

Chapter 3

Regulations and controls on the use of cluster munitions

3.1 This chapter provides context to the bill by considering the international instruments governing the use of cluster munitions, efforts to develop additional such instruments and unilateral action that has been taken in various countries regarding cluster munitions. Many of the submitters brought these measures to the attention of the committee to help it in developing its view on the bill.

International instruments governing the use of cluster munitions

3.2 The use of cluster munitions is not specifically prohibited or regulated by any international legal instrument, other than the norms of international humanitarian law (IHL) governing the conduct of hostilities. This particularly involves the Geneva Conventions and Additional Protocols. Article 48 of Additional Protocol I requires the parties to a conflict to 'distinguish between the civilian population and combatants, and between civilian objects and military objectives'.¹ Article 51 is also of particular relevance noting that:

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.²

3.3 Article 57 also requires parties to a conflict to take precautionary measures regarding civilian populations and installations during attacks including requirements to:

Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects....Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects....Refrain from deciding to launch any attack 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.³

1 Protocol I: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

2 Protocol I: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

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3.4 The *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* of 1993 and the Geneva Protocol of 1925 for Chemical Weapons outlaw the production, stockpiling and use of chemical weapons, which includes chemical cluster munitions.

3.5 Although conventional or high explosive cluster munitions can function like landmines, they are not specifically covered under the 1997 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and their Destruction* (Mine Ban Treaty or the Ottawa Treaty), which entered into force on 1 March 1999. The treaty prohibits the use of anti-personnel landmines, which it describes as those 'designed to be exploded by the presence, proximity or contact of a person'.⁴ Therefore, sub-munitions that are ERW because they fail to function as designed are not covered by the treaty, whereas those that are specifically designed as anti-personnel mines have been prohibited.

3.6 Another international instrument of relevance to cluster munitions is Protocol V on Explosive Remnants of War to the 1980 Convention on Prohibitions or Restrictions on the Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or to Have Indiscriminate Effects—also referred to as the Convention on Certain Conventional Weapons (CCW). This instrument addresses the use of weapons that cause excessive injury or suffering to combatants or have an indiscriminate impact on civilians. The CCW has protocols restricting the use of landmines, blinding lasers, incendiary weapons, munitions that cause injury by non-detectable fragments, as well as for remedial efforts to minimise the impact of ERW (Protocol V).

3.7 Protocol V was negotiated by the CCW Group of Government Experts and adopted on 28 November 2003. It entered into force on 12 November 2006. The protocol provides for post-conflict remedial measures to minimise the risks and effects of ERW and, therefore, broadly addresses undetonated cluster munitions. It requires states parties to remove ERW and record and transmit information regarding the use of ordnance likely to become ERW to facilitate such removal.⁵ Protocol V only addresses post-conflict measures, and does not delineate any specific preventative measures or refer to particular weapon systems, such as cluster munitions. Nevertheless, Article nine of Protocol V urges states parties 'to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war'. The technical annex prescribes that states producing or procuring munitions should take

4 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 3 December 1997.

5 Protocol V on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 28 November 2003.

appropriate efforts to ensure the greatest reliability possible including with respect to manufacturing, storage and training.⁶

3.8 The Medical Association for Prevention of War (Australia) was concerned that Protocol V does not adequately protect civilians from the effects of cluster munitions. It stated that:

Protocol V sets out the responsibility to clear ERW after weapons have been used. It necessarily leaves civilians vulnerable for the period until the ERW are cleared (and given the impossibility of performing 100% clearance of any given area, indefinitely after that, albeit to a lesser extent). Clearing ERW takes years. In the meantime, civilians either abandon their land or risk death and mutilation.⁷

3.9 Most observers believe that cluster munitions are not inherently indiscriminate and can be used in a fashion consistent with IHL. In its submission to the inquiry, the Australian Red Cross suggested that the use of cluster munitions in densely civilian populated areas would violate IHL and the principles of distinction, discrimination, proportionality and feasible precautions. Also according to the Red Cross, such breaches could be considered war crimes under Article 8 (2) (b) of the Rome Statute of the International Criminal Court.⁸ This article considers war crimes to include:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁹

3.10 On the other hand, a number of submitters argued that cluster munitions are prone to 'misuse'. Human Rights Watch noted that many uses have breached IHL and some uses have been consistently indiscriminate.¹⁰ Indeed, Austcare World Humanitarian Aid suggested that the use of cluster munitions in recent conflicts has demonstrated that the 'fundamental principles of IHL have been undermined'.¹¹ In Dr

6 Protocol V on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 28 November 2003.

7 Medical Association for Prevention of War (Australia), *Submission 6A*, p. 2.

8 The Australian Red Cross, *Submission 9*, pp. 2-4.

9 The International Criminal Court, *Rome Statute of the International Criminal Court*, 16 January 2002, p. 11.

10 Steve Goose, *Human Rights Watch World Report, Cluster Munitions: Toward a Global Solution*, 2004, <http://hrw.org/wr2k4/12.htm> (accessed 22 February 2007).

11 Austcare World Humanitarian Aid, *Submission 2*, p. 3.

Saul's view 'the inability of existing humanitarian law to limit civilian casualties from cluster munitions 'justifies further regulation'.¹²

Efforts to strengthen international instruments

Official government diplomatic efforts

3.11 Most international discussions about the use of cluster munitions have focused on the CCW. The CCW operates on a consensus basis and the third review conference of states parties to the conference was held on 7–17 November 2006 in Geneva. There has been division within the states parties to the CCW about whether cluster munitions are sufficiently regulated by existing IHL or new specific measures are required. Discussions by the Group of Government Experts within the CCW are due to occur in June 2007 to consider the application and implementation of IHL on ERW. The focus will be on cluster munitions, including their reliability and technical and design developments, to minimise their adverse humanitarian impact.

3.12 Due to a perceived lack of progress in the CCW including concerns that the mandate of the June discussions was too limited, in November 2006, Norway commenced a process to develop a new treaty. It would ban certain—as yet undefined—types of cluster munitions that are deemed to cause serious hazards to civilians. The Oslo Conference on Cluster Munitions was held from 21–23 February 2007 and involved representatives from 49 governments, as well as various NGOs and international agencies including the UN, the International Committee of the Red Cross (ICRC) and representatives of the CMC organisations.

3.13 Forty-six of the participating countries agreed that by 2008 they would conclude a legally binding international instrument to prohibit cluster munitions that 'cause unacceptable harm to civilians', establish a framework for cooperation in cluster munition ERW removal and rehabilitation, and continue to address cluster munitions within other forums including IHL and at national levels.¹³ These countries, according to ANBL, included 36 per cent of global cluster munition stockpilers and 50 per cent of the producers.¹⁴ The next meeting towards development of the legal instrument was held in Peru from 23–25 May 2007. Australia attended the Peru meeting and engaged in international negotiations regarding this initiative.¹⁵

12 *Submission 7*, paragraph 8.

13 *Declaration of the Oslo Conference on Cluster Munitions*, 23 February 2007, [http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20\(final\)%2023%20February%202007.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20(final)%2023%20February%202007.pdf) (accessed 5 March 2007).

14 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8A*, p. 2.

15 As the meeting was held after this report was prepared and circulated, the meeting's findings were not considered in the preparation of this report.

3.14 The ICRC held an expert meeting on cluster munitions from 18–20 April 2007 to clarify the technical, legal, military and humanitarian aspects of the use of cluster munitions in order to inform diplomatic discussions and help develop an appropriate international response.¹⁶ At that meeting, Germany provided a draft protocol for the CCW regarding cluster munitions to be discussed at the Peru meeting in May.¹⁷

3.15 Australia supported the proposed June 2007 discussions during the third review conference of states parties to the CCW in November 2006, but did not attend the Oslo Conference. It has supported efforts to impose technical and targeting restrictions on cluster munitions to ameliorate the humanitarian impact, according to the Department of Defence.¹⁸

Non-government and humanitarian organisation views

3.16 There is a broad consensus within the international humanitarian community about the need for additional regulation of the production and use of cluster munitions. In its submission to the inquiry, ANBL pointed out that various treaties—such as the Mine Ban Treaty—have come into force to outlaw previously legal activities, as a result of the codification of moral and ethical constraints.¹⁹ In its submission, MAPW noted that Protocol V of the CCW required additional protections, as it relies on information from the users of cluster munitions, which is often incomplete or not provided. As noted earlier, MAPW also argued that Protocol V does not provide any protections for civilians in the period between the creation of cluster sub-munition ERW and their clearance, which often takes years. MAPW argued that a new treaty on the use of cluster munitions would be an important mechanism for stigmatising and pressuring compliance from recalcitrant states.²⁰

3.17 However, there is debate, including within the CMC, about the scope of any new international instrument. Some NGOs, most notably Handicap International, have proposed a blanket ban on the use of cluster munitions, considering them to be inherently indiscriminate weapons that inevitably create a disproportionate risk for

16 International Committee of the Red Cross, 'ICRC statement to the Third Review Conference of the Convention on Certain Conventional Weapons', 7 November 2006, *ICRC Official Statement*.

17 The German draft has not been considered for this report, as it only became available during the final stages of the report's preparation and will be the subject of ongoing diplomatic discussion before agreement is reached. However, it provides a draft definition of cluster munitions that excludes several sub-munition based weapon systems. It also seeks to immediately prohibit the use of unreliable cluster munitions, phase-out reliable area-saturation cluster munitions and mandate the replacement of the use of these weapons with alternative systems.

18 Department of Defence, *Submission 10*, p. 1.

19 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8A*, p. 1.

20 Medical Association for Prevention of War (Australia), *Submission 6A*, pp. 2-4.

civilian populations. On the other hand, most humanitarian-focused NGOs, including Human Rights Watch and the ICRC, have proposed regulating, rather than banning, the use of cluster munitions.²¹ In November 2006, the UN Secretary General also effectively promoted this view. He pointed out the need for greater adherence to IHL, including cessation of the use of cluster munitions against military assets in or near civilian populated areas. He also advocated an end to stationing military assets in such areas, a freeze on the transfer of cluster munitions that are known to be inaccurate and the development of technical requirements for new weapons to enhance their reliability and reduce their adverse humanitarian impact.²²

3.18 The debate on whether to regulate or ban cluster munitions is partly due to an acknowledgement, among some organisations, of the military utility, legality and discrimination of application of some uses of the weapons, and an anticipation of the probable greater achievability or efficacy of regulation than prohibition. The advocates of regulation focus on some or all of the following: a moratorium on the use of cluster munitions; a ban on use of the weapons in or near civilian populated areas or with high-altitude delivery; a ban on certain types of cluster munitions that are inaccurate, unreliable or not equipped with dependable self-destruct or self-neutralisation mechanisms; and a requirement for mapping and reporting cluster munition use to assist in post-conflict removal.²³

Unilateral action by various states

3.19 While international discussions regarding cluster munitions have been ongoing, some countries have taken unilateral action to limit their involvement with cluster munitions. Many of the submissions to the inquiry cited these measures, particularly the Belgian legislation, the UK bill and the actions taken by Norway.

3.20 In June 2006, Belgium issued a ban on the transportation, export, stockpiling, trade, production and 'carrying' (use) of sub-munitions, which were defined as those designed to separate from a parent munition to fulfil their tasks. A second law was passed clarifying that for the purposes of the ban, cluster munitions and sub-munitions did not include anti-electrical, smoke-producing or illuminating projectiles. They also excluded guided anti-armour sub-munition based systems not designed for area saturation and developed to explode only on impact. The ban also required Belgium to destroy its stockpiles of cluster munitions within three years. In December 2006, the Belgian Senate adopted a bill to prohibit investments in companies associated with the

21 Stephen Goose, 'Humanitarian consequences and international response'. 18 March 2004, Presentation to the Conference *Cluster Bombs: Effective Weapon or Humanitarian Foe*; International Committee of the Red Cross, 'Cluster munitions: ICRC calls for urgent international action', 6 November 2006, *Press Release 06/120*.

22 UN Secretary-General Kofi Annan, *Message of UN Secretary-General to Third Review Conference on Convention on Certain Conventional Weapons*, 7 November 2006.

23 Thomas Nash, 'Stopping Cluster Munitions', 2006, *Disarmament Forum*.

production, use and stockpiling of cluster munitions, and included a list of landmine and cluster munition producers.²⁴

3.21 The UK is also considering legislation that would prohibit the use, production, possession, procurement or transfer of cluster munitions. The definition of cluster munitions has been refined along the lines of that used in the Belgian legislation. For the purposes of the UK bill, cluster munitions are containers that disperse multiple explosive sub-munitions excluding WMD, electronic, landmine, propaganda, pyrotechnic and precision guided sub-munitions equipped with self-destruction or self-neutralisation capabilities.²⁵

3.22 On 20 March 2007, the UK announced that it would immediately unilaterally withdraw all 'dumb' cluster munitions—those without guidance systems, self-destruction or self-neutralisation capabilities—from its arsenal. This comprises 28 million sub-munitions including the air-delivered RBL bomblets and artillery launched MLRS M26 grenades. However, it does not include the Israeli-made M85 sub-munition, which is designed for area saturation but has self-destruction features and was considered to be a legitimate weapon capable of being used in conformity with IHL. The unilateral action was taken for humanitarian reasons. It followed parliamentary consideration of a bill to prohibit a wider range of cluster munitions, a previous commitment to phase out 'dumb' weapons by 2015 and support during the February Oslo Conference for a legally binding international instrument to prohibit cluster munitions that have an unacceptable impact on civilians.²⁶

3.23 In early 2006, Norway announced a moratorium on the use and testing of cluster munitions while it reviewed the reliability of the munitions in its stockpile. The moratorium was extended in October 2006 pending an international agreement about the acceptability of these munitions from a humanitarian perspective, following concerns about the use of cluster munitions in Lebanon. Norway had earlier initiated a self-imposed moratorium on air-delivery of cluster munitions.

3.24 The US is retrofitting 5 000 DPICM projectiles with self-destruction capabilities and in 2001 announced a failure rate requirement of less than one percent

24 Tom Conway, *Cluster Munition Coalition Update: Mines Action Canada*, 25 July 2006, <http://www.minesactioncanada.org/home/index.cfm?fuse=Home.News&ID=213>, (accessed 19 February 2007).

25 United Kingdom House of Lords, *A Bill to Make Provision for the Control of Cluster Munitions; for the Destruction of such Munitions; and for Connected Purposes*, 23 November 2006, pp. 1-2.

26 BBC News, "Britain bans 'dumb' cluster bombs", 20 March 2007, http://news.bbc.co.uk/2/hi/uk_news/6472371.stm (accessed 21 March 2007); "UK to ban 'dumb' cluster bombs – report", 21 March 2007, <http://www2.irna.ir/en/news/view/menu-239/0703190858171351.htm> (accessed 21 March 2007).

for procurement of new sub-munitions.²⁷ On 14 February 2007, four Senators introduced legislation in the US Senate that, if enacted, would prevent funds being appropriated to any Federal department or agency for the purpose of using, selling or transferring any cluster munitions unless the sub-munitions had a 99 percent or higher functioning rate. Furthermore, the munitions would only be used against clearly defined military targets and not where civilians were known to be present or in areas normally inhabited by civilians. Finally, under the proposed legislation, if such cluster munitions were used, the President would be required to submit to the Senate Committee on Foreign Relations and the House of Representatives Committee on Foreign Affairs, 'a plan...for cleaning up any such cluster munitions and sub-munitions which fail to explode and continue to pose a hazard to civilians'. The proposed legislation, however, did contain a presidential waiver that would allow the President, under specified conditions including that it is vital to protect the security of the US, to fund the use, sale or transfer of cluster munitions that had a failure rate of more than one percent.²⁸ The bill has been referred to the Senate Foreign Relations Committee.

3.25 There has been parliamentary discussion on cluster munitions in several other countries, including Austria, Denmark, France, Germany, New Zealand, Norway, Sweden and Switzerland. These discussions also have focused on the adverse humanitarian impact, or the need for a ban or regulation of cluster munitions.²⁹ In many cases the government positions are evolving, still under consideration, or have not yet been clearly articulated. However, those that have been expressed—notably by Austria, Denmark and Germany—tend to convey hesitation about supporting comprehensive bans on cluster munitions. They focus on the need for adherence to IHL in their use and emphasise the importance of only using cluster munitions with advanced technical design specifications to lower failure rates to minimise their legacy as ERW.³⁰

3.26 During the Oslo Conference in February, Austria and Bosnia-Herzegovina also announced national moratoriums. Several other countries including Argentina, Belgium, Canada, Denmark, France, Germany, Portugal, Sweden and Switzerland

27 Human Rights Watch, *Essential Elements for Reducing the Civilian Harm of Cluster Munitions: Examples of Positive Policy and Practice*, (March 2006), <http://hrw.org/arms/pdfs/munitionChart.pdf> (accessed 19 February 2007).

28 A Bill to limit the use, sale, and transfer of cluster munitions, S 594 IS, 110th Congress, 1st Session. <http://www.fas.org/asmp/resources/110th/S594is.htm> (assessed 26 March 2007).

29 Human Rights Watch, *Essential Elements for Reducing the Civilian Harm of Cluster Munitions: Examples of Positive Policy and Practice*, (March 2006), <http://hrw.org/arms/pdfs/munitionChart.pdf> (accessed 19 February 2007).

30 Cluster Munitions Coalition, *New Cluster Munition Coalition Bulletin*, March 2006, <http://www.stopclustermunitions.org/news.asp?id=16> (accessed 23 February 2007); Danish Ministry of Defence, 'Position of the Danish Government on Cluster Munitions', 18 March 2004, *Presentation to the Conference Cluster Bombs: Effective Weapon or Humanitarian Foe*, pp. 1-3; Cluster Munitions Coalition, *Urgent: Ask German MPs to Support Moratorium*, <http://www.stopclustermunitions.org/news.asp?id=36> (accessed 27 February 2007).

have withdrawn from service, or indicated they will not procure—and in some cases deploy—cluster munitions with poor failure rates or lacking self-destruction or self-neutralisation capabilities.

Summary

3.27 In this chapter, the committee considered the international instruments governing the use of cluster munitions. Despite the existence of these instruments, the use of cluster munitions continues to cause death and serious injury to civilian populations. The committee notes that although there is disagreement about the need to ban or regulate cluster munitions, there is considerable momentum regarding the need to prevent the use of designs that cause unacceptable consequences to civilians.

3.28 Parliaments in a number of countries are responding to the inadequacy of current international protocols by considering unilateral action that would better regulate their use of these weapons. The legislation proposed in the different countries varies significantly in the extent of regulation to be imposed on the development and use of cluster munitions. However, these legislative measures consistently have refined the definition of cluster munitions—to different degrees—to allow certain designs that incorporate mechanisms to ensure they have no or minimal adverse humanitarian impact.

3.29 A number of parliamentarians in Australia have also introduced legislation intended to eliminate any possibility of civilians being harmed, killed or put at risk as a result of Australian involvement with cluster munitions. In the following chapter the committee considers this proposed legislation.

