

The Cluster Munition Coalition is led by a Steering Committee of:

**Human Rights Watch, Landmine Action and Norwegian People's Aid (Co-Chairs)**

DanChurchAid, Handicap International, International Campaign to Ban Landmines, IPPNW Russia, Landmine Resource Centre (Lebanon,) Mines Action Canada, Pax Christi, Protection (Egypt).



## **Prohibiting cluster munitions: summary of key issues**

Cluster munitions, like landmines, have severe consequences on civilian populations. When cluster munitions fail to explode and remain on the ground following conflict, they threaten the lives of civilians and often children because they can explode when handled or even stepped on. During attacks, cluster munitions threaten civilians because they cover such wide areas, often up to several hectares. Not only are they a direct cause for injuries and disability in affected countries, but they also compromise the socioeconomic development of the areas they contaminate.

### **§ Defining cluster munitions**

In the absence of an internationally agreed definition of 'cluster munition' the CMC is calling for a prohibition on cluster munitions, as defined. Through an effects-based description, the CMC provides guidance on the types of weapons that it considers cluster munitions: weapons that are prone to indiscriminate use and that pose severe and lasting risks to civilians from unexploded submunitions. The CMC and a number of states are pursuing a treaty approach that will prohibit cluster munitions as a category.

Some treaty approaches seek to define all weapons with submunitions as cluster munitions and then seek to exclude some cluster munitions from the prohibition. This is not the most effective approach. The approach most likely to result in a broad prohibition of cluster munitions is to place the onus on states to demonstrate whether any submunition-based weapons are acceptable at all. Weapons that can be shown not to cause the problems associated with cluster munitions such as those with smoke, flare or propaganda submunitions and possibly certain weapons with individually precision-guided submunitions, may then not be defined as cluster munitions and thus not be covered by a prohibition.

### **§ Self-destruct mechanisms**

NGOs, numerous states and fuse experts (both independent and military) have widely discredited the presence of a self-destruct mechanism as a solution to the problems of cluster munitions. Self-destruct mechanisms are complicated and have the same or greater potential for failure than the primary fuse on a submunition. Despite manufacturers' claims, Israeli M85 self-destruct bomblets left large numbers of UXO in southern Lebanon during the 2006 conflict. There is no evidence to suggest that fitting self-destruct mechanisms to submunitions would justify excluding such weapons from the definition of cluster munitions based on humanitarian grounds. Some states argue that certain weapons with small numbers of individually precision-guided submunitions that have self-destruct mechanisms are acceptable. However, the presence of a self destruct mechanism could never be a sufficient basis on which to consider these weapons acceptable. If justified at all, such a consideration would have to be based on the combination of individually guided submunitions and self destruct mechanisms.

### **§ Failure rates**

The exemption of cluster munitions based on an arbitrarily decided percentage failure rate of 1 or 2% has been widely acknowledged as problematic. Some of the main reasons are:

- § It is real numbers not percentages that matter: 1% of 1 million submunitions is 10,000 deadly items of UXO.
- § There is no basis for deciding that 1% is the right level, other than it seems a low number.
- § There is no internationally agreed testing regime for cluster munitions. It would therefore irresponsible to allow an exemption based on testing criteria.
- § Such a testing regime would be impossible to set up, verify and monitor internationally and would leave substantial room for varying interpretation and non-compliance.
- § Failure rates are always higher in combat conditions than in testing and there has been no evidence to suggest that testing is systematically designed or undertaken to simulate real life conditions.

## § Transition periods

The prospect of a transition period during which states could continue to use cluster munitions that they have agreed to ban fundamentally undermines both the purpose and the urgency of a new treaty. Some states within the Oslo Process have called for transition periods and sought to justify them because of time needed to replace cluster munitions with other weapons systems. In reality cluster munitions are mainly outdated weapons with limited military utility in modern combat. It does not make sense to postpone the withdrawal of cluster munitions in order to seek more time to fill a perceived 'capability gap' resulting from their withdrawal when cluster munitions are already inappropriate weapons for modern conflict and are often incapable of filling the roles assigned to them. In any case, the humanitarian harm caused by cluster munitions is enough to justify their immediate prohibition, regardless of perceived 'capability gaps'.

## § Military utility

It is widely recognised that the case for the military utility of cluster munitions has not been made. This was a key conclusion of the ICRC meeting of experts on cluster munitions in Montreux in April 2007. On the contrary senior serving and retired military officials have acknowledged that the use of cluster munitions undermines states' overall political and military strategies by killing and injuring civilians and leaving severe problems for populations returning after conflict. States have argued that cluster munitions fulfil very specific roles and are uniquely effective against precise types of targets. In reality their use in conflicts has been as a weapon of convenience against a wide range of targets. Furthermore, the properties assigned to cluster munitions as a way of demonstrating their unique capabilities (force protection, indirect fire, etc.) are also applicable to other types of conventional weapons.

## § Interoperability

Concerns that obligations in a new treaty on cluster munitions could cause practical problems of 'interoperability' amongst states working in military coalitions are misplaced. An analysis of interoperability between Canadian and US Forces in the context of different legal obligations regarding anti-personnel mines suggested three primary reasons for an "absence of practical problems" in relation to those weapons:

1. the lack of the use of such mines in the conduct of coalition operations;
2. that Canada was not the only coalition partner whom the United States had to deal with that has these legal obligations;
3. that Canadian Forces commanders and other personnel are made aware of their legal obligations.

Given current participation in the Oslo Process, points one and two above will likely be similar in the context of the new treaty on cluster munitions. The first point may initially be somewhat different for cluster munitions than it currently is for AP mines. However, even if cluster munitions are currently in general use by certain states, those other states that sign a treaty prohibiting cluster munitions in order to extend protection to civilians from the effects of these weapons will be able to use their participation in military coalitions as a way of ensuring cluster munitions are not used in such joint operations. This will increase protection to civilians from cluster munitions. States that have not signed the treaty will find it difficult to stockpile cluster munitions on states parties' territory or tranship them through states parties' territory thus reducing the practicality of using them in joint operations. This will also increase protection for civilians.

## § Prohibition or regulation

The Oslo Process on cluster munitions and the Oslo Declaration is based on the need for a prohibition on a specific category of weapons, rather than a restriction regime. A rule against the use of cluster munitions in populated areas has been considered by some states and also by some NGOs as a solution to the problems, but it is no longer considered a sufficient response within the Oslo Process. This is mainly because such a rule would be difficult if not impossible to police. Much would hinge on the definition of a populated area and even with a very strong definition it would always be open to interpretation. It is also hard to imagine that such a rule, when drafted, would be free of caveats. Furthermore, UXO problems would not be addressed by proscribing use in populated areas, since civilians may return to depopulated areas subsequent to attacks. In short a prohibition on the type of weapon causing the problem would be a far more reliable mechanism by which to provide adequate protection to civilians.

## § Total ban

Some states have sought to characterise the CMC position as calling for a 'total ban' on cluster munitions. The term 'total ban' is in fact used primarily by certain states in a scaremongering way in order to undermine the NGO position and present their approach as more reasonable. These states also seek to exploit the 'unacceptable harm' language in the Oslo Declaration in order to argue for unjustified exemptions in the negotiated treaty based on dubious technical fixes such as self-destruct or failsafe mechanisms. In reality, since the CMC does not have an agreed definition of cluster munitions at this point, it does not make sense for the CMC (or anyone that does not have a specific definition) to call for a 'total ban'.

So the CMC principles call for a "prohibition on cluster munitions, as defined." In public campaign materials this phrase can be shortened to a prohibition on cluster munitions, since it is a given that a definition will be agreed in the treaty. Qualifying the call for a prohibition on cluster munitions with 'total ban' is a maximalist interpretation. Qualifying the call with 'those that cause unacceptable harm' is a minimalist interpretation. Neither interpretation is necessarily helpful. However, when explicitly referring to the Oslo Declaration in formal documents, the CMC uses the full language of "cluster munitions that cause unacceptable harm." Once a definition of cluster munitions is agreed by CMC members it will be logical for campaigners to call for a ban on all cluster munitions.

## § The Oslo Process

Following the failure of the UN Convention on Certain Conventional Weapons (CCW) to agree to urgent action to address the humanitarian impact of cluster munitions at the third review conference in November 2006, despite five years of discussions around the issue and calls from 30 nations in support of negotiations, the Norwegian government announced its intention to establish a new international process to establish a treaty to ban cluster bombs. The 75 participating States in the new process now cover the five world regions and include:

- § 19 (of 34) producer states;
- § 7 (of 14) states that have used cluster munitions;
- § 34 (of 75) stockpilers; and,
- § 11 states affected by the weapons.

There are also 20 states not party to the CCW participating in the Oslo process making it a more open and globally representative forum for addressing this issue. In fact any state seeking to participate in the process can get on board at any time. The Norwegian Minister of Foreign Affairs has issued the following message concerning the international process:

*"I will encourage all states to include themselves in this process. We need to act now, to prevent countless new lives being shattered. The door is open for all states who share our commitment to conclude a new legally binding instrument that prohibits the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm, by 2008."*

To take part in this process a state simply needs to publicly express the government's formal support for the aims expressed in the Oslo declaration.