U.S. Policy on Cluster Munitions and Its Susceptibility to Litigation
Dustin E. Sewell

Abstract: With the increasing likelihood that battlefields of the future will emerge from and around heavily civilian-populated areas, why does the U.S. maintain the belief that indiscriminate cluster munitions are a necessary military utility for waging war? While there is no simple answer, through my research, I show that although the U.S. is taking unilateral action through proposed legislation to tighten restrictions on the failure rate of cluster munitions, any use, manufacture, or sale of such weapons in the future will continue to be a violation of International Humanitarian Law. This will leave the government and the manufacturers susceptible to litigation.

On August 12th, 2008, a Dutch journalist was killed by a Russian cluster bomb attack (Barry, 2008). “Stan Storimans, 39, died while filming the fighting in Gori, Georgia, during the conflict over the breakaway province of South Ossetia” (Sterling, 2008, para. 2). AP Journalist Toby Sterling (2008, para. 3) affirms that while both Russian and Georgian officials, having denied the use of cluster munitions during the conflict, a Dutch government investigation team turned up evidence contrary to the claims. According to the Dutch Foreign Affairs Ministry, the investigation team uncovered “forensic evidence” and “eyewitness accounts” sufficient to show that “Storimans was killed by a munition ‘propelled by a type of rocket that is only found in Russia’s military arsenal.’” According to reporter Jeroen Akkermans, who was working with Storimans at the time, several Georgian civilians also died as a result of the cluster bomb attack. Sterling (2008, para. 3) quotes the Dutch Foreign Affairs Minister, Maxime Verhagen, when he writes, “Cluster munitions must not be used in this way. There were no troops present in Gori and innocent civilians were killed.”

While the deaths of Storimans and the Georgian civilians are both tragic and create awareness as to the indiscriminate nature of such weapons, a tie to U.S. interest, apart from sympathy for the victims and their families, is nonexistent. However, the 2006 Israeli attack on Lebanon establishes ancillary U.S. involvement while the attack in Iraq in 2003 establishes direct participation. According to a Human Rights Watch (HRW) report published on their website (Flooding South Lebanon: Israel’s Use of Cluster Munitions in Lebanon in July and August 2006, 2008, p. 36-37), Israel’s attack on Lebanon in July and August of 2006 left villages and urban centers blanketed with Unexploded Ordnance (UXO), sometimes referred to as Explosive Remnants of War (ERW) (Wiebe & Peachy, 1999, p. 3); UXO is the result of high failure rates of sub-munitions from cluster bombs and rockets. Chris Clark, the program manager of the Mine Action Coordination Centre South Lebanon (MACC SL), “has projected an average failure rate of 25 percent, with up to 70 percent in some locations” (Flooding South Lebanon: Israel’s Use of Cluster Munitions in Lebanon in July and August 2006, 2008, p. 44).

HRW places the number of civilian casualties in south Lebanon, as of January 2008, at 200; 61 of these children under the age of 18 (Flooding South Lebanon: Israel’s Use of Cluster Munitions in Lebanon in July and August 2006, 2008, p. 49). Of particular interest to the United States in this matter is a statement by Ambassador Stephen D. Mull, Acting Assistant Secretary for Political-Military Affairs, in an on-the-record-briefing in Washington, D.C. when he affirms that “Some [of Israel’s cluster munitions used in the attacks on Lebanon] were provided by the U.S.” (U.S. Dept. of State, 2008, para. 46).

A more direct tie to U.S. involvement and interest surrounding the use of cluster munitions is illustrated by the incident of “March 2003 [when] U.S. forces dropped cluster bombs in the Iraqi region of Hilla, south of Baghdad, killing at least 33 civilians and injuring 109—according to a report by the New York-based Human Rights Watch” (Lima: Taking Aim at Those Who Finance Cluster Bombs, 2007, para. 11). The civilian casualties of Iraq, South Lebanon, and South Ossetia are testimony to the fact
that cluster munitions are still very prevalent in contemporary arsenals. Furthermore, two of these cases link to U.S. culpability and thereby demand some measure of responsibility to the victims and their families. This paper will examine U.S. policy regarding cluster munitions, its actions involving them, and its susceptibility to litigation in greater detail.

**Background**

Cluster munitions are bombs or rockets that are launched from the air or surface and release hundreds of smaller explosives or submunitions — sometimes referred to as bomblets or grenades. The submunitions are “designed to explode on impact, just before impact or a short time after impact” (Wiebe, 1999, p. 2). The explosives used in submunitions typically have a higher charge than those found in anti-personnel landmines. Cluster munitions also result in “more upper body injuries and deaths” than comparably found with landmine incidents; this is attributed to the higher explosive charge coupled with the fragmentation of a heavy metallic outer shell (Wiebe & Peachy, 1999, p. 2). According to the Cluster Munition Coalition (CMC), the intended purpose of these weapon systems is “to destroy dispersed, moving and unseen targets” (Technical Analysis of Cluster Munitions, para. 1). They are considered “area weapons,” meaning that their effects, or “footprint,” are not limited to a single target. According to Lora Lumpe (2008), of the Friends Committee on National Legislation (FCNL), one cluster munition rocket can saturate an area with explosives equivalent in size to three football fields. Consequently, the widespread delivery and blanketing dispersal of such weapons means that targets are hit indiscriminately; this results in a potential danger to both military and civilian personnel/infrastructure.

Aside from the indiscriminate danger of “area targeting” that comes with the use of cluster munitions, another problem is the high rate of submunitions that fail to detonate as they are designed to do. While precise numbers denoting global cluster munition failure rates, or dud rates, are impossible to ascertain, there is no argument that the cluster bombs currently in service have, “as with all munitions, a certain number of submunitions in each canister [that] fail to explode on impact” (Technical Analysis of Cluster Munitions, para. 2). FCNL figures, according to Lumpe (2008), estimate the average failure rates to be between 5 and 25 percent. The Survey of Cluster Munitions Produced and Stockpiled briefing introduced in Montreux, Switzerland in April of 2007, breaks down the failure rates by type of weapon system: Impact and Time Delay Fuzed Bomblets (ITDFB): 10 to 30 percent as reported by explosive ordinance personnel in areas like Southeast Asia, Kuwait, Kosovo, and Lebanon; Dual Purpose Improved Conventional Munitions (DPICM) without Self-Destruct (SD): 3 to 23 percent based on testing done by the U.S.; DPICM with SD: 1.3 to 2.3 percent based on testing done by Norwegian and UK officials; and no failure rate numbers for Sensor Fuzed Weapons (SFW) are available at this time. During Operation Desert Storm, a report presented by the Government Accounting Office (GAO) maintains that “over half of the Army’s multiple-launch rocket system (MLRS) cluster weapon lots” exceeded their goal of a less-than 5 percent dud rate with some lots reaching dud rates as high as 23 percent (Wiebe, 1999, p. 3).

To put the subject of submunition failure rates into another perspective, one should consider that of the roughly 30 million submunitions dropped over Iraq and Kuwait during Operations Desert Shield and Desert Storm, according to the U.S. Office of Munitions, and even with an “optimistically low dud rate of 5 percent,” the net result is 1.5 million unexploded submunitions dispersed across the 2 countries (Wiebe & Peachy, 1999, p. 3). The CMC offers their perspective on the problem:

> The numbers of unexploded submunitions left behind after conflicts ranges from the thousands (20,000 were cleared in Kosovo in 18 months after the NATO bombing in 1999) to the hundreds of thousands (the UN estimates up to 1 million submunitions were left unexploded after the conflict between Hezbollah and Israel in July and August 2006) (Technical Analysis of Cluster Munitions, n.d., para. 3).

While estimates of failure rates and exact numbers of UXO may vary based on the Non-Government Organizations (NGOs) or government that is collecting the data, variations also exist because of the number of different categories of submunitions and delivery systems (currently exceeding a dozen of the more popular types); the consensus is that high failure rates exist. The reality is that these incidents of UXO result in the injury or death of...
innocent people long after a conflict has ended. According to the CMC, “incidents involving submunition duds are much more likely to cause death than injury” (The Problem: What’s the Problem With This Weapon?, n.d., para. 4). Furthermore, recent estimates show that 98 percent of cluster bomb casualties are civilians. This percentage is based on statistical evidence drawn from “at least 13,306 recorded and confirmed cluster submunition casualties” (Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities, 2007, p. 11). These casualties are detailed in a 2007 executive summary published by Handicap International, which has recently collected data from the 13,306 strikes and incidents in the following countries/regions: Afghanistan, Albania, Bosnia and Herzegovina, Cambodia, Chad, Chechnya/Russian Federation, Croatia, Eritrea, Ethiopia, Iraq, Israel, Kosovo, Kuwait, Lao People’s Democratic Republic, Lebanon, Montenegro, Nagorno-Karabakh/Azerbaijan, Serbia, Sierra Leone, Sudan, Syria, Tajikistan, Vietnam, and Western Sahara/Morocco (Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities, 2007, p. 2-4). As this is clearly shown to be an international issue, an issue without borders per se, how is it that the international community is still allowing such weapons to be manufactured, sold, and deployed?

Looking for a moment beyond national boundaries and deeper into the relationships between governments, their armed forces, and the political support they garner from commercial sectors of the arms industry (also known as the military-industrial complex—a commonly used term coined by President Dwight D. Eisenhower), reports show that “[t]he globalization of the arms industry has opened up major loopholes in all current regulations, allowing sales to human rights abusers and countries under arms embargoes” (Global Arms Industry Exploiting Major Loopholes in Arms Regulations According to Control Arms Coalition; Oxfam International, Amnesty International and International Action Network on Small Arms Involved in Campaign, 2006, para. 1). As Jeremy Hobbs, the Director of Oxfam International, sardonically puts it, “Europe and North America are fast becoming the IKEA of the arms industry, supplying parts for human rights abusers to assemble at home, with the morals not included” (Global Arms Industry Exploiting Major Loopholes in Arms Regulations According to Control Arms Coalition; Oxfam International, Amnesty International and International Action Network on Small Arms Involved in Campaign, 2006, para. 5). The one-stop-shop IKEA analogy, selling everything and anything arms-related to anyone looking to purchase, may not be far off target when compared with the information that, as of 1997, “U.S. weapons [were] involved in 45 of the world’s 50 largest ethnic and territorial conflicts” (Washburn, 1997, p. 40). If these “major loopholes” in the regulation of the arms industry exist as the previous reports detail, who stands to benefit the most?

As of 2005, an estimated 82 percent of all global arms transfers were credited to just 5 countries: the United States, Russia, the United Kingdom, France and Germany (Global Arms Industry Exploiting Major Loopholes in Arms Regulations According to Control Arms Coalition; Oxfam International, Amnesty International and International Action Network on Small Arms Involved in Campaign, 2006, sec. “Facts and Figures”). An older, but still relevant, figure also shows that as of 1997, U.S. arms export subsidies were second only to those that supported agricultural prices; it is estimated that the U.S. government was spending “$7.5 billion a year to support weapons merchants through a mixture of grants, subsidized loans, tax breaks, and promotional activities” (Washburn, 1997, p. 38). These figures demonstrate the high revenues involved in arms sales—arms sales that can then be linked to a kind of rationalization, at least from a business standpoint, of the special interest lobbying that is required to keep the loopholes for arms commerce open. If the supply and demand is there, it is shown that arms manufacturers will take the necessary steps to keep the arms and thereby the money flowing—even if it means selling to parties possibly lacking scruples. It should be noted that of the five top global arms transfer countries, the U.S. and Russia are the only ones not taking part in the Convention on Cluster Munitions (CCM), an international body that will require all state parties who sign the treaty on December 3rd, 2008 to stop stockpiling, using, selling and exporting all treaty-defined cluster munitions; this paper will discuss the CCM in greater detail later on.

According to FCNL’s Lora Lumpe, “the United States is the biggest user, manufacturer, and exporter of cluster munitions” (2008). Lending support for this claim is a report by Netwerk Vlaanderen, a Belgian organization that promotes sustainable investments while monitoring arms trade funding;
their report, “Explosive Investments: Financial Institutions and Cluster Munitions,” highlights the finding that “[t]he six biggest producers of cluster bombs [are] Lockheed Martin, EADS, Thales, GenCorp, Textron and Raytheon” (Lima: Taking Aim at Those Who Finance Cluster Bombs, 2007, para. 9). This indicates that four of the six biggest cluster munitions manufacturers, Lockheed Martin, GenCorp, Textron and Raytheon are all U.S. based companies (only EADS and Thales are European).

Collectively, the “big six” of cluster munitions manufacturers enjoyed “12.6 billion dollars in financing from 68 financial institutions between 2004 and 2007” (Lima: Taking Aim at Those Who Finance Cluster Bombs, 2007, para. 9). Looking deeper into the financial transactions of one of these companies, U.S. based Textron (Textron’s CBU-105 cluster bombs have been used recently by the U.S. Army in Iraq), reports show that they “received a 1.25 billion dollar credit facility in 2005, arranged by Citigroup and JPMorgan Chase, which provided 120 million dollars each. A total of 19 banks—including Bank of America, Britain’s Barclays, Germany’s Deutsche Bank and Switzerland’s UBS—are now taking part in the credit arrangement” (Lima: Taking Aim at Those Who Finance Cluster Bombs, 2007, para. 10).

The manufacture, sales, and export of arms, and more specifically cluster munitions, is big business with billions to tens of billions of dollars at stake (e.g., money provided by 19 financial institutions went to one company alone). With only 5 countries leading the industry overall and only 6 corporations leading the cluster munitions industry, the United States finds itself at the forefront of all of it. Making money in global free market economies is not a problem. The problem arises when these types of manufacturers cross moral and ethical boundaries to maintain their business revenues. With the information that there is also no foreseeable shortage of customers, “[t]he CMC reports that 34 countries continue to produce cluster munitions, another 25 have used them in armed conflicts, and 75 have stockpiles that pose a threat to humanity” (Lima: Taking Aim at Those Who Finance Cluster Bombs, 2007, para. 13), the loopholes are simply not going to be closed without exerted pressure from external, third-party sources. The loopholes in international regulation that allow arms manufacturers to sell and export munitions with little-to-no concern for who the buyer is or what they plan to do with the weapons—as evidenced from reports provided—is where the problem begins. One possible solution, as Hobbs sees it, is that “it is time for an Arms Trade Treaty” (Global Arms Industry Exploiting Major Loopholes in Arms Regulations According to Control Arms Coalition; Oxfam International, Amnesty International and International Action Network on Small Arms Involved in Campaign, 2006, para. 5).

Stephen Goose, in an Arms Control Association (ACA) published report, compares international treaty-body work on banning cluster munitions with the work of landmine banishment from a decade ago when he writes,

In 1996, in the wake of the failure of the Geneva-based Convention on Certain Conventional Weapons (CCW) to deal adequately with anti-personnel mines, Canada challenged the world to include a ban treaty in one year’s time, and the world responded. Now, in the wake of the failure of the CCW to address cluster munitions in 2006, Norway is spearheading a process aimed at a treaty banning those weapons by the end of 2008. Once again, nontraditional diplomacy seems to be bearing fruit (2008, p. 1-2).

The Norwegian “spearheading” that Goose talks about, started in 2006, has come to be known as the “Oslo process” (Goose, 2008, p. 2). The Oslo process began with Norway, Austria, Ireland, Mexico, New Zealand, Sweden, and later Peru—like minded governments who wanted more immediate results in the elimination of cluster munitions than the CCW was providing. The process, which kicked off with an all-states-invited meeting on February 22-23, 2007, progressed with conferences on four other separate occasions to discuss the purpose and scope of a proposed treaty and to define all relevant terms regarding cluster munitions, UXO, and ERW. According to the CMC website, between May 19-30, 2008, “107 countries […] adopted the Convention On Cluster Munitions at the Dublin Diplomatic Conference on Cluster Munitions” (The Problem: What’s the Problem With This Weapon? Cluster Munition Coalition, n.d., para. 8).

U.S. allies such as Britain, Canada, Australia, France, Netherlands, Denmark, Italy, Spain and Belgium have already adopted the CCM and plan to sign the final draft of the treaty, which will be available for ratification into international law on December 3, 2008, in Oslo, Norway. Meanwhile,
states such as the U.S., Russia, India, China, and Israel all refuse to participate in the process and are expected not to sign the treaty this December. The language of the CCM is constructed so that it will become a legally binding instrument that will require all signed parties to “prohibit the use, production, transfer, and stockpiling of [all predefined] cluster munitions that cause unacceptable harm to civilians and to include provisions on clearance, victim assistance, risk education, and stockpile destruction” (Goose, 2008, p. 4).

**Literature Review**

Dissimilar from its allies, who have already adopted the CCM, and contrary to arguments that the CCW has thus far failed to address cluster munitions, the U.S. government maintains that the CCW is a more appropriate international venue to address the human rights concerns of cluster munitions rather than through the CCM (U.S. Dept. of State, 2008, Cluster Munitions, para. 1). While refusing to participate in the Oslo Process, the U.S. is taking unilateral action through: the adoption of a new Department of Defense (DoD) policy on cluster munitions (U.S. Dept. of Defense, 2008), joint resolutions in the Senate and House of Representatives, and the Cluster Munitions Civilian Protection Act of 2007 (Congressional Bills S.594/H.R. 1755—both of which are under review in their respective Senate or House committees at the time of this paper).

A recent defense policy document, DoD Policy on Cluster Munitions and Unintended Harm to Civilians—released July 9, 2008, states that while “cluster munitions are legitimate weapons with clear military utility,” after 2018 the U.S. military will only employ cluster munitions that result in a less than 1% failure rate (U.S. Dept. of Defense, 2008, para. 2). “This percentage is not 1% in testing, but requires a 1% UXO rate for actual use during combat operations, across the range of intended operational environments in which we intend to use that weapon” (United States Intervention on Technical Improvements: Group of Governmental Experts to Conventional Weapons Convention, 2008, para. 6). The question this raises is: how can the military purchase and use munitions with a less-than one percent failure rate that is based on actual combat figures when the new munitions have yet to be used in combat?

The DoD maintains that cluster munitions are not only a legitimate military utility, but are “an integral part of U.S. forces capabilities” (U.S. Dept. of Defense, 2008, para. 3). DoD officials further point out that cluster munitions are necessary and highly efficient for engaging “area targets” and that the loss of such utilities “would create a capability gap for indirect fire of area targets and require an increase in other resources.” While the U.S. DoD has no intention of eliminating cluster munitions from its arsenal altogether, they are making an attempt to address current human rights concerns by requiring that all cluster munitions be 99% effective by 2018. The DoD is additionally requiring “excessive” inventory—those seen to exceed operational planning requirements—to be removed within a year of the policy release date. While it appears on the surface that the DoD is taking more responsibility for its weapons systems, after 2018 the new policy will still offer loopholes with regard to the use of cluster munitions; the loopholes exist because the stockpiled munitions which exceed the 1% failure rate will remain deployable as long as their use is authorized by the “Combat Commander” (U.S. Dept. of Defense, 2008, para. 8).

Acting as a form of public relations arm of the DoD in this case, the U.S. State Department addressed U.S. policy regarding the use, sale and export of cluster munitions immediately following the announcement that 107 countries signed their intent to adopt the CCM at the Dublin conference in May of 2008. According to U.S. Ambassador, Stephen D. Mull, while the U.S. government concedes that human rights concerns exist with the use of cluster munitions, it maintains that they only represent a small percentage of the threat that UXO poses to civilians. “In 2006, for example, [the U.S.] recorded about 15,000 casualties from the whole range of unexploded ordinance – grenades, landmines, other bombs that are left behind. We have not been able to document that more than 5 percent of all of those casualties resulted from cluster munitions” (U.S. Dept. of State, 2008, U.S. Cluster Munitions Policy, para. 5). He argues that cluster munitions make up a small percentage of a much larger problem. He further adds that the U.S. has spent “more than $1.2 billion on cleaning up” former conflict areas—making them safe for civilian re-habitation. This is a figure that they say “no other country in the world comes close to” matching (U.S. Dept. of State, 2008, U.S. Cluster Munitions Policy, para. 4).
Using the State Department positions that cluster munitions represent a small percentage of UXO and that the U.S. spends more than any other country in the world on post-conflict cleanup, Mull adds to his argument that the U.S. has “been pursuing” the cluster munitions issue, but that it is doing so through the CCW. He insists that, because the CCW is a “disarmament body [...] which meets in Geneva and comprises all of the major military powers and military trade producers in the world,” it is the appropriate place to solve “the issue” rather than through the Oslo process which does not have all the key cluster munitions players represented at the table (U.S. Dept. of State, 2008, U.S. Cluster Munitions Policy, para. 6). He maintains that the U.S. has “an essential tactical disagreement” from those participating in the Oslo process and “that unless you get all the major producers and users of these weapons to agree on how they’re going to regulate them, [...] you’re not going to meet your goal of addressing the [human rights] impact of them” (para. 9). This is the State Department’s justification for its refusal to take any involvement in the Oslo process (para. 10).

Dismissing the CCM for not falling into U.S. interest and echoing the sentiments of the U.S. Defense Department, the U.S. State Department holds the position that cluster munitions are a viable and legitimate contemporary warfare weapon. As a result, they are supporting the DoD policy that the technological advancement of these weapons as opposed to the outright banishment of them from future strategic planning and military stockpile availability is the correct course of action. The U.S. government’s position is that cluster munitions can become safe enough through technology to continue their use into future conflicts—conflicts that are just as likely to take place in heavily populated civilian areas as the recent attacks in Iraq, Lebanon, and South Ossetia (U.S. Dept. of State, 2008, U.S. Cluster Munitions Policy, para. 8). The U.S. government’s stance is that a one percent failure rate is acceptable for cluster munitions; it will take 10 years to replace current stockpiles with submunitions that meet the new requirement, and “[d]uring this 10 year transition period, [U.S.] forces will still maintain the ability to use existing stocks of cluster munitions—stocks that currently maintain a [high] reliability rate, but may not meet [the] new standard” (United States Intervention on Technical Improvements: Group of Governmental Experts to Conventional Weapons Convention, 2008, para. 9).

The Cluster Munitions Civilian Protection Act of 2007 is an instrument with the intended purpose of regulating and restricting the “use, sale, or transfer of cluster munitions” by the United States government (Cluster Munitions Civilian Protection Act of 2007, S.594, sec. 2 and H.R. 1755, sec. 3). Senate Bill S.594 was introduced to the Senate on February 14, 2007, by U.S. Senators Feinstein, Leahy, Sanders and Mikulski; it was then referred to the Senate Committee on Foreign Relations. Its twin bill, H.R. 1755, was introduced to the House of Representatives on March 29, 2007 by Representatives McGovern, McCollum, and Issa; it was subsequently referred to the House of Representatives Committee on Foreign Affairs. Currently, both bills are still under review by their respective committees. Also of note, H.R. 1755 currently has thirty-seven cosponsors (Cluster Munitions Civilian Protection Act of 2007, H.R. 1755). Similarly, S.594 has twenty-three listed cosponsors (Cluster Munitions Civilian Protection Act of 2007, S.594)—one of whom is U.S. Senator Patty Murray. Senator Murray was informed about this piece of legislation by a group of researchers from the University of Washington Bothell. Information about the bill coupled with information that Washington State’s other U.S. Senator, Senator Maria Cantwell, is already listed as a cosponsor, resulted in Senator Murray’s decision to cosponsor the bill. This is mentioned strictly to highlight the idea that the political process can be influenced by, for lack of a better term, objective collegiate research rather than just special interest lobby groups with financial clout.

If signed into law, the Cluster Munitions Civilian Protection Act of 2007 will restrict funding to any “Federal department or agency” that uses, sells, or transfers cluster munitions unless specific criteria are met. The criteria for acceptance are: 1) all submunitions must meet the “99 percent or higher functioning rate;” 2) all cluster munitions “will only be used against clearly defined military targets” and will not be used in areas where civilians are either present, or even known to inhabit; and 3) within 30 days of their use, the President must submit a cleanup plan of UXO which includes estimated costs to “the appropriate congressional committees” (Cluster Munitions Civilian Protection Act of 2007, S.594, sec. 2 and H.R. 1755, sec. 3). There is, of course, a Presidential Waiver section built into the document. However, the President will be required
to justify the waiver of cluster munitions that do not meet the acceptable criteria to the appropriate congressional committees within 30 days of their use, sale, or transfer (Cluster Munitions Civilian Protection Act of 2007, S.594, sec. 3 and H.R. 1755, sec. 4). Speaking about the bill, Senator Leahy says, “Civilians too often, and increasingly, are the victims of war. Our bill strikes the right balance by ensuring that when cluster munitions are used or sold, they are subject to strict controls so they do not pose unacceptable risks to civilians” (Senators Feinstein and Leahy Introduce Legislation to Restrict the Use, Sale or Transfer of Cluster Bombs, 2007, para. 9).

Insofar as the Cluster Munitions Civilian Protection Act of 2007 will place restrictions on cluster munitions rather than prohibit them outright, S.J. Res. 37 and H. J. Res. 91 are Congressional Resolutions—introduced on June 3 and June 5, 2008, respectively—that are intended to “express the sense of Congress that the United States should sign the Declaration of the Oslo Conference on Cluster Munitions” (A joint resolution expressing the sense of Congress that the United States should sign the Oslo treaty (Briefing to University of Washington Bothell, Washington D.C., September 11, 2008). He maintains that it has worked to “expose” the dangers of cluster munitions for years, “has been an active member of the CMC since 2007,” and has played an active role in the “Oslo process” with local AI sections lobbying their governments to participate (Cluster munitions treaty agreed in Dublin, 2008, para. 7). Specific sections listed as working on local government lobbying for the adoption of the CCM are: AI Norway, AI Peru, AI New Zealand, AI Austria, AI Ireland, AI Belgium, AI France, AI UK and AI USA.

Lumpe of FCNL is currently working to raise awareness and political support amongst “key senators” for U.S. entry into the global treaty process (personal communication. November 4, 2008). She hopes that the treaty signing and subsequent media coverage will embolden the new Presidential administration to bring the U.S. into the treaty. While her overall goal is to get the U.S. government to sign the CCM in December, she is also actively lobbying members of congress for their support of the Cluster Munitions Civilian Protection Act of 2007. According to Lumpe, a big obstacle to overcome during the lobby process is the reality that some liberal senators, like Senator Murray, are looking for “military cover” before supporting any bills that will impact the military. “That is my finding during the lobby process is the reality that some liberal senators, like Senator Murray, are looking for “military cover” before supporting any bills that will impact the military. “That is my finding

Like FCNL, HRW, according to Tom Malinowski, sees the Oslo treaty as the best and most “obvious choice” for the global elimination of cluster munitions use. However, he also notes that if the Cluster Munitions Civilian Protection Act of 2007 can be signed into U.S. law, then perhaps it will serve as a “stepping stone” for U.S. action towards the global treaty (Briefing to University of Washington Bothell researchers presented at Human Rights Watch, Washington D.C., September 11, 2008). He maintains that quite often the government needs to take baby-steps on each topic before it starts the marathon.
Legal Analysis of Cluster Munitions

On December 3rd, 2008, an estimated one hundred nation-states will sign the CCM. Previous to this treaty, there has been no specific legal framework that regulated cluster munitions. While these weapons have always raised concerns under existing international humanitarian law (IHL) (Docherty, 2005, para. 1), there has been no governing body or treaty, prior to the CCM, able to sufficiently define and regulate the use, manufacture, and sale of these weapons. The Universal Declaration of Human Rights (UDHR), signed in 1948, protects the right to life in Article 3, which states that, “everyone has the right to life, liberty and security of person.” It also provides the for the right of the accused to be presumed innocent until proven guilty according to law, and for the right that “life” shall not be taken away without “judicial process” (Universal Declaration of Human Rights, 1948, article 11; Israel’s Human Rights Violations Facilitated by the Use of CAT Bulldozers, n.d., p. 5). “The prohibition of extrajudicial killings is established based on these principles” (Israel’s Human Rights Violations Facilitated by the Use of CAT Bulldozers, n.d., p. 5). The sixth Article of the International Covenant on Civil and Political Rights (ICCPR) complements the UDHR principles by explicitly prohibiting extrajudicial killings.

According to Docherty, in a HRW published report from 2005, (para. 2), “Additional Protocol I of 1977 to the Geneva Conventions offers internationally accepted legal standards for evaluating the problems posed by cluster bombs.” She further cites Protocol V of the CCW, which deals specifically with ERW, as international legal standards relevant to cluster munitions (para. 3). Although not all states are party to these treaties, they are considered “customary law,” or binding legal norms for all nations “regardless of specific legal commitments” (para 2).

Protocol I, in addition to the Fourth Geneva Convention, provides the legal protection for civilians during war or conflict. “Article 48 of Protocol I states, ‘the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives’” (Docherty, 2005, para. 7). The distinction between civilians and combatants is the fundamental concept of this Protocol. However, the lines of distinction are blurring as the nature of warfare and conflict arise changing in contemporary times; situations where combatants are fighting near or amongst civilian populations are becoming the de facto standard.

Directly relating to cluster munitions, Protocol I, Articles 51(4) and 51(5) specifically prohibit indiscriminate attacks where they are defined as striking both military and civilian objects and people simultaneously, or civilian objects without distinction (Docherty, 2005, para. 8). As cluster munitions are defined by their intentional characteristics as area targeting weapons, they fall into the category of “indiscriminate.” The use of cluster munitions in the past decade also shows that attacks are well within the boundaries of heavily populated civilian areas and are therefore in violation of Articles 51(4) and 51(5) of Protocol I.

Protocol V on ERW of the CCW addresses the corrective measures required to minimize their effects, including submunition duds in post-conflict areas (Docherty, 2005, para. 13). It requires states to remove ERW from territory under their control and to aid in the clearance of UXO remaining in areas not under their control. Protocol V “also sets up duties to record and share information, protect humanitarian missions, and take all feasible precautions to protect civilians from ERW.” A key point highlighted by Docherty is that Protocol V does not restrict preventive measures to minimize civilian harm. It merely “encourages” responsible parties to take “generic preventive measures” (Docherty, 2005, para. 18). This Protocol provides insight as to why the U.S., according to Ambassador Mull, has spent more than any other nation on post-conflict area cleanup—more than $1.2 billion (U.S. Dept. of State, 2008, U.S. Cluster Munitions Policy, para. 4). It does so because it is required to do so by Protocol V. Additionally, if the U.S. did not use so many cluster munitions, it would not have to spend as much money on cleanup.

With the layering of legal requirements mortared in place from the UDHR, ICCPR, Additional Protocol I of the Geneva Conventions, and the CCW, how is it that cluster munitions are still killing and wounding civilians today—and doing so with such significant numbers? The answer comes from the continued and widespread use of cluster munitions by states that lack compliance with current IHL (Docherty, 2005, para. 4). One of the challenges posed by international authority is the enforcement
U.S. Policy on Cluster Munitions and Its Susceptibility to Litigation

of compliance on a global scale.

Recently, however, two international tribunal judgments found the defendants liable for the deaths of civilians by cluster munitions. In 2004, the Eritrea-Ethiopia Claims Commission (EECC) held Eritrea, a nation in northeast Africa, "liable for the deaths of civilians killed in cluster munition strikes on Mekele, Ethiopia on June 5, 1998" (Wiebe, 2008, sec. I, para. 1). This is now referred to as the "Eritrea Judgment." The second tribunal judgment passed on June 12, 2007; the International Criminal Tribunal for the Former Yugoslavia (ICTY) found Milan Martic, the former president of the now defunct Serbian Republic of Krajina, "criminally liable for deaths and injuries resulting from cluster munition rocket attacks on Zagreb, Croatia on May 2 and 3, 1995" (Wiebe, 2008, sec. I, para. 1). This case is now referred to as the "Martic Judgment."

While both the Eritrea and Martic Judgments highlight the "deaths of civilians in densely populated areas," they each do so in different ways (Wiebe, 2008, sec. I, para. 5). "The EECC did not overtly question the use of cluster munitions near civilian areas, but the ICTY did." According to Virgil Weibe in his Pepperdine University Law School Review, the ICTY used the design and purpose of cluster munitions to show intent by the defendant in the targeting of civilians; meanwhile, the EECC dismissed the charges of intentional targeting of civilians and simply held Eritrea liable for failure to "take adequate precautions" in their attacks (Wiebe, 2008, sec. I, para. 5 and sec. IX, para. 2). The importance of both verdicts, however, is that they each hold the commanders responsible for failure to prevent strikes when there is "foreknowledge about the adverse humanitarian effects of weaponry in actual combat usage" (Wiebe, 2008, sec. I, para. 5). A further breakthrough is the way in which the Martic Judgment, while conceding that Martic attempted to hit legitimate military targets, uses the "characteristic of indiscriminate targeting" of cluster munitions to hold a defendant guilty of the deaths and permanent injury of civilians through collateral damage (Wiebe, 2008, sec. IX, para. 1). In short, the indiscriminate nature of cluster munitions, when used in civilian populated areas, can and is used as evidence to hold an attacker responsible for any resultant civilian casualties, injuries, or property damages.

Looking beyond the governments or individuals who perpetrate crimes against humanity, corporations and their leaders are now also falling under the legal microscope for potential culpability of aiding and abetting the perpetrators in their crimes. Relying heavily on the Nuremberg military tribunals of WWII in which German industrialists were convicted for aiding and abetting the Nazis in their atrocities, four Palestinian families and the parents of American Rachel Corrie, "filed a lawsuit against Caterpillar, Inc. under the Alien Tort Statute (ATS) and general federal jurisdiction, for aiding and abetting the Israel Defense Forces' (IDF) commission of war crimes and other human rights violations by knowingly providing the IDF with bulldozers"—bulldozers that were used to "illegally demolish civilian homes, resulting in deaths and injuries" (Skinner, 2008, sec. 1, para. 1). Rachel Corrie was one of the victims. The Plaintiffs cite "In re Tesch"—also referred to as the Zyklon-B Case—and the United States v. Flick as evidence. The Zyklon-B case concluded with the conviction of top corporate officials from the companies that made the poisonous gas known as Zyklon-B, which was used by the Nazi regime to kill people of Jewish faith in the concentration camps (Skinner, 2008, sec. 1, para. 1). In the case of the United States v. Flick, a businessman was "convicted for contributing money vital to the Nazi's financial existence, while knowing of their crimes." The case against Caterpillar is different in that the plaintiffs are accusing the company of misdeeds instead of specific corporate officials like the cases of Zyklon-B and the United States v. Flick.

The primary allegation in the Caterpillar case is that the company aided and abetted the IDF "by providing a product it [knew would] be used to substantially further human rights abuses" (Skinner, 2006, p. ii).

In the recent case of "In re South African Apartheid Litigation," the plaintiffs, similarly to the Caterpillar Case, cited the Nuremberg trials as evidence. The arguments of the case claim that several corporate officials "were complicit with the apartheid regime in South Africa" (Skinner, 2008, sec. 1, para. 2). The plaintiffs make explicit allegations that the defendants were willing associates of the apartheid regime and purposefully created and profited from labor conditions more parallel to prisoners than employees. They further argue that "like Nazi-era firms that profited from forced labor during World War Two, [the] defendants actively sought cooperation with the regime to secure profits" (Skinner, 2008, sec. 1, para. 2). The premise of the case is that corporations that cooperate with deplorable regimes
like the Nazis or the South African separatists are liable under the ATS.

Arguments like these brought about by the Caterpillar Case and the South African Apartheid Litigation, ones in which the Nuremberg trials and specifically the industrialist cases are cited as evidence, are attempting to show “corporate complicit liability” (Skinner, 2008, sec. 1, para. 3). As Skinner points out in her report, giving credit to the trials of WWII, a new door is open for international humanitarian law because “[t]hese arguments are having some success” in recent litigation (Skinner, 2008, sec. 1, para. 3 and para. 4).

Recent cases like the Eritrea and Martic Judgments find that the indiscriminate nature of cluster munitions provide sufficient cause to hold defendants liable for unintentional harm to civilians and civilian property. These cases directly contradict the U.S. stance that cluster munitions are still a viable and legitimate weapon system. Furthermore, the introduction of the idea that corporations as well as individuals can be held accountable for aiding and abetting human rights atrocities coupled with the liability of harm to civilians based on cluster munition characteristics establishes a legal foundation for future litigation against cluster munitions manufacturers (again, four of the largest six of these being U.S. companies).

Conclusion

If governments and national leaders have already been found liable for deaths caused by the use of cluster munitions in the past (Eritrea and Martic Judgments), and corporations are becoming recent targets for aiding and abetting war crimes (as cited with the Zyklon-B Case of WWII, the Caterpillar Case, and the South African Apartheid Litigation), the U.S. government and U.S. corporations that manufacture cluster munitions are just as susceptible to litigation for future claims of incidents involving these types of weapons. As such, the only foreseeable solution to avoid litigation for future incidents involving these weapons is the absolute cessation of the use, stockpiling, production, sale, and exporting of them. Current unilateral action being taken by the U.S. will not stop cluster munitions from being used or sold in the future; it merely places restrictions on them—restrictions that are not sufficient to avoid civilian casualties altogether.

It is therefore argued by some that the best and only option for the U.S. to consider, in order to avoid future litigation involving cluster munitions, is to adopt the Convention on Cluster Munitions—to join its allies and sign with the more than eighty other nations (as of December 3rd, 2008) to eliminate cluster munitions in total altogether. This action will show the world that the United States truly cares about the repercussions and human rights impact that its actions put onto others.

In a personal communication from the FCNL on December 3, 2008, it was declared that President-Elect Barack Obama is quoted as saying that he will “carefully review the new treaty [the CCM] and work closely [with] our friends and allies to ensure that the United States is doing everything feasible to promote the protection of civilians.” The hope, at least from the human rights community, is that the new administration will find a way for the U.S. to do its part by signing the treaty.

References


Sewell


