

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

**Changes in Main Committee II Chair's 18 November 2011 Draft Text
Compared to GGE Chair's August 2011 Draft Text**

Prepared by Human Rights Watch and Harvard Law School International Human Rights Clinic

[Note: In amended provisions, new text is italicized. Text that has been deleted is in bold in the "old" text]

Preamble

Para. 5: new

Recognizing the desirability of comprehensive prohibitions or restrictions on cluster munitions that cause unacceptable harm to civilians

Comment: This is part of the effort to show complementarity with the Convention on Cluster Munitions. It uses the language of the Oslo Process, referring to "cluster munitions that cause unacceptable harm to civilians." It cites, however, "prohibitions or restrictions," not just prohibitions, suggesting that final future obligations could be weaker than those of the Convention on Cluster Munitions.

Para. 7: new

Bearing in mind the Convention on the Rights of Persons with Disabilities which, *inter alia*, requires that States Parties to that Convention undertake to ensure and promote the full realization of all human rights and fundamental freedoms of all persons with disabilities without discrimination of any kind on the basis of disability.

Comment: This addition is a direct quote from the preamble of the Convention on Cluster Munitions.

Para. 8: amended

New: Have agreed, *as an intermediate step*, as follows:

Old: Have agreed as follows:

Comment: This addition, like that of preambular paragraph 6, suggests that Protocol VI is merely a step toward stronger provisions. Given the time that it has taken to negotiate this weak protocol, stronger steps seem unlikely. None of the major users and producers have given any sign that they view this protocol as an intermediate step.

Article 1(5): amended

New: 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.*

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

Comment: This addition is in response to the US proposal, which was originally to put it at the end of Technical Annex A. While not objectionable on its face, this language emphasizes UXO rate, rather than “unacceptable harm” (taking into account accuracy and targeting, and number and weight of submunitions, as well as UXO rate) as the standard for judging cluster munitions. Finally, the chair made Article 1(5) stronger than the US proposal because he used the phrase “should ensure” rather than “should use their best efforts.”

Article 5(4): amended

New: During a period of deferred compliance pursuant to paragraph 3 of this Article, a High Contracting Power shall *not* use cluster munitions, other than those described in Technical Annex B, *except:*

(a) *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; and*

(b) after approval by its highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority.

Old: During a period of deferred compliance pursuant to paragraph 3 of this Article, a High Contracting Power shall **only** use cluster munitions, other than those described in Technical Annex B, **after** approval by its highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority.

Comment: This addition, in response to Italy’s proposal, theoretically sets restrictions on when a state can use clusters during the transition period. Paragraph (a) is written to encompass joint military operations, like that in Afghanistan, as well as attacks on one’s own territory so it is really not much of a restriction. Given the potentially wide scope of security cooperation agreements, the addition seems to say that it is lawful to use cluster munitions whenever it is lawful to use force. Although the “pursuant to” phrase was added to encompass joint military operations out of a state’s territory, the phrasing does not seem to work. It seeks to cover operations outside of a state’s territory yet uses the word “including” after “on its territory.” It is also worth noting that that the Italian proposal referred to “national” territory rather than just territory.

Article 5(5)(b): new

(b) take steps in any design to reduce the number of submunitions contained in each cluster munitions, consistent with military requirements;

Comment: This seems to be an effort to strengthen the protocol by encouraging cluster munitions with fewer submunitions which would have less of an area effect. But it’s still weak because it doesn’t set any design requirements and it has the caveat “consistent with military requirements.”

Article 5(6): new

Each High Contracting Power 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: This provision seeks to reduce the dud rate and make duds less prone to detonating when handled, but it is weak because it is not an obligation. States parties need only “endeavor” to have an SDA feature.

Article 6(1)(a): amended

New: Each High Contracting Party that retains cluster munitions shall:

(a) remove all cluster munitions prohibited by this Protocol, *as well as those no longer intended for use*, that are under its jurisdiction and control from its operational stocks, separate them from munitions retained for operational use, and in accordance with national procedures mark and safely secure them:

Old: Each High Contracting Party that retains cluster munitions shall:

(a) remove all cluster munitions prohibited by this Protocol that are under its jurisdiction and control from its operational stocks, separate them from munitions retained for operational use, and in accordance with national procedures mark and safely secure them:

Comment: This provision expands the types of cluster munitions that should be separated from operational stocks. It ironically highlights, however, that there are cluster munitions that are legal for use, even if they aren’t intended to be used.

Article 6(1)(b): amended

New: (b) destroy or ensure the destruction, in accordance with national procedures, of all cluster munitions prohibited by this Protocol, *as well as those no longer intended for use*, that are under its jurisdiction and control as soon as is feasible, starting no later than:

Old: (b) destroy or ensure the destruction, in accordance with national procedures, of all cluster munitions prohibited by this Protocol that are under its jurisdiction and control as soon as is feasible, starting no later than:

Comment: This provision expands the types of cluster munitions that should be destroyed. It ironically highlights, however, that there are cluster munitions that are legal for use, even if they aren’t intended to be used.

Article 6(1)(d): new

(d) 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: This new provision literally seems to allow states to stockpile cluster munitions older than 1980 even though Article 4 explicitly prohibits this. It also is a rolling date, which would be

potentially problematic even without the 1980 problem because states would not have to get rid of old stockpiles even after the 12-year transition period is over, which contradicts Article 5. The provision refers to “all cluster munitions,” which would include those in Technical Annex B, and thus may be intended to require even those submunitions to be set aside at some point. While this seems to indicate the protocol is an intermediate step, the fact that removing cluster munitions from operational stocks is not required for 40 years undermines the argument that there is a good faith effort to endeavor to produce “more comprehensive prohibitions or restrictions” in the near future.

Article 8 title: amended

New: “Marking, clearance and destruction of cluster munition remnants and risk reduction education”

Old: “Clearance and destruction of cluster munition remnants”

Comment: This change in title relates to additions described below.

Article 8(3): amended

New: (3) Where cluster munition remnants are located in territories under the control of a High Contracting Party and party to an armed conflict at the time of entry into force of this protocol for it, that party shall mark and clear, remove or destroy cluster munition remnants *in affected territories under its control* as soon as feasible and to the extent possible within 10 years after the entry into force of the Protocol for it.

Old: (3) Where cluster munition remnants are located in territories under the control of a High Contracting Party and party to an armed conflict at the time of entry into force of this protocol for it, that party shall mark and clear, remove or destroy **all such** cluster munitions remnants as soon as feasible and to the extent possible within 10 years after the entry into force of the Protocol for it.

Comment: This change seems to be just a point of clarification with little significance.

Article 8(4)(b): new

(b) take all feasible precautions to protect the civilian population, individual civilians and civilian objects from the risks and effects of cluster munition remnants;

Comment: This provision is a humanitarian one that emphasizes the need to protect civilians. While an improvement, it doesn’t eliminate our other concerns with the text.

Article 8(4)(c): new

(c) take appropriate measures in order to mark affected areas so as to ensure the effective exclusion of civilians;

Comment: This provision is a humanitarian one that emphasizes the need to protect civilians. While an improvement, it doesn't eliminate our other concerns with the text. The phrasing of this provision is also awkward because read with the chapeau, it says states parties must "take the following measures...to reduce the risk posed by cluster munition remnants... take appropriate measures" to mark affected areas.

Article 8(4)(d): amended

New: (d) assess and prioritise needs and practicability in terms of clearance, removal or destruction taking into account the impact from other explosive remnants of war and landmines;

Old: (b) assess and prioritise needs and practicability in terms of **marking and** clearance, removal or destruction taking into account the impact from other explosive remnants of war and landmines;

Comment: This change just deletes "marking" because marking has its own new paragraph just above.

Article 8(4)(e): new

(e) conduct risk reduction to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by cluster munition remnants

Comment: This provision is a humanitarian one that emphasizes the need to protect civilians. While an improvement, it doesn't eliminate our other concerns with the text.

Article 8(4)(f) amended:

New: (f) clear, remove or destroy cluster munition remnants;

Old: (c) **mark and** clear, remove or destroy cluster munition remnants;

Comment: This change just deletes "marking" because marking has its own new paragraph just above.

Article 13(3)(a): amended

New: (a) review the Technical Annexes of this Protocol *with a view to further minimising the humanitarian impact of cluster munitions*;

Old: (a) review the Technical Annexes of this Protocol **and consider whether any amendments to them should be made, in order to** further minimise the humanitarian impact of cluster munitions;

Comment: This provision requires MSPs to review the Technical Annexes with an eye on the humanitarian impact of clusters. The change seems to weaken the provision because it cuts the reference to considering amendments to the annexes.

Article 13(3)(b): amended

New: (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*.

Old: (b) endeavour to agree on comprehensive provisions regarding the use, stockpiling, production and transfer of cluster munitions, as well as the completion of destruction of cluster munitions.

Comment: These changes arguably strengthen the provision because they make an implicit reference to the Convention on Cluster Munitions at the end and add a reference to prohibitions. It is still weak because it also refers to restrictions, suggesting that they, not prohibitions, may be the end goal, and because it says “more comprehensive” rather than “comprehensive” as it did before. In any event, any endeavor clause amounts to little more than window dressing on a bad protocol.

Article 13(4)(e): amended

(e) cluster munitions retained in accordance with paragraph 2 of Article 4 and paragraph 7 [previously 8] of Article 5;

Comment: This just a change responding to new paragraph numbering.

Article 13(6): new

6. A High Contracting Party retaining cluster munitions in accordance with paragraph 5 of Technical Annex B shall provide information in its annual reports on the methodology used to determine how such munitions meet the criteria set out in that paragraph.

Comment: This provision is a strengthening because it requires transparency on how the failure rate in Technical Annex B is reached. It does not resolve the problem, however, that failure rates in testing are always much lower than in combat operations or that a failure rate approach—rejected by Convention on Cluster Munitions negotiators—is used in the annex at all.

Technical Annexes: amended

Paragraph 5 of Technical Annex A moved to end of Technical Annex B.

Comment: This was the US’s big “concession,” but it does not have a significant effect. Cluster munitions discussed here were excluded from the protocol under the old Annex A so they could have been used; in the new version, they can still be used. US Sensor Fuzed Weapons were formerly excluded from the protocol under Annex A. They are exceptions under Annex B and thus could be used without restriction forever. This 1 percent clause was always in the “exception” not “exclusion” category in previous GGE drafts of the protocol, until September 2010. Thus, it was a concession granted to the US, that is now back in line with earlier drafts.