

Convention on Conventional Weapons (CCW)

Negotiations for far too long on a protocol that doesn't go far enough



Negotiations on cluster munitions within the Convention on Conventional Weapons (CCW) framework have been ongoing for a number of years. During the upcoming CCW 4th Review Conference in Geneva from 14–25 November, many States Parties to the CCW are attempting to secure agreement on the basis of a draft Chair's text for a new protocol on cluster munitions that would allow continued use of cluster munitions proven to cause unacceptable harm to civilians.

The CMC is concerned that, as currently drafted (see: <http://bit.ly/ozC7iY>), this proposed protocol would cause **more humanitarian harm than good**. It could lead to an increase in the use and production of cluster munitions and therefore pose an even greater humanitarian danger from cluster bombs than the status quo.

There is clearly currently a lack of consensus on the draft protocol text, which is weak, convoluted and full of exceptions and loopholes. Efforts are being made to achieve a consensus on this basis and emerging from negotiations is an argument that 'something is better than nothing,' risking the establishment of a precedent for permitting the regression of International Humanitarian Law (IHL).

Is something better than nothing?

No – definitely NOT! To those states that argue that if major military powers agree to "something" in the CCW, it is better than nothing - we should ask, at what price? In the context of humanitarian law, something is *not* better than nothing if that 'something' contributes to wholly preventable loss of civilian life and sets an alarming precedent for weakening IHL. The loopholes in the current text are dangerous and fundamentally undermine claims that it will yield humanitarian benefits:

Weak text riddled with loopholes – no 'added-value' or 'urgent' humanitarian impact

- The CCW proposal only bans pre-1980 cluster munitions. An arbitrary date not associated with any technological improvements in cluster munition production, post-1980 munitions are equally devastating and unacceptable on humanitarian grounds. It should be noted that all known incidents of cluster munition use since 2008 (by Georgia, Russia, the United States and Thailand) have involved weapons produced post 1 January 1980. In addition, these cluster munitions are already 30 years old and therefore of little military value. By the time a CCW protocol is adopted and enters into force, these weapons are likely to be over 40 years old and put out of service by armies regardless of any CCW regulation.
- Proponents of the protocol claim that it will affect 90% of the world's cluster munition stockpiles not covered at present by the Convention on Cluster Munitions as certain major military powers refuse to be bound by its provisions. This is deeply misleading and based on suspect calculations. States have failed to provide concrete data on the impact that this limited ban would have on current stockpiles, but available information suggests that the impact would be modest and fall short of existing national policies of the world's largest stockpiler state, the United States.
- The draft text legally permits states to use cluster munitions with a so-called failure rate of 1% or less. Negotiations for the Oslo Convention showed that *actual* failure rates in combat situations are higher than claimed failure rates based on testing. For instance the M85 used in Lebanon was presented as having a less than 1% failure rate but had an observed failure rate of at least 15% on the ground. Even cluster munitions with a failure rate of 1% can leave large absolute numbers of unexploded submunitions with indiscriminate effects.
- The draft text allows the use of cluster munitions with only one safeguard mechanism (i.e. a self-destruct mechanism). Self-destruct mechanisms have also shown their unreliability by leaving large numbers of unexploded submunitions on the ground. Almost all cluster munitions that have been used in recent conflicts such as in Afghanistan, Iraq, Lebanon or Libya, and that have been proven to have a severe humanitarian impact on civilian populations, are not banned under this text. The Convention on Cluster Munitions bans them all.
- Whilst the stated aims of introducing a protocol on cluster munitions within the CCW are to address the "urgency" of the humanitarian danger caused by cluster munitions, the draft text contains a lengthy transition period that would enable compliance to be deferred for at least 12 years. Thus, even after joining the agreement, a state would be permitted for over a decade to stockpile and use the types of cluster munitions that have been demonstrated to cause unacceptable humanitarian problems. This heightens the risk for new contamination of civilian areas and prolongs the economic burden for affected and donor states.

What should States Parties and signatories to the Convention on Cluster Munitions do now?

- States that are committed to rid the world of the humanitarian harm caused by cluster bombs should not support the draft Chair's text.
- States should clearly indicate their views that there is no consensus on the CCW draft protocol at the 4th Review Conference in November 2011 and that it contradicts the GGE negotiating mandate to 'address urgently the humanitarian impact of cluster munitions'
- States should recognize the humanitarian consequences and high political cost of supporting a weak CCW protocol that allows use of cluster munitions which will lead to preventable civilian deaths.
- The 2008 Convention on Cluster Munitions is the standard by which all states should be judged and all states should take steps towards its *comprehensive* ban on cluster munitions. States Parties should use the opportunity of the Review Conference to promote the norms of the Convention on Cluster Munitions and its universalisation.
- States should also be concerned that the adoption of a legal standard that is lower than the standard set by the Convention on Cluster Munitions would create a highly negative and unprecedented regressive development of International Humanitarian Law.

Emerging from negotiations is a proposal for a so-called 'Endeavour clause' to be included as a compromise measure within the Chair's text. Supporters of this substantially weak clause are willing to establish poor and counter-productive IHL, with the further defense that they will 'endeavour' to improve it in the future. Such reasoning implicitly admits that the text will not reach its humanitarian goals of responding "urgently" to the problems caused by cluster bombs. This raises the question of why any state committed to IHL which has already banned cluster munitions under the Convention on Cluster Munitions would negotiate and accept new international law that allows use of the very same cluster munitions already banned on humanitarian grounds.

The CMC believes the draft Chair's text, with or without its proposed 'Endeavour clause,' runs counter to the positive obligations contained in Article 1(c) and Article 21(1) and (2) of the Convention to "never under any circumstances" assist, encourage, or induce any activity relating to the use, production, stockpiling, and transfer of cluster munitions; to actively discourage use of cluster munitions; and to promote norms that stigmatize these weapons. It is therefore difficult to reconcile efforts by States Parties to the Convention on Cluster Munitions to support the proposed weak CCW protocol which would result in the creation of an alternative to joining the Convention on Cluster Munitions - a lower legal standard that allows for and facilitates cluster munition use in the future.

The extent of the sea-change of international opinion brought about by the Convention on Cluster Munitions is evident in the considerable shifts of national positions of a number of large military powers not party to the Convention, which now concede that cluster munitions can cause humanitarian harm. Our message is firm and clear:

Stigmatizing the use of a weapon through the absolute prohibitions of the Convention on Cluster Munitions is a much more powerful tool for influencing the behaviour of non-States Parties than the weak and permissive legal regulations currently negotiated under the CCW.

States that have joined the Convention on Cluster Munitions must not be complicit in the adoption of a protocol which would re-legitimize banned cluster munitions, weaken the norm against their use, and provide an "out" for countries that have not yet joined the Convention on Cluster Munitions by allowing them to adopt weak standards while claiming to be meaningfully addressing the humanitarian harm caused by cluster munitions.

The CMC calls for States to engage in the crucial negotiations during the upcoming CCW 4th Review Conference in Geneva from 14–25 November and to uphold the standards established by the Convention on Cluster Munitions.