

CONVENTION ON CLUSTER MUNITIONS

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1. The Nature of Cluster Munitions

The term “cluster munitions” refers to any of a number of weapons systems which, as the name suggests, deliver clusters of smaller explosive submunitions onto a target. Often referred to as “cluster bombs” the submunitions are in fact every bit as likely to be delivered by missiles, artillery or strewn from fixed dispensers as they are to be dropped in bombs from aircraft. Submunitions delivered in any given attack may number in the hundreds or many thousands. The concept, already well-developed by the end of World War II and used in scores of conflicts since, has certain military advantages over delivering similar amounts of destructive force in single or “unitary” munitions. For example, a single bomb to the middle of an enemy airstrip leaves one crater which, even if large, can be quickly filled. A cluster munition attack, on the other hand, may produce hundreds of craters, taking days to repair. But in fact cluster munitions have seldom been reserved for such a specialised role. Rather they have been used sweepingly against every imaginable military target, and sometimes, no target at all. The wide field of destruction produced by these weapons makes them easy tools to essentially “remove” large areas from the battlefield, with a high level of confidence that anyone within the target zone will be killed or grievously wounded. Well-suited for hunting an elusive enemy in unfriendly terrain, the reduced need for pin-point accuracy lowers the number of sorties that need to be flown and consequently the risk of casualties amongst the attacking force. However, as the seemingly inevitable “collateral effects” of such attacks became more and more obvious, ever stronger objections to cluster munitions also arose, ultimately leading to an international campaign to completely ban their use.

2. Cluster Munitions and the Law

Assessing the legitimacy of any weapon commences from the balance between military necessity and humanity expounded in the Saint Petersburg Declaration nearly a century and a half ago. It is now distilled into three basic prohibitions. The first, prohibiting weapons which cause unnecessary suffering or superfluous injury, has only ever been weakly advanced in respect of cluster munitions. The casualties caused to combatants, horrific as they are, in reality differ little from unitary munitions which employ fragmentation. Similarly, despite the very real environmental effects caused by cluster munitions it is not often argued that they reach the high threshold of causing widespread, long-term and severe damage prohibited by international law. It is around the third relevant ground of prohibition in international law, namely indiscriminate effect, that claims to illegality coalesced. Weapons that are of a nature to strike military objectives and civilians or civilian objects without distinction are prohibited under article 51, paragraph 4, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). This provision is well-accepted as reflecting customary international law.

The humanitarian objection to cluster munitions therefore arises mainly from two properties of this class of weapons. First is the fact that whatever legitimate role cluster munitions may be applied to, their nature and characteristics lend themselves so easily to attacks which strike combatants and civilians alike. Proponents of cluster munitions point out that they are not incapable of being used discriminately, for example if used against a military objective where there are only combatants. What is harder to deny is that in modern conflict conditions, where civilians are almost always present, the properties of this weapon make indiscriminate use unusually likely and discriminate use increasingly difficult.

The second objection is their propensity to leave behind large numbers of unexploded remnants which exact an even greater indiscriminate toll amongst civilians. The damaging effect of explosive remnants of war generally had already attracted international concern and, indeed, action within Protocol V to 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 (Conventional Weapons Convention). These concerns were heightened in respect of cluster munition remnants, however, because of the ease with which they detonate, their persistence in very large numbers for years after delivery and their high level of lethality amongst civilians. The fact that many employ brightly coloured and shiny bomblets resembling toys, produces a particularly grave toll amongst children. The remnants indisputably obstruct economic and social development, destroy the livelihood of those affected, impede post-conflict rehabilitation and reconstruction, delay or prevent the return of refugees and internally displaced persons.

3. The Path to Prohibition

The call for a ban on cluster munitions springs from the conflicts in South-East Asia of the 1960s and 1970s during which hundreds of millions of bomblets were dumped indiscriminately on wide-area targets. It was not until the late 1990s however that civil society and faith-based groups started to get the question effectively aired in international fora. Hopes that the Conventional Weapons Convention process would specifically address this munition were frustrated and after five years of effort even the attempt to achieve a negotiating mandate to ban the weapon became bogged down in its consensus-based framework.

Unexploded submunitions are so unpredictable in their detonation that the practical effect of a cluster munition strike is much the same as strewing a field with mines. Little surprise, therefore, that advocates of a ban sought to replicate the comprehensive prohibition set out in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention). States defending the right to use these munitions argued (and continue to argue) that rather than prohibition, there should be restrictions based on technical reliability criteria such as “less than one percent failure rate”. They also argued that existing law sufficed to prohibit indiscriminate attacks. Those seeking a ban pointed out that rates derived from perfect test conditions were hardly ever replicated in the imperfect conditions of actual combat where munitions are delivered in haste or panic, get caught in foliage, are cushioned in their descent by preceding explosions, land on soft soil or the

roofs of buildings. They also argued that existing law had proved an ineffective protection for hundreds of maimed and killed civilians in recent conflicts.

This inertia produced by this wide divergence of views was, however, disrupted in July 2006 when Israel's conflict with Hezbollah militants resulted in up to 4 million bomblets being delivered onto Lebanese territory and a somewhat smaller number being fired into northern Israel. The effect on Lebanon was dramatic with many thousands of bomblets failing to explode rendering farm land unusable and turning schools and markets into death-traps. International views on the need for a specific treaty dealing with cluster munitions were in many cases changed purely as a result of this graphic demonstration of their indiscriminate effects both at the time of delivery and in the aftermath and the patent failure of supposed reliability criteria and existing legal constraints.

4. The Oslo Process

Having learned the lesson of the Ottawa process relating to anti-personnel mines Austria, Ireland, Mexico, New Zealand, Peru and the Holy See followed Norway's lead to spearhead the "Oslo process" outside of the Conventional Weapons Convention framework. Its aim, enunciated in the Oslo Declaration, was a treaty prohibiting the use and stockpiling of "cluster munitions that cause unacceptable harm to civilians" and securing care and rehabilitation to survivors and clearance of contaminated areas.

Some initial disagreement arose about the qualification "that cause unacceptable harm to civilians" because of resistance to the implication that cluster munitions could cause harm to civilians that would be "acceptable". Ultimately the semantic aspects of the argument proved surmountable and States moved with impressive speed to draft, and then bring into force, a treaty that was widely-based and comprehensive in its scope.

International conferences were held in Oslo (22-23 February 2007), Lima (23-25 May 2007), Vienna (5-7 December 2007), Wellington (18-22 February 2008) and finally Dublin (19-30 May 2008) where the Convention was adopted on 30 May 2008. The treaty was opened for signature on 3 December 2008 in Oslo. It entered into force on 1 August 2010, six months after it was ratified by 30 States. As of March 2014, 108 States have signed the treaty, with 84 having ratified or acceded to it.

A major feature of the path to prohibition was the prominent role played by civil society groups, including Human Rights Watch, Handicap International and Norwegian People's Aid, operating under the umbrella of the Cluster Munition Coalition. Active too were victims' groups and international organizations such as the International Committee of the Red Cross. Persuasive evidence and argument was also provided by experts in demining and humanitarian affairs, including those of the various agencies of the United Nations. This concentrated activity brought significant pressure to bear on Governments and played an equally effective role in galvanising public opinion in the wings of the diplomatic efforts.

Although a number of militarily important States remain outside of the Convention, and cluster munitions have been used on a number of occasions by non-parties since the Convention came into force, supporters of the treaty point to a "stigmatising" effect of the ban. The large number of parties makes claims to a legitimate role for the weapon harder to support even for those States not legally bound by its provisions. The Syrian government's recent extensive use of cluster munitions, for example, has resulted in condemnation from approximately 130 countries.

The treaty has also had a significant effect in causing responsible investors, including superannuation funds, to disinvest in companies that produce cluster munitions.

A BRIEF SUMMARY OF THE CONVENTION

5. Obligations

The fundamental obligations of parties, as set out in article 1, are not to:

- Use cluster munitions;
- Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
- Assist, encourage or induce anyone to engage in any prohibited activity under the Convention.

The obligations apply “under any circumstances” meaning that they apply to both international and non-international armed conflict. The preamble stresses that “armed groups” within a State party’s territory shall not be permitted to engage in any activity prohibited under the Convention.

As with other recent “weapons” treaties, the Convention straddles the distinction between international humanitarian law and disarmament since it addresses not only use of the weapon but also its acquisition, retention and transfer.

6. The Scope of the Convention

The definitions set out in article 2 essentially cascade from the term “cluster munition” which is, itself, widely set. It covers any conventional (i.e., non-nuclear) munition designed to disperse or release explosive submunitions each of less than 20 kilograms in weight. The individual submunitions are included in the definition. The Convention takes no regard of issues such as the age or generation of the munition, its sophistication or its reliability. The means by which the submunitions are delivered, dispersed or released is also irrelevant.

A narrow group of munitions escapes the prohibition. Unambiguously directed at advanced weapons designed to sense and destroy armoured vehicles, such munitions must have fewer than ten submunitions, each weighing more than 4 kilograms. They must also have electronic self-destruction mechanisms and electronic self-deactivating features. Such weapons, which may have as few as two submunitions, clearly do not produce the indiscriminate area effects and risks that the Convention seeks to address. Also excluded are flares, smoke, pyrotechnics or chaff (a material used to confuse radar), munitions designed for air defence and those that produce electrical or electronic effects. Once again, none of these munitions give rise to the humanitarian concerns of explosive bomblets. The Convention also excludes mines which are regulated (or in the case of antipersonnel mines – prohibited) elsewhere.

7. Storage and Stockpile Destruction

The majority of States that became early parties to the Convention did not have cluster munitions to begin with. But for those that did the burden in respect of their destruction, arising from article 3, is potentially quite significant. Cluster munitions are often stored and deployed in a mix with other munitions. They must be separated-out and marked for destruction “as soon as possible” but at least within eight years of the treaty entering into force for that party.

There is a mechanism for parties to get an extension of up to four years and, in exceptional cases, further extensions of up to four years each. Extensions must not exceed the time strictly necessary to complete destruction and must be supported not only with reasons, but also with detailed plans for fulfilment of the obligation. Destruction methods must comply with applicable international standards for protecting public health and the environment.

Parties are allowed to retain cluster munitions for training in detection, clearance and destruction of cluster munitions or for developing cluster munition counter-measures. Potentially a conduit for circumventing the prohibition on stockpiling, the Convention demands that no more munitions be retained for these purposes than are “absolutely necessary”.

8. Clearance and Destruction of Remnants

Amongst the most significant and potentially onerous of the Convention’s obligations are those relating to clearance and destruction of remnants set out in article 4. Remnants must be cleared from contaminated areas under the party’s “jurisdiction or control” – which essentially means its own sovereign territory or territory it occupies. This may well mean that the victim of an attack is bound to “clean up” the deadly refuse dumped on its territory by an enemy or aggressor.

Such areas must be surveyed, assessed, fenced and marked, remnants must be recorded, and local civilians must be educated as to the risk. Clearance and destruction, informed by international standards, must be completed within prescribed time limits: ten years from the coming into force of the Convention for an existing contaminated area, or ten years from the time of contamination for future attacks. Once again where necessary, extensions can be sought to these deadlines.

Those States which have delivered or abandoned cluster munitions on the territory of another State prior to the coming into force of the treaty are “strongly encouraged” to provide technical, financial, material or human resources assistance to the affected State to facilitate the marking, clearance and destruction of those remnants. Many affected States had hoped for a stronger obligation in this regard.

These obligations overlap with those in respect of all explosive remnants of war set out in Protocol V to the Conventional Weapons Convention.

9. Victim Assistance

Parties must, under article 5, provide assistance to cluster munition victims within their jurisdiction or control, which includes all persons directly impacted by cluster munitions as well as their affected families and communities.

The Convention requires that all such victims receive medical care, rehabilitation and psychological support which is age—and gender—sensitive and which operates without adverse discrimination. Parties must also provide for victims' social and economic inclusion and must also collect reliable relevant data with respect to those victims.

Parties must develop a national plan and budget to implement victim assistance activities and designate a national focal point within the Government for coordinating assistance. Cluster munition victims and organizations representing them must be consulted and involved in this process.

10. International Cooperation and Assistance

As a counter-balance to the potentially heavy burdens of articles 3, 4 and 5, all parties in a position to do so are required by article 6 to provide technical, material and financial assistance to parties affected by cluster munitions. Requests for assistance, which is described as a right, may apply in respect of remnant clearance, destruction and risk education. The obligation also applies in favour of States needing resources to meet their obligations of stockpile destruction, victim assistance and social and economic recovery.

There is also an obligation to provide urgent emergency assistance to affected parties in the wake of any future cluster munition attack.

Assistance can be provided through the United Nations system, through international, national or regional organizations, through non-governmental organizations, or bilaterally.

11. Transparency Measures

Under article 7 parties must report on the status of their treaty implementation to the United Nations no later than 180 days after the Convention enters into force for them and then annually. Reports must include national implementation measures; the type, quantity and technical characteristics of cluster munitions and submunitions stockpiled; the status and progress of stockpile destruction programmes; the conversion or de-commissioning of production facilities; the size and location of contaminated areas; the status and progress of clearance programmes; measures taken to provide risk education; the status and progress of implementation of the treaty's victim assistance provisions; the amount of national resources allocated for clearance, stockpile destruction and victim assistance; and the type, quantity and destination of international cooperation and assistance provided.

12. Facilitation and Clarification of Compliance

Under article 8 parties agree to consult and cooperate regarding implementation of the Convention and to work together to facilitate compliance with their obligations. A process is established to deal with the clarification and resolution of questions of compliance, including requesting clarification through the United Nations Secretary-General and recommending “appropriate measures” at a Meeting of States Parties. Meetings of States Parties may also adopt other procedures or specific mechanisms for the clarification of compliance.

13. National Implementation Measures

Parties must, in accordance with article 9, take all appropriate legal, administrative and other measures to implement the Convention, including imposing penal sanctions on persons engaged in prohibited activities. Many States have included provisions prohibiting investment in companies involved in the manufacture of cluster munitions.

14. Meetings of States Parties, Review Conferences and Amendments

Articles 11 and 12 deal with annual Meetings of States Parties and Review Conferences. Article 13 provides for parties to make proposals as to amendment.

15. Reservations Prohibited

States may not, under article 19, make any reservations to the Convention when they ratify or accede. The Convention entered into force on 1 August 2010 in accordance with article 17.

16. Relations with States Not Party to the Convention

Unusually detailed provisions under article 21 govern interoperability between States that are party to the Convention and those that are not. This compromise, a major issue during the treaty negotiations, recognises the need of many States to rely on the airpower or firepower of non-parties for their defence—particularly in coalition operations. Those in need of such support are seldom in a position to dictate what armaments will be used to save them, and where they lack that element of control they do not breach their obligations under the Convention if that support turns out to be cluster munitions. However, as a corollary there is a duty on parties not only to notify their obligations to non-party allies but also promote its norms, make best efforts to discourage the use of cluster munitions and encourage non-parties to join the Convention.

Furthermore, article 21 does not provide a license to circumvent the obligations of the Convention by requesting coalition partners to do that which the party itself cannot. The fundamental obligations of States to apply the treaty in good faith (*pacta sunt servanda*) are not diminished by this article.

Related Materials

A. Legal Instruments

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, p. 3.

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 (with Protocols I, II and III), Geneva, 10 October 1980, United Nations, *Treaty Series*, vol. 1342, p. 137.

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to 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, Geneva, 3 May 1996, United Nations, *Treaty Series*, vol. 2048, p. 93.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Oslo, 18 September 1997, United Nations, *Treaty Series*, vol. 2056, p. 211 (see esp. art 2(1)).

Protocol on Explosive Remnants of War to 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 (Protocol V), Geneva, 28 November 2003, United Nations, *Treaty Series*, vol. 2399, p. 100.

B. Documents

General Assembly resolution 51/45 S of 10 December 1996 (General and complete disarmament).

Declaration of the Oslo Conference on Cluster Munitions, Oslo, 22-23 February 2007.

General Assembly resolution 63/71 of 2 December 2008 (Convention on Cluster Munitions).

C. Doctrine

W. H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford, 2009.

J. Borrie, *Unacceptable Harm: A history of how the international treaty banning cluster munitions was won*, United Nations Institute for Disarmament Research, Geneva, 2009.

A. Breitegger *Cluster Munitions and International Law: Disarmament With a Human Face?*, Routledge Research in the Law of Armed Conflict, Oxon, 2012.

G. Dube, *Negotiating the Convention on Cluster Munitions: The Role of African States*, Institute for Security Studies, Issue 187 of ISS papers, South Africa, 2009.

G. Nystuen & S. Casey-Maslen (eds.), *The Convention on Cluster Munitions: A Commentary*, Oxford University Press, Oxford, 2010.

Mines Action Canada, *Banning Cluster Munitions: Government Policy and Practice*, 2009.

D. Online Resources

The Convention on Cluster Munitions.

The Cluster Munitions Monitor.

IKV Pax Christi, *Worldwide investments in cluster munitions: a shared responsibility*, Utrecht, 2013.