



ICRC



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OVERVIEW

Despite the existing rules of international humanitarian law (IHL), cluster munitions have caused significant civilian casualties in the conflicts in which they have been used. Better implementation of IHL, including the recently adopted Protocol on Explosive Remnants of War, will not fully resolve the problems caused by these weapons. The ICRC believes that specific rules on cluster munitions are needed and that, as a matter of urgency, the international community should conclude a new treaty that would prohibit the use, production, stockpiling and transfer of inaccurate and unreliable cluster munitions; require the elimination of current stocks of these weapons and provide for victim assistance, the clearance of cluster munitions and activities to minimize the impact of these weapons on civilian populations.

CLUSTER MUNITIONS

WHY DO WE NEED A NEW TREATY?

WHAT DOES INTERNATIONAL HUMANITARIAN LAW SAY ABOUT CLUSTER MUNITIONS?

International humanitarian law does not currently contain specific rules on cluster munitions. Like other weapons, their use in armed conflict is regulated by the general rules of IHL governing the conduct of hostilities. These rules restrict how weapons may be used and identify measures that must be taken to limit their impact on civilians.

The general rules most relevant to cluster munitions include:

- the **rule of distinction**, which requires that in conducting an attack a distinction must be made between civilians and combatants and between civilian objects and military objectives;
- the **prohibition of indiscriminate attacks**;

- the **rule of proportionality**, which requires that the incidental effects of the attack on civilians and civilian objects not be excessive in relation to the concrete and direct military advantage anticipated.

Yet despite these rules, cluster munitions have caused large numbers of civilian casualties both during and after conflicts. This raises important questions as to how the above IHL rules are interpreted and how rigorously they are being applied to cluster munitions, given the inaccuracy and unreliability of these weapons. It can also be questioned whether, in the light of the IHL rules mentioned above, such weapons can legitimately be used against military objectives in populated areas.

Cluster munitions pose a particular risk to civilians when used in or near populated areas.

Sean Sutton/Panos Pictures



SHOULDN'T THE EMPHASIS BE ON PROMOTING AND IMPLEMENTING EXISTING IHL RATHER THAN THE DEVELOPMENT OF NEW RULES ON CLUSTER MUNITIONS?

Wide adherence to and implementation of IHL treaties are important objectives. History has shown, however, that there are particular problems with cluster munitions, and that simple reliance on implementation of the general rules has not been adequate to prevent tremendous human suffering when these weapons have been used. This has also been the case in the past with chemical and biological weapons,

dum-dum bullets, anti-personnel mines and incendiary weapons, each of which is now the subject of specific treaties that supplement general IHL rules.

In addition, in most conflicts where cluster munitions have been used, the users of these weapons were professional armed forces well trained in IHL. Yet even when used by such forces, cluster munitions have

had serious consequences for civilians. If more forces acquire these weapons, including less professional forces, the problem is likely to get even worse. In view of the specific characteristics of these weapons, the ICRC believes that the existing IHL rules are not enough and that there is an urgent need for specific regulations on cluster munitions, including prohibitions.

A child examines the bomb marks left on the pavement of his village after cluster munitions were used.

REUTERS/Desmond Boylan



DOESN'T THE PROTOCOL ON EXPLOSIVE REMNANTS OF WAR ADDRESS THE PROBLEMS CAUSED BY CLUSTER MUNITIONS?

The Protocol on Explosive Remnants of War (Protocol V to the Convention on Certain Conventional Weapons) is intended to reduce the post-conflict dangers to civilians from all forms of unexploded and abandoned explosive ordnance (referred to as explosive remnants of war). This treaty provides a framework for the rapid clearance of these weapons, including cluster munitions, after the end of active hostilities. Among other things, it requires each party to an armed conflict to clear – or provide assistance for the clearance of – any failed or abandoned explosive munitions that result from its operations, and to rapidly make information on the types and locations of munitions used available to clearance agencies.

However, the Protocol does not contain specific restrictions on the use of any weapon. It therefore does not address the wide area effects of cluster munitions at the time of use or the dangers for civilians caught in a cluster munition attack. In addition, the Protocol contains no specific requirement to reduce the failure rate of cluster munitions – or any other weapon – in order to reduce the level of contamination. As cluster munitions account for a high percentage of unexploded ordnance in conflicts where they have been used, neither the Protocol nor available resources will be adequate if the use and proliferation of cluster munitions continue.

WHAT IS THE ICRC POSITION ON CLUSTER MUNITIONS?

The ICRC believes that the international community must address the cluster munition problem as a matter of urgency. The ICRC has therefore called for a new treaty that will:

- prohibit the use, development, production, stockpiling and transfer of inaccurate and unreliable cluster munitions;
- require the elimination of current stocks of inaccurate and unreliable cluster munitions;

- provide for victim assistance, the clearance of cluster munitions and activities to minimize the impact of these weapons on civilian populations.

Until such a treaty is adopted, the ICRC has called on States to unilaterally and immediately end the use of such weapons, not to transfer them to anyone and to destroy existing stocks.

WHAT DOES THE ICRC MEAN BY INACCURATE AND UNRELIABLE CLUSTER MUNITIONS?

The term "inaccurate" is used to refer to submunitions that cannot be precisely targeted once they are released from the cluster munition container. Thus, they fall to the ground unguided. Their small size, their use of parachutes and ribbons and other features mean that their descent is often affected by weather (wind, air density, etc.) and they may land far from the intended target. These characteristics raise questions as to whether the user is able to distinguish between military objectives and civilians as required by IHL, particularly when such weapons are used in populated areas.

WHY ISN'T THE ICRC CALLING FOR A BAN ON ALL CLUSTER MUNITIONS?

At present, there is no agreed definition of the term "cluster munition". In general, any weapon that releases multiple explosive submunitions could be considered a cluster munition. The ICRC uses the terms "inaccurate" and "unreliable" to describe the characteristics of those cluster munitions that have caused the extensive humanitarian problems seen in past conflicts. The proposed measures would go a long way towards eliminating the cluster munitions that pose such problems. It should be borne in mind that a very large proportion of existing stocks contain old models (20–30 years old or more), which have problems of accuracy and reliability. While some newer models incorporate self-destruct mechanisms to destroy the submunition if the main fuse fails to explode as intended, these features have fallen short of expectations and have not provided an adequate solution to the reliability problem.

Developing a definition of cluster munitions and drawing up precise definitions of those types to be prohibited will be part of the process of negotiating a legally binding treaty. It will be up to governments to take responsibility for judging which, if any, cluster munitions are not inaccurate and unreliable. Governments seeking to exclude models with certain characteristics from a prohibition will need to prove that these weapons will not create the humanitarian problems seen in past conflicts.

The term "unreliable" describes the fact that large numbers of submunitions fail to explode as intended on impact. This makes them a long-term danger to the civilian population. Submunition failure rates have been significant in nearly every conflict in which these weapons have been used. The uncertain failure rates of cluster munitions make it difficult to understand how a reliable assessment can be made in accordance with the IHL rule of proportionality mentioned above.

Cluster munitions don't always explode on impact, making them a long-term danger to communities.

AFP/Karim Sahib

CLUSTER MUNITIONS



WHAT ARE GOVERNMENTS DOING?

Following calls by international and non-governmental organizations, and information on the effects of cluster munitions from wars in Serbia (Kosovo) and Lebanon, governments have begun to respond. There are currently two tracks of work at the international level.

In February 2007, Norway launched the "Oslo Process" when it invited governments supporting the development of new rules on cluster munitions to a conference in Oslo. The Final Declaration of the Conference (supported by 46 States) established several common goals, which include the adoption of a legally binding international instrument prohibiting "cluster munitions that cause unacceptable harm to civilians" by the end of 2008 and establishing a framework for cooperation and assistance for the care and rehabilitation of survivors, the clearance of contaminated areas, risk education, and the destruction of prohibited cluster munitions. Follow-up meetings in Lima, Peru (23 to 25 May 2007) and Vienna, Austria (5 to 7 December 2007), attended by more than 130 countries, began to consider these issues in greater detail. Meetings to

continue the development of a legally binding instrument are also set to take place in Wellington, New Zealand (February 2008) and Dublin, Ireland (May 2008). The Oslo Process includes a number of major military powers and many countries affected by cluster munitions, and seeks to prohibit cluster munitions causing severe humanitarian consequences through the rules of a new treaty.

Governments are also working within the Convention on Certain Conventional Weapons (CCW). In January 2008, States Parties began to "negotiate a proposal" to address the humanitarian impact of cluster munitions. However, the goal of this work is less precise than that of the Oslo Process. It is yet unclear if CCW governments are negotiating a legally binding treaty, non-binding best practices or a political declaration. The CCW includes all major military powers, including the main users and producers of cluster munitions, but fewer States affected by cluster munitions have participated in the work of the Convention. The CCW could produce standards that would be adhered to by important States not participating

in the Oslo Process. These standards may be less stringent than those developed in the Oslo Process, but could nevertheless contribute to addressing the cluster munition problem.

In addition to progress at the international level on cluster munitions, an increasing number of countries are taking national action to ensure that their armed forces do not use or acquire cluster munitions that have unacceptable humanitarian consequences. Several have adopted moratoria on the use, production and transfer of cluster munitions or have enacted laws banning cluster munitions. Other States have adopted or are planning to adopt procurement policies whereby they would only acquire or use cluster munitions with a high reliability or which have self-destruct or self-neutralization features. Importantly, countries are also removing from service certain types of cluster munition that have caused significant civilian harm or pose a serious risk to civilians due to their high failure rates and inaccuracy.

DOES THE ICRC HAVE A PREFERENCE AS TO WHERE A NEW TREATY ON CLUSTER MUNITIONS IS NEGOTIATED (I.E. WITHIN THE FRAMEWORK OF THE OSLO PROCESS OR OF THE CONVENTION ON CERTAIN CONVENTIONAL WEAPONS (CCW))?

The ICRC is prepared to contribute to the development of the strongest possible protection for civilians from cluster munitions, in any forum in which this issue is being discussed. It will therefore contribute to the work of States in both the CCW and the Oslo Process.

However, the ICRC has consistently said that it seeks the strongest possible protection of civilians from these weapons. We believe it is important to have an instrument that is strong, clear, easily implemented and will make a real difference on the ground. It is therefore

important that the negotiating process have clear objectives and a time frame, so as to avoid unproductive work. States participating in the Oslo Process work within its objectives of concluding a treaty in 2008 that will prohibit cluster munitions that cause "unacceptable harm to civilians". The ICRC and the entire Red Cross and Red Crescent Movement has urged these governments to fulfill their commitment to negotiate and conclude such a treaty in 2008.

The objectives of the process to address cluster munitions in the CCW framework

are, thus far, less clear. States have agreed to "negotiate a proposal" to address the humanitarian impact of cluster munitions in that framework. Until further clarity on State positions and the collective intention of CCW States is available, it is difficult to evaluate the contribution this process might make. The ICRC will urge CCW States to embed any norms that can be agreed within the CCW framework in legally binding rules, as opposed to codes of conduct or best practices, for example.