

19 February 2007

The Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
Canberra, ACT, 2600

Submission to Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Cluster Munitions (Prohibition) Bill 2006

The Australian Network to Ban Landmines (ANBL) and the Synod of Victoria and Tasmania, Uniting Church in Australia, welcome this opportunity to make submission on the *Cluster Munitions (Prohibition) Bill 2006*. Both bodies essentially support the proposed Bill and believe that such legislation would send a clear message that the Australian Parliament and Australian Government believe that many commonly used cluster munitions have inherent flaws that render them open to misuse. Moreover, even when not misused they result in a deadly legacy with humanitarian impacts far outweighing any military utility that the weapon system provides.

Both the ANBL and the Synod of Victoria and Tasmania recognise that in the view of government the key test around cluster munitions, and any weapon system for that matter, is does the humanitarian consequences of the weapon system outweigh the military utility the weapon system may offer. Australia has accepted that a case exists that a ban is appropriate for nuclear, chemical and biological weapons as well as anti-personnel landmines. The question to be considered should cluster munitions be added to this list.

1. Definition of cluster munitions

Cluster munitions are munitions (bombs, artillery shells and rockets) that contain two or more submunitions, but more usually in the hundreds, that break open on deployment to rain down the submunitions over a wide area.

2. History of the use of cluster munitions

Table 1. History of the use of cluster munitions (from Human Rights Watch, September 2006).

Date	Location	Details
1943	USSR	Soviet forces use air-dropped cluster munitions against German armour
1943	United Kingdom	German aircraft drop over 1,000 SD-2 “butterfly bombs” in an attack on the port of Grimsby.
1960s – 1970s	Cambodia, Laos, Vietnam	US forces make extensive use of cluster munitions in bombing campaigns. The International Committee of the red cross estimates that in Laos alone 9 – 27 million unexploded submunitions remain, and some 11,000 people have been killed or wounded, of which more than 30% have been children. UN military databases provide an estimate that

		9,500 sorties against targets in Cambodia delivered up to 87,000 air-dropped cluster munitions.
1973	Syria	Israel uses air-dropped cluster munitions against non-state armed group training camps near Damascus.
1975 - 1988	Western Sahara	Moroccan forces use cluster munitions against non-state armed group.
1978	Lebanon	Israel uses cluster munitions in southern Lebanon.
1979 - 1989	Afghanistan	Soviet forces make use of air-dropped and rocket-delivered cluster munitions. Non-state armed groups use rocket-delivered cluster munitions on a smaller scale.
1982	Lebanon	Israel uses cluster munitions against Syrian forces and non-state armed groups during its invasion of Lebanon.
1986	Chad	French air force use air-dropped cluster munitions against a Libyan airfield at Wadi Doum.
1991	Iraq, Kuwait, Saudi Arabia	The US, France, Saudi Arabia and the UK drop 61,000 cluster munitions containing 24 million submunitions. A total of 2,400 explosive dud cluster munitions were detected and destroyed in Kuwait alone in 2002.
1992 -1995	Bosnia and Herzegovina	Forces of Yugoslavia and non-state armed groups use available stocks of cluster munitions during the civil war.
1992 -1997	Tajikistan	Used during civil war.
1994 - 1996	Chechnya	Used by Russian forces against Chechnyans.
1995	Croatia	On 2-3 May 1995 Orkan M-87 multiple rocket launchers used to attack civilians in Zagreb.
1996 -1999	Sudan	Sudanese government forces use air-dropped cluster munitions in southern Sudan.
1997	Sierra Leone	Nigerian ECOMOG peace-keepers use air-dropped cluster munitions on the eastern town of Kenema.
1998	Ethiopia/ Eritrea	Ethiopia and Eritrea exchange artillery cluster munition strikes. Ethiopia attacks the Asmara airport and Eritrea attacks Mekele airport.
1998 -1999	Albania	Yugoslav forces conducted cross-border rocket attacks and there are six NATO aerial cluster munition strikes.
1999	Yugoslavia (including Kosovo)	The US, UK and the Netherlands drop 1,765 cluster bombs, containing an estimated 295,000 bomblets.
2001 -2002	Afghanistan	The US drops 1,228 cluster bombs containing 248,056 bomblets.
2003	Iraq	The US and UK use nearly 13,000 cluster munitions containing an estimated 1.8 million to 2 million submunitions in the three weeks of major combat.
2006	Lebanon	Israeli Defence Forces make extensive use of cluster munitions against Hezbollah.

3. Humanitarian problems with cluster munitions

Cluster bomblets pose a particular danger to civilians compared to other weapon systems because of:

1. the broad area of effect they have;
2. the lack of accuracy;

3. the number of explosive duds left behind; and
4. the size and shape of many unexploded cluster submunitions makes them attractive to children.

3.1 Broad area effect

Many of the commonly used cluster munitions have a broad area of effect, contaminating large areas of land with unexploded live 'duds'. For example the US made CBU-87 and CBU-103 used in Afghanistan contained 202 cluster bomblets and open at a pre-set altitude or time spreading the bomblets over an area ranging from 40m by 60m or 120m by 240m.¹

The US Multiple Launch Rocket System (MLRS) firing unit could sequentially launch twelve rockets containing 7,728 submunitions (dual-purpose grenades) designed to explode on impact into an area of 120,000 to 240,000 m² at a range of up to 32 km.

3.2 Lack of Accuracy

Many of the common types of cluster munitions have low accuracy. An example of this was given by Human Rights Watch in their analysis of cluster bomb strikes in Afghanistan in 2001. Ishaq Suleiman, a village of 12,000 people northwest of Herat, was hit by five cluster bombs, containing 1,010 bomblets, over the course of six days. At least eight civilians were killed during the attacks and four more died later due to contact with unexploded bomblets. The village was located about 1.7 km from the Fourth Armoured Brigade Headquarters of the Taliban. The villagers believed they had been targeted because Taliban soldiers were sheltering in the village. However, US military documents showed that each strike was accidental. The US strikes were actually targeted at the Fourth Armoured Brigade Headquarters, but were so inaccurate that they hit Ishaq Suleiman instead.²

3.3 Explosive duds left by cluster munitions

Many of the submunitions do not explode on impact and then can lie around until touched, when they explode if armed, killing and maiming people for years after a conflict ends. The Geneva International Centre for Humanitarian Demining (GICHD) has assessed the threat from unexploded submunitions is higher than almost all other explosive remnants of war, with their small and attractive shapes leading to misunderstandings of their lethality.³

Deminers in the field regularly report failure rates for cluster submunitions well above the claims made by manufacturers and by military sources, where new cluster munitions are usually tested under ideal conditions and on hard ground.⁴ For example, the UN Mine Action Coordination Centre office in Kosovo reported that the dud rate for all types of cluster bombs dropped on Kosovo was 8%-11%, though deminers quote up to 30%.

The high failure rates of cluster munitions, combined with the large volume of submunitions able to be delivered over a short period of time, leads to particularly severe contamination of a wide area, with contamination both on the surface and underground. The National Demining

¹ Human Rights Watch, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', New York, December 2002, p. 6.

² Human Rights Watch, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', New York, December 2002, pp. 21-23.

³ GICHD, 'Explosive Remnants of War (ERW) – A Threat Analysis', Geneva, 2002, pp. 8-9.

⁴ Human Rights Watch, 'A Global Overview of Explosive Submunitions', May 2002, p. 4.

Office in Lebanon estimated following the 2006 conflict that throughout South Lebanon over one million unexploded cluster munitions contaminate a total of 34 million m².⁵

As an example of the level of explosive duds a cluster munition weapon system can leave behind, consider the MLRS that uses M77 submunitions. The reliability rate for the M77 submunitions is 84% according to a US Department of Defence report to the US Congress on unexploded ordnance published in 2000. Using this reliability rate, the MLRS firing mission described above would result in 1,236 unexploded submunitions scattered randomly in the impact area. Only a trained military expert could tell whether they are armed and hazardous or whether they failed to arm.⁶

In the US Department of Defence Report to Congress on the Kosovo Operation Allied Force on 31 January 2000 it was admitted that “if the submunitions are disturbed or disassembled they may explode, thus, the need for early and aggressive unexploded-ordnance clearing efforts.”

There is no single reason why submunitions fail to operate as designed. However, due to cost considerations, many submunitions have fuses of a significantly lower quality compared to those used for unitary weapons.⁷

A common reason for faults is incorrect assembly or damage to components during assembly that is overlooked during the quality assurance process.⁸ In addition, storage, movement and transportation of the munition can lead to failures if essential procedures are not followed.⁹ The large number of submunitions within a cluster munition increases the likelihood of a fault in at least one part of the weapon being undetected, and storage, movement and transportation increases the likelihood that submunitions will be damaged prior to the munition being used resulting in fired ‘duds’.

The arming mechanism on many cluster munitions is often a vane, ribbon or parachute-like device that is spun or pulled by the air rushing past the munition as it falls. If the device fails to deploy or function as intended, or the distance of travel from the dispenser is not sufficient to arm the fuse, the submunition will not explode on impact. The arming process can then be completed by an unfortunate person who subsequently then disturbs, moves or plays with the submunition.¹⁰

Submunitions can also hit each other and be damaged as they are dispersed from their dispenser, or hit the ground in a position that fails to set off their impact fuse. Impact fuses require the submunitions to hit the target or ground at close to perpendicular.¹¹ Parachute-like or ribbon devices attached to submunitions were intended to overcome this problem. However, parachutes and other deceleration devices can cause the submunition to get hung-up on trees and vegetation or on structures. Alternatively, trees and vegetation can slow the

⁵ Electronic Information Mine Network, <http://www.mineaction.org/overview.asp?o=540>. Accessed 7/2/2007.

⁶ Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 1.

⁷ Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 4.

⁸ The UK Working Group on Landmines, ‘Cluster Bombs – The military effectiveness and impact on civilians of cluster munitions’, August 2000, p. 25.

⁹ The UK Working Group on Landmines, ‘Cluster Bombs – The military effectiveness and impact on civilians of cluster munitions’, August 2000, p. 25.

¹⁰ Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 4.

¹¹ Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 5.

submunitions to the point that they have insufficient energy to explode on impact.¹²

The topography that submunitions land on can effect the number of unexploded duds. Landing on muddy or soft ground can create larger numbers of unexploded submunitions. The US Army manual on techniques of observed fire instructs troops that cluster munitions “should not be fired into forests; mountainous areas (slope greater than 60 percent); or rocky, uneven terrain. This type of terrain may increase the dud rate and reduce the effectiveness of the rounds. Also the effectiveness of ICM [Improved Conventional Munition] and DPICM [Dual Purpose Improved Conventional Munition] rounds may decrease if the target area is marshy or covered with deep snow or water.”¹³

To increase functional reliability, newer cluster munitions incorporated two or more redundant fuse systems, yet high failure rates remained. The BLU (Bomb Live Unit)-97 CEM (Combined Effects Munition) used in Kuwait, Iraq, Yugoslavia (including Kosovo) and Afghanistan has two independent fuse systems (one is an “all-ways fuse” that is capable of functioning at any angle of impact). In Kosovo the failure of the BLU-97 CEM submunitions was documented by deminers at 7%.¹⁴ Given that the cluster bomb containing the BLU-97 CEM submunitions contains 202 of these submunitions, a typical strike by one such bomb in Kosovo would have resulted in 14 unexploded bomblets.

3.3.1. Threat to refugees and displaced populations

Cluster submunitions pose a particular threat to refugees and those returning to their homes in areas of former conflict, who have to live with and around the contamination and threat unexploded submunitions cause. For example, the Korokon Camp for internally displaced persons in Eritrea was an example of people having to co-exist with this threat in their place of refuge. Housing thousands fleeing from war, the Korokon camp was first visited by HALO Trust two years after it was established.¹⁵ They found and destroyed 402 BL755 submunitions manufactured by the UK in the playground of the school and rough grazing land nearby. The failure rate of these submunitions in Eritrea is estimated by HALO Trust to be upwards of 29%.¹⁶

3.3.2 Post-conflict reconstruction and development

Where people fear to use the land because of the presence or suspected presence of cluster submunitions, and indeed any unexploded ordnance (UXO), the economy of the family and wider community are affected. Where they litter the land, the presence of cluster munitions prevents the use and rehabilitation of infrastructure and resources, including housing, water and irrigations systems, paths and roads, schools, clinics, markets, and religious centres such as temples and churches. They can also have a severe effect on development, exacerbating poverty by restricting the agricultural land able to be used, the community resources available, and commercial activities resuming.¹⁷

¹² Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 5.

¹³ Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 5.

¹⁴ Human Rights Watch, ‘A Global Overview of Explosive Submunitions’, May 2002, p. 5.

¹⁵ HALO Trust are an international demining organisation.

¹⁶ Landmine Action, ‘Explosive Remnants of War – Unexploded Ordnance and Post-conflict Communities’, March 2002, p. 52.

¹⁷ Landmine Action, ‘Explosive Remnants of War – Unexploded Ordnance and Post-conflict Communities’, March 2002, p. 55.

The denial of agricultural land due to contamination, or even the mere suspicion of contamination, can leave a family poverty stricken, particularly in subsistence communities. Families and villages who have no other economic options than farming contaminated land will be left with no choice but to continue their farming, resulting in statistics that show a high proportion of the UXO accidents in general occur when people are going about their daily economic activities.¹⁸

In Lao PDR, almost three quarters of casualties occurred while farming, tending animals, and other livelihood activities in rice paddies, fields and in the village. In Lebanon, both before and after July 2006, most casualties occurred near the home, while people were inspecting conflict damage, trying to salvage crops, or just walking around.¹⁹ The percentage of casualties that occur while carrying out such activities shows the direct economic impact of the presence of cluster munitions on an individual's, family's and community's life. Males represent 84% of casualties recorded, and constitute a similar percentage of casualties carrying out livelihood activities.²⁰ In many cluster submunition affected countries males are the breadwinners. As such the socio-economic loss for individual victims and their families for the immediate and distant future can not be underestimated.

Southern Lebanon's rural economy relies on agricultural production. After the recent war much of the farmland was and continues to be littered with unexploded submunitions, making it dangerous and inaccessible to farmers. According to one farmer "The season is gone. Our economic situation's getting desperate. Even if the UN came now, it's too late - the olives are spoiling. It's the same for everyone on this area. We live off the land".²¹ The UN estimates that the war in Lebanon has cost this vital agriculture industry some US\$280 million. It has left them facing "a downward spiral of debt and poverty". Mohammed Mokahhal, a farmer from the eastern Bekaa Valley, has stated that, "I personally lost over US\$35,000. I couldn't harvest my potatoes or tend to vegetables like lettuces and peas which I had planted a week before the Israeli attacks began. And even when I managed to pick some I couldn't transport them to the market because of the threatening situation".

In southern Lebanon, farmers usually repay their debts during harvest period (May-October), to secure credit for the following planting season. But this year their ability to repay these debts has been severely reduced, making it impossible to start the new cropping cycle due to the lack of working capital. There is much concern that this will lead to a downward spiral of debt and poverty for the Lebanese farmers.²²

Similar to the issues that arise from clearing landmines in a post-conflict environment, costs of clearance are related to cluster submunitions is greatly dependent on the area of suspected contamination rather than the number of unexploded submunitions present. As the manager of the United Nations mine clearance operations in Kosovo explained: "...because of the characteristics of the weapon we have to search large areas of land in order to clear an area to

¹⁸ Landmine Action, 'Explosive Remnants of War – Unexploded Ordnance and Post-conflict Communities', March 2002, p. 26.

¹⁹ Handicap International, 'Fatal Footprint – The Global Human Impact of Cluster Munitions', November 2006, p. 43.

²⁰ Handicap International, 'Fatal Footprint – The Global Human Impact of Cluster Munitions', November 2006, p. 43.

²¹ Injuries in Lebanon Revive Bid to Ban Cluster Bombs, Christian Science Monitor, 7 November 2006.

²² Farmers seek government help to escape downward spiral of debt, 10 December 2006.

the required humanitarian standards. Whether the failure is one of one percent or 20 per cent we still have to search the entire area to clear all submunitions.’²³

Furthermore, as unexploded cluster submunitions can be very sensitive to movement they must be destroyed where found, making them especially challenging for clearance operators.

Parachutes or ribbon-like extensions from submunitions being caught in trees and vines has occurred in places like Afghanistan and Kosovo and most recently throughout the olive and grape groves in southern Lebanon. In the post-conflict period civilians have been injured and killed by submunitions that have been dislodged from the trees in reconstruction and by high winds. The submunitions have armed as they fall to the ground and exploded on impact.²⁴

3.4 Children as disproportionate casualties of cluster munitions

I went with my cousins to see the place where NATO bombed. As we walked I saw something yellow – someone told me it was a cluster bomb. One of us took it and put it into a well. Nothing happened. Later I went back to the bomb and put it in this position [vertical]. We began talking about taking the bomb to play with and then I just put it somewhere and it exploded. The boy near me died and I was thrown a metre in the air. The boy who died was 14 – he had his head cut off. I was near him and another boy who tried to help me.

13-year-old boy in Pristina Hospital, having undergone a double leg amputation.²⁵

*In 1993, nine-year-old Phonsay was playing in the fields when a friend found what he thought was a ball and threw it at him. Fortunately, Phonsay missed the catch. The ball was, in fact, a cluster bomb. Phonsay does not remember much of what happened next. An explosion caused burning shrapnel to tear a hole in his skull and left him unconscious. When he regained consciousness 25 days later, he discovered that brain damage had left him hemiplegic – he had lost the use of his entire left side. Although he can now talk and is able to walk, he still has difficulty comprehending how he became a casualty of a war that ended long before he was born.*²⁶

Children make up a disproportionately large percentage of civilians who are injured and killed by cluster bombs. A study released by Handicap International in November 2006, *Fatal Footprint: The Global Human Impact of Cluster Munitions*, identified 11,044 casualties due to cluster munitions, 27% of whom were children. The report found that cluster submunition incidents involve more people at a time, are more fatal and result in more multiple injuries than mines or any other explosive remnants of war.

Curious and inquisitive by nature, children are more likely to pick up and play with cluster submunitions they find without knowing what they are. The size, shape and sometimes bright colours of cluster submunitions attract a child’s attention. The bright yellow colour and parachutes (decelerator) of the BLU-97 CEM cluster submunitions dropped by the US Air Force on Kosovo, Afghanistan, Iraq and Kuwait made them particularly attractive to children.

²³ The UK Working Group on Landmines, ‘Cluster Bombs – The military effectiveness and impact on civilians of cluster munitions’, August 2000, p. 26.

²⁴ The UK Working Group on Landmines, ‘Cluster Bombs – The military effectiveness and impact on civilians of cluster munitions’, August 2000, p. 26.

²⁵ The UK Working Group on Landmines, ‘Cluster Bombs – The military effectiveness and impact on civilians of cluster munitions’, August 2000, p. 5.

²⁶ Bombs of Laos, geographical.co.uk, October 2005, p 50.

In addition, the spherical US bomblets scattered throughout Lao PDR and Cambodia resembled balls that children might be attracted to.

The presence of unexploded submunitions results in a significant downturn in the quality of life of children. In the words of one Lebanese father "All the children are too scared to go out now. They just play on the main roads or in our houses. It's as if the war hasn't ended for us".²⁷

3.5 Examples of Humanitarian Impacts of Cluster Munitions from past Conflicts

3.5.1 Lao PDR

Lao PDR was extensively bombed with cluster bombs by the US air force during the Vietnam War. The International Committee of the Red Cross (ICRC) has estimated that there have been 11,000 dead and injuries from unexploded ordnance since an end to the war in 1975, with 30% of the casualties being children. It has been estimated that 44% of the casualties are from unexploded cluster bomblets.²⁸

The ICRC estimated in 2003 that there were still between 9 and 27 million unexploded submunitions in Lao PDR.²⁹

3.5.2. 1991 Gulf War

In the 1991 Gulf War US and UK forces dropped over 13 million cluster bomblets and over 11 million cluster submunitions from artillery and rockets on Iraq and Kuwait. The most commonly used submunition was the Mk118 which was estimated to have failure rates of the order of 20 – 40% due to insufficient drop heights and its use on soft sand.³⁰

Human Rights Watch (HRW) reported that by February 1993 unexploded bomblets had killed 1,600 civilians and injured 2,500 and that 60% of victims were children under the age of 15. HRW further reported that even in 2002 clearance teams in Kuwait were still finding and destroying 200 'dud' submunitions per month.

3.5.3. Kosovo and Serbia

HRW reported that in the war against Serbia, between 90 and 150 civilians were killed by the 1,765 cluster bombs dropped by NATO forces, representing an estimated 18-30% of all civilian casualties even though cluster bombs were just 6% of the ordnance used during the war.³¹ The International Committee of the Red Cross (ICRC) reported that from June 1999 to May 2000 at least 50 civilians were killed and 101 injured by unexploded bomblets in Kosovo and Serbia. ICRC data from the post-conflict period in Kosovo found that cluster bombs were responsible for five times as many victims under the age of 14 than anti-personnel landmines.

The lethality rate for clusters (31.7%) was almost two and a half times higher than of

²⁷ Injuries in Lebanon Revive Bid to Ban Cluster Bombs, Christian Science Monitor, 7 November 2006.

²⁸ Brian Rappert and Richard Moyes, 'Failure to Protect: A case for the prohibition of cluster munitions', Landmine Action, London, August 2006, p. 5.

²⁹ Brian Rappert and Richard Moyes, 'Failure to Protect: A case for the prohibition of cluster munitions', Landmine Action, London, August 2006, p. 5.

³⁰ Brian Rappert and Richard Moyes, 'Failure to Protect: A case for the prohibition of cluster munitions', Landmine Action, London, August 2006, p. 8.

³¹ Human Rights Watch, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', New York, December 2002, p. 2.

landmines (12.9%), and cluster munitions were six times more deadly than other ordnance.³²

In Kosovo, submunitions have made up 16.6% of all explosive remnants of wars cleared in the post conflict period.³³ By May 2002 an estimated 8,100 submunitions had been removed, with an estimated 59% of contaminated areas fully cleared.³⁴

In 2004, there were still 75 areas identified by KFOR that were contaminated by cluster munitions.³⁵

In terms of military utility of cluster munitions used in Kosovo, the UK used 530 cluster bombs containing 78,000 cluster submunitions in Kosovo but according to General Sir Hugh Beach their use “in the course of the campaign may have resulted in the destruction of as few as 30 major items of military equipment.”³⁶

3.5.4. Afghanistan

HRW reported that the US dropped approximately 1,228 cluster bombs containing 248,056 bomblets between October 2001 and March 2002. Further, that between October 2001 and November 2002 at least 127 civilians had been killed or injured by cluster bomblets.³⁷ Of the civilian casualties, 87 (or 69%) were children under the age of 18.

In Herat, from October 2001 to June 2002, cluster bomblets killed 44% of their victims and mines 21%. Cluster bomblet duds also killed four times as many civilians as other types of unexploded ordnance and had higher lethality rates.³⁸

3.5.5. The 2003 Gulf War

The US Administration has admitted that at least 1,500 cluster bombs were used by US forces in Operation Iraq Freedom. A total of some 350,000 submunitions were used on Iraq. HRW has confirmed that submunitions were used in populated areas of Baghdad and other Iraqi cities. The UK forces have admitted using some 11,800 cluster submunitions in the war on Iraq.

Media reports tabulated by independent research organisation ‘Iraq Body Count’ indicated that at least 200 Iraqi civilians were killed by cluster bombs as of 7 May 2003, with a further 172 deaths possibly attributable to cluster munitions. Of this number 147 were killed by unexploded dud submunitions, with approximately half of those killed being children.

3.5.6. Southern Lebanon

Since fighting ceased in Southern Lebanon in August 2006, 30 fatalities and 184 injuries have been reported from all types of unexploded ordnance in the country. According to Lebanon’s

³² Human Rights Watch, ‘Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan’, New York, December 2002, p. 9.

³³ GICHD, ‘Explosive Remnants of War (ERW) – A Threat Analysis’, Geneva, 2002, p. 15.

³⁴ GICHD, ‘Explosive Remnants of War (ERW) – A Threat Analysis’, Geneva, 2002, p. 31.

³⁵ Richard Moyes (ed.), ‘Explosive remnants of war and mines other than anti-personnel mines’ Mine Action Canada, Actiongroup landmine.de, landmine action, March 2005, p. 10.

³⁶ International Security Information Service, “Cluster bombs: a case for banning?” Briefing Paper No. 79, February 2001.

³⁷ Human Rights Watch, ‘Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan’, New York, December 2002, p. 1.

³⁸ Human Rights Watch, ‘Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan’, New York, December 2002, p. 9.

National Demining Office 95% of all casualties have been caused by cluster submunitions.

Eight of the 30 people killed since the end of the conflict in 2006 have been demining personnel, and 20 of those injured have been mine clearers. Many of those injured have been maimed for life.

During the conflict the Israeli army fired between 2.5 to 4.5 million cluster submunitions on Lebanese land.³⁹ The United Nations Mine Action Coordination Centre has identified more than 800 cluster munition strike locations in southern Lebanon. This resulted in more than one million unexploded submunitions contaminating a total of 34 million m². So far only 58,000 submunitions have been discovered and removed by clean up teams.⁴⁰ According to the UN the failure rate of cluster submunitions is as high as 40%.

As recent conflicts in Iraq and Lebanon have shown, the reliability of self-destruct mechanisms is open to question. In Lebanon, since the ceasefire, large numbers of unexploded submunitions with self-destruct mechanisms have been found. M85 cluster submunitions are manufactured in Israel and were used by Israeli ground forces during the recent conflict and by UK forces in Iraq in March 2003. The UK Government has argued that the self-destruct mechanism means they leave very small numbers of unexploded ordnance, stating the failure rate to be as low as 1%. However, there appears to be no evidence to back these claims and little consistency in the government's statements on the issue. In 2003, Secretary of State for Defence, Adam Ingram cited a 2% failure rate for the M85⁴¹ but by November 2006 his statements indicate a failure rate of 5%.⁴²

The UK's statements of low failure rates of the M85 are not supported by evidence gathered in the field. UN officials in southern Lebanon stated in November 2006:⁴³

"We can state categorically that we are finding large numbers of unexploded M85 submunitions that have failed to detonate as designed and failed to self-destruct afterwards. In effect these submunitions have failed twice. These M85 submunitions are even more dangerous than other types because the self-destruct mechanism makes them more problematic to deal with and where ever possible they are destroyed in situ."

As of 29 August, the UN MACC Southern Lebanon reported that 2,171 submunition duds had been located and destroyed, in just two weeks of operations. This total did not include submunitions cleared by the Lebanese Army or Hezbollah. It consisted of 820 M77 MLRS submunitions, 715 M42 artillery submunitions, 631 M85 artillery submunitions, and five BLU-63 aerial bomblets. The number of M85 duds is most striking.⁴⁴

Kevin Bryant, Senior Technical Advisor for clearance projects, Handicap International has noted that the M85 submunitions, although fitted with a self destruct mechanism, suffered an estimated 15% failure which is far in excess of the previously claimed failure rate of 2%.

³⁹ Steve Goose, Statement during the General Exchange of Views, Third Review Conference of the Convention on Conventional Weapons, 8 November 2006.

⁴⁰ Haaretz.com, 'IDF admits targeting civilian areas in Lebanon with cluster bombs', 21 November 2006

⁴¹ Hansard of the UK Parliament 16 June 2003: Column 52W.

⁴² Hansard of the UK Parliament 8 Nov 2006: Column 1548W.

⁴³ Landmine Action Press Release, 'Lords Set to Support Cluster Munitions Ban', Thursday 14 December 2006.

⁴⁴ Human Rights Watch Arms Division, 'First Look at Israel's Use of Cluster Munitions in Lebanon in July-August 2006' Briefing Prepared for the 15th Session of the Convention on Conventional Weapons (CCW) Group of Governmental Experts, 30 August 2006.

4. International Humanitarian Law and Cluster Munitions

The design of such munitions makes them, like anti-personnel landmines, open to easy misuse with consequences that leave a legacy that in some cases, such as Laos, lasts for decades.

It is the view of the ANBL and the Synod of Victoria and Tasmania that most current cluster munitions, by their design, will almost always violate the requirements of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*. It is our view that the Articles violated are 51 and 57.

The relevant parts of Article 51 violated are:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) those which are not directed at a specific military objective;

(b) those that employ a method or means of combat 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. Amongst 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; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

The relevant parts of Article 57 are:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) 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.

Attempts to survey governments with regard to their understanding of IHL has found that they have a variety of understanding as to how the above Articles would apply to the use of cluster munitions. Those governments that consider cluster munitions to have high military utility seek to emphasise the importance of military necessity and those governments (and international non-government organisations) concerned about deleterious humanitarian consequences of the use of cluster munitions seek to emphasise the importance of the general principle of humanity. Thus, there are significant grounds for concern about the adequacy of

the existing rules and principles of IHL as basis for substantially reducing casualties and suffering inflicted by cluster munitions. Despite broad interest by governments in improving munition failure rates as a response to humanitarian concern, the Group of Governmental Experts on explosive remnants of war to the *UN 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* has not yet produced any clear recommendation to clarify how longer term risks are to be evaluated and considered under the existing rules of IHL. Even if the will existed to clarify key terms within IHL, there are reasons for doubting the adequacy of these measures to address the humanitarian impact of cluster munitions because of insufficient will by user states to adequately restrain their use of cluster munitions.⁴⁵

5. Military utility of cluster munitions

The military utility of many cluster munitions lies in the very features that result in their humanitarian problems. Cluster munitions with anti-armour capabilities are most effective against formations of armoured vehicles supported by other vehicles and infantry. The weapon's large area footprint combined with the hundreds of submunitions contained within the cluster munition means that there is a high probability of armoured vehicles being struck directly by the cluster submunitions without each vehicle having to be individually targeted. Infantry and soft-skinned vehicles will be shredded by the shrapnel effects of the submunitions without having to be struck directly.

It is argued that cluster munitions minimise the risk and exposure of aircrews to enemy fire because they facilitate striking a target with a single sortie rather than by flying multiple aircraft over the same target a number of separate times. It is also argued that they are useful against anti-aircraft artillery and surface-to-air missile sites. A further argument is that if cluster munitions are not used in some circumstances, then a larger number of unitary munitions need to be used, which it is argued may cause greater humanitarian impacts than the cluster munitions.⁴⁶ This last argument is countered by the evidence from where cluster munitions have been used that has demonstrated that unexploded cluster submunitions are many more times lethal than other unexploded ordnance.

By the end of the Vietnam War the cluster bomb was entrenched in western military thinking. This was despite the fact that the US appeared to have achieved no sustainable battlefield advantage from using more than 350 million submunitions of many different designs throughout the conflict.⁴⁷

In practice cluster munitions have been used against a wide array of targets, both mobile and static and concrete evidence of their military effectiveness against these targets has not been provided.

Cluster munitions were designed to for use against mass formations of armoured vehicles. Conflict today is moving away from large-scale battles. Alternative technology for attacking armour does exist and is being developed. Whatever the remaining military utility, it is

⁴⁵ Brian Rappert and Richard Moyes, 'Failure to Protect: A case for the prohibition of cluster munitions', Landmine Action, London, August 2006, pp. 19-20.

⁴⁶ Major Thomas J. Herthel, 'On the chopping block: Cluster munitions and the Law of War', The Air Force Law Review, 2001, p. 258.

⁴⁷ The UK Working Group on Landmines, 'Cluster Bombs – The military effectiveness and impact on civilians of cluster munitions', August 2000, p. 6.

outweighed by the humanitarian consequences.

In the view of Human Rights Watch, airdropped cluster bombs appear to be of diminishing importance to the US military, given the prevalence of less expensive precision guided munitions and existing and emerging alternatives to cluster bombs.⁴⁸

There is a new generation of cluster munitions that have emerged that are primarily designed to sense and destroy armoured vehicles without creating antipersonnel effects. Advanced sensors, autonomous guidance packages, and the ability to loiter above a target area are the new features of these advanced submunitions. Instead of several hundred submunitions these systems often carry less than ten (sometimes only two) advanced submunitions. If the submunition is unable to identify, characterise and engage a target, it is typically equipped with a self-destruct or self-neutralising capability.⁴⁹ We are not aware of any evidence that these advanced submunitions have been used in situations where they have generated humanitarian problems. Cost of the submunitions probably restrains their widespread use, in preference to cluster munitions that disperse hundreds of cheap submunitions.

6. The ADF and cluster munitions

Australia does not possess cluster munitions and the Australian Defence Forces do not use cluster munitions. However, Australian forces have been part of conflicts in Afghanistan and Iraq in which Australia's allies have extensively used cluster munitions with devastating humanitarian impacts.

7. Who makes and uses cluster munitions

As of 2002 there were 33 countries that produce at least 208 cluster munitions and 56 countries that possess them. At least nine countries had transferred 30 different types of cluster munitions to at least 45 other countries.⁵⁰

The countries that were producing cluster munitions in 2002 were:

- Argentina
- Belgium
- Brazil
- Bulgaria
- Canada
- Chile
- China
- Egypt
- France
- Germany
- Greece
- India
- Iran
- Iraq
- Israel
- Italy
- North Korea
- South Korea
- Netherlands
- Pakistan
- Poland
- Romania
- Russian Federation
- Singapore
- Slovakia
- South Africa
- Spain
- Sweden
- Switzerland
- Turkey
- United Kingdom
- USA
- Yugoslavia

Belgium is no longer a producer, having introduced domestic legislation banning cluster munitions.

⁴⁸ Human Rights Watch, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', New York, December 2002, p. 2.

⁴⁹ Human Rights Watch, 'A Global Overview of Explosive Submunitions', May 2002, p. 3.

⁵⁰ Human Rights Watch, 'A Global Overview of Explosive Submunitions', May 2002, p. 1.

8. Australian Government's current approach to cluster munitions

The Australian Government has stated that it is concerned about the humanitarian impact of explosive remnants of war (ERW), including unexploded cluster munitions, on civilian populations.⁵¹

The Australian Government has so far not supported the development of a new treaty to ban cluster munitions with unacceptable humanitarian consequences. Instead, the Australian Government has favoured a meeting of governmental experts under the *UN 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* (CCW) “to consider further the application and implementation of existing international humanitarian law to specific munitions that may cause explosive remnants of war, with particular focus on cluster munitions, including the factors affecting their reliability and their technical and design characteristics, with a view to minimising the humanitarian impact of the use of these munitions.”

The Department of Foreign Affairs and Trade has stated that:⁵²

This mandate represents a comprehensive approach which will give the CCW Experts' Group the flexibility to consider all relevant aspects of ERW, including cluster munitions, international humanitarian law aspects of targeting, and technical measures to increase the reliability of munitions in order to prevent their becoming ERW. This mandate also specifically refers to the meeting called by the ICRC for early 2007, in order to discuss a ban on unreliable cluster munitions.

The Australian Government has also stated that it wishes to wait for more parties to join Protocol V to the CCW, that deals with the clean up of explosive remnants of war in post conflict situations, to see if a further instrument is needed to deal with cluster munitions specifically.

It is the view of the ANBL and the Synod of Victoria and Tasmania that the Australian Government's current approach is inadequate given the obvious unacceptable humanitarian effects that most current cluster munitions generate when used. Further, the ANBL and the Synod of Victoria and Tasmania are concerned that States that are major stockpilers, manufacturers and users of cluster munitions in the CCW will prevent meaningful progress being made within the CCW. This is based on the past experience of their behaviour and positions in the CCW when attempts have been made to address the humanitarian impacts of cluster munitions.

Most of the technical reforms proposed to cluster munitions could only partially address the humanitarian problems caused by cluster munitions and it is unclear that they are a workable basis for enhanced protection or would be sufficiently broadly adopted by countries. Technical modification have tended to focus on 'failure rates' of submunitions, addressing post-conflict contamination but not impact at the time of attacks. Even an obligation for all

⁵¹ Letter from John Sullivan, Assistant Secretary, Arms Control and Counter-Proliferation Branch, Department of Foreign Affairs and Trade, 21 December 2006.

⁵² Letter from John Sullivan, Assistant Secretary, Arms Control and Counter-Proliferation Branch, Department of Foreign Affairs and Trade, 21 December 2006.

submunitions to be fitted with self-destruct mechanisms would still present problems with the reliability of the self-destruct mechanisms.⁵³

The ANBL and the Synod of Victoria and Tasmania are aware of an initiative being organised by Norway to develop a new international treaty that would ban cluster munitions that have unacceptable humanitarian impacts. It is our understanding that at least 30 countries will be part of the first meeting in this initiative to take place in Oslo on 22 – 23 February 2007.

The Norwegian initiative offers an opportunity for states to choose real and meaningful negotiations to establish rules that protect civilians from cluster munitions. The Ottawa process on anti-personnel landmines paved the way for a new type of diplomacy involving multilateral and effective negotiations. The Norwegian initiative offers again the rare opportunity to work towards establishing parameters to reduce injurious civilian harm caused by these weapons, both physically, economically and socially.

The 30 countries which have indicated their involvement to our knowledge are: Argentina, Austria, Belgium, Bosnia and Herzegovina, Chile, Costa Rica, Croatia, Czech Republic, Denmark, Germany, Guatemala, Holy See, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, New Zealand, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden and Switzerland. It is noteworthy that the list includes countries that manufacture cluster munitions.

9. Recommendations

The Australian Network to Ban Landmines and the Synod of Victoria and Tasmania recommend that the Australian Parliament adopt the *Cluster Munitions (Prohibition) Bill 2006* into law.

The two organisations believe that the legislation needs to be amended to ban any assistance by members of the ADF or any other Australian with regard to production, transfer and stockpiling of cluster munitions, in addition to banning ADF members intentionally engaging in military preparations “for a member of the defence force of another country to use cluster munitions, container units or submunitions.”

The organisations also believe that the Australian Government should seek to play a constructive role in the process that has been initiated by the Government of Norway to develop a new international treaty that would ban cluster munitions that cause unacceptable humanitarian consequences.

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⁵³ Brian Rappert and Richard Moyes, ‘Failure to Protect: A case for the prohibition of cluster munitions’, Landmine Action, London, August 2006, p. 2.

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