

DIPLOMATIC CONFERENCE FOR THE ADOPTION OF A CONVENTION ON CLUSTER MUNITIONS

CCM/CW/SR/11

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SUMMARY RECORD OF ELEVENTH SESSION OF THE COMMITTEE OF THE WHOLE

Held at Croke Park, Dublin on Monday, 26 May 2008

Chair: President O'CEALLAIGH

The meeting was called to order at 3 p.m.

The President stated that delegates would firstly discuss Article 3, followed by Article 2, in this session of the Committee of the Whole. Informal consultations on the Preamble to the Convention, and on interoperability, would occur in parallel meetings during the afternoon.

Article 3

The President stated that a revised paper on Article 3 had been circulated by the Friend of the President, Ambassador Kongstad, on 25 May. He invited Ambassador Kongstad to introduce the paper.

Ambassador Kongstad stated that Article 3, relating to storage and stockpile destruction, was important to achieving core objectives of the Convention. The paper circulated sought to reflect the views expressed by delegations in the extensive informal consultations on this issue. He expected that it would attract broad agreement.

The President noted Ambassador Kongstad's confidence that there could be broad consensus on the text proposed. He stated his intention to forward it to the Plenary but wished to first hear the comments of delegations.

The **United Kingdom** asked what was intended by the reference to "financial means" in Article 3(4) (b)? It raised the issue of confidentiality under European Union contract law, requiring that financial details are not disclosed until a tender process is completed. Would this provision cause difficulties in that respect? It also sought clarification on what type of benchmarks were envisaged by paragraph 5.

Canada commiserated with the Friend of the President that some text that would have made it simpler to execute the extension provisions had to be removed following the objections of some delegations.

The **Cluster Munitions Coalition** was concerned that the text of Article 3 was being gradually weakened. This article is crucial to achieving the humanitarian objectives of

the Convention. Stockpiles of cluster munitions must be destroyed as soon as possible. It had particular concerns about the retention clause. The Coalition wished to focus now on the obligation of States under paragraph 6 to keep only the minimum number of sub-munitions absolutely necessary for the purposes of training and development. The experience of the Ottawa Convention had shown that a divergence of views had emerged among States on the meaning of this obligation. Most States agree that the minimum number is in the hundreds or thousands but not in the hundreds of thousands. States should express some parameters in the negotiations here. It should be clear from the diplomatic record how this notion should be conceived.

Ambassador Kongstad responded to the questions posed by the United Kingdom. Regarding paragraph 4(b), the current text only called for an overview of financial requirements, not for detailed information which would be inconsistent with regional tendering procedures. In paragraph 5, the reference to benchmarks could encompass timelines, milestones or similar elements.

The **United Kingdom** stated that it was satisfied if Article 3(4) (b) did not require the divulgement of financial figures in advance of a contract being let.

The President stated that this could be taken as understood. He proposed to forward the revised Article 4 as President's text to the Plenary. It would be made available in all three working languages of the conference.

Article 2

The President stated that definition of "cluster munition victim" had been forwarded last Friday as Presidency Text to the Plenary following discussions on Article 5 dealing with victim assistance. Further definitions in Article 2 required discussion. He proposed to firstly discuss the definition of "cluster munition" in this session of the Committee. Ambassador MacKay had acted as Friend of the President in leading informal consultations on this definition. The United Nations Development Program ("UNDP") had also conducted two briefing seminars on this topic. A paper circulated by Ambassador MacKay last Friday would be opened for discussion now.

France stated that it supported the clear objective of the Oslo process, a ban on all cluster munitions causing unacceptable harm. It drew attention to a joint communication of its Ministry of Foreign Affairs and Ministry of Defence stating that France had decided to withdraw the M26 cluster munition from service immediately. This represented in excess of 80% of France's stock of cluster munitions.

Regarding the definition of cluster munition in the draft Convention, France considered that the definition proposed should be strengthened to better fulfil the Oslo mandate. It considered that there were potential dangers with the latest proposal of the Friend of the President. The current text risked covering weapons that should not be banned due to their intrinsic nature. France expressed its full support for Norway's proposal that a weight criterion should be introduced into sub-paragraph (c). This criterion had been consistently proposed throughout the Oslo process and had been mentioned with approval by the UN and civil society representatives. This criterion would be an important aspect of the effective implementation of the Convention. It

supported the cumulative approach put forward by Norway which would incorporate the weight criterion. It would ensure that exemptions were limited and more accurately defined.

The **United Kingdom** stated that it considered the clause to be one of the most important in the Convention. A detailed definition of the exemption was fundamental. It valued the views which had been expressed by the International Committee of the Red Cross on this issue throughout the negotiations. Ambassador MacKay's paper should make clear in line 1 that a cluster munition means a *conventional* munition.

Spain considered that the aim of the exceptions was to lay down criteria by which a cluster munition would not cause unacceptable harm to civilians. There were two consequences of cluster munitions leading to unacceptable harm: (i) cluster munitions detonating by accident after military use, and (ii) those indiscriminately affecting areas and potentially injuring a civilian population. The final proposal of the Friend of the President retained a criterion which had previously been rejected, namely the quantity of sub-munitions. This was an arbitrary figure.

Spain was of the view that the definition proposed privileged a particular launch technique over other technologies. It was unconvinced that a weapon with self-neutralisation and self-deactivation functions (referring to Norway's proposal in CCM/72) could not cause unacceptable harm. It also considered that there should be a further definition of the term "pre-defined area" in sub-paragraph (b) in order to avoid the indiscriminate use of weapons affecting non-military targets. For a weapon to be deemed safe, its effects in a pre-defined area must be considered, not its launch technology.

Switzerland stated that the language adopted in Article 2(c) must not undermine the Convention's objective of banning cluster munitions causing unacceptable harm to civilians. Switzerland was happy to go forward on the basis of the proposed text.

Costa Rica stated that it was unhappy with paragraph (c), and referred to its proposal with other States for its deletion, as set out in CCM/71. It requested additional information on the reference to "air defence systems" which had been incorporated into paragraph (a) of the proposed text. It sought clarification on what munitions were included here. Costa Rica expressed support for the remarks made by Spain.

Germany considered the definition of "cluster munition" to be a crucial element of the new Convention. States must agree this definition properly against the background of the Oslo objectives. It was happy to proceed on the basis of the draft text but there must be consistency in the definitions adopted. Sub-paragraph (c) should refer to explosive sub-munitions. Germany considered that a cumulative approach might be achieved in paragraph (c) by the inclusion of the word "all".

Germany also expressed unease about the reformulated chapeau in Article 2(c). The objective of the exemption was to ban area target munitions and allow point target munitions. The reference in the chapeau to "area effect" made this unclear.

Australia stated that it was generally supportive of the draft text. Regarding the inclusion of air defence systems, it considered that the best description might be air defence munition.

Argentina stated that it hoped consensus could be reached on the issue of defining a cluster munition. It considered the inclusion of air defence system in paragraph (a) to be confusing, given that this had not been included at the outset. Argentina would prefer the deletion of paragraph (c), but it was to be included the provision must be fine-tuned. It endorsed Spain's comments and stated that the definitions adopted should not benefit one type of technology.

The **United Kingdom** stated its strong preference for clarity in the definitions adopted. It referred to the remarks of President Kellenberger of the International Committee of the Red Cross, which emphasised that the main problems with cluster munitions were inaccuracy, unreliability and their use in massive numbers. A practical problem would arise if States were individually looking at systems and taking decisions on whether they were prohibited or not. A clear and common approach to definitions, based on precise criteria, was required. Exempted weapons should meet clear conditions based on point target or internal guidance capabilities.

Morocco stated that it considered the point target reference to be too vague to meet the requirements of the Oslo Declaration. The definition should look at the effects caused by the weapon's use.

Mexico stated that its delegation had formally proposed the deletion of Article 2(c). If Article 2(c) were to be included, it should limit the possible exceptions. It had doubts about the inclusion of the weight criterion. Mexico was opposed to the inclusion of new exemptions such as air defence systems. This should be looked at further.

Jamaica stated that it found it difficult to accept wide exemptions. It was committed to the Oslo Declaration, and was unconvinced that Article 2(c) did not leave loopholes open for the use of cluster munitions causing unacceptable harm.

Slovakia stated that it had concerns with the proposed Article 2(c), sub-paragraphs (a) to (d), which contained many subjective clauses, for example the reference to the number of sub-munitions. It also considered the reference to "electronic" self-destruction mechanisms and self-deactivating features to be too selective in singling out "electronic." Munitions might still fail despite these criteria and their overall reliability and risk of unacceptable harm should be borne in mind.

Norway stated that Article 2 must clearly and accurately distinguish prohibited cluster munitions from those that are not prohibited. It found the specific reference to air defence systems in the Friend's text to be somewhat peculiar and a relatively imprecise term. Would air defence munitions not be included within paragraph (c) if they meet the applicable criteria there? Norway's own proposal of a weight criterion was intended to be one of several cumulative conditions. This criterion would effectively prohibit the majority of cluster munitions causing unacceptable harm to civilians. Norway would circulate a short explanatory note on this proposal later in the afternoon.

Chile considered that Article 2 would provide the parameters for the Oslo Declaration's commitment to ban cluster munitions causing unacceptable harm by 2008. It was prepared to consider the proposals put forward on Article 2(c). It had some doubts about including references to numbers in this provision. It should make it clear that the exemption only applies to cluster munitions that do not cause unacceptable harm to civilians.

Guatemala supported other delegations that had called for the deletion of Article 2(c). It was unconvinced by the criteria set out in the proposed text but was prepared to continue negotiations.

Denmark stated that the inclusion of Article 2(c) was necessary in order to achieve the objectives of the Oslo Declaration. The proposals put forward incorporated considerations of accuracy and reliability. It hoped that a common wording could be agreed that was acceptable to all States.

Austria stated that there was no reason to include new exceptions. It supported the deletion of Article 2(c) but was prepared to discuss language on cluster munitions that do not cause unacceptable harm. It was uncertain about the language proposed, which set out abstract criteria without knowledge of the effects of the future weapons. It considered that effects-based language should be adopted. This should be complemented by a reporting requirement on new weapons and their effects in Article 7.

Venezuela stated that it was concerned about Article 2(c) favouring the use of certain technologies. It considered the proposed text to be slightly arbitrary. There was no evidence to prove that a munition meeting all of these criteria might not still be indiscriminate. The criteria should be backed by hard evidence.

Malta expressed its discomfort with Article 2(c), which was creating an exception that was difficult to define. It thanked Ambassador MacKay for setting out cumulative options. Some of these elements could be usefully included, for example the weight criterion. This could limit many cluster munitions entirely and limit exemptions. It supported Austria's comment that a reporting requirement should safeguard the limits of the exemptions.

Sierra Leone welcomed Norway's intention to circulate an explanatory note to clarify the weight criterion. Any consensus reached on Article 2(c) should be informed, and an explanatory note would facilitate this.

Zambia stated that it was opposed to Article 2(c). It was studying the proposal and reserved the right to comment further.

Peru stated that all the criteria set out in paragraph 2(c) should be included in the definition in order to confirm that only munitions not causing unacceptable harm are exempted.

South Africa stated that the African group of States were having ongoing discussions on Article 2(c). The future Convention must be clear, precise and credible. South Africa was adopting a flexible position in the negotiations, with the goal of meeting

the Oslo objectives. The focus should be on the most effective measures in defining the scope of the exemption: it was not necessarily helpful to list all elements. States should consider which criteria were most effective in meeting the Oslo goals and seek to eliminate any ambiguity. A lack of clarity on key concepts would affect the confidence of States in signing up to the new Convention.

The President reminded delegates that the Convention would not be signed in Dublin, but in Oslo in December.

Lebanon stated that it had co-sponsored the deletion of Article 2(c), but this was not a red line for its delegation. Article 2(c) must comply with the highest humanitarian standards, and contain safeguards for the review of exemptions at Review Conferences. States could retain cluster munitions for training and development purposes. It would appreciate similar flexibility from other States on issues such as interoperability.

Democratic Republic of Congo stated that the Friend's paper reconciled the position of many States, but might be improved in some respects. It regretted the determination of some States to establish technical criteria on exemptions. These criteria should not be accepted unless it could be proven that they would ensure no unacceptable harm to civilians.

Sweden supported the use of concrete criteria, including the weight criterion, in Article 2(c) in order to achieve the aims of the Oslo process.

Ghana would prefer that Article 2(c) was not included, but considered that the Friend's text provided a good basis for discussions. The African group of States was considering the elements proposed for inclusion in Article 2(c).

Finland supported Denmark in considering Article 2(c) to be a necessary inclusion in the Convention. The Friend's paper contained important definitional elements but Finland was not convinced that criteria based on numbers and weight should be included, as they fail to take possible future developments in weapons technologies into account. It supported the comments of Slovakia and Spain in this regard.

Japan considered that the inclusion of Article 2(c) would strengthen the Convention. The provisions in sub-paragraphs (c) and (d) on self-destruction and self-deactivation would have to be strengthened.

Guinea stated that it had reservations about Article 2(c) and would liaise further with the African group in this regard.

The **Netherlands** stated that the Convention should have an appeal that is as broad as possible. The text proposed by the President achieved that purpose. It considered that the proposed Article 2(c) would succeed in banning all cluster munitions that cause unacceptable harm. The self-destruction and self-deactivation features must be reliable to be acceptable elements of an exemption.

Australia supported the cumulative approach set out in paragraph (c) of the Friend's text, and endorsed by the International Committee of the Red Cross. The Convention

is an instrument of international humanitarian law that is designed to regulate behaviour in war. The notion of what is unacceptable in war may be difficult to agree, but ultimately leads to the greater benefit of all. While weapons might be abolished, targets could not be abolished. States should be mindful of the risk that an overly extensive ban might lead to the development of other weapons causing greater harm to civilians.

Uruguay stated that while it had proposed the deletion of Article 2(c), it was prepared to continue negotiations to achieve a clear definition and an effective Convention. It supported the remarks of Argentina, Mexico and others.

The **United Kingdom** remarked that delegates had a choice between agreeing a robust, effective and inclusive Convention or one which fails to achieve this. It welcomed the constructive debate between delegates on definitions.

Burundi stated that it was open to any international convention of a humanitarian nature which reflected the general will of States.

Senegal stated that Article 2 was important to achieving a strong humanitarian Convention. It was open to compromise on an acceptable solution, and was consulting with the African group of States in this regard. The parameters of the Oslo Declaration should be borne in mind in determining provisions related to the use of cluster munitions.

Nigeria wished to associate itself with Zambia's remarks. While it would like to see Article 2(c) deleted from the text to protect the integrity of the Convention, it was flexible in negotiations on the issue.

Benin stated that the definition should not incorporate criteria which will become obsolete as technology develops.

Lao People's Democratic Republic stated that experts had certain reservations about the criteria invoked in the draft text on Article 2(c). Exemptions which would allow the continued development of cluster munitions were not advisable. It was prepared to await more specific evidence to guarantee that such exempted weapons would not cause unacceptable harm.

Panama stated that it was unhappy with the inclusion of air defence systems in subparagraph (a). It was not happy with the explanations provided for subparagraphs (c) and (d).

Honduras expressed its support for the deletion of Article 2(c).

Germany stated that the Convention was supposed to achieve a comprehensive prohibition of cluster munitions causing unacceptable harm to civilians. This should be the yardstick for negotiations on Article 2(c). The definition should clearly distinguish cluster munitions that cause unacceptable harm from weapons that do not raise similar concerns.

Jamaica supported the remarks of Lao People's Democratic Republic that there must be proof on how the exemptions will affect civilians. It fully supported a universal Convention, but was not at all convinced that there are any cluster munitions that cause "acceptable" harm. The Convention should not leave a loophole for the development of more advanced cluster munitions.

Botswana associated itself with the African position as stated by Zambia. It did not see the need for a reference to air defence systems in paragraph (a). It requested further clarification on this point.

Burkina Faso confirmed its commitment to the Oslo Declaration. It supported the view that Article 2(c) should be deleted, but was open to reaching consensus on this point.

Canada stated that the issue with Article 2(c) is what it is that States have agreed in the Oslo process to ban, not the issue of adopting a total or partial ban. It cannot be said that all cluster munitions that exist or might be developed are inherently indiscriminate. It is incumbent on States to monitor the use and results of weapon development. It reminded States of the possibility of amending the Convention by a two-thirds majority. States will have the opportunity in the annual meetings of States Parties and in the Review Conference to adjust to future developments.

The floor was opened to observer delegations.

Iraq expressed its support for the deletion of Article 2(c), on the basis that no weapon is 100% accurate or reliable.

The **International Committee of the Red Cross (ICRC)** stated that it considered that air defence systems should qualify under Article 2(c), without the need for a separate reference in paragraph (a). It considered that the cumulative approach was essential to address the issue effectively. It had reflected on the weight criterion proposed by Norway and could support this proposal. This would provide an additional safeguard preventing the limitation of numbers being compensated for by States by other means. The weight criterion would "future-proof" the Convention.

Regarding the reference in sub-paragraph (b) to "point-target, the ICRC noted that other formulations were under discussion which would be more precise and effects-oriented, and which would not require a further definition. It would like to see the outcome of that discussion before expressing its full support for sub-paragraph (b).

The starting-point of the Convention was international humanitarian law rather than an arms control approach. When specific weapons are controlled under international humanitarian law, it is because the general rules are considered inadequate due to the particular harm inflicted by such weapons. In the context of the Anti-Personnel Landmines Convention, a blanket ban had been supported on the basis of the harm caused by landmines. Submunitions did not fall into the same category as landmines: they were not designed to fail on impact or to target civilians. It was not the inherent nature of this weapon, but its characteristics, that were problematic. Every weapon can be used indiscriminately and no convention can completely preclude all harm to civilians. It would be wise to include a commitment to review the accuracy of

weapons exempted under Article 2(c) as suggested by Canada and require States to report on this matter.

The **Cluster Munitions Coalition** stated that the reality on the field justifies a categorical prohibition. It supported the deletion of Article 2(c) to prevent any weapon being used that could cause unacceptable harm. However, if it were to be included, it must be as clear and precise as possible. It considered that while the work of the Friend of the President was going in the right direction in this regard, the definition should be more effects-oriented. The criteria adopted must be clear, objective and cumulative to ensure that the risks posed by cluster munitions are not repeated. “Future-proofing” the Convention was critical in this regard.

The floor was returned to participating States.

Ambassador MacKay stated that there had been a consistent understanding throughout the Oslo process that the Convention would cover “conventional” weapons. The issue of including air defence systems had arisen informally in consultations and had been included in the Friend’s paper for informal discussion. No opposition had been expressed then to its inclusion. It was possible that air defence systems would be included in paragraph (c) as sharing the same characteristics. Ambassador MacKay agreed with Germany that Article 2(c) should refer to “explosive” sub-munitions. This would comply with the remaining definitions in Article 2 proposed by Lieutenant Colonel Jim Burke.

Regarding sub-paragraphs (c) and (d), the references to electronic self-destruction mechanism and electronic self-deactivating feature accorded with the Article 2 definitions proposed by Lieutenant Colonel Jim Burke. Ambassador MacKay thanked colleagues for their flexibility and engagement in discussing Article 2(c).

The President stated that the discussion in the Committee of the Whole had shown that some supported the deletion of Article 2(c). Others were happy to proceed on the basis of the Friend’s paper, or had proposed amendments or additions to it. Every feasible effort was being made to reach agreement on this text. The President would host informal consultations, including bilateral discussions, this evening in an effort to achieve consensus. Lieutenant Colonel Jim Burke had acted as a Friend of the President in conducting informal consultations on definitions other than “cluster munition” and “cluster munition victim” in Article 2. He had circulated a paper on these definitions that afternoon and was now invited to present it.

Lieutenant Colonel Burke stated that his updated paper took account of further informal consultations which he had held since Friday. The paper was divided into three parts: firstly, definitions in the existing text; secondly, definitions that may be required, and thirdly, issues arising from the headline definition of cluster munition proposed by Ambassador MacKay, namely an approach to the definition of “point-target.”

Regarding the definitions demanded by the existing text of the Convention, five had been agreed in the informal meetings subject to minor changes, for example the insertion of the word “conventional” in line 1. States had been unable to reach consensus on the definition of “transfer”: the language proposed in the paper now

reflected Norway's proposal and was close to the definition contained in Amended Protocol II to the Convention on Certain Conventional Weapons. It may be difficult to reach consensus on this matter.

Regarding additional definitions that may be required, a definition of "self-neutralisation mechanism" had been included at Slovakia's request. The definition of "cluster munition area" had been changed to "cluster munition *contaminated* area" following objections in the informal consultations. A definition of "mine" had also been suggested in case required, having regard to its removal from the scope of the Convention in Article 1. There had been no time today to informally address the proposed definition of "dispensers." There was general agreement on the first suggestions for definitions that may be required: "self-destruction mechanism"; "self-neutralisation mechanism"; "self-deactivating"; "cluster munition contaminated area" and "mine."

Lieutenant Colonel Burke stated that two approaches had been discussed to the issue of "point target" in the informal consultations. One was a definition of "point target" based on a NATO definition, with the addition of the words "on a single object." This proposed language reflected a preliminary effort to improve the text and there had been general agreement on this point. The second approach was to incorporate language into sub-paragraph (b) of Article 2(c) which would improve the provision but not alter its substance. The text presented here was that which had commanded the widest support. Lieutenant Colonel Burke would host one more informal meeting at 6pm to provide delegates with a final opportunity to address the issue informally.

The floor was opened to observer delegations.

The **Cluster Munitions Coalition** stated that it was the clear understanding of all States that the definition of "transfer" encompassed the transit of cluster munitions through a State Party's territory.

The floor was returned to participating States.

Germany stated that it was generally happy with the definitions proposed in the informal paper. It was flexible on whether "point target" should be specifically defined or addressed in Article 2(c) (b).

Article 8

Mr Mabhongo (South Africa, Friend of the President) had circulated an informal paper on Article 8 today. He believed that the text proposed reflected a balance of interests and that States would be willing to accept it. The text presented was concise and offered flexibility to States. The negotiations had been complex and it had taken several hours to reach agreement. He had been informed by all participating States that it met their concerns.

Canada, the **United Kingdom** and **Argentina** expressed their support for the text presented.

The President stated he would forward the text proposed as Presidency Text to the Plenary in all three Conference languages.

Transition period

The President proposed that Germany report on consultations which it had conducted at his request on the provision for a transition period.

Germany stated that it had conducted consultations on transition periods since last Friday with a number of delegations. It had also held an informal meeting that morning. It summarised the main points emerging from these consultations. The fundamental question was whether a transition period should be provided for in the Convention. All delegations present were committed to achieving a ban on cluster munitions and did not wish to undermine Article 1. However, there were differing perspectives on the issue of a transition period, partly as a result of regional backgrounds but mainly reflecting differences between those who possess and those who do not possess cluster munitions.

Opponents of a transition period stated that it risked undermining the humanitarian objectives of the Convention. Advocates of a transition period pointed to the need to have as many States as possible join the Convention from the outset with a commitment to all of its aspects, for example the provisions on victim assistance. These advocates were not contemplating a blanket provision but were mindful that there would be immediate benefits stemming from the entry into force of the Convention. Article 1 must not be qualified. Delegates had also discussed the relationship of any transition period to Article 3 of the Convention.

Germany considered that clear basic differences remained between States on transition periods, but that it would be possible to bridge these differences. Four points had transpired in the informal consultations: firstly, States did not wish to undermine Articles 1 and 2; therefore any provision on transition periods might be best placed elsewhere. Secondly, it was better to speak of “phasing out” rather than a transition period in order to ensure that this period was not in addition to, and should be shorter than, any periods allowed for storage and stockpile destruction under Article 3.

The third point was that restrictive criteria needed to be in place in order to meet humanitarian concerns. These criteria could encompass a reference to concepts of exceptional circumstances, Article 51 of the UN Charter, territorial defence etc. Fourthly, some requirements had been suggested for the characteristics of cluster munitions to be phased out e.g. accuracy, reliability, age, number of sub-munitions. The outcome of Germany’s consultations could provide a basis for the President to pursue this issue further.

The President thanked Germany for its efforts on his behalf and for its full report of the discussions. It was clear that significant differences remained. His team would conduct further bilateral consultations on this issue.

The meeting rose at 6 p.m.