

Article36

Refusal to condemn cluster munition use undermines UK claims to leadership on the protection of civilians.

Article 36 is a UK-based not-for-profit organisation working to promote public scrutiny over the development and use of weapons.

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The UK's attempt to prevent states from condemning "any cluster munition use, by any actor" through the Dubrovnik Declaration continues a long-standing pattern of persistent but ultimately futile efforts to resist the overriding humanitarian imperative for civilian protection in the context of cluster munitions. A review of the history of UK diplomatic engagement on cluster munitions provides grounds to question the claim that their opposition to condemnation of use is motivated by concern to promote the universalization of the Convention on Cluster Munitions (CCM). Rather it should be seen as an attempt to avoid fully promoting the norms of the Convention and to avoid undertaking, collectively, the best effort to discourage the use of cluster munitions. Both of those are obligations under article 21 of the CCM. The UK's attempt to justify its refusal to condemn cluster munition use on the basis of article 21 is not founded in legal analysis but in political desperation. The UK's objection to condemnation of use should be rejected by committed states parties.

The UK was previously a significant user, stockpiler and exporter of cluster munitions. As well as using the weapons in the Falkland Islands, Kosovo, Serbia and Iraq, UK-exported cluster munitions were used in Croatia, Eritrea and elsewhere. Whilst the UK's accession to the CCM and its destruction of stocks is to be welcomed, such actions should not be mistaken for leadership in efforts to address the harm caused by these weapons. Rather, a review of UK diplomatic engagement reveals opposition to the broad prohibition of cluster munitions up until the agreement of the CCM and ongoing efforts to reduce the normative impact of that treaty on allies that are not party. Fortunately, this history also reveals a pattern of failure by the UK to realize its preferred outcomes due to inadequate policy argumentation and ineffective diplomatic strategy, coupled with a political acceptance at key moments of the overriding imperative to address humanitarian concerns.

A history of reluctance, leaks, confusion and policy disarray

In the early 2000s the UK government's position on cluster munitions was that they were legal weapons and that existing international humanitarian law was adequate. UK ministers claimed that the government had "carefully weighed" the humanitarian risks and the military advantages of the weapons and that on the basis of this careful weighing the weapons were considered appropriate. However, when the government was forced to reveal that it had undertaken no assessment of civilian casualties or other forms of harm from either its own extensive use of cluster munitions or use by any other actors, the "careful weighing" was revealed as empty words in response to real humanitarian concerns.¹

Shortly before the 2006 CCW Review Conference, an internal letter from the UK's Secretary of State for International Development to other government colleagues (and that was leaked to the media) pushed for a prohibition on "dumb cluster munitions". In response to that leak the UK hastily revised its policy that existing law was adequate, fleshing out a definition of "dumb cluster munitions" that happened to match those that it held in stocks but that were not already approaching, or beyond, the end of their planned service life. Despite trumpeting this new policy at the CCW Review Conference, the UK organized in opposition to a mandate to negotiate on cluster

munitions. In the final session of the conference the UK described it as “a pity” that some states considered another discussion mandate on the broad issue of explosive remnants of war as an insufficient response to the humanitarian problem of cluster munitions.

However, having called for a prohibition on “dumb cluster munitions” the UK was invited to participate in the Oslo Conference in February 2007 that initiated the diplomatic process towards the agreement of the CCM. In accepting that invitation, the UK’s Foreign Secretary underlined, literally in her own ink, that the UK did **not** want to see a **parallel** track of work to the discussions on explosive remnants of war in the CCW.

The UK’s “dumb cluster munition” policy fell apart during the course of the Oslo Process. In a working paper to the CCW in 2005 the UK had claimed that all of its cluster munitions would have a failure rate of “less than 1%”. Despite various attempted statistical manipulations, the UK was unable to escape from the fact that its own testing results, released under the Freedom of Information Act, showed a higher proportion of submunitions left unexploded than either their CCW commitment or what they had been claiming in Parliament. The UK then tried to argue that the M85 submunitions used by Israel in Lebanon in 2006 were not the same as those in its own stockpile and that it was seeking to exempt from prohibition. This too was rejected.

To add to this embarrassment, in late 2006 the UK tried to claim that its direct fire cluster munitions (CRV-7) were not cluster munitions at all, despite having described them as cluster munitions in numerous official statements. When challenged on this by journalists, Ministry of Defence (MoD) sources told the BBC that the UK’s position was “endorsed by both the Norwegian Government and the International Committee of the Red Cross”. The BBC reported that this was not true, and the MoD had to issue a public retraction.²

Although these policy lines appeared to be slightly shambolic, the UK apparently sought to reassure the US during the Oslo Process that the issue was under control. As revealed through Wikileaks, US diplomatic cables reported that the UK’s Director General of Defence and Intelligence in the Foreign Office told US officials that the British were only taking part in the Oslo Process as a “tactical manoeuvre” and that cluster bombs were “essential to its arsenal”.³ Such reports should cast doubt on any belief that the UK is currently “tactically manoeuvring” certain states to join the CCM through its efforts to weaken the Dubrovnik Declaration.

Shortly after that conversation is reported to have taken place with US officials, and despite repeatedly telling non-governmental organisations and others that keeping both its M85 and CRV-7 cluster munitions was a “red line”, the UK position collapsed and it endorsed the prohibition of both of those weapons through the agreement of the CCM.

Beyond this, the UK’s attempts to block states from condemning any use of cluster munitions are consistent with its efforts to assist the US in avoiding the full pressure that the CCM exerts internationally. Cables revealed by Wikileaks reported UK diplomats trying to facilitate a form of “exemption” to allow the US to move cluster munitions through the British territory of Diego Garcia without attracting the attention of parliamentarians. The then Head of the Foreign Office’s

security policy unit, was quoted as saying: “It would be better for the US government and HMG [the British government] not to reach final agreement on [a] temporary agreement understanding until after the [treaty] ratification process is completed in parliament, so that they can tell parliamentarians that they have requested the US government to remove its cluster munitions by 2013, without complicating/muddying the debate by having to indicate that this request is open to exceptions.”⁴ The UK has still not extended its national Cluster Munitions (Prohibitions) Act to cover Diego Garcia and it is not known if US cluster munitions have been transferred through the territory subsequent to that Act becoming UK law.

The power of the humanitarian imperative to direct UK policy

Despite resistance to the comprehensive prohibition of cluster munitions ahead of the agreement of the CCM, and despite subsequent attempts to shield UK allies that are not party to the treaty from its full normative pressure, the UK has referred to the prohibition of cluster munitions as a humanitarian milestone.

In 2008, the then UK Foreign Secretary at the signing conference of the Convention asserted a need to “tell those not here in Oslo that the world has changed, that we have changed it and that a new norm has been created.” Similarly enthusiastic, in 2013, a different UK Foreign Secretary, promoting action against sexual violence in conflict, argued that, “ending the 17th century slave trade was deemed impossible, and it was eradicated. Achieving global action against landmines, cluster munitions and climate change was thought impossible, yet the world acts on these issues.”⁵

Whilst recognising the broadly critical nature of this historical review so far there are a number of aspects of the UK’s engagement on cluster munitions that provide grounds for optimism. Ultimately, despite a diplomatic instinct to retain military capacities and to reduce pressure on allies that might continue to use cluster munitions, the humanitarian imperative towards civilian protection has still dictated the central elements of UK policy at critical moments. In announcing its decision to adopt the CCM, UK statements appealed to a sense of humanitarian values. “I am confident that this agreement is in line with British interests and values, and makes the world a safer place,” stated then Prime Minister Gordon Brown, in May 2008.

In a similar vein, moving away from its initial strong criticism of the parallel ‘Oslo process’ approach to negotiate a treaty banning cluster munitions amongst likeminded countries, in 2013, the UK said the CCM was “a shining example of what can be achieved when governments and civil society come together to pursue a common purpose...”

The UK also praised the role of civil society and the model of collaboration between NGOs and governments, noting that, “this spirit of partnership between States, NGOs and International Organisations is at the heart of the Convention’s success and we remain grateful to the ICRC, the UN and Cluster Muniton Coalition for their on-going commitment and dedication to the Convention.”

In 2011 negotiations were underway for a new protocol to the CCW that would provide a lower legal standard to the 2008 CCM. Many

states parties to the CCM strongly opposed any such protocol, calling instead for states to take national measures and work towards joining ban treaty. The UK initially appeared supportive of US-led efforts towards such a protocol. However, in the face of parliamentary and media pressure, a Foreign Office Minister again highlighted the humanitarian importance of eliminating cluster munitions, stating in parliament that, “we will participate in negotiations at the CCW review conference this month, with the aim of getting the best possible result, and we will be guided by our determination to deliver a significant humanitarian outcome and, crucially, not to undermine the progress made under the Oslo treaty. We will therefore continue to press the world’s users and producers to give up more, to be more transparent and to be explicit in their commitment to work towards a world entirely free of cluster munitions.”

When the proposals for a CCW protocol were put to the floor at the UN in Geneva, the UK delegation remained silent on the matter, providing no support for proposals made by the US or the chair. Efforts to negotiate this alternative, more permissive legal standard ultimately failed amid widespread opposition from states parties to the ban treaty.

The UK has also cited humanitarian considerations as the motivation for its exemplary approach to stockpile destruction, stating that, “we believe that destroying operational stocks is the only way to categorically put them beyond use and secure the Convention’s humanitarian aims.”

In all of these examples the UK has been able to recognize the humanitarian imperative towards civilian protection and to articulate this as guiding the policy orientation adopted.

Conclusion

During the course of its engagement on cluster munitions, the UK has presented an erratic pattern of engagement. This has resulted from tensions between the pressure of a humanitarian imperative and, variously, a reluctance to limit military capabilities, anxiety about diplomatic processes that it cannot control, and desire to assist allies that are standing outside of these processes. Whilst such erratic behaviour presents itself again in the UK’s effort to work against collective condemnation of cluster munition use through the Dubrovnik Declaration, in the longer view the humanitarian imperative has effectively dictated the key political decisions.

In that context, the current resistance to international condemnation of use should be seen as the final throes of a long-standing inability, in elements of the UK’s governmental machinery, to fully embrace the prohibition of cluster munitions. Claims that this position is motivated by a concern more effectively to universalize the Convention are hardly credible. Their appeal to article 21 of the Convention as supporting this position seems equally thin. It is clear that collective condemnation of cluster munition use by any actor is one of the best efforts that states can make to discourage further cluster munition use. On basic humanitarian grounds, discouraging use should override “persuading to join the convention” as a basis for prioritizing actions because the former has the more direct and immediate relationship to preventing human suffering. International condemnation is recognized as one of the most effective measures available for discouraging unacceptable behaviour. If the UK has some concrete

information about states that are considering joining the Convention, but that have indicated they may be put off by the current wording of the Dubrovnik Declaration then the UK should articulate that explicitly. Without such an explicit statement the UK’s concerns regarding universalization should be dismissed outright, because discouraging use of the weapons should take priority over self-interested speculation. In either case, condemning any use of cluster munitions by any actor should be seen as an obligation for committed states parties.

On this basis, states should clearly reject the UK’s effort to block the condemnation of any cluster munition use by any actor in the Dubrovnik outcome documents. If the UK continues to refuse to modify its position on this point then, whatever the outcome, it clearly raises concerns about the UK’s claim to act as a leader on the UN Security Council regarding the Protection of Civilians in armed conflict. This is all the more challenging in an international context where the Security Council is widely seen as failing to deal with the most pressing humanitarian emergencies. The protection of civilians is best served by strong international condemnation of any cluster munition use by any actor, not by a ‘pick and choose’ approach of condemning use by certain actors whilst refusing to condemn use by allies. The protection of civilians demands that we transcend such politicisation. If the UK cannot do this then it is not in a position to provide leadership on the protection of civilians.

END NOTES

- 1 Landmine Action (2005), “Out of Balance: The UK Government’s efforts to understand cluster munitions and international law.”
- 2 See Landmine Action (2007), Campaign newsletter, “Dumb cluster bomb policy”.
- 3 See The Guardian, 1 December 2010: <http://www.theguardian.com/world/2010/dec/01/wikileaks-cables-cluster-bombs-britain>
- 4 Guardian, December 2010: <https://www.gov.uk/government/news/g8-declaration-on-preventing-sexual-violence-in-conflict>5 David Lidington, Foreign Office Minister, 9 November 2011
- 5 UK Statement to the Second Meeting of States Parties to the CCM, Beirut, 11 September 2011

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