



HOUSE OF LORDS

# Library Note

## **Cluster Munitions (Prohibitions) Bill [HL]** (HL Bill 2 of 2009–10)

The Cluster Munitions (Prohibitions) Bill was introduced in the House of Lords on 19th November 2009, and is due to receive its second reading on 8th December. This Library Note provides background information on the use of cluster munitions; UK and international policy on their use; and the measures contained in the Bill.

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## Table of Contents

Introduction .....	1
1. Historical Context.....	2
2. UK Government Policy on Cluster Munitions—Development and Disarmament.....	8
3. The UK and the Oslo Negotiations .....	9
4. The Convention on Cluster Munitions.....	10
5. The Cluster Munitions (Prohibitions) Bill .....	16
Bibliography .....	19



## Introduction

The Cluster Munitions (Prohibitions) Bill was announced in June 2008 as part of the Government's Draft Legislative Programme 2009/10,<sup>1</sup> and was included in the Queen's Speech on 18th November 2009.<sup>2</sup> The Bill was introduced in the House of Lords on 19th November 2009, and the second reading debate is due to take place on 8th December 2009.

The purpose of this Bill is to create new criminal offences under UK law to enforce the prohibitions set out in Article 1 of the Convention on Cluster Munitions,<sup>3</sup> signed by the Foreign Secretary, David Milliband MP, in Oslo on 3rd December 2008. These provisions must be enacted into law in order for the United Kingdom to ratify and become a State Party to the Convention on Cluster Munitions.

This Library Note examines the historical context of the use of cluster munitions, previous international efforts to prevent their usage, and events leading to the Oslo Declaration, the direct precursor to the Convention on Cluster Munitions. The Note also examines UK Government policy on cluster munitions and its responses to these international disarmament efforts. The Note then examines the Convention on Cluster Munitions in detail, including the duties and responsibilities that it places on State Parties, before turning to a specific account of the provisions of the Cluster Munitions (Prohibitions) Bill.

This Note draws upon much of House of Commons Library Standard Note SN/1A/4339 *Cluster Munitions*, published on 21st May 2007.

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<sup>1</sup> HC *Hansard*, 29th June 2009, cols 4–5WS.

<sup>2</sup> HC *Hansard*, 18th November 2009, cols 1–4.

<sup>3</sup> The Cluster Munitions Convention,  
[http://www.clusterconvention.org/pages/pages\\_ii/ia\\_textenglish.html](http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html).

## I. Historical Context

### *Defining 'Cluster Munitions'*

Cluster munitions of varying type have been in use since the Second World War. However, it was the United States, during the Vietnam War, who first introduced and utilised cluster munitions in their recognisable modern form.<sup>4</sup> Such munitions can be broadly defined as follows:

In its most basic form a cluster munition is a hollow shell or canister (such as a bomb casing, rocket, or artillery shell) that is packed with any number of small explosive submunitions, also referred to as bomblets (ranging from tens to several hundred). These munitions can be either air-launched or ground-launched and incorporate a fuse-release system (which can be time-delayed) that disperses the submunitions over a specific target area.<sup>5</sup>

Cluster munitions technology has developed significantly since these weapons were first introduced, not least with the emergence of increasing variations of cluster munitions and submunitions, from more traditional forms of anti-personnel and anti-armour submunitions, to anti-runway and anti-electrical cluster munitions, designed to be used to destroy infrastructure and disable power lines and communications.<sup>6</sup>

Cluster munitions have also become markedly more sophisticated, particularly through the design of 'smart' guidance systems which aim to enable submunitions to more accurately engage their intended target, and self-deactivation or self-destruction mechanisms, which aim to render submunitions harmless if they fail to detonate as intended. Taken together, such guidance systems and deactivation mechanisms have led to distinction being drawn between so-called 'smart cluster munitions'—or those equipped with such measures—and 'dumb' cluster munitions—those without.<sup>7</sup> Former Foreign Secretary, Margaret Beckett MP, outlined the UK Government's understanding of this distinction in answer to a parliamentary question on 23rd November 2006:

The UK understanding of 'dumb' cluster munitions is that they contain numerous sub-munitions of an explosive content. Additionally, they do not have a target discriminatory capability or they do not have a self-destruct, neutralisation or deactivating capability in the event of failing to detonate prior to, or immediately after, impact with the target. In this context, the term 'smart' is not defined.<sup>8</sup>

The distinction between 'smart' and 'dumb' cluster munitions was a key element in domestic disarmament plans prior to the Convention on Cluster Munitions, as examined below in the discussion of UK policy towards cluster munitions.

### *Difficulties of Definition*

However, it is worth noting here that, as Margaret Beckett also pointed out in the written answer cited above, prior to negotiations on the prohibition of cluster munitions which began in Oslo in 2007, there was "no internationally agreed definition of cluster munitions

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<sup>4</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 935.

<sup>5</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/IA/4339, p 3.

<sup>6</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/IA/4339, p 3.

<sup>7</sup> HC *Hansard*, 23rd November 2006, col 242W.

<sup>8</sup> HC *Hansard*, 23rd November 2006, col 242W.

of any variant”, smart or otherwise.<sup>9</sup> The lack of such a definition has had critical implications for efforts to prohibit or restrict the use of these munitions, creating ambiguity regarding which weapons should be regarded as ‘cluster munitions’ and whether distinction should be drawn between different types of weapon, particularly in relation to those weapons equipped with the types of guidance and self-deactivation mechanisms mentioned above.<sup>10</sup> A key aim of the Convention on Cluster Munitions therefore, was to propose a comprehensive definition of cluster munitions and submunitions, and to identify those weapons subject to the Convention accordingly. The final definition agreed on by State Parties is explored below in the discussion of the Articles of the Convention.

### *Proliferation*

The proliferation and use of different types and models of cluster munition since the Vietnam War has been widespread, as Bonnie Docherty, Lecturer of Law at Harvard Law School and a senior researcher in the Arms Division of Human Rights Watch,<sup>11</sup> records:

At least fifteen states have used cluster munitions in thirty-two countries and disputed territories around the world. At least seventy-seven countries stockpile cluster munitions, and at least thirty-four have produced more than 210 types. At least thirteen countries have transferred to at least sixty states more than fifty types of cluster munitions. Non-state armed groups have also deployed cluster munitions. Cluster munitions have been used, stored, or manufactured on five continents.<sup>12</sup>

Alongside this growth in the use of cluster munitions, concern has also grown regarding the effect of these weapons, particularly on civilian populations and non-combatants.

### *Humanitarian Ramifications*

There are two principal humanitarian concerns over the use of cluster munitions. The first is the potential for civilian casualties given the *area effect* of these weapons. Cluster munitions are designed to disperse tens or hundreds of submunitions across large surface areas. The result is that even if these weapons are deployed against military targets, there is considerable potential for collateral damage and civilian casualties.<sup>13</sup> This is particularly true of ‘dumb’ cluster munitions, or those without dedicated guidance systems. This has become of increasing concern as modern conflict sites have moved increasingly from rural to urban environments, often where there are large civilian populations and where military and civilian populations closely interact.<sup>14</sup>

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<sup>9</sup> HC Hansard, 23rd November 2006, col 242W.

<sup>10</sup> Cluster Munition Coalition: <http://www.stopclustermunitions.org/the-problem/what-is/?id=107>.

<sup>11</sup> Bonnie Docherty was also an active participant in the negotiations for the Convention on Cluster Munitions, lobbying and providing legal advice at conferences throughout the process during 2007–2008.

<sup>12</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 938.

<sup>13</sup> Cluster Munitions Coalition: <http://www.stopclustermunitions.org/the-problem/>.

<sup>14</sup> Jessica Corsi, ‘Towards peace through legal innovation: The process and the promise of the 2008 Cluster Munitions Convention’, *Harvard Human Rights Journal*, 22 (2009) p 146.

Landmine Action, a campaign coalition of non-governmental organisations, summarises this potential humanitarian impact as follows:

Most cluster munitions are fragmentation weapons. This means that they function by the dispersal of shrapnel over a radius that can be as wide as 50-metres. The effects of such shrapnel on human beings include deep wounds from the metal fragments, the loss of limbs and extremities and, in most cases, death. In addition to the effects of shrapnel, the blast from the high explosive charge in each bomblet or submunition can lead to blindness and internal complications. Cluster munitions may also contain an incendiary causing burns...

Cluster munition attacks often lead to the destruction of houses and important infrastructure. Other important community assets such as livestock are also often destroyed in cluster munition attacks.<sup>15</sup>

Docherty suggests that in the past decade all major conflicts in which such weapons have been employed, including wars in Afghanistan (2001), Iraq (2003), Lebanon (2006), and Georgia (2008), have included cluster munition strikes on towns and villages.<sup>16</sup>

The second key area of concern is the post-conflict legacy of cluster munitions, specifically regarding unexploded bomblets or submunitions. As with all weapons, cluster munitions are vulnerable to failure. However, as Landmine Action points out, because they are deployed in such large numbers, even the smallest failure rate of bomblets or submunitions often leads to dense contamination of a given area from unexploded submunitions or Explosive Remnants of War (ERW).<sup>17</sup> The existence of such ERW in civilian areas can have devastating consequences, as Landmine Action explains:

ERW from cluster munitions is very dangerous, since it is highly explosive, contains deadly shrapnel, and is small and often attractive to children. Accidents involving unexploded bomblets or submunitions from cluster munition attacks are triggered when people deliberately or inadvertently come into contact with the ordnance. Explosions from these incidents can kill anyone within 50-metre radius. ERW incidents with cluster munitions often result in multiple deaths because a group of people, often children, gather around the item. Deaths and injuries to people who come into contact with unexploded cluster munitions are the clearest example of the indiscriminate long-term consequences of the weapon.<sup>18</sup>

Landmine Action further highlights that cluster munitions have demonstrated particularly high failure rates in the various conflicts in which they have been used.<sup>19</sup> The result is not only that many civilians, and particularly children, have been harmed or killed as a result of coming into contact with this ordnance, but that large areas of land where the weapons have been deployed often have to be abandoned. This land may be the only source of income for civilians in war-torn areas, meaning that the socio-economic effects to communities already subject to armed conflict can be exceedingly severe.<sup>20</sup>

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<sup>15</sup> Landmine Action: <http://www.landmineaction.org/issues/>.

<sup>16</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 938.

<sup>17</sup> Landmine Action: <http://www.landmineaction.org/issues/issue.asp?PLID=1012>.

<sup>18</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 4.

<sup>19</sup> Landmine Action: <http://www.landmineaction.org/issues/issue.asp?PLID=1012>.

<sup>20</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 5.

In its 2007 report *Cluster of Impact: The Fatal Footprint of Cluster Munitions on People and Communities*, Handicap International reported 13,306 recorded and confirmed cluster munition casualties since these weapons were first used, and that 98 per cent of these casualties were civilians.<sup>21</sup> However, due to the difficulties in obtaining accurate figures, particularly from ongoing sites of conflict, the report estimates that the true figure is more likely to be between 55,000 and 100,000 cluster submunition casualties. These figures also do not include fatalities from incidents since 2007 where cluster munitions are known to have been deployed, such as during the Georgian conflict in 2008.

### *Moves towards disarmament*

Concern and recognition of the consequences of the use of cluster munitions, particularly for civilians and civilian communities, has provoked a number of efforts to ban or restrict the usage of these weapons since their introduction. In 1974 for example, seven states formed a coalition proposing a ban on these weapons, a call that was echoed by 13 states two years later.<sup>22</sup> Neither of these initiatives progressed however, and it was not until 2001 that further serious discussions on banning cluster munitions were held between States Parties to the Convention on Conventional Weapons (CCW) (1980).<sup>23</sup> The CCW already prohibits or restricts weapons that are 'excessively injurious' or have 'indiscriminate effects'.<sup>24</sup> However the aim of this new initiative was to add a protocol to the CCW which would specifically address the dangers posed by unexploded or failed cluster bomb submunitions.<sup>25</sup> Following these discussions, in 2003 CCW State Parties adopted 'Protocol V on Explosive Remnants of War (ERW)', which entered into force on 12th November 2006.<sup>26</sup>

Protocol V explicitly recognises the serious post-conflict humanitarian problems caused by explosive remnants of war (including those from cluster munitions), and requires states who have ratified the Protocol who are in control of territory on which explosive remnants of war are found, to clear, mark, remove or destroy them. States using munitions that may become explosive remnants of war must also record information on their use and then transmit it to humanitarian clearance organisations to facilitate clearance.<sup>27</sup> The UK has signed Protocol V, though it has yet to ratify it. The Foreign Office has stated that the Government hopes to do so in the near future.<sup>28</sup>

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<sup>21</sup> Handicap International, *Cluster of Impact: The Fatal Footprint of Cluster Munitions on People and Communities*, (2007).

<sup>22</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 938.

<sup>23</sup> Jessica Corsi, 'Towards peace through legal innovation: The process and the promise of the 2008 Cluster Munitions Convention', *Harvard Human Rights Journal*, 22 (2009) p 148.

<sup>24</sup> Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28th November 2003:

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/c110d2926d08a892c1256e280056b275>.

<sup>25</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 939; Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28th November 2003:

<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/c110d2926d08a892c1256e280056b275>.

<sup>26</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 12.

<sup>27</sup> UN Protocol V: Protocol on Explosive Remnants of War:

[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/5484D315570AC857C12571DE005D6498/\\$file/Protocol+on+Explosive+Remnants+of+War.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/5484D315570AC857C12571DE005D6498/$file/Protocol+on+Explosive+Remnants+of+War.pdf) ; HL *Hansard*, 15th December 2006, cols 1763–70.

<sup>28</sup> UK Arms Control and Disarmament, Foreign and Commonwealth Office, 'The Convention on Certain Conventional Weapons': <http://ukarmscontrol.fco.gov.uk/en/the-uk-disarmament/certain-conventional-weapons>.

However, Docherty points out that Protocol V was far from a definitive answer to the humanitarian concerns posed by cluster munitions, and that the international diplomatic process had proved slow in moving to address these concerns:

While unexploded submunitions are a form of ERW and thus covered by the protocol, the instrument fell short because it was relatively weak and only addressed cluster munition duds. The slow nature of the CCW process and the requirement that actions be consensual hampered progress towards further reducing the danger of cluster munitions.<sup>29</sup>

However, Docherty suggests that two events in 2006 contributed to breaking this 'diplomatic deadlock'.<sup>30</sup> The first was the conflict which began on 12th July 2006 in Lebanon.

### *The Lebanon Crisis*

Cluster munitions have been deployed in many conflict areas in recent years, from conflicts in Eastern Europe and Eurasia in Kosovo (1999) and Georgia (2008), to the Middle East, in Afghanistan (2001) and Iraq (2003). However, it was arguably the usage of cluster munitions in Lebanon in 2006 that truly provided the catalyst for concerted international action on disarmament.<sup>31</sup>

During five weeks between July and August 2006, the Israeli army launched approximately four million cluster submunitions into southern Lebanon, leaving behind, according to initial UN figures from 2007, possibly as many as a million unexploded submunitions.<sup>32</sup> According to the United Nations Office for the Co-ordination of Humanitarian Affairs, approximately 90 per cent of these cluster munitions were launched in the last 72 hours of the war.<sup>33</sup> Unexploded submunitions from these strikes reportedly killed or injured 150 civilians in the first six months after the conflict. By 1st January 2009 this figure had risen to 320.<sup>34</sup>

The use of cluster munitions in Lebanon provoked considerable international reaction, including among senior figures with the United Nations.<sup>35</sup> The strength of this reaction was evident at the CCW Review Conference in Geneva in 2006—the first such conference since the Lebanon conflict, where a proposal was put forward by six nations—Austria, Holy See, Ireland, Mexico, New Zealand and Sweden—calling for a

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<sup>29</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 939.

<sup>30</sup> *Ibid*, p 939.

<sup>31</sup> Landmine Action, Human Rights Watch, Landmine Monitor, the International Campaign to Ban Landmines, and the Cluster Munitions Coalition, *Banning Cluster Munitions; Government Policy and Practice*, (May 2009) p 3.

<sup>32</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 939; Landmine Action, Human Rights Watch, Landmine Monitor, the International Campaign to Ban Landmines, and the Cluster Munitions Coalition, *Banning Cluster Munitions; Government Policy and Practice*, (May 2009) p 3; Chris Clark, UN Programme Manager for the Mine Action Programme in South Lebanon, Montreux, 18th–20th April 2007.

<sup>33</sup> United Nations Office for the Coordination of Humanitarian Affairs, *A Lasting Legacy: The Deadly Impact of Cluster Bombs in South Lebanon*, (2006) pp 1–7.

<sup>34</sup> Bonnie Docherty, 'Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law', *Human Rights Quarterly*, 31 (2009) p 939.

<sup>35</sup> These figures included Jan Egeland, UN Humanitarian Co-ordinator, who described the attacks as "shocking and completely immoral":

<http://www.un.org/apps/news/story.asp?NewsID=19670&Cr=Leban&Cr1>.

“negotiating mandate” for a legally-binding instrument that “addresses the humanitarian concerns posed by cluster munitions”.<sup>36</sup> By the end of the conference 30 states had declared their support for the proposal. However, key nations, including the UK, the US, China and Russia, each withheld their backing, thus ensuring that the required consensus was not reached.<sup>37</sup> State Parties instead committed to proposals for further discussions to be held under the auspices of the CCW during 2007.<sup>38</sup>

Docherty suggests that the frustration felt by those states who had advocated an immediate start to treaty negotiations, many of whom believed the proposal for further discussions was little more than a delaying tactic, led what she describes as the second key ‘event’ in breaking the international deadlock: the Oslo Declaration.<sup>39</sup>

### *The Oslo Declaration*

Reportedly dissatisfied at the lack of progress being made through the CCW, in November 2006 Norway announced that it would be launching its own approach, similar to that adopted by Canada in seeking a ban on the use of landmines which led to the 1997 Land Mine Ban Convention<sup>40</sup> (or ‘Ottawa Treaty’).<sup>41</sup> This initiative would seek an international ban on the use of all cluster munitions “that have unacceptable humanitarian consequences”.<sup>42</sup> An international conference followed in Oslo in February 2007, at which forty-six states, including the UK, adopted what became known as the ‘Oslo Declaration’, which stated:

Recognising the grave consequences caused by the use of cluster munitions and the need for immediate action, states commit themselves to:

1. Conclude by 2008 a legally binding international instrument that will:
  - (i) prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and
  - (ii) establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education and destruction of stockpiles of prohibited cluster munitions.<sup>43</sup>

Numerous international diplomatic conferences at cities around the world followed in 2007–08 in order to establish the details and remit of such an agreement. These meetings were concluded in Dublin in May 2008 where a final treaty, the Convention on Cluster Munitions, was agreed by all 107 participating states, less than a year and a half after negotiations began.<sup>44</sup> The Convention was opened for signatures in Oslo in December 2008, and will enter into force six months after its thirtieth ratification.

<sup>36</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 13.

<sup>37</sup> *ibid*, p 13.

<sup>38</sup> *ibid*, p 13.

<sup>39</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 940.

<sup>40</sup> International Committee of the Red Cross: <http://icrc.org/ihl.nsf/INTRO/580>.

<sup>41</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 13; Corsi, ‘Towards peace through legal innovation: The process and the promise of the 2008 Cluster Munitions Convention’, *Harvard Human Rights Journal*, 22 (2009) p 149.

<sup>42</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 940.

<sup>43</sup> Oslo Conference on Cluster Munitions, ‘Declaration’, 22nd–23rd February 2007.

<sup>44</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 940.

The measures contained within the Convention are explored in detail below, after an examination of UK Government policy on cluster munitions and response to these international initiatives.

## 2. UK Government Policy on Cluster Munitions—Development and Disarmament

British armed forces have deployed cluster munitions in a number of recent conflicts, including Kosovo in 1999 and Iraq in 2003.<sup>45</sup> Setting out the Government's position on the use of cluster munitions in a debate in the House of Commons on 23rd November 2006, Armed Forces Minister Adam Ingram said:

The United Kingdom believes that cluster munitions are legal weapons, that international humanitarian law is adequate to govern their use, and that the international community would be better served by implementing existing law in a consistent manner when using cluster munitions. We further believe that we have the most rigorous targeting procedure for the use of cluster munitions, which is derived from the law itself and which is incorporated into our doctrine and training.<sup>46</sup>

However, following the Lebanon crisis and leading up to the Oslo Convention, a number of UK Government sources did acknowledge and express concern over the humanitarian implications of cluster weapons, particularly 'dumb' cluster munitions without guidance systems or any kind of self-destruct or self-neutralisation mechanisms.<sup>47</sup> One such figure was former Secretary of State for International Development, Hillary Benn MP, who reportedly wrote to other members of the Cabinet, saying:

The high failure rate of many cluster munitions, and the failure of many militaries around the world to use these munitions in a targeted way, means that cluster munitions have a very serious humanitarian impact, pushing at the boundaries of international humanitarian law.

It is difficult then to see how we can hold so prominent a position against land mines, yet somehow continue to advocate that use of cluster munitions is acceptable.<sup>48</sup>

Responding to these concerns the Third Review Conference of the CCW in Geneva in November 2006 the UK Government advocated increasing recognition of the humanitarian impact of cluster munitions, though did not support the initiative led by Sweden and others for a legally binding treaty on all cluster munitions.<sup>49</sup> In addition, following the conclusion of the conference, then Foreign Office Minister, Kim Howells, confirmed in a written statement on 4th December 2006 that the Government would be seeking to withdraw from service all 'dumb' cluster munitions held by UK forces by the "middle of the next decade".<sup>50</sup>

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<sup>45</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 13.

<sup>46</sup> HC *Hansard*, 23rd November 2006, cols 800–4.

<sup>47</sup> HC *Hansard*, 23rd November 2006, col 802; HC *Hansard*, 11th December 2006, col 454, cols 743–6W.

<sup>48</sup> House of Commons Library, *Cluster Munitions*, 21st May 2007, SN/1A/4339, p 17.

<sup>49</sup> HC *Hansard*, 4th December 2006, col 2WS.

<sup>50</sup> *ibid*, col 2WS.

Following subsequent examination of whether this deadline could be brought forward however, the then Defence Secretary, Des Browne MP, announced in a follow-up statement on 20th March 2007 that:

I am pleased to announce that we are withdrawing dumb cluster munitions from service with immediate effect. We have considered carefully both military and humanitarian factors, reflecting our duty both to ensure that the armed forces have the capabilities they need to undertake the missions we ask of them, and to strive to reduce civilian casualties to the minimum.<sup>51</sup>

However, Des Browne also pointed out that the UK still believed cluster munitions to be viable weapons of war, and that it would continue to hold in its inventory some forms of cluster munitions, adding:

Cluster munitions are legal weapons which have a valid role in modern warfare, particularly against an array of military targets in a defined area. However, they have also given rise to humanitarian concerns because they disperse sub-munitions over an area and those sub-munitions can have a high failure rate. Some cluster munitions address these concerns including through inbuilt self-destructing or self-deactivating mechanisms, reducing the risk of harm to civilians. Dumb cluster munitions do not.

The types of cluster munitions we intend to retain are legitimate weapons with significant military value which, as a result of mitigating features, is not outweighed by humanitarian factors. As with all weapons, our forces' use of them will remain regulated by rules of engagement and internal scrutiny procedures designed to adhere to international law and reflect humanitarian values.

As well as living up to [our] responsibilities under international law, this decision is part of our wider efforts to reduce civilian casualties and to press other militaries to do the same. We continue to press for wider agreement to ban dumb cluster munitions through the convention on certain conventional weapons (CCW) and complementary initiatives like the Oslo conference on 23rd February, where we, alongside other nations, agreed to work towards an international ban in 2008.<sup>52</sup>

### **3. The UK and the Oslo Negotiations**

Further to the position outlined by Des Browne above, it was reported that during the Oslo process, nations including the UK and France had campaigned for some exemptions to be made to the Convention for weapons with submunitions which self-destruct, or have certain claimed reliability rates, or that are 'direct fire' weapons. However such exemptions were apparently discarded during the negotiations before the final Convention on Cluster Munitions was signed.<sup>53</sup>

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<sup>51</sup> HC *Hansard*, 20th March 2007, cols 36–7WS.

<sup>52</sup> *ibid*, cols 36–7WS.

<sup>53</sup> Landmine Action, Human Rights Watch, Landmine Monitor, the International Campaign to Ban Landmines, and the Cluster Munitions Coalition, *Banning Cluster Munitions; Government Policy and Practice*, (May 2009) p 8.

#### 4. The Convention on Cluster Munitions

The Convention on Cluster Munitions agreed in Dublin in May 2008 has been described alternately as “remarkable”, “ground-breaking”, a “comprehensive and landmark legal instrument” and arguably the “most significant weapons treaty for a decade”.<sup>54</sup> Central to this significance is that the Convention on Cluster Munitions both adopts the approach of the Mine Ban Treaty (1997) in combining humanitarian and disarmament measures in one overarching agreement, and expands previous weapons treaties to deal with cluster munitions both when they function according to their intended purpose, *and* when they malfunction or misfire.<sup>55</sup> Key remedial measures also contained in the Convention include duties and obligations on State Parties regarding the clearance of unexploded submunitions, ‘risk education’ on the dangers of these submunitions, victim assistance both for those hurt at the time of attack *and* by unexploded or dud submunitions, and provisions for international co-operation and assistance for affected states.<sup>56</sup>

The key provisions of the Convention are outlined in brief below.

##### *Obligations, scope of application and definitions*

Article 1 of the Convention places a clear and fundamental obligation on each State Party to never under any circumstances:

- a) Use cluster munitions;
- b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
- c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under the Convention.<sup>57</sup>

Critically, these preventative measures are accompanied in Article 2 of the Convention by broad and overarching definitions of cluster munitions and submunitions, and ‘cluster munition contaminated areas’, which both recognise the area effect of these weapons and is based on their technical specifications. Article 2 also provides definition of ‘Failed’, ‘Unexploded’ and ‘Abandoned’ submunitions, and ‘Cluster munition remnants’, which are key to the further Articles of the Convention.

These definitions are outlined below:

‘Cluster munition’ means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions.

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<sup>54</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 935; Foreign Secretary, David Milliband MP, 3rd December 2008; Landmine Action, Human Rights Watch, Landmine Monitor, the International Campaign to Ban Landmines, and the Cluster Munitions Coalition, ‘Banning Cluster Munitions; Government Policy and Practice’, (May 2009) p 8; McGoldrick, D and Hulme, K, (2009), p 219.

<sup>55</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 935.

<sup>56</sup> *ibid*, p 935.

<sup>57</sup> Convention on Cluster Munitions, 30th May 2008, Article 1.

‘Explosive submunition’ means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact;

‘Failed cluster munition’ means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;

‘Unexploded submunition’ means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended;

‘Abandoned cluster munitions’ means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;

‘Cluster munition remnants’ means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;

‘Cluster munition contaminated area’ means an area known or suspected to contain cluster munition remnants.<sup>58</sup>

In order to clearly distinguish between cluster munitions and those weapons not subject to the Convention, a list of which types of munition do not fall under this definition is also provided in Article 2. These include weapons designed to dispense flares or smoke, or have air defence capabilities, or electronic effects. Paragraph 2(c) of Article 2 also specifies key technical criteria according to which other munitions that carry submunitions are excluded from the definition. With regard to the debate on ‘smart’ versus ‘dumb’ munitions in particular, paragraph 2(c) clearly states that weapons which carry submunitions are only not subject to the Convention if they satisfy all of the criteria below:

A cluster munition does not mean:

- c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions has all the following characteristics:
  - i) Each munition contains fewer than ten explosive submunitions;
  - ii) Each explosive submunition weighs more than four kilograms;
  - iii) Each explosive submunition is designed to detect and engage a single target object;
  - iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
  - v) Each explosive submunition is equipped with an electronic self-deactivating feature.<sup>59</sup>

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<sup>58</sup> Convention on Cluster Munitions, Article 2;  
[http://www.clusterconvention.org/pages/pages\\_ii/ia\\_textenglish.html](http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html).

<sup>59</sup> *ibid*, Article 2.

Docherty highlights that whilst Article 2 contains *exclusions*, or categories of weapons not encompassed by this definition, it contains no *exemptions*, or exceptions that would make some types of cluster munitions acceptable. The result, Docherty argues, is that the Convention clearly bans all cluster munitions that have been used in conflict, and that very few existing munitions which resemble cluster munitions are subject to the exclusions outlined above:

[O]nly the German SMArt-155, the French and Swedish BONUS, and the now discontinued US SADARM, which all have just two submunitions—fall under the exclusion in Article 2(2)(c). Of these, only the SADARM has been used in combat— by the United States in Iraq in 2003. The definition even bans the high-tech US Sensor Fuzed Weapon, which was also used in Iraq and is similar to SADARM except it has more submunitions.<sup>60</sup>

As a result, Docherty suggests, “the ban on cluster munitions [contained within the Convention] is complete as well as absolute”.<sup>61</sup>

#### *Storage and stockpile destruction*

Article 3 of the Convention places a duty on all State Parties to destroy all the cluster munitions referred to in Article 1 no later than eight years after the Convention enters into force for that State Party.<sup>62</sup>

#### *Clearance and destruction of cluster munition remnants and risk reduction education/International Assistance*

Article 4 of the Convention places a duty upon State Parties to clear and destroy any cluster munition remnants in areas under their jurisdiction and control, and to take steps to prevent civilians from entering cluster munition contaminated areas. However, Paragraph 4 of Article 4 also imposes a further duty which applies in cases where cluster munitions have been used or abandoned by a State Party *prior to entry into force of the Convention for that State Party*, and which have become *cluster remnants that are located in areas under the jurisdiction of control of another State Party at the time of entry into force of the Convention* as follows:

- a) In such cases, upon entry into force of this Convention for both States Parties, the former State Party is strongly encouraged to 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 United Nations system or other relevant organisations, to facilitate the marking, clearance and destruction of such cluster munition remnants;
- b) Such assistance shall include, where available, information on types and quantities of the cluster munitions used, precise locations of cluster

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<sup>60</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 949.

<sup>61</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 946.

<sup>62</sup> Convention on Cluster Munitions, Article 3;

[http://www.clusterconvention.org/pages/pages\\_ii/ia\\_textenglish.html](http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html).

munition strikes and areas in which cluster munition remnants are known to be located.<sup>63</sup>

Such retroactive measures, combined with the duties of international assistance and co-operation embedded within Article 6 of the Convention, ensures that signatories to the Convention not only have the right to seek and receive assistance in dealing with cluster munition remnants and ordinance. However, it also imposes a requirement upon other State Parties, including those who deployed this ordinance if they are State Parties to the Convention, to provide what assistance they can in dealing with the threat posed by the remnants of these munitions.

### *Victim Assistance*

Docherty suggests that the ‘most groundbreaking achievement’ of the Convention on Cluster Munitions is in the area of victim assistance. Article 5 of the Convention states that:

Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age—and gender—sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.<sup>64</sup>

Article 2 (1) includes a definition of such cluster munitions victims, where none had existed before, stating that:

‘Cluster munition victims’ means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities.<sup>65</sup>

Such a broad definition, combined with the duties outlined in Article 5, entitles all those who have been affected by cluster munitions to receive assistance, care and support.

### *Transparency*

Article 7 of the Convention places a duty on each State Party to report to the UN no less than 180 days after the Convention enters into force for that nation, on progress in implementing the provisions of the Convention, including those in Article 5 concerning victim assistance.

### *Relations with States not party to this Convention*

The remaining Articles in the Convention govern national implementation measures, how often states will meet to take decisions with regard to the Convention, and administrative

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<sup>63</sup> Convention on Cluster Munitions, Article 4;  
[http://www.clusterconvention.org/pages/pages\\_ii/ia\\_textenglish.html](http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html).

<sup>64</sup> Convention on Cluster Munitions, Article 5;  
[http://www.clusterconvention.org/pages/pages\\_ii/ia\\_textenglish.html](http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html).

<sup>65</sup> Convention on Cluster Munitions, Article 2;  
[http://www.clusterconvention.org/pages/pages\\_ii/ia\\_textenglish.html](http://www.clusterconvention.org/pages/pages_ii/ia_textenglish.html).

measures, with the exception of Article 21, which is devoted to relations with states not party to the Convention, and which provoked considerable debate during the negotiations process.

Paragraphs 1 and 2 of Article 21 state that each State Party shall encourage States not party to the Convention to ratify it, and that each State Party shall notify the governments of all States not party to the Convention of its obligations under the agreement.

Docherty suggests that the meaning of Paragraphs 3 and 4 however is arguably more ambiguous.<sup>66</sup> They determine how the convention applies during situations of joint military operations, stating:

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party;
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
  - a) To develop, produce or otherwise acquire cluster munitions;
  - b) To itself stockpile or transfer cluster munitions;
  - c) To itself use cluster munitions; or
  - d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

Docherty argues that the meaning of these paragraphs is “unsettled” and open to interpretation. Commenting on the negotiations she records:

Some states argue that the phrase “[n]otwithstanding the provisions of Article 1” signifies that paragraph 3 permits assistance with prohibited activities during joint operations. Others counter that the notwithstanding clause merely clarifies that State Parties may engage in operations with states not party to the Convention on Cluster Munitions, something even most advocates for a strong treaty do not dispute.<sup>67</sup>

Docherty adds that Paragraph 4 seems more “in keeping” with the other provisions in the Convention, but its only partial overlap with Article 1 could be read as “compromising the absoluteness of these provisions”. She adds:

States seeking to allow assistance during joint operations argue that the list [of prohibitions] is exhaustive and thus any activity not explicitly mentioned is permitted during such operations. For example, although under paragraph 4 states parties cannot “expressly request the use of cluster munitions” when the choice is under their “exclusive control”, some states read it as implying that they can assist with use in other ways. Supporters of a stronger convention, by contrast, argue that Paragraph 4 reinforces Article 1(1) and that its list is

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<sup>66</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 955.

<sup>67</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 957.

illustrative and non-exhaustive; any activity prohibited under Article 21, even during joint operations.<sup>68</sup>

### *Non-State Actors*

It is also worth noting that, while the Convention on Cluster Munitions is only binding on State Parties, it also identifies the threat posed by non-state armed groups, and implies that State Parties have a duty to prevent such groups from violating the provisions of the Convention. Explicit reference is not made to these obligations within the Convention. However, Docherty suggests that certain actions, such as transferring cluster munitions to another party, assisting in activities proscribed by the Convention, and measures to “prevent and suppress” prohibited activities, would all apply implicitly to non-state groups and their actions.<sup>69</sup>

### *Signatories*

103 countries including the United Kingdom have signed the Convention on Cluster Munitions, and 24 of those countries have ratified the Convention to date.<sup>70</sup> Notable non-signatories include the US, China, Pakistan, India, Iran, Israel and Russia.

### *Weapons yet to enter into service—UK armed forces*

On 5th July 2008 in answer to a written parliamentary question, Defence Minister, Bob Ainsworth MP, set out both the UK’s commitment to the Convention on Cluster Munitions, and plans to withdraw certain types of weapon, but also the Government’s understanding that the Convention would not apply to certain weapons yet to come into service by UK armed forces:

The adopted Convention, prohibiting the use of cluster munitions that cause unacceptable harm to civilians, is a major breakthrough in that it brings considerable humanitarian benefits and makes the world a better and safer place. In line with the Prime Minister’s statement of 28th May 2008 and the Convention text adopted by 109 states in Dublin on 30th May 2008, the UK is withdrawing from service its sub-munitions; namely the L20A1 Extended Range Bomblet Shell (M85) and the CRV-7 Multi-Purpose Sub-Munition (M73). The UK armed forces will no longer use them operationally.

The Convention prohibition on cluster munitions does not cover new weapons which do not carry the same risk to civilians because of their larger size, low numbers and the fact that they have sensor targeting and two fail-safe systems. A case in point is the 155mm ballistic sensor fused munition (BSFM), an anti-armour system artillery round. BSFM is due to enter service in the UK armed forces in 2012 and replace the anti-armour capability of the L20A1-M85.<sup>71</sup>

Bob Ainsworth also gave the Government’s understanding of how the Convention would

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<sup>68</sup> *ibid*, p 957.

<sup>69</sup> Bonnie Docherty, ‘Breaking New Ground: The Convention on Cluster Munitions and the Evolution of International Humanitarian Law’, *Human Rights Quarterly*, 31 (2009) p 960.

<sup>70</sup> <http://www.stopclustermunitions.org/the-solution/the-treaty/?id=84>.

<sup>71</sup> HC *Hansard*, 5th July 2008, col 1061W.

apply to joint military operations involving UK forces, with particular regard to the United States:

The Convention does not alter our ability to work with coalition partners on operations involving states who are not signatories to the agreement. The adopted text also does not prevent the US from continuing to stockpile cluster munitions on their bases within UK territory (including Diego Garcia). However, in keeping with our commitment to uphold the norms of the treaty, we will be discussing with the US the longer-term status of their stockpiles on UK territory.<sup>72</sup>

## 5. The Cluster Munitions (Prohibitions) Bill

The Cluster Munitions (Prohibitions) Bill, if passed, would implement the obligations specified under the Convention on Cluster Munitions, and pave the way for UK ratification of the Convention.<sup>73</sup> Commenting on the introduction of the Bill, the Foreign Secretary, David Milliband MP, said:

It is time to put an end to the civilian suffering and casualties caused by cluster munitions. As I said on signing the Convention on Cluster Munitions, I am utterly convinced that by fulfilling our obligations under the convention we will make the world a safer, better place.

The UK already supports efforts to tackle the post-conflict legacy of cluster munitions, contributing around £10m a year towards the clearance of Explosive Remnants of War.

This bill builds on the UK's leadership on arms control, whether that's landmines or the Arms Trade Treaty. With the first meeting of States Parties planned for November 2010 in Laos, there is no better way to bolster our reputation as a champion for change than to ratify the convention and attend as a State Party.<sup>74</sup>

### *Content and Structure*

As stated above, the main purpose of the Bill is to "create criminal offences in order to enforce the prohibitions set out in Article 1 of the Convention on Cluster Munitions".<sup>75</sup> The Explanatory Notes published alongside the Cluster Munitions (Prohibitions) Bill provides the following description of the structure of the Bill:

The Bill consists of 34 clauses:

- Clause 1 defines the prohibited munitions to which this Bill applies. Clauses 2 to 4 create and define the criminal offences for breaches of the prohibitions in Article 1 of the Convention, and make provision for the offences to have some extra-territorial effect. For those offences, clauses 5 to 9 provide defences for certain purposes permitted under the Convention. Clause 10 ensures that only an evidential burden of proof with respect to the defences is required of the defendant;

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<sup>72</sup> *ibid*, col 1061W.

<sup>73</sup> Ministry of Defence, 'Ban on cluster munitions bill published', Press Release, 24th November 2009.

<sup>74</sup> *ibid*, 24th November 2009.

<sup>75</sup> Cluster Munitions (Prohibitions) Bill Explanatory Notes, p 1.

- Clauses 11 to 19 are provisions for identifying prohibited munitions, and securing the removal, immobilisation and destruction of them; and for creating offences relating to interfering with or obstructing destruction;
- Clauses 20 to 23 make provision for the production of information and records for the purposes of the Convention, the investigation of alleged offences, and disclosure of information. Clauses 24 to 26 make provision relating to proceedings for an offence under the Bill;
- Clauses 27 to 34 are general provisions which include safeguards on powers of entry, a power to modify the Bill, how notices are served, the application of the Bill to the Crown and the extent of the Bill; and
- There are three Schedules to the Bill. Schedule 1 sets out definitions from Article 2 of the Convention to assist interpretation. Schedule 2 sets out the offences to which clause 9 (interoperability defence) applies. Schedule 3 contains minor and consequential amendments of other Acts.<sup>76</sup>

### *Reaction to the Bill*

The Bill has attracted the support of the main political parties, as well as campaign groups. During a debate in the House of Lords on the Convention on Cluster Munitions on 13th July 2009, Lord Howell of Guildford, Shadow Minister for Foreign and Commonwealth Affairs, suggested that the Conservative Party would support measures to incorporate the Convention into UK Law:

My Lords, will the Minister accept that we on this side will give full support to enabling the legislation to be brought forward for the UK to ratify this convention.<sup>77</sup>

Lord Howell reaffirmed this position in the debate on the Humble Address in the House of Lords on 19th November 2009:

I must say straightaway that we on this side of the House strongly support the Cluster Munitions (Prohibition) Bill.<sup>78</sup>

In the same debate, Lord Wallace of Saltaire, the Liberal Democrat Spokesperson on Foreign and Commonwealth Affairs, indicated that the Liberal Democrat benches would support the Bill:

We also welcome very strongly the Queen's Speech inclusion of the Bill on cluster bombs, to which we will give our full support, as we have supported the work of the noble Lords, Lord Dubs, Lord Elton, and others in pushing for that measure.<sup>79</sup>

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<sup>76</sup> Cluster Munitions (Prohibitions) Bill Explanatory Notes, p 2.

<sup>77</sup> HL *Hansard*, 13th July 2009, col 930.

<sup>78</sup> HL *Hansard*, 19th November 2009, col 35.

<sup>79</sup> HL *Hansard*, 19th November 2009, col 40.

Thomas Nash, Co-ordinator of the Cluster Munition Coalition, has welcomed the Cluster Munitions (Prohibitions) Bill, saying:

We welcome the publication of the bill and will continue our work with parliamentarians of all parties to ensure the rapid passage of legislation that provides the strongest humanitarian protection.<sup>80</sup>

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<sup>80</sup> Ministry of Defence, 'Ban on cluster munitions bill published', Press Release, 24th November 2009.

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