

**GROUP OF GOVERNMENTAL EXPERTS OF
THE STATES PARTIES 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**

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Application and implementation

**of existing international humanitarian law
to specific munitions that may cause
explosive remnants of war, with particular focus
on cluster munitions, including the factors affecting
their reliability and their technical and
design characteristics, with a view to minimizing
the humanitarian impact of the use of these munitions**

**DRAFT
CCW PROTOCOL ON CLUSTER MUNITIONS**

Submitted by Germany

Introduction

1. The **draft CCW Protocol on Cluster Munitions** attached is based on national and international discussion and experience, as well as on existing norms of international law.
2. Its main philosophy and key elements are as follows:
 - (i) The **civilian population must be protected** both by **restricting the military use of cluster munitions** (targeting) and by developing **new technical standards**.
 - (ii) The **use** of cluster munitions must be subject to **clear restrictions within or near populated areas**. Draft Article 3 provides for the “Protection of Civilians and Civilian Objects”.
 - (iii) The development of **new technical standards** should lead to the replacement of present day cluster munitions by a new generation of area target munitions. Draft Article 4 on “Prohibitions” presents the following three-step approach:
 - (a) **“Unreliable” or “inaccurate” cluster munitions should no longer be used at all, with immediate effect.**

- (b) **“Reliable” and “accurate” cluster munitions** may continue to be used for the time being. However, they should be **phased out in a mid-term perspective**, which, in our view, should be no longer than ten years.
- (c) **Ultimately, all cluster munitions would be replaced by alternative munitions** that provide the same capabilities as cluster munitions while presenting considerably less humanitarian hazards. They could be labelled “Sensor Fused Area Munitions” (**SEFAM**).
- (iv) The key **legal terms** used in the future instrument must be clearly defined. Article 2 of the draft therefore contains definitions of cluster munitions, their submunitions, dangerous duds, alternative munitions, reliability, accuracy, etc. These definitions must be further refined and completed by best practice to be elaborated by military and technical experts and laid down in a Technical Annex.
- (v) Provisions in draft Articles 5, 6 and 7 establish clear restrictive rules on **transfer, storage, destruction, development, production and acquisition** which are modelled on existing legal instruments such as the CCW and the Ottawa Convention. The procurement of alternative munitions (SEFAM) will take priority over the ultimate destruction of cluster munitions stocks.
- (vi) Post-conflict related issues such as **clearance of cluster munitions, information, cooperation and assistance** are taken up in draft Article 8 which refers to **CCW Protocol V** with the view of confirming the validity and relevance of that new instrument. Additional provisions could be elaborated as appropriate, including measures that go beyond the scope of Protocol V. Duplication should be avoided.
- (vii) The provisions contained in this draft ensure that the **civilian population is better protected** while, at the same time, **military capabilities to engage area targets are maintained**.
- (viii) They **substantially reduce the human cost** caused by cluster munitions. They also reduce the cost of ERW clearance.
- (ix) The draft responds to the **call for urgent action** put forward by the **International Committee of the Red Cross**:
 - (a) to immediately end the use of inaccurate and unreliable cluster munitions,
 - (b) to prohibit the targeting of cluster munitions against any military objective located in a populated area,
 - (c) to eliminate stocks of inaccurate and unreliable cluster munitions and,
 - (d) pending their destruction, not to transfer such weapons to other countries and
 - (e) to incorporate these measures in a new instrument of international humanitarian law.

Annex

DRAFT PROTOCOL ON CLUSTER MUNITIONS
(DRAFT PROTOCOL VI TO THE CCW CONVENTION)

The High Contracting Parties,

Recognizing that cluster munitions, due to their indiscriminate effects and high risk of becoming explosive remnants of war, are of serious humanitarian concern during and after armed conflict,

Comment: This text is modeled after the 25-Nation-Declaration on cluster munitions made at the Third Review Conference held in Geneva on November 2006 (CCW/CONF.III/11 (Part III), section XIV titled “Declaration on Cluster Munitions”).

Conscious of the need to confirm and further develop International Humanitarian Law with the aim of enhancing the protection of the civilian population from the effects of cluster munitions by establishing specific rules on the use, reliability, accuracy, transfer, storage, development, production, acquisition, destruction and prohibition of cluster munitions,

Confirming their determination, with immediate effect, to prohibit the use of unreliable and inaccurate cluster munitions, and to use reliable and accurate cluster munitions only as a last resort,

Desiring to prohibit, on a mid-term basis, cluster munitions, thereby further enhancing the protection of civilians while at the same time not restricting military capabilities to engage area targets by the use of alternative munitions,

Comment: These paragraphs have been modelled in the spirit of paragraph 3 of the preamble of the CCW Convention and highlight the main objectives of the draft Protocol.

Have agreed as follows:

Article 1

Scope of application and obligations

1. This Protocol relates to the use of cluster munitions and their sub munitions against targets on land, including those in inland waters.

Comment: This paragraph has been modeled after Article 1(1) of Amended Protocol II.

2. This Protocol shall apply to situations resulting from conflicts referred to in Article 1, paragraphs 1 to 6, of the Convention, as amended on 21 December 2001.

Comment: This paragraph is identical with Article 1(3) of Protocol V.

3. Each High Contracting Party undertakes never under any circumstances, to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Protocol.

Comment: This paragraph has been modeled after Article 1(c) of the Ottawa Convention.

4. Provisions laid down in this Protocol are without prejudice to existing or future international humanitarian law which provide for stricter obligations or which have wider applicability.

Article 2

Definitions

For the purpose of this Protocol:

1. “Cluster munitions” means an air-carried or ground-launched dispenser that contains sub munitions with explosives. Each cluster munitions is designed to eject sub munitions over a pre-defined area target. “Cluster munitions” does not mean a dispenser that contains:

- (a) direct-fire sub munitions,
- (b) flare and smoke ammunitions,
- (c) landmines,
- (d) sub-munitions that are inert post impact, or
- (e) less than ten sub munitions with explosives.

Comment: This paragraph reflects the result of the initiative on a common understanding of cluster munitions within the CCW Meetings of Military and Technical Experts (CCW/GGE/XV/WG.1/WP.3, dated 1 September 2006).

2. “Sub-munition” of cluster munitions means a munition, which contains explosives and separates from a parent munition. Sub munitions are designed to detonate on, prior to, or immediately after impact on the identified target.

Comment: This paragraph reflects the result of the initiative on a common understanding of cluster munitions within the CCW (CCW/GGE/XV/WG.1/WP.3, dated 1 September 2006) as well as IMAS 04.10 (UNMAS Glossary of Mine Action Terms: “www.mineactionstandards.org”).

3. “Reliable” cluster munitions means cluster munitions which contain sub munitions of a dangerous dud rate below one percent measured according to the testing standards set out in the Technical Annex.

4. “Unreliable” cluster munitions means cluster munitions which contain sub munitions of a dangerous dud rate of one percent or more measured according to the testing standards set out in the Technical Annex.

Comment: Some States define “reliable” as “smart” cluster munitions and “unreliable” as “dumb” cluster munitions.

5. “Dangerous dud” means a sub-munition which failed to explode or to fully explode, and has a fuse in armed position.

6. “Accurate” cluster munitions or sub munitions are munitions which are effective only within a pre-defined target area. Technical standards on accuracy are set out in the Technical Annex.

7. “Inaccurate” cluster munitions or sub munitions are munitions which are effective also outside a pre-defined target area. Technical standards on accuracy are set out in the Technical Annex.

Comment: “**Accuracy**” of cluster munitions or sub munitions describes the capability to ensure that the effect of the cluster munitions takes place only within the pre-defined target area. This term describes in geometrical dimensions the deviation from the center of a pattern to the aim point. “**Precision**” describes in geometrical dimensions the dispersion of the various impact points to the midpoint of the impact pattern.

8. “Alternative munitions” means an air- or ground-launched dispenser that contains sub-munitions. Each alternative munition is designed to eject sub-munitions over a predefined area target. The dispenser: (a) which includes a sensor for accuracy, contains sub-munitions that are inert post impact, or (b) contains less than ten sub-munitions with explosives, of which each includes multiple sensors with a capability to detect a target. Norms for Alternative Munitions are set out in the Technical Annex.

Comment: Alternative munitions, as described here for the purpose of this Protocol, are designed to substitute the military capabilities of all cluster munitions, i.e. both unreliable/inaccurate and reliable/accurate cluster munitions. They include the capability to discriminate a target or to ensure accuracy. Alternative munitions have to fulfill the norms of reliability and could be described as “Sensor Fused Area Munitions” (SEFAM).

9. “Military objective” means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or

partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage;

Comment: This paragraph is identical with Article 1(3) of Protocol III.

10. “Civilian objects” are all objects which are not military objectives as defined in paragraph 9 of this article.

Comment: This paragraph has been modeled after Article 1(4) of Protocol III.

11. “Concentration of civilians” means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads.

Comment: This paragraph is identical with Article 1(2) of Protocol III.

12. “Feasible precautions” are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Comment: This paragraph is identical with Article 1(5) of Protocol III.

13. “Transfer” involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over the cluster munitions, but does not involve the transfer of territory containing stockpiled cluster munitions.

Comment: This paragraph has been modeled after Article 2(15) of Amended Protocol II.

Article 3

Protection of civilians and civilian objects

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by cluster munitions.

Comment: This paragraph has been modeled after Article 2(1) of Protocol III. The prohibition directly stems from Article 51 (2) of the Additional Protocol I of 1977.

2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians or in areas normally inhabited by civilians the object of attack using cluster munitions.

Comment: This paragraph, which has been modeled after Article 2(2) Protocol III, does not prohibit the use of cluster munitions against

military objects that are clearly separated from the concentration of civilians or from areas normally inhabited by civilians.

3. It is prohibited to attack with cluster munitions objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, or pharmaceutical installations. This shall also apply if these installations are not used solely for the sustenance of the civilian population but also for the sustenance of members of the armed forces.

Comment: This paragraph represents the regulatory concept entailed in Article 54 of the 1977 Additional Protocol I. Guidance on this Article for Military Commanders is set out in the Technical Annex.

Article 4

Prohibitions

1. It is prohibited in all circumstances to use any unreliable and/or inaccurate cluster munitions as defined in Article 2, paragraphs 4 and 7. Norms for testing are set out in the Technical Annex.

2. It is prohibited in all circumstances to use any cluster munitions as defined in Article 2 [...] years after this Protocol enters into force for the respective High Contracting Party. Norms for testing are set out in the Technical Annex. Pending the entry into force of the prohibition under the first sentence of this paragraph, the respective High Contracting Party undertakes to use cluster munitions only as a last resort if no other type of munition is available to reach the desired military advantage.

3. The provisions of this Article do not prevent the use of alternative munitions as defined in Article 2, paragraph 8. Norms on alternative munitions are set out in the Technical Annex.

Comment: This Article establishes a step by step “phasing out” of the use of unreliable and/or inaccurate as well as ultimately also reliable and accurate cluster munitions which, after an appropriate transition period, are to be replaced by alternative munitions that provide the same military capabilities as cluster munitions while presenting considerably less humanitarian hazards. The provision to use cluster munitions only as a last resort (before their prohibition takes effect) is an expression of the general rule of proportionality.

Article 5

Transfers

1. In order to promote the purposes of this Protocol, each High Contracting Party:
 - (a) undertakes not to transfer, except for destruction, testing, exercises and training in detection, clearance, or destruction techniques for cluster munitions and their sub munitions, any cluster munitions the use of which is prohibited by Article 4 of this Protocol;
 - (b) undertakes not to transfer any cluster munitions to any recipient other than a State or a State agency authorized to receive such transfers;
 - (c) undertakes not to transfer any cluster munitions to States which are not bound by this Protocol unless the recipient State agrees to apply this Protocol; and

Comment: This paragraph has been modeled after Article 8. 1 (c) of Amended Protocol II.

- (d) undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.
2. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with paragraph 1 of this Article, including when providing relevant licenses.

Comment: This Article has been modeled after Article 8 of Amended Protocol II and Article 5 of the thirty-nations proposal for the Draft Protocol on Prohibitions or Restrictions on the Use and Transfer of Mines Other Than Anti-Personnel Mines co-sponsored by thirty States (CCW/GGE/VII/WG.2/WP.6)

Article 6

Storage and Destruction

In order to promote the purposes of this Protocol, each High Contracting Party:

| (i) *Storage*

- (a) undertakes to take cluster munitions and their sub munitions prohibited according to Article 4 (1) out of such stocks which are foreseen for use, and keep it in separate and secure stockpiles for the purpose of destruction, taking into account the exceptions under paragraph 3 of this Article,

(b) undertakes to take cluster munitions and their sub munitions prohibited according to Article 4 (2) out of such stocks which are foreseen for use, and keep it in separate and secure stockpiles for the purpose of destruction, [...] years after the entry into force of this Protocol for that State Party, taking into account the exceptions under paragraph 3 of this Article,

(ii) Destruction

(a) undertakes to destroy or ensure the destruction of all stockpiled cluster munitions and their sub munitions prohibited according to Article 4 (1) it owns or possesses or that are under its jurisdiction or control, as soon as possible but not later than [...] years after the entry into force of this Protocol for that State Party.

(b) undertakes to destroy or ensure the destruction of all stockpiled cluster munitions and their sub munitions prohibited according to Article 4 (2) it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than [...] years after the entry into force of this Protocol for that State Party.

(iii) Exceptions

undertakes to retain no more than a limited number of cluster munitions and sub munitions prohibited according to Article 4 (1 and 2) for the development of and training in detection, cluster munitions clearance, or cluster munitions destruction techniques. The amount of such dangerous cluster munitions shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.

Comment: This Article, except Paragraph 1, has been modeled after Articles 3 and 4 of the Ottawa Convention. Paragraph 1 above allows for mid-term intermediate storage (separate from operational stocks) of prohibited cluster munitions awaiting destruction, taking into account the high costs involved in the destruction of cluster munitions. Limited available funds can so be used primarily for the acquisition of alternative munitions (to replace cluster munitions), and ultimately for the destruction of both kinds of cluster munitions prohibited under Article 4 (1 and 2) above.

Article 7

Development, Production and Acquisition

1. In order to promote the purposes of this Protocol, each High Contracting Party:

(a) undertakes never under any circumstances to develop, produce, otherwise acquire, directly or indirectly, any cluster munitions the use of which is prohibited according to Article 4 (1 and 2) of this Protocol;

(b) undertakes to examine ways and means of improving the reliability and accuracy of cluster munitions that it possesses, intends to produce or procure, with a view to achieving the highest possible reliability and accuracy; the Technical Annex contains provisions to that effect.

Comment: This Paragraph has been modeled after Articles 3 and 4 of the Ottawa Convention.

2. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions, which would be inconsistent with paragraph 1 (a) of this Article.

Comment: Whereas Article 7(1)(b) has been modeled after Part 3, section (e), of the Technical Annex to Protocol V, this paragraph is by and large without precedence in the CCW context.

Article 8

Clearance, Information, Co-operation and Assistance

The provisions of Protocol V, in particular those on Clearance, Removal or Destruction of Explosive Remnants of War (Article 3), Recording, Retaining and Transmission of Information (Article 4), Other Precautions for the Protection of the Civilian Population (Article 5) and of Humanitarian Missions and Organizations (Article 6), Assistance with respect to existing ERW (Article 7), Co-operation and Assistance (Article 8) and Generic Preventive Measures (Article 9), shall also apply in the context of this Protocol, as appropriate.

Comment: This Article is meant to remind that Protocol V contains important provisions which also apply to cluster munitions and, for the sake of clarity and conciseness of the CCW, should not be duplicated. Complementary provisions could be included if they would provide added value as compared to Protocol V.

Article 9

Compliance

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent violations of this Protocol by persons or on territory under its jurisdiction or control.

Comment: This paragraph is identical with Article 14 (1) of Amended Protocol II.

2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict, willfully kill or cause serious injury to civilians and to bring such persons to justice.

Comment: This paragraph is identical with Article 14 (2) of Amended Protocol II.

3. Each High Contracting Party shall require that its armed forces and relevant agencies, departments or ministries issue appropriate instructions and operating procedures and that its personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

Comment: This paragraph has been modeled after Article 14 (3) of Amended Protocol II and Article 11 (1) of Protocol V.

4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

Comment: This paragraph is identical with Article 14(4) of Amended Protocol II.

Technical Annex

This Technical Annex contains best practice for achieving the objectives contained in this Protocol. It is to be adapted in line with further developments and is to be reviewed, as appropriate, at the annual conferences of the CCW High Contracting Parties.

(This draft text consists of placeholders to serve as initial indications for the work of military and technical experts.)

1. Reliability of Cluster Munitions

- (a) standards (*e.g. dangerous dud rate*);
- (b) failure classification;
- (c) testing methods.

2. Accuracy of Cluster Munitions

- (a) standards (*e.g. guidance systems, satellite navigation, inertial navigation*);
- (b) testing methods.

3. Alternative Munitions

- (a) benchmarks (*e.g. amount of sub-munitions with explosives; reliability to minimize dud rate; accuracy; capability to engage area targets; sub-munition inert post impact; capability to detect target*);
- (b) testing methods.

4. Target categories

- (a) single target;
- (b) small area target;
- (c) large area target.

5. International Humanitarian Law

Guidance for Military Commanders (*e.g. Protection of civilians and civilian objects pursuant to Article 3*).
