

Observations on the draft Cluster Munitions Convention

Summary of key points

The CMC is pleased with the comprehensive nature of the draft Cluster Munitions Convention, combining a prohibition on a weapon category with positive obligations and deadlines for completion of stockpile destruction and clearance, as well as obligations for victim assistance and international assistance more broadly. The CMC recognizes that the victim assistance and clearance provisions are well developed, but we consider that certain adjustments to the text would help enhance the effective implementation of these provisions in the future.

Preamble

- We agree with the ICRC that the effects of cluster munitions both during attacks and after attacks should be explicitly noted in the preamble.

Article 1 - General obligations and scope of application

- We believe it is critically important to retain the current formulation of this article as a categorical prohibition on all cluster munitions, as defined.
- We are pleased there is no provision for any transition period in this article (or any other article) allowing for continued use of the banned weapon. This is also critically important.
- With respect to the 1(c) prohibition on assistance with banned acts, we suggest reinserting the phrase “in any way” to strengthen the prohibition, and make it consistent with the provisions in the Mine Ban Treaty and Chemical Weapons Convention.
- Moreover, with regard to articles 1(b) and 1(c) states should make clear either through additional treaty text or through the diplomatic record that:
 - investments in cluster munitions are banned by 1(c);
 - foreign stockpiling of cluster munitions on territory under the jurisdiction or control of a State Party is banned by the 1(b) and 1(c) prohibitions on stockpiling and assistance respectively;
 - transit through the territory of a State Party is banned by the 1(c) prohibition on assistance and by the definition of transfer in Article 2;
 - the planning or implementation of activities related to the use of cluster munitions in joint military operations with a state not party which may use cluster munitions is banned by the 1(c) prohibition on assistance;

- the development, production, acquisition, stockpiling, retention or transfer of components of cluster munitions are also banned under the prohibitions in 1(b);
- States should consider adding positive obligations on stockpile destruction, clearance, risk education, victim assistance, and international cooperation and assistance to the general obligations.

Article 2 - Definition

- The CMC supports the categorical approach of Article 2 as currently drafted, but is concerned that the treaty would be undermined if Article 2(c) is used to exclude weapons that have the same effects as cluster munitions either now or in the future.
- There should be no exceptions for submunitions with self-destruct, self-deactivation or self-neutralizing features, for submunitions with a certain reliability (or failure) rate, or for so-called “direct fire” submunitions. There should be no exception for munitions based solely on factors such as the capacity to detect, engage and strike point targets within an area; electronic fuzing; “sensor-fuzing” technology or a limited number of submunitions.
- The burden of proof must be on states to demonstrate that any proposed exclusions from the definition of cluster munitions will not cause unacceptable harm to civilians, that they will not have the objectionable effects of cluster munitions: that they will not have an indiscriminate wide area effect, and will not leave behind excessive unexploded ordnance.
- The CMC strongly supports the definition of cluster munition victims, which we believe is entirely consistent with the principle of non-discrimination amongst persons with disabilities and which we believe will only enhance and increase the assistance provided to all persons injured as a result of armed conflict or other causes. We believe the qualifier “substantial” should be removed from the definition of “cluster munition victims” because it is subjective and may be interpreted in different ways by States Parties. However, it should be made clear that the families and communities included in the definition of “cluster munitions victims” refer only to those residing in areas affected by cluster munitions.

Article 3 - Storage and stockpile destruction

- There should be a detailed technical assessment of why the proposed period of six years is necessary to destroy stockpiles of cluster munitions, as opposed to a shorter time frame.
- We object to the provision allowing for an extension of the stockpile destruction deadline.
- If states determine an extension provision is absolutely necessary, it should be framed so that it is only available to states in extraordinary circumstances and should only be for the same number of years as the original period. If states ask for an extension, it should be for the absolute minimum number of years and it should be clear that states can grant a shorter period than that requested.
- States should make clear that it is prohibited for a foreign country not party to the convention to stockpile cluster munitions on territory under the jurisdiction or control of a State Party. Foreign stocks should be removed prior to entry into force of the convention.

- We agree that there is no need for a provision allowing the retention, acquisition or transfer of the prohibited weapon for the purposes of training, research and development of detection, clearance, and destruction techniques or for the development of countermeasures. There is no demonstrated requirement for live submunitions for any such purposes. We are concerned that such an exception could be easily abused.
- If such a provision were to be included, it should be made clear that only submunitions rather than entire cluster munitions are permitted and there should be a requirement to report in detail on the past and planned use of the retained submunitions.

Article 4 - Clearance of unexploded ordnance from cluster munitions

- The wording of Article 4.2 should be clarified to highlight the main obligations: the identification of cluster munition contaminated areas and the clearance of these areas, in conjunction with risk education and marking and fencing when appropriate and feasible.
- Language referring to “assessing the threat” or “assessing the practicability” of clearance should be deleted so the obligation to clear *all* contaminated areas is unambiguous.
- We suggest adding language to highlight the need to prioritize, plan, and seek resources, as well as ensure that the country establishes an effective capacity to undertake these activities.
- We support the inclusion of the particular obligation to provide assistance for States Parties that have used cluster munitions prior to entry into force of the treaty.
- Regarding the extension request process, there should be a clear indication that the requested extension period shall not exceed the minimum number of years strictly necessary to complete obligations under Article 4.2, and that States Parties have the right to grant a shorter extension period than that requested by the relevant State Party.

Article 5 - Victim assistance

- The article should ensure that the provision of victim assistance is governed by human rights principles, in particular: non-discrimination, and full and effective participation in society.
- In light of constant evolution of human rights law, it is necessary to link the provision of victim assistance to the highest existing international standards.
- Increasing accountability of states in fulfilling their obligations to provide victim assistance is essential. Article 5 should therefore be reinforced with requirements of states to create national plans in which they determine priorities and a timeframe for implementation. Article 7 would complement this by requiring report on the status of programs under the national plan.
- Consulting with victims and their representative organizations in all these steps is recognized as essential (see the Convention on the Rights of Persons with Disabilities) and should be added.

Article 6 -International cooperation and assistance

- There should be a particular emphasis on the duty to provide assistance by States Parties that have previously used cluster munitions. This language should be reinserted in Article 6.2 as a general obligation that applies to clearance, risk education and victim assistance.

Article 7 -Transparency measures

- It should be clear that the requirement to provide information about types and quantities of cluster munitions in subparagraphs b, c and h also refers to the submunitions comprised by the stockpiled cluster munitions.
- Current language on reporting on victim assistance measures is vague and, as it stands, does not create a meaningful accountability mechanism. It is essential to require states to report on the status of their implementation programs and national plans, including documentation of progress from year to year.
- The CMC suggests adding new requirements for States Parties to report on national resources (funds, personnel, materials) provided for activities under Articles 3, 4, 5; and international assistance and cooperation provided under Article 6 with respect to clearance, risk education, victim assistance, and stockpile destruction.

Article 8 -Facilitation and clarification of compliance

- Some of the “ways and means further to clarify or resolve the matter” (Article 8.5) and the “other general procedures for clarification and resolution” of compliance cases that the Meetings of States Parties can suggest (Article 8.6) should be included now, either in the text or the diplomatic record.
- We support the language in 8.6 stating States Parties may decide to adopt other procedures for clarification and resolution of instances of non-compliance. However, we also encourage states to give deep consideration to such procedures (both formal and informal) now and where possible include them in the treaty text.

Article 9 - National implementation measures

It would be desirable to add under this article:

- language encouraging adoption of new, comprehensive national legislation to implement the convention, as opposed to relying on non-specific existing laws and other measures;
- a deadline for national implementation measures, such as “as soon as possible but no later than two years after entry into force”.

Article 11 - 12 Meetings of States Parties and Review Conferences

- The MSPs and Review Conferences articles should be rewritten to focus discussions on the key elements of the treaty, including stockpile destruction, clearance, victim assistance, and international assistance and cooperation.

Article 17 -Entry into force

- We concur with the designation of 20 ratifications as the trigger for entry into force.

ANNEX A

The CMC considers that any treaty on cluster munitions must include:

1. A prohibition on the use, production, transfer and stockpiling of cluster munitions, as defined;
2. A definition of cluster munitions that does not exclude those that have submunitions equipped with self-destruct mechanisms;
3. No provision allowing for cluster munitions with submunitions with a certain reliability standard;
4. Application in all circumstances, including during conflicts of an international and non international nature;
5. A prohibition on providing assistance to anyone to use, produce, transfer or stockpile cluster munitions; [1]
6. An obligation to destroy their stockpiles of cluster munitions within a specified period of time, which must be as short as possible;
7. An obligation to mark and fence contaminated areas as soon as possible, to clear contaminated areas as soon as possible, but no later than a specified deadline and to establish and maintain an effective capacity to undertake these actions;
8. An obligation to provide assistance with marking, fencing and other warnings, risk education, and clearance; users of cluster munitions should have special obligations for such assistance, including provision of timely and detailed information on use;
9. An obligation to provide victim assistance. This includes but is not limited to: the implementation of data collection, emergency and continuing medical care, physical rehabilitation, psychological support and social inclusion, economic inclusion and/or reintegration, legal support and disability laws and policies;
10. An obligation to promote, protect, ensure and report on the full and equal enjoyment of all human rights and fundamental freedoms by all cluster munition victims (affected individuals, their families and communities), and to promote respect for their inherent dignity;
11. An acknowledgement of the responsibility to protect civilians from cluster munitions at all times through the obligations contained in the new treaty;
12. A compliance provision committing states to provide maximum cooperation and transparency; [2]
13. An obligation to submit annual transparency reports;
14. A requirement to adopt national implementation measures, including penal sanctions;

15. A provision prohibiting any reservations to any articles of the treaty;
16. A provision prohibiting withdrawal from the treaty if engaged in armed conflict;
17. Provisions for annual meetings of States Parties and regular Review Conferences;
18. No provision for a transition period on the prohibition on use, production and transfer;
19. No geographic exceptions for the prohibition on use, production and transfer.

[1] “Assistance” should be understood to include, among other things, a prohibition on investments, on involvement in joint military activities in which cluster munitions may be used, and on transit of cluster munitions.

[2] The reports should include, for example, information on national implementation measures, stockpiles and stockpile destruction, contaminated areas and clearance activities, risk education activities, victim assistance activities, and victims’ rights.

N.B.: The CMC recognises that states may propose a treaty approach that excludes from a definition of cluster munitions certain weapon systems that have submunitions that are capable of identifying and engaging targets. The CMC believes that the burden must be on governments to demonstrate that such weapons do not cause unacceptable harm to civilians.

ANNEX B

Cluster Munition Coalition Definition for the Future Cluster Munition Convention

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Any munition which meets the following definition would be prohibited by the convention.

Definition

A cluster munition is 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.

Notes on the Definition

The CMC definition is deliberately short and simple, without extraneous technical terminology. The CMC feels that a much longer, more complicated definition that tries to account (either through explicit inclusion or exclusion) for everything that might conceivably be considered a “cluster munition” would be unnecessary and possibly counter-productive for this convention. This should not be conceived as an arms control treaty between potential adversaries, but as a humanitarian agreement among like-minded states.

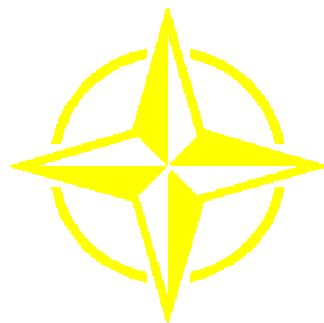
With this definition there is *no exception* for:

- submunitions with self-destruct, self-deactivation or self-neutralizing features;
- submunitions based on a specified reliability rate;
- so-called “direct fire” submunitions;
- cluster munitions based solely on a limit on the number of submunitions;
- so-called “sensor-fuzed” submunitions. [1]

The definition would *not prohibit* non-explosive or inert submunitions or pyrotechnic submunitions such as smoke, flare or illuminating submunitions. There could be differing interpretations on the status of the following, which negotiators should clarify:

- incendiary submunitions;
- remotely-delivered landmines;
- nuclear weapons with multiple warheads;
- chemical and biological submunitions.

[1] The CMC recognizes that some states believe certain such weapons do not cause unacceptable harm to civilians. However, too little is known about these weapons and their effects to warrant a blanket exception in the convention at this time. The CMC believes that the burden of proof is on governments to demonstrate otherwise.



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