

# **STOP KILLING CIVILIANS, START TAKING RESPONSIBILITY: Searching questions about cluster munitions**

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This discussion paper is submitted to provide ideas and suggestions regarding campaigning strategy for the Cluster Munitions Coalition and affiliated organisations.

## **THE PROBLEM:**

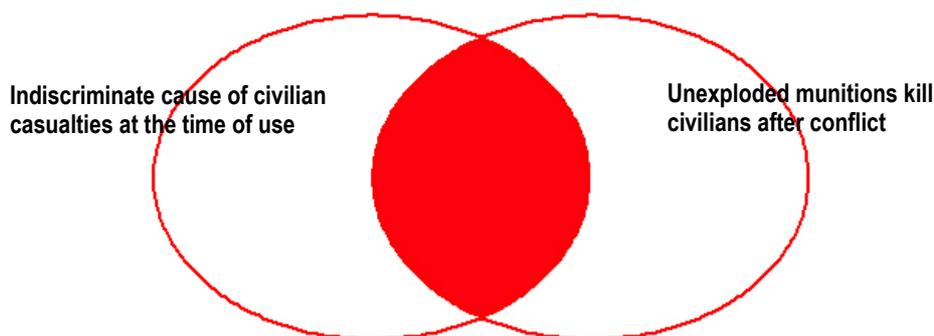
### **Cluster munitions are still killing and injuring civilians**

It is 30 years since humanitarian concern regarding cluster munitions was first cited in formal international discussions as grounds for these weapons being subject to specific controls or being banned. The 1974 Conference of Government Experts at Lucerne and the 1976 Conference of Government Experts at Lugano both discussed problems associated with these weapons. At that time, opposition to cluster munitions was focused on their “area-effects,” in particular the likelihood that their large “footprint” and reliance on “pre-formed fragmentation” made them indiscriminate and led to unacceptable civilian casualties.

Since then the number of countries possessing, using and affected by cluster munitions has steadily grown whilst no specific international controls over these munitions have been introduced. Despite reported modifications in the design and use of cluster munitions, the humanitarian problems persist – as we have seen most recently in Kosovo, Chechnya, Iraq and Afghanistan.

In addition to the problem of civilian casualties at the time of use, persistent and severe post-conflict problems with cluster munitions have also been documented. Sub-munitions have been identified as suffering from particularly high failure rates, and thus they present with greater frequency in the post-conflict environment in proportion to the numbers used. The potential for submunition failure to be linked to a broader failure within the system can result in more problematic forms of dense contamination.<sup>1</sup>

### **Cluster munitions- the humanitarian footprint**



It has generally fallen to international organisations and non-governmental organisations to attempt to document and highlight both the immediate and the post-conflict impacts.<sup>2</sup>

<sup>1</sup> Landmine Action, 2002, *Explosive Remnants of War: unexploded ordnance and post-conflict communities*, London.

<sup>2</sup> See for example, ICRC, 2000, *Explosive Remnants of War: a study on submunitions and other unexploded ordnance*, Geneva; Human Rights Watch, 2002, *Fatally Flawed: Cluster Bombs and Their Use by the US in Afghanistan*,

## THE RESPONSE:

### A continuing failure by user governments to address the problem

Against three decades of known humanitarian problems, proponents of cluster munitions have failed to adequately investigate and establish the main sources of these problems let alone to initiate reforms that deal with their consequences. While some governments have acknowledged the problems cluster munitions cause both as a result of inaccuracy and the legacy of unexploded sub-munitions,<sup>3</sup> the dominant official government response has been one of the denial of a problem and evasion of overall responsibility. User states have been forceful in distinguishing failed cluster sub-munitions from anti-personnel landmines,<sup>4</sup> restating claims about the relatively low failure rate of cluster munitions,<sup>5</sup> and denying the importance of certain factors in leading to unexploded sub-munitions<sup>6</sup> so as to avoid giving credence to

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Washington DC and Human Rights Watch 2003, *Off Target: The conduct of the war and civilian casualties in Iraq*, Washington DC; Landmine Action, 2002, *Explosive Remnants of War: unexploded ordnance and post-conflict communities*, London and The UK Working Group on Landmines, 2000, *Cluster Bombs: the military effectiveness and impact on civilians of cluster munitions*, London; UNMAS, 2002, *Explosive Remnants of War – Experience from Field Operations*. CCW discussion paper CCW/GGE/II/WP.13 prepared by John Flanagan, former Programme Manager of the UN Mine Action Programme in Kosovo, 15<sup>th</sup> July 2002, Geneva.

<sup>3</sup> Norway. 2003. (CCW/GGE/VI/WG.1/WP.3) noted that “all air-delivered cluster bombs previously in Norwegian stock have been destroyed, because of their low level of precision and high dud rate.” It is important to note that this source is cited as evidence that some states have accepted the existence of problems. It is not accepted that the Norwegian distinction between air-dropped and ground-launched is an adequate basis for protecting civilians.

<sup>4</sup> For instance, during a news briefing on 21 April 2003, US Secretary of Defense Donald Rumsfeld and General Richard Myers of the Joint Chiefs of Staff were asked:

Q: Mr. Secretary, prior to the conflict, human rights groups complained about the use of cluster bombs by the United States. Now that the major combat phase is over, we're seeing the evidence that this, in fact, is a weapon that can continue to kill after the hostilities are over. There've been a small but significant number of people maimed or killed, including some children and some American forces as well. Would you consider limiting the use of cluster bombs in the future, or perhaps even eliminating them from the U.S. arsenal in response to this kind of -- type of criticism?

Myers: I think it gets back to -- well, first of all, cluster bombs are not like mines, completely different subject. Cluster bombs are set to go off when they strike their target or whatever they do, so they're not like a mine that lies there until it's activated. I have not heard of injuries due to cluster bombs, but we'll look into it. It's possible, of course, but we'll have to look into it. And --

Q: Well, we've been seeing pictures of unexploded sub-munitions in various residential areas --

Myers: We'll have to find out who's they are, and do all that sort of thing. I just -- I have not seen those pictures, but I'll --

<sup>5</sup> As opposed to repeated claims by user governments that cluster munitions fail at a rate 5 percent, estimations made post-conflict have consistently placed the over figure over 10 percent and often much higher. See for example UK Working Group on Landmines, 2000, *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions*, London.

<sup>6</sup> A UK defence minister reported that: ‘Approximately 5 per cent of the bomblets within a Cluster Bomb fail to detonate when they impact. Regardless of the height from which they are dropped, this figure does not vary,’ (Spellar in *UK House of Commons Hansard*, 24 January 2000, *Column 59*.) Later in the year, when asked about the Government’s assessment NATO cluster munition failure rates in Kosovo, Spellar stated that “The cluster munitions used by the UK have a manufacturer’s estimated failure rate of approximately 5 per cent. The failure rate of other nations’ cluster munitions (which have different specifications) may vary, but any assessment is a matter for these nations. We are not aware of any agreed NATO estimate of the failure rate of cluster munitions used by Allies in Kosovo” (*UK House of Commons Hansard*, 24<sup>th</sup> November 2000, *Column 337W*.) The following excerpts from the 21 June 2000, UK Parliament Select Committee on Defence, Minutes of Evidence are also pertinent:

1220. [...] Are you telling me that the failure rate is no different from 30,000 feet to under 15,000 feet? [...] You have admitted that the MoD have done no tests on that, that you relied on the manufacturer's own assessment of the failure rate. Why did you do no tests on that? Why did you use it without doing

calls for additional international prohibitions. Meanwhile the humanitarian consequences for civilians continue.

During and after conflicts in Afghanistan, Chechnya, Iraq, Kosovo and Kuwait, insufficient efforts have been made by user governments to establish the full extent of casualties from cluster munitions or the causes for such humanitarian problems. Accurate and reliable information regarding targeting, failure-rates and the possible long-term impact of cluster munition use has not been gathered by the bodies who are responsible for that use.<sup>7</sup> This makes it difficult to evaluate the relative importance of design or use factors in leading to humanitarian problems or the likely impact of possible modifications. Failure to undertake such evaluations amounts to a failure to take satisfactory precautions to assure that civilians are receiving sufficient protection.

While indiscriminate attacks are prohibited under IHL,<sup>8</sup> the meaning of terms such as ‘attack’, ‘excessive’ civilian loss of life and damage, and ‘concrete and direct military advantage’ are not clear. While those employing cluster munitions have spoken about military advantage in a broad fashion, including advantages to the war strategy as whole and advantages gained in particular tactical encounters, when it comes to determining proportionality there have been moves to see humanitarian impact only in relation to immediate effects.<sup>9</sup>

States have relied on abstract justifications that using alternatives to cluster munitions would either:

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any tests on it?

(*Mr Hoon*) The failure rate of the cluster bomb concerns the bomblets that are released at the time.

1221. Absolutely.

(*Mr Hoon*) I am not a technical expert on munitions but my understanding is that the failure rate would still be the same whatever height the bomb was dropped. It does not make any difference whether you drop it from 20,000 feet or from 200 feet.

1222. Is it likely to land on the target, for example, at a higher level? What is the likelihood of it differing from its target?

(*Mr Hoon*) That has not actually been the difficulty as far as cluster bombs are concerned. The criticism has been that some of the bomblets—5 per cent—have not exploded. Now they have been left on the ground and I recognise that there have been civilian casualties as a result. I am not saying to you that those decisions were taken lightly; they were not. This is an extremely effective weapon and had we not used that extremely effective weapon we would have put our forces at greater risk.

Such statements are interesting because the actual incidence of unexploded submunitions does not relate solely to the submunition but relates to the whole system of delivery (within which delivery altitude may be a significant factor). In fact there was also criticism of the potential inaccuracy of the weapons, although this is denied here. As we go on to note in a later footnote, the “greater risk” to British forces needs to be understood in the context that “there were no casualties amongst allied forces in the course of the actual campaign” in Kosovo.

<sup>7</sup> For instance, when the UK Secretary for Defence was asked ‘what reviews have been undertaken by his Department regarding the civilian casualty figures caused by unexploded cluster submunitions in the post-conflict regions of (a) the Gulf, (b) Kosovo and (c) Afghanistan; and what assessment [has been] made of the impact of these bomblets on Iraqi civilians in the future’ a defence minister responded that ‘No such reviews and assessments have been undertaken by the Ministry of Defence.’ (*UK House of Commons Hansard* 15 July 2003, Column 191W.)

<sup>8</sup> Article 51(5)(b) of the Additional Protocol I (amongst other Protocols) bans an indiscriminate attack which it defines in part as one:

‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.’

<sup>9</sup> Wiebe, Virgil 2000. ‘Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law’ *Michigan Journal of International Law* 22(1): 100-105. See also, how a narrow determination is given of humanitarian consequences even by a country apparently relatively supportive of further controls (Norway, 2003, *National Interpretation and Implementation of International Humanitarian Law with Regard to the Risk of Explosive Remnants of War* CCW/GGE/VI/WG.1/WP.3, 24<sup>th</sup> November 2003.) This in turn draws upon Greenwood, 2002, *Legal Issues Regarding Explosive Remnants of War*, CCW/GGE/1/WP.10, 23rd May 2002.

- expose their forces to greater risk<sup>10</sup>

or

- increase the likely civilian casualties at the time of the attack through the requirement to use a greater number of munitions containing a greater quantity of explosives.<sup>11</sup>

This latter point has been utilised for some 30 years now. However, the burden of responsibility should be to show that, whichever weapons system is chosen, the impact on civilians is proportional to the concrete military advantage. If it breaches IHL to use cluster munitions in a certain situation, such a breach is not made acceptable by the possibility that using an alternative weapon system would have breached IHL even more.

Various technical and operational modifications are reported as being ongoing. The US policy combines the pursuit of technical modifications to achieve a greater reliability for ground and air delivered sub-munitions (99% or higher) by 2005,<sup>12</sup> undertaking evaluations of the need for retrofitting for specific existing sub-munitions,<sup>13</sup> destroying certain stockpiles, acquiring new sub-munitions,<sup>14</sup> and reviewing use and targeting practices. Many others have taken the improvement of reliability rates as a central plank of reform. The Swiss government, for example, has proposed establishing international standards for reliability at least 98%.<sup>15</sup>

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<sup>10</sup> For example, the Dutch Government responded to a parliamentary question of 10<sup>th</sup> April 2003, that, “The government considers cluster munitions developed to combat armoured and non-armoured military targets on a given surface to be a legitimate weapon, for which, moreover, no effective alternative is available. Use of other weapons in situations like this would also entail unnecessary risks for pilots, as they would have to carry out a greater number of sorties to achieve the desired effect.” Quoted in an ABM AMRO bank memo at: [http://www.abnamro.com/com/about/data/Insys\\_memoEN.pdf](http://www.abnamro.com/com/about/data/Insys_memoEN.pdf)

<sup>11</sup> For example, in a letter to The Rt. Hon. Sir George Young MP (28 Feb 2002) the British Government stated that:

“There could be serious implications of using other weapons against such targets. In most cases, this would mean using large unitary bombs, which would risk far greater damage than cluster bombs at the time of the attack.”

This argument was one of the first formulated in support of cluster munitions. Erik Prokosch, 1995, *The Technology of Killing*, p.151, reports an USA Government delegate at the 1974 conference in Lucerne as saying:

“In the CBU flak suppression role, they drive crews from their weapons into shelters” [...] “The pellets [pre-formed fragmentation] don’t have a strong penetration capacity, so the crews are protected. So are civilians if they take cover, as they almost always do. The choice would be general-purpose bombs which would result in increased casualties.”

Prokosch goes on (p. 154) goes on to report a British Government delegate saying:

“The implication for this conference is that a far greater weight of HE [high explosive] must be delivered into an area to achieve the same probability of destroying tanks when using blast bombs rather than BL755.”

The arguments against charges that cluster munitions are indiscriminate at the time of use have barely changed in 30 years, and yet no strong evidence has been presented to support these arguments or to lay out the mechanisms by which the balance of risk to civilians is evaluated during the process of targeting.

<sup>12</sup> Cohen, William. 2001. *Memorandum for the Secretaries of the Military Departments: Department of Defense Policy on Submunition Reliability* 10 January 2001, and Melita, A. *Munitions Insights/Initiatives* at <http://www.dtic.mil/ndia/2001munitions/melita.pdf>

<sup>13</sup> Human Rights Watch Briefing Paper, 2003, *Cluster Munitions: A Foreseeable Hazard in Iraq March*, New York.

<sup>14</sup> See Human Rights Watch. 2003. *Cluster Munitions: Measures to Prevent ERW and Protect Civilian Populations*, New York.

<sup>15</sup> Various country positions as of mid-2003 are presented in Handicap International, 2003, *Cluster Munition Systems*, Lyon.

It is not clear that such initiatives will reduce the negative humanitarian impact of cluster munitions. For example: many past announcements regarding improvements in submunition reliability have proven of dubious worth as indicators of subsequent performance in combat.<sup>16</sup> Reliability is only one factor contributing to the presence of dangerous ordnance. The actual quantity of unexploded ordnance is dependent upon reliability and the total quantity of munitions used. As we have noted – unexploded submunitions are only part of the overall humanitarian problem of cluster munitions. The impact of cluster munitions at the time of use is a central focus of concern.

#### ISSUES TO ANSWER:

**Given the established and continuing humanitarian problems, the uncertainty surrounding the full extent of the problem and its causes, the past failure of attempts to alleviate them, and concerns about future usage, the onus for justifying the continued possession and use of cluster munitions rests with user governments.**

As a minimum part of justifying why and how these weapons are acceptable, governments should be able to answer and provide evidence in relation to some basic questions:

*Who bears the burden of risk in conflict?*

- How are decisions taken and documented regarding whether or not the civilian cost from cluster munition use would be excessive in relation to the concrete and direct military advantage anticipated? What is the minimum level of information required about the target area in order to make such a decision? How recent must this data be in order to be considered a reliable basis for decision making? Who are the specific individuals responsible for deciding how this balance is made and whether sufficient evidence exists to make an appropriate decision?
- If military advantages are calculated regarding advantages to the war strategy as whole, in addition to advantages expected in particular tactical encounters, how can the decisions taken be assessed by outsiders to the military? If they cannot, how can confidence be established regarding the appropriateness of such decision making?
- How are the assessments made in relation to the two points above made differently with respect to different forms of weaponry? How is the area effect of cluster munitions, and possible inaccuracy, factored into the assessment of the target area?
- Most of the recent use of cluster munitions in war has taken place in situations where those using cluster munitions have had a considerable air and ground superiority. How do such asymmetrical capabilities affect decision making? How do expectations regarding military losses relate to the burden of risk borne by civilians?<sup>17</sup>

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<sup>16</sup> For a review of official claims and counter-claims about reliability rates see UK Working Group on Landmines, 2000, *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions*, London. See also self-destruct submunitions in Human Rights Watch, 2003, *Off Target: The conduct of the war and civilian casualties in Iraq*, New York.

<sup>17</sup> The following excerpts from the 21 June 2000, UK Parliament Select Committee on Defence, Minutes of Evidence provide an interesting example:

1215. How many refugees and innocent civilians is a pilot worth?  
(*Mr. Hoon*) I do not think it is proper for me to try and deal with that.

1216. In your assessment?  
(*Mr. Hoon*) Judgments are made. Military campaigns inevitably involve risk both for the armed forces of this country and, indeed, for civilians of other countries. That is something which is taken into account which is why we take account of relevant principles of international law both in terms of the targets that we select and, indeed, in terms of the equipment that we utilise.

*The number of unexploded submunitions is unacceptably high:*

- How can appropriate, accurate, realistic and measurable failure rates be determined? How can we measure the composite failure rate of the whole delivery system – rather than only individual munitions?
- In evaluating adherence to any self-imposed failure-rate regime, or evaluating the claims of manufacturers, how would states evaluate failure rates? What would be the sample frame within which failure rates were determined and how would the uneven distribution of failures within that sample frame be evaluated? How can states build confidence in the transparency and accountability of such processes?
- What, if any, exceptions might be made for higher failure-rates due to ‘non-standard’ environmental or other conditions? If such conditions could be established as excusing increased failure rates, and such failure-rates had been determined to afford humanitarian protection, how does employment of cluster munitions in such conditions reflect on commitment to protection of civilians?
- If practical reliability rates were improved how would states ensure that cluster munition use does not proliferate and increase such unacceptable casualties at the time of use and the number of unexploded submunitions are actually increased?
- Given the continuing problems posed by cluster munitions despite previous attempts to modify their use and design, by what criteria and standards will states in the future determine whether the current reforms have been adequate? If these cannot be specified, what is to prevent yet further forestalling of the introducing specific international controls over these munitions in the future (as has taken place in the past)?

## CONCLUSIONS

After 30 years without significant progress towards addressing the concerns raised by civil society regarding cluster munitions, states need to stop killing civilians and start taking responsibility. The first step in this process should be to explain in detail the actual mechanisms by which user states ensure the protection of civilians as required by International Humanitarian Law. In addition they should lay out how a realistic, appropriate and measurable regime could be established for evaluating cluster munition failure rates in real combat situations. States undertaking such processes also need to consider the requirement to build confidence through related mechanisms of transparency and accountability. Such processes are required in order to determine whether there are any grounds to believe cluster munitions can be used in anything other than an irresponsible manner.

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later ...

1219. Was there not a report recently of children killed by a [submunition] left from a cluster bomb in dreadful circumstances? Have there not been other deaths as a result of those failed cluster bomb munitions?

*(Mr Hoon)* To repeat: in a military campaign there will be casualties. We were remarkably fortunate that there were no casualties amongst allied forces in the course of the actual campaign. We all regret that there are civilian casualties in a military campaign but if you want to preserve human rights, if you want to preserve democracy, there are times when it is necessary to use force. That was what we did.