

**CLUSTER MUNITION COALITION ANALYSIS
OF CCW DRAFT PROTOCOL VI ON CLUSTER MUNITIONS**

**Changes in Main Committee II Chair's 23 November 2011 Draft Text
Compared to the 22 November and 18 November 2011 Draft Texts**

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[Note: New text is underlined. Text that has been deleted is in bold.]

Preamble

Para. 5: added 22 Nov

<i>Reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict,</i>
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Comment: *This new paragraph is taken directly from the preamble of the CCW. It highlights the principle that international humanitarian law (IHL) should move in an increasingly strong direction. It is a somewhat ironic addition to the draft protocol because the draft does the exact opposite of progressively developing IHL. If adopted, the weak protocol, with partial prohibitions and restrictions that allow ongoing use indefinitely, would come after an existing strong treaty that comprehensively bans the weapons (the Convention on Cluster Munitions). The draft text represents a regression, rather than progression of the law.*

Para 6: amended 22 Nov

22 Nov: <u>Determined to take action in implementing</u> comprehensive prohibitions <u>and</u> restrictions on cluster munitions <u>which may have indiscriminate effects,</u>

18 Nov: Recognizing the desirability of comprehensive prohibitions or restrictions on cluster munitions that cause unacceptable harm to civilians,
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Comment: *This amendment makes the paragraph minimally stronger because it replaces “recognizing the desirability” with “determined to take action” and because it makes prohibitions essential rather than optional (by changing “or” to “and”).*

The rest of the changes, however, weaken the humanitarian power of the paragraph. In the old version, this paragraph seems to have been part of the effort to present the proposed protocol as an intermediate step toward stronger “prohibitions or restrictions.” The new version, however, refers to implementation of “prohibitions and restrictions,” implying that those prohibitions and restrictions already exist. If read literally, therefore, the paragraph is calling for the implementation of prohibitions and restrictions in this draft text rather than the creation of a future yet-to-be-negotiated one. This preambulatory paragraph echoes language in the endeavor clause of Article 13, which is forward looking, however, so the intent of this paragraph is unclear.

This paragraph also removes the phrase “cause unacceptable harm to civilians,” language that originated in the Oslo Process, appears in the preamble of the Convention on Cluster Munitions, and is widely used to describe the problems of cluster munitions. It replaces that phrase with “may have indiscriminate effects,” language that has been used previously in the CCW context.

Because it refers to “indiscriminate effects,” it covers the problems of unexploded submunitions but deemphasizes the problems caused by cluster munitions at the time of attack.

Para. 9: added 22 Nov

Determined to make an effective and coordinated contribution to resolve the challenge of removing and destroying cluster munition remnants located throughout the world,

Comment: *This addition to the preamble stresses the importance of clearance of cluster munition remnants to the protocol. While it is a positive step to add such language to the preamble, it has little potential for real-world humanitarian impact.*

Para. 10: added 22 Nov, amended 23 Nov

23 Nov: Resolved to take further steps in the future in order to improve and complement existing provisions regarding cluster munitions,

22 Nov: Resolved to take further steps in order to improve and complement existing provisions regarding cluster munitions,

Comment: *This paragraph added November 22, is part of the effort to present the proposed protocol as an intermediate step toward stronger restrictions. It calls on states parties to improve the protocol’s provisions in the future. There is no indication, however, that users and producers have any intention to take such further steps, and because this provision is in the preamble, it would not create a binding obligation on States Parties. The November 23 addition of “in the future” does not change the meaning of the paragraph.*

Para. 11: amended 22 Nov and 23 Nov

Change from 22 Nov to 23 Nov:

23 Nov: Have agreed as follows:

22 Nov: Have agreed, **as such a step**, as follows:

Change from 18 Nov to 22 Nov:

22 Nov: Have agreed, as such a step, as follows:

18 Nov: Have agreed, **as an intermediate step**, as follows:

Comment: *The November 22 amendment in this paragraph did not change its meaning. Both versions referred to this agreement as one of a series of steps toward “improv[ing]” its provisions in the long run. The reference in this phrase to this protocol being a step toward a future, stronger instrument, however, does not appear in the November 23 version, and the phrase reverts instead to the August text.*

Article 1(1): amended 22 Nov and 23 Nov

Changes from 22 Nov to 23 Nov:

23 Nov: In conformity with the Charter of the United Nations, the rules of International Humanitarian Law and other rules of international law applicable to them, the High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, taking all necessary and feasible measures to address the humanitarian impact and to prevent and alleviate human suffering caused by cluster munitions.

22 Nov: In conformity with the Charter of the United Nations, the rules of International Humanitarian Law and other rules of international law applicable to them, the High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, taking all necessary and feasible measures to address the humanitarian impact and to alleviate human suffering caused by cluster munitions.

Changes from 18 Nov to 22 Nov:

22 Nov: In conformity with the Charter of the United Nations, the rules of International Humanitarian Law and other rules of international law applicable to them, the High Contracting Parties agree to comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, taking all necessary and feasible measures to address the humanitarian impact and to alleviate human suffering caused by cluster munitions.

18 Nov: In conformity with the Charter of the United Nations, the rules of International Humanitarian Law and other rules of international law applicable to them, the High Contracting Parties agree to:

- (a)** comply with the obligations specified in this Protocol, both individually and in co-operation with other High Contracting Parties, to address the humanitarian impact caused by cluster munitions;
- (b)** take all necessary and feasible measures **to prevent** and alleviate human suffering caused by cluster munitions.

Comment: *Following the November 22 changes, the draft text merges previous paragraphs (a) and (b). It also applies the phrase “take all necessary and feasible measures” to addressing “the humanitarian impact caused by cluster munitions.”*

The November 22 version had a notable omission. It removed the words “to prevent,” which meant States Parties agreed only to take measures to alleviate human suffering caused by cluster munitions, not to prevent and alleviate it. Given the objections of several states to this deletion, the November 23 text reinserts the words “to prevent.”

Article 1(2): deleted 22 Nov, reinserted 23 Nov

This Protocol shall apply to situations of conflict, and situations resulting from conflicts referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001.

Comment: *The November 23 version reinserts a paragraph on the scope of the protocol that was temporarily removed in the November 22 draft text. Deleting it had meant that the scope of the proposed protocol would be determined by the CCW framework convention, and thus the proposed protocol would not have bound states that had not accepted the 2001 amendment extending CCW’s scope to non-international armed conflicts to abide by its obligations in such*

situations. Several delegations had insisted that the provision should be stronger, with scope defined as “under any circumstances,” a phrase that appears in a number of other weapons treaties.

Article 1(5): amended 22 Nov and 23 Nov

Change from 22 Nov to 23 Nov:

23 Nov: This Protocol shall not apply to the munitions described in Technical Annex A.

22 Nov: This Protocol shall not apply to the munitions described in Technical Annex A.

Nevertheless, each High Contracting Party that retains munitions in accordance with this Technical Annex should ensure that such munitions have the lowest possible unexploded ordnance rate, consistent with military requirements.

Change from 18 Nov to 22 Nov:

22 Nov: This Protocol shall not apply to the munitions described in Technical Annex A.

Nevertheless, each High Contracting Party that retains munitions in accordance with this Technical Annex should ensure that such munitions have the lowest possible unexploded ordnance rate, consistent with military requirements.

18 Nov: This Protocol shall not apply to the munitions described in Technical Annex A. Each High Contracting party that retains munitions in accordance with this Technical Annex should ensure that such **weapons** have the lowest possible unexploded ordnance rate, consistent with military requirements.

Comment: *This paragraph has been amended several times, but it has ended up back where it started at the beginning of the Review Conference. On November 22, there were two changes to this provision, both of which were primarily technical in nature. The reference to “weapons” was changed to “munitions” because Technical Annex A encompasses some munitions that are not weapons. The word “nevertheless” was inserted in response to concerns that the munitions in Technical Annex A could not at once be excluded from the treaty and then be covered by it. It is unclear whether the addition of “nevertheless” would have made a legal difference. In the end, however, the chair removed the second sentence of the paragraph, returning the text to the language from the August draft.*

Article 2(12): added 22 Nov, deleted 23 Nov

“Military objective” means, so far as objects are concerned, any object which is by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Comment: *The definition of “military objective,” drawn verbatim from Article 1 of CCW Protocol III and Article 52(2) of Additional Protocol I to the Geneva Conventions, was added to the draft text on November 22 to complement Article 3 bis. The November 23 text deletes it because it also deletes Article 3 bis.*

Article 2(13): added 22 Nov, deleted 23 Nov

“Civilian objects” are all objects which are not military objectives as defined in paragraph 12 of this article.

Comment: *The definition of “civilian objects,” drawn verbatim from Article 1 of CCW Protocol III and Article 52(1) of Additional Protocol I to the Geneva Conventions, was added to the draft text on November 22 to complement Article 3 bis. The November 23 text deletes it because it also deletes Article 3 bis.*

Article 3 bis: added 22 Nov, deleted 23 Nov [placeholder left]

Protection of civilians

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack.
2. In order to ensure respect for and the protection of civilian populations, individual civilians and civilian objects, High Contracting Parties and parties to an armed conflict shall at all times respect and recognise the distinction between military objectives, and civilians or civilian objects.

Comment: *The draft text added Article 3 bis on protection of civilians on November 22. It deleted it the next day, although it retained the placeholder for the plenary’s consideration.*

The temporary insertion of this article seemed like a significant addition, but in fact it merely reiterated existing IHL and thus would have had no humanitarian impact. Paragraph 1 restated the well-established IHL rule that civilians and civilian objects cannot be targeted. Paragraph 2 restated the well-established IHL rule of distinction, i.e., that parties to an armed conflict must distinguish between military objectives, and civilians or civilian objects. These principles of customary IHL also appear in Additional Protocol I to the Geneva Conventions although with different language, which could have led to confusion. The language in the first paragraph was exactly the same as in CCW Protocol III. States Parties are required to follow these rules of IHL regardless of whether they are included in this proposed protocol, so Article 3 bis would not have in any way increased protection of civilians.

Article 5(1): amended 22 Nov

22 Nov: It is prohibited for a High Contracting Party to use, stockpile or retain cluster munitions produced on or after 1 January 1980, other than those described in Technical Annex B.

18 Nov: It is prohibited for a High Contracting Party to use, **acquire**, stockpile or retain cluster munitions produced on or after 1 January 1980, other than those described in Technical Annex B.

Comment: *This provision cuts the word “acquire” and moves it to Article 5(2).*

Article 5(2): amended 22 Nov

22 Nov: It is prohibited for a High Contracting Party to produce, develop or otherwise acquire cluster munitions other than those described in Technical Annex B.

18 Nov: It is prohibited for a High Contracting Party to produce or develop cluster munitions other than those described in Technical Annex B.

Comment: *This provision inserts the phrase “or otherwise acquire” meaning that states parties to the proposed protocol would not be allowed to acquire any cluster munitions, other than those in Technical Annex B. It does not represent a major change to the draft text, however. Previously, Article 4(1) prohibited acquisition of pre-1980 cluster munitions, and Article 5(1) prohibited acquisition of all other cluster munitions (other than those in Technical Annex B). The new version has an equivalent prohibition, just in a different place.*

Article 5(4)(a): amended 22 Nov and 23 Nov

Change from 22 Nov to 23 Nov:

23 Nov: while defending its territory or while fulfilling obligations pursuant to its security cooperation agreements or arrangements existing at the time of entry into force of this Protocol;

22 Nov: **In order to defend** its territory, or **to fulfil** obligations pursuant to its security cooperation agreements or arrangements existing at the time of entry into force of this Protocol;

Change from 18 Nov to 22 Nov:

22 Nov: In order to defend its territory, or to fulfil obligations pursuant to its security cooperation agreements or arrangements existing at the time of entry into force of this Protocol;

18 Nov: In order to defend **against attack or threat of attack on** its territory, **including** pursuant to security cooperation agreements or arrangements existing at the time of entry into force of this Protocol;

Comment: *The latest change to this paragraph, on November 23, seems primarily an effort to polish the language of a much-discussed provision. More noteworthy changes, which are retained in the November 23 text, first appeared in the November 22 version of the proposed protocol.*

Compared to the November 18 version, the amendments made on November 22 improve its drafting but leave it virtually as vague as the comparable provision in the old text. Both versions refer to situations of self-defense, just in slightly different ways. The more recent text uses the phrase “defend its territory” and the earlier one uses “defend against attack or threat of attack.” The phrase “defend its territory” does not clarify what a State Party may defend against so the provision could still encompass “attack or threat of attack.” Therefore it does not resolve states’ concerns about including “threat of attack,” a concept which if interpreted broadly has the potential to contravene the UN Charter’s idea of self-defense. The addition of “to fulfil obligations” is merely a drafting clarification.

Article 5(5)(a): amended 22 Nov and 23 Nov

Change from 22 Nov to 23 Nov:

23 Nov: take steps in any design, procurement, or production of cluster munitions, to incorporate additional safeguard mechanisms or designs such as a self deactivating feature and

to reduce the number of submunitions contained in each cluster munition, or otherwise minimize the unexploded ordnance rate;

22 Nov: take steps in any design, procurement, or production of cluster munitions, to incorporate additional safeguard mechanisms or designs, to reduce the number of submunitions contained in each cluster munition, or otherwise minimize the unexploded ordnance rate;

Change from 18 Nov to 22 Nov:

22 Nov: take steps in any design, procurement, or production of cluster munitions, to incorporate additional safeguard mechanisms or designs, to reduce the number of submunitions contained in each cluster munition, or otherwise minimize the unexploded ordnance rate;

18 Nov:

- (a) Take steps in any design, procurement, or production of cluster munitions, to incorporate additional safeguard mechanisms or designs, or otherwise minimize the unexploded ordnance rate;
- (b) take steps in any design to reduce the number of submunitions contained in each cluster munition, **consistent with military requirements**;

Comment: *The November 23 draft text inserts a reference to a self-deactivating feature, which previously appeared in a different way in the now-deleted Article 5(6). The old Article 5(6) obligated states to “endeavour to ensure” the inclusion of a self-deactivation feature in submunitions. As amended, the draft protocol only refers to a self-deactivation feature as an example of an additional safeguard mechanism or design, which States Parties must take steps to incorporate. The change thus weakens the rules regarding self-deactivation features.*

The November 22 version of the draft text also amended the provision in ways that are retained in the November 23 text. That amendment merges two paragraphs and removes the phrase “consistent with military requirements.” The removal of the phrase on “military requirements” arguably makes it somewhat stronger from a humanitarian perspective, but it does not change the fact that this provision legitimizes continued production of cluster munitions.

Article 5(5)(d): deleted 22 Nov, reinserted in amended form on 23 Nov

23 Nov: not use cluster munitions other than those with the lowest possible ordnance rate consistent with military requirements.

18 Nov: Use **only** cluster munitions with the lowest possible unexploded ordnance, consistent with military requirements.

Comment: *This change to the November 23 text merely inserts, in slightly different words, a provision that existed in the November 18 text. Its temporary deletion removed a paragraph that explicitly legitimized the use of cluster munitions. While that was rhetorically important, it had no legal significance because the proposed protocol still allowed cluster munition use.*

Article 5(6): deleted 23 Nov

Each High Contracting Party shall endeavour to ensure that submunitions, which are equipped with a self-destruction or self-neutralisation mechanism in accordance with paragraph 1 of

Technical Annex B and that are developed after the entry into force of this Protocol, are also equipped with a self-deactivating feature.

Comment: *The November 23 text deletes this paragraph on self-deactivating features and moves the language on self-deactivating features to Article 5(5)(a). See earlier comment.*

Article 6(1)(d): amended 22 Nov

22 Nov: remove all cluster munitions produced after 1 January 1980 and which are more than 40 years old from its operational stocks, unless their reliability has been confirmed by appropriate testing procedures.

18 Nov: remove all cluster munitions which are more than 40 years old from its operational stocks, unless their reliability has been confirmed by appropriate testing procedures.

Comment: *The addition of “produced after 1 January 1980,” which explains that all cluster munitions, even those in Technical Annex B, must be separated from operational stocks, clarifies the drafting of this provision because it removes the confusion about how to handle pre-1980 stocks. However, it also explicitly establishes a transition period for separating certain stockpiles. Furthermore, the change does not eliminate the vagueness of the phrase about reliability and “appropriate testing procedures,” a potentially significant loophole.*

Article 7(4)(c) and (d): amended 22 Nov and 23 Nov (reverted to 18 Nov text)

23 Nov:

(c) Not transfer any cluster munition or submunition to any recipient other than a State or State agency authorized to receive such transfer;

(d) Prevent unauthorised transfers, from areas under its jurisdiction or control, of any cluster munition or submunition;

22 Nov:

(c) Not transfer any cluster munition to any recipient other than a State or State agency authorized to receive such transfer;

(d) Prevent unauthorised transfers, from areas under its jurisdiction or control, of any cluster munition;

18 Nov:

(c) Not transfer any cluster munition **or submunition** to any recipient other than a State or State agency authorized to receive such transfer;

(d) Prevent unauthorised transfers, from areas under its jurisdiction or control, of any cluster munition **or submunition**;

Comment: *The November 23 draft reinserts references to submunitions in two subparagraphs because submunitions as well as cluster munitions can be transferred. They had been temporarily deleted in the November 22 draft, presumably to make them consistent with other ones in Article 7(4).*

Article 13(3): amended 22 Nov and 23 Nov

Changes from 22 Nov to 23 Nov:

23 Nov: During the conferences referred to in paragraph 3 of Article 8 of the Convention following the entry into force of this Protocol, the High Contracting Parties with a view to further minimising the humanitarian impact of cluster munitions, shall, *inter alia*, review the technical annexes of this Protocol and endeavour to agree on comprehensive prohibitions and restrictions regarding the use, stockpiling, production and transfer of cluster munitions, as well as the completion of destruction of cluster munitions, in line with other relevant and applicable agreements.

22 Nov: During the conference referred to in paragraph 3 of Article 8 of the Convention following the entry into force of this Protocol, the High Contracting Parties shall:

- (a) review the Technical **Annex B** of this Protocol with a view to further minimising the humanitarian impact of cluster munitions;
- (b) endeavour to agree on comprehensive prohibitions and restrictions regarding the use, stockpiling, production and transfer of cluster munitions, as well as the completion of destruction of cluster munitions, in line with other relevant and applicable agreements.

Changes from 18 Nov to 22 Nov:

22 Nov: During the conference referred to in paragraph 3 of Article 8 of the Convention following the entry into force of this Protocol, the High Contracting Parties shall:

- (a) review the Technical Annex B of this Protocol with a view to further minimising the humanitarian impact of cluster munitions;
- (b) endeavour to agree on comprehensive prohibitions and restrictions regarding the use, stockpiling, production and transfer of cluster munitions, as well as the completion of destruction of cluster munitions, in line with other relevant and applicable agreements.

18 Nov:

During the conference referred to in paragraph 3 of Article 8 of the Convention following the entry into force of this Protocol, the High Contracting Parties shall:

- (a) review the Technical **Annexes** of this Protocol with a view to further minimising the humanitarian impact of cluster munitions;
- (b) Endeavour to agree on **more** comprehensive prohibitions **or** restrictions regarding the use, stockpiling, production and transfer of cluster munitions, as well as the completion of destruction of cluster munitions, in line with other relevant agreements.

Comment: *The November 23 draft makes two small changes to the endeavor clause. It adds the words “inter alia” to make clear that reviewing the Technical Annexes and endeavoring “to agree on comprehensive prohibitions and restrictions” are just some of the options for States Parties to pursue in the future. It also changes the paragraph to cover both technical annexes as the November 18 text had.*

The November 22 version also made changes to the so-called “endeavor” clause, which also appear in the most recent draft text. They do not significantly strengthen it. By changing “prohibitions or restrictions” to “prohibitions and restrictions,” it ensures that States Parties must try to achieve prohibitions, but it still leaves open the possibility of restrictions, which would fall short of the ban in the Convention on Cluster Munitions. The deletion of the word “more” does not change that fact. Interestingly, the November 23 text retains the addition of the qualifier “applicable” to “agreement,” despite opposition from several states. Its meaning is unclear although it suggests a narrowing of that phrase.