

# **Banning Evil: Cluster Munitions and the Successful Formation of a Global Prohibition Regime**

By Denise Garcia  
2012, Vol. 4 No. 04

The rise and entry into force of the 2008 Convention on Cluster Munitions (CCM) that prohibits cluster bombs constitutes a global prohibition regime. I argue that this new prohibition regime and the arising new international norm set by the CCM, i.e. the prohibition of the use, development, production, acquisition, stockpiling, retention or transfer of cluster munitions developed due to a strong moral opprobrium, initially elicited by commanding moral force of International Humanitarian Law as a robust and compelling previously existing normative structure and then by the success of the ban on landmines that acted as a model of activism and fast-track diplomacy a decade before. The ban on cluster bombs is about military doctrines succumbing to the higher authority of moral and humanitarian concerns propelled by activist non-governmental actors and a few forward-looking states.

Cluster munitions constitute a substantial part of the military arsenals of all major powers. Their development, procurement and stockpile are a central hard component of national security. Yet, in less than two years, cluster munitions were banned by an international treaty negotiated outside the normal channels, the United Nations (UN), and spectacularly, in less than two years. The treaty is the Convention on Cluster Munitions (CCM) signed in Oslo in December 2008, by almost one hundred states, and quickly enforced force (August 2010).

Realists would dismiss such cases and say that the politics of national security is impervious to change and influence. A few prominent scholars have demonstrated the role of other actors beyond the state in bringing change to other issues that are close to the national security of states. The case of the powerful convention that banned landmines in 1997 proved to be the first hard case in which an issue of national security was brought to change by the penetrating and coordinated influence of non-governmental organizations (NGOs) worldwide.

Differently from landmines, cluster munitions are a highly profitable industry and have a vital place in the military doctrines of the North Atlantic Treaty Organization (NATO) allies and others. One element that fundamentally differentiates landmines from cluster munitions is economic. The latter are much more costly to produce and the trade is substantially more profitable. A major part of global artillery arsenals is made up of cluster bombs. Eighty per cent of United States (US) artillery ammunition, for instance, consists of such munitions. Russia, China and the US are the biggest producers.



Marchers at the May 2008 Dublin Diplomatic Conference on Cluster Munitions that produced the Convention on Cluster Munitions

I argue that the ban on cluster munitions was brought to life by a stout global prohibition regime by a more complex set of arrangements and coalitions than the landmines case and it represents a moral prohibition regime. In the cluster munitions ban case, few states were as progressive as NGOs.

The ban was brought to fruition by the exceptional combination of state and non-state activism, a new form of diplomacy for the 21st century, and the commanding moral force of international humanitarian law (IHL) as a robust and compelling previously existing normative structure. Clearly, the Convention that banned cluster bombs went beyond IHL but benefited from this powerful normative framework.

Demonstrators at the May 2008 Dublin Diplomatic Conference on Cluster Munitions that produced the Convention on Cluster Munitions

The ban of cluster bombs is about military doctrines succumbing to the higher authority of moral and humanitarian concerns. In 1997, the International Campaign to Ban Landmines (ICBL), led

by Nobel Peace Laureate chief negotiator Jody Williams, leading civil society worldwide, successfully banned antipersonnel landmines with the Ottawa Treaty.

Yet once again, another set of weapons, namely cluster munitions, has gained prominence on the international agenda. Jody Williams, said upon receiving the Nobel Peace Prize: the landmine does not recognize the peace, after the war is over, it keeps on killing. Cluster munitions also present the same indiscriminate elements with the same 'unnecessary suffering' component to civilian populations.

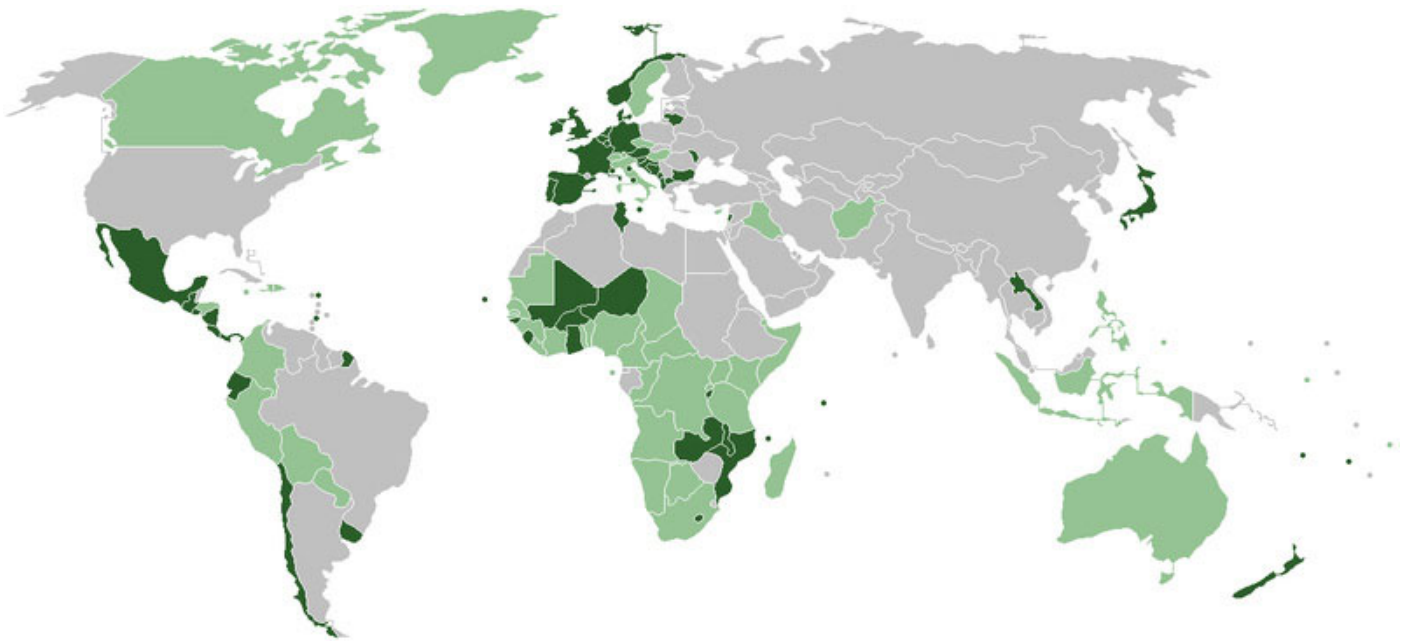
In summer 2006, the world watched in dismay, the brief but devastating war between Israel and Hezbollah when the Israeli army fired as many as four million cluster bombs into Lebanese territory during the short-lived war. Unfortunately, de-mining experts say, up to 1 million cluster bombs failed to explode immediately and continue to threaten civilians. Although the war ended in a month, Lebanese citizens continue to live in fear of leftover munitions; unexploded cluster bomb remnants that remain scattered across the country. Due to anti-personal characteristic of cluster munitions, which often leaves children as victims, advocates for banning the weapons created a united voice.

The international outcry for the catastrophic humanitarian consequences of deploying these weapons in densely populated areas, in the summer 2006, helped spark the global movement to ban cluster munitions and to create a global prohibition regime. Some of the other serious precedent situations include during the Cold War, Laos, most prominently. After the end of the Cold War Afghanistan, Iraq, Chechnya, Kosovo, and the EthiopiaEritrea conflict were some of the most notable cases. It is important to notice that the process towards a ban is more than a century old. However the focus of this article will be since the summer 2006. What happened then in Lebanon constituted the shock event that triggered all the action for global prohibition treaty-making.

I use primarily the framework of the illuminating theory of global prohibition regimes to start explaining how this has happened. The ban process started with the creation of the "Oslo Process", a track-two diplomacy course of action, i.e. with the government of Norway's call to negotiate a ban on clusters outside the UN in November 2006. The Oslo Process started with 46 states who committed to begin negotiations in February 2007 towards creating an international instrument to ban the use of cluster munitions (Oslo Conference on Cluster Munitions, 2008).

Over the following year and a half, several conferences around the world were held to continue to craft the prohibition regime on banning cluster munitions. Three months after Oslo, states met again in Lima in May 2007, and again in Vienna in December. Discussions were held to work towards creating a treaty, with negotiations that spanned from specific definitions of cluster munitions to the extent of the assistance to victims.

By February 2008, states met in New Zealand reaching an agreement known as the Wellington Declaration. This was a commitment by states to attend the Dublin conference three months later, setting final negotiations for a treaty to ban cluster munitions. The conference in Dublin lasted 10 days in May 2008 resulting in 107 states that signed and decided upon a final treaty.



States Parties to the Convention on Cluster Munitions (light green: signatory states, dark green: state parties)

The global prohibition regimes literature usually deals with activities that must be suppressed, such as piracy, slavery, and drug trafficking. I will start out using this literature's mostly known framework (Nadelmann and Andreas, 2006). For the purposes of my argument, the activities to be suppressed and subsequently prohibited are the use, development, production, acquisition, stockpile, and transfer of cluster munitions (CCM, article 1). Nadelmann and Andreas have pointedly observed that most global prohibition regimes follow a common evolutionary pattern that usually has five stages (Nadelmann and Andreas, 2006, 20-22).

In the first stage, the activity is still viewed as legitimate and normal. The state is usually the most common accomplice or protagonist. If any constraints are in place, they derive from bilateral treaties or political caution. At this stage, moral notions or evolving international norms play no role. The second stage entails the framing of the activity as a problem and as an evil. This framing, or "redefinition" as they say, is done by moral entrepreneurs, legal scholars, or religious groups.

The redefinition or reframing is gradual and at this stage, government officials are still involved to some degree in accepting or even serving as guarantors of the activity to be suppressed. In the third stage, regime change advocates and activists begin to protest and campaign vigorously using many tools ranging from diplomatic pressure to campaigning to military intervention. They spouse suppression and criminalization through international treaty making. These advocates include, for Nadelmann and Andreas, governments that typically exert hegemonic influence in an issue area as well as moral entrepreneurs.

If victorious, the process reaches a fourth stage that is the one of a fully existing prohibition regime: the activity becomes the subject of criminal laws (and police action) and institutions and

treaties form to coordinate. This stage means that some states will not have the political will or legal and financial capacity to implement and carry out the treaties' obligations. At this stage, criminal organizations still engage into the suppressed activity. In certain cases, the regime reaches a fifth stage. At this stage, the activity perhaps only exists in some areas. The reason why I chose this framework is summed up by:

"global prohibitions regimes are more likely to involve moral and emotional considerations than are most other global regimes. Like many criminal laws, they seek not to regulate but to ban; the underlying assumption is that certain activities must be prohibited because they are evil. Transnational moral consensus regarding the evil of a particular activity is not, however, sufficient to ensure the creation of a global prohibition regime" (Nadelmann and Andreas, 2006, 228).

Nadelmann and Andreas' framework will only be partly useful for the purposes here because of the strong criminal law component leading to regime formation in their theory (Nadelmann, 1990), perhaps still absent in this emerging prohibition regime against cluster munitions. However, this framework is pertinent here because this new regime is indeed about deciding on an issue out of moral conviction and this is what happened to banning the evil caused by cluster bombs.

I argue that two complementary theoretical frameworks will be needed to fully explain the rise of this new regime: one is the constructivist framework of international norms, and the other is from a branch of International Law, namely, International Humanitarian Law (IHL), also called the Laws of War. It is generally accepted that the definition of international norms is: a standard of right or wrong, a prescription or proscription for behavior "for a given identity." (Katzenstein, Wendt, and Jepperson, 1996). This is pertinent because the prohibitions set by the CCM were based upon a few powerful norms laid out by IHL (distinction between civilians and combatants, choice of weapon consistent with the need to avoid collateral damage, and weapon that is proportional to the desired military objective).

It is also probably true that the CCM already started prescribing behavior for the non-signatories with an ongoing significant stigmatizing effect. It can also be said that the ban is not yet a taboo as some observers are saying. An authoritative normative view of taboos, *vis-à-vis* issues that are closely related to national security, advances that a taboo is not the behavior of non-use itself but rather the normative belief about the behavior (Tannenwald, 2005, 4). A taboo is an intensely powerful kind of prohibition that is concerned with the protection of individuals from behavior that is associated with peril. A taboo is larger than a norm and it has characteristics of prohibition, danger, and its non-observance involves consequences (Tannenwald, 2005, 4).

The nuclear taboo, for example, is a *de facto* taboo not a *de jure* taboo because there is no prohibition on the use based on an international treaty (the Non-Proliferation Treaty does not contain express references). The case of the cluster bombs ban includes a *de jure* prohibition and the subjective element about it is the possible political opprobrium that will result on the use. However, this subjective element and the strong ascendance of the political opprobrium occurred because they were based on the force of the existing concrete and usually adhered to IHL norms. The four Geneva Conventions and their Protocols are the most widely ratified international

treaties in international law, and clearly represent the moral framework for the conduct of security relations vis-à-vis the use of arms in international relations.

## **Cluster Munitions**

Cluster Munitions, or cluster bombs or weapons, are conventional weapons that may be used against a number of targets, invented for large theater wars during the Cold War, which never occurred. They consist of a container or dispenser projected when airborne, land or sea-based that scatter clusters of bomblets over wide areas. They are theoretically designed to detonate prior or right after impact.

Cluster bombs are a threat to civilians in particular because a large number of unexploded bomblets consistently fail to detonate and the operation area usually covers a wide radius. Even a single fired container of cluster bombs that was launched and failed to detonate, the failure would scatter two hundred to six hundred hazardous bomblets over a large area. Furthermore, functioning like landmines, duds or unexploded bomblets without self-destruct devices are sentinels that could remain dangerous for decades after the end of a conflict and remain a serious menace to civilian populations.

Due to the destructive and lethal potential of cluster bombs, international efforts have gained momentum that led to successful multilateral negotiations to prohibit cluster munitions at the end of 2008. Most cluster munitions have not been used, they are still in stock of the great producers' arsenals: United States, Russia, and China.

### **First stage: the activity is still viewed as legitimate and normal.**

Prior to the Convention on Cluster Munitions (CCM), there were no restrictions on the production, use, and transfer of cluster bombs as well as no legal international means of protecting potential victims against the use of cluster munitions. Historically, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, also known as the Convention on Certain Conventional Weapons (CCW) was the first tentative albeit ineffective step.

The CCW was negotiated by 51 states in 1980. Its key goal is the protection of combatants from inhumane injuries and the prevention of non-combatants from accidentally being wounded or killed by certain types of arms. It applies to both international and intrastate conflicts. It entered into force in December 1983 and now has 111 high contracting parties. The CCW was a response to the Vietnam War by the international community, where the suffering caused by the indiscriminate use of the weapons with which the CCW deals was immortalized by the photo of Phan Thị Kim Phúc that was taken just after South Vietnamese planes bombed her village. AP Photographer Nick Út and NBC cameraman Le Phuc Dinh filmed her and her family emerging from the village after the air strike, running for their lives. This photo became one of the most famous photos to emerge from the Vietnam War and it received the Pulitzer Prize in 1972.

When the states parties to the CCW failed in November 2006 to agree on a mandate to continue on a path to negotiations addressing the humanitarian problems caused by cluster munitions, Norwegian Foreign Minister Jonas Gahr Støre invited interested states and organizations to a meeting in Oslo. On 22– 23 February 2007, Norway hosted the Oslo conference in which a group of 46 states met and, except for Japan, Romania and Poland, agreed on a process to develop and conclude a new treaty that would prohibit cluster munitions by 2008. The aim of the meeting was to start a process towards an international instrument on cluster munitions together with other concerned states and humanitarian actors. The 46 key states agreed to define key users, producers and stockpilers, and the countries mostly affected by cluster munitions were present (CMC 2007a).

Many previous initiatives throughout the last century attempted to set standards for the use of cluster munitions, thus paving the way for these processes (Prokosch 1995, Borrie 2009). Major NGOs and the International Committee of the Red Cross (ICRC) have been campaigning on this issue for many years.

However, pressure for controls on cluster munitions had been building for years by the use of such munitions in a large number of conflicts, including Afghanistan (during the Cold War and in 2001), Albania (1998–99), Bosnia and Herzegovina (1992–95), Cambodia (1969– 73), Chechnya/Russian Federation (1994– 96), Croatia (1995), Eritrea (1998), Ethiopia (1998), Iraq (1991 and 2003–06, where the almost three thousand casualties reported overshadows the problem of unreported casualties, and clearance is made difficult by the bad security situation), Israel (2006), Kosovo (1999, where NATO forces used cluster munitions with widespread humanitarian consequences, including placing a heavy burden on public health systems), Kuwait (1991), Laos (1965–73), where over 50 million cluster bombs were dropped within a kilometer of villages), Lebanon (2006, where total casualties reached 587 by April 2007), Montenegro (1999), Nagorno-Karabakh/Azerbaijan (1992–94), Serbia (1999), Sierra Leone (1997), Sudan (1996–99), Syria (1973), Tajikistan (1992–97), Vietnam (1965–75, where by 1975 approximately 300 cluster bombs had been dropped per square kilometer), and Western Sahara/Morocco (1975–88) (HI 2007). The worst-affected countries were Afghanistan, Cambodia, Iraq, Laos and Vietnam.

Throughout 2007, a group of approximately 15 like-minded or countercore states appeared: Australia, Canada, the Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Slovakia, Spain, Sweden, Switzerland and the UK. Their main concern was that the generation of a norm against the use of cluster bombs would cause them a legal conundrum vis-à-vis joint operations with the US and other non-high contracting parties, especially within NATO (Borrie 2009: 173).

The 46 key states agreed to define key uses, producers, and stockpilers, and the countries mostly affected by cluster munitions were present.

A discussion held in November 2008 to finalize negotiations towards a sixth CCW Protocol that would address cluster munitions failed to reach an agreement. All in all, the CCW is an important process because it brings together all the producers and users, many of whom had no role in shaping the language agreed upon in Oslo.



However, the CCW High Contracting Parties were very reluctant to even pursue a new international commitment that represented a move away from their traditional balance between military and humanitarian considerations that the CCW always struck. However the proper starting of a rejection of the norm deeply held until then – i.e. the retention of cluster bombs in arsenals – meant moving away from this balance and actually embrace a new realization: the use of cluster bombs and its accompanying humanitarian impacts outweigh military necessities.

### **Second stage: gradual re-framing as a problem and as an evil by moral entrepreneurs.**

Two key recent events led up to the drawing up and signing of the CCM: in the fall of 2005, Norway elected a government that held a majority in parliament that eventually embraced the concept of a ban. In March 2006, Belgium passed legislation banning cluster bombs (Borrie 2009: 64). Both processes were catalyzed by the same shock event, namely the brief but devastating war between Israel and Hezbollah in Lebanon in the summer of 2006.

Even though the conflict only lasted for a month, it killed almost 300 people, contaminated an area of approximately 37 million square meters and left hundreds of thousands of unexploded munitions. One of the parties to this conflict clearly and severely violated the principle of the choice of a proportional weapon according to IHL. This breach of this important principle produced a lasting tragic humanitarian disaster (Kellenberger 2007).

From 2006 through 2008, two disarmament diplomacy processes potentially dealing with cluster munitions gathered speed. One was aimed at prescribing regulations for the production, use and transfer of cluster bombs, and the other at proscribing all these activities. The former negotiation track took place within CCW. The latter negotiation track was a typical track-two diplomacy negotiation process outside the United Nations, called for by one country, Norway, known as the Oslo Process.

Throughout 2007 and for part of 2008, the CCW and the Oslo Processes overlapped, and were entangled politically and diplomatically (Borrie 2009: 160). This is because the former included all the major producers and users of cluster munitions and the latter included member states who were not at the CCW negotiations, the states worst affected by contamination, and the UK (as a major user and producer) and other NATO allies. The CCW NATO states hoped to maneuver the CCW negotiations (held in Geneva) towards a result that would not substantially harm their newer stocks of cluster bombs and at the same time allow them to claim the "humanitarian high ground" (Borrie 2009: 161).

The Oslo Process represented a broad moral coalition amongst states, civil society and UN agencies that brought together a new standard to protect civilians and helped to cement a new form of diplomacy. The UN Secretary General welcomed it, accepted the depositary functions for the treaty that was the result of the process and offered assistance with regard to treaty obligations for the CCM. The treaty was based on the principle that the necessities of war ought to yield to humanitarian considerations and to do so unfalteringly on behalf of humanity (O'Ceallaigh 2008). The CCM represents the irresistible moral compelling force that the existence of these weapons is incompatible with life in the 21st century, at a time when the nature of war has changed so dramatically:



Achieving the broadest possible support for international humanitarian law norms is an important objective .... But historically the highest levels of State participation have been achieved by the adoption of clear and morally compelling agreements. We urge States to reflect carefully on these procedural issues which are an integral element of ensuring the effectiveness and credibility of international humanitarian law agreements in the field of arms (Kellenberger 2007, emphasis added).

Endorsements against the use of cluster munitions signaled an emerging stigmatization pattern and the real path to reframing the issue. NATO affirmed in July 2007 that it would not use cluster bombs in Afghanistan because of apprehension regarding the potential humanitarian effects, as well as possible contraventions of IHL (Rappert 2008). Rapidly, the re-framing as an evil accompanied by the stigma against use of the weapons broadened, deepened and intensified (Nash 2008).

Beyond the pioneering domestic legislations passed by Belgium and Norway, in March 2009 the US Congress passed a one-year moratorium on the transfer of cluster munitions with a failure rate of less than 1%, which represents the majority of the American arsenal (Mines Action Canada 2009). In the 2008 hostilities between Georgia and Russia, Human Rights Watch concluded that both sides used cluster munitions. What followed was both sides trying to deny the weapons' use and justify their conduct on moral grounds (HRW 2009). It appears, therefore, that by 2009, the reframing of the use of cluster munitions as an evil activity not to be conducted by civilized nations was complete.

In the Ottawa landmines treaty and probably also with regard to the CCM, even though many important producer states have not ratified the multilateral mandates arising from the two agreements, two facts emerge as a result: one is the drying up of demand for the weapons and the second is a considerable reduction in the number of victims per year. This latter fact helps strengthen the case for the moral force of the rising prohibition, and a firm path towards the construction of the prohibition regime.

The events in Lebanon were a turning point for the ICRC position on cluster munitions to turn into taking a stand and acting vigorously towards contributing to the re-framing of production, use and transfer of cluster bombs as an evil (Borrie 2009: 241). The background was the Ottawa landmines process, which has fundamentally contributed to changing behavior. The media have been sensitized and the landmines ban has meant the construction of a taboo that makes it almost unthinkable for states to use them.

For example, the Israeli government wanted to mine the wall separating Israel from the Palestinian territories, but it was dissuaded from doing so at the highest level; so even though Israel had refused to ratify the Ottawa treaty, it decided not to use landmines (Hiznay 2008). The most startling example of non-use has been the US, which has not deployed landmines since the first Gulf War and is pressured not to use them because of joint NATO operations. Four million landmines have been cleared and destroyed, and the trade is dead (Hiznay 2008). The Ottawa treaty is a striking example of the development of a taboo that prevents the use of a particular weapon.

The role of particular individuals was vital to the moral reframing of all activities associated to cluster bombs to be considered evil. John Borrie advances the idea of an "informal network of individuals" or a group of "humanitarian disarmers" who were significant to the achievement of the prohibition treaty. Prominent in the category of influential individuals was Ambassador Steffen Kongstad, deputy secretary general for humanitarian affairs at the Ministry of Foreign Affairs in Norway. He had been involved in the Ottawa landmines process and therefore was instrumental via the legacy and wisdom he brought to the cluster ban process.

From the NGO standpoint, there was a genuine coalition of individuals, involving Thomas Nash, coordinator of the Cluster Munitions Coalition (CMC) that is a network of civil society organizations, including NGOs and faith-based and professional groups, that has been participating in the CCW and Oslo Process; Steve Goose, director of the Human Rights Watch Arms Division; and Grethe Østern of Norwegian People's Aid, co-chair of the CMC. This 'triumvirate' worked hard to spread the word broadly, working both locally and globally.

They provided assistance to the campaign, set up parliamentary groups and in particular targeted David Miliband, the then UK foreign secretary by getting inside the space where Miliband and his staff walked (including metro stations near work), and using the local media, the BBC and working with grassroots movements (like women's groups). The UK domestic scene contributed to all this as Gordon Brown was unpopular at home and wanted to seize the limelight through support of a good cause (Conway 2008).



A B-1B Lancer unleashes cluster munitions. The B-1B uses radar and inertial navigation equipment enabling aircrews to globally navigate, update mission profiles and target coordinates in-flight, and precision bomb without the need for ground-based navigation aids

Initially, Mexico (through Ambassador Pablo Macedo) and New Zealand (through Ambassador Don Mackay) were the first to join Norway in setting up the first off-the-UN conference. Following them were Austria, Ireland and Sweden, forming a core group. Other interested states included Belgium, the Holy See, Lebanon and Peru (Borrie 2009: 141).

At the end of the Oslo conference, the group consolidated around Austria, Ireland, Mexico, New Zealand, Norway, and Peru. The Holy See later joined as a fully fledged member. The resulting benefits were the use of the moral clout and extensive diplomatic networks in the developing world by this core group (Borrie 2009: 162). On the other side of the coin, the US, Brazil, China, India, Israel, Pakistan and Russia, all major cluster munitions users, rejected the Oslo Process throughout (Borrie 2009: 149). They were still accepting the activities and were acting as guarantors of the continued uses of cluster bombs.

An important step achieved during the moral reframing was during one of the preparatory conferences to the CCM, the Vienna conference. The Norwegian's People's Aid, an influential NGO, presented a report, entitled M-85: An Analysis of Reliability. It exposed the fact that, despite the incorporation of high-quality selfdestruction mechanisms, M-85 bomblets presented a higher-than-anticipated level of failure rate that did not prevent contamination (Borrie 2009: 189).

This report struck down the argument by some states that technical improvements had reduced failure rates, since the M-85 bomblets were lauded as among the best models. As the conference concluded, there was a sense of optimism for continuing discussions at the next major meeting in Wellington, New Zealand. The dramatic increase in participation and support for the Oslo Process was an acknowledgement of the growing stigmatization of cluster munitions and a sign that the process was irreversible, with the majority of the international community fully supporting a total ban.

The dwindling bond among likeminded states (the counter-core group of guarantors) attempting to weaken the treaty proved to be vital in the lead-up to Dublin where the CCM was cinched. Three factors led to this loosening of the *raison d'être* of this group. The first was the French military review of the utility of the cluster bombs it possessed in its arsenal. The review, carried out before Wellington, ascertained that the cluster bombs the French had were of limited utility. Substitute capabilities that would not engender the same humanitarian setbacks like the BONUS sensor-fused system (a type of cluster bombs) would be able to fill the gap (Borrie 2009: 251).

This led the French to start a back-channel bilateral consultation with Norway, which had the same interest in maintaining the sensorfusing munitions. Secondly, not all of these like-minded states had cluster munitions; for instance, Australia did not. In addition, among the ones who had such weapons, the capabilities and types of weapons varied considerably. Thirdly, interoperability, still an outstanding issue, was less of a concern for those countries that were not part of a military alliance, such as Finland, Sweden and Switzerland. Thus, the reasons for the solidarity of this group of states began to dissipate (Borrie 2009: 255-277).

### **Third stage: activists campaign for change through campaign for international treaty making.**

Moral reasons and a humanitarian legacy led Belgium to ban cluster munitions, since it was also the first country to pass legislation banning landmines, despite opposition from and resentment on the part of its NATO allies. The action was led by NGOs in Belgium, especially Handicap International (HI), despite strong resistance from arms manufacturers. Surprisingly, Belgium played no leadership role in the CCW or in the Oslo Process; it only joined the latter later on. What resulted from the Belgian ban, nonetheless, was an impetus for the Norwegians to enact legislation and eventually become the champions of the international process banning cluster bombs (Borrie 2009: 64–70).

Norway spearheaded the Oslo Process to achieve an international treaty in the wake of failed arms talks in Geneva at the end of the CCW meeting in 2006 after the conflict in Lebanon. The Norwegian government took an active stance by including its commitment to work for an international ban on cluster munitions in its election platform (Norwegian Ministry of Foreign Affairs 2007b). After failed attempts during CCW negotiations in 2006 in Geneva, the proactive Norwegian government declared its commitment to establishing an international ban on cluster munitions (Norwegian Ministry of Foreign Affairs 2007a).

After Norway, Austria, and Bosnia and Herzegovina announced moratoria banning the use of cluster munitions, additional countries joined their efforts. In the following months, some three

dozen countries formally declared their support for a new treaty on cluster munitions. Parliamentary initiatives to regulate or prohibit cluster munitions in about a dozen countries, including the US and UK, two of the biggest users of cluster munitions, followed. The UK quickly imposed a partial ban. In Oslo in February 2007, the UK was one of 46 countries that committed to be part of a process aimed at concluding in 2008 an international treaty to prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians. Norway and Austria had already on humanitarian grounds declared a moratorium on the use of artillery cluster munitions with M85 submunitions in their arsenals. Belgium was the first country to ban cluster bombs, doing so at the beginning of 2006.

The partnership among the ICRC, states, the UN Development Program (UNDP) and civil society was invaluable, and the combination of the committed core group of states in coalition with these actors was essential in providing the leadership needed. In April 2007, the ICRC convened a meeting that helped catalyze perceptions vis-à-vis all aspects of the negotiations in both processes (Oslo and the CCW). With substantial legal and humanitarian discussion, the meeting exposed the inadequacy of technical fixes and solutions (i.e. reducing failure rates and therefore having less unexploded ordnance) proposed by some states who wanted to cling to their weapons and the CCW process (Borrie 2009: 170). The ICRC's endorsement the Oslo Process was instrumental in some states justifying their pro-ban position (Borrie 2009: 233).

The ICRC has engaged in extensive humanitarian diplomacy over the years, e.g. it has been instrumental in the development of prohibitions on various conventional weapons. Of particular notice were the important moves that paved the way for what became the global prohibition on landmines through the Ottawa treaty. Already in the 1950s, the ICRC had singled landmines as one of the conventional weapons of concern.

It reissued analyses throughout that decade reminding and informing states of the injurious effects of the use of landmines on civilians. With the recurrent use of mines in Indochina in the 1960s, the ICRC attempted to further the understanding of IHL applicable to landmines. In 1973, it published a report entitled *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects*. This report focused mostly on napalm, but also highlighted landmines. The ICRC hosted conferences on the same theme of the report in 1974 and 1976. Some of the questions discussed in these meetings became part of the CCW later on (Maslen 1998).

Reframing the issue in terms of a twofold avenue was vital. The first was reframing it from a disarmament to a humanitarian question. The second was framing the problem from the victims' standpoint; in other words, the use of such weapons came to be seen as indiscriminate. They were seen as area weapons that in relation to the changed nature of current conflicts can have very indiscriminate effects, both during and after attacks. Throughout the negotiations, the humanitarian aspect of the issue was discussed first without reference to the technical aspects (which were referred to in the CCW).

There was an insistence that negotiations were based on an effectsbased definition and approach throughout the negotiations. This meant leaving the technical aspects until the end of the process. For instance, deciding on weight came right at the end; e.g. paragraph 2(c) was negotiated as a compromise at the last minute in Dublin (Abelsen 2008). By focusing on very strong provisions

on cooperation and assistance, as stressed by the Holy See in particular, a clash between the global South and North was avoided. This was done by avoiding talking about technology, otherwise the South would have been reluctant to join in the discussions.

### **Reframing the issue in terms of a twofold avenue was vital**

CCM achieved a multilateral reframing that went beyond the "militaryutility centered discourse" (Borrie 2009: 337) that threatened to overlook and neglect the real humanitarian implications of the use of cluster bombs. The CCM could "mark a significant milestone in how we can identify ways to protect civilians in armed conflict more broadly" (Borrie 2009: 338).

The constitution of the pro-ban "core group" took place through coalition building among states at the highest level, involving Norway, Ireland, New Zealand, Peru, Mexico, Austria and the Holy See. An important element was that there was enormous political involvement: from the bottom up and from the top down, and in many forms. In Norway, a very high echelon of government officials was involved. In 2005, a new government had come to power that had adopted a policy of banning cluster munitions.

Even though Norway had stockpiles with less than 1% failure rate and cluster munitions made up 40% of its arsenal, there was decision to impose a moratorium through a consolidated, sustained national process within the country. Lebanon placed the issue higher on the international agenda, thus increasing the political momentum. Simultaneously, as said, in November 2006, the CCW negotiations were unable to agree and move forward. Sweden made a statement on behalf of the European Union (EU) in support of an agreement that was ultimately rejected. In this situation, Norway proposed an Oslo meeting in February 2007.

Under the CMC umbrella of approximately two hundred members are gathered significant national and worldwide organizations such as the Afghan Campaign to Ban Landmines, Amnesty International, HI, Human Rights Watch, the International Campaign to Ban Landmines, the Lebanon Landmine Resource Center, among others.

The CMC played a pivotal role in Dublin, where hundreds of campaigners lobbied the government delegates using several policy papers previously produced by the coalition (Little 2009). The success of the Oslo Process was greatly influenced by civil society actors' ability to organize with a coherent message and involved funders. Many activists believe that the signatories of the Convention will stigmatize cluster munitions so that powerful countries like the United States will not use them even though they have not signed the legally binding document (HRW 2008a). Attempts to move forward from the Oslo signing conference in December 2008 will continue to be heavily influenced by civil society campaigners and organizations like the CMC.

### **Fourth stage: International Treaty is created. Bastions of recalcitrance remain.**

On 30 May 2008, 107 states adopted the ground-breaking Convention on Cluster Munitions at a diplomatic conference held in Dublin, Ireland. The formal signing ceremony took place in Oslo on 4 December of that year. The new international norm set by the CCM prohibits the use,

development, production, acquisition, stockpiling, retention or transfer of cluster munitions. In addition, it contains provisions to clear contaminated land and help victims, and on strengthening international cooperation and assistance.

On 16 February 2010, Burkina Faso became the 30th state to deposit its instrument of ratification of the CCM. Thus, according to the convention's stipulations, it becomes legally binding on the 30 ratifying states on 1 August 2010 and subsequently for other ratifying states. The entry into force of the convention is considered a major landmark in the process of stigmatizing the weapon and establishing an international humanitarian law norm that will be observed even by non-high contracting parties, and its existence has already started modifying state behavior (Herby 2010).

In Oslo, significant progress was made when the convention was officially opened for signing. Ninety-four states signed the convention, while four states (Ireland, the Holy See, Sierra Leone and Norway) ratified it immediately. The main obligations for the signatories of the CCM are that they prohibit the production, stockpiling and transfer of all cluster munitions in all circumstances. Signatories also cannot assist those who engage in the activity prohibited by the Convention. Cluster munitions are defined in Article 2 as "a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions."

Notable signatories included the UK, which had made the pivotal decision to sign, despite its military's frequent use of cluster bombs (Baker 2008). However, the countries that stockpile or produce large amounts of cluster munitions, which include China, Russia, the US, Israel, Pakistan and Brazil, all remained in opposition; three of these are members of the UN Security Council (Burns 2008). The US believes that the proper process for addressing such weapons is through the CCW.

The US has consistently opposed the Oslo Process and the treaty to ban cluster munitions. Nonetheless, the country has made some progress in dealing with the issue. In February 2007, Senators Diane Feinstein and Patrick Leahy introduced the Cluster Munitions Civilian Protection Act in the US Senate, which "would ban the use, sale and transfer of cluster bombs with a dud rate of 1% or more," as well as ban the use of all cluster munitions in places "where civilians are known to be present or in areas normally inhabited by civilians." "The bill also provide[d] for a presidential waiver of the law's requirements if it the use of cluster munitions was considered vital to protect the security of the United States" (Peratis 2007). US opposition is likely due to pressure from US companies that design and manufacture cluster munitions.

The US has stated that, over the past years, it has allocated almost one billion dollars to clear explosive remnants of war in Asia, Europe and the Middle East (including over thirty million dollars to help clear Lebanon of unexploded ordinance after the Israeli attack in the summer of 2006). Ronald Bettauer, a US diplomat, stated that the decision to supply such aid was due to the importance of this issue, concerns raised by other countries, and the US's own concerns about the humanitarian implications of these weapons (The Economist 2007).

The US announced a new policy on cluster munitions during the CCW negotiations in Geneva in July 2008 (Department of Defense 2008). The new policy recognizes the necessity to minimize



unintended harm to civilians. A year following the publication of the policy, the removal of all cluster munitions surplus stocks that exceed operational requirements will be initiated. Secondly, after 2018, the US will only transfer and deploy munitions containing less than 1% unexploded ordnance. Until then, the use of over 1% failure rate munitions must be approved by the combat commander.

This policy was unacceptable to Human Rights Watch and the CMC, who were present at the CCW meeting in Geneva. This is especially because the reliability test is simply not truly reliable. The military inadequacy of cluster munitions has been heavily documented since Lebanon, which was a real test of just how inaccurate these weapons are. Research carried out by the Norwegian Defence Research Institute documented that the failure rates were far higher than expected. It was also documented that self-destruction mechanisms do not work as intended (Kongstad 2007).

**Fifth stage: at this stage, the activity perhaps only exists in some areas.**

Moving towards signing a treaty such as the CCM will continue to be difficult for the powerful actors who have prominent roles in the use, stockpiling and production of cluster munitions. States such as Russia continue to refuse to sign the CCM, and this refusal continues to influence Russia's neighboring Eastern European states because of their fear of being the victims of future Russian attacks. This concern was enhanced by the Russia–Georgia mini war in August 2008, during which, according to Human Rights Watch, both Russia and Georgia used cluster munitions against each other in the conflict (HRW 2008b).

Finland originally supported the CCM, but then withdrew support due to their concern for self-defense from potential Russian aggression. This exemplifies the importance of powerful states that use, stockpile or produce cluster munitions helping to establish the norm by signing the treaty. Laos and Lebanon are examples of states that signed the convention who have been victims of cluster munitions (Abramson 2009). Such moves by victimized states could potentially influence other states to make a stand against anti-humanitarian violence.

According to commentators, "[t]he CCM marks a new chapter in disarmament and a milestone of international law" (Harrison 2008), and by its signing a new international legal standard has been achieved (Borrie 2009: 305). After the signing of the treaty, Germany, France and the UK decided unilaterally to renounce all kinds of cluster weapons. Japan acceded to the treaty as well, despite a great deal of reluctance, and was, together with Germany, one of the first 15 states to ratify the CCM.

The norm set by the CCM, i.e. the prohibition of the use, development, production, acquisition, stockpiling, retention, or transfer of cluster munitions; as well as provisions to clear contaminated land and help victims, and on strengthening international cooperation and assistance, is emerging robustly and cluster bombs have been stigmatized in a dramatically fast way. Quite clearly, the CCM created a global code of conduct that extends far beyond the increasing group of high contracting parties. It is highly unlikely that any country that aspires to occupy the moral high ground of politics will ever use these weapons again.

## **Further Explaining the Rise of the Prohibition Regime: IHL Applicable to Cluster Munitions.**

The four Geneva Conventions that embody IHL are universally ratified and comprise the most adhered to multilateral regime in international law. It is the previous existence of this strong and consolidated regime, and established branch of international law, that has made possible and set in motion the enabling framework upon which the transnational moral entrepreneurs led by Norway could act to create the new regime embodied by the CCM. The role of the ICRC cannot be underestimated either. The powerful combination of the previously existing framework laid out by IHL and the awareness raising and educational campaigning by the ICRC were key constitutive ingredients for the CCM to rise as a prohibition regime.

IHL is constituted by three broad principles: the first is the requirement to distinguish between military personnel and civilians during hostilities. The second is the rule of proportionality, where a lawful attack may not have excessive consequences for civilians vis-à-vis the initial military objective (collateral damage). The third is the choice of weapon, with the idea being to choose weapons systems that will have the least impact on civilians. These general principles are part of customary international law generally accepted by all nations.

The deployment of cluster munitions may violate all these principles, as these weapons are prone to cause indiscriminate effects, of which Lebanon is the prime example. It is clear that the temporal and territorial limits of a conflict are uncertain in most conflicts waged today. However, "military necessity" is sometimes used to justify egregious acts and to conceal violations. IHL prohibits these transgressions and sets out conspicuous breaches.

The Additional Protocol to the Geneva Conventions of June 1977 articulates the core of the limits and prohibitions set by IHL vis-à-vis the choice of weapons in hostilities in Articles 35, 36, 51 and 57. The protocol's Article 35 asserts the basic rules covering the methods and means of warfare. It clearly declares that the choice of means of waging war is bound by considerations of humanity and the environment. Parties cannot freely choose the methods of carrying out conflict. As a result, there is a clear prohibition on the employment of weapons and methods of warfare that "cause superfluous injury or unnecessary suffering" (Article 35.2). Parties are also barred from utilizing means that will cause long-term and severe harm to the environment.

There are two applications of the precautionary principle in IHL. One is Article 36 of the Additional Protocol, which is the first application of the precautionary approach vis-à-vis the choice of the weapon. It pronounces that in developing new weapons, parties should ascertain whether their use would contravene IHL, or international law in general.

The other is Article 57, entitled Precautions in Attack, which articulates the need to distinguish civilian populations and objects from military personnel and objects. It mandates the choice of the target to privilege a purely military target instead of civilian object that may bring a military advantage in a battle. Beyond laying down the requirement of distinction, which is a fundamental tenet of IHL, the article also reiterates the constraint and limitation on the choice of means and methods of attack.

This has to be carried out in a precautionary fashion aimed at minimizing collateral damage to civilians and their property, and civilian objects in general. There is a clear mandate for suspending planned attacks that have the potential to result in harm to civilians. Article 57 institutes the idea of "proportionality", another core tenet of IHL. Force shall not exceed the concrete and discrete military goal. The article also reiterates the notion of precaution when it advises parties to provide sufficient warning prior to attacks in order to spare civilians.

The rule of distinction is further elaborated on in Article 51, in conjunction with further restraints on the choice of the weapon. This article deepens the legal tenets of distinction by defining "indiscriminate attacks" as well as by prohibiting violence and tactics that spread terror among civilians. This is where the core of the restraints on the choice of the weapon resides by tying them to the necessity of distinction: Article 51 urges parties not to use means and methods that cannot distinguish civilians and combatant populations, in addition by mandating that the choice of the weapon should distinguish between military and civilian objects.

IHL clearly establishes a powerful moral framework for the conduct of international relations during war. It is a potent set of prescriptions and proscriptions for how states must behave during hostilities. The CCM is primarily an IHL convention; in other words, the rise of the prohibition regime set by the CCM, as well, as its mandate, are grounded in IHL.

### **Conclusion: The Construction of a Moral Proscription Arising from the Prohibition Regime**

I have argued that the rise and entrance into force of the CCM that prohibits the evils caused by cluster bombs constitutes a moral global prohibition regime. The norm set by the CCM, i.e. the prohibition of the use, development, production, acquisition, stockpiling, retention or transfer of cluster munitions developed due to a strong moral opprobrium, elicited by IHL, and ongoing stigmatization process associated with the use of these weapons.

What is extraordinary about the process of emergence of this new prohibition regime is its strong moral component enabled by the existence of a previously strong normative regime set by IHL as a moral code upon which states must operate vis-à-vis how they manage the choices of weapons to wage war, and the limits imposed by it on the evils they may cause to civilians.

This moral code of proscriptions spawned by International Humanitarian Law-based global prohibition regimes will extend far beyond the group of High Contracting Parties to these international treaties.<sup>1</sup>

---

<sup>1</sup>. Garcia, D. (2012). "Banning Evil: Cluster Munitions and the Successful Formation of a Global Prohibition Regime." *Cornell International Affairs Review*, 5(2). Retrieved from <http://www.inquiriesjournal.com/a?id=1244>

## Endnotes

1. The term cluster bombs will be used interchangeably with cluster munitions.
2. Most importantly, Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Landmines," *International Organization* 52:3 (Summer 1998), pp.613-644, and Kenneth Rutherford *The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines*, *World Politics*, (October 2000) pp. 74-114.
3. As Price and Rutherford argue, the first form this new form of activism was tried out and succeeded was during the international campaign to ban landmines.
4. Associated Press, Explosion in northeastern Lebanon kills Syrian worker, wounds 4, (*International Herald Tribune*: 18 Sept. 2007).
5. The principle works that have detailed the history of these efforts are, most prominently: Eric Prokosch "The Technology of Killing: A Military and Political History of Antipersonnel Weapons" Zed Books Ltd, 1995 and John Borrie *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* United Nations Publications; 1st edition (October 30, 2009).
6. Afghanistan, Albania, Bosnia and Herzegovina, Cambodia, Chad, Croatia, Eritrea, Ethiopia, Iraq, Israel, Kuwait, Laos, Lebanon, Montenegro, Pakistan, Chechnya, Saudi Arabia, Serbia and Kosovo, Sierra Leone, Sudan, Syria, Tajikistan and Vietnam.
7. For a full account of individuals involved in the process, see Borrie (2009).
8. For another analysis of the applications of IHL to cluster munitions, see Rappert (2008).
9. Precaution includes three components: action to avoid harm regardless of improbability, shifting the burden of proof to supporters of a probably damaging activity thorough consideration of all alternatives, and transparent decision-making to include the affected. In a nutshell, the precautionary principle calls upon the advocates of actions that may lead to irrevocable damage to take preventative measures to avert harm. This is in spite of the lack of scientific certainty. Regretfully, this principle is still at a stage of what the law ought to be (*lege ferenda*) and not what the law and state practice are (*lex lata*); however, it is also in the process of becoming international customary law (despite persistent opposition) (CISDL 2002).