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Memorandum to CCW Delegates

CLUSTER MUNITIONS AND INTERNATIONAL HUMANITARIAN LAW: THE NEED FOR BETTER COMPLIANCE AND STRONGER RULES

*Prepared for the Convention on Conventional Weapons (CCW) Group of
Governmental Experts on Explosive Remnants of War (ERW)
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The States Parties to the Convention on Conventional Weapons (CCW) have long recognized the dangers of cluster munitions. They first questioned the civilian harm these weapons cause at the Lucerne Conference in 1974 that eventually led to the CCW. Over the past several years, the Group of Governmental Experts has addressed cluster munitions as part of the ongoing discussions on explosive remnants of war (ERW). For 2004, the ERW working group has a mandate “to continue to consider the implementation of existing principles of international humanitarian law” (IHL).¹ Sweden introduced a working paper to guide these discussions in March. It calls on states to submit information on how they apply IHL to “munitions, including cluster munitions.”² This Human Rights Watch memorandum presents a legal analysis of cluster munitions to help provide a context for state practice.

While other CCW documents have analyzed IHL with regard to explosive remnants of war in general,³ this one focuses on cluster munitions in particular. It describes how cluster munitions raise serious concerns under existing IHL, and shows how despite these concerns, they continue to be deployed in questionable circumstances. It argues that elaborating IHL with respect to the particular issues that surround cluster munitions may improve the current poor compliance of the basic principles of distinction and proportionality. Finally it suggests topics to include in a proposed cluster munition protocol.

¹ Procedural Report of the Group of Governmental Experts of the State Parties to the CCW, CCW/GGE/VI/2, December 11, 2003, Annex III.

² Proposal for the Structuring of IHL/ERW Discussion during CCW Experts' Meetings in 2004, submitted by Sweden, CCW/GGE/VII/WG.1/WP.2, March 11, 2004.

³ See, e.g., Christopher Greenwood, Legal Issues Regarding Explosive Remnants of War, CCW/GGE/II/WP.10, May 23, 2002; International Committee of the Red Cross (ICRC), Explosive Remnants of War: An Examination of Legal Issues Raised in the ERW Discussions, CCW/GGE/II/WP.8, July 15, 2002.

Existing International Humanitarian Law

Although there is no treaty that specifically regulates cluster munitions, Additional Protocol I of 1977 to the Geneva Conventions offers internationally accepted legal standards for evaluating the problems posed by these weapons.⁴ The articles discussed below are considered customary law, that is, legal norms deriving from common state practice that bind all nations regardless of specific legal commitments. The CCW Protocol V on Explosive Remnants of War, agreed to in November 2003, is also relevant to cluster munitions.⁵

Protocol I, along with the Fourth Geneva Convention, lays out the law that protects civilians during war.⁶ The basic principle of this branch of IHL is that of distinction between civilians and combatants. Article 48 of Protocol I states, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁷

Attacks that strike military objects and civilians or civilian objects without distinction are considered indiscriminate and are prohibited.⁸ While Protocol I recognizes that some civilian deaths are inevitable, it says states cannot legally target civilians or engage in indiscriminate attacks. Article 51(4) and Article 51(5) define the concept of indiscriminate attacks in several ways.⁹ Cluster munitions raise concerns under most of the definitions. These weapons are prone to being indiscriminate, particularly when certain methods of attack or older or less sophisticated models are used.

The legal analysis of cluster munitions can be organized according to their immediate impact and after-effects. Damage done during strikes raises concerns under Protocol I’s proportionality test, which balances military advantage and civilian impact.¹⁰ According to Article 51(5)(b), an attack is disproportionate, and thus indiscriminate, if it “may be expected to cause incidental loss of civilian life,

⁴ Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 [hereinafter Protocol I].

⁵ 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, Protocol V on Explosive Remnants of War [hereinafter CCW Protocol V], available in Procedural Report of the Group of Governmental Experts of the State Parties to the CCW, CCW/GGE/VI/2, December 11, 2003, Annex II, Protocol on Explosive Remnants of War, pp. 10-21.

⁶ Protocol I; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. These treaties apply primarily to international conflicts. Geneva Conventions, Common Art. 2; Protocol I, Art. 1(3).

⁷ Protocol I, Art. 48.

⁸ *Ibid.*, Art. 51(4).

⁹ The five kinds of indiscriminate attacks enumerated in Protocol I are those that: are 1) not directed or 2) cannot be directed at “a specific military objective,” 3) have effects that violate the Protocol, 4) treat separate urban military objectives as one (carpet bombing), and 5) are disproportionate. *Ibid.*, Art. 51(4, 5).

¹⁰ In this context, disproportionate attacks are a subset of indiscriminate attacks. “The attacks which form the subject of this paragraph [Art. 51(5)] fall under the general prohibition of indiscriminate attacks laid down at the beginning of paragraph 4.” Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), p. 623. See also *ibid.*, p. 683.

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.”¹¹ Certain kinds of cluster munition attacks tend to tip the scale toward being disproportionate. Strikes in or near populated areas are particularly problematic because when combatants and civilians commingle, civilian casualties are difficult to avoid. Based on research in Iraq, Afghanistan, and Yugoslavia, Human Rights Watch believes that when non-precision guided submunitions are used in any type of populated area, there should be a strong, if rebuttable, presumption under the proportionality test that an attack is indiscriminate. In other words, a cluster munition strike on a populated area should be considered indiscriminate under the law, unless the military, which should bear the burden of proof, could show the military advantage of a particular strike outweighed the civilian harm.

Cluster munition strikes also have the potential to be indiscriminate because the weapons cannot be precisely targeted. Article 51(4)(b) prohibits attacks “which employ a method or means of combat which cannot be directed at a specific military objective.”¹² Article 51(5)(a), drafted in response to the carpet bombings of World War II, similarly prohibits bombings that treat “separated and distinct” military objectives as one.¹³ Cluster munitions are area weapons, useful in part for attacking dispersed or moving targets. They cannot, however, be directed at specific soldiers or tanks, a limitation that is particularly troublesome in populated areas. Cluster bombing a populated area in order to kill individual soldiers is not unlike carpet bombing a city in order to destroy separate military bases. In both cases the attack is indiscriminate.

The after-effects of cluster munitions also raise concerns under IHL. Experts disagree about the scope of the proportionality test. If it is interpreted as encompassing more than immediate loss, as Human Rights Watch believes it should be, the large number of explosive duds, which become *de facto* landmines, may make cluster munition use disproportionate. Unexploded submunitions cause greater “loss of civilian life, injury to civilians, and damage to civilian objects”¹⁴ than most types of unexploded ordnance. Taking into account both strike and post-strike casualties greatly increases the likelihood that the loss would be excessive in relation to the military advantage, especially if an attack occurred in a populated area or an area to which people might return.

Because of their dud rate, cluster munitions also exemplify weapons that can be indiscriminate in effect. Article 51(4)(c) of Protocol I says that indiscriminate attacks include “those which employ a method or means of combat the *effects* of which cannot be limited as required by this Protocol.”¹⁴ Even if a cluster munition strike is not indiscriminate, its *effects* may be. The effects become more dangerous if the submunitions litter an area frequented by civilians or the dud rate is high due to poor design, use in inappropriate environments, or other factors. Cluster submunition duds cannot distinguish between

¹¹ Protocol I, Art. 51(5)(b).

¹² *Ibid.*, Art. 51(4)(b).

¹³ *Ibid.*, Art. 51(5)(a).

¹⁴ *Ibid.*, Art. 51(4)(c) (emphasis added).

combatants and non-combatants and will likely injure or kill whoever disturbs them. Under either the proportionality test or the effects provision, the high dud rate of cluster munitions combined with the large number of submunitions they release challenges the principle of distinction.

Regardless of whether cluster munitions are indiscriminate, states are legally bound to minimize civilian harm from strikes and duds. Article 57(2)(a)(ii) of Protocol I imposes a duty on states to “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.”¹⁵ “All feasible precautions” implies that the weapons should be used sparingly, if at all, when it is foreseeable that they will cause more than incidental harm to civilians. The availability of alternative weapons with more precise targeting and limited after-effects should also be considered.¹⁶

CCW Protocol V on Explosive Remnants of War governs post-conflict remedial measures to minimize the effects of ERW, including submunition duds.¹⁷ It requires parties to clear ERW in their territory and facilitate clearance of explosive ordnance they used in territory not under their control. It also sets up duties to record and share information, protect humanitarian missions, and take all feasible precautions to protect civilians from ERW. The protocol does not mandate any preventive measures, but States Parties are “encouraged to take generic preventive measures aimed at minimizing the occurrence of explosive remnants of war,” some of which are outlined in a technical annex.¹⁸ Although it does not mention cluster munitions specifically, the obligations and voluntary recommendations apply to unexploded submunitions.

Strengthening IHL

The Swedish working paper from March 2004 notes that recent reports on the use of cluster munitions “raise important questions on the extent to which existing IHL is being adequately implemented and is effective in minimizing the dangers of specific weapons, especially when they are used in populated areas.”¹⁹ IHL could be strengthened on both counts to increase protection for civilians from cluster munitions.

¹⁵ Protocol I, Art. 57(2)(a)(ii).

¹⁶ The law of war also prohibits the use of “inhumane” weapons, which are those that cause “superfluous injury or unnecessary suffering.” See, e.g., *ibid.*, Art. 35(2). This prohibition is designed to protect combatants, not civilians, from inhumane weapons, such as mustard gas or dum dum bullets. A few opponents have argued that cluster bombs cause superfluous injury and unnecessary suffering and should be banned as inhumane, but most critics focus on their humanitarian problems. For more information on this debate, see Major Thomas J. Herthel, “On the Chopping Block: Cluster Munitions and the Law of War,” *Air Force Law Review* 51 (2001): 256-59; Thomas Michael McDonnell, “Cluster Bombs over Kosovo: A Violation of International Law?” *Arizona Law Review* 44 (2002): 66-74.

¹⁷ CCW Protocol V.

¹⁸ CCW Protocol V, Art. 9, Technical Annex.

¹⁹ Proposal for the Structuring of IHL/ERW Discussion during CCW Experts’ Meetings in 2004.

Poor Compliance

The Coalition's use of cluster munitions in Iraq provides examples of poor compliance with IHL. The U.S. and U.K. ground forces made widespread use of cluster munitions in populated areas. Given the foreseeability of civilian casualties from strikes and duds during urban attacks, this conduct raises concerns under the proportionality test, and in many cases was likely indiscriminate. The attacks also ran counter to U.S. military statements from before and after major hostilities. An August 2001 U.S. Air Force background paper says that there are "[c]learly some areas where CBUs [cluster bomb units] normally couldn't be used (e.g., populated city centers)."²⁰ A 2004 letter from the U.S. Marine Corps echoes these sentiments: "Cluster munitions are not suitable to fighting in an urban environment."²¹ The United States not only targeted populated areas but also employed old models of submunitions, with dud rates of fourteen to sixteen percent or higher. Such older submunitions are likely to be indiscriminate in effect and increase the chances that an urban strike will violate the proportionality test. More information on the disturbing use of cluster munitions in Iraq is available in Human Rights Watch's report *Off Target: The Conduct of the War and Civilian Casualties in Iraq*.²²

Human Rights Watch is unaware of any conflict where cluster munitions have been used uniformly in a manner fully consistent with IHL. In Chechnya, for example, HALO Trust reported civilian casualties during Russian cluster munition strikes on Grozny. Although the military necessity is not fully known, using these weapons in a large city almost surely violated IHL in some cases.²³ Landmine Action investigated a May 2000 incident in Eritrea during which Ethiopian forces used cluster bombs on an area where locals allege no military was present.²⁴ In total, at least twelve countries have used cluster munitions in nineteen different countries, making the weapon a matter of global concern.²⁵

It appears that most states have not given sufficient consideration to the application of IHL specifically to cluster munitions. In a CCW working paper, for example, Australia describes its targeting practices but does not address ERW or cluster munitions in any specific way.²⁶ In a more positive example, Norway has instituted a national restriction on the use of air-dropped cluster bombs because of their "low level of precision and high dud rate." Only the Ministry of Defense can approve cluster strikes and

²⁰ U.S. Air Force, *Bullet Background Paper on International Legal Aspects Concerning the Use of Cluster Munitions*, August 30, 2001. This is an informal paper prepared by the office of the Air Force Judge Advocate General.

²¹ Letter from Col. J.J. Coghlan, U.S. Marine Corps Reserves, to Congresswoman Betty McCollum, May 9, 2004.

²² Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003).

²³ Colin King, *Submunitions and Other Unexploded Ordnance* (Geneva: ICRC, 2000), p. 28 (citing reports from the HALO team in Grozny).

²⁴ Landmine Action, *Explosive Remnants of War: Unexploded Ordnance and Post-Conflict Communities* (London: Landmine Action, 2002), p. 50.

²⁵ Human Rights Watch, draft update of "A Global Overview of Explosive Submunitions," Memorandum to CCW Delegates, May 21-24, 2002.

²⁶ International Humanitarian Law and Targeting: An Australian Approach, working paper prepared by the Australian delegation, CCW/GGE/III/WP.6, December 3, 2002, p. 3.

the weapons must have low dud rates or self-destruct devices.²⁷ When implementing IHL, states should consider cluster munitions in particular and impose more cluster specific regulations.

Effectiveness

If the law were elaborated and made more specific, there is little doubt that civilians would enjoy greater protection from cluster munitions. The ICRC wrote about the ERW problem that “[a]lthough it could be argued that the general rules of international humanitarian law are sufficient, it is unlikely that they will be applied in an adequate or consistent manner unless specific rules for ERW are adopted. Clear rules will help identify the minimum norms expected of parties to a conflict and promote their implementation on a broad scale.”²⁸ Such words hold even more truth for cluster munitions, which are unlike other weapons in three major ways. Cluster munitions are large weapons that, in contrast to unitary weapons, contain dozens or hundreds of smaller submunitions. Cluster munitions produce an area effect, meaning that their submunitions spread over a footprint around the size of a football field. When used in populated areas, cluster strikes virtually guarantee civilian casualties, and duds littering rural areas endanger children and livestock. Finally each cluster munition leaves some unexploded ordnance because the submunitions themselves have high dud rates. A five percent dud rate applied to 100 unitary weapons leaves five unexploded bombs while the same rate with 100 cluster munitions could typically leave 1,000 duds. A new legal instrument would increase the clarity and scope of IHL and better protect civilians from cluster munitions’ unique combination of characteristics.

First, the legal standards that apply to explosive duds could be clarified with an eye to improving compliance and enforceability. Legal experts disagree, for example, on whether the proportionality test encompasses the long-term effects of submunitions. A U.S. Air Force legal document says that the dud rate must be part of this determination because unexploded bomblets are “reasonably foreseeable.”²⁹ British lawyer Christopher Greenwood argues the opposite in a CCW paper on IHL and ERW. Speaking about unexploded ordnance in general, he wrote that “only the immediate risk” can be relevant because “[t]he risks posed by ERW once the immediate aftermath of an attack has passed are too remote to be capable of assessment at that time.”³⁰ Even the ICRC has expressed uncertainty on this point. In a 2002 CCW document, it wrote, “It remains to be determined . . . the extent to which the long-term effects of unexploded munitions must be taken into account in making the determinations required by the principle of proportionality.”³¹ A new protocol could greatly clarify the factors to be considered when performing a proportionality test for cluster munitions.

²⁷ National Interpretation and Implementation of International Humanitarian Law with Regard to the Risk of Explosive Remnants of War, presented by Norway, CCW/GGE/VI/WG.1/WP.3, November 24, 2003, pp. 1-2.

²⁸ ICRC, Explosive Remnants of War: An Examination of Legal Issues Raised in the ERW Discussions, CCW/GGE/II/WP.8, July 15, 2002, p. 8.

²⁹ U.S. Air Force, Bullet Background Paper on International Legal Aspects Concerning the Use of Cluster Munitions.

³⁰ Christopher Greenwood, Legal Issues Regarding Explosive Remnants of War, p. 8.

³¹ ICRC, p. 2.

Second, the scope of the law, especially with respect to preventive measures to protect civilians from cluster munitions, could be expanded. A CCW discussion paper submitted by Canada outlines three aspects necessary to IHL. It must cover “(i) the use of munitions that may become ERW; (ii) means to prevent munitions from becoming ERW (technical and other measures); and (iii) the post-conflict risks resulting from Explosive Remnants of War.”³² Point (i) is only addressed by Geneva Protocol I, which as discussed above, could be clarified to minimize the harm caused by strikes and duds. CCW Protocol V sets binding rules related to post-conflict remedial measures, applicable to point (iii). It does not, however, address point (ii)’s preventive fixes, particularly important for cluster munitions, except for “encourag[ing]” parties to take “generic preventive measures” to minimize ERW. Protocol V includes a voluntary (and weak) technical annex, which says that states should “examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability.” Protocol V does not discuss targeting choices, such as use in populated areas. A new protocol could fill gaps and strengthen the standards on preventive measures to minimize civilian harm.

Third, a new protocol could resolve debates on how to measure the balance between military necessity and humanitarian objectives by either banning cluster munitions in specific situations, or creating a strong presumption against their legality. For example, there is lively debate on whether civilian harm outweighs military necessity, or vice versa, with respect to cluster munitions. Professor Thomas McDonnell opposes the use of cluster munitions because of the civilian casualties they cause, while Major Thomas Herthel defends the weapons as valuable to the military arsenal. Scholars, nongovernmental organizations, and some military experts generally concur that strikes on populated areas should be avoided because the broad footprint makes civilian casualties almost inevitable. According to the ICRC, “Of particular concern is the use of submunitions against military objectives in populated areas where the weapon’s quantity and failure rate pose significant dangers to civilians. The ICRC has also expressed concern about the immediate casualties during conflict when the weapon is used against military objectives in civilian areas.”³³ Even cluster supporter Herthel acknowledges that the risk of civilian harm increases when cluster munitions are used in populated areas. Urban strikes, however, are not explicitly regulated or prohibited under the current proportionality test. A cluster protocol could ensure that strikes with non-precision guided submunitions are banned or that at least there is a rebuttable presumption that they are disproportionate and therefore illegal.

The widespread use of cluster munitions in populated areas is a testament to the need for a new protocol, given that there is a growing consensus such strikes should be avoided. In Iraq, the United States developed an elaborate vetting process for cluster strikes, which included review by a lawyer in the field. Despite such precautions, U.S. ground forces made extensive use of clusters in populated neighborhoods and killed or injured more than a thousand civilians. According to General Sir Hugh Beach, the British government used law officers to scrutinize strikes in Kosovo, yet many scholars have

³² A Survey of Questions and Issues for the Group of Governmental Experts on Explosive Remnants of War, discussion paper prepared by the delegation of Canada, CCW/GGE/II/WP.4, July 10, 2002, p. 4.

³³ ICRC, p. 4

called NATO's cluster bombing indiscriminate.³⁴ The fact that even states that generally follow IHL cause disproportionate civilian harm with cluster munitions suggests that a binding protocol that elaborated standards with respect to these weapons would help to remedy the situation.

A New Protocol

Given the serious civilian harm caused by cluster munitions and the need to strengthen IHL to address their unique characteristics, the States Parties to the CCW should approve a mandate to negotiate a new protocol addressing these weapons. Human Rights Watch favors a CCW protocol that regulates, but does not completely prohibit, all cluster munitions. It thus acknowledges that certain models of cluster munitions used in certain circumstances may be legitimate yet takes a strong stand against the humanitarian damage caused by these weapons. By clarifying and extending the scope of rules to minimize harm from strikes and duds, such a protocol would address the specific character of this type of munition. It could prohibit, for example, strikes with non-precision guided submunitions in populated areas as well as attacks in environments that increase the number of duds. It could set guidelines or standards for accuracy and dud rates. It could also supplement post-conflict remedial measures by refining Protocol V's requirements for cluster munitions in particular. By agreeing to a new protocol in the near future, the CCW's parties could strengthen IHL and improve compliance.

³⁴ General Sir Hugh Beach, "Cluster Bombs: A Case for Banning?" ISIS Briefing Paper No. 79, February 2001, part 4, www.isisuk.demon.co.uk/0811/isis/uk/regpapers/no79_paper.html (retrieved June 3, 2004).