

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

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

Reaffirming the need to continue the codification and progressive development of the rules of international law applicable in armed conflict

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, which merely regulates cluster munitions, would come after an existing strong treaty that bans the weapons (the Convention on Cluster Munitions). In other words, the draft text represents a regression, rather than progression of the law.

Para 6: amended

New: *Determined to take action in implementing* comprehensive prohibitions *and* restrictions on cluster munitions *which may have indiscriminate effects,*

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

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: new

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: new

Resolved to take further steps in order to improve and complement existing provisions regarding cluster munitions.

Comment: This new paragraph 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 intent to take such further steps, and because this provision is in the preamble, it would not create a binding obligation on states parties.

Para. 11: amended

New: Have agreed, *as such a step*, as follows:

Old: have agreed, **as an intermediate step**, as follows:

Comment: The amendment in this paragraph does not change the meaning. In both versions it refers to this agreement as one of a series of steps toward “improv[ing]” its provisions in the long run. Again there is no indication that these steps will in fact be taken.

Article 1(1): amended

New: 1. 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.

Old: 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: At first glance, this change seems primarily to merge old paragraphs (a) and (b). It also applies the phrase “take all necessary and feasible measures” to addressing “the humanitarian impact caused by cluster munitions.” However, the new version has a notable omission. It removes the words “to prevent,” which means states parties agree only to take measures to *alleviate* human suffering caused by cluster munitions, not to *prevent* and alleviate it.

Article 1(2): deleted

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: This change clarifies that the proposed protocol would apply in all situations, not only those of armed conflict. It was necessary because stockpile destruction occurs in times of peace as well as time of war. It does not eliminate, however, the transition period on stockpile destruction.

Article 1(4): amended

New: 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.

Old: 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: There are two changes to this provision, both of which are primarily technical in nature. The reference to “weapons” has been 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” makes a legal difference.

Article 2(12): new

“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: This language is drawn verbatim from Article 1 of CCW Protocol III and Article 52(2) of Additional Protocol I to the Geneva Conventions.

Article 2(13): new

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

Comment: This language is drawn verbatim from Article 1 of CCW Protocol III and Article 52(1) of Additional Protocol I to the Geneva Conventions.

Article 3 bis: new

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: This new article seems like a significant addition, but in fact it merely reiterates existing IHL and thus has no humanitarian impact. Paragraph 1 restates the well-established IHL rule that civilians and civilian objects cannot be targeted. Paragraph 2 restates 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, and the language in the first

paragraph is exactly the same as in CCW Protocol III. States parties are required to follow these rules regardless of whether they are included in this proposed protocol so Article 3 bis does not in any way increase protection of civilians.

Article 5(1): amended

New: 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.

Old: 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

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

Old: 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

New: 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;

Old: 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 amendments to this much-discussed provision 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 new text uses the phrase “defend its territory” and the old 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

New: 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;

Old:

- (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: This 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)(e): deleted

Use only cluster munitions with the lowest possible unexploded ordnance, consistent with military requirements.

Comment: This deletion removes a paragraph that explicitly legitimized the use of cluster munitions. While that is rhetorically important, it has no legal significance. Cluster munition use is still allowed under the new text of the proposed protocol.

Article 6(1)(d): amended

New: 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.

Old: remove all cluster munitions produced 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 “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.”

Article 7(4)(c) and (d): amended

New:

- (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;

Old:

- (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: These changes are merely corrections in drafting, making these subparagraphs consistent with other ones in Article 7(4).

Article 13(3)(a): amended

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

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

Comment: Presumably the reference to Technical Annex A was dropped because Technical Annex A covers munitions that are *not* cluster munitions, and therefore reviewing Technical Annex A could not be done with a view to minimizing the humanitarian impact of cluster munitions.

Article 13(3)(b): amended

New: 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.

Old: 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: These changes to the so-called “endeavor” clause 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. The addition of the qualifier “applicable” to “agreement” suggests a narrowing of that phrase. Its meaning is unclear. Is it an attempt to exclude the Convention on Cluster Munitions, which does not apply to all states?