Norway

21.11 pm

Comments on draft protocol VI dated November 18th

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Mr. Chair,
We thank you for the new draft text that was distributed Friday afternoon. As you have already announced that you have another text for us tomorrow, we should perhaps not dwell too much with this current version, but we have a few observations on some of the *changes* that have been made to the original draft. Having established that none of our proposals have been reflected in this text, we of course reserve our right to come back to the other elements of the text later.

Preamble:
We appreciate that there is a new para in the preamble that refers to the Convention on the Rights of Persons with disabilities. Otherwise, the changes in the preamble seem to have little impact. To state in the preamble's last para that the present protocol is an *intermediate* step is not reflected in the draft protocol itself and has thus little if any value.

Article 1 para 5:
The proposed changes in Article 1 para 5 also appear to be somewhat irrelevant. The High Contracting Parties should ensure that weapons mentioned in Technical Annex A have the lowest possible unexploded ordnance rate provided that such rates are consistent with military requirements. We would like to repeat what we said about this proposal on Friday: The munitions that are now mentioned in Technical Annex A, after the 1 % failure rate provision have been moved out, *are not munitions that are known to have failure rates* – this is why most of them are not defined as cluster munitions under the CCM.

Article 5 para 4 (a):
In this provision it appears that the possibility to use cluster munitions has been further limited compared to the previous version. Cluster munitions produced after 1980 with no fail-safe mechanisms can, during the twelve-year deferral period, only be used to defend ones' territory against attack or threat of attack.

Mr. Chair,
We have several problems with this concept. First of all, it is an explicit authorization of use of cluster munitions. This is problematic in itself.

Secondly, to go into issues pertaining to national security and the rules on the use of armed force under the UN Charter, means that application of the draft protocol would be subject to political rather than humanitarian considerations.

The legal implications of this part of the draft text are very unclear. Article 51 of the Charter, pertaining to States' inherent right of self-defense, specifies that this right can be exercised when an armed attack *occurs*. It does not extend to the *threat* of an attack. The proposed text would, in other words, appear to extend the right for a state to use cluster munitions in a wide range of situations, – in which, according to the judgment of that state, it is deemed that the state may be under the threat of an attack.

The current text cannot override the rules of the UN Charter, but it could, if left as proposed, generate unnecessary legal confusion.

Article 5 para 5 (b) and para 6:

Mr. Chair,
Article 5, para 5 (b) and para 6 contain some new provisions stating that the High Contracting Parties shall *take steps* to reduce the number of sub-munitions, and that they shall *endeavor* to ensure that cluster munitions are equipped with more fail-safe mechanisms. As such, these provisions make little if any difference. There are no tangible legal obligations laid down in these new draft provisions.

Article 6:
Article 6, (para 1, (a) as well as (b) contains a new provision stating that cluster munitions no longer *intended for use* are to be removed from operative stock. Again, this is a problem because it underlines that the rest of the cluster munitions *are* intended for use.

Article 6, para 1, (d) specifies that all cluster munitions of more than 40 years of age shall be removed from operational stocks unless their reliability has been confirmed in testing. This means that High Contracting Parties may keep cluster munitions produced as early as 1971 in their operative stocks, and can thus presumably also use them – why would they otherwise be in operational stock? This proposal leaves the scope of the prohibition in Article 4 on the use, stockpiling and retention of cluster munitions produced before 1980 very unclear.

Article 13:

Mr. Chair,
We have noted that there is a new "endeavor" clause in draft Article 13. Again, even though this new text has a reference to "endeavor" to reach comprehensive prohibitions and restrictions in line with *other relevant agreements*, we fail to see that these aspirations are reflected in any of the operative provisions in this draft.

Technical Annexes A and B:

Mr. Chair,
We heard several statements on Friday pertaining to the effect of moving the 1% failure rate rule from Annex A to Annex B. The 1 % rule has thus moved from being outside the scope of the draft Protocol, to fall within the scope of the draft Protocol. This was how the draft was until September 2010, in other words: the 1 % rule was an *exclusion* rather than an *exception*. The effect of moving it is hardly noticeable from a humanitarian point of view. It would be interesting to hear *how* it represents a major concession for some of the users and producers of cluster munitions.

Mr. Chair,
The fact remains that High Contracting Parties will be allowed to use cluster munitions with a 1% failure rate indefinitely. We have already explained our reasons for not accepting a 1 % failure rate as a benchmark. Years of experience with testing and conducting research on cluster munitions with an alleged 1% failure rate led to the conclusion that the producers' promise of 1 % could not be kept, even in testing on hard surfaces. In actual use, the failure rate percentage was over 10%. But even more importantly; even a 1% failure rate is way too much when tens of thousands of sub-munitions are being dispersed. Our greatest concern, however, is still that there are no changes in Technical Annex B, meaning that by far most cluster munitions will be allowed for continued use.