

The New Cluster Munitions Treaty: Gains, Concerns, Prospects

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There is a new Convention on Cluster Munitions (CCM), adopted by 111 states at the close of the 19-30 May 2008 Dublin Diplomatic Conference on Cluster Munitions. It is a largely good treaty which benefits victims and avoids more victims of cluster munitions, in the process breaking some new ground in international law and treaty-making. This newly adopted treaty is expected to be signed by more than 100 states in Oslo in early December 2008, and thereafter enter in force within 2009 upon ratification by 30 states-parties. The treaty-signing in Oslo would bring to full circle the Oslo Process which started there in February 2007.

Cluster Munitions Banned

The Oslo Process is quite on track to achieve its stated objective to “conclude by 2008 a legally binding international instrument that will prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians.”² The new CCM is said to comprehensively ban cluster munitions “as a class of weapons.”³ A “cluster munition” is defined as “a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those submunitions.”⁴

Excluded from this definition are, among others, munitions with five cumulative characteristics which are intended “to avoid indiscriminate area effects and the risks posed by unexploded submunitions” – understood to be munitions that do not cause unacceptable harm to civilians. To be excluded from the ban, each munition must contain fewer than 10 explosive submunitions. Furthermore, each explosive submunition must: weigh more than 4 kilograms, be

¹ Coordinator of the non-governmental Philippine Campaign to Ban Landmines (PCBL) which participated in the Wellington (February 2008) and Dublin (May 2008) Conferences on Cluster Munitions. PCBL participated as a member of the international non-governmental Cluster Munition Coalition (CMC), and liberal reference to some of its statements and papers are made herein. The views expressed herein are either those of PCBL itself or those of others as attributed, some adopted, some not, as can be gleaned.

² Oslo Declaration (23 February 2007), para. 1 (i).

³ Steve Goose, Co-Chair of CMC, Statement to the Committee of the Whole on the Agreement to Adopt the Cluster Munitions Convention, Dublin Diplomatic Conference on Cluster Munitions, 28 May 2008.

⁴ Convention on Cluster Munitions (CCM), Article 2, paragraph 2 chapeau.

designed to detect and engage a single target object, be equipped with an electronic self-deactivation mechanism and an electronic self-deactivating feature.⁵

Taken all together, the said definition of cluster munitions has the practical effect of banning all cluster munitions which have been used⁶ or are known to presently exist in various stockpiles around the world. On this basis, “Millions of cluster munitions are now consigned for destruction and will never have the chance to kill or maim civilians in the future.”⁷ Almost by after-thought, the new CCM’s prohibitions were made to apply to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft,⁸ since these have the effects of cluster munitions. Also, the cluster munitions ban takes effect immediately upon entry into force of the new CCM for each state-party as there is no transition period for such effectivity.⁹

One concern that has been raised though with the technologically-oriented aspects of the aforesaid definition is that it may open the possibility for a new generation of heavier cluster munitions and submunitions which perform the same way as the old or present generation of banned cluster munitions. Some states, led by Austria, have called for the new CCM’s review mechanism to include a periodic review of whether the aforesaid technological characteristics indeed serve the desired effect of “avoid(ing) indiscriminate area effects and the risks posed by unexploded submunitions.”

Other Treaty Gains

By unanimous assessment, the biggest gain in the new CCM are its provisions on victim assistance, vastly improving on those in the 1997 Ottawa Treaty banning anti-personnel mines which has no separate article on the matter. After all, the Oslo Process had also aimed for a treaty that would “establish a framework for cooperation and assistance...”¹⁰

The new CCM’s separate article on victim assistance invoked “applicable humanitarian and human rights law” to develop various measures that would “adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.”¹¹ The measures include non-discrimination among cluster munition victims and other war victims, close consultations with and active

⁵ CCM, Art. 2, para. 2 (c).

⁶ Remarks of Irish Ambassador Daithi O’Ceallaigh, President of the Dublin Diplomatic Conference, during its Final Plenary on 30 May 2008.

⁷ Thomas Nash, CMC Coordinator, Statement at the Final Plenary, Dublin Diplomatic Conference on Cluster Munitions, 30 May 2008.

⁸ CCM, Art. 1, para. 2.

⁹ See CCM, Art. 17.

¹⁰ Oslo Declaration, para. 1 (ii).

¹¹ CCM, Art. 5, para. 1.

involvement of victims and their organizations, and a government focal point for coordination.¹² One impetus for these measures was to “connect the dots” with international human rights law, notably the 2007 Convention on the Rights of Persons with Disabilities.¹³

Then, there is also the definition of “cluster munition victims” to include not only those who have “suffered physical or psychological injury” (i.e. the survivors) but also those “who have been killed (i.e. the dead). The reference to “all persons” victimized is understood in the diplomatic record to cover not only nationals of the affected state but also migrants, refugees and other non-nationals.¹⁴ Without these additions, a significant sector or number, inc. “their affected families and communities,” could have been left out of assistance. To give credit, these additions were largely the result of a Philippine initiative at the Dublin conference.

The new CCM also “has very good provisions on clearance, transparency, and international cooperation and assistance, all of which are an improvement on the Mine Ban Treaty, taking advantage of lessons learned over the past decade.”¹⁵ The article on clearance and destruction of cluster munition remnants and risk reduction education¹⁶ not only builds on the 2003 Protocol V on Explosive Remnants of War (ERW) of the Convention on Certain Conventional Weapons (CCW) but also operationalizes a form of user state responsibility, albeit not mandatory, only “strongly encouraged”¹⁷ – but still a first for a weapons treaty.¹⁸

Not noticed much as an improvement in the new CCM over the 1997 Ottawa Treaty is the article on national implementation measures.¹⁹ Whereas in the latter treaty the phrasing limits the mandate to measures which prevent and suppress prohibited activity, the new CCM now does not limit the measures that way but instead mandates all measures of implementation, whether of a penal nature or not. Again, this resulted from a Philippine initiative. This fits the notion in particular of developing comprehensive, not just criminal, legislation on cluster munitions. And also serves another objective of the Oslo Process to “Consider taking steps at the national level...”²⁰

Weak Areas of Concern

¹² CCM, Art. 5, para. 2, esp. (e), (f) and (g).

¹³ CCM, Preamble, ninth para.

¹⁴ CCM, Art. 2, para. 1.

¹⁵ Goose, CMC Statement to the Committee of the Whole, Dublin Conference, 28 May 2008.

¹⁶ CCM, Art. 4.

¹⁷ CCM, Art. 4, para. 4.

¹⁸ Bonnie Docherty, Human Rights Watch, Remarks at the Lunchtime Talk on “The Prohibition of Cluster Munitions and the Future of International Law,” a CMC side event for the Dublin Conference, 29 May 2008.

¹⁹ CCM, Art. 9 and 1997 Ottawa Treaty, Art. 9.

²⁰ Oslo Declaration, para. 2.

The acknowledged main weak area of concern in the new CCM is its separate article on relations with states not party to this Convention, particularly in matters of military cooperation and joint operations, or what has been called “interoperability.”²¹

The concern is that the provisions here, “Notwithstanding...” the main prohibitions of the new CCM,²² would allow for states parties to be complicit in prohibited activities, e.g. use and stockpiling of cluster munitions, by military ally states who are not parties to the treaty.²³ But this is not necessarily the proper interpretation of the treaty provisions concerned. In any case, there are also clear positive provisions for each state party to encourage such military ally states to adhere to the new CCM, to notify them of its obligations thereunder, and to make its best efforts to discourage them from using cluster munitions.²⁴

The “interoperability” provision has been sought by leading NATO states inside the Oslo Process like the U.K. in consideration of their military alliances mainly with the U.S., the major cluster munitions user, stockpiler and producer which is staying outside of the Oslo Process. Another consideration of these states led by the U.K. has been legal liability protection for its soldiers who are in joint military operations with U.S. and/or other military forces which might use and stockpile cluster munitions. Of course, a valid concern is the efficacy of the new CCM, given that the U.S. and other major “usual suspects” in cluster munitions use, development, production, acquisition, stockpiling, retention or transfer – e.g. Russia, China, India, Pakistan and Israel – would continue to remain outside the treaty.

Military alliances and cooperation can continue, the only point being that states parties to the new CCM keep to their international obligations thereunder, esp. the main undertakings, inc. the prohibition against assisting anyone to engage prohibited activity.²⁵

Legal liability of soldiers of states parties should not be a problem as long as they do not knowingly or intentionally assist prohibited activity. That the U.S. and other major “usual suspects” remain outside the new CCM does not detract from its merits and validity as a humanitarian disarmament measure. As it is, a good number of states, including significant users, stockpilers and producers, are already on board.

Just as important as the international legal ban on cluster munitions is the global moral-political stigmatization of these weapons which often positively modify the behavior of states outside a weapons ban treaty regime, as shown for example in the case of the U.S. itself vis-à-vis the 1997 Ottawa Treaty norm of a

²¹ CCM, Art. 21.

²² In CCM, Art. 1, para. 1.

²³ See esp. CCM, Art. 21, para. 3 and to some extent para. 4.

²⁴ CCM, Art. 21, paras. 1 and 2.

²⁵ CCM, Art. 1, para. 1 (c).

total ban on anti-personnel mines.²⁶ One can also imagine and hope that the U.K., as the top military ally of the U.S., would encourage it to adhere to the new CCM, to make best efforts to discourage it from using cluster munitions, and to request it to remove its stockpiles in the U.K – this would be one real test.

Among the remaining concerns regarding “weakening” of the new CCM are the extensions of a stockpile destruction deadline from 6 to 8 years, and of a clearance deadline from 5 to 10 years. Heavily-affected states like Laos, Vietnam and Cambodia have felt that greater demands were being placed on affected states for clearance than for user-producer states for stockpile destruction.²⁷ Then, there is the provision permitting the retention or acquisition of a limited but unspecified number of cluster munitions and explosive submunitions for development of and training in detection, clearance or destruction techniques,²⁸ which some see as a potential loophole.

There could have been several more positive and novel provisions that would have further improved and strengthened the new CCM but somehow did not make it into the treaty text. Just to cite a few Philippine proposals, one was for user state responsibility for victim assistance to match the one for clearance, and another for exploring inter-treaty regime interfacing and mechanisms for this purpose. User state responsibility is an important attraction for affected states, like still observer-status Vietnam, which feel they are being burdened with primary responsibility for clearance and victim assistance arising from a ground situation which they did not cause. Still another Philippine proposal was for operative provisions to address non-state armed groups ended up in the non-operative Preamble,²⁹ a retrogression from already existing models for such operative provisions in two international treaties.³⁰

Oslo Process Factors

The success of the Oslo Process so far has been largely attributed to the tried and tested “force mix” for the record-breaking one-year 1996-97 Ottawa Process for a total ban on anti-personnel mines: a core group of like-minded reputable states, a global civil society campaign, and humanitarian-oriented international and inter-governmental organizations. Except for the latter, the cast has not been exactly the same. The core group this time was composed of Norway, Peru, Austria, New Zealand, Zambia, Mexico, and the Holy See. Conspicuously absent from this core group was Canada which led the Ottawa

²⁶ See Jody Williams, Chair of the Nobel Women’s Initiative, An Open Letter to the Delegations at the Dublin Diplomatic Conference on Cluster Munitions, 26 May 2008.

²⁷ See International Committee of the Red Cross (ICRC), Summary Report, Southeast Asia Regional Meeting on Cluster Munitions Hosted by the ICRC, 24-25 April 2008, Bangkok Thailand.

²⁸ CCM, Art. 3, para. 6.

²⁹ CCM, Preamble, twelfth para.

³⁰ These are Art. 4, para 1 of the 2000 Optional Protocol to the Convention on the Rights of the Child (CRC) on the Involvement of Children in Armed Conflict, and Art. 1, para. 3 of the 2003 Protocol V on Explosive Remnants of War (ERW) to the Convention on Certain Conventional Weapons (CCW).

Process. Indeed, a case of “no permanent friends, only permanent interests.” The global civil society campaign was carried by the Cluster Munition Coalition (CMC) launched November 2003. It had a new generation of young and dynamic campaigners, along with veterans who had cut their teeth in the International Campaign to Ban Landmines (ICBL) as early as 1992.

While the Ottawa Process arose from the cumulative impact of the global scourge of anti-personnel mines and the consequent public awareness and stigmatization, the Oslo Process can point to a particular triggering event in the use of cluster munitions to horrendous effect in the Southern Lebanon War of August 2006, thereby generating public outrage and pressure. Severely affected states like Lebanon, Laos, and those of the former Yugoslavia are among the natural allies of this new process, as are groups of survivors from there who are now also an integral part of CMC as among its most effective campaigners. And then there was also a cluster munitions aerial bombing training accident in Norway itself which precipitated the Oslo Process. This involved basically a series of international conferences on cluster munitions held successively from Oslo (February 2007) to Peru (May 2007) to Vienna (December 2007) to Wellington (February 2008) and to Dublin (May 2008) for the crucial treaty negotiations.

The Dublin Diplomatic Conference at the historic Croke Park football stadium was superbly presided over by Ireland through Ambassador Daithí O’Ceallaigh. Under his presidency, the conference worked intensively and systematically, but also with Irish hospitality and good spirit (inc. Guinness), to finish and finalize the treaty text in 10 days from May 19 to 28 (including weekend and evening work for some, but not without free tickets for all participants inclined to watch a weekend football friendly of Ireland vs. Serbia) so that it could be formally adopted at the scheduled close of the conference on May 30.

At the most critical point on May 28, Amb. O’Ceallaigh, after intensive consultations, decided not to open the consolidated treaty text to any further debate and changes, as it represented in his assessment the best possible balance of interests and compromise consistent with the Oslo Declaration. Opening the text would risk unraveling, maybe even losing, the entire treaty and the momentum for its cluster munitions ban. The key balance as it developed had to do with the separate interoperability article (Art. 21, esp. para. 3), the third exclusion to the definition of cluster munitions (Art. 2, para. 2 [c]), and no transition periods.

Considered a key turning point at the conference was the U.K. decision announced on May 28 to “support a ban on all cluster bombs, including those currently in service by the U.K... in order to secure a strong a Convention as possible in the last hours of negotiation.”³¹ This became the signal of sorts for NATO states to support the emerging ban treaty. Even Japan, another major

³¹ Statement from No. 10 Downing Street at 1300 on 28 May 2008.

U.S. ally which had been holding out, soon followed suit. And when the new CCM was preliminarily adopted by the conference later that day, the British and international media spin tended to credit the U.K. for leading the way. Of course, the U.K. should be credited for its courageous and dramatic last-minute decision but, to set the record straight, it had for the most part led the rearguard action to water down the draft treaty to accommodate U.K. and U.S. military interests. But credit should also be given to civil society and public pressure in the U.K., Japan and other U.S. ally states for helping turn the tide.

The exemplary Irish presidency of this conference which successfully resulted in a cluster munitions ban treaty has been praised and commended within Ireland for being more reflective of an Irish traditional foreign policy of neutrality, international humanitarianism, and renunciation of war, not to mention its resonance with an Irish anti-war movement.³² At the same time, CMC's own planning and organizing around the Dublin conference could have benefited from a deeper involvement of more Irish NGOs and campaigners. This should perhaps be one among many aspects of the Dublin experience that should be assessed or summed-up before the road ahead back to Oslo gets too busy again with campaign work.

The Road Ahead Back to Oslo

The main next step of treaty work to be done is, of course, achieving rapid entry into force of the new CCM. The CMC has in fact been very quick to submit an Action Plan on this at the very close of the Dublin conference.³³ The process involves signature and then ratification and then entry into force upon the 30th ratification. The adoption of the new CCM on May 30 by 111 states does not necessarily translate to later signatures, much less ratifications. It is not inconceivable that the U.S., the so-called "elephant not in the room"³⁴ at Dublin, might attempt a more direct and aggressive campaign to dissuade states from signing on to or ratifying the new CCM in the same way that it campaigned against the 1998 Rome Statute of the International Criminal Court usually on a bilateral basis.

The policy struggle on adherence to the new CCM will likely be re-fought at the national level, first within the executive department, including the military, before signature, and then within the legislative department, to complete the ratification process. Since signature and ratification, esp. the latter, will be "for real" in binding the concerned state to international obligations, the whole process is bound to become more careful and consequently slower. It is not

³² Refer to the Public Talk "Achieving a Cluster Munitions Ban: Blueprint for an Ethical Foreign Policy?," with Former Assistant Secretary General Denis Halliday, held on 29 May 2008 in Trinity College, Dublin, sponsored by Action from Ireland (Afri).

³³ Cluster Munition Coalition, ACTION PLAN To Achieve Rapid Entry into Force of the Convention on Cluster Munitions, 30 May 2008, Dublin, Ireland.

³⁴ As Jody Williams described the U.S. in her remarks on behalf of CMC during the Committee of the Whole (COW) session of the Dublin Conference on 26 May 2008.

unlikely that the same policy questions will be asked again and again from department to department.

This will definitely entail deeper policy and legal studies by all concerned based now on the new treaty text, no longer the previous Draft Cluster Munitions Convention circa 21 January 2008. Everything will have to be restudied for their implications, esp. the new contentious provisions on interoperability and on cluster munition definition, as well as all the state obligations in the treaty. Those who support the new CCM like the CMC should do their homework on this. In terms of thinking through and working on arguments, this kind of homework can have use on two levels: the policy debate at the national level, and the struggle for interpretation at the international level.

In the lead up to and at the Oslo signing conference on 2-3 December 2008, states can articulate their interpretations or understandings of key, critical or vague provisions, hopefully guided by the best interests of cluster munition victims. But the diplomatic record of interpretations or understandings is only one important arena of struggle to fill in whatever gaps or clarify whatever grey areas, and this has its limits. Some matters will just have to be determined or developed by practice, both at the international and national levels. There may be a need to test case the interoperability provisions, like with the U.S. cluster munitions stockpiled in the U.K. A lot of close monitoring will have to be done, including on the field experience with munitions which are now excluded from the definition of cluster munitions.

One matter for development is inter-treaty regime interfacing and mechanisms for this purpose. Recall the Oslo Process objective of “continu(ing) to address the humanitarian challenges posed by cluster munitions... in all relevant fora”³⁵ and the new CCM’s speaking “of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons.”³⁶ Still, most implementation measures would or should be at the national level. It is mainly here where answers must be found to the question: after achieving rapid entry into force of the new CCM, what is to be done? After Oslo, the next stop should be not another international meeting city but rather all the relevant national capitals.

³⁵ Oslo Declaration, para. 3.

³⁶ CCM, Preamble, tenth para. Attention to this was called by Austrian Counsellor Markus Reiterer in his remarks at the Panel Debate “Connecting the Dots: Weapons and Human Rights,” Survivor Corps side event for the Dublin Conference, 28 May 2008.