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Bombing Civilians : Grounds for Banning Cluster Munitions and the Responsibility for Removal

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Abstract

This article argues for banning the use of cluster munitions by the United States and in general. It examines cluster munitions and the effects they have on a population and whether or not they should be used according to a number of different international and national agreements such as The Hague Conventions, Geneva Conventions, the Army Field Manual and the Universal Declaration of Human Rights. It looks at the responsibility of the states and corporations that produce and use these weapons through Just War Theory and Rule Utilitarianism and why corporations and states need to share the responsibility for the cleanup/removal and any other damage that these weapons inflict on populations where they are used.

Introduction

Human Rights have been a mainstay of the international political arena since the end of the Second World War. Atrocities were committed by all sides, the firebombing of Dresden, dropping of the atomic bombs on Hiroshima and then Nagasaki, the wholesale killing of Jews, Gypsies and other groups within Europe by the Nazi party, and the Rape of Nanking by the Japanese. The conclusion of hostilities and the creation of the United Nations (UN) in mid 1945 ushered in an era of human rights. In 1948 the Universal Declaration of Human Rights (UDHR) was adopted, which outlined the rights of all humans. The purpose of the UN was to prevent the types of wars that the world had experienced in the last fifty years and to provide an avenue for countries to work out their differences before hostilities begin. The current 'War on Terror' has brought International Human Rights back into the spotlight with the violations that were committed and are still being

committed in the 'War on Terror'. The purpose of this paper is to look at cluster munitions and to assess whether their use is permitted according to International law or even national laws. If these weapons are not permitted, why do they continue to be produced? Who is responsible for shutting down the production? Should the government or the corporation producing these weapons hold the responsibility for the cleanup of these weapons once they have been deployed, and should they also be responsible for any medical costs attributed to these weapons? I propose that these weapons should be banned based on international humanitarian laws (IHL), as well as other laws and rules. This model will be applied to the United States, but can be applied to other countries in a similar way. By using this model it is possible to assess whether the United States is wrong in its production and use of these weapons.

Cluster Munitions

Cluster munitions are varied in their use, as well as their shape. Cluster munitions are designed to destroy a number of targets; these include vehicles, armored and soft, personnel, as well as infrastructure. According to the Stop Cluster Munitions website "The main reason given for the continuing value of cluster munitions is their ability to counter *symmetrical* threats, such as large columns of tanks protected by air defences."¹ While cluster munitions may be useful against symmetrical threats, wars today rarely contain symmetrical threats. Both the Iraq and Afghanistan wars are largely being fought by ground troops who utilize guerilla tactics, and rarely use tanks or other armored vehicles. The utility of these weapons expands beyond this as they are also very effective against ground troops. The main deployment method for cluster munitions is by air, usually dropped from an airplane, but they can also be fired from land based rockets such as an MLRS (Multiple Launch Rocket System).² There are also numerous different sizes and shapes of cluster munitions, Diagram 1.2 in the appendices contains some of the sizes and shapes of cluster munitions that have been used, and that are currently being used.

The size and shape of cluster weapons is one of the problems associated with them. Many of the cluster bomblets (the explosive part of the cluster munition) are quite small and look very innocuous. The shape of cluster munitions range from ball shaped to a pineapple, yet their shape belies their explosive nature as Choen Ha experienced:

In 2005, Choen Ha and two other boys were playing near their village in Kampong Speu province when they found four steel balls. Each took a turn throwing them, playing 'marbles'. They did not know that the balls were BLU-63s, or that they were dangerous. When the third boy's turn came, he struck his mark and one of the items exploded. One boy died of massive abdominal injuries from the shrapnel, while the two other boys were injured. Ha was 17 at the time of the incident near Rol An Beng village and did not finish school. To pay for medical treatment his family spent their entire life savings. There are eight in his family and Ha is the third of six children (four boys and two girls): they are all "angry against the Americans" and during the interview called for clearance, destruction of stockpiles, and a ban on the production of cluster munitions.³

To the detriment of the population affected by these weapons, many people, both child and adult, pick up these weapons and lose their lives or severely injure themselves.⁴ If the shape is not alluring enough to pick up these weapons, many of them are made of some type of metal which can be used or sold by the local population. In the documentary "Bombies", filmed in Laos, a village metal smith actually uses the old bomb shells and bombies to create farming utensils for the village. He melts the metal to create machetes, scythes and other useful implements. The metal smith also uses a BLU 3 (pineapple shaped) bombie as a candle, and a pot holder.⁵ This is the danger of these weapons when they are visible. Most often these weapons are hidden from view under the ground, yet still remaining active, waiting for someone to disturb them. After they have been dropped, and if they do not explode, these munitions can become a landmine as was the case for Vladimir Jovanovic:

Vladimir Jovanovic, a 72-year-old Serb, was injured in the 1999 cluster bomb attack on his home of Nis, Serbia. He died on April 4, 2000, some eleven months later, while working in his yard with a shovel, an unexploded cluster bomblet from the same attack took his life.⁶

One temporary fix to the problem of unexploded cluster munitions is found in the current/next generations of cluster munitions. They are to be fitted with a self-destruct, or self-deactivation device. The former neutralizes the bomblet by destroying it, the latter by disabling the trigger.⁷ The current stockpiles of U.S. cluster munitions are estimated to be at 5.5 million, containing around 728.5 million sub-munitions, or bomblets.⁸ Of these sub-munitions, only 30,990 have the ability to self-destruct.⁹ While the next generation of sub-munitions will be an improvement over previous generations, there are still an extremely large number of sub-munitions left in the stockpile that are not reliable. The dud rate for the next generation of cluster munitions has been pinned at no more than 1 percent. In a statement from 2001, the Secretary of Defense, William Cohen, stated that by the year 2005 all sub-munitions "would have a dud rate of less than 1 percent."¹⁰ While this is a significant change from the stock of older munitions, it still does not deal with the problem of the munitions that do not explode as intended.

Handicap International

A preliminary report created by Handicap International (HI) in 2006 shows the devastating effects of these weapons. The report titled "Fatal Footprint: The Global Human Impact of Cluster Munitions" is a collection of data from 23 countries¹¹ and areas which have been impacted by cluster munitions. The report was conducted from April to October 2006.¹² In the preliminary report it concludes four major 'lessons':

- That the level of detail that is collected in this report is far from complete
- Cluster munitions cause disproportionate amounts of damage to the civilian population after the conflict has ended.
- Most of the casualties are younger males who are at work.
- Clearance of these munitions without delay will reduce civilian casualties.¹³

Of the data that HI had gathered at this time a total of 11,044 people had been casualties, either killed or injured, by cluster munitions. The total number of injuries is based on the 23 countries. The cluster bombs that caused the injuries are not from any single country but a number of countries as numerous countries produce them and they are sold throughout the world.

Table 1.1 Injured or Killed by Cluster Munitions¹⁴

Confirmed Cluster Munition Casualties				
	Total	Injured	Killed	Unknown Status
Number	11,044	5,581	3,830	1,633
Percentage		50.5%	34.7%	14.8%

Table 1.2 Type of Casualty¹⁵

Confirmed Cluster Munition Casualties								
	Total	Man	Woman	Boy	Girl	Military	De-miner	Unknown

The data shows that 50% of the people who are casualties of cluster munitions are injured and the 35% of them are killed. According to these statistics cluster munitions are more likely to maim the victim rather than kill them. A conflicting report published in Ploughshares Monitor claims that "Cluster bomblets tended to kill rather than maim their victims".¹⁶ In either case whether they kill or maim their victims, these incidents are preventable. Table 1.2 looks at the type of casualties that the cluster munitions inflict. The section that stands out is the military group which during wartime is the only valid target. It also happens to be the lowest percentage of casualties apart from de-miners. This chart shows that of the 11,044 casualties, 68% of those were civilian. This does not take into account the 3,405 which are unknown, and a large portion of this group could ostensibly be civilian as well. If we do not include the unknown portion into the casualties, then 98% of cluster munition casualties are civilian. Only 1% of the casualties of cluster munitions are in fact military. These casualties occur during the conflict and after it has ceased. How is it that these weapons are still allowed to be used when they injure/maim around 50% of the people affected by them and that 68% of the casualties are in fact civilian and non-military. Under the most basic international laws of war, such as the Hague Conventions, civilians are to be protected from the ravages of war. The next section of will examine the laws that protect civilians from war, and how these laws can and should apply to cluster munitions.

Human Rights, International Law and Cluster Weapons

Before we can assess the current problem we need to look at other weapons that have been attributed similar status. The basis for pushing forward the banning of these weapons rests largely on the Ottawa Process which pushed for "banning the use, production, transfer, and stockpiling of AP mines."¹⁷ This agreement, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, was signed and ratified by 153 countries. The significance of the convention was that it was a major step in the protection of civilians from destructive nature of landmines. Another important aspect of the Convention is that it was started outside of the UN by a number of countries who wanted to protect themselves, as well as warring countries from the devastation of Anti-Personnel (AP) landmines. Previous to this the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) was created by the UN to further the protection of civilians and military personnel from the destructiveness of some methods of warfare, some examples of these, and the number of countries that have ratified them are:

- Protocol on Non-Detectable Fragments (Protocol I). Geneva, 10 October 1980
 - 100 States¹⁸
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980.
 - 89 States¹⁹
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980.
 - 94 States²⁰
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995
 - 85 States²¹
- Protocol on Explosive Remnants of War (ERW) (Protocol V, 28 November 2003)
 - 30 States²²

While these have not been as successful in attaining ratification as the land mine issue the majority have been relatively successful in attaining signatures. This is not an exhaustive list of the prohibitions on weapons as there are also conventions that deal with chemical, biological, and nuclear weapons as well. These conventions have attempted to limit the effects of warfare on the military personnel, as well as the civilian population. There are also other treaties signed such as the Geneva Conventions and the Declaration of Human Rights that are designed to help protect civilians from the ravages of warfare. The two protocols that are of importance specifically to the case of the use of cluster bombs are Protocol II and Protocol V. In this study Protocol II is of particular importance because this protocol has been ratified by the United States. Protocol V is equally important as it has not been ratified by the United States and so it is not bound to follow the regulations in it. While Protocol V has not been ratified, the president of the United States has urged the Senate to push forward this protocol. In a letter to the Senate dated June 19, 2006 President Bush said "I urge the Senate to give prompt and favorable consideration to each of these instruments and to give its advice and consent to their ratification. These treaties are in the interest of the United States, and their ratification would advance the longstanding and historic leadership

of the United States in the law of armed conflict.”²³ This will be a historic step in leading to the cleanup and removal of munitions such as cluster bombs and other unexploded ordinance (UXO), but unfortunately it does not go far enough as it does not prohibit their use or production. Similar to the Ottawa Process, there are talks outside of the traditional channels such as the UN to ban the use, production, transfer and stockpiling of cluster munitions. This group of states, non-governmental organizations (NGO), and the UN has helped to move forward talks on the banning of these weapons.

In order to help understand the rights that every human has we must first find a set of rules that the world generally accepts as the most basic/primal rights for humans. The best example of basic human rights come from the UDHR which was created by the UN and its member states in 1948. In the UDHR they recognize “the inherent dignity” and “equal and inalienable rights of all members of the human family” which “is the foundation of freedom, justice, and peace in the world”²⁴. The basic premise is that freedom, justice and peace are not possible without the rights that they have outlined in this declaration. At a minimum level these rights need to be respected in order for there to be world security. Apart from Protocol V, the following laws and declarations have all been ratified or are codified within the US legal system, and as such they are laws to be followed under the international system.

Universal Declaration of Human Rights

The UDHR contains 30 articles which outline the basic rights of all humans. The articles that hold the most importance when discussing the effects of cluster munitions are article 3 and 13. Article 3 states “Everyone has the right to life, liberty and security of person.”²⁵ When article three is violated, under the laws of most countries, a person could be charged with murder. Cluster munitions are no different and their effects usually endure long after the war has ended. Under this reasoning there should be some way for the wounded to be compensated for their pain and suffering. Article 13 is another reason why cluster weapons should be banned. Under article 13 “Everyone has the right to freedom of movement and residence within the borders of each state.”²⁶ The use of cluster munitions can greatly impede the movements of a population. If it is dangerous to farm your own land, build a house, and move freely, for fear of being killed by an explosive device, then cluster bombs hinder your right to freedom of movement and residence. As such cluster munitions are in violation of the fundamental right of freedom to move within your own state, and your rights to life, liberty, and security of person.

Hague Convention IV & Field Manual No.27-10 The Law of Land Warfare

The following are excerpts from the field manual which the United States Army uses as a basis for their conduct during war. The manual was created by the US Department of Defense and explains how the soldiers within the US army are to conduct themselves as agents of the state. Many of the rules contained within this manual are taken directly from The Hague Conventions or the Geneva Conventions pertaining to the laws of war. Chapter 2, Section III of FM 27-10 deals with the ‘Forbidden Means of Waging Warfare’. While these rules pertain to belligerents, do they not also pertain to the civilian population as well? One would assume that if the soldiers of the enemy are protected from certain means of warfare, then the civilians are granted this and greater protection as they are not belligerents. In *The Ethics of War*, James Turner Johnson echoes this by saying “What is wrong to do to combatants certainly should never be done against non-combatants: the rule protecting the former also covers the latter.”²⁷ He then goes on to say that “To use means calculated to cause unnecessary suffering against combatants is forbidden in the law of armed conflict; similarly, such means are forbidden in dealing with non-combatants.”²⁸ Under section III, article 33 and 34 of the Field Manual it states:

33. Means of Injuring the Enemy Limited

a. Treaty Provision.

The right of belligerents to adopt means of injuring the enemy is not unlimited. (HR, art. 22.)

b. The means employed are definitely restricted by international declarations and conventions and by the laws and usages of war.

34. Employment of Arms Causing Unnecessary Injury

a. Treaty Provision.

It is especially forbidden * * * to employ arms, projectiles, or material calculated to cause unnecessary suffering. (HR, art. 23, par. (e).)

b. *Interpretation.* What weapons cause “unnecessary injury” can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades. Usage has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the **scoring of the surface** (emphasis mine) or the filing off of the ends of the hard cases of bullets.²⁹

In the army manual it recognizes that even while at war there are certain rules as to how the war can be conducted. Certain weapons are prohibited or generally accepted to cause disproportional damage, such as atomic weapons, or poisonous weapons. The preceding articles deal with arms and projectiles that cause unnecessary suffering or injury. The first important element is that it is forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering. The US military interpretation of this statement is that ‘unnecessary injury’ can only be determined by the state using the weapon. However, the last sentence of this interpretation is important in assessing whether the damage of cluster munitions is unnecessary. The last sentence deals with the scoring of bullets, which is forbidden under the Hague Regulations. The reason that these type of bullets are forbidden is that when a bullet is scored, upon impact it fragments

and can cause 'unnecessary injury and suffering' to the victim. In a report from the Journal of Trauma:

"Dissections of the bullet tract (through tissue and gelatin) revealed that tissue disruption from the fragmenting bullets was significantly greater (p less than 0.001) than from non-fragmenting bullets. The recovered bullets were weighed. The results showed that the fragmenting bullet lost 59 to 77% of its original weight and the non-fragmenting bullet was the same weight as originally."³⁰

These results tend to prove that fragmentation bullets do cause more damage than the non-fragmentation variety. Why do they cause more damage? They break apart and cause more tissue damage. Cluster munitions work in a similar fashion. Cluster munitions are created to fragment before they enter you, so instead of having one wound with fragments, the victim may end up with 50 or 60 wounds. If you refer to the diagram 1.1 in the appendices, part 4 of the deployment of cluster weapons shows that the metal fragments inside have been scored which produces fragments of burning metal. Similarly the other cluster munitions in diagram 1.2 can be filled with hundreds of BBs which can cause immense damage to a human body. These weapons are intended to cause a large amount of damage to the victim. The point of rules in war (*ius in bello*) is to prevent states from using weapons that cause excessive amounts of damage, yet these weapons are created to cause widespread damage.

Chapter 2, section IV of the Army Field Manual deals with bombardment of targets attacks that are permissible. It states:

41. Unnecessary Killing and Devastation

Particularly in the circumstances referred to in the preceding paragraph, loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. Moreover, once a fort or defended locality has surrendered, only such further damage is permitted as is demanded by the exigencies of war, such as the removal of fortifications, demolition of military buildings, and destruction of military stores (HR, art. 23, par. (g); GC, art 53).³¹

If cluster munitions are used in areas where people are expected to return to or are used in an area that is already populated, the loss of life, property and damage to property should be foreseeable. It is foreseeable that there will be UXO, or ERW left over in the area of bombardment that will cause 'unnecessary killing and devastation' to the civilian population during the conflict and well after its resolution. Cluster Munitions should never be used in populated areas, because they will cause unnecessary killing and devastation. The simplest way to ensure that there is no unnecessary killing and devastation is to stop using cluster weapons, and to stop producing them to sell to other states. The long-term cost on the civilian population outweighs any military advantage that is to be gained in the short-term. The use of these weapons only further alienates a population.

Geneva Convention IV

The fourth Geneva Convention concerns the protection of civilians during a time of war. While this convention was put in place to protect civilians from the dangers during war, it does not address how civilians should be protected after the war has ended. The case of cluster munitions is particularly important in this since these weapons are dangerous not only during the time of war, but also after a conflict has ended. This report has already shown how these weapons are extremely dangerous to the civilian population and military population after the war has ended, but we can also assume that these types of weapons are also lethal during the conflict. The most important article of the fourth Geneva Convention is article 3 which states:

1. Persons taking no part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture³²

The understanding of these rules is that the parties to the conflict are to protect civilians to the best of their ability. There is no guarantee that all civilians can be protected, but if a more precise weapon or strategy can be implemented to protect civilians from the dangers of war that route should be taken. The additional Protocol's I and II to the Geneva Conventions which were created in 1977 further the rules of protection that are afforded to civilians.³³ Under article 48 of Protocol I "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."

³⁴ While the United States has not signed onto the additional protocols, many people still consider these treaties international law. This idea will be discussed in more detail in the responsibility section of the report. These ideas are also found in the Army Field Manual under article 41 which deals with unnecessary killing and devastation. If these are the rules that are to be respected during war, is it not prudent to say that the rules for protecting civilians after the conflict has ended are in fact greater or equal to the protection they are afforded during war? A rational person would argue that civilians are to be protected both during and after war to the highest degree possible as they are not combatants. The use of cluster

munitions not only violates the idea that due care should be taken to protect civilians during war since cluster munitions are inaccurate, but they also pose a significant threat after the conflict has ended.

CCW - Protocol II

The CCW is a five part convention which deals with the use of conventional weapons. Protocol II is especially important because it deals with the Prohibition or Restrictions on the Use of Mines, Booby-Traps and Other Devices. While cluster munitions are not land mines, an argument can be made that if cluster munitions are dropped and do not explode, they turn into mines. The argument behind this stems from the definition of a mine that is included in Protocol II. Under Protocol II there are three definitions of mines: mine, remotely-delivered mine, and AP mine. The following are the definitions are directly from Protocol II:

Mine – means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.

Remotely-delivered mine – means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be “remotely delivered”, provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.

Anti-personnel mine – means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.³⁵

Cluster munitions are primarily dropped from airplanes, but can also be delivered by artillery or missile, and so are remotely delivered. Cluster munitions can be employed as AP weapons, but can also be used against a number of other targets. Each type of cluster munition is designed to be effective against a certain type of target. Diagrams 1.3-1.5 in the appendices are designed for soft targets, as small BBs would be ineffective against armored vehicles. Once a cluster munition has been dropped, and if it has not exploded, it then becomes a munition placed under or on the ground.³⁶ The problem in assessing cluster weapons as mines is that they are not “designed to be exploded by the presence, proximity or contact of a person or vehicle”, yet many are triggered in this manner.³⁷ So while cluster munitions are designed to kill people, they are not designed to explode by proximity or contact, they are designed to explode in the air. When they do fail to explode and end up on the ground, cluster munitions are similar to a land mine because most of the casualties from cluster munitions are killed/injured when they are stepped on, touched, or bumped, and thus can be considered a land mine.

CCW - Protocol V

Previous sections have dealt with conventions and treaties that have been signed and ratified by the United States. Protocol V on ERW is a relatively new addition to the CCW and has not been ratified, but has been endorsed by President Bush and is currently being considered by the Senate. Protocol V is the most pertinent UN protocol in dealing with cluster munitions, as well as other munitions that are left unexploded from conflict. Protocol V defines what constitutes ERW. Under Protocol V there are five definitions:

Explosive ordnance – conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996.

Unexploded ordnance – explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so.

Abandoned explosive ordnance – explosive ordnance that has not been used up during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.

Explosive remnants of war – unexploded ordnance and abandoned explosive ordnance.

Existing explosive remnants of war – unexploded ordnance and abandoned explosive ordnance that existed prior to the entry into force of this Protocol for the High Contracting Party on whose territory it exists.³⁸

Protocol V does not deal specifically with the use of cluster munitions, but cluster munitions do fall under the category of unexploded ordnance. When cluster bombs are released from the bomb canister, the falling action primes the munition, and making it ready to explode. Protocol V also outlines the removal of ERW, and more importantly that parties to the conflict:

“shall to the maximum extent possible and as far as practicable record and retain information on the use of explosive ordnance or abandonment of explosive ordnance, to facilitate the rapid marking and clearance, removal or destruction of explosive remnants of war, risk education and the provision of relevant information to the party in control of the territory and to civilian populations in that territory.”³⁹

The states/actors that are using these weapons are responsible for keeping track of the weapons that they drop or leave behind, their cleanup, and their removal. When the conflict is over these dangers must be removed in order to protect

the population, both civilian and military. As mentioned earlier while protocol V is a good start at making states responsible for the weapons that they drop and leave behind, it still does not prohibit the use, production or selling of cluster munitions or other similar weapons. Human Rights Watch (HRW) also stated in a report on cluster munitions that "Regrettably, the protocol covers only the post-conflict measures. Delegates opted not to negotiate on "preventive measures," such as technical improvements or use restrictions, or specific weapons systems, such as cluster munitions."⁴⁰ Countries would still be able to produce these weapons and use them, as long as they are able to clean up the weapons after the end of the war. The major problem with regard to cluster munitions is that the possibility of trying to track where each bomblet goes is highly cost prohibitive, and highly unlikely. One possible solution to track where each individual bomblet is dropped is to place a GPS receiver or a radio transmitter in each sub-munition so that they can be pinpointed at a later date. It is doubtful that states would be willing to spend the money to place such technology in each sub-munition, even if it would make the responsibility of cleanup easier. The cleanup of these weapons would also be very costly, possibly in terms of the lost lives, but also the logistical operation of trying to find these weapons once they have been dropped.

Responsibility of Use

The final section of this paper will look at who should be responsible, and why they should be held responsible if these weapons are used. Responsible is defined as "Able to make moral or rational decisions on one's own and therefore answerable for one's behavior."⁴¹ The two main groups that should be responsible for these weapons are the corporations who create these weapons, and the states/actors that use these weapons. By creating these weapons a corporation shares some of the responsibility for their use, and the repercussions because these weapons are designed to kill. The state or group is also responsible for their use and the repercussions because they are purchasing weapons that are designed to kill. By placing it in this context it seems to easy to lay responsibility because weapons, by their definition are "An instrument of attack or defense in combat, as a gun, missile, or sword."⁴² Cluster munitions intended effect is to kill large concentrations of soldiers and as such are designed to kill. The main concern over cluster bombs is their unintended effect which sees these weapons ending up as a landmine type weapon which affects a population years after a conflict has ended. The basis of my argument against the use and production of cluster munitions is that companies and states should be responsible for the unintended, but foreseeable, effects of these weapons. I will use two theoretical models to assess these weapons, the first is a Just War approach, and the second is Rule Utilitarianism, both of which are important aspects of international law.

Just War Theory

The Just War theory contains two aspects, the *ius in bello* (Justice in War), and the *ius ad bellum* (Justice of War).⁴³ The *ius in bello* is the aspect that this paper will be looking at as cluster munitions are used in war and so the Justice of going to war is not of concern in this paper. The two main points of the *ius in bello* are the ideas of discrimination and proportionality. The idea of discrimination states that "Noncombatants must be given immunity and protection".⁴⁴ This idea is found in the fourth Geneva Conventions relating to the treatment of non-combatants as was mentioned earlier in the paper. The second aspect is the idea of proportionality which states "Military actions must do more good than harm".⁴⁵ This idea can be found in additional Protocols to the Geneva Conventions which have not been ratified by the United States, yet, according to the report *Fatally Flawed* by HRW "The provisions discussed below, however, are considered customary law, that is, legal norms deriving from common state practice that bind all nations regardless of specific legal commitments."⁴⁶ There are also laws that the United States must follow in their own manual on The Law of Land Warfare. As mentioned earlier in the paper under the section on the Hague Conventions and FM 27-10, "Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places within the meaning of the preceding paragraph but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated."⁴⁷ These are in fact legal obligations the United States military must abide by, as such cluster munitions do stretch the bounds of legality as the loss of lives and damage to property continues after hostilities have ceased. Since cluster munitions are a very imprecise weapon by nature, the ability to discriminate between civilian and military is highly compromised, and the death/injuries that will follow their use are foreseeable. The long terms effects of these weapons need to be considered when they are weighing the military advantage at the time of use. Depending on the height that the weapon is dropped and set to explode, the attack area can be increased or decreased, which can raise or lower its ability to discriminate between a civilian and military target.

Rule Utilitarianism

Rule Utilitarianism theory states "a moral act is one that is prescribed by the rule (or set of rules) that, if generally applied, would maximize (total or average) utility."⁴⁸ When the rule is not followed, the action is considered to be wrong. Rule Utilitarianism applies to this specific project because we have created rules that we believe to be the rules that produce the best result. In the case of conflict and IHL, the Geneva Conventions, Law of Land Warfare, Declaration of Human Rights and the CCW conventions, these rules were created because they are intended to provide the best result when we resort to war. The best result when we are talking about war is to reduce the unnecessary casualties and solve the problem that initiated the conflict. When these rules are broken we consider the actions wrong, the perpetrators are subject to consequences.

If we use rule utilitarianism and apply it to the case of cluster munitions again it can be concluded that these weapons stretch the bounds of legality. Cluster munitions under the eyes of many groups such as Human Rights Watch, Ploughshares Monitor, and a large group of countries believe that these weapons are in violation of IHL. There are also accounts of soldiers resigning after the use of cluster munitions. Michael Byers says that "At least five British officers resigned their commissions after the United States used cluster bombs and fuel-air explosives to attack Iraqi weaponry, with devastating effects on enemy soldiers."⁴⁹ Other weapons available in the U.S. arsenal could have been used which do not have 'devastating effects on enemy soldiers'. Other weapons that could fall under the idea of rule utilitarianism are those such as biological, chemical and even nuclear weapons. The international community has placed restrictions on their use because they know that the consequences of using these weapons are dire. It is nearly impossible to discriminate between civilian and military, and the effects of these weapons are nearly always disproportionate to the military objective

to be achieved. Rule utilitarianism and Just War theory are in essence the guiding force for international law and how wars are to be conducted.

Yet there are times when rule utilitarianism is not pragmatic, an example of this is if civilians will be killed in order to achieve some greater good. An example scenario is if someone intends to use a nuclear device, and the only way to stop it is to kill a number of civilians by dropping a bomb. A strict rule utilitarian would argue that it is wrong because it breaks the rule which creates the most utility, yet as shown here, sometimes this argument does not hold up.

Why Corporations?

Why should we burden corporations with the responsibility for the production of these weapons? During the research of this paper I came up with a list of reasons why the corporation that produces these should be responsible:

- There is a dud rate, therefore they know there will be UXO
- Actual failure rates are much higher than reported failure rates
- These weapons kill and maim

As the producer of these weapons they know the intended, and unintended but foreseeable effects of the weapon that they are producing. Globally there are numerous corporations that produce cluster weapons, in the United States these companies include: Aerojet, Alliant TechSystems, General Dynamics, L-3 Communications, Lockheed Martin, Northrop Grumman, Raytheon and Textron Defense Systems.⁵⁰

These corporations should bear some of the responsibility because they know that they are creating a weapon that is not perfect, and will fail. The problem is that the actual rate of failure is much higher than the failure rate the company presents the weapon to have. The second reason that corporations should be responsible is because companies are responsible for their product when they fail. Cluster munitions are intended to explode; the unintended but foreseeable effect is that the bomblet fails to explode. While companies have been exploring avenues to create self destruct (SD) and self de-activation (SDA) cluster munitions, the majority of these stockpiled weapons do not have this technology. Only .00004% have the SD or SDA technology.⁵¹ If we apply the Just War theory to business then companies who build these weapons should be forced to build in SD or SDA technology, ensuring a 0% failure rate so that they are not a threat to the civilian population during and after a conflict. As stated earlier, the dud rate for next generation weapons is mandated to be lower than 1 percent. While this would significantly reduce the number of dud bomblets that are a problem during and after a conflict, it still does not justify the continued use of cluster munitions, nor does it deal with the current stockpiles of less reliable weapons.

Second, because these weapons kill and maim both civilian and military targets they are in violation of both the Army Field Manual and the 4th Geneva Convention. Since these rules are national and/or international law, states have a duty and responsibility to follow the rules, and the state has the responsibility to enforce these rules on corporations that produce goods that are in violation of these laws. Cluster munitions are especially troublesome since they are around long after the conflict has ended, and any death or maiming after a war has ended is one more than is needed and is unnecessary.

While halting production would have consequences for many of the companies that produce these weapons, the production of these weapons are only a small part of their production. Of the eight companies that are mentioned above, seven of those companies are on Defense News' 'Top 100' for companies worldwide, based on the amount of revenue that they earn, specifically from defense.⁵² Of those seven, five are in the top 10 companies. Lockheed Martin tops the list with in 2005 with defense revenue of over \$35 billion, making it the number one defense contractor.⁵³ The lowest company at number 36, Textron Defense Systems had revenues of 1.4 billion.⁵⁴ Halting the production of only one line of products should not affect their revenues significantly. With an estimated defense budget slated at around \$470 billion for the year 2007, there will be plenty of room to increase revenues in the future.⁵⁵ Since cluster munitions violate both national and international laws corporations need to be willing to sacrifice a few million dollars for the price of someone's life.

Why States?

Why should states bear the responsibility of the use of these weapons? The states are the end users of these weapons, and as such bear more responsibility for the use of their weapons. As the end user of these weapons, the states are well aware that these weapons will fail, and there will be UXO left in the area where these weapons are used. Some have argued that these weapons should not be used in civilian populated areas, since there is a higher risk of civilians being killed or maimed. A 2001 U.S. Air Force document states that cluster munitions "must pass [the] proportionality test" and there are "[c]learly some areas where CBUs normally couldn't be used (e.g., populated city centers)."⁵⁶ The same paper also stated that "the dud rate must be part of the proportionality determination because unexploded bomblets are "reasonably foreseeable."⁵⁷ Forbidding their use only in city centers is too limited as in many countries a large portion of the population live in rural areas, and many people rely on farming for their livelihood. As in the case of Laos, many of the casualties from cluster munitions have been people who live in rural areas. The U.S. has taken action to prevent a close ally, Israel, from using cluster munitions in the past. In 1982 Ronald Reagan "imposed a six-year ban on cluster-weapon sales to Israel" because "Israel had used the weapons in populated areas during its 1982 invasion of Lebanon".⁵⁸ In the recent war between Israel and Lebanon, Israel again used cluster munitions which "violated agreements with the United States by its use of cluster munitions."⁵⁹ The killing of civilians violates the Fourth Geneva Convention, as well as other customary international laws. The killing of civilians in Lebanon in 1982 should have set a precedent on the use and sale of cluster weapons in populated areas because of the devastation it caused. It also indicated that the US government believed that discrimination is an important part of weapon use, as well as how their weapons are to be used by other powers. Unfortunately this is not always the case, as they have been used in populated areas in Iraq, and Afghanistan in the current 'War on Terror', even though they have halted sales to other countries that use these weapons in populated areas.

The state also has a greater duty because the government is the body that has signed onto these laws and treaties that are meant to protect their own state, as well as other countries, from the ravages of war. As such they are responsible to take action against corporations that create products that violate the international laws by halting the production of these weapons. If they are continuing to be produced then it means they are intending to sell, or use, these weapons. It is simply

not enough for a state to say that they will not use cluster munitions, they need to stop production.

Conclusion

In conclusion the use of cluster munitions has only brought unnecessary killing and suffering to an already troubled world. Their use, while not specifically mentioned in international law, violates many of its basic tenets. It also violates many of the national laws that the United States has agreed to and codified in its own Field Army Manual. While civilians are not the intended target of cluster munition use, they are an unintended but foreseeable victim in their use. Unfortunately, many civilians realize the risk these weapons pose after it is too late. States and corporations are well aware of the effects and problems created by these weapons as they acknowledge the problems. Since the corporations and states know that they are going to cause these problems they need to be held responsible when the weapons are used. They need to provide for the medical, humanitarian, cleanup and removal, education of the population on the dangers, and any other damage if they continue to use these weapons. Cluster bombs can prohibit the movement of a population in areas affected by these weapons. This can lead to slower economic development as it takes time and money to find and remove these weapons. The countries most affected by these weapons are already struggling to survive without having to deal with cluster bomb removal.⁶⁰ The long term effect of cluster munitions on a population is apparent as people are still dying from cluster submunitions 30 years after the end of the Vietnam War. There are also psychological effects that will persist into the future about the state/actor that uses these weapons against a population. As John Rawls put it "The way a war is fought and the actions ending it endure in the historical memory of peoples and may set the stage for future war. This duty of statesmanship must always be held in view."⁶¹ Society has created the rules of how war should be conducted so that we can try to prevent the enduring memory of atrocities committed during war. The companies that produce these weapons must be willing to sacrifice a small percentage of their profits so that other people can feel secure in their world. States must also be willing to take action, and start talks to end the production of these weapons if the corporations are unwilling to take action themselves. Economics of supply and demand don't take into account outside factors, such as human life, and using this theory to continue production of these weapons falls well short of ethical. These weapons need to be banned. In much the same way we have decided that nuclear weapons should never be used again, we need to look at cluster munitions and the enduring effect that they will have on people today, and for future generations.

Appendices

Diagram 1.1 – Deployment of Cluster Munitions⁶²

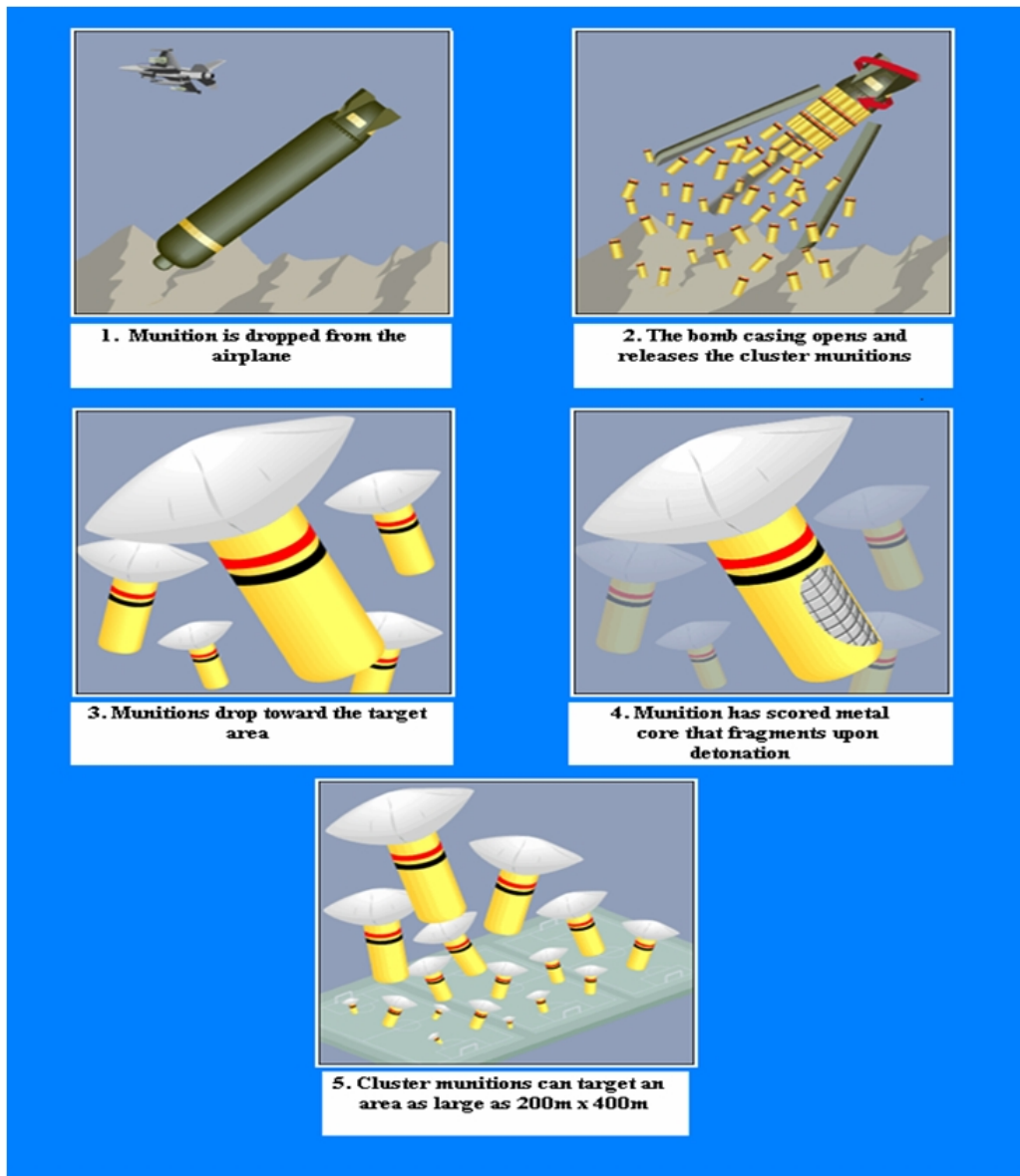


Diagram 1.2 – Types of Cluster Munitions ^{63 64}





Diagram 1.3 – BLU-26/B ⁶⁵

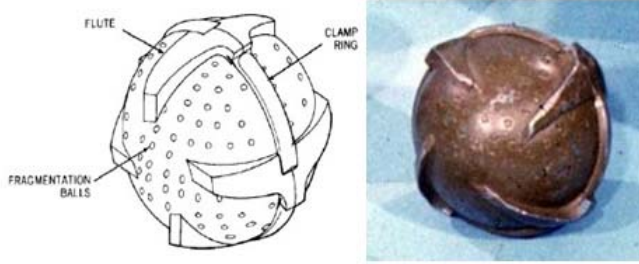


Diagram 1.4 – BLU-3/B ⁶⁶

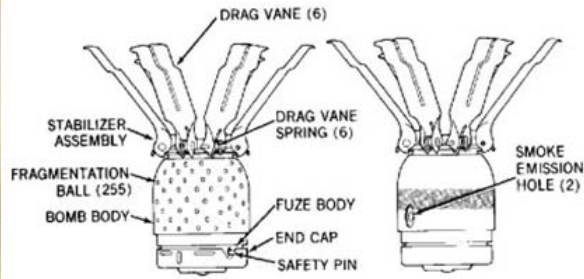


Diagram 1.5 – BLU-24/B ⁶⁷

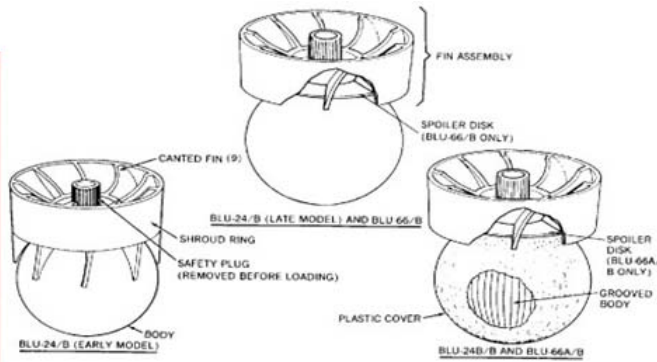


Diagram 1.6 – Cluster Bomb or Land Mine? ⁶⁸



Diagram 1.7 – Cluster Munition above Ground ⁶⁹



Table 1.3 – Defense Contractors ⁷⁰

Rank	Company	Leadership	Country	Last Year's Rank	2005 Defense Revenue*	2005 Total Revenue*	% of Revenue from Defense	2004 Defense Revenue**
1	Lockheed Martin	Robert Stevens, President and CEO	U.S.	1	36,465.0	37,213.0	98.0	34,050.0
3	Northrop Grumman	Ronald Sugar, Chairman and CEO	U.S.	3	23,332.0	30,700.0	76.0	22,126.0
5	Raytheon	William Swanson, Chairman and CEO	U.S.	5	18,200.0	21,900.0	83.1	18,771.0
6	General Dynamics	Nicholas Chabraja, Chairman and CEO	U.S.	6	16,570.0	21,244.0	78.0	15,000.0
8	L-3 Communications	Michael Strianese, interim CEO	U.S.	13	8,549.2	9,444.7	90.5	6,133.8
20	ATK 4	Daniel Murphy, Chairman and CEO	U.S.	20	2,882.0	3,217.0	89.6	2,516.0
36	Textron	Lewis Campbell, Chairman, President and CEO	U.S.	33	1,400.0	10,000.0	14.0	1,500.0

More Survivor Stories

Salima is a mother of five, three daughter and two sons, of whom two are disabled – Ali (23) and Maryam (42) – and still live with her. During the recent conflict, eight suspected Hizbollah militants were living in a neighbor's house and the neighborhood was repeatedly hit with cluster munitions so the family took refuge in Salima's parents' house until the ceasefire. While walking home with her father and the children, Salima noticed destruction everywhere, as well as several submunitions with ribbons. Salima's father carefully moved one submunition off the road with his foot so that his grandchildren would not step on it. When they arrived at the house, Maryam and Ali waited outside while Salima and her father proceeded to enter the house. Salima moved the big stones by hand and swept the small rubble away with a broom. All of a sudden, she felt something strange, but did not hear an explosion. She had hit a submunition with her broom. Salima sustained shrapnel injuries in her head, one on her forehead, and sever shrapnel injuries on her chest, thighs, and waist. She has undergone several operations and still needs regular treatment.

Salima, who worked in tobacco and has a small olive grove, may never be able to work again. The olive grove and the garden around the house are still off-limits because there are more submunitions scattered there, and all the olives will be lost unless the family engages in risk-taking behavior in order to harvest the crop. Ali in the meantime, is traumatized by the events and ever since she heard the 'boom' and then his mother screaming, he has cut himself off from society and only identifies with the cartoons on TV, something he did not do before the incident.⁷¹

On March 25, 2003 Abdallah Yaqoob was sleeping along with his family when a cluster munition strike hit his neighbourhood in Basra. Shrapnel came through the window and nearly cut off his left arm and opened his abdomen. While the family escaped to the hospital Abdallah's father tried to keep Abdallah's intestines inside his body and prevent his arm from coming off completely. Abdallah, his family and the rest of the Hay al-Zeitun neighbourhood know very well why they were hit by the British forces: Iraqi forces were hiding in the neighbourhood. Abdallah was hit by British L20A1/M85 grenades. "I stayed after the attack to watch the house. I clearly saw the bombs because there were four left behind around our house and many more in the whole neighbourhood", says Ali, Abdallah's older brother. Today Abdallah's arm is buried not far away from his house.⁷²

Endnotes

1. (Stop Cluster Munitions 2007)
2. See Appendix for pictorial representation of a cluster munition deployment
3. (Handicap International 2006) p.12
4. To read more stories of the effects of cluster munition strikes check the appendices.
5. (Bullfrog Films 2001)
6. (Handicap International 2006) p.26
7. (Collins 2002)
8. (Human Rights Watch 2007) p. 62
9. *ibid* p.63
10. (Human Rights Watch 2007) p.62
11. The following countries were included in this report: Cambodia, Lao People's Democratic Republic, Vietnam, Chad, Eritrea, Ethiopia, Sierra Leone, Sudan, Albania, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, Serbia, Chechnya/Russian Federation, Tajikistan, Afghanistan, Iraq, Kuwait, Lebanon, Saudi Arabia, Syria, and Western Sahara/Morocco
12. (Handicap International 2006) p.9
13. *ibid* p.41-43
14. *Ibid* p.44
15. (Handicap International 2006) p.44
16. (Collins 2002)
17. (Cameron, Lawson and Tomlin 1998) p.5
18. (International Committee of the Red Cross 2005)
19. *ibid*
20. *ibid*
21. *ibid*
22. *ibid*
23. (Bush 2007)
24. (United Nations 1948)
25. *ibid*
26. *ibid*
27. (Johnson 2006) p.668

28. ibid
29. (Department of the Army 1956)
30. (Fackler, et al. 1984)
31. (Department of the Army 1956)
32. (Convention (IV) relative to the Protection of Civilian Persons in Time of War 1949)
33. (Human rights Watch 2002) p.10
34. ibid
35. (United Nations 1996)
36. For a picture of a cluster munition that could be a land mine see diagram 1.6 in appendices
37. (United Nations 1996)
38. (United Nations 2003)
39. ibid
40. (Human Rights Watch 2007) p.5
41. (The American Heritage Dictionary of the English Language, Fourth Edition 2004)
42. (The American Heritage Dictionary of the English Language, Fourth Edition 2004)
43. (Reichberg and Syse 2004) p.30
44. (Fixdal and Smith 1998) p. 286
45. (Fixdal and Smith 1998) p.286
46. (Human rights Watch 2002) p.10
47. (Department of the Army 1956)
48. (Talbot n.d.)
49. (Byers 2005) p.120
50. (Stop Cluster Munitions 2007)
51. (Human Rights Watch 2007) p.63
52. See table 1.3 in appendices for a chart of these companies and their revenue from defense production
53. (Defense News 2006)
54. ibid
55. (Department of Defense 2006) p.5
56. (Human rights Watch 2002) p.11
57. ibid p.12
58. (Human Rights Watch 2007)
59. ibid
60. For a list of countries affected by cluster munitions follow this weblink: [[www.stopclustermunitions.org/dok ...](http://www.stopclustermunitions.org/dok...)]
61. (Rawls 2006) p.636
62. (British Broadcasting Corporation 2005)
63. (Mennonite Central Committee 2007)
64. (Mennonite Central Committee 2007)
65. (Parsch 2007)
66. ibid
67. ibid
68. (Stop Cluster Munitions 2007)
69. (Docherty 2007)
70. (Defense News 2006)
71. (Handicap International 2006) p.37
72. (Stop Cluster Munitions 2007)

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