

## **Draft Cluster Munitions Convention Explanatory Notes**

### Preamble

The Oslo Process is premised on concern about the humanitarian impact of cluster munitions and the need to end the suffering and casualties they cause among civilians. A Preamble setting out the context and background supporting international efforts to address the humanitarian concerns posed by cluster munitions has been incorporated into the text.

Several delegations at the Vienna Conference expressed a preference for the objectives of the process, as set out in the Oslo Declaration, to be highlighted within the text. A reference reaffirming the Oslo Declaration has been incorporated into the Preamble accordingly.

### Article 1: General obligations and scope of application

The first part of this Article lays down the obligations of States Parties not to use, develop, produce, acquire, stockpile, retain or transfer cluster munitions as defined in Article 2. The scope of application of the treaty is “never under any circumstances”, meaning that application of the treaty does not require qualification of the level of armed conflict. The provision thus is largely similar to corresponding provisions in the Biological Weapons Convention, the Chemical Weapons Convention and the Anti-Personnel Mine Ban Treaty.

The second part of this Article specifies that the present Convention does not regulate mines as defined in Article 2 (1) of Amended Protocol II to the CCW, reflecting the discussion at the Lima and Vienna Conferences. This means that neither anti-vehicle mines nor anti-personnel mines fall under the scope of application of this Convention.

At the Vienna Conference, a number of delegations again expressed the need for detailed work on the issue of military interoperability with States not Party to the Convention with regard to Article 1 c) on assistance. In particular, a need for dedicated consideration of this issue at the Wellington Conference was identified.

### Article 2: Definitions

This article identifies and describes key terms used in the Convention.

**Cluster munition victims:** The definition comprehensively details the elements necessary for defining cluster munition victims, clarifying (as was done in the

preambular part of the Vienna Discussion Text) that the term encompasses the directly affected person, and also his/her family and community.

**Cluster munition:** The definition specifies that the term includes both the “parent” munition and the explosive sub-munitions contained therein. Reflecting the discussion at Vienna, there is an exception from the term “cluster munition” for some sub-munitions which may be categorised as explosive, but which are not considered to be cluster munitions for the purposes of the Convention, such as pyrotechnical or electronic units.

**Explosive sub-munition:** This is a part of the definition of cluster munitions. Explosive sub-munitions falling within the definition are designed to function by detonating an explosive charge. The term “function” indicates that this definition will not cover sub-munitions that are inert, such as kinetic rods, which are not meant to function through an explosion. Explosive sub-munitions covered by the convention are designed to detonate prior to, on, or after impact. This means that the timing of the detonation does not have any bearing on whether or not an explosive sub-munition falls within the prohibition.

At the Vienna Conference, a range of views were expressed on what might constitute a cluster munition causing unacceptable harm to civilians. Some States suggested that exemptions to the definition of “cluster munition” should be based on the concepts of reliability and accuracy, although there were no specific proposals on how such an approach could be implemented, nor on how concepts of reliability or accuracy could be objectively quantified. There were, however, a number of proposals made relating to specific exemptions in addition to those referred to above. Building on work done at the Lima Conference, the list of exemptions proposed by various delegations includes: explosive sub-munitions that aim, detect and engage point targets; cluster munitions which contain fewer than a specified number of explosive sub-munitions; explosive sub-munitions with self-destruct and self-deactivation or other failsafe mechanisms, explosive sub-munitions with a tested failure rate of less than a specified percentage, explosive sub-munitions of a non-conventional nature, explosive sub-munitions above a minimum threshold for volume and mass. Other suggestions have been that the age of the sub-munitions should be relevant, and that combinations of some proposed exclusion criteria merited further consideration. Some other states opposed any possible exemptions to the definition of “cluster munitions”, expressing support for a total prohibition on all cluster munitions. It is envisaged that there will be detailed discussion of these issues at the Wellington Conference. Reliability and accuracy sentence

**Unexploded cluster munitions:** This definition now specifically states that both unexploded parent munitions and unexploded explosive sub-munitions are included within its scope.

### Article 3: Stockpile Destruction

This Article lays down an obligation to separate cluster munitions from ordinary stockpiles while awaiting destruction. Stockpiles shall be destroyed within six years, but there is a possibility to get an extension of that deadline. The Article contains proposed procedures for applications for extensions.

There is broad agreement that safe and secure destruction of cluster munitions is a technical and logistical challenge, and that this must be reflected in the relevant time frames. A range of views have been expressed as to what the actual deadlines for stockpile destruction should be. These views have ranged on both sides of the deadlines suggested in the discussion text.

During the consultations some delegations have raised the possibility of permitting the retention of cluster munitions and/or sub-munitions to facilitate the development of clearance and disposal capabilities. Other delegations expressed the view that such retention was neither necessary nor justified.

### Article 4: Clearance and destruction of cluster munition remnants

In the light of discussions in Vienna, some revisions were made to Article 4. Paragraph 1 has been reworded to address the two different sets of circumstances in which clearance of cluster munition remnants may be required; that is clearance of cluster munitions remnants existing at entry into force of the Convention and clearance of cluster munition remnants that may be created after entry into force.

A new sub-paragraph (e) has been added to paragraph 2 to address the need for risk education. The requirement for a national plan has been included in paragraph 2(b) to reflect recent experience in clearance programmes and to be consistent with Article 6.

Paragraph 4 has been reworded in order to define more precisely the circumstances in which a State Party, whose past use of cluster munitions has created cluster munition remnants on the territory of another State Party, should provide bilateral assistance to the affected State Party. Language from CCW Protocol V has been used to describe the methodology of providing such assistance. A new sentence has been added prescribing certain elements of information that should be provided as part of such bilateral assistance.

At the beginning of paragraph 6 a new sentence has been inserted requiring that any request for an extension should be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the five year period for clearance.

There has also been some redrafting in order to ensure consistency of language throughout the Article but this has not altered the substance of the Article.

#### Article 5: Victim Assistance

Discussions held on assistance to cluster munitions victims throughout the consultation process in Vienna, Brussels, Belgrade, Lima and Oslo have shown unequivocal support for clear and comprehensive provisions on victim assistance to be contained in the future Convention and that a broad concept of the term victim should be employed. Provisions on victim assistance are now contained in various places throughout the text: the Preamble (paragraphs 6 to 8), Article 2, Article 5, Article 6 (paragraph 7), and Article 7 (paragraph 1, subparagraph I).

In response to points raised in Vienna, paragraph 9 of the Preamble now also expresses the resolve to avoid discrimination among victims of various types of weapons.

An explanation of the definition of “cluster munition victims” is covered in the notes on Article 2 (see above).

The slightly amended version of Article 5 now clarifies that the provision of medical care, rehabilitation, psychological support, and social and economic inclusion shall be done in accordance with international human rights law. The obligation to collect data has been slightly strengthened.

Future discussions on the issue of victim assistance might also concentrate on the importance to include victims in decision making as well as on formulating in a more concrete manner a provision on how national implementation should or could be framed including through the determination of national focal points and the elaboration of national action plans.

#### Article 6: International cooperation and assistance

Many delegations have highlighted the central role of this Article for the implementation of the Convention and especially supported the language regarding the assistance that shall be provided by each State Party in a position to do so, as well as the State Party that has used cluster munitions on the territory of another State Party. This obligation on the latter is already explicit in Article 4, paragraph 4, and is also referred to in paragraph 4 of Article 6.

A paragraph regarding the need for provision of emergency assistance to State Parties that may be affected by cluster munitions use has been included.

In response to several interventions made in Vienna, risk education and awareness-raising activities were included as areas for which assistance should also be provided by States in a position to do so.

Another concern expressed in Vienna, addressed in paragraph 8, is the request for assistance from States Parties in a position to do so, to contribute to the economic and social recovery needed as a result of cluster munitions use in affected States Parties.

#### Article 7: Transparency Measures

During the discussions held in Vienna, a growing support for transparency measures was evident. Significant differences were established between the type and quantity of cluster munitions destroyed and the type and quantity of cluster munitions remnants cleared and destroyed. The reporting requirements relating to these separate categories have been clarified.

The reports should include information regarding the status of destruction programmes, the types and quantities of cluster munitions destroyed, and the discovery of any stockpiles after the reported completion of destruction programmes.

A requirement to report on measures taken to provide risk education has also been incorporated.

#### Article 9: National Implementation Measures

At the Vienna Conference, several delegations expressed concern regarding potential incompatibilities with existing national legal systems. This concern also related to the scope of jurisdiction based on nationality envisaged in the text. This Article has now been amended to replicate the equivalent provision in the Anti-Personnel Mine Ban Treaty, to clarify that national implementation measures shall be undertaken in accordance with a State Party's existing national legislative framework.

#### Article 10: Settlement of disputes

Several States noted at the Vienna Conference that reference of a dispute to the International Court of Justice would require mutual consent of the Parties. This is already reflected in paragraph 1, which refers to other peaceful means "of their choice", and also says "in conformity with the Statute of the Court".