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User State Responsibility for Cluster Munition Clearance

Memorandum to Delegates of the Wellington Conference on Cluster Munitions

States should take advantage of the historic opportunity presented by the Oslo Process to minimize the humanitarian harm caused by existing cluster munition remnants, or "duds." The Wellington draft treaty text takes an important step in that direction with the inclusion of an article assigning user states special responsibility for clearance of existing duds. Some states have argued that this article should be cut. The provision, however, is essential to fulfilling the humanitarian goals of the convention, and this paper lays out legal precedents for its inclusion.

In order to address the threat of duds from past conflicts, the Wellington draft treaty text currently assigns responsibility to: 1) state parties to clear and destroy cluster munition remnants within their territories,[1] and 2) the international community to

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[1] Draft Cluster Munition Convention discussion text circulated in advance of the Wellington Conference on Cluster Munitions, to be held February 18-22, 2008, art. 4(1) [hereinafter Wellington Text].

provide affected states with technical, material, and financial assistance in dud clearance.[2] The Wellington draft treaty text also places a special responsibility for clearance on user states, providing in Article 4(4) that:

> This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for it and have become cluster munition remnants located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter. In such cases, upon entry into force of this Convention for both States Parties, the former State Party shall provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party, either bilaterally or through a mutually agreed third party, including through the UN system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants. Such assistance shall include information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.[3]

Although the language of this provision should be written more clearly, we applaud the drafters of the language for their recognition that a ban on production, transfer, stockpiling, and use of cluster munitions alone will not eliminate the current harm posed by cluster duds now on the ground. We urge states to support this provision, which requires user states to assist in clearance[4] of submunition duds, even if the use occurred before the treaty takes effect. We also urge states to insert similar language into Article 6 on International Cooperation and Assistance.[5]

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[2] Ibid., art. 6(2).

[3] Ibid., art. 4(4).

[4] For the purposes of this paper, Human Rights Watch and the Clinic use the term "clearance: to include actual clearance, financial assistance, technical assistance such as information-sharing about the location where weapons were dropped, and any other material assistance to help with the removal and destruction of cluster submunition duds.

[5] This paper does not address the issue of victim assistance in detail, but many of the same arguments for user state responsibility could be made in that context as well.

A number of legal precedents support the inclusion of this approach in a new treaty. First, the principle of holding user states responsible for existing duds stems from past weapons treaties, including Convention on Conventional Weapons (CCW) Protocol V on Explosive Remnants of War (ERW). Second, states parties can be and have been assigned, in several ways, responsibility for actions initiated before a law takes effect. Several international legal bodies have held states responsible for harm initiated by them before a treaty entered into force if the harm continues in the present. If harm was foreseeable, parties that have contaminated an area have been found to have a duty to clear materials they have left behind even before certain principles have been codified as legal obligations. Under international law, states can also choose to take responsibility for actions that occurred before a treaty enters into force. Third, the principle requiring user states to assist with clearance of existing submunitions is a critical element of any treaty banning cluster munitions because such states have the information necessary to facilitate efficient and effective clearance.

Article Language

Article 4(4) in the Wellington text could be clarified as such:

> When a State Party, before entry into force of the Convention for it, has used or abandoned cluster munitions in areas under the jurisdiction or control of another State Party, the former State Party shall provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party to facilitate the marking, clearance, and destruction of any cluster munition remnants. Provided either bilaterally or through a mutually agreed third party, such as the UN, such assistance shall include information on types and quantities of the cluster munitions used as well as the precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.

The phrase “and in particular user states” should be added to Article 6(2). Its addition will help ensure provision of support for risk education and victim assistance.

Special Responsibility of User States

Existing international humanitarian law (IHL), or the law of war, provides precedent for requiring user states to eliminate the humanitarian harm posed by weapons that linger after a conflict has ended. CCW Protocol V is particularly relevant because it applies to cluster munitions when they are ERW, but the existence of similar articles in other treaties shows that such obligations are not unusual.

Article 4(4) is a logical extension of the CCW Protocol V, which was drafted in 2003 and entered into force in 2006. This protocol articulates an obligation for user states to help clear ERW. It mandates that "where a user of explosive ordnance which has become explosive remnants of war, does not exercise control of the territory, the user shall, after the cessation of active hostilities, provide where feasible, inter alia technical, financial, material or human resources assistance . . . to facilitate the marking and clearance, removal or destruction of such explosive remnants of war."[6] In addition to addressing user states' clearance responsibilities, CCW Protocol V requires all states parties "in a position to do so" to "provide assistance in dealing with the problems posed by existing explosive remnants of war."[7] Protocol V thus includes one article requiring user states to assist with clearance of new ERW and another requiring all states parties, in a position to do so, to assist with clearance of existing ERW. The Wellington text goes a step further, explicitly combining these two obligations—special responsibility for user states and clearance of ERW that pre-date the treaty.

Other weapons treaties provide more precedent for the principle. The Chemical Weapons Convention, which entered into force in 1993, obligates user states that have abandoned their weapons in a foreign state's territory to assist in post-conflict weapons clearance: "Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party."[8] In order to facilitate the

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[6] CCW Protocol on Explosive Remnants of War (Protocol V), UN Doc. CCW/MSP/2003/2 (Nov. 27, 2003), entered into force November 12, 2006, art. 3(1) [hereinafter Protocol V]. In its non-binding technical annex, Protocol V encourages user states to record information regarding the location, number, and types of unexploded ordinance left behind and then provide this information to the "parties in control of the affected area." Ibid., Technical Annex, arts. a(i), a(ii), a(iii), a(iv), and c(iii).

[7] Ibid., art. 7(2).

[8] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1015 U.N.T.S. 163, art. 1.3. [hereinafter Chemical Weapons Convention].

destruction of remaining chemical weapons "the Abandoning State Party shall provide all necessary financial, technical, expert, facility as well as other resources."[9] Additionally, the diplomatic history for the 1996 amendments to CCW Protocol II on Landmines[10] demonstrates that in drafting the amendments, states recognized the necessity of mandating clearance by user states in order to minimize humanitarian harm. For example, the representative from Finland stated that "[t]o avoid casualties among the civilian population, those who laid the mines must bear the primary responsibility for clearing them."[11] The Czech Republic similarly prioritized "establish[ing] the principle that those using mines were responsible for their removal."[12] Peru echoed this sentiment, stating that "[c]lear regulations should be established making it compulsory for States which had laid mines to remove them."[13] These weapons treaties present IHL standards that require user state clearance and reflect both the international community's preference for user state responsibility and states' awareness of typical weapons clearance obligations.

Responsibility for Pre-Treaty Actions

The special responsibility for user states, as laid out above and articulated in Article 4(4), should apply to cluster munition remnants left before the treaty takes effect. Neither international nor domestic law prohibit imposing clearance responsibilities on states whose use of cluster munitions pre-dates the convention. By contrast, three legal precedents argue in favor of the principle: states can be held responsible for present harm initiated before a law enters into force, parties can be held

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[9] Ibid., Verification Annex, art. 15.

[10] CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1342 U.N.T.S. 168, 19 I.L.M. 1529, entered into force Dec. 2, 1983, as amended May 3, 1996, 35 I.L.M. 1206 [hereinafter Amended Protocol II].

[11] United Nations Conference of Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or to Have Indiscriminate Effects, Summary Record of the 3rd Meeting Held at the Austria Center, Vienna, on Tuesday, September 26, 1995, General Exchange of Views, CCW/CONF.I/SR.3, p. 4, in CCW/CONF.I/16 (PART II), p. 319.

[12] United Nations Conference of Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or to Have Indiscriminate Effects, Summary Record of the 3rd Meeting Held at the Austria Center Vienna, on Wednesday, September 27, 1995, General Exchange of Views (continued), CCW/CONF.I/SR.4, p. 18, in CCW/CONF.I/16 (PART II) p. 352.

[13] United Nations Conference of Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or to Have Indiscriminate Effects, Summary Record of the 3rd Meeting Held at the Austria Center Vienna, on Wednesday, September 27, 1995, General Exchange of Views (continued), CCW/CONF.I/SR.5, p. 9, in CCW/CONF.I/16 (PART II) p. 363.

responsible for foreseeable harm initiated before a law enters into force, and states can accept responsibility for past actions.

Present Humanitarian Harm

Unexploded submunitions, even if launched in the past, represent present harm to civilians,[14] which user states should minimize through clearance assistance. IHL treaties and international legal bodies have held states responsible for harm initiated before a treaty entered into force if the harm continues in the present. As mentioned above, CCW Protocol V articulates the duty of states to prevent the present harm of existing ERW, a category that includes submunition duds that were abandoned before the cluster munitions treaty would enter into force. Article 4(4) merely applies that obligation to user states.

In addressing other humanitarian concerns, international bodies have held actors liable for their past actions that cause present harm. The European Court of Justice (ECJ) recognized that the nature of ongoing harm could justify liability for harm initiated in the past. In its 2004 decision in the case of *Van De Walle*, the ECJ held that contaminated soil must be designated as "waste" and thus come within the scope of domestic and European Community rules regarding waste management, even if the soil was contaminated before the legislation came into effect.[15] In *Lovelace v. Canada*, the Human Rights Committee (HRC), the authoritative body for interpretations of the International Covenant on Civil and Political Rights (ICCPR), similarly held that the harmful effects of rights violations that occurred before the rights were codified in a treaty constituted a violation of treaty obligations because the harm continued in the present.[16] The European Court of Human Rights (ECtHR)

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[14] Unexploded submunitions launched in the past prose present harm, killing and injuring scores of civilians each year. For information on the post-conflict harm of cluster munitions in Kosovo, Afghanistan, Iraq, and Lebanon, see, for example, Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, vol. 12, no. 1(D), February, 2000, http://www.hrw.org/reports/2000/nato/; Human Rights Watch, *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan*, vol. 14, no. 79(G), December 2002, http://hrw.org/reports/2002/us-afghanistan/; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003), http://www.hrw.org/reports/2003/usa1203/; Human Rights Watch, *Flooding South Lebanon: Israel's Use of Cluster Munitions in Lebanon in July and August 2006*, vol. 20, no. 2(E), February 2008, http://hrw.org/reports/2008/lebanon0208/.

[15] *See* European Court of Justice, Van de Walle, C-1/03, Judgment of 7 September 2004 (1); Owen McIntyre, "Case Law Analysis: The All-Consuming Definition of 'Waste' and the End of the 'Contaminated Land' Debate?" *Journal of Environmental Law*, vol. 17, (2005), p. 109.

[16] The ICCPR did not enter into force in Canada until 1976 and yet the HRC considered that the deprivation of Indian status that had occurred due to the plaintiff's marriage to a non-Indian in 1970 "continued to have effects which themselves constitute a

has also held states to be in violation of their treaty obligations for present harm even when the violation was initiated before the state became party to the European Convention on Human Rights.[17] In the case of *Loizidou v. Turkey*, the ECtHR noted that the Court has "endorsed the notion of a continuing violation of the Convention and its effects as to the temporal limitations of the competence of Convention organs."[18] A cluster munitions convention must similarly assign responsibility to user states to mitigate the danger presented by cluster duds that were dropped in the past but cause present harm.

Foreseeable Harm

States should be held responsible for clearance of cluster munition duds as soon as they knew, or should have known, of their harm, even if the harm was initiated before a law enters into force. This principle applies to cluster munitions because the fact that they leave dangerous duds has been evident from their earliest use in the Vietnam War.

Environmental law articulates the principle of assigning to parties that contaminate an area responsibility for foreseeable harm, and the requirement to clean up waste, pollution, or other contamination is analogous to that for cluster duds. For example, plaintiffs in England can recover for present or past harm so long as they can prove that the defendants could have foreseen the harm that they would cause.[19] The US Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) likewise imposes legal responsibility on polluters for acts committed before the legislation was passed because they should have known the harm they were causing.[20] When challenged in court, the US Fourth Circuit Court of Appeals reasoned that "[w]hile the generator defendants profited from inexpensive waste disposal

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violation of the Covenant after that date." UN Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, UN Doc. Supp. No. 40 (A/36/40) at 166 (1981), paras. 7.3, 13.1, and 19.

[17] See, for example, European Court of Human Rights, Papamichalopoulos and Others v. Greece (No. 14556/89), Judgment of 24 June 1993, 18/1992/363/437; European Court of Human Rights, Loizidou v. Turkey, (No. 15318/89), Judgment of 18 December 1996, 40/1993/435/514, para. 41.

[18] European Court of Human Rights, Loizidou v. Turkey, para. 41.

[19] Gerrit Betlem and Michael Faure, "Environmental Toxic Torts in Europe: Some Trends in Recovery of Soil Costs and Damages for Personal Injury in the Netherlands, Belgium, England and Germany," *Georgetown International Environmental Law Review*, vol. 10 (Spring 1998), p. 878.

[20] 42 U.S. 103 (1980), http://www.epa.gov/superfund/policy/cercla.htm.

methods that may have been technically 'legal' prior to CERCLA's enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage."[21] Thus it justified liability based on the existence of foreseeable harm that pre-dated explicit, legal codification. In the Netherlands, the highest court, upholding a statute from 1995, held that any land contamination that occurred before January 1, 1975 (the "magic date"), could not be punished under tort law.[22] After this date, however, polluters should have known the damage they were causing and are consequently held liable, sometimes strictly liable, for any harm caused.[23] The Wellington text does not impose a "magic date" because cluster munitions harm has been foreseeable since almost their first use, but it establishes an obligation for users to clear submunition duds left after armed conflict. Although these specific environmental law precedents do not apply to states, they lay out a legal principle that can be adapted to state responsibility for cluster munition clearance.

Responsibility for Past Actions

Under international law, states can accept legal responsibility for past actions. The International Law Commission (ILC)[24] notes in its Draft Articles on Responsibility of States for Internationally Wrongful Acts that "[a] State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State."[25] States should choose to assume such responsibility with regards to unexploded submunitions because of the latter's grave humanitarian consequences. Over the past several decades, submunition duds have caused at least thousands of civilian casualties from Laos to Lebanon.

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[21] *United States v. Monsanto*, 858 F.2d. 160, 174 (4th Cir. 1988).

[22] Betlem and Faure, "Environmental Toxic Torts in Europe," p. 859.

[23] Ibid.

[24] The UN General Assembly established the ILC for the "promotion of the progressive development of international law and its codification." UN General Assembly, "Statute of the International Law Commission," Resolution 174(II) (1947), as amended by Resolutions 485 (V) (1950), 984 (X) (1955), 985 (X) (1955), and 36/39 (1981), art. 1.

[25] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary," *Yearbook of the International Law Commission* (2001), vol. II, part 2, Commentary to Article 13, para. 6. Note also that the ILC mentions as another qualification the progressive interpretation of obligations, stating that this principle does not hold that treaty provisions are to be interpreted as if frozen in time. See Commentary to Article 13, para. 9 (citing *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, para. 53; *Tyrer v. United Kingdom*, E.C.H.R., Series A. No. 26 (1978) at pp. 15-16). This Commentary is addressing the general principle that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UN General Assembly, Resolution 56/83 (2001), as corrected by A/56/49)Vol. I)/Corr. 4, art. 13.

States should establish an obligation for user states to assist with clearance of unexploded duds left during past conflicts in order to prevent future civilian harm.

Information Sharing and Other Assistance

Ensuring that dud clearance is as efficient and effective as possible requires detailed information from weapons users regarding both the location of cluster munition strikes and the technical characteristics of the weapon in order to facilitate detection and destruction of the submunitions.[26] CCW Protocol V already requires that detailed information including "the location of areas targeted using explosive ordnance; the approximate number of explosive ordnance used in the areas under; the type and nature of explosive ordnance used in areas under; and the general location of known and probable UXO . . . should be released to the party or parties in control of the affected territory."[27] This language, which applies to cluster munitions as ERW, lends strong support to the inclusion in the final treaty text of explicit user state responsibility to provide information for cluster munitions clearance.

Other IHL treaties recognize the necessity of information sharing for post-conflict weapons clearance. CCW Amended Protocol II explicitly requires information from states regarding the mines left behind in another state's territory: "the parties to a conflict . . . shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control."[28] The international community recognized that without detailed information sharing, there was no way to prevent future civilian casualties from mines. As the Chinese delegation explained in preparation for the Chemical Weapons Convention in 1992, protecting civilians

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[26] Speaking to the General Assembly regarding the 1996 amendments to Protocol II, the Secretary-General of the United Nations stated, "It should probably be made clear in the Protocol that the recording should not only cover the boundaries of the fields bud also the number, type, and pattern of distribution of the mines, as well as details of any anti-lifting devices attached tot hem." UN Conference of Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or to Have Indiscriminate Effects, Draft Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps, and Other Devices, Note by the Secretariat Concerning the Recording and Publication of the Minefields, Mines, and Booby-Traps (Article 3) and Protection of Untied Nations Missions from the Effects of Minefields, Mines, and Booby-Traps. A/CONF.95/CW/4 P.1-2.

[27] Protocol V, Technical Annex, arts. a(i), a(ii), a(iii), a(iv), and c(iii).

[28] Amended Protocol II, art. 9(2).

from the harm of abandoned weapons requires information from the user state: "Even today, the chemical weapons abandoned by the foreign State still cause havoc and constitute a grave threat. . . . As the foreign State concerned has provided no information on the chemical weapons it abandoned in China, it is impossible to take the necessary precautionary measures when such weapons are discovered, and many injuries have occurred as a result."[29] Likewise, deminers require detailed information to clear submunitions efficiently and effectively. The abandoning state is the best source of this information.[30] The need to clear unexploded submunitions completely and swiftly thus necessitates the user state's participation in clearance of duds regardless of the time of their origin.

Conclusion

A cluster munition convention offers the international community an opportunity not only to prevent future use of cluster munitions, but also to eliminate the existing threat to civilians from remaining cluster duds. It should do so by adopting some version of the international cooperation provisions discussed here. They will help advance the core goal of the convention, which is to prevent humanitarian harm to the civilian population.

[29] UN Conference on Disarmament, CD/1127, February 18, 1992.

[30] Deminers, for example, have repeatedly asked Israel to release precise information about its cluster munition strikes on south Lebanon in 2006 in order to speed up clearance and reduce civilian casualties. Israel has to date refused to release anything more than general information. See Human Rights Watch, *Flooding South Lebanon*, pp. 92-93.