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Elements of a Treaty on Cluster Munitions

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I am going to present a few thoughts about a future treaty addressing the humanitarian challenges of cluster munitions. It is important at the outset to determine that this is the perspective: how can we agree on an instrument that will make a difference from a humanitarian point of view – fewer new victims, prevention of proliferation and assistance to survivors and affected persons and states.

As was mentioned yesterday, this is not “point zero”; we have a lot of legal history to build on, starting with long standing fundamental humanitarian principles such as the principle of distinction and the principle of proportionality.

Moreover we have a significant amount of treaty law that has been developed over the years – including of course the so called Geneva law (the four Geneva Conventions and their Additional Protocols), as well as more specific treaties within what could be described as different varieties of humanitarian disarmament instruments – including the Chemical Weapons Convention (CWC), the Biological Weapons Convention (BWC), the Convention on Certain Conventional Weapons (CCW) and its five protocols, and last but not least the Mine Ban Treaty.

The evidence and experience thus far has shown that these instruments are not sufficient. That is why we were invited here to Oslo, to discuss a future treaty addressing cluster munitions specifically.

A number of elements need to be addressed in such a treaty:

- 1) All treaties pertaining to IHL need to define when or in which situations they apply. Some IHL treaties apply only in international armed conflicts, some IHL treaties apply in non-international conflicts - in other words, one has to qualify the situation in order to decide whether or not the treaty applies in the relevant situation.

In light of the humanitarian aim of an instrument on cluster munitions, there seems to be no good arguments for making the

applicability of the prohibition dependent on what kind of conflict we are talking about.

Also there is a long standing tradition, in other instruments with similar aims, for not making the application depend on a qualification of the conflict: the CWC, the BWC and the Mine Ban Treaty all make it clear that these treaties apply *in all circumstances*. Because we are talking about a treaty dealing with aspects of IHL, the scope of application should, however, be specifically addressed in order to make this point clear.

2) One of the clearly most difficult and contentious questions in such a treaty is to decide what exactly should be forbidden. Some participants have mentioned terms like “total ban”. What does a total ban mean in this context?

It would seem necessary to distinguish between “total ban” as in prohibiting everything that might contain more than one sub-munition, and “total ban” as a complete prohibition of use etc., not just regulations of use. Again, from a humanitarian point of view it would seem that the better solution would be to prohibit only the specific weapons that constitute the humanitarian problems, and then to prohibit their use etc. completely.

A treaty must therefore contain a clear definition of what exactly it is that should be prohibited.

It seems relatively unlikely that every weapon with more than one sub-munition will fall within such a definition. For example advanced target-seeking munitions which leave no duds do probably not fall within the category of weapons that may violate humanitarian principles.

There are many ways to go about such a definitional approach. I shall not try to make any proposals here. Looking at this from a humanitarian point of view, however, it seems important to address the definition from the point of view of the principle of distinction and the principle of proportionality.

From such a point of view, it may be problematic to make once-and-for-all exhaustive lists over specific weapons systems that should be prohibited, because such lists will soon be outdated and inaccurate.

It probably also is very problematic from a humanitarian point of view to discuss *acceptable failure rates* – as we heard yesterday.

The concerns that have been discussed here show that there are a couple of main areas that needs to be addressed in a definition provision. These pertain to the way the weapons function, firstly

during an attack – area effect weapons are normally unable to hit specific targets within the footprint area and can therefore constitute a problem with regard to the principle of distinction. Secondly, *after* an attack there is the problem of duds (and even 1% can be a humanitarian disaster if large amounts of bomblets are dispersed). Again, *uxo*'s are clearly problematic with regard to the principle of distinction – civilians are subject to killing and maiming, in addition to the risk of duds creating effective area denial for villages and agricultural and industrial areas, having severe economic effects and creating many new IDPs.

The issue of definitions and how to delimit the material scope of the treaty will probably be one of the very last questions to be finally resolved at a diplomatic conference. It should however, be clear from the outset that there has to be an approach which addresses the humanitarian concerns.

3) Another key element to determine is which actions should be prohibited by such a treaty. Here it seems natural to draw on corresponding provisions in other treaties such as the Mine Ban Treaty. This would entail that the *use* of such cluster munitions would be prohibited. Again, it would seem to be little point in trying to lay down *restrictions* on use – we already have restrictions on use to a large extent within applicable IHL, particularly in the first Additional Protocol to the Geneva Conventions.)

Other actions that should be prohibited are *development, production, acquiring, stockpiling, retain* and *transfer*, including *exporting* such cluster munitions.

It would also seem necessary to prohibit *assistance* to such actions, as has been done in other comparable treaties.

4) From what we have heard about the enormous amounts of sub-munitions stockpiled around the world, it would seem to be of paramount importance to have a provision for stockpile destruction. This is perhaps the most important step in order to prevent humanitarian disasters in the future, as well as in preventing further proliferation and possible use of cluster munitions both by states and non-state actors. The modalities for obligations on stockpile destruction will of course also be an important negotiating issue – how to set deadlines, transparency and compliance measures, how to provide for technical assistance etc.

5) Another important issue for a treaty is a provision on clearing contaminated areas in affected states. This issue is somewhat different from the issue of mine clearing in the Mine Ban Treaty, not

least because the affected state rarely will be the party that has deployed the unexploded sub-munitions.

Many states have expressed concerns that a new treaty on cluster munitions must not be inconsistent with existing treaty obligations, including Protocol V of the CCW. From a legal point of view this consistency issue is hardly a problem. The very point with new treaty obligations is to undertake additional obligations – any new treaty will not be competing with or undermining for example Protocol V unless it lowered the level of clearing obligations, in which case States Parties still would be bound by their more extensive obligations anyway. (It is, however, difficult to imagine an instrument which would weaken the obligations laid down in Protocol V.)

It is moreover important to make sure that such a provision on clearance of contaminated areas will address these issues for all states, including those who are not party to the CCW Protocol V.

Generally, a lot of existing treaties pertain to issues that should also be dealt with in a treaty on cluster munitions. Clearly, many provisions in IHL instruments are relevant, as are human rights treaties, not least the newly adopted treaty on the rights of disabled persons. This is not an obstacle, but rather an expression of what may be seen as common concerns and common ground.

6) A treaty on cluster munitions should have provisions on international cooperation and assistance, in particular for the benefit of victims and affected persons. Victim assistance and cooperation between states are of course of paramount importance in a treaty on cluster munitions as they were in the Mine Ban Treaty.

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The elements that I have just described are by no means exhaustive – in such a treaty there must inevitably be provisions on other issues such as:

General transparency and compliance measures, national implementation measures, settlement of disputes and other procedural matters such as meetings of states parties, costs and amendments, depositary functions, reservations, ratification and accession, authentic languages and entry into force.

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To sum up, I have listed some main elements of a new treaty –

- Scope of application
- Definitions
- What actions should be banned
- Stockpile destruction
- Clearing contaminated areas
- International cooperation and assistance, including victim assistance
- Transparency measures and other procedural issues

There could be many other ways of doing this exercise – this is by no means an attempt to make an authoritative list. This has just been an attempt to help starting the thinking and discussions.

All of the elements that I have now talked about are elements that have already been agreed as legally binding international law obligations in various instruments pertaining to different topics. The challenge for us now is to use these well known elements to specifically address the humanitarian challenges of cluster munitions.