

Implications of the Convention on Cluster Munitions for developing a norm against area-effect use of explosive weapons.

**Richard Moyes, Policy & Research Director,
Landmine Action**

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The recently adopted Convention on Cluster Munitions (CCM) is explicitly concerned with “the suffering and casualties caused by cluster munitions at the time of their use” as well as when they fail to function as intended and when they are left abandoned. In order to end this suffering and casualties, the Convention prohibits the use, production, stockpiling and transfer of cluster munitions as a defined category of weapons. The overarching definition of a cluster munition states that:

“Cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions.

This is then clarified by three further clauses:

It does not mean the following:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) Each munition contains fewer than ten explosive submunitions;
 - (ii) Each explosive submunition weighs more than four kilograms;
 - (iii) Each explosive submunition is designed to detect and engage a single target object;
 - (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
 - (v) Each explosive submunition is equipped with an electronic self-deactivating feature;

Section (c) of the definition presents certain technical characteristics that must all be met in order for a munition with submunitions weighing less than 20 kilograms not to be prohibited. According to the first part of section (c), the combined effect of these characteristics is intended “to avoid indiscriminate area effects and the risks posed by unexploded submunitions.”

Of these cumulative characteristics, (i) – (iii) are related, *inter alia*, to avoiding indiscriminate area effects. These technical characteristics serve to calibrate how “indiscriminate area effects” are to be understood. Of these characteristics, Art. 2.c (iii) limits the individual submunitions to each striking a “single target object”. Such a “target object” should be a vehicle, artillery piece or other such distinct item. It is prohibited to use weapons where the explosive submunitions are scattered and distribute explosive force and fragmentation randomly across an area. This represents a substantial functional distinction between weapons excluded from prohibition at Art. 2.c and cluster munitions.

This obligation not to distribute explosive force and fragmentation randomly across an area is further strengthened by Art. 2.c (i) and Art. 2.c (ii). Art. 2.c (i) serves to limit the number of submunitions permissible in accordance with Art. 2.c (ii) – (v) that can be delivered by a single container munition (i.e. the shell or bomb that disperses submunitions). Art. 2.c (ii) serves to limit the miniaturisation of permissible submunitions and hence the miniaturisation of the whole weapon system in a way that would effectively subvert the intent of Art. 2.c (i) by allowing large numbers of such munitions to be launched at once. Taken together, these two provisions provide limitations on the capacity for an individual munition to saturate an area even with submunitions that detect and engage single target objects.

None of the characteristics intended to avoid indiscriminate area effects relate to the accuracy of the container munition. So “indiscriminate area effects” are *not* considered to result primarily from the risk of “area effects” being inadvertently applied in the wrong place. Rather “indiscriminate area effects” are wholly considered to result from the use of multiple explosive items to distribute explosive force and fragmentation randomly across a pre-defined area. Art. 2. c. (i) and (ii) further suggest that “indiscriminate area effects” can result from submunitions that detect and engage single object targets if these are used in large quantities.

The general parameters of “indiscriminate attacks” are laid out in the 1977 First Protocol Additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I) at Article 51 (4) – (5):

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at a specific military objective;

- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

[...]

In relation to the provisions of Article 51, the Convention on Cluster Munitions adopts a presumption that the use of explosive weapons across areas, without measures to limit the effects of those weapons to single target objects will be “of a nature to strike military objectives and civilians or civilian objects without distinction” and will thus be unlawful.

Thus, without asserting that all use of explosive weapons to create an area effect constitutes an indiscriminate attack, the Convention on Cluster Munitions supports the development of a normative presumption under Article 51 of Additional Protocol I that use of such area effect explosive weapons will be indiscriminate.