

I. Limiting conventional arms for humanitarian reasons: the case of cluster munitions

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Several years of international negotiations on imposing greater controls on cluster bombs reached a climax in 2011 when states parties to the 1981 Certain Conventional Weapons (CCW) Convention convened to negotiate a draft protocol on cluster munitions in the convention's Fourth Review Conference.¹ The weapon category 'cluster munitions' lacks an internationally agreed legal definition, but in general terms a cluster munition can be defined as a canister that breaks apart prior to detonation, releasing multiple individual sub-munitions. These weapons can be delivered from aircraft or land- or sea-based systems against moving or fixed targets—including people, vehicles or infrastructure such as airfield runways. The individual sub-munitions may be difficult or impossible to target precisely, and a certain proportion may not detonate immediately. There is a risk that the use of these weapons will fail to discriminate between military targets and protected civilians and that unexploded ordnance will continue to pose a threat beyond the duration of the conflict in which they were used. For these reasons there have been efforts to restrict or entirely prohibit cluster munitions.

The CCW Convention was the first treaty under international law with provisions to address cluster munitions, and discussions to expand restrictions on these weapons by introducing a specific CCW protocol on cluster munitions have been ongoing in the CCW regime since 2003.² In 2006, at the Third CCW Review Conference, six countries submitted a proposal for a mandate to negotiate a CCW protocol on cluster munitions.³ At the same conference, 25 states parties issued a declaration that called for an agreement—not necessarily within the CCW regime—that would prohibit the 'use of cluster munitions within concentrations of civilians', ban the 'development, production, stockpiling, transfer and use of cluster munitions that pose serious humanitarian hazards because they are for example

¹ On this process see Lachowski, Z., 'Conventional arms control', *SIPRI Yearbook 2008*, pp. 488–90. For a summary and other details of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW Convention) and its protocols see annex A in this volume.

² Protocol V to the CCW Convention, which was adopted on 28 Nov. 2003 and entered into force on 12 Nov. 2006, includes obligations on states to remove or destroy explosive remnants of war on their territory, including unexploded cluster munitions. CCW Convention (note 1), Protocol V, Article 3. As of 1 Jan. 2012, 76 of the 114 parties to the CCW Convention were parties to Protocol V.

³ Third CCW Review Conference, 'Proposal for a mandate to negotiate a legally-binding instrument that addresses the humanitarian concerns posed by cluster munitions', Presented by Austria, the Holy See, Ireland, Mexico, New Zealand and Sweden, CCW/CONF.III/WP.1, 25 Oct. 2006. Documents relating to the CCW Convention are available at <<http://www.unog.ch/ccw/>>.

unreliable and/or inaccurate', require the destruction of stockpiles of such cluster munitions and establish forms of cooperation and assistance to achieve this destruction.⁴

The states parties were unable to agree on a way forward in 2006. Instead, they convened an intersessional group of governmental experts (GGE) meeting to 'consider further the application and implementation of existing international humanitarian law to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions'. This meeting was also opened to information and input from non-governmental sources, including expert reports produced under the auspices of the International Committee of the Red Cross (ICRC).⁵ In 2008 the states parties agreed to negotiate a draft sixth protocol to the CCW, on cluster munitions, partly spurred by rapid progress in a parallel process taking place outside the framework of the CCW.

In December 2006 Norway had invited all 'countries that are ready to explore ways to address this pressing humanitarian issue in a determined and an effective manner and are prepared to develop a new legally binding international instrument on cluster munitions' to a conference in Oslo in early 2007.⁶ The letter of invitation was explicit about the intention to address the issue outside the CCW framework—thus avoiding the need to build consensus among the parties to the CCW Convention—and that the terms of reference for the exercise included a ban, rather than restrictions, on identified cluster munitions. Norway also invited relevant United Nations agencies, the ICRC and non-governmental organizations (NGOs) from the Cluster Munitions Coalition 'that have been central in bringing attention to the problem'. The 'Oslo Process' launched at the conference on 22–23 February 2007 later resulted in the adoption of the 2008 Convention on Cluster Munitions (CCM)—a far-reaching treaty imposing a complete ban on cluster munitions.⁷ While the CCM had 67 parties as of 1 January 2012 (including 18 that ratified it in 2011), states such as China, India, Israel, Pakistan, Russia and the United States that are critically relevant to the control of cluster munitions are strongly opposed to a outright ban on these weapons.

⁴ Third CCW Review Conference, 'Declaration on cluster munitions', Presented by Austria, Belgium, Bosnia and Herzegovina, Croatia, Costa Rica, the Czech Republic, Denmark, Germany, the Holy See, Hungary, Ireland, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Sweden and Switzerland, CCW/CONF.III/WP.18, 20 Nov. 2006.

⁵ Third CCW Review Conference, Final document, Part II, Final declaration, CCW/CONF.III/11 (Part II), 17 Nov. 2006, p. 6.

⁶ Støre, J. G., Norwegian Minister of Foreign Affairs, Letter of invitation to the Oslo meeting on cluster munitions, Dec. 2006, <<http://www.regjeringen.no/en/dep/ud/selected-topics/humanitarian-efforts/clusterinitiative/conference.html>>.

⁷ For a summary and other details of the Convention on Cluster Munitions see annex A in this volume.

It was against this background that the Fourth CCW Review Conference met to consider a draft protocol on cluster munitions.

The Fourth Review Conference of the Certain Conventional Weapons Convention

The mandate of the GGE that prepared the Fourth CCW Review Conference was to negotiate a draft protocol on cluster munitions ‘to address urgently the humanitarian impact of cluster munitions, while striking a balance between military and humanitarian considerations’.⁸ Within the GGE the states that are primarily motivated by the humanitarian aspects of the issue argued for the CCW protocol to include a ban on cluster munitions to mirror the provisions of the CCM. Their main concerns were that, if the CCW Convention were to maintain states’ rights to produce and use some types of cluster munition, it would lead to their active use in future conflicts, and thus impede the building of a norm against cluster munitions.⁹ In other words, the acceptance of some cluster munitions would create loopholes in the legal framework for weapons that are known to cause unacceptable harm to civilians. States not party to the CCM focused their attention on the conditions for the legal use of cluster munitions considered necessary for national defence. The users and producers of cluster munitions commonly put two main arguments forward. First, several states cited their ‘legitimate defence interests’ based on the unmatched strategic role of cluster munitions in their national defence. Second, some states claimed that the humanitarian risks posed by cluster munitions would be reduced through technical improvement, for example by making them more precise or adding self-destruction mechanisms, and that the risks would be further mitigated by stopping the use of cluster munitions by non-state actors and in civilian areas.¹⁰

The GGE’s draft protocol on cluster munitions, which was used as the basis for negotiations at the review conference, would prohibit the use, acquisition, stockpiling or retention of cluster munitions produced prior to 1980 and would impose restriction on cluster munitions manufactured in or after 1980.¹¹ It would permit the continued use of all cluster munitions produced in or after 1980 for up to 12 years after the protocol’s entry into force; after that point, only the use of a restricted class of cluster munitions

⁸ Meeting of the High Contracting Parties to the CCW Convention, Final report, CCW/MSP/2010/5, 10 Feb. 2011, p. 7.

⁹ In the case of landmines, e.g., an explanation that has been put offered for the successful reduction of their use in conflict is that they are now considered to be ‘weapons of another era’.

¹⁰ See e.g. Fourth CCW Review Conference, Statement by Mr Wu Haitao, Head of the Chinese Delegation, 14 Nov. 2011, pp. 3–4.

¹¹ Group of Governmental Experts of the High Contracting Parties to the CCW Convention, ‘Draft protocol on cluster munitions’, 26 Aug. 2011, articles 4 and 5.

would be permitted.¹² The draft protocol would ban the sale of cluster munitions to non-state actors and to states not party to the CCW Convention.¹³

According to the USA, the CCM's combined impact on all of its states parties would be exceeded by the draft protocol's impact on cluster munition stockpiles in the USA alone.¹⁴ In fact, the GGE's draft protocol mirrored existing US law in key aspects, for example by requiring low failure rates, and would impose few new conditions on the USA.¹⁵ States such as Brazil and India supported the text, with Brazil highlighting its 'unequivocal potential to make a difference on the ground' and stating that 'a protocol based on the [GGE draft] would be better than the alternative of having no obligations at all'.¹⁶ Several European Union member states, including Ireland and Poland, expressed the opinion that even an imperfect protocol would have value.¹⁷ Although Germany criticized the GGE draft (based on the ICRC's concerns about such humanitarian aspects as safeguard mechanisms), it also underlined the need to recognize the fundamental differences between the CCW and CCM processes and noted that a CCW protocol must be seen as an intermediate step towards a future ban on the use of cluster munitions.¹⁸

While most states known to be users or producers of cluster munitions were in favour of the GGE's draft protocol, the USA was the most active supporter. It called the draft protocol 'the only chance' to bring major producing and using states 'into a legally binding set of prohibitions and regulations' on cluster munitions.¹⁹ Other such states objected to certain provisions in the draft. Pakistan was the most sceptical, raising the concern

¹² Group of Governmental Experts of the High Contracting Parties to the CCW Convention (note 11), Article 5 and Technical Annex B.

¹³ Group of Governmental Experts of the High Contracting Parties to the CCW Convention (note 11), articles 7(4c). Non-state armed groups have used cluster munitions in Afghanistan (the Northern Alliance), Bosnia and Herzegovina (a Serb militia), Croatia (a Serb militia) and Israel (Hezbollah). Landmine and Cluster Munition Monitor, *Cluster Munition Monitor 2011* (Mines Action Canada: Ottawa, Oct. 2011), p. 15.

¹⁴ Fourth CCW Review Conference, Opening statement by Phillip Spector, Head of the US Delegation, 14 Nov. 2011, p. 2.

¹⁵ The US Department of Defense's June 2008 policy on cluster munitions served as the basis for the US position in the negotiations. It bans use of cluster munitions in civilian areas and the procurement and use of cluster munitions with a failure rate of more than 1%. US Department of Defense, 'DoD policy on cluster munitions and unintended harm to civilians', 19 June 2008, <<http://www.defense.gov/releases/release.aspx?releaseid=12049>>.

¹⁶ Fourth CCW Review Conference, Statement by Mr Neil Benevides, Deputy Permanent Representative of Brazil to the Conference on Disarmament, 14 Nov. 2011, p. 3; and Fourth CCW Review Conference, Statement by Ambassador Sujata Mehta, Permanent Representative of India to the Conference on Disarmament, 14 Nov. 2011.

¹⁷ Fourth CCW Review Conference, Statement by Gerard Corr, Permanent Representative of Ireland to the UN in Geneva, 15 Nov. 2011; and Fourth CCW Review Conference, Statement by Dr Cezary Lusinski, Deputy Permanent Representative of Poland to the UN in Geneva, 14 Nov. 2011.

¹⁸ Fourth CCW Review Conference, General statement, Ambassador Hellmut Hoffmann, Ambassador of Germany for Global Disarmament Affairs, 15 Nov. 2011, pp. 3–4.

¹⁹ Fourth CCW Review Conference (note 14), p. 2.

that the choices of technical provisions for permitted cluster munitions and of the cut-off date of 1 January 1980 could favour the cluster munitions produced by certain countries and might give them commercial advantages.²⁰

The strongest opposition to the draft came from parties to the CCM, which had objected to the text throughout the preparatory process.²¹ They objected to the CCW proposals on the grounds that the CCM has established a legal norm that the possession and use of cluster munitions is prohibited while the protocol to the CCW Convention would permit their use, and so the two would be incompatible.²² For example, South Africa, one of the many states that rejected the draft protocol, was 'uncertain about the real impact of these measures' and stated that the draft was 'fundamentally flawed', that it would have 'a detrimental impact on the CCM and the credibility of the CCW' and that the draft 'fall[s] short of urgently addressing the humanitarian impact' of cluster munitions and therefore 'does not give effect to the mandate given to the GGE'.²³ Some non-CCM parties argued that no norm had been established and that without a CCW protocol they would be under no obligation with respect to cluster munitions other than the general rules of international humanitarian law.²⁴

More than 50 of the CCW Convention's parties expressed opposition to the proposal on the last day of the conference. The conference did not lead to an agreement and negotiations within the CCW framework on a protocol on cluster munitions were thus postponed for at least five years, until the next review conference.²⁵

The important role played by NGOs in CCW deliberations was noteworthy. In particular, Jakob Kellenberger, president of the ICRC, circulated his statement on the draft protocol to all CCM states parties prior to the review conference.²⁶ A number of NGOs and UN agencies presented their criticisms of the draft protocol in statements to the conference.²⁷ This

²⁰ Fourth CCW Review Conference, Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the UN, 15 Nov. 2011.

²¹ Austria, Mexico and Norway had submitted an alternative draft text in Aug. 2011 that followed the structure of the CCM but without any legal obligations or a definition of a cluster munition. Group of Governmental Experts of the High Contracting Parties to the CCW Convention, 'Draft alternative protocol on cluster munitions (draft protocol VI to the CCW)', Working Paper submitted by Austria, Mexico and Norway, CCW/GGE/2011-III/WP.1/Rev.1, 26 Aug. 2011.

²² See e.g. Fourth CCW Review Conference, Norwegian Delegation, General exchange of views, 15 Nov. 2011.

²³ Fourth CCW Review Conference, Statement by South Africa, 14–25 Nov. 2011, p. 2.

²⁴ See e.g. Fourth CCW Review Conference, Statement by Tamar Rahamimoff-Honing, Counsellor, Representative of Israel, 14 Nov. 2011, p. 5.

²⁵ Zughni, F., 'Cluster munitions protocol fails', *Arms Control Today*, vol. 41, no. 10 (Dec. 2011).

²⁶ Kellenberger, J., President of the International Committee of the Red Cross, Statement to the Fourth CCW Review Conference, 15 Nov. 2011, <<http://www.icrc.org/eng/resources/documents/statement/ccw-statement-2011-11-15.htm>>.

²⁷ See e.g. Fourth CCW Review Conference, Statement by United Nations agencies and other organizations involved in humanitarian action, Delivered by Navanethem Pillay, United Nations High Commissioner for Human Rights, 14 Nov. 2011.

criticism was echoed in conference statements made by smaller states that had not been affected by cluster munitions.²⁸ The role of the ICRC as not just an observer but an assertive actor in the CCW review conference produced a strong reaction from some states parties. For example, India stated that the NGOs ‘should continue to contribute as in the past to enhancing our understanding of and sensitivity to [international humanitarian law] issues in a neutral and apolitical manner’.²⁹ In light of the fact that the conference ultimately failed, at least one participant at the review conference has expressed concerns that NGO participation in future disarmament negotiations could be limited or even prevented.³⁰

The Convention on Cluster Munitions

Seven of the eight states parties to the CCM that have completed the destruction of their stockpiles are European.³¹ The largest remaining stockpiles subject to the CCM are also European: Germany (which had declared 67 million sub-munitions) and the United Kingdom (which had declared 39 million sub-munitions) had each destroyed more than half of their stockpiles by mid-2011.³²

The model for the CCM was the 1997 Anti-Personnel Mines (APM) Convention, which has provided the framework for a sustained practical disarmament effort that has led to the demining of large areas of contaminated territory and the destruction of large numbers of landmines.³³ In June 2011 Iraq became the 87th state to declare that it had completed destruction of its stockpiles of landmines falling within the scope of the treaty and Nigeria became the 18th state to report completion of its obligation to clear APMs in known mined areas.³⁴ While the convention has been highly successful in preventing the use of and trade in landmines, there seems to have been a loss of momentum in certain aspects of its implementation. According to the *Landmine Monitor 2011*, ‘the rate of compliance with submitting annual transparency reports is at an all-time low’ and ‘clearance deadline extension requests are becoming the norm rather than the exception’.³⁵

²⁸ See e.g. Fourth CCW Review Conference, Statement by Jones Apperh, Executive secretary, Ghana National Commission on Small Arms, 14 Nov. 2011.

²⁹ Fourth CCW Review Conference, Statement by Ambassador Sujata Mehta (note 16), p. 5.

³⁰ CCW state party official, Interview with author, 9 Dec. 2011.

³¹ Austria, Belgium, Ecuador, Moldova, Montenegro, Norway, Portugal and Spain have completed destruction of their stockpiled cluster munitions.

³² Landmine and Cluster Munition Monitor (note 13), pp. 19–20.

³³ For a summary and other details of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction see annex A in this volume.

³⁴ International Campaign to Ban Landmines, *Landmine Monitor 2011* (Mines Action Canada: Ottawa, Oct. 2011), p. 2.

³⁵ International Campaign to Ban Landmines (note 34), pp. 2, 30.

After the entry into force of the CCM in 2010, the first meeting of states parties took place in November 2010 in Vientiane, Laos (the country most contaminated with cluster munitions). At the conference, the states parties agreed on an action plan to guide implementation of the CCM's provisions on stockpile destruction, clearance and victim assistance, among other things.³⁶ In order to monitor progress, consensus was reached on the submission of annual updates of the initial national transparency reports as required by Article 7 of the convention.³⁷ In 2011 a total of 43 states parties submitted such a report, which provide valuable information on, for example, land contamination and bilateral assistance programmes.³⁸

The second meeting of states parties to the CCM took place in Beirut, Lebanon (a country also badly affected by cluster munitions), on 12–16 September 2011. The meeting focused on the national implementation of the CCM, including in legislation.

Prospects and challenges

With the failure of negotiations on a cluster munitions protocol to the CCW Convention it will be difficult to sustain political engagement in discussing future prospects and challenges. The main priority within the CCM is likely to be ensuring compliance with stockpile destruction timetables and mobilizing support for countries that need assistance with land clearance. The CCM prohibits assistance in the use, production, transfer and stockpiling of cluster munitions. However, there are different views on what constitutes 'assistance', with some parties (e.g. Norway) taking a restrictive approach and others (e.g. the UK) taking a less restrictive approach. Questions such as how to manage stockpiles on the territory of a CCM party that are owned by a non-party and the transit, trans-shipment, financing or export of explosives or other components necessary to produce banned munitions have been addressed in the CCM and are likely to be future topics of discussion.

Of the 28 states that are heavily contaminated by cluster munition remnants, 8 have ratified the CCM and a further 8 have signed but not yet ratified it.³⁹ Bringing such countries as Cambodia, Serbia and Viet Nam that are seriously affected by cluster munitions into the CCM is likely to be a priority for the parties to the convention.

The wider normative effect of the CCM is difficult to assess. Production and marketing of cluster munitions is ongoing. Some trade in cluster muni-

³⁶ 'CCM Vientiane Action Plan', 12 Nov. 2010, <<http://www.clusterconvention.org/documents/action-plan/>>.

³⁷ 'CCM Vientiane Action Plan' (note 36), Action 59.

³⁸ United Nations Office at Geneva, 'Article 7 database', <[http://www.unog.ch/80256EE600585943/\(httpPages\)/84610CE6A9FDDACDC1257823003BBC39](http://www.unog.ch/80256EE600585943/(httpPages)/84610CE6A9FDDACDC1257823003BBC39)>.

³⁹ Landmine and Cluster Munition Monitor (note 13), p. 5.

tions was reported in 2011: the Republic of Korea (South Korea) allegedly sold munitions to Pakistan; and in 2010–11 the USA approved potential deals for CBU-105 sales to Saudi Arabia and Taiwan.⁴⁰ Yet the strong reactions to Spain's confirmation that it had sold 1055 cluster munitions to Libya in 2006 and 2008, some of which were used in 2011, suggests that a norm-building process is under way, even if it is still in its early stages.⁴¹ Singapore has unilaterally imposed a moratorium on the export of cluster munitions to parties 'who might use them in an irresponsible and indiscriminate manner' and the USA has suspended all exports of cluster munitions with a failure rate of more than 1 per cent; neither is a party to the CCM.⁴² South Korea, which is a party to neither the CCM nor the CCW Convention, has restricted its acquisitions of cluster munitions to those that have self-destruct mechanisms and a failure rate of 1 per cent or lower.⁴³

These developments suggest that, at a minimum, the discussion of cluster munitions has been the catalyst for a dialogue at the national level on a responsible approach.

⁴⁰ Amnesty International, IPIS and TransArms, *Deadly Movements: Transportation Controls in the Arms Trade Treaty* (Amnesty International: London, July 2010), p. 11; and Landmine and Cluster Munition Monitor (note 13), p. 17.

⁴¹ Landmine and Cluster Munition Monitor (note 13), pp. 168–69.

⁴² Landmine and Cluster Munition Monitor (note 13), pp. 307, 330.

⁴³ Landmine and Cluster Munition Monitor (note 13), p. 280.