

## **Explosive remnants of war (ERW) and proportionality assessments under International Humanitarian Law: an example of UK practice**

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The 3<sup>rd</sup> Review Conference of the Convention on Certain Conventional Weapons (CCW) agreed in November 2006 that the foreseeable effects of explosive remnants of war on civilian populations are factors to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack.

Prior to this agreement, however, the UK Ministry of Defence (MoD) had acknowledged to Landmine Action that it already incorporated the risk of unexploded munitions into the proportionality evaluations of attacks. This paper presents the UK MoD's explanations to Landmine Action of how such assessments were done specifically with respect to the use of air-dropped cluster munitions in operations in Kosovo (1999) and Iraq (2003). Information was requested on how the process was undertaken for these specific weapons because they had already been identified as particularly prone to creating an ERW threat.

The chain of correspondence presented here took place immediately prior to the 3<sup>rd</sup> Review Conference of the CCW. On 12 October 2006 Landmine Action asked the following question to the MoD under the Freedom of Information Act:

“Was the risk to civilians of possible items of unexploded ordnance considered when evaluating the ‘proportionality’ of individual attacks using BL755 cluster bombs in a) Kosovo and b) Iraq, and if it was considered how was such a process undertaken (e.g. what data was used to foresee the likely level of UXO arising)?

The initial response from the MoD presented a general overview of pertinent legal rules but did not explicitly respond to the question asked:

Dear Mr Moyes,

[...] The targeting process must be in accordance with international and UK domestic law. The First Additional Protocol to the Geneva Conventions (API) outlines the key principles that guide target planning and the decision-making process of targeteers and UK commanders. It states that only military objectives may be attacked and the attack must be discriminate, proportionate and necessary. It is incumbent upon all UK personnel to ensure that neither civilians nor civilian objects are targeted and that every effort is made to avoid, or at least minimize, civilian casualties and damage to civilian objects.

Cluster bombs are lawful weapons that provide a unique capability against certain legitimate military targets, such as dispersed armoured units and fielded military forces. They have been used by the UK in a manner consistent with our obligations under international law, against legitimate military targets, on those occasions when they were the most appropriate weapon system to employ.

Statistics show that between 5-10% of the BL755 bomblets will fail to detonate, depending on a variety of factors such as the surface of the ground on which they land and the height and speed at which they are dropped. For this weapon, as with all weapon types, the planning for, and execution of, attacks

would be subject to tight controls to ensure that any potential collateral damage implications were identified, minimised and then assessed as proportionate to the military advantage to be gained from the attack. These principles were applied during both the Iraq and Kosovo campaigns.

[...] I do hope this provides the information you require.

Given that this response did not directly engage with the very specific questions being asked, Landmine Action sought further clarification as follows:

Dear \_\_\_\_\_

Many thanks for the reply. However, it does not answer the specific question that I asked:

“Was the risk to civilians of possible items of unexploded ordnance considered when evaluating the ‘proportionality’ of individual attacks using BL755 cluster bombs in a) Kosovo and b) Iraq, and if it was considered how was such a process undertaken (e.g. what data was used to foresee the likely level of UXO arising)?”

So when you say “attacks would be subject to tight controls to ensure that any potential collateral damage implications were identified” – please can you confirm if the risk to civilians of possible items of unexploded ordnance from BL755 was or was not systematically considered as part of these “tight controls?” A yes or no answer would be sufficient for a) Kosovo and b) Iraq.

The second part of my question asks “how was such a process undertaken” – so if the answer to the question above is yes, what data was used to assess the likely level of UXO that would be produced and how was this then used as a proxy for likely “collateral damage”?

Many thanks for any further clarification you can provide. This specific issue is subject to ongoing examination by States within the Convention on Conventional Weapons so please accept my assurance that this information is significant.

Yours sincerely,

Richard Moyes

This reiteration of the question produced the following reply – which again was couched in rather general terms and did not explicitly engage with the questions as asked:

Dear Mr Moyes

Further to your email timed at 12:43, I am advised that the collateral damage effects of any weapon are considered as part of the UK’s targeting process and the use of BL755 would have been considered in the same way. It would have been known that a percentage of bomblets would fail to detonate, but it was standard practice to note where these weapons had been used and, post-conflict, EOD teams would then be assigned to undertake clearance operations.

In another effort to get a clear answer to this question about how the rules of IHL had actually been implemented in practice Landmine Action again sought clarification:

Dear \_\_\_\_\_

... Are you saying yes or no that the risk of UXO was considered as part of the proportionality evaluation? You seem to be saying yes it was... but given the wider significance of this I think it is important to be very sure. Other than advice that collateral damage effects (in general) are considered, do you have any actual evidence that the likely UXO effects really were taken into account in either of these two conflicts in evaluations of proportionality at the time of attacks?

And if the answer is yes – as I asked in my original question – how was this particular component factored into the wider “collateral damage effect” i.e. what data was used to assess the likely level of UXO that would be produced and how was this then used as a proxy for likely “collateral damage”? What I mean by this last point is: how is an estimation of the number of UXO items that will be produced turned into an estimation of likely collateral damage?

I hope you can appreciate that the answers so far provided do not clearly and explicitly address the questions.

If you do not feel you are in a position to answer these questions more directly please do not hesitate to tell me.

Again, I assure you that these answers are very significant in the context of current discussions regarding international humanitarian law within the CCW.

Yours sincerely,

Richard Moyes

This email was still essentially a re-phrasing of the initial question. None of the answers provided in the first three MoD responses sought directly to answer the specific questions being asked. Instead they presented general assertions that ‘IHL was strictly implemented’ without engaging with *how* this had been done. None of the responses suggested that the specific question was problematic, or that the answers may be sensitive, or that the law may not be clear on this point – instead they simply tried to avoid engagement with the question. However, this third attempt elicited a more substantive response, albeit one that was still problematic:

Dear Mr Moyes,

I have been asked to respond to your request ...:

From [your previous email] it was determined there were 2 questions of interest to you:

Q1. “Are you saying yes or no that the risk of UXO was considered as part of the proportionality evaluation?” and

Q2. “.....do you have any actual evidence that the likely UXO effects really were taken into account in either of these two conflicts in evaluations of proportionality at the time of attacks.....”

The responses to these questions are as follows:

Q1. Yes.

Q2. No. This must be put into context in terms of the UK’s targeting process and how a weapon (in this case BL755) is used within that process. A formal collateral damage estimation (i.e one derived from using a software modelling

tool) cannot be carried out for this type of weapon. As a consequence, BL755 could not be used for pre-planned targeting purposes. It would be a military judgement call as to when it would be used and even then, only against suitable, legitimate targets. The use of BL755 would have to comply with the Laws of Armed Conflict, of which 'proportionality' is a major element.<sup>1</sup>

I hope this provides the information you require.

This response finally provided an unequivocal answer to first part of the question as initially asked – the risk of unexploded ordnance *had* been incorporated into proportionality evaluations for attacks with BL755 cluster bombs in Kosovo and Iraq. This in itself is highly significant. British legal expert Christopher Greenwood QC argued at the UN Convention on Conventional Weapons in May 2002 (CCW/GGE/II/WP.10) that “the dangers posed by unexploded munitions appear to have been considered rarely if at all” in relation to evaluations of proportionality. Yet this MoD response states that the UXO risk was already being factored into proportionality judgements by the UK Air Force in Kosovo in 1999.

However, the second part of the answer was very confusing – seeming to fall back again on assertions that the use of these weapons *would have to* comply with certain rules when the question being asked is about *how* compliance with these rules is ensured. Again, Landmine Action sought clarification:

Dear \_\_\_\_\_

Many thanks again for this response.

I must admit I don't quite understand the internal logic of this. If in accordance with your answer to Q2 “there is *no actual evidence* that the likely UXO effects were taken into account at the time of attacks” then how do you know that the answer to Q1 is yes?

From your answer I understand that the UXO risk is being taken into account by those people making the “military judgement call” – but presumably there is some instruction to them on how to do this, what information regarding likely failure rates they should base their evaluations on etc. For example, with the BL755 containing 147 individual bomblets then even if failure rates are the same the likelihood and quantity of UXO items left by a BL755 strike is far greater than would be the case for a unitary bomb. Surely for this to be properly factored into the assessment some guidance notes would need to be produced to highlight this?

I just don't see how, in the absence of any evidence, we can know that the answer to Q1 is yes.

If we don't have any actual evidence that this UXO risk was taken into account, and we cannot explain how it was taken into account by those people making

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<sup>1</sup> Some background information on the issues described here was presented on 30 Oct 2006 in The House of Commons, UK Parliament:

**Mr. Caton:** To ask the Secretary of State for Defence how his Department makes collateral damage predictions in deployment of weaponry.

**Mr. Ingram:** A collateral damage estimation (CDE) is conducted for all pre-planned targets by qualified targeteers who are trained to carry out this process. For targets where there is an obvious risk of collateral damage, a computer-based collateral damage model (CDM) is used, as a guide to military judgment, to determine the estimated effects of a range of weapons against differing structures in a variety of locations (rural, semi-rural, urban, etc). When it is not operationally feasible to conduct a full and formal CDE, Commanders must still apply the basic principles of the Laws of Armed Conflict (Distinction, Discrimination, Proportionality and Necessity).

the “military judgement call” – then surely there are reasonable grounds for concern that it wasn’t actually taken into account?

Many thanks again for your efforts in this regard.

This fourth email was still asking the same basic question that had been clearly presented at the onset: how is the UXO risk factored into the proportionality evaluation? The MoD response was to assert that the mechanism by which it had been done were secret because revealing it could put British Forces at risk:

From [your previous email], 3 questions have been identified:

*Q1. How do you know that the answer to Q1 is yes*

*Q2. Surely for this to be properly factored into the assessment some guidance notes would need to be produced to highlight this?*

*Q3. If we don’t have any actual evidence that this UXO risk was taken into account, and we cannot explain how it was taken into account by those people making the “military judgement call” – then surely there are reasonable grounds for concern that it wasn’t actually taken into account?*

Q1. The UK targeting process must be in accordance with international and UK domestic law. All individuals are accountable for their actions and decisions. It is therefore incumbent on commanders, targeteers and decision makers to ensure they comply with relevant law and protocols. As we have indicated previously, the UK targeting process complies with the following:

- The principal international agreements that govern International Humanitarian Law (IHL)
- The Laws of Armed Conflict (LOAC) including:
  - Hague Conventions (1907 Hague Conventions)
  - Geneva Conventions (Geneva Conventions of 12 August 1949)
  - The First Additional Protocol to the Geneva Conventions (AP I) (1977 Geneva Protocols I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (AP I))

This last protocol outlines the key principles that guide target planning and the decision-making process of targeteers and UK commanders. It states that only military objectives may be attacked and the attack must be discriminate, proportionate and necessary. It is incumbent upon all UK personnel to ensure that neither civilians nor civilian objects are targeted and that every effort is made to avoid, or at least minimize, civilian casualties and damage to civilian objects.

Those making 'military judgment calls' do so with the training, rank and experience that fits them to make such decisions and they are bound by these laws and protocols.

Q2. We understand your concern that procedures and guidance should be exposed to public scrutiny. There is certainly a public interest in demonstrating that the UK takes its commitments under international law seriously and takes rigorous steps to ensure that those commitments are fulfilled. However, by confirming to you now that such procedures and guidance does exist, we believe we have served this public interest. To release any further information or detail about those procedures and guidance would not be in the public interest - this sort of information is highly sensitive and could potentially cause significant harm to UK defence and to troops on operations were it to fall into the wrong hands. While you have not explicitly requested any information of this type, we believe it would be exempt from release under the Freedom of Information Act.

Q3. Like you, we do not deal in supposition and we consider your opinion, as articulated in Q3, that: *'If we don't have any actual evidence that this UXO risk was taken into account, and we cannot explain how it was taken into account by those people making the "military judgement call" – then surely there are reasonable grounds for concern that it wasn't actually taken into account?'* is unsound. We are therefore unable to respond to that aspect of your communication.

## **Comment and analysis**

Although slightly cumbersome, it is important to present this communication in full because no single MoD response provides the full story. It should be noted that the questions as initially presented by Landmine Action were clear and simple – responding to them did not require the repetitions of which IHL treaties are pertinent to evaluations of the legality of attacks etc. The questions were not about the scope or requirements of the law but about how the balancing of civilian risk and military necessity had been undertaken in practice. In looking at these communications the following points come to the fore:

- Blanket assertions of strict adherence to IHL are used to avoid discussion about how decisions were made regarding specific, concrete examples.
- The evidence and explanations presented regarding how the UXO risk of cluster bombs had been factored into proportionality evaluations in Kosovo and Iraq are unconvincing – no evidence can be provided that this had been done.
- Secrecy is used to block off further questioning. However, with the BL755 having now been withdrawn from service it may be that this secrecy defence is no longer relevant.

As has been highlighted previously in relation to UK attitudes towards cluster munitions and international humanitarian law there is a tendency to assert adherence to the law without being able to explain convincingly what this means. Such an approach does not serve the best interests of international humanitarian law – rather it raises concern that IHL is being used as a rhetorical shield for belligerents rather than functioning as a practical shield for vulnerable civilian populations.