

Tipping A Broken Scale: The Legality of U.S. Cluster Munitions in Ukraine

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INTRODUCTION

Since the 2022 Russian invasion of Ukraine, the United States, NATO countries, EU members, and even distant nations like Japan and New Zealand have aided Ukraine.¹ Support has taken on a multitude of forms, including the treatment of Ukrainian wounded,² “a new era of intelligence sharing between Ukraine, the United States, and other allies,”³ the provision of medical supplies,⁴ and the supply of lethal military equipment.⁵ Arguably, among the most controversial decisions was the Biden administration’s choice in 2023 to provide cluster munitions.⁶ This note examines legal questions arising from that decision.

Part I examines cluster munitions, why they are controversial, the ban on cluster munitions, why the US has not joined the ban, and how US policies on cluster munitions have evolved. Part II considers the Russo-Ukraine conflict and the pressures on Ukraine’s allies regarding military aid. Part III discusses arguments supporting and criticizing the US’s decision to offer cluster munitions. Part IV analyzes legal issues surrounding the provision of cluster munitions; these include treaties, case law, the status and intent of the Convention on Cluster Munitions, and the question of how the decision to provide cluster munitions impacts US alliances. Finally, Part V provides a conclusion regarding why the US is both legally and morally justified in providing cluster munitions to Ukraine and why, if the world wants to eliminate the use of Cluster Munitions, it must prevent and punish invasions by aggressor nations.

1 Christoph Trebesch et al., *The Ukraine Support Tracker: Which Countries Help Ukraine and How?*, KIEL INST. FOR THE WORLD ECON. (2023), <https://www.ifw-kiel.de/publications/the-ukraine-support-tracker-which-countries-help-ukraine-and-how-20852/>.

2 Oren Liebermann et al., *US Approves Treatment of Wounded Ukrainian Soldiers at US Military Hospital in Germany*, CNN (July 26, 2022), <https://www.cnn.com/2022/07/26/politics/us-ukraine-soldiers-treatment/index.html>.

3 Amy Zegart, *Open Secrets: Ukraine and the Next Intelligence Revolution*, FOREIGN AFF. (Dec. 20, 2022), <https://www.foreignaffairs.com/world/open-secrets-ukraine-intelligence-revolution-amy-zegart>.

4 *Getting Emergency Medical Supplies to Where They Are Needed Most: Interview with Olexander Babanin on the Logistics of WHO Support to Ukraine*, WHO (May 9, 2022), <https://www.who.int/europe/news/item/09-05-2022-getting-emergency-medical-supplies-to-where-they-are-needed-most—interview-with-olexander-babanin-on-the-logistics-of-who-support-to-ukraine>.

5 See Trebesch, *supra* note 1.

6 Lawrence Ukenye, *U.S. Approves Cluster Bombs Despite Humanitarian Concerns*, POLITICO (July 7, 2023), <https://www.politico.com/news/2023/07/07/u-s-approves-cluster-bombs-in-latest-ukraine-weapons-transfer-00105234>. See also *Biden Administration Announces Additional Security Assistance for Ukraine*, U.S. DEP’T OF DEF. (July 7, 2023), <https://www.defense.gov/News/Releases/Release/Article/3451570/biden-administration-announces-additional-security-assistance-for-ukraine/>.

PART I: WHAT ARE CLUSTER MUNITIONS

Cluster munitions are weapons used since WWI,⁷ fired by aircraft or ground systems that open midair to disperse dozens or even hundreds of submunitions, or “bomblets,” into an area.⁸ They allow a single shell to hit many targets within an area, causing damage to a more significant number of enemy assets and letting a smaller force engage a larger adversary.⁹ During eight years of conflict in Vietnam, the US Air Force “dropped nearly 350 million bomblets”¹⁰ and—relative to conventional high-explosive (HE) shells—claims to have used.¹¹ According to US data, it needed to fire only 1.7 cluster munitions to result in a single enemy killed in action (KIA); conventional HE shells were almost eight times less effective, requiring 13.6 rounds to result in an enemy’s¹²

Cluster munitions are officially designated as “dual-purpose,” in reference to the bomblets’ two main effects—fragment and shape charge effects.¹³ “The first is for defeating armoured vehicles; the second for defeating soft targets.”¹⁴ While “DPICM implies a dual function, the ability

7 The military designation for these munitions is “dual-purpose improved conventional munition or DPICM (pronounced Dee-Pick-Em’s) rounds. However, because most civilian observers, journalists, and commentators refer to them simply as “cluster munitions,” the lay terminology is used throughout most of this note. *See also* Max Boot, *What Ukraine Needs to Win the War Against Russia*, COUNCIL ON FOREIGN RELS. (Sept. 27, 2023, 2:02 PM), <https://www.cfr.org/in-brief/what-ukraine-needs-win-war-against-russia>; Eitan Barak, *None to Be Trusted: Israel’s Use of Cluster Munitions in the Second Lebanon War and the Case for the Convention on Cluster Munitions*, 25 AM. U. INT’L L. REV. 423, 430 (2010).

8 PAUL K. KERR & ANDREW FEICKERT, CONG. RSCH. SERV., RS22907, CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS (2023).

9 *Id.*

10 John Ismay, *America’s Dark History of Killing Its Own Troops With Cluster Munitions*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/magazine/cluster-munitions-history.html>.

11 *See* Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 236-37 (2001) (“In Vietnam, US aircrews were especially susceptible to attack by anti-aircraft artillery (AAA), as well as the newly employed, Russian designed, surface-to-air missiles (SAM). Because of the AAA and SAM threat, aircrews found it difficult to engage and neutralize the Vietnamese air defenses from altitudes that allowed using single bombs accurately and effectively. Cluster munitions provided the solution; used as a flak-suppression weapon, they could deliver literally hundreds of bomblets with a single pass, thereby eliminating the need for aircrews to fly at lower altitudes or over the same target more than a single time.”).

12 Jack Watling & Justin Bronk, *Giving Ukraine Cluster Munitions is Necessary, Legal and Morally Justified*, ROYAL UNITED SERVS. INST. FOR DEF. AND SEC. STUD. (July 10, 2023), <https://rusi.org/explore-our-research/publications/commentary/giving-ukraine-cluster-munitions-necessary-legal-and-morally-justified>.

13 Headquarters: Department of the Army, Training Circular 3-09.81: Field Artillery Manual Cannon Gunnery, U.S. ARMY (Apr. 13, 2016), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/tc3_09x81.pdf.

14 Ove Dullum, *Cluster Weapons—Military Utility and Alternatives*, NORWEGIAN DEF. RSCH. ESTABLISHMENT 84-5, (Feb. 1, 2008).

to defeat armour has become second priority. DPICM [are] usually now marketed for use against soft targets.”¹⁵

In the US, the two types of artillery shells containing DPICMs currently available are the M483A1, which contains 88 bomblets, and the longer-range M864, with 72 or 76 bomblets.¹⁶ Capable of being fired at a 20-25km range, the 155mm size is important because allies “have transferred several different 155mm howitzers to Ukraine both towed guns, such as the US M777 and the UK-designed FH-70, and self-propelled guns, such as the US-designed M109 and the German PzH 2000.”¹⁷ Thus, M483A1/M864 shells provide ammunition for US platforms as well as those offered by other allies. With each of these platforms using barrels with a limited lifespan of around 1,800 rounds before needing to be replaced, “giving Ukraine DPICMs will mean it has to fire fewer total rounds for a given battlefield effect, allowing it to sustain the fight for significantly longer.”¹⁸ In addition to traditional artillery shells fired from howitzers, the US has also allegedly provided Ukraine with M30 Guided Multiple Launch Rocket System (GMLRS) rockets, which can be launched from the US High Mobility Artillery Rocket Systems (HIMARS) and can be equipped to carry a payload of 404 DPICM bomblets.¹⁹

The efficacy of DPICMs is of note due to the nature of the Russo-Ukrainian conflict. Over the last two decades, modern conflicts—especially those in which the US and its allies have been involved—have been characterized by “low-intensity warfare against non-state armed groups” rather than conflicts “between peer and near-peer state adversaries” with large numbers of well-armed, organized troops with similar

15 See *id.* at 78 (“Soft target” typically refers to human targets, although for DPICM analysis, unarmored vehicles—sometimes referred to as “semisoft” targets—arguably fall into this category because they lack protection against DPICM fragments. Therefore, the crew of unarmored vehicles is as likely to be wounded or killed by a DPICM as they would have had they been a standing soldier.) See also Virgil Wiebe, *For Whom the Little Bells Toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions*, 35 PEPP. L. REV. 895, 927 (2008) (“The [dual-purpose] system was intended for use against troops in the open, ‘soft targets’ (such as supply depots, fuel & ammunition dumps, or unhardened communications centers), and mass tank and armor formations (e.g. over an area 1 km x 1 km)).”

16 Mark F. Cancian, *Cluster Munitions: What Are They, and Why is the United States Sending Them to Ukraine?*, CTR. FOR STRATEGIC INT’L. STUD. (July 10, 2023), <https://www.csis.org/analysis/cluster-munitions-what-are-they-and-why-united-states-sending-them-ukraine>. See also Headquarters: Dep’t of the Army, *supra* note 13.

17 Steve Brown, *How Ukraine’s New DPICM Cluster Munitions Actually Work*, KYIV POST (July 19, 2023), <https://www.kyivpost.com/post/19631>.

18 See Watling & Bronk, *supra* note 12.

19 Povilas M., *Rocket Engine in Belgorod Revealed That Ukraine Has New Weapons*, TECHNOLOGY.ORG (June 5, 2024), <https://www.technology.org/2024/06/05/rocket-engine-in-belgorod-revealed-that-ukraine-has-new-weapons/>.

technological or logistical capabilities.²⁰ Ukraine now faces the latter, a fortified modern opponent with established defensive positions.

Early in the conflict, Russia began constructing “miles-long rows of concrete pyramids known as dragon’s teeth and deep ditches called tank traps. . . designed to slow Ukrainian vehicles and force them into preset positions where Russian forces can target them. . . Russia [also built] miles of trenches, and pillboxes—small structures for their troops to shoot from.”²¹ “Since Summer 2022, Russia has constructed some of the most extensive systems of military defensive works seen anywhere in the world for many decades. These defences are not just near the current front lines but have also been dug deep inside areas Russia currently controls.”²²

Trench warfare, which harkens back to WWI or the “U.S. Army’s experience in the summer of 1944... fighting against Nazi forces in the hedgerows of Normandy in France,”²³ is where artillery and DPICMs become important. Trench warfare is more complicated than the close-quarters battles “U.S. troops have engaged in over the past 20 years... Trenches are very difficult to demolish. Artillery strikes must land directly inside the trenches to be effective, and that does not happen often.”²⁴ However, with cluster munitions, a shell need not land perfectly within a trench; it can detonate above, releasing bomblets across fortifications. Cluster munitions are “force multipliers, designed to make trench systems into killing zones ... [one DPICM] can replace whole

20 Robert Lawless, *The International Law Governing a U.S.-China “Great Power” Armed Conflict in Taiwan*, 46 FLETCHER F. WORLD AFF. 119, 120 (2022).

21 Marco Hernandez & Josh Holder, *Defenses Carved Into the Earth*, N.Y. TIMES (Dec. 14, 2022), <https://www.nytimes.com/interactive/2022/12/14/world/europe/russian-trench-fortifications-in-ukraine.html>.

22 *Latest Defence Intelligence Update on the Situation in Ukraine*, UK MINISTRY OF DEF. (May 1, 2023), <https://twitter.com/DefenceHQ/status/1652911854501388290/photo/1>. See also Gerry Doyle et al., *Digging In*, REUTERS (Apr. 27, 2023), <https://www.reuters.com/graphics/UKRAINE-CRISIS/COUNTEROFFENSIVE/mopakddwbp/> (documenting “extensive Russian fortifications designed to slow any Ukrainian advances”).

23 Raphael S. Cohen, *Stop Comparing Ukraine to World War I*, FOREIGN POL’Y (July 18, 2023), <https://foreignpolicy.com/2023/07/18/ukraine-counteroffensive-world-war-ii-western-front-normandy-trench-warfare-strategy-history/>. See also Cédric Pietralunga, *Trench Warfare Makes a Comeback in Ukraine’s Fight Against Russia*, LE MONDE (Sept. 30, 2023), https://www.lemonde.fr/en/international/article/2023/09/30/trench-warfare-makes-a-comeback-in-ukraine-s-fight-against-russia_6142009_4.html (stating “Modern warfare has been characterized for several decades by long-range combat using aerial and armored resources, the counter-offensive launched by Kyiv in early June stands out for its emphasis on infantry, which has become the essential factor in advancing their forces. “The Ukrainians are rediscovering trench warfare and adopting tactics reminiscent of the [WWI] German Sturmtruppen.”).

24 Jeff Schogol, *Trench Warfare Tips: What US Troops Need to Know From Ukraine*, TASK & PURPOSE (Nov. 23, 2023), <https://taskandpurpose.com/news/us-military-ukraine-trench-warfare/>. See also Dieter Storz, *Artillery*, INT’L ENCYCLOPEDIA OF THE FIRST WORLD WAR (Dec. 16, 2014), <https://encyclopedia.1914-1918-online.net/article/artillery>, (stating that, in WWI, artillery was responsible for 75% of casualties during trench warfare).

barrages from [HE] artillery, offering ‘the same lethality as [ten] 155mm artillery rounds...’²⁵

A. *Why are Cluster Munitions Controversial?*

Efficacy on the battlefield notwithstanding, cluster munitions have a controversial history. Some reports claim civilians are almost the sole victims of cluster munitions;²⁶ since their inception, they have allegedly “killed or injured an estimated 56,000 to 86,000 civilians.”²⁷ Such claims stem from two issues relating to cluster munitions’ nature: their tendency to create collateral damage amongst civilian populations not only during a conflict but also afterward.

1. Collateral Damage During Conflict

“Due to the way in which they scatter many small submunitions, these weapons have a tendency to strike both military and civilian populations and objects when used near populated areas.”²⁸ Cluster munitions spread submunitions over large swaths of land, sometimes hundreds of square meters, creating “an increased likelihood of civilian victims or collateral damage. . .”²⁹

2. Collateral Damage Post-Conflict

All munitions have a rate of failure, called a “dud” rate, creating an unexploded ordinance (UXO) that stays on a battlefield. Because cluster munitions disperse hundreds or thousands of bomblets, even small dud rates create large amounts of UXO,³⁰ which can pose a danger to civilians for a long time after a conflict has ended.

²⁵ Craig Hooper, *Ukraine Wants Cluster Munitions to Blast Russian Fortifications*, FORBES (July 1, 2023), <https://www.forbes.com/sites/craighooper/2023/07/01/ukraine-wants-cluster-munitions-to-blast-russian-fortifications/?sh=4b3c519d3cc0>.

²⁶ *Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities*, HANDICAP INT’L 52, 136 (2007), https://reliefweb.int/attachments/c779e69b-bfcf-32a8-8c3d-2a0d2d53bf77/948D323F9A5BA883852572DF00674624-HI_ClusterMunitions_2007.pdf.

²⁷ See Ismay, *supra* note 10.

²⁸ Int’l Campaign to Ban Landmines, *Banning Cluster Munitions: Government Policy and Practice*, LANDMINE AND CLUSTER MUNITION MONITOR (2009), <http://www.the-monitor.org/en-gb/reports/2009/banning-cluster-munitions-government-policy-and-practice.aspx>.

²⁹ See Convention on Cluster Munitions, *A Guide to Cluster Munitions: Third Edition*, GENEVA INT’L. CTR. FOR HUMANITARIAN DEMINING (2016), <https://www.clusterconvention.org/files/publications/A-Guide-to-Cluster-Munitions.pdf>. See also Herthel, *supra* note 11 (stating that blanket prohibitions against the use of cluster munitions in populated areas are unwarranted but that “military planners should avoid the use of cluster munitions near populated areas unless the direct military benefit clearly outweighs the likely collateral damage, both during and after the conflict.”).

³⁰ Virgil Wiebe, *Footprints of Death: Cluster Bombs As Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT’L L. 85, 113 (2000) (“There is a

The post-war effects are somewhat different from the intended effect delivered during war where the target is supposed to be vehicles and personnel in a fighting state. In-battle targets are male persons that are expected to behave as soldiers ... The post-war effect may take place against people of all ages and both sexes, and children may become a frequent target due to their high physical and unpredictable activity. If a dud detonates, it will usually do so in the presence of a human foot or hand. This will usually be fatal. . .³¹

B. The Ban on Cluster Munitions

“The international community has a 150-year-long history of regulating and banning weapons that cause excessive humanitarian harm to combatants or civilians.”³² In 1868, the St. Petersburg Declaration established the principle of military necessity, setting a standard for warfare by prohibiting weapons that cause unnecessary suffering.³³ The 1868 Declaration, “described as ‘the cornerstone of the laws of war,’”³⁴ was the first of many protocols and conventions laying a framework for humane warfare. After both World Wars, the international community reflected on the worst aspects of the conflicts and collectively reconsidered the types of weapons and behaviors that warfare should allow.

“Until the creation of the International Criminal Court (ICC) in 1998 . . . war crimes were traditionally prosecuted in tribunals assembled at the end of a conflict.”³⁵ The creation of the ICC signaled a new international commitment to the investigation and prosecution of war crimes, like those related to indiscriminate killings of civilians.³⁶ Along with the “CNN effect,”³⁷ this has arguably created an increase in discussions about war crimes relating to civilian casualties and collateral damage.

predicted failure rate of 2-6 per cent. This is not significantly worse than other bombs, although the difference is there are lots of bomblets.”)

31 See Dullum, *supra* note 14, at 68-9.

32 Bonnie Docherty, *The Time Is Now: A Historical Argument for a Cluster Munitions Convention*, 20 HARV. HUM. RTS. J. 53, 55 (2007).

33 *1868 Declaration of Saint Petersburg*, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/en/ihl-treaties/st-petersburg-decl-1868> (last viewed Sept. 25, 2023).

34 See Herthel, *supra* note 11, at 246 (quoting Eric Prokosch, *The Technology of Killing, A Military and Political History of Antipersonnel Weapons* 164-65 (1995)).

35 Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 64 (2005).

36 *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 02, 2020), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

37 Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 HOUS. L. REV. 745, 779-80 (2019) (The CNN effect theorizes that “modern

While the most blatant and devastating use of cluster munitions in warfare arguably occurred in Laos and Vietnam, the movement to ban these weapons gained momentum in the 2000s. Cluster munitions began raising concern after the 1998-1999 Kosovo War after it was noted that “[m]ore NATO troops were killed by unexploded NATO submunitions after the conflict than were killed by Serb forces during the war.”³⁸ The use of cluster munitions in Afghanistan and Iraq then led to “a group of more than 150 concerned NGOs [forming] the Cluster Munition Coalition (“CMC”) in November 2003.”³⁹ The CMC decided to follow the model of the Noble Peace Laureate, International Campaign to Ban Landmines, which had spearheaded the Mine Ban Treaty.⁴⁰

The campaign in Iraq brought more attention to cluster munitions than previous conflicts for multiple reasons. First, the US and UK used ground-based—rather than air-dropped—cluster munitions, creating an increased rate of delivery and making it feasible for more submunitions to cover a target area.⁴¹ Next, “NGOs explicitly warned the international community ahead of the invasion of the problems cluster munition use would cause.”⁴² Finally, the conflict confirmed NGO suspicions that “submunition failure rates in operational use were significantly higher than the failure rates claimed by cluster munition manufacturers and the militaries deploying them.”⁴³

In 2006, the conflict between Israel and Hezbollah—after which “an estimated one million unexploded cluster bomblets littered the lands of southern Lebanon”⁴⁴—resulted in the final push for the international community.⁴⁵ As negotiations were underway near the end of the conflict, “Israel blanketed southern Lebanon with millions of submunitions,” resulting in outcries from UN officials.⁴⁶ By the end of the year,

media has played a significant role in reinforcing the liberal commitments to life, liberty, and basic human protections.”)

38 Richard Moyes, *Cluster Munitions in Kosovo: Analysis of Use, Contamination and Casualties*, LANDMINE ACTION 1, 46 (2007).

39 See Docherty, *supra* note 32, at 64-5.

40 *Meeting the Challenge: Protecting Civilians Through the Convention on Cluster Munitions*, HUM. RTS. WATCH (2010), <https://www.hrw.org/sites/default/files/reports/armsclusters1110webwcover.pdf>. [hereinafter *Meeting the Challenge*].

41 John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won*, U.N. INST. FOR DISARMAMENT RSCH. 50 (2009).

42 *Id.*

43 *Id.* at 51.

44 Karl C. Ching, *The Use of Cluster Munitions in the War on Terrorism*, 31 SUFFOLK TRANSNAT'L L. REV. 127, 127 (2007).

45 See *Meeting the Challenge*, *supra* note 40, at 110.

46 See *id.*; See also Barak, *supra* note 7, at 440 (stating that, “Although few accusations appeared in the international media claiming Israel’s use of CMs was illegal amidst the intense fighting, the world’s outcry was raised in the war’s aftermath; Israel suddenly found itself under heavy attack.”). See Ching, *supra* note 44, at 159 (“In this conflict, however, Israel likely failed to comply with the principles of distinction and proportionality as required by Protocol I when it decided to bombard southern Lebanon with

Secretary-General Kofi Annan urged states to “freeze” cluster munition use,⁴⁷ the Red Cross called “for an immediate end to the use of inaccurate and unreliable cluster munitions,”⁴⁸ and “the number of states pursuing prohibitions on cluster munitions at the national level significantly increased.”⁴⁹ These efforts culminated in 2007 when, led by Norway, a group of nations came together to draft the Convention on Cluster Munitions (CCM).⁵⁰ In December 2008, 94 states signed the convention; the US, Russia, and Ukraine were not signatories.⁵¹

Critics of the CCM, like Brian Lee Cox, have noted that “[p]ublic perceptions related to cluster munitions have been shaped by narratives that have been meticulously curated over the years by advocates and activists seeking an international ban on the weapons.”⁵² Cox proposes that, “the stigma involving cluster munitions that has been manufactured for over a decade has calculatingly skewed the vital balance between military necessity and humanitarian concerns heavily in favor of the latter.”⁵³ He argues that when military necessity is discarded in favor of what is considered a humanitarian concern, there remains the possibility that the greater humanitarian need (in the instant case, the defense of Ukrainian civilians from Russian invaders) will be ignored due to a stigma “cultivated by advocates and activists.”⁵⁴

C. US Response to the Convention on Cluster Munitions

The US resisted calls to sign onto the CCM for two primary reasons: First, it argued that the Convention on Certain Conventional Weapons (CCW) would have been “the proper venue to establish international restrictions on weapons,” and second, it maintained “that cluster munitions [were] essential to its national defense and to the defense of its allies and

thousands of cluster bombs and millions of cluster bomblets, many of which remained on the ground as hazardous duds, in an effort to end Hezbollah’s own indiscriminate rocket attacks on Israeli cities.”)

47 Kofi Annan, *Message of the UN Secretary-General to the Third Review Conference of the Convention on Certain Conventional Weapons*, UNITED NATIONS (Nov. 7, 2006), <https://press.un.org/en/2006/sgsm10720.doc.htm>.

48 Press Release no. 06/120, ICRC, Cluster Munitions: ICRC Calls for Urgent International Action (Nov. 6, 2006).

49 See *Meeting the Challenge*, *supra* note 40.

50 CONG. RSCH. SERV., *supra* note 8.

51 See *id.*

52 Brian Lee Cox, *Why Biden Administration Decision to Provide Cluster Munitions to Ukraine Is Long Overdue*, LAWFIRE (July 21, 2023), <https://sites.duke.edu/lawfire/2023/07/21/guest-post-why-biden-administration-decision-to-provide-cluster-munitions-to-ukraine-is-long-overdue/>.

53 *Id.*

54 *Id.*

[could] be used within the parameters of [international humanitarian law].”⁵⁵

However, while refusing to sign onto the CCM, President George W. Bush also recognized that the changing international opinions on cluster munitions necessitated a US response. Rather than signing onto the Convention, the Bush administration instead announced that it sought “to implement a policy to meet the intent of the treaty but to do so without giving up a key capability for an interim period while the services determine how to replace the capability.”⁵⁶

A 2008 Department of Defense (DoD) memorandum said the US recognized “the need to minimize the unintended harm to civilians and civilian infrastructure associated with unexploded ordnance from cluster munitions” while also stating that “cluster munitions are legitimate weapons with clear military utility in combat.”⁵⁷ The memo pledged “that by the end of 2018, DoD [would] no longer use cluster munitions which, after arming, result in more than [1%] unexploded ordnance across the range of intended operational environments.”⁵⁸ Further, the memo stated that starting in 2009, “munitions that could not achieve an unexploded ordnance rate of less than [1%] were [to be]... immediately placed under the release authority of the combatant commander.”⁵⁹ The policy gave the DoD “a 10-year grace period to determine the

55 Joseph Anzalone, *The Virtue of a Proportional Response: The United States Stance Against the Convention On Cluster Munitions*, 22 PACE INT’L. REV. 183, 204 (2010).

56 Mike Jacobson, *Cluster Munitions No More: What This Means for the U.S. Military*, U.S. ARMY MANEUVER CTR. OF EXCELLENCE (2014), https://www.moore.army.mil/armor/earmor/content/issues/2014/oct_dec/jacobson.html.

57 Press Release, U.S. Mission to Int’l. Orgs. in Geneva, Department of Defense Releases New Cluster Munitions Policy (July 9, 2008). See also Dan Rice, *NATO Must Abandon the Cluster Munitions Convention*, CTR. FOR EUROPEAN POL’Y ANALYSIS (Mar. 25, 2024), <https://cepa.org/article/nato-must-abandon-the-cluster-munitions-convention/> (stating that a potential Russian invasion of Baltic countries may necessitate the withdrawal of NATO countries from the CCM). See also *Lithuania’s Defence Ministry Suggests Withdrawing From Cluster Munitions Convention*, LITHUANIAN NAT’L RADIO AND TELEVISION (Sept. 18, 2023), <https://www.lrt.lt/en/news-in-english/19/2079404/lithuania-s-defence-ministry-suggests-withdrawing-from-cluster-munitions-convention> (stating that Lithuania’s Defense Ministry is considering withdrawing from the CMC due to the effectiveness of cluster munitions as a form of self-defense.).

58 See U.S. Mission to Int’l. Orgs. in Geneva, *supra* note 57.

59 A combatant commander, or CCDR, is a four-star general or admiral who is in command of one of the eleven unified or specified combatant commands established by the President. See *Joint Publication 1-02: Department of Defense Dictionary of Military and Associated Terms*, U.S. DEP’T. OF DEF. (Feb. 15, 2016). Placing the responsibility for cluster munitions which have a higher than permissible dud rate upon CCDRs establishes a particularly high hurdle that must be overcome before their use is authorized. It ensures that one of the highest-ranking members of the military chain of command for a particular conflict or theater of operations will have direct oversight of the usage of said cluster munitions. Theoretically, these high-ranking individuals are better equipped to make decisions regarding the utilization of weapons whose nature requires a more complicated analysis of strategic needs and a balancing of those needs against the potential for immediate and long-term consequences. See also Jacobson, *supra* note 56.

requirement for a replacement, conduct research and development, and acquire enough new munitions.”⁶⁰

Under Barack Obama’s presidency, this policy was reaffirmed. The Obama administration stated that it would “continue to implement its own voluntary policy to prohibit by 2018 the use of cluster munitions with more than a [1%] unexploded ordnance rate.”⁶¹

However, the Bush-Obama era guidance—the implementation of which was set to take effect on January 1, 2019—was nullified during the Donald Trump administration in a DoD policy memo signed on November 30, 2017, by Deputy Defense Secretary Patrick Shanahan.⁶²

The Shanahan memo argued that “[c]luster munitions are legitimate weapons with clear military utility, as they provide distinct advantages against various threats in the operating environment. Additionally, the use of cluster munitions may result in less collateral damage than the collateral damage that results from use of unitary munitions alone.”⁶³ By not establishing a deadline to replace munitions exceeding a 1% dud rate, the new policy indefinitely delayed implementation of the ban, instead simply stating that “these munitions will be removed only after new munitions that meet the 1% or less unexploded submunitions standard are fielded in sufficient quantities to meet combatant commander requirements.”⁶⁴

The Trump administration also prohibited the DoD from providing cluster munitions to countries “except as provided for under U.S. law’ [and that] the Consolidated Appropriations Act of 2010 ... prohibits the transfer of cluster munitions unless the submunitions, after arming, ‘do not result in more than [1%] unexploded ordnance across the range of intended operational environments.”⁶⁵ However, “the Foreign Assistance Act of 1961 (as amended through December 2022) provides an exception,” allowing the President to authorize assistance to foreign governments “without regard to” other relevant provisions of US law if it is determined “that to do so is important to the security interests of the United States.”⁶⁶

Under President Biden, the DoD has yet to make any determinations regarding the general future direction US policy will take regarding

⁶⁰ *Id.*

⁶¹ *U.S. Deeply Disappointed by CCW’s Failure to Conclude Protocol on Cluster Munitions*, U.S. STATE DEP’T (Nov. 25, 2011), <https://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-protocol-on-cluster-munitions/>.

⁶² Patrick Shanahan, *DoD Policy on Cluster Munitions*, U.S. DEP’T. OF DEF. (Nov. 30, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/DOD-POLICY-ON-CLUSTER-MUNITIONS-OSD071415-17.pdf>.

⁶³ *Id.*

⁶⁴ See CONG. RSCH. SERV., *supra* note 8.

⁶⁵ See Cox, *supra* note 52.

⁶⁶ See *id.*

cluster munitions. When, in March 2022, Pentagon Press Secretary John Kirby was directly asked about “the Pentagon’s ongoing internal review on its own cluster munitions policy,” he responded that he didn’t “have any updates... with respect to cluster munitions.”⁶⁷ However, the decision to provide Ukraine with such weapons, ostensibly under the Foreign Assistance Act of 1961 exception, has presented a question of whether this was “a one-time exception to policy or it could constitute a major policy change regarding the future provision of cluster munitions to other countries as well.”⁶⁸

⁶⁷ *Pentagon Press Secretary John F. Kirby Holds a Press Briefing*, U.S. DEP’T OF STATE. (Mar. 2, 2022), <https://www.defense.gov/News/Trans/Tran/Article/2952916/pentagon-press-secretary-john-f-kirby-holds-a-press-briefing/>. [hereinafter *Kirby Press Briefing*].

⁶⁸ See CONG. RSCH. SERV., *supra* note 8.

PART II: UNITED STATES INVOLVEMENT IN THE RUSSO-UKRAINIAN CONFLICT⁶⁹

Following Russia's invasion, the US quickly decided to support Ukraine with not only humanitarian aid but also weapons.⁷⁰ As of December 2024, since Russia launched its invasion, the US had provided over \$64.1 billion in military security assistance,⁷¹ and when financial and humanitarian aid were factored in, total aid came in at around \$106 billion.⁷² Notably, these numbers do not include the assistance provided by more than 40 nations.⁷³ Arguments for US support of Ukraine touch upon many issues. The US State Department has noted that "Ukraine is a key regional strategic partner that has undertaken significant efforts to modernize its military and increase its interoperability with NATO. It remains an urgent security assistance priority to provide Ukraine the equipment it needs to defend itself against Russia's war against Ukraine."⁷⁴

Another prominent argument for supporting Ukraine is that it sends a message to China, which—with Russia's performance in Ukraine—is

69 This note, focused on the specific issue of cluster munitions, avoids domestic discussions regarding US assistance to Ukraine. Such debates, marred by rhetoric designed to influence voters, confuse the issue by focusing on tangential topics such as whether the US is wise to expend significant financial resources supporting a foreign ally. Those considerations are irrelevant to whether—after Russia invaded Ukraine—the US could provide cluster munitions within the legal and ethical boundaries established by international law. Worse, those discussions are rife with misinformation. For example, some American politicians protesting support for Ukraine simply say that taxpayer money should not be sent overseas and could be better used supporting Americans domestically. In arguing that point, those politicians ignore that most US military aid comes in the form of *domestic* expenditure on arms manufacturing within the US, which supports American workers and replaces the US military's own stores while primarily sending aging equipment to Ukraine. In effect, they influence voters to resent military aid as providing no tangential benefit to Americans while the aid, in fact, benefits Americans as much—if not more—than Ukrainians. *See generally* Marc A. Thiessen, *Ukraine Aid's Best-Kept Secret: Most of the Money Stays in the U.S.A.*, WASH. POST (Nov. 29, 2023) (noting that on "117 production lines in at least 31 states and 71 cities... American workers are producing major weapons systems for Ukraine."). *See generally* Anastasia Lapatina, *How America's Aid to Ukraine Actually Works*, LAWFARE (July 16, 2024, 1:00 PM), <https://www.lawfaremedia.org/article/how-america-s-aid-to-ukraine-actually-works> (noting that "Only a small percentage of the overall aid package takes the form of cash transfers to Kyiv; the vast majority goes right back into the U.S. economy.").

70 U.S. Embassy Kyiv (@USEmbassy Kyiv), X (Jan. 21, 2022, 8:10 PM), <https://x.com/USEmbassyKyiv/status/1484709938807070721> (discussing that the U.S. started supplying Ukraine with aid, to include ammunition for front line troops, during the Russian troop build-up and before the formal invasion of Ukraine occurred.).

71 *U.S. Security Cooperation with Ukraine*, BUREAU OF POL. MIL. AFFS. (Dec. 2, 2024), <https://www.state.gov/u-s-security-cooperation-with-ukraine/>.

72 Jonathan Masters & Will Merrow, *How Much U.S. Aid is Going to Ukraine?*, COUNCIL ON FOREIGN RELS. (Sep. 27, 2024, 5:00 AM), <https://www.cfr.org/article/how-much-us-aid-going-ukraine>.

73 *Id.*; *Fact Sheet on Efforts of Ukraine Defense Contact Group – National Armaments Directors*, U.S. DEP'T OF DEF. (Sept. 6, 2024), <https://www.defense.gov/News/Releases/Release/Article/3897721/fact-sheet-on-efforts-of-ukraine-defense-contact-group-national-armaments-direct/>.

74 *U.S. Security Cooperation with Ukraine*, *supra* note 71.

now arguably the US's only near-peer military threat.⁷⁵ The belief that letting Russia invade Ukraine without rebuke may invite “aggression from other rival powers”⁷⁶ like China was summed up by Taiwanese President Tsai Ing-wen, who said, “Russia’s invasion of Ukraine was a wake-up call to us all, and served as a reminder that authoritarianism does not cease in its belligerence against democracy.”⁷⁷ If Russia is victorious in Ukraine, not only may Putin “be emboldened to continue further into other countries,” but it “will send a message to other authoritarian governments that they can do the same.”⁷⁸ “It’s going to be a green light, not only for Putin to continue his aggression against possibly NATO members, it’s also going to be a green light for ... China to attack Taiwan.”⁷⁹ The suggestion that China is looking to Russia’s invasion favorably was bluntly pointed out by NATO in July of 2024, when it argued that China had become a “decisive enabler of Russia’s war against Ukraine through its so-called ‘no limits’ partnership and its large-scale support for Russia’s defence industrial base.”⁸⁰

Foreign aid has almost certainly resulted in battlefield success by the Ukrainian military:

The lower end of estimated [Russian] troop losses exceeds the total number of U.S. servicemembers killed in Afghanistan *and* Iraq between 2001 and 2019, and the higher end of the range coincides with the number of Soviet troops lost during the Soviet Union’s disastrous, decade-long conflict in Afghanistan. The international

⁷⁵ See Carla Babb, *China Remains Top Threat in New US National Defense Strategy*, VOICE OF AM. (Oct. 27, 2022, 5:11 PM), <https://www.voanews.com/a/china-remains-top-threat-in-new-national-defense-strategy/6808577.html>.

⁷⁶ See Masters & Merrow, *supra* note 72.

⁷⁷ Meaghan Tobin & Ellen Nakashima, *Taiwan, Like Ukraine, is Fighting for Democracy, Tsai Says in New York*, WASH. POST (Mar. 30, 2023), <https://www.washingtonpost.com/world/2023/03/30/taiwan-president-tsai-ukraine-russia/>. This argument is particularly moving given that both Russia and China are permanent members of the United Nations Security Council, a position which has allowed Russia to act with some degree of impunity. Taiwan views the Russian invasion of Ukraine as an example of a powerful military nation invading a historical territory to which it believes it has a claim. Taiwan fears that should the Russian invasion be successful, it will set a precedent that could result in a Chinese invasion of Taiwan.

⁷⁸ Romina Bandura & Ilya Timtchenko, *Funding a Decisive Ukraine Victory Is an Investment, Not a Cost*, CTR. FOR STRATEGIC & INT’L STUD. (Oct. 12, 2023), <https://www.csis.org/analysis/funding-decisive-ukraine-victory-investment-not-cost>.

See also Max Boot, *What Ukraine Needs to Win the War Against Russia*, COUNCIL ON FOREIGN RELS. (Sept. 27, 2023, 2:02 PM), <https://www.cfr.org/in-brief/what-ukraine-needs-win-war-against-russia> (stating that, “Failing to send sufficient weaponry to Ukraine simply increases the odds of the conflict dragging on indefinitely, at a horrendous cost to both Ukraine and Russia, and a growing risk to the whole world.”).

⁷⁹ The President’s Inbox, *Ukraine’s 2023 Counteroffensive*, COUNCIL ON FOREIGN RELS. at 21:03 (Sept. 19, 2023), <https://www.cfr.org/podcasts/ukraines-2023-counteroffensive-max-boot>.

⁸⁰ NATO, WASH. SUMMIT DECLARATION (July 10, 2024), https://www.nato.int/cps/en/natohq/official_texts_227678.htm.

community is ensuring that Russia pays a heavy price for its assault on the rule of law.⁸¹

From an American and NATO perspective, supporting these victories serves strategic purposes. Russia's current and long-term military capabilities have been severely undermined during the conflict. As noted by Admiral Tony Radakin, the Chief of the United Kingdom's Defense Staff, Russia has "lost nearly half the combat effectiveness of its army."⁸² In 2022, Russia "fired 10 million artillery shells but at best can produce 1 million shells a year. It has lost 2,500 tanks and at best can produce 200 tanks a year."⁸³ "In sum, for a fraction of what the United States spends on its military every year, Ukraine has inflicted significant losses on an international competitor with no commitment of U.S. military forces."⁸⁴

Regarding the legality of general lethal aid to Ukraine,⁸⁵ "it has been argued that there is a primary rule of international law which stipulates that neutral States may discriminate in favour of victims of aggression, meaning that supplying States are not in breach of any international obligation."⁸⁶ It has generally been agreed upon that the UN Charter, combined with Russia's illegal invasion of Ukraine, means "that providing weapons and other support to Ukraine ... neither violates international law nor makes the sending countries parties to the conflict."⁸⁷

In an analysis for the Journal of International Humanitarian Legal Studies, Kevin Heller and Lena Trabucco consider five areas of international law that affect the legality of providing general lethal aid to Ukraine: (1) the jus ad bellum; (2) the law of neutrality; (3) international humanitarian law; (4) state responsibility for complicity in

81 Charles H. Brower II, *Putin vs. Zelensky: Reflections on Leadership, Global Order, and the Rule of Law*, 45 U. ARK. LITTLE ROCK L. REV. 47, 74-6 (2022) (citation omitted).

82 Jon Jackson, *Russia Has Lost Half Its Combat Capability in Ukraine: U.K. Defense Chief*, NEWSWEEK (July 5, 2023), <https://www.newsweek.com/russia-has-lost-half-its-combat-capability-ukraine-uk-defense-chief-1811042>.

83 *Id.*

84 See Bandura & Timtchenko, *supra* note 78.

85 General lethal aid here means non-controversial forms of lethal aid other than cluster munitions. These would include general artillery, small arms, troop carriers, aircraft, tanks, and crew-operated weapons.

86 Pearce Clancy, *Neutral Arms Transfers and the Russian Invasion of Ukraine*, 72 INT'L & COMP. L. Q. 527, 528 (2023). See also Emiliano J. Buis, *The Legality of Conventional Arms Transfers During Armed Conflicts: Assessing State Responsibility for Facilitating Military Actions of Other States*, 56 TEX. TECH. L. REV. 61, 71 (2023) (stating that "When it comes to discerning whether a transfer of arms would undermine international peace and security, the predominant discourse explains that the arms sent to Ukraine are useful to consolidate the main purpose of the United Nations (article 1.1 of the UN Charter), allowing the country to conduct an appropriate self-defense against an armed attack carried out in clear opposition to the principle included in article 2.4.").

87 Kristen E. Eichensehr, *Contemporary Practice of the United States Relations to International Law: Use of Force, Arms Control, and Non-Proliferation*, 116 A.J.I.L. 646, 649 (July 2022).

internationally wrongful acts; and (5) international criminal law.⁸⁸ Because “states are entitled to help Ukraine defend itself against Russia’s armed attack, and there is no evidence that Ukrainian soldiers are using Western-supplied weapons to commit war crimes . . . the least problematic [areas] are the jus ad bellum, state responsibility for complicity in internationally wrongful acts, and international criminal law.”⁸⁹

Because Ukraine has an individual right of self-defence against Russia, it is entitled to ask other states to act in its collective self-defence. One form of collective self-defence is providing material support . . . Providing Ukraine with weapons thus cannot be considered an internationally wrongful act . . . It is also important to note that [so long as Ukraine’s acts of self-defence against Russia comply with the requirements of necessity and proportionality] the jus ad bellum currently imposes no limits on the quantity or quality of weapons that states can provide to Ukraine.⁹⁰

They add, however, that if nations “provide weapons despite knowing previous transfers had facilitated criminal acts, the government officials behind the transfers would risk being held criminally responsible . . . for any war crimes Ukraine used the weapons to commit.”⁹¹

Lastly, they point out that:

Because the obligations of neutrality are not optional, the Western states that are providing weapons to Ukraine are violating their duty of impartiality and could be targeted by Russian countermeasures . . . It nevertheless seems unlikely that Russia would actually take countermeasures against European states – at least lawful ones. Countermeasures cannot involve the use of force, and it is not clear, given Russia’s increasing economic and political isolation, what kinds of legal obligations Russia could suspend to persuade foreign states to stop transferring weapons to Ukraine.⁹²

In summary, the limitations on what weapons the US and its allies have been willing to provide Ukraine are essentially not due to concerns over violations of international law created by the general act of aid.

⁸⁸ Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT’L HUM. L. STUD. 251, 251 (2022).

⁸⁹ *Id.* at 273.

⁹⁰ *Id.* at 254-55.

⁹¹ *Id.* at 268, 273-74. (Heller and Trabucco note that there have been allegations of the Ukrainian military using cluster munitions while attempting to retake a town in Hursarivka, which—if considered an indiscriminate attack—could qualify as a war crime. They, however, go on to note that “Nothing indicates, however, that any of the weapons used in those war crimes were provided by Western states during the conflict or that Ukraine is routinely committing war crimes.”)

⁹² *Id.* at 274.

Instead, Ukraine’s allies are more likely hesitant to cross lines into active participation, which Russia may decide are grounds for escalating the conflict into a nuclear one.⁹³ For example, despite Ukrainian President Volodymyr Zelensky’s repeated requests for the establishment of a no-fly zone,⁹⁴ the US and NATO have refused to consider the idea for fear of creating circumstances that would lead to a confrontation between Russian aircraft and allied forces.⁹⁵ Therefore, relevant to the debate on cluster munitions, the line allies are hesitant to cross does not exist due to an argument against the provision of weapons at large.

PART III: THE UNITED STATES DECISION TO PROVIDE CLUSTER MUNITIONS

A. Arguments Against Providing Cluster Munitions

There are two general categories of arguments that advocates have advanced against the proposition of providing Ukraine with cluster munitions. First, “the claim that their use will kill Ukrainian civilians,” and second, “the allegation that DPICMs are prohibited, and their use may amount to a war crime.”⁹⁶

The former argument is broad due to the unavoidable and fundamental nature of modern warfare. “[B]eginning with World War II, the ratio of civilian to military casualties in war has steadily increased. Many experts believe that today 90 percent of casualties are civilian.”⁹⁷ To that point, according to an annual report released by the Cluster Munition Coalition:

More than 300 people were killed and over 600 wounded by cluster munitions in Ukraine in 2022 . . . surpassing Syria as the country with the highest number of casualties from the controversial weapons for the first time in a decade. Russia’s widespread use of the bombs . . . and, to a lesser extent, their use by Ukrainian forces — helped make 2022 the deadliest year on record globally.”⁹⁸

⁹³ See Alex Traub, *A Top Russian Official Threatens the U.S. with the ‘Wrath of God’ Over War Crimes Investigations*, N.Y. TIMES (July 6, 2022), www.nytimes.com/2022/07/07/world/europe/a-top-russian-official-threatens-the-wrath-of-god-in-response-to-war-crime-investigations.html.

⁹⁴ Siobhan Hughes, *Zelensky Asks U.S. Again for No-Fly Zone*, WALL ST. J. (Mar. 16, 2022), <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-15/card/zelensky-asks-u-s-again-for-no-fly-zone-SA6RQHFsz3NUsT9uE4ru>.

⁹⁵ Press Release, *Press Conference by NATO Secretary General Jens Stoltenberg*, NATO (Mar. 4, 2022), https://www.nato.int/cps/en/natohq/opinions_192739.htm.

⁹⁶ See Watling & Bronk, *supra* note 12.

⁹⁷ Geoffrey S. Corn, *Humanitarian Regulation of Hostilities: The Decisive Element of Context*, 51 VAND. J. TRANSNAT’L L. 763, 764 (2018).

⁹⁸ Abby Sewell & Omar Albam, *Cluster Munition Deaths in Ukraine Pass Syria, Fueling Rise in a Weapon the World Has Tried to Ban*, ASSOCIATED PRESS (Sept. 5, 2023),

However, it should be noted that this number pales in comparison to the 10,200 civilian casualties between Russia's February 24, 2022 invasion and the end of 2023, when that number was provided by the UN humanitarian office's operations director, Edem Wosornu.⁹⁹

Those opposing cluster munitions are essentially concerned with civilian deaths *after* the war. The US and Ukrainian governments have countered this by pointing out that they had to calculate an analysis weighing the immediate threat posed to Ukrainian civilians by Russia's invasion and a long-term threat to those same civilians by dud cluster munitions left behind on the battlefield after the conflict.

Speaking at the 74th NATO Summit, US National Security Advisor Jake Sullivan explained this, stating that "despite the difficulty, despite the challenges, despite the risk to civilian harm associated with cluster munitions, the risk to civilian harm of leaving Ukraine without the ammo it needed was, in our—from our perspective, greater."¹⁰⁰

Similarly, after the announcement that the US would provide his nation with cluster munitions, Oleksii Reznikov, then Ukraine's Minister of Defence, noted online that, "[T]he russian federation has been indiscriminately using cluster munitions from day 1 of the unprovoked large-scale aggression. . . Our position is simple - we need to liberate our temporarily occupied territories and save the lives of our people."¹⁰¹

Parties opposing the provision of cluster munitions also argue that "all parties to the war 'are obliged to respect the ban on the use of inherently indiscriminate weapons that forms part of customary international humanitarian law.'"¹⁰² In effect, those opposing the use of cluster munitions argue that any use, regardless of whether by Russia or Ukraine, may be a war crime and that the weapons will ultimately result in the death of Ukrainian civilians.¹⁰³ As will be discussed in Part IV, many of these opponents rely on a false premise that any use of cluster munitions constitutes a violation of customary international humanitarian law.

<https://apnews.com/article/syria-ukraine-cluster-munitions-bombs-convention-0ffa6fccfd4bf335f8b3e345afbe8e8a>.

⁹⁹ Edith Lederer, *Russia's Intense Attacks on Ukraine Has Sharply Increased Civilian Casualties in December, UN Says*, ASSOCIATED PRESS (Jan. 16, 2024), <https://apnews.com/article/russia-ukraine-war-civilian-casualties-increase-missiles-b4702b77b170ad94fab56cac8cbcdc2b>.

¹⁰⁰ *Press Briefing by Press Secretary Karine Jean-Pierre and National Security Advisor Jake Sullivan*, WHITE HOUSE (July 11, 2023), <https://www.whitehouse.gov/briefing-room/press-briefings/2023/07/11/press-briefing-by-press-secretary-karine-jean-pierre-and-national-security-advisor-jake-sullivan-vilnius-lithuania/>.

¹⁰¹ Oleksii Reznikov (@oleksiireznikov), X (July 7, 2023, 3:13 PM), <https://x.com/oleksiireznikov/status/1677410470108471298>.

¹⁰² Frederick V. Perry, *The Russian Invasion of Ukraine and the Tottering Principles of International Law: Russia's Assault on World Norms*, 40 WIS. INT'L. L.J. 331, 342 (2023).

¹⁰³ See Watling & Bronk, *supra* note 12.

Opponents of the US provision of cluster munitions to Ukraine have noted “that Russian forces were widely condemned for using cluster munitions in the first few months after their February 2022 invasion” and that, by doing so itself, the US is effectively “ceding the moral high ground to Moscow.”¹⁰⁴ A counterpoint is that—unlike Russia’s use of similar munitions—Ukraine’s “use of cluster munitions is not immoral, for it does not target innocents, only uses munitions with a low dud rate, and uses them only in a defensive posture not as an aggressor, and that on its own sovereign territory.”¹⁰⁵ Further, unlike Russia—which attempted to deny its use of cluster bombs¹⁰⁶—Ukraine has been transparent about its intentions regarding these weapons.¹⁰⁷

B. Argument for Cluster Munitions

From a pragmatic perspective, those supporting the provision of cluster munitions do so because they believe that Ukraine requires the weapons to prevail over an entrenched Russian force.¹⁰⁸ Supporters also point out that neither Russia, Ukraine, nor the US are CCM signatories.¹⁰⁹ As will be discussed in Part IV, Ukraine is choosing to utilize these munitions on its own soil in a defensive posture against an invading force; it is accepting the risk, a situation much different from the conflicts that spurred the creation of the CCM.

¹⁰⁴ Max Boot, *Opinion: Why Liberals Protesting Cluster Munitions for Ukraine are Wrong*, WASH. POST (July 11, 2023), <https://www.washingtonpost.com/opinions/2023/07/11/cluster-munitions-ukraine-war-russia/>.

¹⁰⁵ Edward G. Stafford, *Cluster Munitions and the Moral High Ground*, PROVIDENCE INST. ON RELIGION AND DEMOCRACY (Aug. 14, 2023), <https://providencemag.com/2023/08/cluster-munitions-and-the-moral-high-ground/>.

¹⁰⁶ Mary Wareham, *Russia Denies Its Widespread Use of Cluster Munitions*, HUM. RTS WATCH (Sept. 6, 2023), <https://www.hrw.org/news/2023/09/06/russia-denies-its-widespread-use-cluster-munitions> (discussing how various officials, including President Vladimir Putin, Defence Minister Sergei Shoigu, and Russia’s state-controlled media have all attempted to “demonstrate civilian harm from Ukraine’s use of cluster munitions . . . yet disregard Russia’s own failed submunitions.”). *See also*, *Putin says Russia will use cluster bombs in Ukraine if it has to*, REUTERS (Jul 16, 2023) <https://www.reuters.com/world/europe/putin-says-russia-has-sufficient-stockpile-cluster-bombs-will-use-them-if-2023-07-16/> (Noting that Russian Federation President Vladimir Putin had stated that he regards the use of cluster munitions as a crime.)

¹⁰⁷ *See* Docherty, *supra* note 32, at 66.

¹⁰⁸ *See* Editorial Board, *Biden Is Right on Cluster Bombs for Ukraine*, WALL ST. J. (July 9, 2023), <https://www.wsj.com/articles/biden-is-right-on-cluster-bombs-for-ukraine-russia-war-weapons-military-aid-defense-f22667d3>. *See also* Jake Epstein et al., *The US is Finally Giving Ukraine’s Military Cluster Munitions, Deadly and Controversial Explosives That Could Be ‘Devastating’ For Russia*, BUS. INSIDER (July 7, 2023), <https://www.businessinsider.com/us-finally-giving-ukraine-cluster-munitions-devastating-for-russia-2023-7>.

¹⁰⁹ *See* Epstein et al., *supra* note 108. It is also worth noting that Poland and Romania, key assets in the pipelines through which Ukraine receives most of its American military hardware, are also not signatories to the CCM. This reality assuages additional concerns regarding whether the munitions must travel through a CCM-signatory state on their path from America to Ukraine.

Further, it has been pointed out that, unlike the Russian use of cluster munitions against Ukraine—which directly threatens civilian lives—Ukraine seeks “to employ these weapons against Russian field fortifications in open countryside that are already surrounded by unmarked minefields and unexploded Russian ordinance.”¹¹⁰ It is certainly true, as some have argued, that after the war, unexploded ordinance will remain, posing a continuing threat to civilians. However, because the battlefields are already littered with Russian mines and duds—Ukraine is now the world’s most mined country¹¹¹— the necessity for post-conflict operations to clear battlefields of unexploded ordinance already exists,¹¹² with the World Bank reporting that demining Ukraine will cost \$37.6 million.¹¹³

Ukraine has noted that it is being forced to clear unexploded ordinance from territory it has won back from Russia¹¹⁴ and has stated that it will document all use of cluster munitions and prioritize clearing areas where they were utilized.¹¹⁵ Meanwhile, the US State Department has announced it will provide \$89 million of funding to help Ukraine address “humanitarian challenges posed by explosive remnants of war created by Russia’s brutal war of aggression” and to deploy approximately 100 demining teams to “support a large-scale train and equip project to

¹¹⁰ See Watling & Bronk, *supra* note 12.

¹¹¹ Eve Sampson & Samuel Granados, *Ukraine is Now the Most Mined Country. It Will Take Decades To Make Safe*, WASH. POST (July 22, 2023), <https://www.washingtonpost.com/world/2023/07/22/ukraine-is-now-most-mined-country-it-will-take-decades-make-safe/>.

¹¹² See *Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing*, U.S. STATE DEP’T (July 7, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3452000/under-secretary-of-defense-for-policy-dr-colin-kahl-holds-press-briefing/> (stating that “I should also say, while none of us should minimize this issue, this is an issue the Ukrainians are going to have to grapple with regardless. If we had never made a decision on DPICM, the Ukrainians would be de-mining—it’s going to be a generational effort because of the amount of land mines, anti-personnel, anti-tank mines, cluster munitions that the Russians have been using. So this is an issue we have to tackle regardless.”).

¹¹³ *Ukraine Rapid Damage and Needs Assessment*, WORLD BANK at 125 (2023), <http://documents1.worldbank.org/curated/en/099184503212328877/pdf/P1801740d1177f03c0ab180057556615497.pdf>

¹¹⁴ Matthew Lee et al., *Pentagon Announces the U.S. Will Provide Cluster Munitions to Ukraine as Part of a New Military Aid Package*, PBS (July 7, 2023), <https://www.pbs.org/newshour/world/watch-live-pentagon-holds-briefing-amid-reports-u-s-will-send-cluster-munitions-to-ukraine> (“Ukrainian Parliament member Oleksandra Ustinova noted that Ukrainian forces have had to disable mines from much of the territory they are winning back from Russia. As part of that process, Ukrainians will also be able to catch any unexploded ordinance from cluster munitions.”). See also John Hudson & Anastacia Galouchka, *How Ukraine is Exploiting Biden’s Cluster Bomb Gamble*, WASH. POST (Aug. 21, 2023), <https://www.washingtonpost.com/world/2023/08/21/ukraine-cluster-bombs-biden/> (quoting Andriy Besedin, the head of the Kupyansk city military administration – “[c]leaning up unexploded ordinance is going to require a huge effort — not because of U.S. cluster munitions but because of the incredible amount of mines planted by the enemy.”).

¹¹⁵ Oleksii Reznikov (@oleksiireznikov), X (July 7, 2023, 3:13 PM), <https://x.com/oleksiireznikov/status/1677410470108471298>.

strengthen the Government of Ukraine’s demining and explosive ordnance disposal (EOD) capacity.”¹¹⁶

Lastly there are two political realities supporting the argument for the provision of cluster munitions to Ukraine. First is that the Russian military has been actively employing cluster munitions during its invasion of Ukraine.¹¹⁷ The cluster munitions Russia utilizes reportedly have a failure rate “between 30 and 40 percent,” while those provided by the US reportedly have a failure rate “not higher than 2.5 percent.”¹¹⁸ Therefore, while Russia may have grounds to react to other weapons platforms, it can hardly file political grievances over the provision of US cluster munitions, which are far safer than the ones being used by Russia against Ukrainian forces and civilian populations.

Second, somewhat counterintuitively, the longer the conflict goes on, the more likely other eastern European nations are to forgo political condemnation and begin considering placing cluster munitions and similar weapons in their own inventories. Since Russia’s war of aggression in Ukraine, Lithuania—which has never procured or used cluster munitions—voted 103 to 1, with three abstentions, to withdraw from the CCM due to national security concerns.¹¹⁹ Similarly, Lithuania, Latvia and Estonia have “considered withdrawing from the Ottawa Convention (against antipersonnel mines)... in order to bolster their defenses against Russian aggression.”¹²⁰

PART IV: INTERNATIONAL LAW

Various issues of international law have arisen in debates regarding the US decision to provide Ukraine with cluster munitions. The most often cited issues are whether international treaties, customs, or case law ban cluster munitions. Two less frequently discussed ancillary issues are the CCM’s original intent and its applicability to the conflict. A final question exists regarding whether the provision of weapons threatens standing treaties between the US and other allies.

116 See CONG. RSCH. SERV., *supra* note 8.

117 Julia Conley, ‘War Crimes’: Amnesty Probe Details Hundreds Killed by Russia’s Indiscriminate Bombing of Kharkiv, RAW STORY (June 13, 2022), <https://www.raw-story.com/war-crimes-amnesty-probe-details-hundreds-killed-by-russia-s-indiscriminate-bombing-of-kharkiv/>.

118 Press Briefing by Press Secretary Karine Jean-Pierre and National Security Advisor Jake Sullivan, WHITE HOUSE (July 7, 2023), <https://www.whitehouse.gov/briefing-room/press-briefings/2023/07/07/press-briefing-by-press-secretary-karine-jean-pierre-and-national-security-advisor-jake-sullivan-5/>.

119 Paulius Perminas, *Lithuania Leaves Convention Banning Cluster Munitions*, LITHUANIAN NAT’L RADIO AND TELEVISION (July 18, 2024), <https://www.lrt.lt/en/news-in-english/19/2321829/lithuania-leaves-convention-banning-cluster-munitions>.

120 Michael Birnbaum & Alex Horton, *Biden Approves Antipersonnel Mines for Ukraine, Undoing His Own Policy*, WASH. POST (Nov. 19, 2024), <https://www.washingtonpost.com/national-security/2024/11/19/biden-landmines-ukraine-russia/>.

A. Relevant International Treaties Do Not Ban Cluster Munitions

Two major international treaties, the Rome Statute and the 1977 Additional Protocol I to the Geneva Conventions (Additional Protocol I), are most typically cited when discussing cluster munitions.

The Rome Statute is often mentioned in debates regarding cluster munitions because it is the founding document of the International Criminal Court (ICC), the only permanent international court responsible for the prosecution of war crimes.¹²¹ However, the Rome Statute does not ban the use of cluster munitions.

Luis Moreno-Ocampo, Chief Prosecutor of the ICC, previously noted, “[t]he Rome Statute contains a list of weapons whose use is prohibited per se (Article 8(2)(b)(xvii)-(xx). Cluster munitions are not included in the list and therefore their use per se does not constitute a war crime under the Rome Statute.”¹²² Moreno-Ocampo goes on to note that “a war crime could, however, still be established where any weapon is employed in a manner satisfying the elements of other war crimes.”¹²³ However, as explained below, the use of cluster munitions against Russian military targets would fail to meet that threshold. Ukraine, a non-ratifying signatory to the Rome Statute, accepted the Court’s jurisdiction in 2014 and stated it would “cooperate with the Court without delay or exception.”¹²⁴ The exclusion of cluster munitions by the Rome Statute arguably supports Ukraine’s use of them and the US’s ability to transfer them legally.

Additional Protocol I is cited more often than the Rome Statute regarding cluster munitions because Art. 51 of the same bans indiscriminate attacks and defines them as:

- (a) [T]hose [attacks] which are not directed at a specific military objective;
- (b) those [attacks] which employ a method or means of combat which cannot be directed at a specific military objective;
- or (c) those [attacks] which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike

¹²¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998).

¹²² Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court (Feb. 9, 2006), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2010_02016.PDF. See also Patrycja Grzebyk, *Escalation of the Conflict Between Russia and Ukraine in 2022 in Light of the Law on Use of Force and International Humanitarian Law*, 41 POLISH Y.B. INT’L L. 145, 157 (2021).

¹²³ See Letter from Moreno-Ocampo, *supra* note 122.

¹²⁴ Press Release, International Criminal Court, Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed Since 20 February 2014 (Sept. 8, 2015).

military objectives and civilians or civilian objects without distinction.¹²⁵

Nearly every advocate for the banning of cluster munitions continues to argue that they are indiscriminate in nature. Some argue they are indiscriminate because they “[target] an area rather than a specific target,”¹²⁶ but more commonly, parties claim they are indiscriminate because “unexploded ordnance that is often left behind after an attack does not discriminate between opposing military forces and civilians.”¹²⁷

The first argument that targeting a large area is automatically indiscriminate is rarely seen because, so long as such munitions are directed at a location where *only* military assets are located, Art. 51 is not triggered. Section 5 of Art. 51, “drafted in response to the carpet bombings of World War II,”¹²⁸ explains that:

Among others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹²⁹

Ukraine “has pledged to only use [cluster munitions] to dislodge concentrations of enemy soldiers . . . They will not be used on Russian territory . . . They will be used only in areas where Russian military forces are concentrated in order to break through enemy defences.”¹³⁰ Therefore, this argument is specious at best if Ukrainian forces abide by their pledge.

125 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(4), 1125 U.N.T.S. 3.

126 See Hooper, *supra* note 25.

127 Brian L. Cox, *The Biden Administration’s Decision to Transfer Cluster Munitions to Ukraine: Legal and Policy Considerations*, LIEBER INST.: WEST POINT (July 21, 2023), <https://lieber.westpoint.edu/biden-administrations-decision-transfer-cluster-munitions-ukraine-legal-policy-considerations/>.

128 *Cluster Munitions and International Humanitarian Law: The Need for Better Compliance and Stronger Rules*, HUM. RTS. WATCH 1, 3 (2004). [hereinafter HUM. RTS. WATCH].

129 Additional Protocols to the Geneva Conventions, art. 51(5).

130 Anna Pruchnicka, *Ukraine Receives Cluster Munitions, Pledges Limited Use*, REUTERS (July 13, 2023), <https://www.reuters.com/world/europe/ukraine-receives-cluster-munitions-military-spokesperson-2023-07-13/>.

The argument that cluster munitions are indiscriminate because duds do not discriminate between combatants and non-combatants is more widely used by opponents. Among many others, Human Rights Watch,¹³¹ Amnesty International,¹³² and the International Committee of the Red Cross¹³³ have called for a ban on cluster munitions due to claims of this form of indiscrimination. They frequently liken them to landmines, which are more universally banned.¹³⁴

In its final report to the Prosecutor for the International Criminal Tribunal for the former Yugoslavia, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia addressed the comparison to landmines.¹³⁵ It noted that many groups argue that cluster munitions with high “dud” rates turn bomblets into antipersonnel landmines and that these groups argue that landmines are banned by customary international law. In response, the Committee explained that “whether antipersonnel landmines are prohibited under current customary law is debatable, although there is a strong trend in that direction. *There is, however, no general legal consensus that cluster bombs are, in legal terms, equivalent to antipersonnel landmines.*”¹³⁶ The

131 See HUM. RTS. WATCH, *supra* note 128, at 2 (stating that, “Cluster munitions raise concerns under most of the definitions. These weapons are prone to being indiscriminate, particularly when certain methods of attack or older or less sophisticated models are used.”). See also *Cluster Munitions: New Use, Transfers Test International Ban*, HUM. RTS. WATCH (Sept. 9, 2024), <https://www.hrw.org/news/2024/09/09/cluster-munitions-new-use-transfers-test-international-ban>.

132 *Ukraine: US Transfer of Cluster Munitions to Ukraine Undermines International Efforts*, AMNESTY INT’L (July 7, 2023), <https://www.amnesty.org/en/latest/news/2023/07/ukraine-us-plan-to-transfer-cluster-munitions-to-ukraine-undermines-international-efforts-to-safeguard-civilians-from-indiscriminate-weapons/> (stating that, “Amnesty International has long stressed that cluster munitions are inherently indiscriminate weapons which have caused untold harm to civilians across the world – in some cases decades after conflicts have ended.”).

133 Gilles Carbonnier, *Statement by ICRC Vice President at the 11th Meeting of States Parties to the Convention on Cluster Munitions*, INTL’ COMM. OF THE RED CROSS (Sept. 19, 2023), <https://www.icrc.org/en/document/cluster-munitions-ending-the-scourge-of-these-treacherous-weapons> (stating that “We all have a responsibility to put an end to the scourge of these treacherous weapons.”).

134 In November 2024, the Biden administration announced that it would authorize the provision of antipersonnel land mines to Ukraine. The decision resulted in similar protests from humanitarian organizations. US officials have, likewise, made similar arguments justifying the decision, citing the need to provide Ukraine with critical weapons systems it has been requesting for years as well as steps being taken to attempt and minimize the impact on civilian populations. See Secretary of Defense Lloyd J. Austin III Holds an On-Camera, On-the-Record Press Briefing in Laos, U.S. DEP’T OF STATE (Nov. 20, 2024), <https://www.defense.gov/News/Transcripts/Transcript/Article/3972916/secretary-of-defense-lloyd-j-austin-iii-holds-an-on-camera-on-the-record-press/>. See also Michael Birnbaum & Alex Horton, *Biden Approves Antipersonnel Mines For Ukraine, Undoing His Own Policy*, WASH. POST (Nov. 19, 2024), <https://www.washingtonpost.com/national-security/2024/11/19/biden-landmines-ukraine-russia/>.

135 Comm. Established to Review the NATO Bombing Campaign Against the Fed. Republic of Yugoslavia, Final Report to the Prosecutor, IV(a)(3), <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal#IVA3>, (emphasis added).

136 *Id.*

Committee did, however, note that “cluster bombs must be used in compliance with the general principles applicable to the use of all weapons.”¹³⁷

Thomas Cavanaugh considers an interesting perspective in his introduction of a concept he describes as “temporal indiscriminateness,” which he contrasts with “spatial indiscriminateness.”¹³⁸ Spatial indiscriminateness occurs when a weapon is not or cannot be targeted at a combatant and is fired into an area where it may haphazardly hit combatants or non-combatants; Cavanaugh uses the example of “unguided rockets and missiles (such as the Qassam used by Hamas) which cannot be targeted.”¹³⁹ He explains that weapons that will “haphazardly hit someone or thing somewhere in an indefinite area occupied by combatants, non-combatants, military targets, and non-military buildings cannot be used by one who aspires to abide by the principle of discrimination,” not because they are aimed at non-combatants but, rather, because they are “not aimed at all.”¹⁴⁰

Cavanaugh then proposes that weapons that cannot be aimed at a specific military target at a particular time are similarly indiscriminate in a temporal sense. He explains that cluster bombs constitute a temporally indiscriminate weapon because “while designed to explode shortly after deployment, their high failure rate leads to numerous submunitions becoming, in effect, land mines that explode at a later time, often upon subsequent contact with whoever happens upon them, be it enemy soldiers, one’s troops, or civilians.”¹⁴¹

The concept of temporal indiscriminateness, as proposed by Cavanaugh, has rarely been so precisely defined. On its face, it is the logic through which most proponents of a cluster munition ban believe that cluster munitions are indiscriminate. However, while this novel definition is precise and valuable in pointing out a disconnect between proponents and opponents of cluster munitions regarding discriminateness, it has never been mentioned in international law. Arguably, the only generally accepted definition of discriminateness in reference to the law of armed conflict is what Cavanaugh calls spatial discriminateness.

Lastly, one final question regarding claims that cluster munitions are indiscriminate—and therefore banned under Additional Protocol I—is the existence of the CCM. Traditional notions of statutory intent suggest

¹³⁷ *Id.* (Admittedly, this Committee Report came out before the establishment of the CCM. However, as noted in Part IV(c) of this Note, the CCM does not constitute customary international law).

¹³⁸ See generally Thomas A. Cavanaugh, *Temporal Indiscriminateness: The Case of Cluster Bombs*, 16 SCI. & ENGINEERING ETHICS 135 (2010).

¹³⁹ *Id.* at 138.

¹⁴⁰ *Id.* at 139.

¹⁴¹ *Id.*

that the need to ban cluster munitions means that they were not already prohibited. If, under Additional Protocol I, international law had already banned cluster munitions due to their being indiscriminate, the CCM would have served no purpose. Section IV(c) will expand further on arguments based on the CCM.

B. International Caselaw Does Not Ban Cluster Munitions

Arguably, the leading international case law discussing the use of cluster munitions was seen in the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁴² There, people such as Martin Martić¹⁴³ and Momcilo Perisic¹⁴⁴ were charged with having used cluster munitions against civilian populations. In judgments against both men, the Appeals Chambers cited the arguments against Martić.¹⁴⁵

In *Martić*, “President Milan Martić of the self-proclaimed Republic of Serb Krajina allegedly ordered the latter ‘knowingly and willfully’ to ‘terrorise civilians’” by launching cluster munitions into civilian areas of Zagreb.¹⁴⁶ The Chamber regarded the use of cluster munitions as showing that Martić chose to “deliberately attack the civilian population because the rocket was inaccurate, it landed in an area with no military objectives nearby, it was used as an antipersonnel weapon launched against the city of Zagreb and the accused indicated he intended to attack the city as such.”¹⁴⁷ Therefore, the Chamber decided that the use of cluster munitions was not “to hit military targets but to terrorize the civilians of Zagreb.”¹⁴⁸ Commentators would elaborate on this by pointing out that the

142 See Wiebe, *supra* note 30 (An argument could be made that the 2004 Eritrea-Ethiopia Claims Commission (“EECC”), which held Eritrea liable for civilians killed by cluster munitions in Ethiopia in 1998, is another notable case. For multiple reasons, this paper chooses to focus on the Martić ruling. Not only did the EECC decision come in response to events that took place nearly a decade before the passing of the CCM, additionally, “the EECC did not overtly question the use of cluster munitions near civilian areas... The EECC dismissed charges of intentional targeting of civilians; [meanwhile] the ICTY used the very nature of cluster munitions as evidence of intent to target civilians (and in the alternative held that the cluster munitions were indiscriminate and disproportionate as used.)”).

143 Prosecutor v. Martić, IT-95-11-T, Judgment, (June 12, 2007), <https://www.icty.org/x/cases/martic/tjug/en/070612.pdf>.

144 See Gabriel Partos, *Analysis: Perisic Case is ‘Key Link’*, BBC (Mar. 8, 2024), <http://news.bbc.co.uk/2/hi/europe/4327863.stm>. See also Prosecutor v. Perisic, IT-04-81-PT, (Feb. 5, 2008), <https://www.icty.org/x/cases/perisic/ind/en/per-sai080205e.pdf>.

145 Prosecutor v. Martić, IT-95-11-R61, Decision, (Mar. 8, 1996), <https://www.icty.org/x/cases/martic/tdec/en/960308.pdf>; see also Prosecutor v. Perisic, IT-04-81-PT, Decision, (Sept. 6, 2011), https://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf. See also Prosecutor v. Perisic, IT-04-81-PT, Decision, (Sept. 6, 2011), https://www.icty.org/x/cases/perisic/tjug/en/110906_judgement.pdf.

146 See Docherty, *supra* note 32, at 72.

147 ICTY Prosecutor’s Office, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (June 13, 2000), <http://www.icty.org/sid/10052>.

148 See Prosecutor v. Martić, IT-95-11-R61, *supra* note 145, at ¶ 31.

cluster munitions in question, Orkan rockets fitted with cluster munition warheads, were never “intended for deployment in populated areas.”¹⁴⁹

In the Rule 61 Decision, Trial Chamber I said, “there exists no formal provision forbidding the use of cluster bombs in armed conflicts,” but that “even if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law.”¹⁵⁰ The rulings suggest there is no blanket international custom against cluster munitions. The courts convicted these “commanders for war crimes due to their use of cluster munitions without ruling on whether the weapons were per se illegal.”¹⁵¹ It was *the way* they used cluster munitions that constituted a violation of the laws or customs of war.¹⁵² Therefore, if Ukraine abides by its assurances that cluster munitions shall only be used against Russian military targets, the precedents set forth by the ICTY would not apply.¹⁵³

C. *The CCM Does Not Constitute International Custom*

The establishment of the Mine Ban Treaty and the CCM partially succeeded due to arguments that using such weapons violate the fundamental principles of International Humanitarian Law and, potentially, a norm of *jus cogens*.¹⁵⁴ This argument again draws from the prohibition on indiscriminate attacks found in Additional Protocol I. The theory becomes that “knowingly bombarding an area with cluster bombs coupled with knowledge of their substantial dud rate fails to discriminate military

149 Wiebe, *supra* note 30, at 930 (“[The ORKAN] is designed for use outside populated areas. The reason for this is primarily that its effects in populated areas, regardless of the fact that there might be military targets in populated areas, there is a high probability that parts of the rocket should be dispersed and affect the civilian population, especially when the civilian population has not been evacuated on time or has not taken refuge or shelter. So, I would like to mention once again ORKAN is not intended for deployment in populated areas.”).

150 See Prosecutor v. Martić, IT-95-11-R61, *supra* note 145, at ¶ 18.

151 Daniel Joseph Raccuia, *The Convention on Cluster Munitions: An Incomplete Solution to the Cluster Munition Problem*, 44 VAND. J. TRANSNAT’L L. 465, 467 (2011).

152 See Summary of Judgment: Prosecutor v. Martić, IT-95-11-R61, <https://www.icty.org/x/cases/mart-ic/press/en/PR1162a%20Summary%20of%20Judgement%20for%20Milan%20Mart.pdf> (explaining that a particular non-guided rocket launcher was indiscriminate not due to its basic design, but rather by virtue of its characteristics and the firing range it was used at in a specific instance.)

153 *Id.* at 482 (“The defense argued that the attacks were aimed at Croatian governmental buildings, such as the presidential palace and Ministry of Defense. However, the rockets came down in areas filled with civilians, killing and wounding about two hundred... Based on this evidence, the court determined that the use of the rockets on urban targets necessarily constituted an attack on the civilian population, and thus found Martić guilty. Although the court did not go so far as to find the use of cluster munitions in all situations to be a war crime, it did send the message that directing them against targets in civilian population centers is illegal under the principles of IHL.”).

154 Helena Aigner, *Thesis: Consequences of Cluster Munitions on the Rights of the Child*, U. SEVILLE (2014–2015), <https://repository.gchumanrights.org/server/api/core/bitstreams/1b8210e4-0b8d-42d3-84d5-6de2e8279260/content>.

targets from civilians,” thus violating portions of Article 51(4)(b) of Protocol I that refer to “blind” weapons that “cannot be directed at a specific military objective.”¹⁵⁵ However, as briefly noted in Part IV(a), the passing of the CCM was not enough to elevate it to the status of international custom simply because it was based on Additional Protocol I.

Widely agreed-upon standards can result in international customary norms:

International agreements constitute practice of states and as such can contribute to the growth of customary law. . . [and] some multilateral agreements may come to be law for non-parties *that do not actively dissent*. That may be the effect where a multilateral agreement is designed for adherence by states generally, is widely accepted, and *is not rejected by a significant number of important states*.¹⁵⁶ (emphasis added.)

However, “a rule of customary law is not binding on any state indicating its dissent during the development of the rule is an accepted application of the traditional principle that international law essentially depends on the consent of states.”¹⁵⁷ Therefore, this argument fails in its application to the present discussion. Not only did many “important states”—the United States, China, and Russia among them—never ratify the CCM,¹⁵⁸ the United States has also, through statements and actions, refused to agree to a ban on cluster munitions.

As mentioned in Part I(d), while “the United States [shared] the humanitarian concerns of those” involved in the 2007-2008 Oslo Process that created the CCM, at that time, the Pentagon also stated that “cluster munitions have demonstrated military utility, and their elimination from U.S. stockpiles would put the lives of our soldiers and those of our coalition partners at risk.”¹⁵⁹ Further, the US State Department conveyed concerns about the possible impact of the CCM on “joint military operations involving the US and States Parties to the convention, with the US seeking to ensure that [the CCM] did not inhibit its ability to employ cluster munitions in NATO and other coalition military operations.”¹⁶⁰

155 Thomas Michael McDonnell, *Cluster Bombs Over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 79 (2002).

156 See RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102, cmt. i (AM. L. INST. 1987).

157 RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102, Rep. Note 2, (AM. L. INST. 1987).

158 See Convention on Cluster Munitions: Universalization Status by Region, CONVENTION ON CLUSTER MUNITIONS, <https://www.clusterconvention.org/wp-content/uploads/2023/10/1.-CCM-Universalization-Status-by-Region-TO-PRINT.pdf>.

159 Kevin Sullivan & Josh White, *111 Nations, Minus the U.S., Agree to Cluster Bomb Ban*, WASH. POST (May 29, 2008), <https://www.washingtonpost.com/wp-dyn/content/story/2008/05/28/ST2008052803176.html>.

160 See generally Int'l Campaign to Ban Landmines, *Banning Cluster Munitions: Government Policy and Practice* 1, 254 (2009) <https://www.the-monitor.org/reports/banning-cluster-munitions-government-policy-and-practice>.

Consequently, the US did not participate in—or even observe—the Oslo Process.¹⁶¹

To further demonstrate its persistent objection to the CCM, since 2015, the US has abstained from all annual votes on UN General Assembly resolutions calling for nations to join or promote the convention.¹⁶²

The US's refusal to participate in the Oslo Process and its subsequent consistent abstentions from votes supporting it demonstrate active and persistent US dissent with the agreements outlined in the CCM. As such, even if the CCM were to be considered an international norm, the US would not be bound by it nor the standards it sets forth.

Admittedly, the US's lack of participation in any proceedings related to bans on cluster munitions has not prevented it from taking steps to address international concerns regarding the threat posed by the munitions to civilian populations. As noted in Part I, in May 2008, three weeks after the creation of the CCM, the DoD acknowledged concerns raised by the CCM, releasing a policy that “recognize[d] the need to minimize the unintended harm to civilians and civilian infrastructure associated with unexploded ordnance from cluster munitions.”¹⁶³ The DoD then took steps outside of the CCM to attempt to address the dangers posed by cluster munitions, announcing the policies previously mentioned in Part I. Except for a 2009 strike in Yemen, the US has not used cluster munitions since 2003 during the Iraqi Freedom campaign.¹⁶⁴

While the US's internal decision to drastically change its cluster munitions to lower the dud rate and limit their use in combat shows it agrees with the spirit of the CCM, these changes cannot be considered to

161 *Id.*

162 See 70th Session of the UNGA, Official Records, A/70/PV.67, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/406/51/PDF/N1540651.pdf?OpenElement>. See also 71st Session of the UNGA, Official Records, A/71/PV.51, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/413/39/PDF/N1641339.pdf?OpenElement>; 72nd Session of the UNGA, Official Records, A/72/PV.62, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/411/90/PDF/N1741190.pdf?OpenElement>; 73rd Session of the UNGA, Official Records, A/73/PV.45, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/413/74/PDF/N1841374.pdf?OpenElement>; 74th Session of the UNGA, Official Records, A/74/PV.46, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/405/38/PDF/N1940538.pdf?OpenElement>; 75th Session of the UNGA, Official Records, A/75/PV.37, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/343/94/PDF/N2034394.pdf?OpenElement>; 76th Session of the UNGA, Official Records, A/76/PV.45, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/372/21/PDF/N2137221.pdf?OpenElement>; 77th Session of the UNGA, Official Records, A/77/385, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/690/12/PDF/N2269012.pdf?OpenElement>.

163 See Robert Gates, *DoD Policy on Cluster Munitions and Unintended Harm to Civilians*, DEP'T OF DEF. (June 19, 2008) (In the same policy memorandum from Secretary of Defense Robert Gates, while conceding that cluster munitions pose a threat to civilian populations which should be minimized when possible, it was noted that “cluster munitions are legitimate weapons with clear military utility... [and] an integral part of US force capabilities.”).

164 *US Embraces Cluster Munitions*, HUM. RTS. WATCH (Dec. 1, 2017), <https://www.hrw.org/news/2017/12/01/us-embraces-cluster-munitions>.

represent agreement to the convention's terms, nor can they be treated as implicating American acceptance of new international law.¹⁶⁵ The fact that the US reversed course under Trump,¹⁶⁶ and again under Biden,¹⁶⁷ underscores this reality.

Further evidence that the CCM is not international custom is that, during the Oslo Process, parties to the Convention agreed to include Article 21, which allows States Party to the CCM to “engage in military cooperation and operations with States not party to [the] Convention that might engage in activities prohibited to a State Party.”¹⁶⁸ During the CCM's passage, it was noted that this Article made the Convention markedly different in one way from the 1997 Ottawa Convention on anti-personnel landmines: it contained “a unique article permitting states-parties to engage in military cooperation and operations with non-states-parties, even when cluster munitions are used, as long as a state-party does not request the use of the weapons.”¹⁶⁹

“Prior to the conference, the United States suggested that the treaty might make it impossible for the United States to cooperate on military and humanitarian relief missions because US ships and forces carried cluster munitions.”¹⁷⁰ Art. 21, “proposed by Germany, allowed NATO member states, including Germany, Italy, and the United Kingdom, to sign the Convention without hampering their ability to operate alongside American forces.”¹⁷¹

The importance of Art. 21 to the US was noted in cables to embassies worldwide. Cables sent to various posts explained that without Art. 21,¹⁷² the CCM “could cause constraints on the ability of US military forces to store cluster munitions on or transit through the territories of States

165 See Statute of the International Court of Justice, art. 38(1) (June 26, 1945) (entered into force Oct. 24, 1945), <https://www.icj-cij.org/statute> (stating that sources of international law generally include that which is created by international conventions establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and at times judicial decisions and commentary from qualified publicists.).

166 See Shanahan, *supra* note 62.

167 See Kirby Press Briefing, *supra* note 67.

168 Convention on Cluster Munitions art. 21, Dec. 3, 2008, 2688 U.N.T.S. 113.

169 Jeff Abramson, Treaty Analysis: *The Convention on Cluster Munitions*, ARMS CONTROL TODAY (2008), <https://www.armscontrol.org/act/2008-12/treaty-analysis-convention-cluster-munitions>.

170 *Id.*

171 See Raccuia, *supra* note 151, at 478.

172 In writing this note, the author chose to utilize US State Department cables, which were released through Wikileaks. Doing so does not condone the release of protected, sensitive, confidential, or otherwise classified materials. However, because these cables have been used in other academic works to discuss the nature of the behind-the-scenes negotiations that produced the CCM, it was necessary to include their content to establish that at no time did the US expect the CCM to constitute international custom. Further, the cables demonstrate that many of the States Party to the CCM actively worked to ensure that it would not interfere with their military activities with the US.

Parties, or to undertake combined operations with States Parties' militaries."¹⁷³ Cables to posts in Germany¹⁷⁴ and Norway¹⁷⁵ included notes expressing US appreciation for the inclusion of Art. 21. A cable to the post in Australia also expressed US appreciation for "Australia's efforts to ensure military cooperation will remain smooth" and for that nation's briefings of its legal interpretation of Art. 21 at a CCW meeting of the Group of Governmental Experts.¹⁷⁶

Diplomatic efforts surrounding Art. 21's inclusion in the CCM are important. First, they bolster arguments that the US actively opposed the CCM's constraints. Second, and possibly more importantly, they illustrate how nations were actively working to ensure the CCM would not interfere with joint operations with non-signatory countries. This reveals that many of the CCM's drafters and signatories did not expect the CCM to become tantamount to international norms.

Similar to a court's consideration of statutory intent in deciding how to interpret domestic law:

"[s]ome authors argue that the most important thing in determining whether a treaty can become part of customary international law is the intent of the parties to the treaty ... that the intent of the treaty can be ascertained from the language of the treaty itself or from an examination of the travaux préparatoires."¹⁷⁷

Here, the mere inclusion of Art. 21 demonstrates an intent by many nations that the CCM serve to bind only its signatories and still preserve their ability to participate with allied nations that chose to refrain from signing onto the Convention. Further, the cables from the US State Department, which suggest that signatory countries actively acted at the

¹⁷³ *Demarche to Italy, Spain, and Qatar Regarding Convention on Cluster Munitions*, STATE DEP'T CABLE (Nov. 26, 2008), https://wikileaks.org/plusd/cables/08STATE125632_a.html; *Demarche to NATO and Coalition Partners on Convention on Cluster Munitions*, STATE DEP'T CABLE (Dec. 1, 2008), https://wikileaks.org/plusd/cables/08STATE126440_a.html.

¹⁷⁴ *Demarche to Germany Regarding Convention on Cluster Munitions*, STATE DEP'T CABLE (Nov. 26, 2008), https://wikileaks.org/plusd/cables/08STATE125631_a.html.

¹⁷⁵ *Demarche to Norway on Convention on Cluster Munitions*, STATE DEP'T CABLE (Dec. 1, 2008), https://wikileaks.org/plusd/cables/08STATE125627_a.html.

¹⁷⁶ *Demarche to Australia on Convention on Cluster Munitions*, STATE DEP'T CABLE (Nov. 26, 2008), https://wikileaks.org/plusd/cables/08STATE125625_a.html. See also *United States Cluster Munition Ban Policy*, LANDMINE & CLUSTER MUNITION MONITOR (Aug. 25, 2022), <http://www.the-monitor.org/en-gb/reports/2022/united-states/cluster-munition-ban-policy.aspx#ftn8> ("US Department of State cables made public by Wikileaks show how the US attempted to influence its allies, partners, and other states during the process in order to affect the outcome of the negotiations, especially with respect to the issue of 'interoperability...' The diplomatic cables also showed that the US has worked extensively to influence national implementation legislation and interpretation of the Convention on Cluster Munitions, including on issues of foreign stockpiling and transit. . .").

¹⁷⁷ Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 81 (1996).

behest of the US to include Art. 21, serve as recordings of the negotiations during the CCM's creation.¹⁷⁸ Those recordings demonstrate that at the time of its creation, the CCM intentionally included a clause rejecting the notion that it would create customary international law.

D. Nations Fighting in Self-Defense Were Not the Intended Target of the CCM

A more nuanced issue is that Ukraine, fighting for its sovereignty against an invading force, can be differentiated from the conflicts to which the CCM responded. The sad history of cluster munitions and the devastating legacy they leave behind long after a conflict has ended has almost universally revolved around wars where the aggressor, not the defender, used these weapons with disregard for the long-term dangers they pose to civilian populations.

Examples of cluster munitions being employed in a way that led to civilian deaths include use by the "Soviet Union and Germany during WWII, by the United States in Laos, [by the United States] during Operation Desert Storm in Iraq, by Sudan in Equatoria, by Russia in Chechnya, and by NATO during the Kosovo Conflict."¹⁷⁹ Additionally, the 2006 war between Israel and Hezbollah, which saw "both sides of the conflict deploying the weapons in irresponsible ways" was a significant influence in the passing of the CCM.¹⁸⁰ In each of those conflicts, the decision to use cluster munitions was made by an invading force; thus, in each of those conflicts, the nation that was bombed had no choice in a decision-making process that left its civilian population at risk.

In the instant case, however, a sovereign nation defending itself against an illegal invasion chose to utilize a weapon that poses risks and consequences for its population. The question becomes whether Ukraine is justified in using that weapon against an invading nation that, as of October 2024, inflicted over 30,000 civilian casualties, internally displaced 3.7M people, forced 6.5M people to flee, and left 14.6M people needing humanitarian aid.¹⁸¹

"Natural law theorists writing in the nineteenth century often discussed self-defense under the rubric of 'self-preservation' and the 'necessity of self-preservation.' This provided the normative ground for the use

¹⁷⁸ See State Department Cables, *supra* notes 173-76.

¹⁷⁹ William H. Boothby, *Articles of War: Cluster Munitions and the Ukraine War*, LIEBER INST.: WEST POINT (Feb. 28, 2022), <https://lieber.westpoint.edu/cluster-munitions-ukraine-war/>.

¹⁸⁰ See Wiebe, *supra* note 30, at 898.

¹⁸¹ *Global Conflict Tracker: War in Ukraine*, COUNCIL ON FOREIGN RELS. (Oct. 16, 2024), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine>.

of military force to repel an unjust attack.”¹⁸² This concept was codified by the UN Charter, which states that nothing in the Charter “shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹⁸³ Concerning the Russo-Ukrainian conflict, it seems Ukraine is fully justified in exercising its natural or inherent right to self-defence.¹⁸⁴

In modern times, “the conditions for the exercise of the customary law right of self-defence have crystallized into a more concise form . . .” a nation must show that a defensive action was necessary to protect itself or its citizens and that the action was proportional to the attack.¹⁸⁵

The scope of the contemporary necessity criterion is notoriously indeterminate. . . the criterion of “necessity” in customary international law is not to be viewed as a requirement of “absolute necessity” or “do-or-die.” Nonetheless, it can still be said that necessity is only established if the action is to be considered a “last resort.” A State can use force in self-defence only if there is no other option open to it to defend itself, yet this need not be to defend itself from total destruction.¹⁸⁶

Ukraine’s right to self-defence fits the strictest interpretation of the first prong: necessity. In the first days of the invasion, Russian forces made it apparent that this was a war of aggression;¹⁸⁷ they were not

¹⁸² Jens David Ohlin, *The Doctrine of Legitimate Defense*, 91 INT’L L. STUD. 119, 128-29 (2015).

¹⁸³ U.N. Charter art. 51.

¹⁸⁴ See Allen S. Weiner, *Russia’s Invasion of Ukraine and the Laws of War*, STAN. L. BLOG (Feb. 21, 2024), <https://law.stanford.edu/2023/02/21/stanfords-allen-weiner-on-russias-invasion-of-ukraine-and-the-laws-of-war/> (The sole counterargument to this position is that the Russian invasion of Ukraine was based on a “claim that ethnic Russians were being subjected to atrocities by the Ukrainian government.” However, first, it is debatable “whether states can use force to protect their nationals in a foreign country,” and second, “there seems to simply be no factual support” for such claims regarding Russian nationals in Ukraine.).

¹⁸⁵ Eustace Chikere Azubuike, *Probing the Scope of Self Defense in International Law*, 17 ANN. SURV. INT’L & COMP. L. 129, 145-46 (2011).

¹⁸⁶ James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO INT’L. COMP. POL’Y. & ETHICS L. 429, 457 (2006).

¹⁸⁷ See Patrick Butchard, *Research Briefing: Conflict in Ukraine: A Special Tribunal on the Crime of Aggression*, U.K. HOUSE OF COMMONS LIBR. (Feb. 22, 2024), <https://researchbriefings.files.parliament.uk/documents/CBP-9968/CBP-9968.pdf>. (After Russia invaded Ukraine on 24 February 2022, some states were quick to label this as an act of aggression in their immediate reactions. On 2 March 2022 the UN General Assembly passed a Resolution titled “Aggression against Ukraine”. . . [However, the] International Criminal Court (ICC) cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state has ratified and accepted the Court’s jurisdiction over that crime, or where the UN Security Council refers the situation to the Court. Neither Russia nor Ukraine are parties to the Rome Statute, and Russia is able to veto any

attempting to only “demilitarize and denazify Ukraine”¹⁸⁸ and regions of Ukraine, but also planned to invade Kyiv and overthrow the government.¹⁸⁹ With self-defense being necessary, the question of the use of cluster munition then also turns on necessity.

Given the dynamics of the conflict and Ukraine’s lack of weaponry, cluster munitions are well-suited to fit the Ukrainian military’s needs. Running low on munitions, Ukraine sought cluster munitions to compensate for advantages held by Russia.¹⁹⁰ Reportedly, they have been utilized to some success, with Ukrainian forces stating that cluster munitions “have helped them retake Russian positions that they had struggled to reach. The munitions have been coupled with a change in tactics, which has allowed Ukrainian troops to advance within striking distance of the main Russian defensive lines in some places.”¹⁹¹ Ryan O’Leary, a US Army veteran fighting on behalf of Ukraine, noted that the cluster munitions made a marked difference, that “when the cluster munitions got over there, we used them effectively . . . The cluster munitions worked great to break up the assault. The problem is, we ran out of them within months.”¹⁹²

Proportionality, the second requirement for warfare in self-defense can be assessed using the following question: Was the force taken in response commensurate with either “(1) the scale and means of the attack

decision at the UN Security Council. . . Because the ICC does not have jurisdiction over the crime of aggression in Ukraine, a number of politicians and experts signed a combined statement and declaration calling for a “Special Tribunal for the punishment of the crime of aggression against Ukraine.”).

188 See Center for Preventative Action, *War in Ukraine*, COUNCIL ON FOREIGN RELS. (Mar. 6, 2024), <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine> (stating that, “On February 24, 2022, during a last-ditch UN Security Council effort to dissuade Russia from attacking Ukraine, Putin announced the beginning of a full-scale land, sea, and air invasion of Ukraine, targeting Ukrainian military assets and cities across the country. Putin claimed that the goal of the operation was to demilitarize and denazify Ukraine and end the alleged genocide of Russians in Ukrainian territory.”).

189 Victor Andrusiv, *Putin’s War of Vanishing Goals*, THE WILSON CTR. (Feb. 21, 2023), <https://www.wilsoncenter.org/blog-post/putins-war-vanishing-goals> (Andrusiv argues that as Russia’s invasion of Ukraine was met with resistance, Putin has been forced to repeatedly alter the operation’s goals. He explains that “The defeat of Russian forces in the battles of Kyiv and Kharkiv put an end to talk of ‘denazification’ and ‘demilitarization’” and that “that the new goals are to hold on to the seized territories.” However, simply because Putin’s official reasons for invading have changed throughout the course of the war does not alter the reality that this was an invasion of a sovereign nation by an outside aggressor.).

190 See Editorial Board, *Biden Is Right on Cluster Bombs for Ukraine*, WALL ST. J. (July 9, 2023), https://www.wsj.com/articles/biden-is-right-on-cluster-bombs-for-ukraine-russia-war-weapons-military-aid-defense-f22667d3?mod=hp_opin_pos_3#cxrecs_s.

191 Ian Lovett & Nikita Nikolaienko, *U.S.-Made Cluster Munitions Fuel Ukrainian Counteroffensive*, WALL ST. J. (Aug. 8, 2023), <https://www.wsj.com/articles/u-s-made-cluster-munitions-fuel-ukrainian-counteroffensive-c45c305f>.

192 Rebecca Kheel, *‘Days Where We Wouldn’t Even Shoot’: US Vet Fighting in Ukraine Pleads with Congress to Pass Stalled Aid*, MILITARY.COM (Mar. 13, 2024), <https://www.military.com/daily-news/2024/03/13/days-where-we-wouldnt-even-shoot-us-vet-fighting-ukraine-pleads-congress-pass-stalled-aid.html>.

being responded to (in terms of destruction of life and property) or (2) the defensive requirements of the defending state (meaning that the measures taken are proportional to the ultimate goal of abating the attack suffered)?”¹⁹³ The Russian use of cluster munitions, which have far higher dud rates against civilian targets, suggests that Ukraine’s use of similar weapons against military targets is proportionate according to the first prong.¹⁹⁴ The Ukrainian lack of other effective munitions and their requirement for effective weapons to take back occupied land arguably demonstrates proportionality according to the second prong.

Then Ukrainian Defense Minister Reznikov addressed these factors when welcoming US cluster munitions, saying, “We need to inflict losses on the enemy—war criminals, rapists and looters—who are occupying our territories. The more losses we inflict on them the more lives of Ukrainian people we will be able to save. . . .”¹⁹⁵

Reznikov also—unlike combatants in previous conflicts where the use of cluster munitions was considered—stipulated rules on how Ukrainian forces would use them. He noted “principles which [Ukraine] will abide by and which [it has] clearly communicated to [its] partners.”¹⁹⁶ It will only use cluster munitions to push Russian forces out, not use them outside of its borders or in urban areas, keep a record of the locations where they will be used for de-mining purposes, and provide transparent records to partners regarding Ukrainian use of cluster munitions.¹⁹⁷

After the delivery of US cluster munitions to Ukraine, Deputy Pentagon Press Secretary Singh said Ukraine had been fulfilling its promises, remarking that “the way that the Ukrainians are employing the DPICMs on the battlefield is responsible. They are keeping track of where they are going,” to avoid civilian casualties.¹⁹⁸

193 See Green, *supra* note 186, at 457.

194 See *Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing*, U.S. STATE DEP’T (July 7, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3452000/under-secretary-of-defense-for-policy-dr-colin-kahl-holds-press-briefing/> (stating that, “The DPICM ammunition we are delivering to Ukraine will consist only of those with a dud rate less than 2.35 percent. Compare that to Russia, which has been using cluster munitions across Ukraine with dud rates of between 30 and 40 percent.”) See also Sébastien Roblin, *It Sure Seems Like North Korea Gave Russia 500,000+ Artillery Shells to Use in Ukraine*, POPULAR MECHANICS (Nov. 7, 2023), <https://www.popularmechanics.com/military/weapons/a45704486/north-korea-gave-russia-artillery-shells-to-use-in-ukraine/> (stating that, the munitions that Russia is believed to be importing from North Korea could also have dud rates as high as 25%).

195 See Reznikov, *supra* note 101.

196 *Id.*

197 *Id.*

198 Sabrina Singh, *Deputy Pentagon Press Secretary, Holds a Press Briefing With Assistant Secretary Ratner and Admiral Aquilino*, U.S. STATE DEP’T (Oct. 17, 2023), <https://www.defense.gov/News/Transcripts/Transcript/Article/3560482/sabrina-singh-deputy-pentagon-press-secretary-holds-a-press-briefing-with-assis/>; see also Max Boot, *Putin Fixates On Imaginary Foes While Terrorists Attack Moscow*, WASH. POST (Mar. 23,

Admittedly, in May 2024, Ukraine—with permission from the US—began conducting limited strikes with US munitions against targets on Russian soil.¹⁹⁹ At the time this note was written, there was at least one alleged Ukrainian use of DPICMs against military targets within Russia: a HIMARS strike utilizing M30 GMLRS rockets carrying a DPICM payload.²⁰⁰ However, even if this strike occurred within Russian territory, because it was on a military target deemed to be part of the Russian war of aggression against Ukraine, attacking it was still arguably part of an act of self-defense. This reality was pointed out by NATO Secretary General Jens Stoltenberg, who noted that at a time when the war is occurring “close to the border, to deny Ukraine the possibility of using these weapons against legitimate military targets on Russian territory makes it very hard for them to defend themselves.”²⁰¹ So long as this strike remained necessary for Ukraine’s defense and was proportional to the weapons used against Ukraine, it would still meet the aforementioned legal criteria.

Ukraine’s careful utilization of cluster munitions addresses arguments by observers that a nation fighting for its right to exist should not obtain and use weapons when it is aware of their inherent risk. Ukraine, as a rare exception that has chosen to utilize cluster munitions while knowing the risks to its own population, should be given latitude in the face of an impossible decision: to expose civilians to risks related to cluster munitions, or allow Russia to conquer its territory and oppress its people.²⁰²

2024), <https://www.washingtonpost.com/opinions/2024/03/23/moscow-terror-attack/> (stating that “Ukraine, like America, is a rule-of-law democracy that does its best to minimize the civilian toll from its military actions. The Ukrainians have targeted Russian infrastructure (such as oil refineries) that is being used to support the invasion of Ukraine, but they are not engaging in terror bombing of Russian cities. By contrast, that is precisely what Russia is doing to Ukrainian cities — as Russia has previously terror-bombed civilians in Chechnya and Syria.”).

¹⁹⁹ Alex Marquardt et al., *Biden Gives Ukraine Permission to Carry Out Limited Strikes Within Russia Using US Weapons*, CNN (May 31, 2024), <https://www.cnn.com/2024/05/30/politics/biden-ukraine-limited-strikes-russia/index.html>.

²⁰⁰ Brendan Cole, *Video Shows Kyiv’s First Upgraded HIMARS Cluster Strike on Russian Troops*, NEWSWEEK (June 24, 2024), <https://www.newsweek.com/russia-ukraine-himars-troops-1916429>.

²⁰¹ Peter Dickinson, *‘The Time Has Come’: Calls Grow to Allow Ukrainian Strikes Inside Russia*, ATL. COUNCIL (May 28, 2024), <https://www.atlantic-council.org/blogs/ukrainealert/the-time-has-come-calls-grow-to-allow-ukrainian-strikes-inside-russia/>.

²⁰² See also Boot, *supra* note 104 (stating that, “Ukraine’s democratically elected leaders, whose relatives, friends and neighbors are in the line of fire, are more mindful of minimizing Ukrainian casualties than are self-appointed humanitarians in the West watching the war on television. If President Volodymyr Zelensky and his generals have concluded that they need cluster munitions — and they have — it’s because they have balanced the risks of civilian casualties from unexploded ordnance against the risk of not being able to expel the Russian invaders, and they have decided that the latter is a greater concern than the former.”).

E. Providing Cluster Munitions Does Not Violate Alliances

A concern arising from the US decision to provide Ukraine with cluster munitions was whether it would create complications for US relations with allied signatories of the CCM. However, so long as the US continues mandating how and where cluster munitions are used, it operates within its obligations' boundaries. This question arises over CCM Art. 1, which requires that the States Party not “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions,” nor encourage others to engage in activities banned by the CCM.²⁰³

In his discussion of this issue, Robert Bracknell says “[t]he law of state responsibility, under customary international law, establishes a norm that a State is responsible for an internationally wrongful act when there is an act or omission that is attributable to it under international law that constitutes a breach of an international obligation of the State.”²⁰⁴ He goes on to explain that, “[p]ractically, in the case of the transfer of DPICM, this means the munitions may be restricted from passing through the territory, territorial seas, or airspace of a state party to the Convention.”²⁰⁵ Bracknell argues, “[i]f Denmark or Germany, for example, allowed the munitions to transit their land territory or territorial seas on their way to Ukraine, the state has definitely violated its own international legal obligations under the convention.”²⁰⁶

However, because Art. 21 allows States Party to the CCM to “engage in military cooperation and operations with States not party to [the] Convention that might engage in activities prohibited to a State Party,”²⁰⁷ there is a strong argument that a State Party would not be violating its obligations by cooperating with the US and allowing a transport with cluster munitions to fly over its territory.

The more significant concern is political. Bracknell argues that “the true enforcement mechanism is more inchoate and informal—the damage to the state’s reputation as one which stands by its political and international legal commitments, and, more importantly, the political reaction of the population of the state allowing the breach.”²⁰⁸ Bracknell broaches the politics of the issue by saying that “the decision should have been informed by political and legal considerations and diplomatic

²⁰³ Convention on Cluster Munitions art. 1, May 5, 2008, 2688 U.N.T.S. 39.

²⁰⁴ Robert Gray Bracknell, *Cluster Fluster: Respecting Allies’ Political and Legal Obligations on Munition Transfers to Ukraine*, LAWFIRE (July 8, 2023), <https://sites.duke.edu/lawfire/2023/07/08/guest-post-cluster-fluster-respecting-allies-political-and-legal-obligations-on-munition-transfers-to-ukraine/>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Convention on Cluster Munitions art. 21(3), May 5, 2008, 2688 U.N.T.S. 39.

²⁰⁸ See Bracknell, *supra* note 204.

consultations regarding the impacts on NATO allies. . .”²⁰⁹ He argues that by not consulting with allies before transferring the munitions, the US “[ran] roughshod over the political and legal concerns of 22 NATO member states” and threatened to sow disunity at a time where standing together is of great consequence.²¹⁰ This argument, while valid, speaks solely to the political considerations of the cluster munition transfer question and should not be seen as muddying the waters on whether their transfer and use is *legal* or somehow contradicts the blackletter law established in Art. 21 of the CCM.

CONCLUSION

Russia has illegally invaded a sovereign nation, attacked civilian populations, and flaunted international law. It has demonstrated that it is willing to take advantage of the world’s hesitance to directly confront a nuclear power that could expand its military campaign past the borders of Ukraine. In turn, Ukraine’s defenders have been forced to decide if they believe that it is acceptable to use cluster munitions within a battle space that includes its territory.

“History would suggest the practice of sparing civilians in war occurs only on the basis of conscience, moral perspective, culture, spirituality, life experience, human condition and resolve . . . one state’s centric ideal of what is ethical and humane in the battle space is subject to question and exploitation by another.”²¹¹ Russia—which has threatened to use nuclear weapons in Ukraine²¹²—appears willing to do anything to continue a conflict in which tens of thousands of lives are being lost and tens of millions are being affected. It is likely counting on Western concerns over “what is ethical and humane in the battle space,”²¹³ to limit the assets provided to Ukraine. With this looming threat, Ukraine’s allies must consider every legal and ethical option available, including cluster munitions.

However, it must also be recognized that cluster munitions are dangerous weapons that have previously been used irresponsibly to the detriment of civilian populations across the globe. The fact that nations worldwide are forced to continue clearing battlefields of duds even

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Reynolds, *supra* note 35, at 78.

²¹² Andrew Osborn, *Russia’s Medvedev: We’d Have to Use a Nuclear Weapon if Ukrainian Offensive Was a Success*, REUTERS (July 30, 2023), <https://www.reuters.com/world/europe/russias-medvedev-wed-have-use-nuclear-weapon-if-ukrainian-offensive-was-success-2023-07-30/>. See also Vladimir Isachenkov, *Putin Warns That Sending Western Troops to Ukraine Risks a Global Nuclear War*, ASSOCIATED PRESS (Feb. 29, 2024), <https://apnews.com/article/russia-putin-state-nation-ukraine-war-security-b7f3e66caf093f405f8bbc278d9ca581>.

²¹³ See Reynolds, *supra* note 35, at 78.

decades after conflicts have concluded²¹⁴ serves as a testament to this reality. When used in a haphazard fashion, especially against urban targets with civilian populations, cluster munitions almost certainly violate the ban on indiscriminate weapons seen in Additional Protocol I. However, this can be said of nearly any bomb or artillery shell and speaks as much to battlefield targeting decisions as it does to the nature of a weapon.

Both the US and Ukraine must continue to recognize that the use of any munitions is “governed by the customary international law requirements that uses of force must be discriminate (i.e., targeting only lawful military objectives) and proportionate (i.e., not excessive in relation to the concrete and direct military advantage anticipated).”²¹⁵ However, the use of cluster munitions within those boundaries does not trigger a violation of international law and presents the Ukrainian defense forces with a vital strategic asset. Regardless of their tragic misuse in previous conflicts, when utilized diligently to strike legitimate military targets, the deployment of cluster munitions does not violate international law.

So long as Ukraine’s leadership deems cluster munitions necessary and proportional to the threat their nation faces—and continues to abide by its assurances that these weapons will be used in a tightly controlled fashion that limits the risk to civilian populations—legal arguments against their provision are dubious at best. Further, the US has not violated international norms or international humanitarian law, nor the laws of armed conflict by supplying Ukraine with cluster munitions.

While ethical considerations are a subjective issue, the standard in a defensive conflict needs to be one that primarily considers the perspective of the nation that has been illegally invaded and had its citizens threatened, displaced, and killed. Here, the Ukrainian people and their government have made their thoughts clear. So long as they have weighed the ethical considerations of cluster munitions, outside entities need to defer to their judgment and permit them to take whatever legal steps they can to protect their borders, their citizens, and their nation.

214 See generally *Clearing Cluster Munition Remnants 2023*, MINE ACTION REV. ADVISORY BD. (Aug. 1, 2023), https://reliefweb.int/attachments/d56faade-98d7-4d3e-9be3-05441a76eebe/7722_Cluster_Munition_Remnants_2023_HIGH_RES_WEB_ART.pdf.

215 Stephen Pomper, *U.S. Policy on Cluster Munitions and Russia’s War in Ukraine*, REISS CTR. ON L. AND SEC. AT N.Y.U. (May 4, 2022), <https://www.justsecurity.org/81363/u-s-policy-on-cluster-munitions-and-russias-war-in-ukraine/>.