

CCW Draft Protocol VI on Cluster Munitions – a Step Backwards

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Discussions on a draft protocol on cluster munitions within the CCW¹ framework were unsuccessful for many years, but were picked up again after the adoption of the Convention on Cluster Munition (CCM) in Dublin, May 2008. The current draft CCW protocol VI² allows for the use, development, stockpile etc. of weapons that for humanitarian reasons were outlawed through the adoption of the CCM. It thus establishes a substantially lower standard than the CCM regarding what is considered “unacceptable harm to civilians”. Therefore, the draft CCW protocol has the potential of undermining the humanitarian goals set out in the CCM. This raises a number of ethical and legal questions, not least for States Parties and Signatories to the CCM.

1. The Potential Impact of a Draft CCW Protocol on Cluster Munitions

1.1. Introduction

States Parties to the CCM are under an obligation to not “use, develop, produce, otherwise acquire, stockpile, retain or transfer” cluster munitions. The CCM contains a definition of cluster munitions that is based on the humanitarian problems caused through the failure rates and the indiscriminate area effect of such weapons. All weapons falling within the CCM definition contained in its Article 2 are defined as cluster munitions, and thus banned under the Convention.

The international stigma and condemnation of cluster munitions, not least following its use in Kosovo in 1999 and Lebanon in 2006, led to the development and adoption (by 107 States) of the CCM in 2008. The use of cluster munitions

has since the adoption of the CCM increasingly been stigmatized. There have been several instances of States not party to the CCM which have been accused of using cluster munitions over the past years and have argued against such accusations even though they are not legally bound by the prohibition.

The new draft protocol under the CCW Framework Convention introduces a substantially lower standard than the existing standard for defining cluster munitions. Draft CCW protocol VI will for example allow for the use of cluster munitions that are designed to leave up to 1% unexploded ordnance as well as the use of cluster munitions where the explosive munitions possess only one (not two as in the CCM) safeguard mechanism.

Compliance, even with the ban on *use*, of most cluster munitions to be banned under the draft CCW protocol, may be deferred for 12 years. The draft CCW protocol moreover generally undercuts the CCM standards with regard to for example stockpile destruction, clearance, ban on transfer, victim assistance, and scope of application.

1.2. The “Something is Better than Nothing” Argument

One might ask why States Parties to the CCM would engage in negotiations of draft CCW protocol VI. One argument for participating in developing such a protocol appears to be that it seems better with *some* restrictions for States not party to the CCM than none. A new protocol under the CCW would at least imply *some* regulation of use of cluster munitions by those States that have not joined – and will not join – the CCM, and a CCW protocol might therefore have added humanitarian value.

This argument is not convincing. First, it remains unlikely that States not party to the CCM, such as Russia, China, or even the US, will ratify the draft CCW protocol. Second, the protocol, if adopted, will establish a definition of cluster munitions which is not based on humanitarian considerations,

1 Convention on Prohibitions or Restrictions in the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980.

2 ADVANCE VERSION of draft Protocol VI on cluster munitions to the Group of Governmental Experts (CCW GGE), circulated by the Chairperson on 1 June 2011, which replaces document CCW/GGE/2010-II/WP.2, dated 6 September 2010.

and which will contribute to re-legitimizing the use, production, development, transfer etc. of weapons that are known to have severe humanitarian consequences.

One perception likely to develop is that there will be two alternative standards and definitions of cluster munitions, the CCM standard and the CCW standard. It may be considered less burdensome to choose the CCW. Even signatories to the CCM might consider that the CCW is a better option. The current stigmatization of use etc. of cluster munitions as defined in the CCM might fade, and the concept of defining a category of weapons as cluster munitions as prohibited, will be difficult to maintain.

1.3. Legal Obligations of States Parties to the CCM

Several questions arise with respect to participation in the development of the draft CCW protocol, as well as the potential accession to it, for States that are party (or signatory to) the CCM.

Article 1(3) of draft CCW protocol VI specifies that it shall not affect the rights or obligations of States Parties to the CCM under that Convention. This means that the higher standards of the CCM will prevail in the event of a conflict between the two instruments.

But even if the protocol's much lower standards will not apply to CCM States Parties, it is doubtful if accession to the draft CCW protocol can be seen as compatible with the obligations of States Parties under the CCM. It is moreover doubtful whether even participating in the development and adoption of such a protocol is consistent with the CCM obligations, regardless of potential ratification plans. Some of the legal questions pertaining to *compliance with the CCM* are outlined below.

Article 26 of the Vienna Convention on the Law of Treaties expresses the long-standing principle of *pacta sunt servanda*; every treaty in force is binding on the parties to it and must be performed by them in good faith.

The States Parties to the CCM declares in its preamble that they are “*determined to put an end for all time to the suffering and casualties caused by cluster munitions ...*” and stress “*the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions ...*”. This language underlines the negotiating parties' primary reasons for banning cluster munitions. When States Parties to the CCM participate in negotiating a protocol that will allow the use, production, transfer etc. of cluster munitions, this could be seen as defying their own intentions.

The main problem, however, with regard to the possible promotion of the draft CCW protocol by States Parties to the CCM, is related to Article 21 of the CCM. In this Article, the States Parties undertake to “*promote the norms it [the CCM] establishes and ... make its best efforts to discourage*

States not party ... from using cluster munitions” (emphasis added).

Arguing for the adoption of a protocol that will legitimise the use etc. of cluster munitions cannot be seen as promoting the ban on cluster munitions, nor can it be seen as discouraging States not party to the CCM from using cluster munitions. It may well be argued that if States Parties to the CCM were promoting a protocol that allows for the use, transfer etc. of cluster munitions, this may be incompatible with their obligations under Article 21. It seems difficult to reconcile promotion of use etc., of cluster munitions with performing one's obligations under the CCM “in good faith”.

One may, moreover, question whether actively participating in the development and adoption of the draft CCW protocol could be problematic with regard to the prohibition against encouragement or inducement to the use etc. of cluster munitions in Article 1(c) of the CCM.

The Declaration by the First Meeting of States Parties to the CCM in Vientiane, Laos, in 2010 states: “... *we condemn the use of cluster munitions that causes unacceptable harm to civilian populations and objects, by any actor. Our aim is universal adherence to the Convention*”. Also in the Vientiane Action Plan, the First Meeting of States Parties undertakes to “*Discourage in every way possible all use, development, production, stockpiling and transfer of cluster munitions*”. These documents emphasise the agreement by the States Parties on the interpretation of the CCM. They underline the fundamental difficulties with reconciling the negotiation of a protocol allowing cluster munitions, with the obligations of, *inter alia*, Article 21 of the CCM.

1.4. Lowering a Humanitarian Standard Within an International Law Context

As a point of departure, international law allows States to agree on treaties on any matter. When it comes to treaties with a specific humanitarian aim or treaties protecting human rights, there are, however, both ethical and legal obstacles to establishing new norms that decreases and undermines the protection that has been afforded in earlier treaties.

The Conventions on Biological Weapons, on Chemical Weapons, on Anti-personnel Landmines and on Cluster Munitions as well as the CCW Protocols on Blinding Laser-weapons and on Non-Detectable Fragments, are all international instruments that ban the use of *categories* of weapons. Each of these instruments contains definitions of the weapons that are banned. Attempts to narrow the scope of these treaties through the development of new instruments have not occurred. It seems unlikely that States would come together and start developing a new treaty allowing the use of, for example, certain biological or chemical weapons. That a number of States in 2011 participate in developing an instrument that seeks to re-legitimize weapons that were banned three years earlier because of their documented humanitarian detrimental

effects is, in this context, unprecedented.

2. The Substantive Content of the Draft CCW Protocol

2.1. The Subject Matter – Which Weapons do the Draft CCW Protocol Prohibit?

Article 1(5) of draft CCW protocol VI specifies that the protocol shall not apply to munitions described in its technical Annex A. The draft protocol thus does not prohibit munitions that “*incorporates a mechanism or design which, after dispersal, results in no more than 1% unexploded ordnance ...*”.³ This would fit the manufacturer’s description of for example the M-85, which was used in Lebanon in 2006. According to the producers, this weapon would not leave more than 1% unexploded ordnance, but in reality, over 12% unexploded munitions (in conservative estimates) were left after use.⁴ The well-documented discrepancies between producer specifications regarding failure rates, testing of failure rates on hard surfaces, and failure rates in actual use, for example in Lebanon, resulted in recognition of the fact that a definition of cluster munitions *could not be based on failure rates*. Moreover, there was an understanding that even if only 1% unexploded sub-munitions actually would be the result, this could still amount to potentially thousands of duds following a large-scale attack with this weapon.

In addition to allowing use etc. of cluster munitions, based on their perceived failure rates, the draft CCW protocol allows for cluster munitions that possess only one safeguard mechanism (Technical Annex B, 1). In the CCM, the requirements are that in addition to a number of other cumulative conditions, there must be *two* separate safeguard mechanisms if munitions are to fall outside of the definition of a cluster munition.

The draft CCW protocol also contains a number of other exceptions, for direct fire delivery systems, anti-ship and anti runway systems. At a first glance, Technical Annex B appears similar to the exclusion from the definition of a cluster munition in the CCM Article 2, but a major difference is that the criteria are alternative and not cumulative. In order for a weapon to fall outside of the prohibition in the CCM, a number of criteria must be fulfilled together. This is not the case in the draft CCW protocol.

The technical annexes to the draft CCW protocol, together with its Article 4, define the subject matter of what falls outside and inside the prohibition. Annexes A and B describe cluster munitions that will be allowed. Technical

³ Technical Annex A(5).

⁴ *M-85 – An Analysis of Reliability*, King, Dullum, Østern, 2007. The M-85 report shows the serious limitations of testing and test results – the tools used to measure the quality of cluster munitions. An international legal control regime that excludes weapons on the basis of an arbitrary quality standard of 1% – a percentage assessed in tests that bear little relation to reality – will be impossible to implement effectively.

Annex A describes weapons that, apart from those described in its Article 1(5), are *not* cluster munitions according to the definition in the CCM. The cluster munitions described in Article 1(5) are those with failure rates presumed to be up to 1 %. Technical Annex B applies to a number of different weapons that are cluster munitions and prohibited under the CCM, but that are not to be prohibited under the new draft CCW protocol.

Article 4 specifies that all cluster munitions produced before 1980 are to be prohibited under this protocol, in other words, it is outlawing cluster munitions that are more than 30 years old and therefore (in many instances) are too dated to be contained operational stocks anyway.

2.2. Deferral Periods

Article 5(1) of the draft CCW protocol prohibits the use, development, production, acquisition, stockpiling or retention of those cluster munitions not covered by Technical Annex B. These are cluster munitions without any safeguard mechanisms for example. One would presume that the reason for prohibiting the use of such cluster munitions is that the humanitarian consequences of them being used are truly serious. It is surprising therefore, that Article 5(2) allows for *continued use* for first eight, and then an additional four, years. In other words, the draft protocol allows for *twelve years* continued use of a weapon that is banned because it causes humanitarian suffering.

Article 5(3) specifies that when a High Contracting Party does use such cluster munitions during this deferral period, a high-ranking officer must approve of it. It is doubtful if this provision will increase protection from a humanitarian point of view.

The sincerity of what is expressed in the preamble in the draft CCW protocol, stating that the High Contracting Parties are “Determined to address *urgently* the humanitarian impact caused by cluster munitions, ...” (emphasis added), is certainly debatable in light of the long deferral periods with regard to use.

2.3. Stockpile Destruction

The provisions on stockpile destruction contain no deadlines. States must destroy prohibited cluster munitions “as soon as feasible”. Destruction of cluster munitions produced before 1980 must *start* at the entry into force of the draft protocol, but there is no deadline for finishing. Starting destruction of other prohibited cluster munitions must take place within 12 years after entry into force – the starting point for these weapons is linked to the deferral periods in Article 5.

The lack of a deadline for completion of destruction of stockpiles of cluster munitions means that huge stocks of prohibited weapons could remain for decades. This constitutes a considerable risk with regard to potential use as well as illicit proliferation.

2.4. Victim Assistance

Much of the language contained in the draft CCW protocol on victim assistance is “borrowed” from the CCM. One very significant difference, however, is that the definition of a victim is contained in the preamble, not in the substantive provisions, thus leaving the question of scope of this article very unclear. In addition, it specifies that States Parties shall facilitate victim assistance “in accordance with domestic laws and procedures”, thus imposing no new legal obligations upon the parties to the draft CCW protocol with regard to victim assistance.

2.5. The Scope of Application

The scope of application for the draft CCW protocol is “situations of conflict, and situations resulting from conflicts referred to in Article 1” of the CCW. Article 1 of the CCW, as amended in 2001, refers to all armed conflicts whether of an international or non-international character, thus excluding all situations failing to reach the threshold of an armed conflict. The conventions on biological weapons, chemical weapons, anti personnel mines and cluster munitions all apply regardless of how the situation is qualified (they apply under “any circumstances”). One obvious reason for this is that all of the above-mentioned conventions not only apply to the *use* of weapons, but also to, *inter alia*, stockpile destruction, production, development and transfer. The prohibition on use (normally) belongs in a situation qualified as reaching the threshold of international humanitarian law. The obligations to destroy stocks, to refrain from production and transfer, and victim assistance, should be applicable regardless of whether a State Party is, or has been, involved in an armed conflict.

3. The Process Ahead

The discussions regarding draft CCW protocol VI will continue at the meeting of the Group of Governmental Experts in August 2011, and will be concluded at the CCW Review Conference in November 2011.⁵ The question is what may happen at this Review Conference if there is no consensus regarding the draft text.

In the context of the CCW, all decisions so far have been reached through consensus. The main rule in international law, however, even though reaching decisions through consensus is often done in practice, is to adopt legally binding

instruments by a two-third majority, as specified in Article 9(2) of the Vienna Convention on the Law of Treaties.

The CCW Framework Convention and its protocols were adopted by consensus. The Framework Convention Article 8 specifies that “additional protocols ... shall be adopted in the same *manner* as this Convention” (emphasis added). This means that the CCW High Contracting Parties, in their adoption of the Framework Convention, have explicitly decided that all future protocols under the CCW must be adopted by consensus.

Hence, to prevent the adoption of the draft protocol, it suffices that one High Contracting Party to the CCW states that it will not go along with a consensus decision. One should, however, perhaps not underestimate the political difficulties with taking such a position.

4. Concluding Remarks

Draft CCW protocol VI in its current form represents a huge step backwards with respect to protection of persons affected by armed conflict. Defining the reliability of cluster munitions by setting an arbitrary percentage cannot be justified from a humanitarian point of view because it does not address the indiscriminate area effect of cluster munitions, and it does not ensure that a cluster munition attack will not result in large *absolute* numbers of unexploded sub-munitions on the ground. No objective international benchmarks exist to establish 1% as an acceptable failure rate.

It appears particularly inappropriate to use the CCW, a forum dedicated to prohibit or restrict weapons that “may be deemed to be excessively injurious or to have indiscriminate effects”, to lower the standard for protection against the humanitarian consequences of cluster munitions. In addition to re-legitimizing use of cluster munitions, the draft protocol may thus be seen as undermining the CCW’s own credibility.

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⁵ The time of writing this Policy Brief is June 2011.