

Beyond Black and White: Normative Ambiguities and the Delivery of Cluster Bombs

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Following the decision by the United States of America to provide cluster bombs to Ukraine, a contentious public and academic discourse has emerged, centering on the legality and legitimacy of these arms deliveries. An interview on the intricacies surrounding warfare, international law, and the existence of multiple types of norms.

Dear Elvira and Frank, the USA has decided to deliver cluster bombs to Ukraine for its defense against Russian aggression. This raises some questions. At the beginning, let's briefly clarify: what are cluster bombs – and why are they so problematic?

Elvira Rosert: Cluster bombs are containers filled with at least ten and up to several hundred submunitions, so-called bomblets, that are dispersed few minutes after delivery and fragment into small pieces of shrapnel. The Convention on Cluster Munitions (CCM) prohibits their use because of twofold indiscriminate effects: First, cluster bombs are potentially dangerous to civilians at the time of their use, because they cannot be targeted at distinct (military) objects, but their very purpose is to cover large areas. This so-called footprint cannot be delimited easily, which increases the risk for civilians to be accidentally hit during a strike by a stray submunition.

Second, not all munitions explode immediately, but some fail to do so and remain on the ground as so-called duds. Along with other unexploded ordnance, these cluster bomb duds may detonate anytime later, usually activated by a contact or a vibration. This can happen shortly after the strike, or months, years, or even decades later, at a time when the conflict is over and hence, there are only civilians in the former areas of combat.

Frank Sauer: Elvira already mentioned that cluster munitions cover large areas, and that is obviously what makes them desirable and effective from a military point of view – which is why they have been used for many decades. A single conventional artillery shell has to land in close proximity to enemy troops – it literally has to land in the trench, if they are dug in – to be able to injure or kill with its blast and shrapnel. The numerous submunitions dispensed by a cluster munition shell on the other hand increase the likelihood of impacting the enemy with a single shot. Data from the Vietnam war suggests that cluster munitions are about eight times more lethal

this way. I have no doubts that these weapons would prove useful to the Ukrainian military in its ongoing counter-offensive.

U.S. President Biden said it was a ‘difficult decision’ to deliver cluster bombs. If you look at some of the public comments over the last few days, you might get the impression that the decision was not problematic after all, at least from a legal perspective. You see it more differentiated. In what way?

Elvira Rosert: As long as only the U.S., Ukraine or other non-parties to the CCM are involved, the legal case is unambiguous indeed: While treaty parties, *inter alia*, are prohibited from the development, the production, the transfer, the acquirement, and the use of cluster munitions, these provisions do not apply to states who are not members of the CCM. International treaties legally bind only those who have acceded to them – with the exception of International Customary Law or its non-derogable *ius cogens* norms. Since the CCM, however, does not qualify as either, the U.S. can legally deliver cluster munitions to Ukraine, and Ukraine can accept and use these weapons according to the rules of International Humanitarian Law, most importantly in compliance with the principle of distinction. In the U.S., a national arms export law bans the sale of cluster munitions with dud rates exceeding 1%, but President Joe Biden can waive this law in exceptional circumstances. He is expected to do so, since the failure rate of the DPICM (dual-purpose improved conventional munitions) that the U.S. is willing to deliver is estimated higher. The Biden administration puts the dud rate at 2.35%, while other sources claim it to be as high as 14%, but I should also mention the dud rate depends on the terrain and varies accordingly.

In any case, with the legal situation as clear-cut as it is, one might wonder why there is a debate to begin with. To understand that, a social science perspective on the norm against cluster munitions is helpful. From this vantage point, we recognize the inherently *social* character of norms and their *social* bindingness. In International Relations, one very common and widely used definition of norms views them as [collective expectations of appropriate behavior for actors with a given identity](#). Such expectations can be codified in (International) Law, but they do not have to be. Also, compliance with legal norms is not necessarily congruent with [compliance with social norms](#). That is: social expectations can be of a more limited scope than law, which explains why we are willing to look the other way in the case of some transgressions; or they may be of a broader scope, which explains why certain actions that do not violate the legal norm can still invoke criticism or even outrage – because they violate the social norm in the sense just mentioned: by deviating from the shared expectation.

This, in my view, is what we see in the current debate over cluster bombs: The existence of the debate itself indicates that there is a discrepancy between the international legal and the international social norm. The prospective delivery and use of cluster bombs raise concerns because of the stigma that has been effectively attached to cluster munitions not only through the international treaty, but also through the campaign that advocated a ban and through the public debates

surrounding their use over the past decades. In particular in democratic countries such as France, Germany, Japan or UK, which have ratified the CCM, thereby translating its provisions into national law, it is unsurprising that the norm enjoys a high degree of public acceptance. But President Biden's characterization of the U.S. decision as "difficult" is evidence for the strength of the norm as well: Even though the U.S. never accepted the *legal* obligation, they obviously nevertheless acknowledge the *social* expectation and the humanitarian problem that these weapons cause.

Frank Sauer: I would like to add that it sure is nice to have the grown-ups back in the White House. The fact that Biden had a hard time making this decision, weighing it against concerns of partners and potentially detrimental effects on alliance cohesion, shows that the administration is willing and capable of appreciating the normative complexity of the issue and of thinking this through beyond what one-dimensional legal positivism would suggest. Ukraine also recognizes that this is not just another munition, stating that the weapons would only be used to defend and liberate their own territory and that records would be kept for prioritized de-mining. Despite the unambiguous legal situation, this clearly was a tough call for Washington, and it's a tough call for Kyiv as well of course – because Ukraine has to live with the consequences on its territory.

Accordingly, judging the delivery of cluster bombs is not black and white (see e.g. also Dana Schmalz's [comment](#) on the debate). Frank, you described the situation as a dilemma: supporters of the delivery of cluster bombs argue not only that it is legal, but also 'necessary' since these bombs can help Ukraine compensate for the numerical disadvantage of its artillery systems. Opponents of the delivery argue, among other things, that the legal situation is more complicated, and that the U.S. decision actually violates the international legal order. How to get out of this dilemma?

Frank Sauer: No-one is getting out of that dilemma. It's just an all-around bad situation.

Let's start with Ukraine. The delivery is necessary because the international coalition supporting Ukraine's defense was unable to provide Kyiv with enough of those types of weapons it would have required to forego the risk of using cluster munitions. As I said, cluster munitions are exceptionally lethal. They balance out Ukraine's numerical disadvantage in artillery systems, shells, and barrels – a disadvantage that we, the "West", are partly to blame for. Remember that Ukraine already used cluster munitions delivered from Turkey. So, Kyiv clearly has weighed the pros and cons and decided that the risk of some additional duds on their own territory, endangering their own military personnel on the move and potentially also civilians after the war is over, is outweighed by the military gain. I say "some additional" because Ukraine is of course already littered with Russian mines and sub-munitions, including inside the cities Russia has been shelling with cluster munitions for months.

The U.S. on the other hand clearly did not take this decision lightly, even though they are under no legal obligation either. The Obama and Biden administrations have a record of displaying sensitivity for the social norms connected to treaties the U.S. is not party to. Why else would there be export limits on cluster munitions or policies attempting to comply with the anti-personnel mine ban treaty, another treaty the U.S. has not signed but doesn't simply ignore. Washington certainly knows that this particular decision will be perceived as a setback for the development of international legal norms, and I bet U.S. policymakers are already dreading the moment when this comes back to bite them as yet another case of "U.S. double standards".

Lastly, let's look at Germany where the debate was – and is – particularly intense. I understand that some people are outraged about possible knock-on effects regarding the international development of norms, their codification in law, and the international rules-based order in general. But the legal situation is as it is, the norm is not universal, and leaving the U.S. and Ukraine aside for a moment, a whole number of EU and NATO countries such as Poland, Romania, Estonia, Latvia, or Finland did not sign the treaty either. So, I'd encourage everyone to look at this from the point of view of Ukraine for a minute, a country fighting for survival, under no legal obligation to forego this option, making the call, and accepting the consequences. At least for me, that's very, very hard to argue with.

In sum, everybody is swallowing some bitter pill. It's a total dilemma. And while I certainly wish for cluster munitions to be universally renounced, I accept the fact that we're not yet living in a world where this is the case, and I personally direct my indignation not towards Kyiv or Washington but towards Moscow and Putin, who started this senseless war.

Elvira, based on your work on Norms in International Relations, to what extent does the U.S. delivery – and the debate now emerging – undermine that norm?

Elvira Rosert: First, I would like to stress that I absolutely agree with what Frank just said, which is why in my view, the effects of the delivery on the norm are a secondary concern in this case. What matters more is the hope that Ukraine can effectively use them to strengthen their defense against Russian aggression while protecting Ukrainian civilian population as much as possible from potential long-term effects of cluster bombs.

Regarding the effects on the norm: As we can never predict social dynamics, it remains to be seen, so please read my assessment as an educated guess that might turn out wrong. We know that social norms are much more resilient to non-compliance or to debates regarding their application than to debates [regarding their validity](#). [Recent research](#) even shows that questions regarding the application of norms can strengthen them. And that is how I, maybe somewhat guided through wishful thinking, interpret the current situation: As synergetic, i. e. the deliveries net benefiting Ukraine *and* the debate around them potentially strengthening the norm. I do not see any relevant actors questioning the validity of and the reasons for the prohibition. On the contrary, the two actors in question, namely the U.S. and Ukraine,

demonstrate a high awareness of this norm, carefully justifying and weighing their decisions. Also, it is without doubt that the delivery and the use are happening under exceptional circumstances when one country is fighting for its existence – rather than undermining the stigma, defining the use of cluster bombs as *ultima ratio* strengthens it.

