putting Teetotal states in—of negotiating text in article 2 on specific exclusions their governments were, as matters of principle, opposed to—might be too difficult for them to bear.

A third conclusion for practitioners from the cluster munition case is that the early stages of international campaigning on an issue are critical for getting argumentation and messaging right, and for engendering frame alignment. Proper intellectual and logistical preparation permits campaigners and aligned states to capitalise upon exogenous opportunities that present themselves in order to create additional momentum toward their common goals, even when these events were

unexpected. The massive use of cluster munitions in the 2006 Southern Lebanon conflict was not predicted, but NGOs and non-governmental "experts" had anticipated that further use of the weapon creating humanitarian hazard would occur some time based on the historical pattern of persistent harm they had observed. The Southern Lebanon conflict's consequences bore out NGO claims about humanitarian risks of cluster munitions made ahead of time, and it consequently strengthened the case amongst states for specific restriction.

TANs and epistemic community influence in a given context depends heavily on the credibility of their identities as "good" or "expert". This is less is critical for states because in international legal regime formation in the security field states (and only states) can vote or, in consensus environments, block consensus or potentially horse-trade with other states by creating linkages with other issues. Even a state with poor arguments and evidence to support its position can obstruct a negotiation unless its identity or outside pressure constrains it from doing so. It meant in the cluster munition context that an important phase in which state behaviour was influenced was during the "pre-negotiation" stages before the Dublin conference. As the CMC discovered on trying to reopen paragraph 3 of article 21, when states have firm preferences and smell a workable bargain it can be very difficult to influence their behaviour.

As mentioned at the outset of the thesis, efforts on cluster munitions over the last decade were unusual because of the emergence of not one but two international negotiations on restricting the weapon, which ran in parallel and involved some of the same actors. The contrasts between these initiatives underline the importance of structural or architectural aspects of process design—a fourth conclusion for

practitioners. There is not space here to dwell on the CCW in any detail, suffice that its decision making procedures, composition (including the bulk of the most militarised states with divergent and even conflicting perceived interests) and an absence of means to put the claims of users and producers to the test tended, historically, to low common-denominator outcomes. The cluster munition issue was never likely to be a glowing exception.

In contrast, the Oslo process was an initiative based on a document (the Oslo Declaration) initially and largely drafted by Norway, a concerned, instigating state. This Declaration set out a time-bound framework; a sequence of milestones, and IO and civil society partnership in the initiative was baked in. Unlike the mandates of the CCW from 2006, the Declaration's general aim was not balanced against assumed military requirements but was instead contextualised as a humanitarian imperative in view of the consequences of cluster munition use. It was ambitious enough to be of broad appeal, while not attempting to pre-negotiate detailed understandings. The importance of the define-and-ban discourse was discussed previously in this chapter. Nevertheless, it would have been difficult to maintain the define-and-ban approach in the Oslo process without the Declaration as a touchstone, especially when the core group steering the initiative was put under mounting pressure from the Like-minded. And, of course, the steering of a self-selected motivated group of states also distinguished it from the CCW, as did the Dublin conference rules of procedure, which reflected general UN practice rather than arms control consensus.

The Oslo Declaration, the define-and-ban approach and these other aspects were features of a process intended to perform a task—ban cluster munitions that cause

unacceptable harm to civilians—rather than reflecting the precedents and traditions of a thirty year-old forum. Like the Ottawa process, the Oslo process avoided a so-called competency trap experienced in the CCW, "the tendency for a system to become firmly locked into a particular rule-based structure by virtue of developing familiarity with the rules and capabilities for using them" (March and Olsen, 1998 964). The parallel cases of the Oslo initiative and the CCW offer important contrasting examples to those trying to figure out how to pursue new normative regimes likely to face opposition from great power minimalists in the future.

This leads to a fifth and final conclusion, which concerns the emergence of the CCM as it relates to international "great power" politics. As discussed earlier, the neorealist position that new regimes spearheaded by likeminded groups of small and middle-powers like the one that developed the AP mine ban treaty are merely blips appears less tenable with the CCM's emergence. IR theorists can continue to debate what constitutes a pattern of outcomes of structural significance to the international system, but in practical terms the MBT and CCM regimes show that the great powers cannot continually stymie the international community as it seeks to achieve what are considered by the majority of the world's nations to be worthwhile goals. In this sense, the overt hostility of US policymakers to the Oslo process and their construction of interoperability as a brake upon it just underlines that preponderant material power nevertheless has its limits, and in fact is quite circumscribed in some respects. This realisation in turn offers hope to less powerful states and activists that they are not completely helpless in the face of great power obstruction. It is a realisation that may bear further fruit in international regime building.

APPENDICES

APPENDIX I: LIST OF INTERVIEWS

Table 2: List of interviews with individuals

#	Name	Organisation	Interview date
1	(Pater) Antoine Abi Ghanem	Permanent Mission of the Holy See to the UN in Geneva	11 August 2008
2	Ahmad Arafa	Permanent Mission of Lebanon to the UN in Geneva	11 May 2009
3	Torfinn Rislaa Arntsen	Norwegian MFA	28 August 2008
4	Annette Abelsen	Norwegian MFA	3 September 2008
5	Dr. Espen Barth Eide	Norwegian MFA	26 August 2008
6	Annette Bjørseth	Norwegian Ministry of Defence	26 August 2008
7	Stan Brabant	HI, Belgium	2 September 2008
8	Vera Bohle	GICHD	23 July 2008
9	Kerry Brinkert	MBT Implementation Support Unit, GICHD	25 September 2008
10	Lt. Col. James Burke	Irish Defence Forces	25 July 2008
11	Amb. Timothy Caughley	UN ODA, Geneva Branch	23 March 2009
12	Laura Cheeseman	CMC	1 September 2008
13	Christopher Clark	UNMACC SL	16 July 2008
14	Christopher Clark	UNMACC SL	10 October 2008
15	Simon Conway	CMC / Landmine Action UK	4 December 2008
16	Dr. Kathleen Cravero	UNDP	11 September 2008
17	Charlotte Darlow	Permanent Mission of New Zealand to the UN in Geneva	13 May 2008
18	Charlotte Darlow	Permanent Mission of New Zealand to the UN in Geneva	13 June 2008
19	Bonnie Docherty	Arms Division, HRW	2 September 2008
20	Ove Dullum	Norwegian Defence Research Establishment	25 August 2008
21	Amb. John Duncan	UK Permanent Mission for Disarmament, Geneva	30 Jun 2008
22	John Flanagan	UNMAS	4 June 2008
23	Tamar Gabelnick	ICBL	29 September 2008
24	Jonas Gahr Støre	Norwegian MFA	29 August 2008
25	Tekimiti Gilbert	UNMACC SL	10 October 2008
26	Stephen D. Goose	Arms Division, HRW	21 November 2008
27	Paul Hannon	MAC	4 June 2008

28	Peter Herby	Arms Unit, ICRC	12 December 2008
29	Mark Hiznay	Arms Division, HRW	9 July 2008
30	Mark Hiznay	Arms Division, HRW	15 July 2008
31	Mark Holroyd	HI, Southern Lebanon	8 October 2008
32	Emil Jeremić	NPA Regional Office, South Eastern Europe	3 December 2008
33	Colin King	C. King Associates Ltd.	4 September 2008
34	Peter Kolarov	UN ODA, Geneva Branch	3 April 2009
35	Amb. Steffen Kongstad	Norwegian MFA	5 June 2008
36	Amb. Steffen Kongstad	Norwegian MFA	27 August 2008
37	Col. Stein Erik Laughlo	Norwegian Army	2 September 2008
38	Jean-Christophe Le Roux	French Ministry of Defence	29 July 2008
39	John McBride	Canadian Department of Foreign Affairs and International Trade	2 December 2008
40	Anna Macdonald	Oxfam GB	19 June 2008
41	Anna Macdonald	Oxfam GB	23 June 2009
42	Amb. Donald MacKay	Permanent Mission of New Zealand to the UN in Geneva	13 May 2008
43	Amb. Donald MacKay	Permanent Mission of New Zealand to the UN in Geneva	30 July 2008
44	Ian Mansfield	GICHD	3 May 2010
45	Louis Maresca	Arms Unit, ICRC	5 August 2008
46	Thomas Markram	UN ODA, New York	10 March 2009
47	Richard Moyes	CMC / Landmine Action UK	3 July 2008
48	Dr. Robert Mtonga	CMC/ICBL – Zambia	3 June 2008
49	Thomas Nash	CMC	6 June 2008
50	Thomas Nash	CMC	24 July 2008
51	Thomas Nash	CMC	24 November 2011
52	Per Nergaard	NPA	4 June 2008
53	Per Nergaard	NPA	26 August 2008
54	Dr. Gro Nystuen	University of Oslo	28 August 2008
55	Amb. Dáithí O'Ceallaigh	Permanent Mission of Ireland to the UN in Geneva	12 June 2008
56	Amb. Dáithí O'Ceallaigh	Permanent Mission of Ireland to the UN in Geneva	10 July 2008
57	Davide Orifici	GICHD	16 March 2009
58	James C. O'Shea	Permanent Mission of Ireland to the UN in Geneva	28 July 2008
59	Grethe Østern	NPA	26 August 2008
60	Grethe Østern	NPA	28 August 2008

61	Titus Peachey	MCC	3 December 2008
62	Dr. Christopher Penny	Canadian Armed Forces Office of the Judge Advocate General	21 July 2008
63	Amb. Wolfgang Petritsch	Permanent Mission of Austria to the UN in Geneva	7 February 2008
64	Dr. Eric Prokosch	SIPRI (retired)	5 February 2009
65	Dr. Brian Rappert	University of Exeter	23 June 2008
66	Lene Rasmussen	Danish Church Aid, Lebanon	8 October 2008
67	Markus Reiterer	Austrian Permanent Mission to the UN in Geneva	8 August 2008
68	Samantha Rennie	Diana Princess of Wales Memorial Fund	4 December 2008
69	Christian Ruge	Consultant to Norwegian Ministry of Foreign Affairs	27 August 2008
70	Prof. Kenneth Rutherford	SurvivorCorps	9 April 2008
71	Amb. Christine Schraner Burgener	Swiss MFA	15 October 2008
72	Sara Sekkenes	UNDP	1 July 2008
73	Declan Smyth	Irish MFA	4 December 2008
74	Tormod Strand	NRK Television	28 August 2008
75	Earl Turcotte	Canadian Ministry of Foreign Affairs and International Trade	21 July 2008
76	Earl Turcotte	Canadian Ministry of Foreign Affairs and International Trade	25 July 2008
77	Paul Vermeulen	HI, Switzerland	14 October 2008
78	Sladjan Vuković	CMC / HI Ban Advocates	4 September 2008
79	Mary Wareham	HRW / CALM NZ	23 June 2010
80	Julian P.G. Wathen	UK Ministry of Defence	16 July 2008
81	Virgil Wiebe	MCC / University of St. Thomas, Minnesota	13 November 2008
82	Albrecht von Wittke	Permanent Mission of Germany to the Conference on Disarmament in Geneva	15 December 2008
83	Reto Wollenmann	Permanent Mission of Switzerland to the UN in Geneva	7 August 2008

In addition to the individual interviews listed above, several small group interviews were carried out. These are listed in Table 3 (overleaf) in chronological order.

Table 3: Small group interviews

#	Name	Organisation	Interview date
84	Christina Bennike David Horrocks	MAG, Southern Lebanon Program	9 October 2008
85	Knut Furunes Per Nergaard	NPA, Southern Lebanon Program	9 October 2008
86	Laura Cheeseman Thomas Nash	CMC	22 January 2009
87	Laura Cheeseman Natalie Curtis Susan Hensel Thomas Nash Serena Olgiati	CMC	6 February 2009

APPENDIX II: DESCRIPTION OF INTERVIEW PROTOCOL

Interviews were conducted as part of research for this thesis and, earlier, the *Unacceptable Harm* study. These interviews followed a protocol based on an informed consent form (ICF) developed at the outset of the research. The ICF is included at the end of this Appendix.

Because of the variety of interview respondents and their potential concerns about confidentiality-related aspects of the conduct of the research and how this might impinge on them, this informed consent process was intended to allow them the final say in how the information they provided was to be used, by allowing them to choose what suited them from a range of options.

Before commencement of all interviews I explained the ICF to the prospective interview respondent(s). To begin with, I my research interest was briefly outlined. The respondent(s) would also be given as much time as they needed to read the first page of the ICF. This page described the research, why they were asked for an interview, why it would be recorded, and the purposes for which the data from the interview might be used.

Next, the second page of the ICF was explained. This set out three basic confidentiality options from least restrictive (quotation or attribution of anything from the interview is permitted, with an additional box to tick if the respondent wished to be shown first and have the opportunity to comment) to most restrictive (may be used for the purposes listed on the first ICF page, but the respondent was not to be identified). A third option enabled the respondent to specify particular elements from the interview to be off-the-record and, as an additional safeguard, that they be consulted again to see any proposed attribution from the interview in text while still in draft form.

All of the options allowed the respondent to stipulate that they be consulted before the research was released if I intended to use data they provided in an attributable manner, and they could refuse its use. Besides enabling them to correct any misinterpretation, this ICF framework was designed to help to address the issue of over-restriction—of one or a few sensitive pieces of information resulting in no information from the interview being able to be used. This element was inspired by documents released under national freedom of information acts that block out certain sentences rather than the whole document remaining classified from public view.

It was always suggested to the respondent that they should not fill out the ICF until the end of the interview. This is because respondents did not always anticipate what they would say in view of the loose structure of the interviews. This is an important safeguard, and it seemed to put many respondents at greater ease, as they knew they would have opportunity to specifically determine what was on or off the record.

All interviews were recorded (barring technical mishap). However, the recording device (a Zoom H-2) was not turned on until interview commencement. If the respondent wished, for whatever reason, to withdraw their participation during or at the end of the interview, notes would be handed over and the audio of the interview (which is recorded to a portable flash card) visibly deleted. This situation never occurred however, and while respondents were told orally they could withdraw at any time (as the "show me first" options on the ICF implied) it is not specified on the form. However, respondents were encouraged to remain in touch and my contact details were printed on the ICF.

The policy on access to interview data was explained to interviewees. That is, only one UNIDIR colleague (an assistant project researcher) and myself would have access to the audio files or to eventual transcripts, or to supporting documents from the

interview. Such resources would not be shared further. Attributable details of particular interviews would not be discussed with others, including other respondents.

For their own records, all respondents were e-mailed a scanned copy of the completed and co-signed ICF within a few days of the interview.

Electronic copies of the interview file recordings reside on my computer, which is password protected, and on a secure external hard-drive shared with one project colleague while I worked at UNIDIR. The only hard copies of transcripts and interview-specific documents (including the corresponding ICFs) were kept in a locked filing cabinet in my UN office in Geneva, and later transferred to my home when I finished at the Institute.

The ICF offers respondents a copy of the audio from their interview on CD-ROM, and around one-quarter of interviewees availed themselves of this. Transcripts were never shared: as Oliver observed, transcription is an act of interpretive encoding by the researcher, and so is arguably then no longer the interviewee's "property" but the researcher's (2003: 62-63).

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Project on analysis of negotiations to address the humanitarian effects of cluster munitions

The United Nations Institute for Disarmament Research (UNIDIR) is carrying out research to document contemporary international efforts to address the humanitarian impacts of cluster munitions in an 18-month project from March 2008 to August 2009.

It builds on earlier work UNIDIR has carried out such as *'Disarmament as Humanitarian Action: Making Multilateral Negotiations Work'* (DHA), a project between 2004 and late 2007. As part of its research, the DHA project compared and analysed recent multilateral disarmament and arms control processes including the 1997 Anti-Personnel Mine Ban Convention and the recent work of the UN Convention on Certain Conventional Weapons.

Why have I been asked for this interview?

UNIDIR has begun carrying out its research, including research interviews with those involved in international efforts to address the humanitarian impacts of cluster munitions, in order to preserve their impressions of how these processes unfold.

Why is this interview being recorded?

Being able to record interviews along with written note-taking assists UNIDIR's researchers in two ways: it helps in managing the large amount of data being collected, and it ensures that what you tell us is reflected accurately and appropriately.

The information recorded in this interview is for research purposes only. It will be stored securely, and only the Project Manager/Senior Researcher and Assistant Researcher will have access to the interview data. It will not be broadcast or distributed without your permission: we ask you to complete and sign the back of this form to further guide us about how the information you provide us may be used. You will also be sent a copy of the completed permission form for your records.

If you would like a copy of the recording of your interview on CD-ROM, please indicate that on the back of the form. Expect this to take at least a couple of weeks to reach you.

What will the information from my interview be used for?

Information gathered in interviews may be used for two purposes:

1. It contributes to the research of UNIDIR's project, including a book to be published in late 2009 that tells the story, in particular, of the so-called Oslo Process on ban cluster munitions that "cause unacceptable harm to civilians".

2. It may also contribute to PhD research on 'international efforts to address the humanitarian effects of cluster munitions, 2003-2008' that John Borrie, the project's manager is undertaking.

Interviewee name & position:

Please choose one of the three options and tick the appropriate box(es)

The information I have provided in this interview:

(1) may be used for the purposes specified overleaf, including quotations attributed to me by name.

But I want you to show me first

(2) may be used for the purposes specified overleaf, but some information may not be attributed to me by name.

Please specify below: for instance, “don’t use the stuff I said not to mention during the interview”:

.....

.....

.....

.....

.....

And show me first if you do want to attribute anything to me in print

(3) may be used for the purposes specified overleaf, but I am not to be identified,

I want a copy of the recording of the interview (a CD-ROM with the audio file in MP3 format) to be sent to me, in due course. Yes No

Please write your e-mail or snail-mail address here:

.....

.....

.....

Please sign below

(UNIDIR researcher)

Signature:

.....

..

Date:

(Interviewee)

Signature:

.....

..

Date:

Interview length approx: [h min sec]

APPENDIX III: STATES PARTICIPATING IN THE OSLO PROCESS

List of states participating in the Oslo conference (49)

Afghanistan, Angola, Argentina, Austria, Belgium, Bosnia and Herzegovina, Canada, Chile, Colombia, Croatia, Costa Rica, Czech Republic, Denmark, Egypt, Finland, France, Germany, Guatemala, Holy See, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Jordan, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Mozambique, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland and United Kingdom.

List of states participating in the Lima conference (67)

Albania, Angola, Argentina, Austria, Australia, Bangladesh, Belgium, Bolivia, Bosnia and Herzegovina, Burundi, Cambodia, Canada, Chad, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, Finland, France, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Holy See, Hungary, Indonesia, Ireland, Italy, Japan, Laos, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Malta, Mauritania, Mexico, Mozambique, Netherlands, New Zealand, Norway, Nigeria, Panama, Paraguay, Poland, Portugal, Peru, Senegal, Serbia, Slovakia, Spain, Switzerland, Tanzania, Thailand, Uganda UK, Venezuela, Yemen and Zambia.

List of states participating in the Vienna conference (138)

Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Belize, Benin, Bolivia, Bosnia Herzegovina, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Chad, Chile, Colombia, Congo (Democratic Republic of), Congo (Republic of), Costa Rica, Côte D'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Holy See, Honduras, Hungary, Iceland, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mexico, Monaco, Montenegro, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, Sudan, Suriname, Swaziland, Switzerland, Tajikistan, Tanzania, Thailand, The Former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, Uruguay, Venezuela, Vietnam and Zambia.

List of states adhering to the Wellington conference (111)

Afghanistan, Albania, Algeria, Angola, Argentina, Australia, Austria, Bahrain, Bangladesh, Belgium, Belize, Benin, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Cambodia, Canada, Chile, Cook Islands, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, Fiji, Finland, former Yugoslav Republic of

Macedonia, France, Germany, Ghana, Guatemala, Holy See, Honduras, Hungary, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mexico, Moldova, Montenegro, Morocco, Mozambique, Nauru, Nepal, Netherlands, New Zealand, Nigeria, Niue, Norway, Oman, Palau, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Samoa, Saudi Arabia, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Suriname, Sweden, Switzerland, Tajikistan, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Turkey, Uganda, Ukraine, United Kingdom, Uruguay, Vanuatu, Vietnam and Zambia.

List of states participating in the Dublin Diplomatic Conference (107)

Albania, Argentina, Australia, Austria, Bahrain, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Chad, Chile, Comoros, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Germany, Ghana, Guatemala, Guinea, Guinea-Bissau, Holy See, Honduras, Hungary, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Kyrgyzstan, Laos, Lebanon, Lesotho, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mexico, Moldova, Montenegro, Morocco, Mozambique, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of the Congo, Samoa, San Marino, São Tomé and Principe, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Swaziland, Sweden, Switzerland, Tanzania, The former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Uganda, United Kingdom of Great Britain and Northern Ireland, Uruguay, Vanuatu, Venezuela and Zambia. The following 20 states attended the Conference as observers: Colombia, Cyprus, Egypt, Eritrea, Ethiopia, Greece, Iraq, Kazakhstan, Kuwait, Latvia, Libya, Oman, Poland, Romania, Saudi Arabia, Singapore, Thailand, Turkey, Ukraine and Vietnam.

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