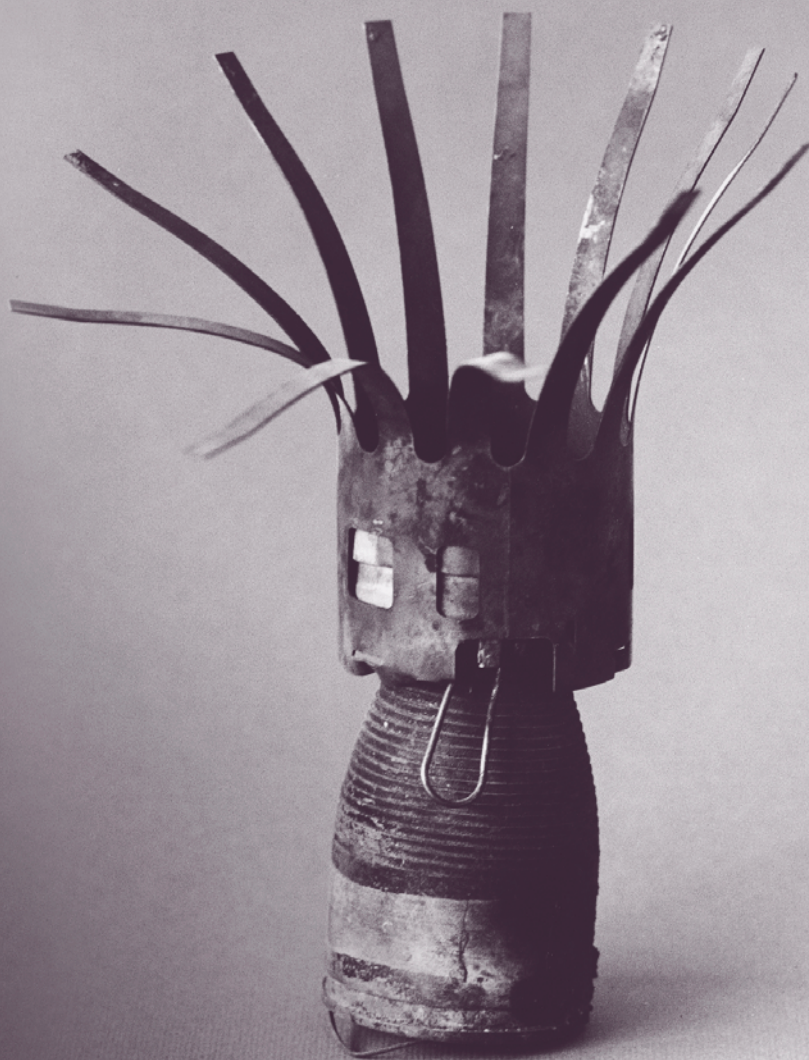


# Out of balance

The UK Government's efforts to understand cluster munitions and international humanitarian law



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THE WORK CONTINUES

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*“As I have said on previous occasions when that issue has arisen, the use of all weapons involves striking a balance. All weapons are capable of damaging the civilian population as well as those against whom they are targeted. It is necessary to strike a balance between not only the risk to civilians, but equally the protection of coalition forces. In relation to the use of cluster bombs, I am confident that the right balance has been struck.”<sup>1</sup>*

**Geoff Hoon MP**

Former UK Secretary of Defence

7 APRIL 2003

**Joan Ruddock MP:** *“To ask the Secretary of State for Defence 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 he has made of the impact of these bomblets on Iraqi civilians in the future.”*

**Adam Ingram MP (Minister of State for the Armed Forces):**

*“No such reviews and assessments have been undertaken by the Ministry of Defence.”<sup>2</sup>*

15 JULY 2003

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1 Hoon, G. *House of Commons Hansard* London: HMSO 7 Apr 2003: Column 29.

2 *House of Commons Hansard* London: HMSO 15 Jul 2003: Column 192W.

# 1.0 Executive summary

*This analysis of UK government practices regarding cluster munitions and the implementation of international humanitarian law (IHL) reveals not just fundamental inadequacies of UK practice but also serious areas of concern for the broader IHL programme.*

International humanitarian law relating to the prosecution of war is founded upon finding a balance between military necessity and a concern for humanity. The principles of IHL pose this balance, but the weighing of the balance must be done in relation to specific cases. The coherence of the arguments and the standards of evidence that are accepted in relation to such processes have a bearing on the protection of civilians not just from cluster munitions, but in all conflicts. Without a careful weighing and the progressive delineation of how this balance is achieved, the principles of IHL are worth little. Without rigour in these processes, the law may become nothing more than a means for the legitimisation of violence – a rhetorical tool to protect military conduct from humanitarian challenge.

This report analyses UK parliamentary statements regarding cluster munitions. It is focused in particular on determining to what extent the UK is equipped to evaluate the proportionality of cluster munition use as is required under IHL. Successive government officials have been confident that the use of cluster munitions has struck an acceptable balance between military needs and protection of the civilian population; but unsubstantiated statements that the rules are obeyed and that cluster munitions are used ‘strictly’ in accordance with humanitarian law does not constitute sufficient proof.

This analysis suggests that over the last 15 years the UK government has done little or nothing to gauge the humanitarian impact of these weapons. As a result, where government officials have determined that ‘an appropriate balance has been struck’ it would appear that they have been working from a fundamentally inadequate base of evidence. Without this evidence, half of the ‘balance’ is necessarily and substantially being misevaluated. With the realisation that the UK’s assertions regarding this ‘balance’ are founded on no

substantial evidence comes a further realisation that in the absence of evidence, the Government systematically gives preference to the military at the expense of increasing risk to the civilian population:

- The UK has undertaken no practical assessments of the humanitarian impact of cluster munitions and does not gather information that would be useful to such assessments (such as the type and country of origin of submunitions found during disposal operations) despite being in a position to do so.
- The UK government is selective in citing data from other organisations regarding the humanitarian impact of cluster munitions. Despite having no comparable data of its own, and despite making little effort to gather such data, officials discredit material from external sources as unsubstantiated or unproven. Seeking to discredit information available on foreseeable humanitarian effects gives preference to military concerns at the expense of possible increased risk to civilians.
- In their analysis of the likely failure rates of cluster munitions, the UK has failed to gather relevant field data and has ignored what field data it does possess in favour of repeating claims of lower failure rates made by the munition manufacturers. Such a practice gives preference to military concerns at the expense of possible increased risk to civilians.
- In describing publicly the military utility of cluster munitions (as part of the process of achieving a balance under IHL) UK officials have neglected to represent internal criticism of these weapon systems and have repeatedly described them in extremely positive abstract terms. Such a practice gives preference to military concerns at the expense of possible increased risk to civilians.
- No substantive evidence has been provided on how UK Forces evaluate and control the humanitarian impact of cluster munition use during operations. Decision making about proportionality can be devolved down to combat crew in certain circumstances.

These macro-level problems regarding the UK's analysis of cluster munitions are supported by various strategies employed by ministers and supportive MPs in response to humanitarian concerns. Through a process of disregarding questions, downplaying humanitarian impact, deflecting responsibility and demanding information of others, UK officials have managed to divert attention away from the fundamental weakness of their case.

The UK's failure to take reasonable efforts to understand the foreseeable effects of cluster munition use, coupled with the employment of these various strategies to avoid addressing central issues, suggests that when considering the balance between the principles of humanity and military necessity, a systematic deference has been given to military concerns. In other words:

**When military considerations are set against consequences for civilians, the former are held to be much more important than the latter.**

## 1.1 Recommendations

Landmine Action repeats its call of 2000 to the British Government for a moratorium on the use, manufacture, sale and transfer of all cluster munitions until the humanitarian problems associated with these weapons have been adequately addressed.<sup>3</sup>

When making that call in 2000, Landmine Action also appealed for an "in-depth review of this weapon type, encompassing use, impact and legality. This review should take place under the auspices of a recognised international body and should include input from civil society as well as the United Nations and the International Committee of the Red Cross and Red Crescent." This review was to serve as a first step towards new international law on cluster munitions.

Since that time the UK has failed to undertake any significant effort better to understand the impact of cluster munition use and has continued to use them. As was foreseeable, these cluster munitions have been a cause of civilian casualties.<sup>4</sup>

It is important therefore to note that Landmine Action's continued call for a moratorium is founded on a concern to allow the proper fora of international humanitarian law to debate these issues. However, the progress of

discussions within the Convention on Conventional Weapons (CCW)<sup>5</sup>, under a mandate that fails to focus clearly on the most important issues, inspires little confidence. Unless the CCW revises the mandate of the Group of Governmental Experts to focus clearly on the threat posed by cluster munitions both at the time of their use and in the post-conflict environment then there is little hope of any effective progress *within* this forum.

Below this political level this report highlights that much more could be done to develop substantive discussion. Rather than relying on abstract speculation, evidence-based arguments would allow for much more effective understanding and analysis of how the balancing process of IHL can be most effectively implemented. Such evidence and discussion are vital if we are to understand what it means both for our national military and for the local civilian population when the UK commits itself to war.

To support the further development of substantive arguments the UK Government should undertake the following:

- In line with US practice, to publish information on cluster munition stocks held by the UK.
- To articulate the reasoning behind the recent classification by the UK Government of the RBL755 as having an "unacceptable" failure rate.
- To explain how the RBL755 can be allowed to remain in service despite being "unacceptable."
- To publish details of cluster munition testing and evaluations to date better to determine the failure rate of specific munitions in different environments.
- To articulate the reasoning behind the choice of munitions for the Guided Multiple Launch Rocket System.
- To articulate how different weapons are considered relative to each other during "collateral damage estimation" or other relevant processes.

Some civil society bodies are already calling for outright prohibitions against cluster munitions. Others still hope that the existing mechanisms of international humanitarian law can serve the purpose for which they were developed. That window of hope is closing.

The overarching goal of states concerned with humanitarian problems of cluster munitions must be to ensure that IHL is used as a mechanism for the appropriate protection of civilians rather than as a fig leaf for belligerents. Within international legal fora such as the CCW, states that simply sit quiet in the face of incoherent arguments and inadequate evidence are failing vulnerable civilian populations now and in the future.

Glossary of common acronyms	
CMC	Cluster Munitions Coalition
CCW	Convention on Certain Conventional Weapons
ERW	Explosive Remnants of War
GGE	Group of Governmental Experts
ICRC	International Committee of the Red Cross and Red Crescent
IHL	International Humanitarian Law
MP	Member of Parliament
MoD	Ministry of Defence
NGOs	Non-governmental Organisation
RAF	Royal Air Force
UK	United Kingdom
UNMAS	United Nations Mine Action Service

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3 McGrath, R. *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions*, London: Mennonite Central Committee and The UK Working Group on Landmines (Landmine Action), 2000: 29.

4 Human Rights Watch (2003), *Off Target*, p.90

5 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.

## 2.0 Introduction

### 2.1 Grounds for humanitarian scrutiny of cluster munitions

Cluster munitions have been a focus of civil society protest since the Vietnam War. As a category of weapons they have been singled out for criticism because of two areas of concern:

#### ***Indiscriminacy at the time of use:***

Cluster munitions are ‘area-effect’ weapons; the target area of the cluster munition strike can contain multiple objects – both military and civilian.

#### ***High failure rates:***

Cluster munitions have been identified as resulting in a particularly high density of dangerous unexploded munitions that present a post-conflict threat to civilians. In this regard cluster munitions are recognised as a particularly problematic component of the problem of explosive remnants of war (ERW).

Landmine Action believes that both of these humanitarian problems need to be addressed. Whilst the availability of evidence regarding post-conflict contamination should not mislead people into seeing the problem of cluster munitions solely as an issue of munition failure rates, Landmine Action does believe that there needs to be a better understanding of how the long-term impact of cluster munitions can be factored into the assessment of proportionality and discrimination at the time of use. This latter point is a central topic of this report, in particular the assessment of proportionality.

All of these arguments are framed by consideration of the texts and practice of International Humanitarian Law (IHL). States and civil society bodies tend to refer to IHL as providing a useful basis for understanding the protection of civilians during armed conflict. However, an examination of the statements offered to support claims to be operating in accordance with IHL reveals startling inadequacies. It is these inadequacies that are the focus of this paper.

### 2.2 The UN Convention on Conventional Weapons: the specific context for this paper

The Convention on Conventional Weapons (CCW)<sup>6</sup> is specifically concerned with weapons “which may be deemed to be excessively injurious or to have indiscriminate effects” and as a treaty it explicitly reaffirms the need “to continue the codification and progressive development of the rules of international law applicable in armed conflict.”<sup>7</sup> The CCW also recognises that in cases not covered by the texts of that treaty, or other international agreements, then the broad rules and principles of IHL still apply. On this basis the CCW would appear to be the appropriate forum for the further codification of IHL with respect to the regulation of cluster munitions.

Within the CCW, the Group of Governmental Experts on explosive remnants of war (ERW) has the following mandate in 2005:

To continue to consider the implementation of existing principles of International Humanitarian Law and to further study, on an open-ended basis, and initially with particular emphasis on meetings of military and technical experts, possible preventive measures aimed at improving the design of certain specific types of munitions, including sub-munitions, with a view to minimize the humanitarian risk of these munitions becoming explosive remnants of war. Exchange of information, assistance and cooperation would be part of this work. The Group will report on the work done to the next Meeting of States Parties.

The reference to sub-munitions in the mandate is an acknowledgement of the specific concerns of some governments, inter-governmental organizations, and non-governmental organizations regarding the humanitarian consequences of cluster munitions.<sup>8</sup> However, the mandate as a whole is not particularly well suited to an effective discussion of cluster munition issues because on the one hand they are subsumed within a much broader issue of ERW and on the other hand, cluster munitions present additional problems outside of this ERW framework.

The 8 March 2004 paper of the Coordinator to the Working Group on ERW<sup>9</sup> suggested government experts undertake a ‘three-step’ approach in considering the implementation of existing principles of IHL:

- In step one, the relevant principles of IHL would be identified.
- In step two, examination would be made of the status of the implementation of these principles by States Parties.
- In step three, the adequacy of the national implementation of relevant IHL principles would be considered to determine whether any further action was necessary.

On the basis of an IHL questionnaire proposed in the March 2005 CCW Meeting of the Group of Governmental Experts (GGE),<sup>10</sup> States Parties exchanged information relevant to step one and two of the ERW mandate during the recent August 2005 GGE meeting. This paper takes discussion on to ‘step three’ – considering the adequacy of national implementation, with a particular focus on the UK.

## 2.3 Rationale for this report

Despite a clear mandate to consider implementation of IHL in relation to ERW, and sub-munitions in particular, little factual data has been forwarded by States Parties regarding the consequences of ERW or cluster munitions. Given this, Landmine Action determined to analyse further the way in which states assess these issues in the hope that this would cast light on the lack of substance in some of the international discussions. *Out of Balance* addresses several general questions with specific reference to cluster munitions:

- What knowledge do user states have of the past humanitarian consequences of cluster munition use?
- How do they, in turn, factor such considerations into their decisions about the meaning of the rules of IHL and what counts as the legitimate use of force?
- Are the existing principles and rules of IHL sufficient in relation to humanitarian concerns?
- If they are inadequate, what more might be done?

This report examines these questions in relation to one user state, the United Kingdom. During the last 15 years the UK has been involved in a number of armed conflicts in which it has used or operated in close coordination with others that used cluster munitions, including the 1991 Persian Gulf War, the 1999 NATO bombing campaign in Yugoslavia, the 2001-2 air campaign in Afghanistan, and the 2003 Iraq War. During that time the UK government has stated repeatedly the importance it attaches to humanitarian law and addressing the problems associated with explosive munitions, including cluster munitions.<sup>11</sup> As such the UK should provide an exemplar case for considering how states assess the humanitarian concerns associated with cluster munitions. As a relatively open and accountable country where successive governments have been obliged to respond to public concerns about cluster munitions, a significant amount of information about UK practices is in the public domain. The information available provides little reassurance.

## 2.4 Methodology

This report is based on a content analysis of entries regarding cluster munitions between 1990 and 2005 in the UK Parliamentary Official Report (*Hansard*). *Hansard* provides a nearly verbatim record of proceedings in the House of Commons and Lords. This includes oral and written evidence, reports, and the proceedings of parliamentary committees and select committees. Box 1 lists some of the guidelines that ministers answering Parliamentary Questions are now meant to follow. A search was conducted for all entries including the words “cluster bomb(s),” “cluster munition(s)” and “cluster weapon(s)” since 1 January 1990.<sup>12</sup> The resulting 900+ entries were then sorted for duplicate entries and substantive significance, and then analysed to identify common themes.



## Ministers' Correspondence with Members of Parliament

'This guidance gives a list of points to be aware of when drafting answers to parliamentary questions.

### 1. Never forget Ministers' obligations to Parliament which are set out in the Ministerial Code:

It is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest.

### 2. It is a civil servant's responsibility to Ministers to help them fulfil those obligations. It is the Minister's right and responsibility to decide how to do so. Ministers want to explain and present Government policy and actions in a positive light. Ministers will rightly expect a draft answer that does full justice to the Government's position.

### 3. Approach every question predisposed to give relevant information fully, as concisely as possible and in accordance with guidance on disproportionate cost. If there appears to be a conflict between the requirement to be as open as possible and the requirement to protect information whose disclosure would not be in the public interest, you should consult your [Freedom of Information] liaison officer if necessary...

### 5. Do not omit information sought merely because disclosure could lead to political embarrassment or administrative inconvenience...'

Cabinet Office, February 2005

■ [www.cabinetoffice.gov.uk/propriety\\_and\\_ethics/civil\\_service/pq\\_guidance.asp](http://www.cabinetoffice.gov.uk/propriety_and_ethics/civil_service/pq_guidance.asp)

## 2.5 Report structure

The structure of the report is as follows:

- The next section examines the core principles and rules in IHL relevant to ERW. In doing so it highlights key topics of disagreement regarding the interpretation and application of IHL.
- Section 4 recounts many of the justifications offered by British government officials for the continued use of cluster munitions, with special reference to the proportionality of this form of force.
- Bearing in mind the points from the legal analysis in Section 3, Section 5 examines the information known by the British government about the civilian casualties and technical reliability of cluster munitions.
- Section 6 briefly examines discussions of 'military effectiveness.'
- In light of the argument in preceding sections, Section 7 further considers how decisions are made about the appropriateness of cluster munitions.
- Section 8 then asks how effectively the UK government is adhering to the principles of IHL in general and the rule of proportionality in particular.
- Finally Section 9 offers some reflections on the relevance of the argument in *Out of Balance* for the future of discussions within the CCW.

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- 6 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.
- 7 Preamble to the CCW (1980)
- 8 UNICEF, *In Iraq, unexploded munitions become child's play* Press Release Baghdad/Geneva: UNICEF 17 July 2003; Landmine Action, *Explosive Remnants of War*, London: Landmine Action, 2002; Pax Christi, *Cluster Weapons: Necessity or Convenience*, Utrecht: Pax Christi, 2005; C. King, *Explosive Remnants of War*, Geneva: International Committee for the Red Cross, 2000; ICRC, *Explosive Remnants of War*, Geneva: ICRC, 2003; Handicap International, *Cluster Munitions Systems: Situation and Inventory*, Paris: Handicap International, 2003; Human Rights Watch, *Cluster Munitions: A Foreseeable Hazard in Iraq*, New York: Human Rights Watch, 2003; and R. McGrath, *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions*, London: Landmine Action, 2000.
- 9 *Note by the Coordinator*, 8th March 2004, Group of Government Experts of States Parties 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 CCW/GGE/VII/WG.1/WP.1
- 10 The questionnaire was proposed by Australia, Canada, New Zealand, Sweden, Switzerland, the United Kingdom, and the United States of America *International Humanitarian Law* and ERW Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.2 8 March 2005.
- 11 For a recent illustration of this see United Kingdom, *Responses to Document CCW/GGE/XI/WG.1/WP.2* Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.7 28 July 2005.
- 12 [www.parliament.uk/hansard/hansard.cfm](http://www.parliament.uk/hansard/hansard.cfm)

## 3.0 International humanitarian law and cluster munitions

In line with the ‘three-step’ approach advocated within the CCW, we begin by identifying the key components of IHL that have a bearing on the analysis of cluster munitions. Although there would appear to be some level of confusion between ‘principles’ (e.g. military necessity and humanity) and ‘rules’ of IHL amongst States Parties to the CCW, at the August 2005 GGE a number of States identified key rules relevant to ERW. These included the

rule on superfluous injury and unnecessary suffering, the rule on environmental protection, the rule of distinction, the rule against indiscriminate attacks, the rule of proportionality, and the rule of feasible precautions.<sup>13</sup> The Additional Protocol I (1977) of the Geneva Conventions provides the most recent formulation of many of these rules. Box 2 lists Articles 51 and 57 from the Additional Protocol.

### BOX 2: ARTICLES 51 & 57 OF THE ADDITIONAL PROTOCOL I (1977) OF THE GENEVA CONVENTIONS

#### Article 51: Protection of the Civilian Population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - those which are not directed at a specific military objective;
  - those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - 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. Among others, the following types of attacks are to be considered as indiscriminate:
  - 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
  - an 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.
6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.
8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

### **Article 57: Precautions in Attack**

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:
  - those who plan or decide upon an attack shall:
    - \_ do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
    - \_ 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;
  - an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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;
  - effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects
5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

### 3.1 UK position on the implementation of IHL

The UK is among the States Parties that have committed themselves to adhering to these rules in armed conflict. In its August GGE submission the UK identified a number of mechanisms for implementing the rules of IHL relevant to explosive submunitions – including the provision of legal advice at the strategic, operational and tactical level, the review of the UK Rules of Engagement, the inter-service development of its *Manual of the Law of Armed Conflict*, service training measures, legality reviews for new weapons, and the legal advice to commanders on targeting.<sup>14</sup>

Despite the relative unanimity among States Parties regarding the identification of the relevant principles and rules of IHL, and the importance of adhering to these proscriptions, just how they should be interpreted is often a matter of disagreement.<sup>15</sup> Nowhere is this perhaps more so than in relation to the rule of proportionality – the focus of this report.

### 3.2 Determining proportionality: military advantage

The Additional Protocol I (1977) of the Geneva Conventions contains two provisions relevant to this rule. Article 51 (5)(b) defines as an indiscriminate attack 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’. Article 57 (2)(a)(iii) requires combatants to ‘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.

As former British Major General A.P.V Rogers has commented, the rule of proportionality ‘is more easily stated than applied in practice’.<sup>16</sup> The meaning of terms such as ‘attack’, ‘excessive’ civilian loss of life and damage, and ‘concrete and direct military advantage’ have been topics of dispute. Prof. Wiebe argues the official US position has been one of interpreting military advantage in a broad fashion to include both

advantages to the war strategy as whole as well as those gained in particular tactical encounters.<sup>17</sup> A stark, informal illustration of how military advantage can be interpreted in broad fashion is given in a news briefing during the 1999 NATO bombing campaign in Yugoslavia when it was put to US Major General Wald that some complaints had been made that unexploded cluster bomblets appear as similar to “small, attractive, bright coloured packages”:

Major General Wald: I hope that doesn’t happen, but I would certainly say that the sooner we have the Serb/MUP forces leave Kosovo, and we can have the Kosovar Albanians get back to a normal life, there are probably going to be a lot more children survive because of that than they would picking up some small object accidentally out in the trees.<sup>18</sup>

In Major General Wald’s formulation the contribution of cluster bombs to the speed of the overall war effort (i.e. getting Serb/MUP force to leave Kosovo) is said to outweigh concerns about the humanitarian effects on children (if there are any). In contrast to the perspective expressed in that account, the *UK Manual of the Law of Armed Conflict* states that:

‘Concrete and direct’ [military advantage] means the advantage to be gained is identifiable and quantifiable and one that flows directly from the attack, not some pious hope it might improve the military situation in the long term.<sup>19</sup>

Echoing conclusions made by other states,<sup>20</sup> the manual goes on to say that “in deciding whether an attack would be indiscriminate, regard must also be had to the foreseeable effects of attack.”<sup>21</sup>

### 3.3 Determining proportionality: impact on civilians

Just as what should count as military advantage is conceived in different ways so too is how to factor in incidental loss of civilian life, civilian injuries and damage to civilian objects. Much depends on what are deemed the ‘foreseeable effects’. In an independent legal analysis of IHL regarding ERW, Christopher Greenwood, QC of the United Kingdom argued that only the immediate risk from ERW should count in determinations of proportionality:

If, for example, cluster weapons are used against military targets in an area where there are known to be civilians, then the proportionality test may require that account be taken both of the risk to the civilians from sub-munitions exploding during the attack and of the risk from unexploded sub-munitions in the hours immediately after the attack. It is an entirely different matter, however, to require that account be taken of the longer-term risk posed by ERW, particularly of the risk which ERW can pose after a conflict has ended or after civilians have returned to an area from which they had fled. The degree of that risk turns on too many factors which are incapable of assessment at the time of the attack, such as when and whether civilians will be permitted to return to an area, what steps the party controlling that area will have taken to clear unexploded ordnance, what priority that party gives to the protection of civilians and so forth. The proportionality test has to be applied on the basis of information reasonably available at the time of the attack. The risks posed by ERW once the immediate aftermath of an attack has passed are too remote to be capable of assessment at that time.<sup>22</sup>

In direct response to such an interpretation of foreseeable effects, the ICRC has argued that:

Implementing the rule of proportionality during the planning and execution of an attack using cluster

munitions must include an evaluation of the foreseeable incidental consequences for civilians during the attack (immediate death and injury) and consideration of the foreseeable short and long term effects of submunitions that become ERW.<sup>23</sup>

Whereas in the past (and in certain situations today) long term effects might not have been reasonably foreseeable, the ICRC has argued that the now extensive experience of the post-conflict effects of cluster munitions means the application of the proportionality rule should include long term considerations.<sup>24</sup> Similarly, at a presentation of the July 2005 GGE meeting, Prof. McCormack of the University of Melbourne contended that despite the uncertainty about the effects of ERW, there was now enough operational experience with cluster munitions to include their long term effects into determinations of proportionality. As such:

The balancing test requires commanders and planners to take into account the expected damage to civilian property and the expected loss of civilian life, it should be both the short-term as well as the longer-term expectation that ought to be part of the equation.<sup>25</sup>

At stake in these disagreements about the application of the proportionality rule are not only questions about how to interpret certain terms, but also how determinations of adherence to or deviation from the principle of proportionality can be made.

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- 13 See ICRC, *Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that may become Explosive Remnants of War*. Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.7 28 July 2005.
- 14 United Kingdom of Great Britain and Northern Ireland, *Responses to Document CCW/GGE/XI/WG.1/WP.2, Entitled IHL and ERW, dated 8 March 2005* Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.1 24 June 2005.
- 15 For contrasting non-government legal assessments of the cluster munitions see Weibe, V. 'Footprints of death', *Michigan Journal of International Law*, 2000, vol. 22(1), 85-167; Hulme, K. (forthcoming) 'Of Questionable Legality: The Military Use of Cluster Bombs in Iraq, 2003' *Canadian Journal of International Law*; Major Herthel 'On the chopping block', *Air Force Law Review*, 2001, vol. 22, 229-269; McDonnell, T. 'Cluster bombs over Kosovo', *Arizona Law Review*, 2002, vol. 44(1), 31-130.
- 16 A.P.V Rogers *Law on the Battlefield* Manchester: Manchester University Press, 1996: 17
- 17 Weibe, V. 'Footprints of death', *Michigan Journal of International Law*, 2000, vol. 22(1), 85-167.
- 18 See Department of Defense. *DoD News Briefing* 13 May 1999 Available: [www.defenselink.mil/transcripts/1999/t05131999\\_t0513asd.html](http://www.defenselink.mil/transcripts/1999/t05131999_t0513asd.html) (accessed on 11 May 2004).
- 19 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* Oxford: Oxford University Press, 2004: 86
- 20 France, *Explosive Remnants of War and International Humanitarian Law* Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.17 11 August 2005.
- 21 Ibid
- 22 Christopher Greenwood QC, *Legal Issues Regarding Explosive Remnants of War* Group of Government Experts of States Parties 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 CCW/GGE/I/WP.10 23 May 2002, p.8. It is noticeable that in Greenwood's formulation the "factors incapable of assessment" are all factors that might serve to reduce the risk (prevention of civilians entering the area, clearance of the ordnance etc). So Greenwood suggests a situation where the information 'reasonably available' is that an ERW threat will be created, and the unknown factors are the extent to which that threat would be mitigated by other interventions. He then suggests that the known threat should not be factored into the proportionality assessment because of the unknown nature of possible mitigating factors.
- 23 See ICRC, *Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that may become Explosive Remnants of War*. Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.7 28 July 2005: 4.
- 24 As it went on to state, "When these weapons are used in or near populated areas the long-term consequences of unexploded submunitions upon civilians are readily foreseeable. If civilians are already present in a target area, they will predictably need to gather food and water, travel, seek medical care and conduct other daily activities which put them at risk from unexploded submunitions. If they have left the area during the hostilities, it is predictable that they will return at the earliest opportunity and be at risk from unexploded submunitions." *Ibid*.
- 25 McCormack, T. "International Humanitarian Law Principles and Explosive Remnants of War" Presented to the CCW GGE 11th session in Geneva, 2 August 2005.

## 4.0 UK arguments: the right balance has been struck

### 4.1 UK types and use of cluster munitions

UK armed forces possess artillery-delivered cluster munitions (such as the multiple launch rocket system MLRS, the 155 mm HE L20A1 extended range bomblet shell, and the 155 mm HE M483A1) and air-delivered cluster munitions (RBL755). Unlike countries such as the US though,<sup>26</sup> the UK does not make figures on the stockholding of such munitions public.<sup>27</sup>

During the last 15 years, the UK has employed artillery- and air-delivered cluster munitions in a number of conflicts. Official figures about usage in the 2003 Iraq War differ somewhat,<sup>28</sup> but the MoD indicates that 70 RBL 755 cluster bombs were dropped, mainly around Baghdad.<sup>29</sup> In addition, approximately 2,000 L20A1 extended range bomblet shells were fired, mainly around Basra. While the UK itself did not employ any cluster munitions in the bombing of Afghanistan, it did act in coalition with the US which used 1,228 cluster bombs containing a total of 248,056 bomblets.<sup>30</sup> In Operation Allied Force in Yugoslavia, 531 RBL 755 cluster bombs were dropped by Harrier GR7 aircraft, and this amounted to over 50 per cent of the total munitions use by the Royal Air Force in the course of this operation.<sup>31</sup>

### 4.2 Cluster munitions as legal weapons – striking the balance

Throughout these conflicts successive British governments have argued that cluster munitions were effective, necessary, and appropriate force options. Even after the 2003 Iraq War, with years of humanitarian concerns raised by inter-governmental agencies and NGOs about such weapons, officials have maintained this stance. When questioned in May 2004 about whether the UK government would support calls such as those made by Landmine Action, the Cluster Munitions Coalition (CMC) and others for a moratorium on the use, production or trade of cluster munitions, Adam Ingram (Minister of State for the Armed Forces) responded:

No. Cluster bombs are legal weapons that are not indiscriminate. They provide a unique capability for use against wide area or dispersed targets. Were we not to use them, it would be necessary to use a large number of either unitary bombs or artillery shells to cover an equivalent area, involving a greater tonnage of explosive. Increasing the number of munitions launched also increases the risk that one or more launches may go astray. In many instances, using munitions other than cluster bombs may pose a far greater risk to civilians at the time of attack.<sup>32</sup>

A central argument employed to counter concerns about the humanitarian impact of cluster munitions has been that their use has struck the right balance between competing principles about appropriate force. In a question of April 2003, Elfyn Llwyd MP asked:

The Secretary of State referred to the use of minimum force and the need to minimise Iraqi civilian casualties. Does not the continued use of cluster bombs make that more difficult, and in due course will it not make the huge task of reconstruction much more difficult and dangerous?

The former Secretary of Defence Geoff Hoon responded that:

[...] use of all weapons involves striking a balance. All weapons are capable of damaging the civilian population as well as those against whom they are targeted. It is necessary to strike a balance between not only the risk to civilians, but equally the protection of coalition forces. In relation to the use of cluster bombs, I am confident that the right balance has been struck.<sup>33</sup>

A week later Hoon reiterated this conclusion that the right balance had been struck:

Cluster bombs are only used strictly in accordance with international law. This includes the principles [sic: rules] of distinction and proportionality as well as precautionary measures to be taken in planning and conducting an attack, as contained in the First Additional Protocol of 1977 to the Geneva Conventions of 1949.<sup>34</sup>



As hinted at in the quotation above from Minister Ingram, it has long been asserted that the only alternatives to the use of cluster munitions would have an even greater negative impact on the civilian population. Again Secretary of Defence Hoon spoke to this in stating:

Essentially cluster bombs are an effective weapon against what are known as wide-area targets, so for armoured columns, groups of lighter-skin vehicles, cluster bombs are extraordinarily effective. I think one of the issues that those criticising the use of cluster bombs have to face up to is not only the impact on our own forces if we fail to prosecute an attack in those circumstances where we had a suitable weapon, but, for example, what would then happen if we dropped much heavier equipment, and clearly there are heavier bombs than the bomb that comprises a cluster bomb, we would have to drop many more such weapons with the obvious and consistent consequence that some of those might fail with still more catastrophic consequences. I am not suggesting that we are in any way other than extraordinarily sensitive to the potential impact of

unexploded ordnance. We keep records of where cluster bombs have been used and, as I have repeatedly said, it is, generally speaking, British servicemen and women who are charged with the task of clearing up those sites.<sup>35</sup>

This response suggests that those that criticise cluster munition use are effectively calling for policies that would have an even greater negative impact on the civilian population.<sup>36</sup> It is noticeable that in this response Hoon talks about the possibility of the *failure* of alternative weapons causing “still more catastrophic consequences.” This could be taken as indicative of concern within the ‘balancing’ process regarding the longer term impact of unexploded munitions. However, although the conclusions that Hoon draws may be “obvious and consistent” to him they are not supported by any analysis of how post-conflict populations relate to unexploded ordnance in their environment and are in fact contrary to much such evidence<sup>37</sup>. As we will see in the section that follows the UK Government has so far failed to produce any evidence that it has analysed the humanitarian impact of cluster munitions or even collected the basic evidence that would begin such a process.

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26 Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), *Report to Congress: Cluster Munitions* Arlington, VA: DoD October 2004.

27 See *House of Commons Hansard* London: HMSO 14 Mar 2003: Column 431W.

28 See Benn, H. *House of Commons Hansard* 5 Nov 2003: Column 657W.

29 Ministry of Defence. *Operations in Iraq: First Reflections*, July 2003.

30 Human Rights Watch, *Fatally Flawed: Cluster Bombs and their Use by the US in Afghanistan*, Washington, DC: Human Rights Watch, 2002.

31 Baroness Symons of Vernham Dean *House of Lords Hansard* London: HMSO 9 Apr 2001: Column WA145.

32 Ingram, A. *House of Commons Hansard* London: HMSO 12 May 2004: Column 328W.

33 Hoon, G. *House of Commons Hansard* London: HMSO 7 Apr 2003: Column 29.

34 Hoon, G. *House of Commons Hansard* London: HMSO 14 Apr 2003: Column 571W.

35 Hoon, G. Evidence before the House of Commons Defence Committee London: HMSO 14 May 2003.

36 For similar statements justifying the appropriateness of cluster munitions, see, e.g., Bach, W. *House of Lords Hansard* London: HMSO 21 Nov 2001: Column WA141 and Bradshaw, B. *House of Commons Hansard* London: HMSO 27 Mar 2003: Column 454.

37 For example Landmine Action (2002) *Explosive remnants of war and post-conflict communities*, also data from Lao PDR and other countries which suggests people are less likely to have accidents from engagement with large items of ordnance than with smaller items.

## 5.0 The humanitarian impact of cluster munitions

As the previous sections have outlined:

- States Parties to the CCW are currently conducting a ‘three-step’ approach to examining the implementation of existing principles of IHL to ERW, including sub-munitions. The next and final step is to consider the adequacy of the national implementation of relevant IHL principles;
- Significant international disagreement exists about the proper interpretation of provisions of IHL identified as relevant to ERW; much of which turns on what count as the ‘foreseeable effects’ of ERW;
- Against frequent and widespread concerns about the humanitarian consequences of cluster munitions, the UK government has repeatedly claimed that the use of such weapons has struck the right balance between the principles of military necessity and humanity and that, therefore, they are being used in accordance with the rules of IHL (such as proportionality).

### 5.1 To strike a balance: what evidence needs to be gathered?

In relation to the last point, it would be expected then that the UK government undertakes steps to assess the humanitarian impact of cluster munitions so that these determinations can feed into decision making. Even the most simplistic approach would expect efforts to understand both sides of the issue in order to determine where the balance lies. Basic information about the likely deaths and injuries caused from the use of cluster munitions would be a prerequisite for making claims about the balance struck in the use of force.

However, even a cursory examination of parliamentary statements made about cluster munitions over the last 15 years indicates that UK has an exceedingly poor grasp of the humanitarian consequences of its use of cluster munitions or that of its allies. In short, no studies are undertaken to review deaths and injuries inflicted, and other mechanisms that might enable an assessment of the humanitarian effects of these weapons are either absent or weak.

### 5.2 UK evidence gathering on humanitarian impact

In 2001, Adam Ingram, Minister of State of the Armed Forces was asked “what evaluation has been made by (a) the UK and (b) its allies of the use of cluster bombs in Kosovo, with particular respect to the impact of these weapons on civilians (i) during and (ii) after hostilities?” His reply was a worthless failure to address a clear question:

531 RBL 755 cluster bombs were dropped by the RAF during Operation Allied Force. We assessed them to have performed reliably and within their specification. I have no information on allies’ evaluation of similar weapons.<sup>38</sup>

Similarly, in 2003 he 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 he has made of the impact of these bomblets on Iraqi civilians in the future?” This time Minister Ingram acknowledged that:

No such reviews and assessments have been undertaken by the Ministry of Defence.<sup>39</sup>

In the case of the recent Iraq War, the lack of review procedures for casualties has been compounded by a lack of basic information about cluster munitions more generally:

*Lord Hoyle:* How many unexploded cluster bombs are there in Iraq?

*Lord Bach:* We have no means of knowing the number of unexploded cluster bombs there are in Iraq.

*Lord Hoyle:* How many people have been killed and injured by cluster bombs in Iraq since the end of the war?

*Lord Bach:* We have no means of knowing the number of people who have been killed or injured by cluster bombs since the end of the war.<sup>40</sup>

This deficiency in information applies not only to Iraq as a whole but to the British sector of occupied Iraq wherein Minister Ingram noted:

We have no viable means of recording the [number of cluster bomb-related injuries]. We do not hold any information in respect of injured persons not treated by UK forces and even for those treated by UK forces it is frequently not possible to identify the cause of shrapnel injuries.<sup>41</sup>

However, the UK does have data on unexploded ordnance in the British sector. Despite the previous comment by Lord Bach that “we have no means of knowing the number of unexploded cluster bombs there are in Iraq,” during questioning in May 2004 Minister Ingram noted:

To date, around 930,000 individual items of unexploded ordnance have been cleared from the Multi-National Division (South East) Area of Operations. This figure includes around 5,800 items of submunitions, however this category is not broken down further into type of submunition or county of origin.<sup>42</sup> Therefore it is not possible to quantify the number of unexploded cluster bombs and bomblets that remain in Iraq having been dropped by British military operations.<sup>43</sup>

Despite the possibility of being able to collect at least some geographically limited data on the problem of unexploded ordnance, the UK reports that it does not do so.

For the UK, in the official interpretation set out in the *Manual of the Law of Armed Conflict*, much is said to depend on what are counted as the foreseeable effects of attack. The longer-term, post-conflict effects might need to be included as part of proportionality if they are deemed ‘foreseeable’. As noted, legal scholars such as McCormack and Greenwood have expressed different determinations of whether the after effects of cluster munitions are sufficiently knowable to be included when assessing proportionality. Rather perversely then, the past failure of the UK to assess the humanitarian consequences of its use of cluster munitions and its often sceptical evaluation of claims made by NGOs and others, might well be treated by government officials as evidence that the longer-term effects of cluster munitions are not ‘foreseeable’.

**To summarise:** *The UK has undertaken no practical assessments of the humanitarian impact of cluster munitions and does not gather information that would be useful to such assessments (such as the type and country of origin of submunitions found during disposal operations) despite being in a position to do so. By limiting the information available on foreseeable humanitarian effects, such a practice gives preference to military concerns at the expense of increased risk to civilians.*

### 5.3 Use of evidence from humanitarian agencies

What statistics the government has been able to cite about the humanitarian consequences of cluster munition use almost entirely derive from inter-governmental agencies, NGOs, and other non-military sources. Organizations such as UNMAS have been cited in parliamentary questions as providing figures on the number of unexploded cluster bomblets in Afghanistan<sup>44</sup> and Human Rights Watch on casualties in Iraq in Defence committee reports.<sup>45</sup> Only two citations referencing military figures were found in this Hansard search. With regard to the Iraq War one reported that “United Kingdom Field Hospitals have reported eight injuries which may possibly have been caused by cluster munitions.”<sup>46</sup> The other was given by Minister Spellar in 2002 when he stated that:

The most recent figures provided by NATO assess that cluster bomblets have killed 22 civilians in Kosovo with a further 27 injured. Additionally, a further three military personnel have been killed, with four injured [...]<sup>47</sup>

However, this NATO figure is itself contradicted in another response given to a different parliamentary question wherein UN Mine Action Co-ordination Centre figures on casualties in Kosovo indicated that by the end of 2001 54 individuals were reported to have been killed and 106 injured from cluster submunitions.<sup>48</sup>

Despite the near complete dependence on other organisations to provide any indication of the humanitarian consequences, government officials have repeatedly expressed scepticism about claims regarding the deaths and injuries from cluster munitions. So when asked in summer 2003 about the number of civilians

casualties in Iraq from cluster munitions, government officials stated they had received “no proven reports of civilian casualties.”<sup>49</sup> Numerous media accounts during the war of the consequences of the British use of cluster munitions<sup>50</sup> were characterised as “further unsubstantiated reports.”<sup>51</sup>

Whilst in some circumstances the government will draw upon data from non-governmental organisations, other estimates about casualties have not been cited as part of government statements. In June 2003 the Iraq Body Count estimated at least 200 civilians and possibly 372 were killed from the US and UK use of cluster munitions (147 of the suspected 372 from unexploded duds).<sup>52</sup>

Even until February 2004, UK officials were characterising the use of these weapons in the Iraq War as options “against dispersed Iraqi military forces in the open or on the periphery of built up areas”<sup>53</sup> despite criticisms made by organizations such as Human Rights Watch about the use of cluster munitions in the Hay al-Muhandissin al-Kubra and al-Tannuma neighbourhoods around Basra.<sup>54</sup> In a March 2005 paper to the CCW the UK made a further defensive statement that “UK Forces certainly did not practise the deliberate targeting of residential neighbourhoods using ground-launched cluster weapons.”<sup>55</sup> The charge levelled by Human Rights Watch however was not that the UK had ‘deliberately targeted residential neighbourhoods’ but that they had used an inappropriate weapon to attack military targets located in populated areas. There has been no positive assertion that UK Forces would not use cluster munitions to attack targets located in ‘concentrations of civilians’ in the future.

Indeed, when challenged on Radio 4’s *Today Programme* that the UK had used cluster munitions in built up areas Minister Ingram ended up stating “well there were troops and equipment in those areas...”<sup>56</sup> This admission came after the following exchange:

*John Humphries [BBC journalist]:* Why were we using cluster bombs in built up areas when we specifically said we would not?

*Adam Ingram [Minister of State for Armed Forces]:* Well I don’t think that is, is er, an allegation that stands up to full examination. Erm, what we have said from the outset has been consistent that cluster bombs are not illegal, they are effective weapons against er, defined targets.

*JH:* That’s not the question I asked you.

*AI:* No. Well I’m giving you, I’m giving you the answer and then you maybe want to ask me another question...<sup>57</sup>

**To summarise:** *The UK government is selective in citing data from other organisations regarding the humanitarian impact of cluster munitions. Despite having no comparable data of its own, and despite making no efforts to gather such data, officials discredit material from external sources as unsubstantiated or unproven. Seeking to discredit information available on foreseeable humanitarian effects gives preference to military concerns at the expense of possible increased risk to civilians.*

## 5.4 Reliability of cluster munitions

A significant factor contributing to past, present and future civilian casualties from cluster munitions is the number of unexploded duds left from strikes. As noted above, by mid-2003 the Iraq Body Count estimated that of the 372 suspected deaths from cluster munitions, 147 were from unexploded duds.<sup>58</sup> The ratio of ‘after conflict’ to ‘time of use’ deaths will likely have increased significantly since then.

The reliability of cluster munitions has long been contested. In the case of the RBL-755, over the years the UK has forwarded an upper ceiling estimation that 5 per cent of bomblets become unexploded ordnance. In 1999, former Defence Secretary George Robertson maintained that in the bombing of Kosovo:

[T]he RAF dropped some 500 RBL755 cluster weapons during Operation Allied Force, each containing 147 bomblets. Research trials of the equivalent weapon (BL755) when used at low level indicate that approximately 5 per cent of the bomblets are likely to fail to detonate. However, when used at medium level as during Operation Allied Force, the failure rate is expected to be lower given that the impact angles and velocities are greater, and could be as low as 1 per cent.<sup>59</sup>

The figure of approximately 5 per cent has been frequently repeated in subsequent years in response to questions about the impact of cluster munitions.<sup>60</sup>

A number of serious questions have been voiced about the validity of this figure. In 2000 the House of

Commons Defence Committee estimated the actual failure rate of the RBL-755 in Operation Allied Force was higher than 5 per cent, possibly between 8 and 12 per cent.<sup>61</sup> A report commissioned by the Mennonite Central Committee and The UK Working Group on Landmines (Landmine Action) argued that “there is no recorded combat usage that would indicate a failure rate of five per cent and virtually all statistical and anecdotal evidence points to a far higher percentage failure rate.”<sup>62</sup> In such critical appraisals a variety of practical considerations have been offered to explain why official expectations have proved so inaccurate; this including considerations associated with the manufacture, storage, loading, air drop speed, wind conditions, terrain of impact, and angle of impact.<sup>63</sup> At least some of these factors have been noted as relevant by UK officials.<sup>64</sup>

Evidence cited for the higher failure rates included field experience from Kosovo collected by the UN Mine Action Co-ordination Centre indicated and UK government figures from the 1982 Falklands conflict. On 28 May 2000 the Minister of State for Defence, John Spellar MP, wrote in response to a Parliamentary Question:

I am afraid that surviving records are a little inconsistent on the question of how many BL755s were dropped during the [Falklands] conflict. The number was either 106 or 107, we cannot be certain which. We do know, however, that 1,492 submunitions from these weapons were cleared from the Falkland Islands after the conflict.

This amounts to a known *minimum* failure rate of 9.5 per cent for that particular context.<sup>65</sup> This is a minimum failure rate because whilst the number of munitions dropped is effectively static, it is very possible that not all unexploded munitions have been accounted for.

However ministers maintained that trials and operational experience demonstrate a five per cent failure rate for the RBL-755. As Minister Spellar argued only two months prior to his comments above:

Information on the failure rate of cluster bomb submunitions used by UK armed forces is collected during regular in-service trials and from field data. Recent statistics show a failure rate of approximately 5 per cent, in line with expectations.<sup>66</sup>

A year later, the Minister of State, Ministry of Defence (Baroness Symons of Vernham Dean) reiterated that “it

is assessed that, on average, around 5 per cent of the bomblets in the BL755 cluster bomb fail to explode on impact.”<sup>67</sup>

With specific reference to artillery-delivered munitions, in 2003 Minister Ingram stated that the L20A1 extended range bomblet shells used in Iraq had a “proven maximum bomblet failure rate of 2 per cent” but qualified this by suggesting that “[f]urther evaluation...will be required to establish the exact rate on the ground.”<sup>68</sup> Yet in 2004, he stated that “no assessment of cluster artillery shells was carried out in Iraq.”<sup>69</sup> Later in 2004, Minister Ingram claimed the L20A1 has a failure rate of “less 1% in test conditions.”<sup>70</sup>

In light of the dispute about reliability rates it is worth examining the specifics of the ‘in-service trials’ and ‘field data’ referred to by the Government. In relation to field data, it is difficult to understand the basis for reliability estimations given the complete lack of government knowledge about the amount of specific types of unexploded ordnance resulting from recent conflicts<sup>71</sup> (as noted in the previous sub-section). Further to this, in response to questions about unexploded bomblets after the 2003 Iraq War, Minister Benn stated that he was “not aware of any comprehensive assessment on the number of air-launched and ground-launched cluster munitions used during the recent conflict, nor on the number of unexploded bomblets remaining.”<sup>72</sup> In relation to a specific question about the number of the unexploded cluster munitions found within Basra he replied that “the information requested is not available.”<sup>73</sup>

Past statements made because of parliamentary questions indicate that information on failure rates from trials largely derives from testing conducted by manufacturers.<sup>74</sup> The trials of the L20A1 extended range bomblet shells consisted of firings of the shells monitored by the “manufacturer’s Explosive Ordnance Disposal personnel” and sample testing of its self destruct fuze that were “independently [sic] tested by the manufacturer prior to assembly.”<sup>75</sup> Elsewhere the results of such tests were said to be “consistent with the results of Director Royal Artillery tests of 1994.”<sup>76</sup> In the case of the RBL 755, “routine surveillance of a representative sample of weapons is carried out by the Design Authority (Insys Ltd.) on behalf of the Ministry of Defence.” Insys Ltd being the company formed in 2001

through a management takeover of Hunting Engineering Ltd which manufactured the BL 755 and RBL 755.<sup>77</sup> The Defence Evaluation and Research Agency's Luce Bay was used to test the RBL 755 in 1999 in support of the Kosovo campaign, though it is not clear from parliamentary records whether their reliability was tested as part of this activity.<sup>78</sup>

*To summarise: In their analysis of the likely failure rates of cluster munitions, the UK has failed to gather relevant field data and has ignored what field data it does possess in favour of repeating claims of lower failure rates made by the munition manufacturers. Such a practice gives preference to military concerns at the expense of possible increased risk to civilians.*

## 5.5 Opaque analysis and decision making

This lack of rigour leads to incoherence or at least confusion in relation to what these failure rates mean. For instance, when asked about the impact of cluster munitions on civilians during and after hostilities in Kosovo, Minister Ingram repeated a statement often made that the RBL 755 cluster bombs “performed reliably and within their specification” and were thus acceptable force options.<sup>79</sup> However, in a written statement to the March CCW GGE meeting, the UK stated that this weapon had “a failure rate that is unacceptably high.”<sup>80</sup> Bizarrely, the weapon is to remain in service at least until the end of the decade despite being categorised as ‘unacceptable.’ Having long reported the BL755 failure rate as being low and

acceptable the evidential, legal or other basis for this re-interpretation is not at all clear.

Another example of a decision that is unclear in its reasoning is the purported choice in August 2005 by the British Army to order unitary warheads rather than dual-purpose conventional munitions bomblets for the Guided Multiple Launch Rocket System because of the lack of a reliable self-destruct rate for the latter.<sup>81</sup> Publicly articulating the evidence and reasoning for this and similar decisions would help in the development of international standards.

## 5.6 Summary of Section 5

*Despite repeated contentions by governmental officials that the use of cluster munitions has balanced concerns for military necessity and humanity in IHL, it is apparent upon questioning that the UK government has systematically failed to collect or harness existing information. Rather the absence of government data has been taken as evidence of the absence of significant consequences from the use of cluster munitions – this despite the prominence of national and international concerns. High standards of proof have been required to substantiate claims about the civilian injuries and deaths whereas in contrast dubious claims of high reliability have been largely taken on faith. The UK's approach to gathering, selecting and analysing information seems at every turn to give preference to military concerns at the expense of possible increased risk to the civilian population.*

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38 *House of Commons Hansard* London: HMSO 16 Nov 2001: Column 958W

39 Ingram, A. *House of Commons Hansard* London: HMSO 15 Jul 2003: Column 192W. In a similar fashion, consider the following exchange: Mr. Hancock: To ask the Secretary of State for Defence how many (a) adults and (b) children under 16 have been (i) killed and (ii) maimed by unexploded cluster bombs dropped by British aircraft in (A) Kosovo, (B) Afghanistan and (C) Iraq since their invasion by coalition forces.

Mr. Ingram: UK aircraft have not dropped cluster bombs in Afghanistan. We have no viable means of ascertaining the information for either Kosovo or Iraq. *House of Commons Hansard* London: HMSO 30 Jan 2004: Column 578W.

40 *House of Lords Hansard* London: HMSO 8 Sept 2003: Column WA44

41 Ingram, A. *House of Commons Hansard* London: HMSO 10 Jun 2004: Column 605W.

42 In the light of these comments it is worth noting that UK EOD reporting as outlined in the forthcoming *Joint Service EOD Manual* is said to require the following [from an explanatory letter of 3 October 2005 from the Headquarters Engineer in Chief (Army) to Landmine Action]:

In summary the reporting requires Explosive Ordnance (EO) to be identified by quantity and by specific nature where possible or detailed description where identification cannot be confirmed. For example:

“Four Valmara 69 mine fuzes” or

“Four unidentified fuzes, possibly from anti-tank mine. Sand coloured plastic body, half-domed top with three prominent prongs. Dimensions...”

Where possible photographs and references to identification media are included as well as EO serial numbers and manufacturers' details. In addition the incident location and date/time group are required....

... Records are maintained centrally by the Joint Service Explosive Ordnance Disposal Operations Centre (JSEODOC) for all EOD activity on deployed operations and in the UK.

- 43 Ingram, A. *House of Commons Hansard* London: HMSO 5 May 2004: Column 1520W.
- 44 See Short, C. *House of Commons Hansard* London: HMSO 13 March 2002 and Short, C. *House of Commons Hansard* London: HMSO 21 March 2002: Column 468W.
- 45 House of Commons — Select Committee on Defence. 2000. *Lessons of Kosovo* London: HMSO: paragraph 148.
- 46 Hoon, G. *House of Commons Hansard* London: 1 Sept 2003: Column 899W.
- 47 See *House of Commons Hansard* London: HMSO 21 Mar 2002: Column 468W.
- 48 MacShane, D. *House of Commons Hansard* London: HMSO 10 Nov 2003: Column 60W
- 49 Bach, W. *House of Lords Hansard* London: HMSO 2 Jul 2003: Column WA104 and Hoon, G. *House of Commons Hansard* London: HMSO 3 Jun 2003: Column 293W.
- 50 For instance, Burkeman, O. 'Battle for Key City Leads to "Massacre of Children" Claim' *The Guardian* 24 March 2003 and Fisk, R. 'Wailing Children, the Wounded, the Dead: Victims of the Day Cluster Bombs Rained on Babylon' *The Independent* 3 April 2003.
- 51 Hoon, G. *House of Commons Hansard* London: HMSO 1 Sept 2003: Column 899W.
- 52 See Sloboda, J and H Dardagan, *How Many Civilians were Killed by Cluster Bombs?* Iraq Body Count 6 May 2003, see [www.peaceuk.co.uk/archive/modules.php?name=News&file=article&sid=576](http://www.peaceuk.co.uk/archive/modules.php?name=News&file=article&sid=576)
- 53 Ingram, A. *House of Commons Hansard* London: HMSO 11 Feb 2004: Column 1459W.
- 54 Human Rights Watch (2003), *Off Target*, 105-8.
- 55 United Kingdom. *Military Utility of Cluster Munitions* Group of Government Experts of States Parties 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 CCW/GGE/X/WG.1/WP.1 21 February 2005.
- 56 Transcript of 29/05/03 Adam Ingram interview on the *Today Programme*, online at [www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-bbc.htm](http://www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-bbc.htm)
- 57 Transcript of 29/05/03 Adam Ingram interview on the *Today Programme*, online at [www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-bbc.htm](http://www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-bbc.htm)
- 58 See Sloboda, J and H Dardagan, *How Many Civilians were Killed by Cluster Bombs?* Iraq Body Count 6 May 2003, see [www.peaceuk.co.uk/archive/modules.php?name=News&file=article&sid=576](http://www.peaceuk.co.uk/archive/modules.php?name=News&file=article&sid=576)
- 59 Robertson, G. *House of Commons Hansard* London: HMSO 5 Jul 1999: Column: 344.
- 60 Spellar, J. 'Cluster bombs' *House of Commons Hansard* London: HMSO 24 January 2000, column: 60; Hoon, G. *House of Commons Hansard* London: HMSO 13 Dec 1999: Column 15; Hoon, G. *House of Commons Hansard* London: HMSO 19 Jan 2000: Column: 492W; Ingram, A. *House of Commons Hansard* London: HMSO 16 Nov 2001: Column: 958W; Baroness Symons *House of Lords Hansard* London: HMSO 10 Apr 2001: Column WA165; and Bach, W. *House of Lords Hansard* London: HMSO 24 Nov 2000: Column: 337W.
- 61 House of Commons — Select Committee on Defence. 2000. *Lessons of Kosovo* London: HMSO: paragraph 148.
- 62 McGrath, R. *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions*, London: Mennonite Central Committee and The UK Working Group on Landmines, 2000: 29.
- 63 See Handicap International, *Cluster Munitions Systems: Situation and Inventory*, Paris: Handicap International, 2003; McGrath, R. *Cluster Bombs: The Military Effectiveness and Impact on Civilians of Cluster Munitions*, Akron, PA: Mennonite Central Committee and UK Working Group on Landmines, 2000; and King, *Explosive Remnants of War*.
- 64 Ingram, A. *House of Commons Hansard* London: HMSO 15 Nov 2004: Column 1060W.
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- 66 Spellar, J. *House of Commons Hansard* London: HMSO 9 Feb 2000: Column: 161W.
- 67 Baroness Symons *House of Lords Hansard* London: HMSO 10 Apr 2001: Column WA165
- 68 Ingram, A. *House of Commons Hansard* London: HMSO 16 Jun 2003: Column 55W.
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- 72 Benn, H. *House of Commons Hansard* London: HMSO 9 Feb 2000 10 Jun 2003: Column 772W.
- 73 Benn, H. *House of Commons Hansard* London: HMSO 13 Nov 2003: Column 444W.
- 74 Bach, W. *House of Lords Hansard* London: HMSO 14 Nov 2001: Column 562
- 75 Ingram, A. *House of Commons Hansard* London: HMSO 21 Jan 2004: Column 1249W.
- 76 Ingram, A. *House of Commons Hansard* London: HMSO 16 Jun 2003: Column 53W
- 77 *Ibid.*
- 78 Spellar, J. *House of Commons Hansard* London: HMSO 22 Feb 2000: Column: 882W and Spellar, J. *House of Commons Hansard* London: HMSO 17 Jan 2000: Column: 276W.
- 79 Ingram, A. *House of Commons Hansard* London: HMSO 16 Nov 2001: Column: 958W.
- 80 United Kingdom. *Military Utility of Cluster Munitions* Group of Government Experts of States Parties 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 CCW/GGE/X/WG.1/WP.1 21 February 2005.
- 81 Chuter, A. 'U.K. Places First Export Order for Guided MLRS' *Defense News* Posted 22 August 2005.

## 6.0 The military utility of cluster munitions

As argued in Section 5, official UK statements to the effect that cluster munitions are proportional means of force rely on abstract justifications which upon closer examination are rarely supported by government or any other evidence about humanitarian impacts. We have noted that on an ongoing basis the officials have approached the issue of foreseeable humanitarian impact in such a way as to support the military at the expense of possible increased risk to civilians.

Claims about the military advantage gained from such ‘extremely effective’<sup>82</sup> weapons have also relied on abstract statements. On this side of the balance, as in the assessment of humanitarian impact, official statements seek to present cluster munitions in their most positive light.<sup>83</sup>

During the Kosovo campaign the British Foreign Secretary argued that with respect to the RBL 755:

There is a use of cluster bombs but in this context what the term refers to are anti-tank<sup>84</sup> weapons. Each of the clusters in them is designed to penetrate heavy armour. If your target is a collection of a number of tanks, it makes sense to use a weapon that can disable many of the tanks and not just one of them.<sup>85</sup>

Later this suggestion came under heavy criticism. First the MoD’s own analysis of the bombing limited the effectiveness of the RBL 755 to soft-skinned vehicles.<sup>86</sup> A 2000 report by the House of Commons Defence Committee went even further to argue that the “Secretary of State’s claim that cluster bombs are ‘the most effective weapons’ for an anti-armour ground attack task does not, we believe, apply to the circumstances of this campaign.”<sup>87</sup> Since 1999 the limitations of RBL 755 against tanks have been readily acknowledged.<sup>88</sup> The RBL 755 is itself an updated version of the BL 755 which after operational experience in the 1991 Gulf War was deemed militarily unacceptable because of the low altitudes (approximately 500 ft) from which it had to be dropped.

Despite being ‘extremely effective’ in political rhetoric the UK Government has recently acknowledged that the failure rate of the RBL755 is ‘unacceptably high.’<sup>89</sup> After years of asserting that the failure rate was acceptable this has now been re-evaluated to ‘unacceptable’ without any explanation and without any apparent change to the rules governing the use of this weapon.

In the same paper to the CCW the UK stated that “The present type of cluster munitions will eventually cease to be the most effective way of engaging area targets as precision weapons become more available.”<sup>90</sup> Presently, the UK is planning to withdraw the BL 755 and RBL 755 by 2010<sup>91</sup> and in the future the anti-armour purpose of the RBL 755 is expected to be filled by the AGM-65 Maverick and the Brimstone air-to-ground missiles (the deployment of the latter being subjected to repeated past delays). Much has been claimed about the effectiveness of these missiles and their ability to reduce ‘collateral’ damage.<sup>92</sup> However, the Brimstone and Maverick will not completely replace the RBL 755 prior to 2010 as “cluster bombs will retain a utility against a concentration of lighter armoured vehicles and area targets such as surface-to-air missile sites and logistics storage depots. Brimstone, Maverick and cluster bombs are complementary systems and in any future conflict the weapon considered to be most appropriate to the circumstances would be employed.”<sup>93</sup>

Despite the internal criticisms and the prospect of improved weapons in the foreseeable future, Defence Secretary Hoon, in 2003, still felt it was appropriate to describe cluster munitions as “extraordinarily effective.”<sup>94</sup>

**To summarise:** *In describing publicly the military utility of cluster munitions (as part of the process of achieving a balance under IHL) UK officials have neglected to represent internal criticism of these weapon systems and have simply described them in extremely positive abstract terms. Such a practice gives preference to military concerns at the expense of possible increased risk to civilians.*



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- 82 Evidence to Select Committee on Defence London: HMSO 21 June 2000: Question 130.
- 83 See Hulme, K. (forthcoming) 'Of Questionable Legality: The Military Use of Cluster Bombs in Iraq, 2003' *Canadian Journal of International Law*
- 84 It is noticeable that a number of Government statements seek to emphasise the anti-armour role of certain cluster munitions and omit mention of their anti-personnel role. The BL 755 is described in Jane's Air Launched Weapons (1998) as for use against "a wide range of small hard and soft targets." Notably, "in addition to its anti-armour capability each bomblet casing disintegrates into over 2,000 fragments which are effective against not-armoured targets and personnel."
- 85 Cook, R. *Minutes of Evidence to Kosovo: Interim Report*, House of Commons Foreign Affairs Committee, Seventh Report, 14 April 1999 London: HMSO: paragraph 156.
- 86 Ministry of Defence, Kosovo: *Lessons from the Crisis* June 2000: Chapter 7.
- 87 House of Commons — Select Committee on Defence. 2000. *Lessons of Kosovo* London: HMSO: see paragraph 148-151.
- 88 Tebbit, K. *Evidence to Select Committee on Public Accounts* London: HMSO 14 June 2000: Question 66-8 and Vice Admiral Sir Blackham, J. *Evidence to Select Committee on Public Accounts* London: HMSO 15 June 2001: Question 55-9.
- 89 United Kingdom. *Military Utility of Cluster Munitions* Group of Government Experts of States Parties 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 CCW/GGE/X/WG.1/WP.1 21 February 2005.
- 90 United Kingdom. *Military Utility of Cluster Munitions* Group of Government Experts of States Parties 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 CCW/GGE/X/WG.1/WP.1 21 February 2005.
- 91 Ingram, A. *House of Commons Hansard* London: HMSO 4 May 2004: Column 1448W.
- 92 See, e.g., Walmsley, Sir R. *Evidence to Select Committee on Public Accounts* London: HMSO 15 January 2001: Questions 2-14.
- 93 Moonie, L. *House of Commons Hansard* London: HMSO 23 Jan 2001: Column: 540W.
- 94 Hoon, G. *Evidence before the House of Commons Defence Committee* London: HMSO 14 May 2003.

## 7.0 Who decides and how?

So far we have noted that UK Government responses reveal no analysis of humanitarian impact and an ongoing tendency to downplay points of humanitarian concern whilst claiming ‘extraordinary’ military utility. However, the UK has been at pains recently to demonstrate that it has in place strong checks and balances to ensure that IHL is effectively implemented in relation to specific deployments.

At the August 2005 CCW GGE meeting, the UK presented a paper that outlined its implementation of IHL with respect to ERW. In this it mentioned various provisions in place for ensuring its adherence to IHL; including the use of legal advice at the strategic, operational and tactical levels, such as advice to commanders on targeting. With regard to targeting:

...decisions are made drawing together all available information on each individual target. That information is presented to a board of subject-matter experts to inform the Chairman’s decision on a target. The board includes military officers, legal and policy representatives. The way in which the information is presented aims to ensure Distinction, Discrimination, Proportionality and Necessity are properly considered along with Collateral Damage Estimation and the Military Advantage. The relevant documentation is completed by a qualified targeteer who seeks advice from experts when his own experience does not provide the answer e.g. considering the number and type of weapons to be used or additional analysis of complicated targets. The targeteer takes his guidance from the same Targeting Directive as is issued to all of the Component Commanders.<sup>95</sup>

In another CCW paper to the March 2005 GGE, the UK made further comments specific to the targeting of cluster munitions when it noted that “the UK does not regard it appropriate to use cluster munitions when the coordinates or location of a target are not known.”<sup>96</sup>

Yet, given the lack of significant analysis by the MoD and other governmental departments about casualties from cluster munitions, the scepticism often displayed

to claims about injuries and deaths and the questionable assumptions made about field reliability rates indicated in previous sections, it is not at all clear in such procedures how well proportionality and so-called ‘collateral damage’ are factored into targeting decisions. No concrete examples have been presented to illustrate how the ‘subject-matter experts’ evaluate impact and judge the balance. In particular, it is not clear how ‘collateral damage’ in relation to a target is estimated differently depending on the type of weapon to be used. Comments from other sources provide little reassurance that the type of weapon to be used has a significant bearing on how proportionality is being assessed.

Replies to parliamentary questions suggest that in responsive operational situations considerable discretion about targeting is devolved down to individuals in the field. For instance, in reply to a question about the selection of targets during the 1999 NATO bombing campaign in Yugoslavia, Minister Spellar stated that:

During Operation Allied Force, Royal Air Force Harrier GR7s released cluster weapons (RBL755s) against fixed targets and Yugoslav/Serbian fielded forces. The selection and allocation of fixed targets, and the nomination of aircraft to specific tasks, was the responsibility of NATO’s Combined Air Operations Centre at Vicenza in Italy. This selection and tasking process was conducted in close coordination with the UK’s air commander in theatre who scrutinised all targets and tasks against national Rules of Engagement and targeting constraints, where appropriate consulting the UK national chain of command.

While this is consistent with the procedures outlined for the August 2005 CCW GGE meeting, Minister Spellar then added:

On the other hand, attacks against fielded forces were normally conducted in response to targets which had been located, identified and allocated by an Airborne Forward Air Control aircraft. In these highly responsive circumstances, the Harrier GR7

pilot was responsible for locating, positively identifying and assessing the validity of the target against clearly defined Rules of Engagement; the pilot was also responsible for selecting the most appropriate number and type of weapon to be released. UK armed forces will always use the weapons judged most appropriate against a given target, taking into account weapon effectiveness and the need to minimise collateral damage.<sup>97</sup>

The importance of the discretion was later echoed in evidence given by Air Marshall Glenn Torpy to the House of Commons Committee on Defence about operations in Iraq, when asked to “comment on the criteria you used to assess the need to use cluster bombs in the operation?” he stated:

In judging the weapons you use against any particular target, it is very much a judgment left to the crew, who have the detailed knowledge of the effect they are trying to achieve and the target make-up. Cluster weapons are obviously particularly relevant in the context of soft-skin vehicles, lightly armoured vehicles, and on occasions against heavy armour light tanks as well, particularly if they are

grouped together. That is where cluster bombs offer a higher likelihood of killing more vehicles than one precision-guided weapon. Those are the sort of circumstances and considerations that the crew would have when judging what weapon to use against a target centre.<sup>98</sup>

This latter formulation seems to be at some remove from the process of rigorous analysis described in the submission to the CCW. The processes described here do not seem to take into account a different potential for humanitarian impact depending on the type of weapon selected.

With specific reference to the targeting of cluster munitions, the UK has acknowledged that ground conditions have an impact on failure rates.<sup>99</sup> However the UK does not factor such conditions into decision making regarding the appropriate weapon for the attack.<sup>100</sup>

*To summarise: No substantive evidence has been provided on how UK Forces evaluate and control the humanitarian impact of cluster munition use during operations. Decision making about proportionality can be devolved down to combat crew in certain circumstances.*

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95 United Kingdom of Great Britain and Northern Ireland, *Responses to Document CCW/GGE/XI/WG.1/WP.2, Entitled IHL and ERW, dated 8 March 2005* Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.1 24 June 2005.

96 United Kingdom of Great Britain and Northern Ireland, *Responses to Document CCW/GGE/XI/WG.1/WP.2, Entitled IHL and ERW, dated 8 March 2005* Group of Government Experts of States Parties 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 CCW/GGE/XI/WG.1/WP.1 24 June 2005.

97 Spellar, J. *House of Commons Hansard* London: HMSO 12 May 2000: Column: 513W.

98 Air Marshall Torpy, G. Evidence to Defence Committee London: HMSO 5 November 2003: Question 1305.

99 Ingram, A. *House of Commons Hansard* London: HMSO 29 Apr 2003: Column 315W

100 Ingram, A. *House of Commons Hansard* London: HMSO 28 Feb 2002: Column 1458W. He then went on to state 'Using weapons that are not the most appropriate for a target would reduce the likelihood of achieving the military objective and increase the risk of collateral damage. There are often no alternative weapons to cluster bombs that would avoid these negative consequences', though it is not clear that these statements necessarily follow from the previous ones.

## 8.0 Is the UK's implementation of IHL adequate?

*“Cluster bombs are only used strictly in accordance with international law. This includes the principles of distinction and proportionality as well as precautionary measures to be taken in planning and conducting an attack, as contained in the First Additional Protocol of 1977 to the Geneva Conventions of 1949.”*

Geoff Hoon, former Secretary for Defence<sup>101</sup>

It has been repeatedly stated by British Defence ministers<sup>102</sup> and even the Prime Minister<sup>103</sup> that the UK use of cluster munitions has been in accordance with IHL, including the rule of proportionality. As suggested by the number and nature of parliamentary examinations of cluster munitions, a substantial level of concern has been expressed regarding the appropriateness of such weapons. The questioning of governmental officials and others has provided a more detailed picture of the decision-making process for deployment practices and policies.

We have noted the following regarding the UK's efforts to implement the rule of proportionality:

- The UK has undertaken no practical assessments of the humanitarian impact of cluster munitions and does not gather information that would be useful to such assessments (such as the type and country of origin of submunitions found during disposal operations) despite being in a position to do so. By limiting the information available on foreseeable humanitarian effects, such a practice gives preference to military concerns at the expense of increased risk to civilians.
- The UK government is selective in citing data from other organisations regarding the humanitarian impact of cluster munitions. Despite having no comparable data of its own, and despite making no efforts to gather such data, officials discredit material from external sources as unsubstantiated or unproven. Seeking to discredit information available on foreseeable humanitarian effects gives preference to military concerns at the expense of possible increased risk to civilians.

- In their analysis of the likely failure rates of cluster munitions, the UK has failed to gather relevant field data and has ignored what field data it does possess in favour of repeating claims of lower failure rates made by the munition manufacturers. Such a practice gives preference to military concerns at the expense of possible increased risk to civilians.
- In describing publicly the military utility of cluster munitions (as part of the process of achieving a balance under IHL) UK officials have neglected to represent internal criticism of these weapon systems and have simply described them in extremely positive abstract terms. Such a practice gives preference to military concerns at the expense of possible increased risk to civilians.
- No substantive evidence has been provided on how UK Forces evaluate and control the humanitarian impact of cluster munition use during operations. Decision making about proportionality can be devolved down to combat crew in certain circumstances.

Despite the repeated assertions of UK officials, it is difficult to conclude from such practices that “the right balance has been struck.” Indeed it is very hard to determine what, if any, material and evidence has actually been weighed in this balancing process. The deficiency of knowledge about the likely humanitarian consequences of cluster munitions as well as about the operational reliability rates in the UK make it difficult to imagine how any credible determinations could be made about the proportionality of cluster munition strikes. Determining whether a balance has been struck between the principles of military necessity and humanity requires, as a minimum, having some factual sense of both the advantages and disadvantages of attacks. Based on the parliamentary statements assessed in this report, it is far from clear that those making decisions about the use of cluster munitions routinely do so *or even could do so* with a serious sense of the possible effects of weapons.

As past experiences are not examined with any significant rigour, those making operational decisions would seem to do so on the basis of presumptions and expectations that are not founded on evidence.

Instead of rigorous evidence-based decision making at the time of use, or evidence-based analysis following the use of cluster munitions, debates about their merits are based on abstract, non-substantiated assertions. Consider an exchange between Harry Cohen MP and former Secretary of Defence Geoff Hoon during a witness statement made to the House of Commons Select Committee on Defence regarding the UK bombing of Kosovo:

*Mr Cohen MP:* One aspect of targeting policy was cluster bombs and the use of cluster bombs. In an answer to me, you said that the failure rate figures were provided by the cluster bomb manufacturers, and that the MoD had done no independent research into failure rates. If there has been no independent research carried out, how can the MoD be so sure that the failure rates do not change when the cluster bombs are used in a different manner, such as height, speed and angle at which they are released? The Minister of State also said that the possibility of some munition failure is taken into account when reaching decisions on the UK's use of cluster bombs. What failure rate does the MoD then consider acceptable? Is it not the case that the decision to use cluster bombs at a great height was based really on the military achieving the total safety of pilots but without concern for what happened on the ground to civilians or, indeed, refugees who we were supposedly trying to help? Did you not get a distorted balance there?

*Mr Hoon:* No.

Although it is not clear which question Secretary Hoon was responding to in this reply of 'no' he later came back to points about cluster munitions in stating:

*Mr Hoon:* We were aware that there was a small failure rate, in the order of five per cent, estimated by the manufacturers as far as cluster bombs were concerned, but a judgment has to be made. These are extremely effective weapons. They are the most effective weapons against armoured and certain kinds of soft skinned vehicles and, frankly, if we did not use the most effective weapons available to us

we would be putting our armed forces at risk. I would face, rightly, criticism from this Committee if, in an exercise such as we are conducting now, I did not use a weapon that was available to us and our armed forces were put at risk in the process.

*Mr Cohen:* 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.

*Mr Cohen:* 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.<sup>104</sup>

There is no neat mathematical formula for weighing civilian risk and possible military advantages from certain employments of force; let alone 'how many refugees and innocent civilians is a pilot worth'. To think that assessing proportionality during or even post conflict could be anything other than an awkward, messy and difficult process is to lose sight of the issues at stake.

The lack of any significant sense of the humanitarian consequences from cluster munition use and the failure of the UK government critically to examine the basis for its assumptions though means that in practice justifications for their use typically amount to little more than thin rhetorical assertions that 'judgements are made' and factors are 'taken into account' with no elaboration of how this is done. What, if any, official legal reviews have been conducted – where a fairly detailed consideration of military advantages and civilian costs might have taken place – are either not accessible to the public or even the existence of the reviews is not made known.<sup>105</sup>

## 8.1 Deference to the military

While failing to elaborate a substantiated positive case for the proportionality of cluster munitions, UK ministers and supportive MPs have employed various strategies to minimize humanitarian concerns:

**Disregard:**

Against repeated concerns about civilian casualties, relevant departments have failed to undertake internal or commission external research to establish data about the humanitarian effects.<sup>106</sup> When questioned about the impact of civilians ministers have responded with worthless information.<sup>107</sup>

**Downplay:**

Efforts have been made to reduce concerns about cluster munitions by asserting, for instance, that they are ‘anti-tank’ weapons<sup>108</sup> and are ‘designed to detonate on impact and to destroy buildings and vehicles. They are not designed as anti-personnel weapons...’<sup>109</sup> Similarly it has been suggested that unexploded ordnance is commonplace from war;<sup>110</sup> and that the *additional* ERW problems caused to areas of conflict affected by the use of these weapons are negligible.<sup>111</sup>

**Deflect:**

Officials have tried to deflect responsibility to justify cluster munitions away from themselves by shifting the burden of proof to critics. They suggest that it is the critics of cluster munitions that should analyse the situation in more detail, when they themselves present no evidence to support purely abstract arguments.<sup>112</sup>

**Demand:**

Relatively high levels of proof have been required for those trying to substantiate claims that cluster munitions were the cause of injuries or deaths; this in contrast to a willingness to accept manufacturers’ claims about the proven reliability of cluster munitions despite considerable evidence to the contrary.<sup>113</sup>

**Displace:**

When asked about the civilians injured or killed, officials have repeatedly emphasised British post-conflict clearance operations. The assertion that the UK clears up after itself<sup>114</sup> is taken as significantly lessening humanitarian concerns<sup>115</sup> and is used to suggest that the burden of risk is borne by troops (rather than the civilian population) both during and after the conflict.

In light of such considerations and the overall level of knowledge displayed by UK officials in response to questions about cluster munitions, it seems justified to conclude that in considering the balance between the principles of humanity and military necessity, a systematic *deference* has been given to military concerns. In other words, when military considerations are set against consequences for civilians, the former is given much more importance than the latter.

This deference plays out in concerns about how the risks of conflict are distributed between combatants and civilians. The tensions associated with the distribution of risk were noted by Lieutenant General Reith when he said, “We give very clear guidance on trying to minimise casualties to civilians, and if and where cluster munitions have been used we would have tried to minimise that. Equally, we have a duty of care for our own soldiers and if they are in a position where that munition is the best munition to use we will use it.”<sup>116</sup> Concerns about how to balance risks of casualties to civilians and the military are discussed in the *UK Manual of the Law of Armed Conflict* which states:

Sometimes a method of attack that would minimize the risk to civilians may involve increased risk to the attacking forces. The law is not clear as to the degree of risk that the attackers must accept. The proportionality principle does not itself require the attacker to accept increased risk. Rather, it requires him to refrain from attacks that may be expected to cause excessive collateral damage. It will be a question of fact whether alternative, practically possible methods of attack would reduce the collateral risks. If they would, the attacker may have to accept the increased risk as being the only way of pursuing an attack in a proportionate way.<sup>117</sup>

This formulation seems to emphasise that minimising risk to ones own forces cannot be used to justify an attack that has a disproportionate impact on the civilian population. However, given the conspicuous absence of any effort to determine civilian casualties, and the general difficulty of assessing proportionality, the UK government would seem to have undertaken a practice of resolving tensions in favour of the military.

This is captured in statements by former Secretary Hoon that “...I would be failing in my duties as Secretary of State for Defence if I did not allow our armed forces to use the most appropriate weapons to deal with the threats against them”<sup>118</sup> or that “denying ourselves the most appropriate weapons would not help to end conflicts quickly; it could also put our armed forces at greater risk of harm.”<sup>119</sup>

In a BBC radio interview, Adam Ingram spoke to this question of who bears the risk in conflict:

*Adam Ingram [Minister of State for Armed Forces]: ...* What I am saying is that the way in which we’ve presented this argument, that they are used in targeted, in a targeted way, against specific military targets, and they, the use of them is to minimise casualties on our side. Now all, all ammunitions, all weapons can create tragedies and it’s not just cluster bombs, it’s, it’s, it’s a tragedy of war that there are casualties. Fortunately we had very few casualties on our side, and I would put it down to the, to the very careful use of the powerful weapons we have to take out the...

*John Humphries [BBC journalist]: (interjects)* And you have no idea how many children will be blown to bits by the cluster bombs that did not explode and now are abandoned and left around built up areas?

*AI:* Well that’s a ridiculous allegation.

*JH:* What, you have a – oh you can tell me can you?

*AI:* That’s a ridiculous allegation.<sup>120</sup>

This exchange bears a remarkable similarity to comments by Secretary of Defence Geoff Hoon to the Select Committee on Defence in 2000:

Was there not a report recently of children being 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.<sup>121</sup>

It perhaps needs to be emphasised in such circumstances that under the Geneva Conventions “the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>122</sup> The will of a government to protect its own forces does not remove the obligation to provide appropriate protection to the civilian population.

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- 101 Hoon, G. *House of Commons Hansard* London: HMSO 14 Apr 2003: Column 571W.
- 102 For a further reference see Ingram, A. *House of Commons Hansard* London: HMSO 16 May 2003: Column 442W.
- 103 Blair, T. *House of Commons Hansard* London: HMSO: 24 Mar 2003: Column 32.
- 104 Evidence to Select Committee on Defence London: HMSO 21 June 2000: Questions 121-126.
- 105 'Cluster Bombs' *House of Commons Hansard* London: HMSO 5 Nov 2001 Column: 1W.
- 106 *House of Commons Hansard* London: HMSO 15 Jul 2003: Column 192W.
- 107 *House of Commons Hansard* London: HMSO 16 Nov 2001: Column 958W
- 108 Cook, R. *Minutes of Evidence to Kosovo*: Interim Report, House of Commons Foreign Affairs Committee, Seventh Report, 14 April 1999 London: HMSO: paragraph 156.
- 109 Hoon, G. *House of Commons Hansard* London: HMSO 14 Apr 2003: Column 572W
- 110 Evidence to Select Committee on Defence London: HMSO 21 June 2000: Questions 122.
- 111 Knight, J. *House of Commons Hansard* London: HMSO 11 Apr 2002: Column 239. See as well Hoon, G. *House of Commons Hansard* London: HMSO 14 Apr 2003 1 Sept 2003: Column 899W.
- 112 Hoon, G. Evidence before the House of Commons Defence Committee London: HMSO 14 May 2003.
- 113 For another assertion of reliability read Hoon, G. *House of Commons Hansard* London: HMSO 19 Jan 2000: Column: 492W.
- 114 Ingram, A. *House of Commons Hansard* London: HMSO 31 Mar 2003: Column 658.
- 115 See as well Ingram, A. *House of Commons Hansard* London: HMSO 11 Feb 2004: Column 1459W and Hoon, G. *House of Commons Hansard* London: HMSO 13 Dec 1999: Column 15.
- 116 Lieutenant General Reith, J. Evidence to Select Committee on Defence London: HMSO 9 July 2003: Question 901.
- 117 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* Oxford: Oxford University Press, 2004: 25-6.
- 118 Hoon, G. *House of Commons Hansard* London: HMSO 20 Mar 2003: Column 1093. See as well Hoon, G. *House of Commons Hansard* London: HMSO 3 Apr 2003: Column 1077.
- 119 Hoon, G. *House of Commons Hansard* London: HMSO 13 Dec 1999: Column 15.
- 120 Transcript of 29/05/03 Adam Ingram interview on the *Today Programme*, online at [www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-bbc.htm](http://www.the-hutton-inquiry.org.uk/content/evidence-lists/evidence-bbc.htm)
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## 9.0 The future of international deliberations

In recent years, the UK government has frequently stated that its use of cluster munitions has struck the right balance between the principles of military necessity and humanity and that, following from this, such uses of force have been conducted in accordance with IHL. However, in response to public concerns voiced about these weapons, government officials have had to elaborate the basis for these claims. *Out of Balance* has considered this evidential basis in some detail and found it wanting. In failing to elaborate a credible account of how proportional force decisions are taken, the UK government has displayed a repeated and serious neglect for the humanitarian consequences of cluster munition use.

As part of the CCW, the Working Group on ERW has already indicated important issues for consideration about the rule of proportionality. For instance, France has noted that IHL “supplies no guidance for gauging proportionality.”<sup>123</sup> Some states have gone beyond highlighting the uncertainty of IHL, or disagreement about its implementation, to offer evaluations of how proportionality should be determined in light of past humanitarian concerns about cluster munitions. Austria, for instance, said the “probability of harming civilians is essential”<sup>124</sup> to assessments of proportionality and that the range of effects necessary to take into account include intended direct effects as well as unintended, but expected, ERW effects.<sup>125</sup> Norway has stated proportionality requires “taking into account more long-term humanitarian problems caused by ERW.”<sup>126</sup> Sweden has maintained that “[i]f, under current IHL, the long-term effects of ERW are not regarded as relevant when applying the principles of proportionality and precaution in attack, it may be difficult to conclude that present IHL is sufficient to deal with the problems that arise out of ERW.”<sup>127</sup>

These are important interventions from a humanitarian perspective. Yet building on them will require a credible understanding of the long-term effects of unexploded ordnance. In this vein, in assessing the humanitarian dangers posed by the unreliability of munitions, Australia has said “it is desirable to gather empirical

data to quantify the known reliability of [explosive ordnance] in service, in particular its likelihood of generating significant humanitarian impact if it fails to function as designed. This would provide a more detailed basis for the assessment of potential humanitarian impact.”<sup>128</sup> Others have reiterated this basic conclusion by stating that “[w]hen it comes to the use of munitions it would be important to know the likelihood that such munitions become ERW after an attack, if the munitions that are used are equipped with self-destruct or self-neutralization mechanism etc.”<sup>129</sup> Yet despite such statements, very little by way of detailed evidential data has been offered within these meetings regarding the humanitarian effects of cluster munitions or their operational reliability. As in British government responses to domestic parliamentary concerns, within the CCW what little evidence has been cited has come from inter-governmental organizations or NGOs.<sup>130</sup> In the August 2005 GGE meeting, a delegate from the Russian Federation posed the question of whether cluster munitions pose a “Real or Mythical Threat” and felt it adequate to offer highly abstract arguments that the threat (at least from modern Russian versions of this weapon type) is ‘mythical’.

Without a more robust consideration of humanitarian issues, it is not clear that the current activities undertaken as part of GGE meetings are sufficient. For instance, the British Matrix given in Annex II to CCW/GGE/IX/WG.1/1 outlines a risk management approach for classifying humanitarian hazards of various munitions. This has provided a key framework for discussions during the previous two meetings of the GGE. While it has been acknowledged by British officials that this Matrix is provisional in character, the argument of *Out of Balance* would suggest it is based on little actual evidence and is therefore hollow in substance. Even those states that have made positive humanitarian contributions to the CCW – such as Germany’s announcement that it is phasing out the BL 755 due to reliability concerns and that it will only employ the M26 sub-munition to the “Multiple Launch Rocket System” after suitable modernization<sup>131</sup> — have provided little in

the way of elaboration for the evidence or criteria underlying such decisions. Yet such an elaboration would increase the adequacy of current deliberations.

These deficiencies in current discussions mean that the CCW is at risk of becoming a forum of empty overtures and political posturing that does not provide a credible process for developing IHL.

Some civil society bodies are already calling for outright prohibitions against cluster munitions. Others still hope that the existing mechanisms of international humanitarian law can serve the purpose for which they were developed. That window of hope is closing.

The overarching goal of states concerned with humanitarian problems of cluster munitions must be to ensure that IHL is used as a mechanism for the appropriate protection of civilians rather than as a fig leaf for belligerents. Within international legal fora such as the CCW, states that simply sit quiet in the face of incoherent arguments and inadequate evidence are failing vulnerable civilian populations now and in the future.

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