

"La goccia che scava la pietra: la responsabilità di governi e industrie produttrici per l'impatto umanitario delle munizioni cluster"

(The Drops that Carve the Stone: State and Manufacturer Responsibility for the Humanitarian Impact of Cluster Munitions and Explosive Remnants of War)

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Introduction

As others have done, I would like to thank the Italian campaign and especially Simona Beltrami for inviting me to share with you today. The Italian Campaign has been at the front of the struggle against landmines and explosive remnants of war for many years, and it is a tribute to your stamina that your work continues.

I originally entitled my talk in English, "Lick by Lick, the Cow Ate the Grindstone." Simona Beltrami and her colleagues did me the kindness of providing a more elegant suggestion, that being "the drops that carve the stone." The idea here is that there are no easy ways to hold states or manufacturers responsible for the immediate and lasting damage done by cluster munitions and other explosive remnants of war (ERW). Efforts must continue to be made to wear away at this problem from different angles.

Today I first will talk about some basic legal principles of state responsibility for internationally wrongful acts and how cluster munitions fit into that framework. Second, I will lay out reasons for ratifying Protocol V on

Explosive Remnants of War, which was completed last year in Geneva at the Convention on Certain Conventional Weapons. Third, I will argue for the need for another Protocol specifically addressing cluster munitions because of the need to aggressively clarify international humanitarian law by giving greater emphasis to humanitarian concerns. Finally, if I have time, I will make suggestions for actions that can be taken at the national and bi-lateral level.

I. State Responsibility for Internationally Wrongful Acts

A. Basic Principles

In 2001, the International Law Commission completed four decades of work on the Draft Articles on Responsibility of States for Internationally Wrongful Acts.¹ While not in the form of a treaty, many see the Draft Articles as stating basic principles of customary international law.

According to those Articles, "Every internationally wrongful act of a State entails the international responsibility of that State. There is an internationally wrongful act of a State when conduct consisting of an act or omission: is attributable to the State under international law; and constitutes a breach of an international obligation."² A State committing internationally wrongful acts is obligated to cease the act, to promise to not commit the act again, and to make reparations (in the form of restitution, compensation, satisfaction, and promises of non-repetition).³

When there are special rules of international law, such as international humanitarian law like the Geneva Conventions, states are to look there first for resolution before resorting to customary international law. This is particularly so when there are inconsistencies between the Draft Articles and the special rules. Some commentators have concluded, that with respect to Explosive Remnants of War "the legal regimes governing armed conflicts and human rights law do not . . . exclude or modify the general rules of State responsibility."⁴

¹ Extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supp. No. 10 (A/56/10), chap. IV.E.1, November 2001, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (hereinafter "ILC Draft Articles").

² ILC Draft Articles 1 & 2, supra n. 1.

³ ILC Draft Articles 30, 34-39. See also Walter Kalin & Jorg Kunzli, *State Responsibility for Internationally Wrongful Acts: Reparation for Damages Caused by Remnants of War*, Study prepared for the Swiss Campaign to Ban Landmines, June 2002, pp. 3-4 (on file with author) (hereinafter "*State Responsibility & Remnants of War*").

⁴ Kalin & Kunzli, *State Responsibility & Remnants of War*, supra n. 3, at 7. Kalin and Kunzli provide a comprehensive review of the challenges of using human rights and humanitarian law to hold states responsible for unexploded remnants of war.

B. The Application of State Responsibility Principles to Cluster Munitions

So, the question is whether the use of cluster munitions constitute a breach of international law, invoking the right of the wronged party to claim reparations? The short answer is that there is no absolute prohibition under international law on the use of cluster munitions. According to a 2002 study:

[T]he major gap of today's law limiting the permissible use of weapons causing remnants of war is the absence of any specific rule determining the legality of the use of *cluster munitions*, i.e. specifying the rather vague general principles of proportionality and distinction with reference to a weapon causing today's main problem with remnants of war.⁵

The Convention on Certain Conventional Weapons (CCW), in adopting Protocol V, has taken a small step in creating international law as related to cluster munitions.⁶ It is worth taking a few minutes looking at Protocol V before addressing the remaining gaps that should be filled by international law with respect to cluster munitions.

II. The Need to Ratify Protocol V of the CCW on Explosive Remnants of War

Many observers have called Protocol V of the CCW on Explosive Remnants of War an important step in holding parties who participate in armed conflict responsible for confronting ERW.⁷ This will be the case only if it is widely ratified and vigorously implemented.

The hallmark of Protocol V is its largely voluntary nature. The phrases that stand out are "where feasible," "as soon as feasible," "where appropriate," "to the maximum extent possible and as far as practicable," "taking into account all circumstances ruling at the time," and "in a position to do so." These words

⁵ Kalin & Kunzli, *State Responsibility & Remnants of War*, supra n. 3, at 64.

⁶ *Protocol V and Technical Annex on Explosive Remnants of War to 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*, (hereinafter CCW Protocol V), contained as Appendix II to the Report of the Meeting of the States Parties, Meeting of the States Parties to 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 (2003 Session, Geneva, Nov. 27-28, 2003), UN Doc. CCW/MSP/2003/3, Feb. 18, 2004, pp. 25-36, available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/G04/602/44/PDF/G0460244.pdf?OpenElement>.

⁷ See, e.g., *Timid but Important Progress on Explosive Remnants of War*, Geneva Reporter (newsletter of the Quaker UN Office), Oct.-Dec. 2003.

simply are not as inspiring as those found in the Ottawa Landmine Treaty. How can you match a sentence like "Each State Party undertakes never under any circumstance to use anti-personnel mines?"⁸

Those who are serious about working on the issue of cluster munitions and more broadly on the issue of explosive remnants of war must come out from under the shadow of Ottawa. Because of the perceived complexity of the issues surrounding cluster munitions, and the fact that many militaries view them as effective weapons, the Ottawa process is not likely to be repeated.

There has not been a rush of signatures of Protocol V, but there should be. As of September 30, 2004, Sweden, Lithuania, and Sierra Leone have signed the treaty and consented to be bound.⁹ Other countries are moving to do so. Italy should be the next State Party to do so. Protocol V is not a treaty that will energize the masses, and excite politicians. But it is one more important step on the way to eradicating the threat of ERW to our children and grandchildren. As modest as it is, major powers did not want it. If no progress is made in the CCW process, there may be other avenues that advance the law in this area, such as *ad hoc* actions by civilian complainants in national and international regional bodies, or in the form of criminal prosecutions by the International Criminal Court or national courts.

The point is that while we might want Protocol V to be a Ferrari in the annals of international law, we're stuck with a Yugo. While some people might think no Yugo is better than any Yugo, I would say let's get in the car and make it go.

Why is Protocol V important and what role can Italy play in its implementation? The reasons are found within the Protocol itself.

1. Protocol V provides us with definitions.

Terms like "unexploded ordnance," "abandoned explosive ordnance," and "explosive remnants of war" have been given useable definitions. That task alone was an arduous one. For example, "*Unexploded ordnance* means explosive ordnance that has been primed, fused, armed, or otherwise prepared

⁸ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Dec. 3, 1997, 36 ILM 1507 (hereinafter *Ottawa Treaty*) Art. 1(1)(a).

⁹ UN Dep't for Disarmament Affairs, Multilateral Arms Regulation and Disarmament Agreements, CCWC Protocol V Treaty Status page <http://disarmament.un.org:8080/TreatyStatus.nsf/CCWC%20Protocol%20V?OpenView>.

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.”¹⁰

2. Protocol V creates legally binding obligations.

The United States and several other states parties opposed Protocol V being legally binding almost until the last moment.¹¹ The obligations of the treaty are weak, but even so, breaches of Protocol V, in combination with breaches of other parts of humanitarian and human rights law, might lead to future liability under principles of state responsibility.

3. Protocol V assigns explicit responsibility to parties to a conflict for marking, clearing, removing, and destroying explosive remnants of war.

These responsibilities could be much more strongly stated, but this is a very positive start towards holding users of munitions with high failure rates accountable.¹² Parties are also obligated to cooperate with one another, with other states, with NGOs, with regional and international organizations in jointly addressing clearance efforts.¹³

A look at the situation in Iraq with respect to mines and Explosive Remnants of War since March 2003 only serves to underscore how important it is to call users to account, even if in a voluntary way. Cluster munitions, are, of course, part of the challenge of explosive remnants of war (ERW). The ongoing conflict in Iraq highlights this. In a recent Emergency Mine Action Survey, 1760 communities in Northern Iraq were surveyed. Sixteen percent of the communities (290) comprising 21% of the population in the surveyed area were

¹⁰ CCW Protocol V, Art. 2(1)

¹¹ “We continue to believe that a political document would be the most effective and most timely means to deal with this problem, as states should undertake to clear ERW in areas they control without waiting for the new protocol to enter into force. . . . One reason [for the U.S. not opposing a legally binding protocol] is that, in essence, the provisions of the agreement follow current U.S. practice with respect to such munitions.” *CCW Adopts Protocol on Explosive Remnants of War (ERW)*, US Delegation web page on the Convention on Certain Conventional Weapons, Nov. 28, 2003, www.cwtreaty.com/1128ERW.html. See also, Christian Ruge, *Explosive Remnants of War ERW, CCW Group of Governmental Expert Meetings in June and November 2003: Report from the Process with Recommendations for Further Actions*, Fafo - Institute for Applied International Studies, January 26, 2004, www.faf.no/nsp/erw-report.pdf, p. 3 (hereinafter “*Explosive Remnants of War*”).

¹² “Although the protocol is weak on defining strict obligations, Article 3 represents an extremely important principle that may be compared to the ‘polluter pay-principle’ in environmental law. Whether this principle will have the same impact on war-affected communities as it has had in the environmental sector is of course dependent on States Parties willingness and ability to implement the intentions behind the article in a strict and coherent manner.” Ruge, *Explosive Remnants of War*, supra note 11, at 3.

¹³ CCW Protocol V, Article 3(5).

affected by ERW. The ERW includes both old and new contamination, with landmines, UXO, and cluster munitions making up the mix. Cluster munitions are a problem in about ten percent of the affected areas. Of the 1,039 persons injured by UXO, 425 (or 41%) were children. Of the 148 persons recently killed, 53 (or 36%) were children.¹⁴

4. Parties are obligated to record, retain and share information on unexploded and abandoned ordnance.

Parties must fulfill these obligations “to the maximum extent possible and as far as practicable” in order to “facilitate the rapid marking and clearance, removal or destruction of explosive remnants of war, [and] risk education.” The creators of explosive remnants of war shall provide information about that ordnance to organizations “undertaking risk education and the marking and clearance, removal or destruction of explosive remnants of war in the affected area.” Again, there are limits to this responsibility under the terms of the protocol, in that they are to be taken “without delay after the cessation of active hostilities and as far as practicable, subject to [users’] legitimate security interests.”¹⁵ A small, but positive step.

5. Parties are obligated to take other precautions in the territory under their control for the protection of the civilian population from the risks and effects of explosive remnants of war.

“Feasible precautions are those precautions which are practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. . . . These precautions may include warnings, risk education to the civilian population, marking, fencing and monitoring of territory.”¹⁶ While not explicitly mentioned in the non-exclusive list of options, one feasible precaution is not to use submunitions with a well-established record of high failure rates.

6. Parties are obligated, when in a position to do so, to provide assistance to victims of ERW, to groups doing ERW clearance, and to share information, and technology to reduce the humanitarian impact of ERW.¹⁷

¹⁴ Emergency Mine Action Survey conducted by Mines Advisory Group with assistance from Vietnam Veterans of America. Received by e-mail transmission from Tim Carstairs, Oct. 6, 2004 [on file with author].

¹⁵ CCW Protocol V, Article 4(1) & (2).

¹⁶ CCW Protocol V, Article 5(1).

¹⁷ CCW Protocol V, Articles 7 & 8.

Articles 7 and 8 of the protocol go into great detail about giving and receiving assistance for the rehabilitation and reintegration of ERW victims. Article 8 comprises the most detailed section of the protocol, and it in this area that much good can be done.

7. Mid-Level Powers can greatly affect compliance.¹⁸

Unlike other humanitarian law and human rights provisions with elaborate enforcement bodies, Protocol V relies on international peer pressure. It is here where mid-level powers like Italy can have a great impact in bringing both larger and smaller powers into compliance. It is here that the lessons of Ottawa can best be applied. Mid-level powers have led the way on anti-personnel landmines. They are leading and can continue to lead the way on ERW and cluster munitions.

III. The Need for a New Protocol on Cluster Munitions

Having just made the argument that Protocol V should be ratified as soon as possible, I now turn to why a negotiating mandate on cluster munitions is needed at the CCW. Put most simply, the humanitarian concerns surrounding cluster munition use have not been completely addressed by Protocol V. Protocol V addresses what happens after a conflict is over, and not how cluster munitions are used during a conflict. I would like to briefly look at current law on cluster munitions and then turn to some standing arguments against restricting cluster munition use.

A. The Existing Law on Cluster Munitions can be, but sadly has not been, consistently and aggressively applied to protect humanitarian concerns.

Cluster munition use implicates serious questions of proportionality and distinction, the cardinal principles of humanitarian law that have reached the level of customary international law.

The case law on the use of cluster munitions is very thin. The International Criminal Tribunal for the Former Yugoslavia (ICTY) issued an indictment in 1996 for the 1995 cluster bomb rocket attack on Zagreb instigated by Milan Martić. The Court relied on Article 51(2) of Additional Protocol I of the

¹⁸ Virgil Wiebe, *The Case of Cluster Bombs and Explosive Remnants of War: Cooperation and Conflict Between Non-governmental Organizations and Middle-Power States*, in Stefan Brem & Kenneth Rutherford, Eds., *Reframing the Agenda: The Impact of NGO and Middle-Power Cooperation on International Security Policy* (Praeger 2003).

Geneva Conventions,¹⁹ the prohibition on the intentional targeting of civilians.²⁰ This was the primary basis for the indictment. There was ample evidence for an indictment based on public statements by Martić, a Serbian leader in a breakaway province of Croatia. But, in arriving at its decision, the tribunal also considered expert testimony and prosecutorial comment about the nature of the weapon.

Eric Ostberg, of the ICTY Prosecutor's Office, told the Tribunal that "If one was going to destroy a military target, such as a communications centre, or such, as some type of facility on an army base, the type of weaponry that would be used would not have been an Orkan rocket manned with a clustered bomb system." Thus, while any weapon can be used to intentionally target civilians, the prosecutor's office looked to the nature of this particular weapon (its wide area nature, its poor targeting record, and its high dud rate leading to ongoing injuries over time) to reinforce its allegation as to Martić's intent.²¹

Several years later, in 1999, considerable public pressure was brought for the ICTY prosecutor, Carla del Ponte, to investigate NATO actions during the Kosovo war. Del Ponte decided not to initiate a formal investigation, and on June 13, 2000, issued the internal committee report. Rather than following the lead of the aggressive prosecutors back in 1995 and 1996, the committee relied on a narrow reading of the Martić case. It found that because the evidence indicated that Martić's intent was to deliberately target civilians with cluster bombs, and there was no evidence of deliberate targeting on NATO's behalf in Kosovo, no formal investigation should be done. In relevant part, it stated that:

There is no specific treaty provision which prohibits or restricts the use of cluster bombs, although, of course, cluster bombs must be used in compliance with the general principles applicable to the use of all weapons. . . . There is . . . no general legal consensus that cluster bombs are, in legal terms, equivalent to landmines.²²

¹⁹ Art. 51 of 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS (1979) 609-99 (hereinafter Additional Protocol I).

²⁰ The Prosecutor of the Tribunal Against Milan Martić, Indictment, July 25, 1995, www.un.org/icty/indictment/english/25-07-95.htm; The *Tribunal Issues an International Arrest Warrant Against Milan Martić*, Press Release, The Hague, Mar. 8, 1996, UN Doc. No. CC/PIO/042-E, www.un.org/icty/pressreal/p042-e.htm.

²¹ Prosecutor v. Martić, No. IT-95-11-R61, Transcript of Trial Chamber of The International Criminal Tribunal of the Former Yugoslavia, Feb. 26, 1996, www.un.org/icty/transe11/96002271T.txt, at 12, 23-27, 42-44.

²² Office of the Prosecutor, Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, PR/P.I.S./510-E, June 13, 2000, ¶ 27, available at <http://www.un.org/icty/pressreal/nato061300.htm>.

What was lacking in the report was indication that it had thoroughly examined the cluster bomb use in question in light of general principles of humanitarian law. Professor Thomas McDonnell has aptly pointed out that the committee did not call on the prosecutor, the US or NATO to investigate or release publicly the results of any investigation. The committee did not directly consider whether NATO's use of cluster bombs violated Article 51(5)(a) & (c) of Additional Protocol I in using inherently indiscriminate weapons. Nor did it consider whether use in populated areas constituted prohibited target area bombing.²³

Additionally, while cluster bombs may not be considered landmines under the Ottawa treaty, there are valid arguments that they be treated like landmines are treated under international humanitarian law. Professor McDonnell argues that

Given the huge quantity of cluster bomblets that are typically used, the high number of duds they produce, the toy-like appearance of the bomblets, the extreme sensitivity of their fuses, the exceptionally powerful nature of the bomblets, they should be considered as the functional equivalent of mines under Protocol I (of the Geneva Conventions).²⁴

There is room for interpreting existing law more aggressively with respect to cluster munitions. Advocates, be they prosecutors or civil litigators, should be willing to press the issues in appropriate cases.

B. Confronting Current Arguments about Distinction and Proportionality

That said, there is a need for further clarification of the law concerning cluster munition use. This could take place in the *ad hoc* manner in which it has progressed thus far, or it could be addressed more systematically by the CCW process.

Over the past two years, a number of arguments have developed about cluster munition use. I would like to address two of them.

Argument One: If we can't use cluster bombs in civilian areas, we will be forced to use unitary bombs, which could be worse for civilians.

Defenders of retaining the option to use of cluster munitions in civilian concentrations argue that (a) using area weapons like cluster munitions against a

²³ Thomas Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?* 44 *Ariz. L. Rev.* 31, 116-18 (Spring 2002).

²⁴ April 22, 2003 e-mail correspondence from Thomas McDonnell to Virgil Wiebe.

point target does not violate Art 51, so long as you aim at that one target, therefore satisfying the discrimination principle of humanitarian law and (b) unitary bombs might be worse. According to Ed Cummings, one of the negotiators for the United States, "The reality is that the use of unitary bombs may well cause more civilian casualties in certain situations."²⁵

There are several responses to this position. First, the drafters of Article 51(5)(a) of Additional Protocol I of the Geneva Conventions intended to ban target area bombing. According to one commentator:

When dropped on or near a place where 'a concentration of civilians' is found, cluster bombs mimic the abuses of the World War II target area bombings. As one pilot put it, using cluster bombs is 'the shotgun school of bombing.'²⁶

If we assume for argument purposes that using cluster munitions in civilian areas is unacceptable in its humanitarian costs, it seems quite odd to then argue that choosing not to use them will force the use of potentially more illegal options. It is as if target area bombing with cluster bombs is prohibited, the response is to say that this forces resort to target area bombing with unitaries.

Earlier this year, a representative of the US Secretary of Defense argued that a reason why cluster munitions were so useful was that "[s]ubmunitions can have an effect on a far larger footprint on co-located targets than the equivalent tonnage of high explosive bombs."²⁷ Such language comes very close to treating several military objectives as a single one, a practice condemned by Article 51 of Geneva Additional Protocol I. Slides from that presentation about hoped for improvements in targeting through the Guided Multiple Launch Rocket System appears to confirm that there is concern in the US government that current cluster footprints from multiple launch rocket systems are indeed too large, requiring improvements resulting in less area covered.²⁸

Also, framing the choice as being simply between cluster munitions and unitary bombs suggests there are no other alternatives. Refraining from use of

²⁵ *Legal Issues Regarding ERW*, Statement by Edward Cummings, Head of the US Delegation to the CCW, July 17, 2002, <http://www.ccw-treaty.com/071702legalissue.htm>

²⁶ McDonnell, *Cluster Bombs over Kosovo*, supra n. 23, at 97-98 (citations omitted).

²⁷ Dr. David Hodson, Office of the US Secretary of Defense Representative to the CCW, *Military Utility of Submunitions*, slide 8, presented at International Workshop on Preventive Technical Measures for Munitions, co-organized by the Swiss Department of Defence, Civil Protection and Sports Swiss Foreign Office, May 26–28, 2004, Thun/Switzerland, <http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/friedenspolitik/abruerstung/thun-03.pdf> (visited Sept. 2004) (hereinafter Hodson, *Military Utility*).

²⁸ Hodson, *Military Utility*, supra n. 27, slides 4 & 5.

cluster munitions is always an option if such use will be indiscriminate or disproportionate. U.S. commanders in Bosnia decided against the use of cluster munitions because the "long term hazard for civilians" was "unacceptable."²⁹ Some legal commentators also have identified an emerging international norm requiring the use of precision guided munitions in civilian areas.

Finally, at least one military commander has stated that unitary artillery IS more appropriate in urban environments because of the humanitarian costs of submunitions. According to a US Lieutenant General who fought in Iraq,

The Field Artillery did well in urban operations. Once we determined a target would be engaged best by 155-mm fires, we employed Paladin, principally with HE [high-explosive] rounds. We stayed away from DPICM [dual-purpose improved conventional munitions] in urban areas for obvious reasons [potential for unexploded bomblets].³⁰

We do know that not all commanders followed this lead, with DPICM use in urban areas leading to high losses of civilian life.³¹

Argument Two: The immediate effects of unexploded cluster submunitions can be a part of the proportionality argument, but long-term effects are too indeterminate to be considered in warfighting.

Embedded in this argument is an admission that ERW is to be a part of the equation at all. But, according to a noted international scholar oft-quoted by supporters of continued cluster bomb use:

It is an entirely different matter [than considering short-term risk] . . . to require that account be taken of the longer-term risk posed by ERW, particularly of the risk which ERW can pose after a conflict has ended or after civilians have returned to an area from which they had fled. The degree of that risk turns on too many factors which are incapable or assessment at the time of the attack, such as when and whether civilians will be permitted to return to an area, what steps the party controlling the area will have taken to clear the unexploded ordnance, what priority that party gives to the protection of civilians and so forth. *The proportionality*

²⁹ Christopher Bellamy & Emma Daly, *NATO Aircraft Resume Raids on Serbian Positions in Bosnia*, Irish Times, Sept. 1, 1995, at 11.

³⁰ Patrecia Slayden Hollis, *3d ID in OIF: Fires for the Distributed Battlefield* (Interview of Brigadier General Lloyd J. Austin III, Assistant Division Commander [Maneuver] for the 3d Infantry Division [Mechanized] in Operation Iraqi Freedom), Field Artillery, Sept-Oct 2003, p. 10.

³¹ Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003).

*test has to be applied on the basis of information reasonably available at the time of the attack.*³²

Traditional factors in the proportionality calculus are direct military advantage of the action in question, the immediate impact on civilians, and the risk to one's own military personnel. Short and long term impact on civilians should also be in the equation.

First, treaty norms are beginning to recognize the long-term effects of unexploded ordnance. While cluster bombs are not recognized as landmines by the Ottawa Landmines treaty, the principles found in the Ottawa preamble apply to unexploded cluster munitions: they kill and injure innocent and defenseless civilians after a conflict is over, they inhibit economic and agricultural development, and have other severe consequences for years and even decades after deployment.³³

Second, state practice in dealing with unexploded ordnance can provide a guide to making such proportionality determinations. Long-term UXO risk assessment is commonplace. For example, the U.S. Department of Defense has developed "[r]isk models [that] use site-specific data on the distribution and density of UXO to **estimate the threat to human health and the environment** according to current and reasonably anticipated future land use."³⁴ Factors in that analysis include characteristics of UXO present (amount, depth, size, and type), characteristics of the site (topography, vegetation, soil type, and climate) and range of potential exposure (current and future land use, and the population size and proximity to site).³⁵ These models were developed with respect to the closing of military test ranges, but there is nothing to say that such planning can also be a part of battle planning.

A British Artillery Commander in an October 2003 presentation of artillery use in the Iraq war illustrated the level of planning that already occurs. One of his first slides gave a grid of "target audiences and tasks," which include such populations as the civilian population as a whole, right down through Iraqi regular army and irregular army troops. The number one target audience on the grid is the civilian population, and the number one task is to "Create UXO and Mine Awareness." Another slide shows how planners see the importance of linking "Kinetic Operations" (the bullets and bombs) with "Information

³² Christopher Greenwood, *Legal Issues Regarding Explosive Remnants of War*, ¶ 23, Group of Governmental Experts of the States Parties to the Convention on prohibitions or Restrictions on the Use of Certain Weapons Deemed to be Excessively Injurious or to Have Indiscriminate Effects, CCW/GGE/II/WP.10, May 23, 2002 (emphasis added).

³³ *Ottawa Treaty*, supra n. 8

³⁴ U.S. Office of Deputy Under Sec. of Defense, Environmental Security, BRAC Environmental Fact Sheet, Spring 1999 (emphasis added).

³⁵ *Id.*

Operations." There is also a direct link between proportionality and military advantage considerations in targeting and "Post Conflict Roles" for the military. What are some of those post conflict roles? Mine and Ammunition Clearance. Agriculture. Paying Locals. Medic Support (with a picture of a military medic aiding a civilian child).³⁶

All of these at least hint at foreknowledge of the after effects of artillery attacks on civil populations. Most telling are the slides on "Areas of Risk." MLRS (Multiple Launch Rocket Systems) are at the top of the list in terms of areas of risk.³⁷

Third, it seems incongruent that states wish to avoid considering the big picture with respect to humanitarian concerns in proportionality while at the same time insisting that military advantage be seen in a campaign wide perspective. If military planners are smart enough to consider military advantage in the big picture, they should also be able to consider the effects of ERW from cluster beyond a few hours after the attack.

When Italy ratified Additional Protocol I to the Geneva Conventions in 1986, it stated that it understood that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."³⁸ The US military believes that proportionality considerations can be done on a "campaign wide basis" and in the "full context of a war strategy."³⁹

Conflict after conflict has taught us a number of lessons that should be easy to learn: warfighters know which submunitions cause big problems after a conflict; the first few days and weeks after cluster bombing are a period of particularly great danger to civilians in populated areas by submunitions;

³⁶ Brigadier AR Gregory, Commander, Royal Artillery, 1st (United Kingdom), Armoured Division, *Joint Effects on Operation Telic*, Slide Presentation at Fort Sill, Oklahoma, Oct. 2003, available at <http://sill-www.army.mil/> [on file with author].

³⁷ *Id.*

³⁸ Italy's Statement of Interpretation (Reservations) to its Feb. 27, 1986 ratification of the 1977 Geneva Protocols I & II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International and Non-International Armed Conflicts, *reprinted* in Adam Roberts & Richard Guelff, eds., *Documents on the Laws of War* 506-07 (3d ed. 2000).

³⁹ *Air & Space Law*, in *Operational Law Handbook* (Richard M. Whitaker, ed., & Scott R. Morris, rev. edit. ed., 1st Rev. Ed. 1997), at 29-7.

What is a "concrete and distinct military advantage?" - [it] refers to attack as a whole, not isolated parts of it, but there are no other geographic or chronological boundaries to the term. The rule clearly recognizes the inevitability of collateral civilian casualties. . . . Military advantage [is] not limited to tactical gains, but is linked to the "full context of a war strategy," e.g. the execution of the coalition war plan for the liberation of Kuwait. Balancing [is] done on a target-by-target basis. . . . [o]r it may be done on a campaign-wide basis. *Id.*

dumping “unused” cluster munitions in so-called remote areas can also create lasting humanitarian and economic impacts and should not be done lightly. The fishing fiasco in the Adriatic Sea in 1999 in which NATO warplanes dumped cluster munitions and other ordnance is a recent case in point.⁴⁰ The saturation bombing of Laos four decades ago is the most extreme example with respect to cluster bombs.

Those states most committed to using cluster munitions will not be very interested in pursuing an additional protocol to the CCW with respect to the use of these weapons. That process must be pushed forward.

IV. Actions to be considered at the National Level

A. Support the Call for a Moratorium on Use, Production, and Transfer of Cluster Munitions until Humanitarian Concerns are Addressed.

The Cluster Munition Coalition’s call for a moratorium should be heeded. The humanitarian concerns about the immediate and lasting effects of cluster munitions multiple with each conflict.

B. Ban and Destroy Legacy Submunitions that Consistently Cause Immediate and Lasting Humanitarian Damage

Legacy weapons known to cause high civilian casualties should be destroyed. Use of certain cluster munitions virtually always results in dangerous unexploded ordnance. Data and anecdotes coming out of Iraq confirms what we have found in earlier conflicts in which cluster munitions have been used. Evidence I have received from the field indicates that the old air-dropped BLU-97 bomblets have had a reported dud rates ranging from 4% to 12% to 23% to as high as 50% and even 100% in cases where the cluster bomb canister failed to open.⁴¹ The average seems to be somewhere between 10% and 20%, a figure not surprising in light of past experience.

⁴⁰ See infra note 51 and related text.

⁴¹ For example, in March 2004, Titus Peachey of Mennonite Central Committee made field visits to Iraq to study the impact of cluster munitions. Data collected by clearance personnel indicated dud rates of 12% and 23% in two cluster bombs strikes in Northern Iraq. Peachey also received information that in rare cases, the dud rates for BLU-97 strikes exceeded 50%. E-mail coorespondence from Titus Peachy to Virgil Wiebe, Oct. 6, 2004 [on file with author]. Data received by the author from another investigator in Iraq showed detailed statistics from 9 cluster strikes involving BLU-97 bomblets. In eight of those strikes, the average failure rate was just over 14%. In the ninth strike, a failure rate of just over 100% was recorded. The likely explanation is that a cluster bomb unit hit the ground intact, with its bomblets likely unarmed. The additional handful of bomblets pushing the dud rate over 100% likely came from local people finding unexploded bomblets from other strikes and throwing them on top of the pile. The

The failure rate of MLRS submunitions used by the United States in Iraq was at least around the same percentage. According to Human Rights Watch,

In order to take out a single artillery piece in a civilian neighborhood, U.S. ground troops would launch a standard volley of six rockets containing about 4,000 DPICMs with a sixteen percent dud rate that spread over an area with a .6-mile radius. The humanitarian impact was devastating, and duds endangered both soldiers and civilians.⁴²

Another US general who fought in Iraq sung the praises of MLRS at suppressing enemy artillery fire but nonetheless stated in an interview that:

We do need to come up with an alternative for DPICM [dual-purpose improved conventional munitions] bomblets on the battlefield. Unexploded bomblets are a problem for innocent civilians and our light forces, our dismounted infantry, who come after MLRS has been used in an urban environment.⁴³

Submunitions with proven high failure rates should simply be destroyed.

C. Monitor Government Weapons Procurement and Hold Governments to their Promises

Article 36 of Additional Protocol I of the Geneva Conventions requires parties "in the study, development, acquisition, or adoption" of a new weapon to determine "whether its employment would, in some or all circumstances, be prohibited" by international law.⁴⁴ Non-governmental organizations can play a role in holding national militaries accountable in this process.

Human Rights Watch has recently raised concerns over funding for cluster munitions for the US Defense Department. In December of 2001, the Secretary of Defense issued an order stating that the US would not field any weapons system with submunitions that had a failure rate above 1%. By carefully studying contracts that the Defense Department has let out to military

percentage of individually dangerous submunitions in such a situation may be relatively lower, as the submunitions do not have an opportunity to be armed in free fall if they hit the ground still contained in the canister.

⁴² Human Rights Watch Briefing Paper, *Cluster Munitions Too Costly: Department Of Defense FY 2005 Budget Requests Related To Cluster Munitions*, June 2004, p. 3.

⁴³ Patrecia Slayden Hollis, *Trained, Adaptable, Flexible Forces = Victory in Iraq* (Interview of Lieutenant General W. Scott Wallace CG of V Corps in Iraq during OIF), Field Artillery, Sept-Oct. 2003, pp. 5, 6 (ellipses in original).

⁴⁴ Additional Protocol I, supra n. 19, Art. 36.

contractors, HRW has discovered that a number of systems on order will use submunitions that have documented failure rates well above 1%.⁴⁵

One of the projects detailed in report is the GMLRS, or Guided Multiple Launch Rocket System, which has two reported improvements: (1) the rockets are precision guided, and (2) a tighter footprint for the cluster munition version of the rockets.⁴⁶

The development of the GMLRS acknowledges the indiscriminate and disproportionate nature of current MLRS systems. According to the US Department of Defense, the GMLRS will result in a "95% reduction in duds and an 88% reduction in hazardous area" and will "incorporate greatly improved or self-destructing fuzes."⁴⁷ This strikes me as an acknowledgement that current MLRS footprints are way too large (perhaps even indiscriminate), and that the dud rates of the submunitions are way too high (perhaps leading to disproportionate and indiscriminate risks to civilians).

What Human Rights Watch has discovered through a close reading of budget request is that the GMLRS with submunitions requested by the Pentagon still have the old, high dud rate, submunitions included. Why should Italy be concerned about this? Because Italy, France, Germany, and the United Kingdom are partners in the project. At the very least, Italy should reject any attempt to sell it weapons packed with duds, no matter how well targeted those duds are.

D. Sue Governments and Manufacturers in National Courts

Another option to consider is for victims of cluster munitions to sue the governments that used them and/or the manufacturers that produced them. This is not an option lightly considered, as there are many obstacles to success.

1. Speculative Thoughts about Lawsuits in the United States

a. Against the US government?

The Federal government waives immunity from suits by individuals⁴⁸ except when the claim arises "out of the combatant activities of the military . . . during time of war"⁴⁹ or when the claim arises "in a foreign country."⁵⁰ These

⁴⁵ *Cluster Munitions Too Costly*, supra n. 42.

⁴⁶ *Cluster Munitions Too Costly*, supra n. 42 and Hodson, *Military Utility*, supra n. 27.

⁴⁷ Hodson, *Military Utility*, supra note 27, slide 17.

⁴⁸ 28 USC 1346(b).

⁴⁹ 28 USC 2680(j); See also Richard Epstein, *Torts* 625 (Aspen Law & Business 1999).

⁵⁰ 28 USC 2680(k).

provisions seemingly preclude the possibility of suing the US government for use of cluster bombs in combat during a time of war declared by the president and approved by the US Congress.

But let's take a closer look at a situation that occurred recently in this region. I must preface the following comments by saying that all the facts I am about to share came from press reports, and I have done no independent investigation. Compensation may have already been paid to the victims in the events I will describe, and I am using this simply as an example.

In the spring of 1999, NATO designated six drop zones in the Adriatic Sea for warplanes to dump unused bombs after attacking targets in Kosovo and other parts of Serbia. One of the designated drops zones was just outside Italian territorial waters, 20 miles off the coast of Venice. Evidently, no one bothered to inform those most affected by such a decision, the fisherman. On May 9, a cluster bomblet brought up in the fishing nets of the commercial fishing boat the Profeta exploded, setting the boat on fire and nearly killing the crew. Reports indicate that at least 161 bombs were dropped, including at least seven cluster bombs, each containing over 200 bomblets. The reports suggest that the bomblets were BLU-97s. After being warned away from the drop zones, fisherman nonetheless began dredging up cluster bombs and rockets just four or five miles from the coast. Either the ordnance was drifting in from the drop zones, or pilots missed the drop zones. Initial NATO response on May 14, 1999 was to raise doubts as to whether the ordnance was from the current conflict, and then to assert that the drops were in international waters. Economic damage to the fishing industry was estimated in the tens of millions of dollars, and the tourist industry was also affected.⁵¹

Would U.S. law prevent a U.S. court from hearing a claim against the U.S. government on these facts? If it could be argued that once the warplanes left the conflict zone, and they were no longer engaged in "combat activities," the exception to suit I mentioned a moment ago might not apply.⁵² If the planes dropped the bombs in international waters before the bombs drifted, then the claim arguably did not occur in "a foreign country." One might also argue that the decision to put drop zones so close to national waters was a negligent one. If that decision was made in the U.S., then one might also argue that the actions leading to the claim arose in the U.S., rather than in a foreign country

⁵¹ Christopher Dickey, *Seeds of Carnage*, Newsweek, Aug 2, 1999, p. 28; Tom Hundley, *Kosovo War's Jetsam Leaves Italy's Fisherman Trawling for Trouble*, Chicago Tribune, July 16, 1999, p. 3; *Special NATO Briefing from Brussels* (Jamie Shea & Major General Walter Jertz), Federal News Service, May 14, 1999.

⁵² *Skeels v. U.S.*, 72 F.Supp. 372 (D.C. La. 1947).

Returning to the theme of this talk, that different drops carve the stone, this would be just such an example of taking an indirect approach at restricting the use of cluster munitions.

This same strategy might not be as easily used in another, but very similar, situation. Also during the Kosovo conflict, NATO warplanes dumped ordnance in remote mountain areas. UN UXO clearance specialist John Flanagan has pointed out that such a tactic affected grazing areas and that the ordnance was very difficult to clear because of its remoteness from lines of support needed for demining activities.⁵³ Because this activity arguably “arose in a foreign country,” suit in US courts might be prohibited.

b. Against US Manufacturers of US Armaments?

Can a person sue cluster bomb manufacturers? What if a US manufacturer designs a defective weapon? Or, what if the design is okay, but the manufacturer does a bad job in making the weapon? The answers are not entirely clear.

In a case that reached the U.S. Supreme Court in 1988 the Court held that “[l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the suppliers warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States.”⁵⁴

One case concerning faulty mortar shells provides a potential avenue for suits on faulty submunitions. In that case, the complainants argued that the trouble was not with the design of the shells, but the poor manufacture of them. In a training exercise, two marines died and a third was injured when a defective mortar shell exploded inside a mortar tube. The court stated that:

The 81mm mortar shell in this case is unique from most of the defective products that the government contractor defense has shielded from scrutiny. The mortar shell is, at least in part, an instrument of death: one of its primary purposes is to kill or maim. Accordingly, the government specifications for the design of such mortar shells take on special

⁵³ *Explosive Remnants of War - Experience from Field Operations, A discussion paper prepared by John Flanagan, former Programme Manager of the UN Mine Action Programme in Kosovo, for the UN Mine Action Service, Group of Governmental Experts of the States Parties to 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 (Second Session, Geneva, July 15-26, 2002), UN Doc. CCW/GGE/II/WP.13, July 15, 2002, pp. 2-3.*

⁵⁴ *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988).

importance. Comprehensive military specifications ensure that these lethal devices explode only at the proper time and under the proper conditions. In short, design specifications ensure that mortar shells destroy only intended targets, not innocent bystanders. When a manufacturer of mortar shells deviates from these critical specifications, the result can be - and has been here - particularly tragic. A manufacturer's miscue in the manufacturing process - failure to conform to government design specifications - cannot be insulated from tort liability.⁵⁵

If it can be argued that a particular type of cluster munition, or, more precisely, a particular lot or batch of cluster munitions was poorly manufactured, then a case might have some chance of success.

c. By non-U.S. citizens against violators of international law?

The Alien Torts Claims Act states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁵⁶ Over the past two decades, the statute has been used by victims of human rights abuse against their abusers who might be visiting the U.S.⁵⁷ A person who could show a clear violation of international humanitarian law leading to injury, and who could "catch" the alleged perpetrator in the U.S., might be able to make a claim. Here, too, there are hurdles, such as the doctrine of Foreign Sovereign Immunity.⁵⁸

2. Negligence Actions in the United Kingdom

In 2000, the House of Lords in the United Kingdom allowed a suit to go forward on behalf of over 3,000 South Africans suing a British company for failing to adequately warn its subsidiary companies about the dangers of asbestos. Critical in the decision was the High Court's concern that the complainants be able to pursue substantial justice. The lack of access to legal aid by poor plaintiffs to pursue the matter in South African courts played a big role. This group action opened the way for an action concerning ERW.

Saamburu and Maasai herders from central Kenya successfully brought a negligence suit against the British government for injuries and deaths resulting from unexploded ordnance left behind on British army training grounds (Archer's

⁵⁵ *Mitchell v. Lone Star Ammunition*, 913 F.2d 242, 246 (5th Cir. 1990).

⁵⁶ 28 USC 1350.

⁵⁷ See, e.g., *Filartiga v. Pena-Itala* (2d Cir. 1980).

⁵⁸ 28 USC 1604.

Post and Dol Dol) which also serve as traditional grazing grounds for the herders. Martyn Day, the attorney representing the claimants, up to 500 people had been killed. Many victims were children attracted by the shiny exterior of UXO. Warning signs were ineffectual, as many of the tribal people are illiterate. The victims sought not only compensation, but a form of restitution as well (that is, the complete clearance of the grounds). They were able to receive government subsidized legal aid, and also successfully fought efforts to have the case transferred from British to Kenyan courts. The British government claimed that the Kenyan government, not the British Army, had responsibility for safeguarding civilians. In a settlement with the first set of plaintiffs in late 2002, the British government offered over \$7 million to over 230 claimants. It did not accept full liability, as other armies had used the firing ranges.⁵⁹ It is not clear from press reports if there was any agreement to do additional clearance, fencing, or marking of the dangerous areas.

Conclusion.

The gradual movement of the law is towards greater concern for the humanitarian impact of warfighting. This trend continues in the area of ERW and cluster munition use. Like drops that carve the stone, developments in the law of State Responsibility, international humanitarian law in for a like the ICTY and domestic courts, and the ERW Protocol of the CCW all point to greater restrictions on the use of cluster munitions due to humanitarian concerns. Italy is strategically placed to play an important role in this positive development. I pray that she seizes that opportunity.

⁵⁹ James Astill & Richard Norton-Taylor, *MoD Offers Talks on Masai Deaths*, The Guardian, April 11, 2002, p. 11; Clare Dyer, *MoD to Pay Pounds 4.5m Over Masai Deaths*, The Guardian, July 22, 2002, p. 7; UN Integrated Regional Information Networks, *Pastoralist Compensation Claim Materialises*, Africa News, Aug. 22, 2002; UN Integrated Regional Information Networks, *Confident in Firing Range Action*, Africa News, Nov. 30, 2002.