



What You Need to Know: Unpacking the Law in Russia's War Against Ukraine

The Use of Cluster Munitions

Stephen Pomper | May 4, 2022



Stephen Pomper is a Non-Resident Senior Fellow at the Reiss Center on Law and Security at NYU School of Law and a member of the Board of Editors at Just Security. He is Chief of Policy at the International Crisis Group. Previously, he served as Special Assistant to the President and Senior Director for Multilateral Affairs and Human Rights at the National Security Council under President Obama. He also served as the Senior Director for African Affairs. Prior to joining the staff of the National Security Council, he served from 2002 to 2011 in a variety of roles with the Office of the Legal Adviser at the U.S. Department of State.

You served as senior director in the White House office responsible for human rights and multilateral affairs during the Obama administration's second term and in that capacity worked on issues relating to U.S. cluster munitions policy. To begin, what are cluster munitions and how are they governed by international law?

Cluster munitions are conventional explosives that break apart in flight and scatter bomblets called submunitions. They have a deserved reputation as an especially ugly weapon of war because of the danger they pose to civilians. In densely populated urban areas they disperse at random, imperiling residents. In rural regions, their undetonated remnants contaminate the countryside, creating a lingering hazard for farmers, herders and others. The ICRC has [noted](#) that children in particular are “attracted by the shape, size and colour” of the munitions.

As a matter of international law, the primary treaty governing the use of cluster munitions is the [Convention on Cluster Munitions](#) (CCM), which was concluded at Oslo in 2008 and came into force in 2010. The product of [years of effort](#) by civil society and supportive States, the CCM prohibits State parties from developing, producing, acquiring, using, transferring or stockpiling cluster munitions. While 23 NATO powers—including France, Germany, and the U.K.—are parties to the CCM, the United States is not.

Neither is Russia or Ukraine. The CCM was drafted so that NATO members that became parties could continue to cooperate militarily with the United States. It expressly permits “military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State party.”

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Beyond the CCM, the use of cluster munitions is also governed by customary international law. Some experts in the arms control and human rights communities see clusters as [inherently indiscriminate and thus illegal](#). They argue that their wide and imprecise deployment makes it impossible to reliably mitigate the impact on civilians, and that unexploded (or “dud”) submunitions can remain on the ground for years, presenting a lethal threat to non-combatants who come into contact with them.

While the United States does not consider uses of cluster munitions to be per se illegal, it does recognize that they are 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). These requirements are also codified in Additional Protocol I to the Geneva Conventions, to which both Russia and Ukraine are parties, but which the United States has not joined.

Russia has reportedly been using cluster munitions in Ukraine, particularly in populated civilian areas. Is that unlawful?

Reports from the [United Nations](#), the Organization for Security and Cooperation in Europe, human rights organizations, and the [media](#) suggest that Russia has used cluster munitions in populated areas including near [hospitals](#) and [schools](#). There are far fewer reports about the use of cluster munitions by Ukraine but the New York Times recently carried [an account](#). Although reaching specific legal conclusions is best left for a court of law, the repeated use of cluster munitions near objects that appear to be entirely civilian in nature—such as a medical facility or kindergarten—certainly creates the appearance of grave international humanitarian law violations.

How has the United States responded to Russia's use of cluster munitions? What does U.S. law and policy say about the use of cluster munitions?

When reports emerged that Russia had used cluster munitions in Ukraine, the United States struggled with how to criticize it. At first, the U.S. Ambassador to the U.N., Linda Thomas-Greenfield, made a sweeping [condemnation](#), saying that cluster munitions are “banned under the Geneva Convention” and have “no place on the battlefield.” But the Biden administration quickly walked back that remark. It footnoted the [official transcript](#) to make clear that the United States considers use of the munitions unlawful when “directed against civilians”—a much narrower statement than Thomas-Greenfield’s original formulation.

U.S. officials no doubt struggled to find the right formulation because of the United States’ own complicated posture when it comes to cluster munitions. On the one hand, the United States has demonstrated in both word and deed that it sees the humanitarian and reputational risks in

using these weapons. It [stopped](#) using them in Afghanistan in 2002 and Iraq in 2003. Expressing concern about the humanitarian consequences of dud munitions, Secretary of Defense Robert Gates issued an [order](#) in 2008 that required the U.S. military to phase out—over the course of ten years—munitions with an unexploded ordnance rate (UXO) of greater than one percent. The Obama administration [affirmed](#) this policy in 2011. Congress has [enacted](#) a series of export restrictions on cluster munitions with a UXO in excess of one percent. Arms manufacturers have [rolled up production and distanced themselves](#) from cluster-related activities like stockpile testing.

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On the other hand, the Pentagon has strenuously resisted efforts to fully curtail the availability of cluster munitions to the U.S. military. U.S. officials have argued that they are an important tool for channeling or slowing the advance of massed enemy forces by denying them access to wide swathes of territory. In 2008, one State Department official [remarked](#) that “U.S. forces simply cannot fight by design or by doctrine without holding out at least the possibility of using cluster munitions.” The United States refused to participate in the negotiation of the CCM, even as an observer, and [angered CCM supporters](#) when it threw its weight behind the development of a much weaker parallel treaty that might have diverted states away from the toothier CCM. (The United States eventually abandoned the effort.)

Perhaps most strikingly, the Pentagon never did implement the cluster munitions policy that the Secretary of Defense announced in 2008. The reasons for this failure are murky. Part of the problem may have been that the 2008 order is a sparse document: it does not provide benchmarks for the reduction of stockpiles or requirements for public reporting

on progress toward the 2018 objective. Another partial explanation might be that when the Obama administration [announced](#) that it would come largely into compliance with the Ottawa Mine Ban Treaty (except for activities on the Korean peninsula), defense officials may have started thinking of cluster munitions as a way to compensate for that perceived loss of capability. But it is also hard not to question whether the Pentagon was fully committed to implementing its own cluster munitions policy in the first place.

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In any event, the 2008 policy did not survive the Trump administration. In November 2017, Deputy Secretary of Defense Patrick Shanahan [announced](#) that the military would not meet the 2018 deadline for phasing out non-compliant clusters, writing *inter alia* that “[c]luster munitions are legitimate weapons with clear military utility,” and declined to offer a new deadline. The Obama administration’s landmine policy did not survive either. In 2020, Secretary of Defense Mark Esper [canceled](#) Presidential Policy Directive-37, which memorialized that policy, giving the Pentagon renewed space to develop, procure, and use “smart” landmines—i.e., mines with self-destruction and self-deactivation features.

As for where we are today, the Biden administration has indicated a strong inclination to roll back some or all of the Trump administration’s 2020 decision on landmines, subject to a still-ongoing [formal review](#), but it has been oddly silent on the issue of cluster munitions. Reviewing one weapons system in the absence of the other would be a mistake. If the administration looks at landmines without also examining its policy on cluster munitions, history suggests that the reliance on the latter for planning and

perhaps other purposes could well become entrenched or even expand. Given the humanitarian and reputational implications, that is a result worth avoiding.

Does the U.S. government’s position on its own lawful ability to use cluster munitions preclude the Biden administration from being able to assert that Russia’s use of cluster munitions is unlawful?

The U.S. government’s ambivalent posture concerning cluster munitions lends itself to the kind of garbled messaging that characterized its initial statements about Russian usage in Ukraine, but it still leaves open some maneuvering room. U.S. officials cannot very effectively criticize Russia for failing to join the CCM (because the United States is not a party) or argue that the use of cluster munitions is a *per se* violation of international humanitarian law (because the United States takes the contrary position). They can, however, argue that specific uses of cluster munitions violate international humanitarian law if they appear disproportionate or indiscriminate. For example, the United States will be on very firm ground in calling out the use of clusters in the vicinity of schools and hospitals that are being used to provide services to civilians.

Would it be advisable for the Biden administration to alter or elaborate the U.S. position on the use of cluster munitions? What are the main policy considerations?

Yes, the Biden administration should complement its review of U.S. landmines policy with a review of its cluster munitions policy. Among other things this would help avoid creating a perverse dynamic where the abrogation of landmines results in greater reliance on cluster munitions.

In both cases, it will be important for U.S. officials to consider lessons emerging from the conflict in Ukraine. The Pentagon has previously contended—with some [support](#) from outside experts—that both weapons systems may be necessary in an era of resurgent great power competition, when the potential need to confront peer or near-peer militaries could require the United States to deploy them. The unfolding war in Ukraine, however, raises questions about these claims. Without anything near the fighting

capacity that the United States and its NATO allies can muster, Kyiv has thus far managed to outperform expectations against an invading Russian force without materially relying on clusters (isolated reports notwithstanding) and while appearing to comply with the Mine Ban Treaty, to which it is a party.

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The question for U.S. policymakers should be: If Ukraine can do this in a war with Russia, how big a risk would it be for the United States to alter course with respect to these weapons systems? In forming an answer, the U.S. government should also consider what it loses diplomatically by

failing to present a more united front with the bulk of its NATO allies on these issues, particularly when seeking to cast itself as part of a coalition bound by common values.

If the United States decides to revisit its cluster munitions policy, it should consider lessons from the past. Any policy that it implements requiring the destruction of stocks should include benchmarks and reporting requirements so that implementation progress can be monitored. Although Senate politics make treaty accession virtually impossible to contemplate, officials should also consider how close the United States could come in pledging adherence to the CCM itself rather than pursuing a course of action that focuses exclusively on unexploded ordnance metrics. While reducing the dud rate for U.S. munitions is preferable to doing nothing, focusing on that to the exclusion of other measures could miss an opportunity to strengthen a treaty regime that has resulted in the destruction of hundreds of thousands of cluster munitions, to the benefit of civilian protection efforts around the world. [🌐](#)