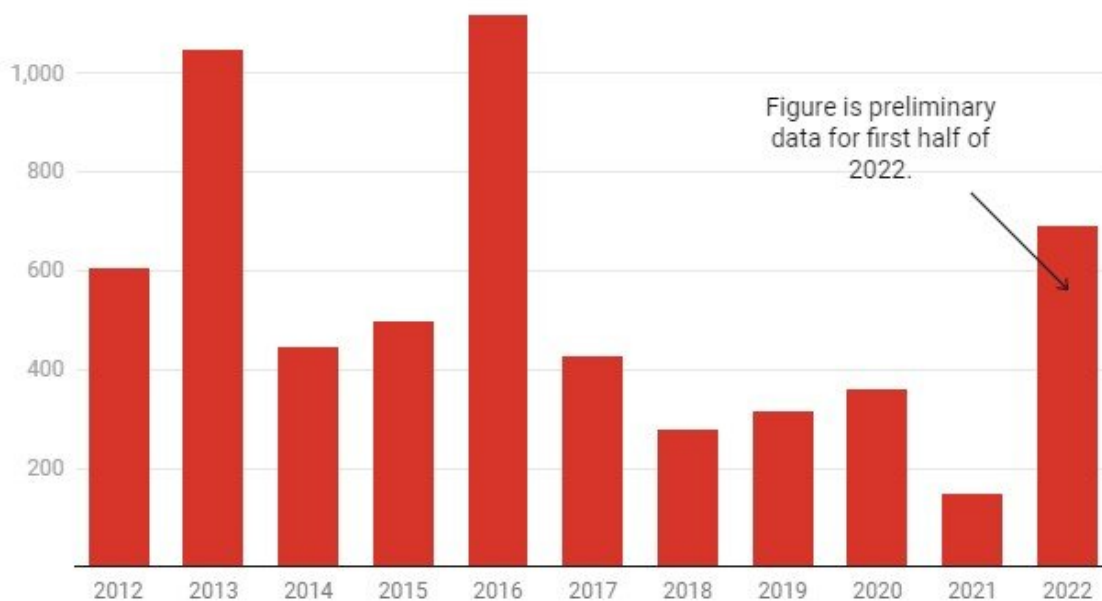


Opinion: There's no legal reason the US shouldn't supply cluster bombs to Ukraine—but that doesn't make it morally right

June 23 2023, by Robert Goldman

Deaths and injuries from cluster bombs

Use of cluster bombs in the war in Ukraine has led to an uptick in casualties in 2022.



Credit: The Conversation

Pressure on the Biden administration to [provide Ukraine with cluster](#)

[bombs](#) has refocused attention on the legal and moral use of such weaponry.

The U.S. has been here before. It [provided Saudi Arabia with cluster munitions](#)—which [contain bomblets that can scatter](#) across a wide area, often not exploding until later—during the kingdom's [military intervention in Yemen](#).

Washington [suspended sales of cluster bombs to the Saudis](#) in 2016 following mounting concern over the [toll they were taking on civilian lives](#). But the U.S. is still [holding out from joining](#) more than 120 nations that have signed an [international ban on cluster bombs](#).

As a [scholar of the law of war](#), I know that cluster bombs highlight a reality about the use and regulation of weapons, even those that can cause widespread civilian suffering: These munitions are not in themselves illegal, but their usage can be. Furthermore, should the U.S. provide Ukraine with cluster bombs, it could weaken the argument against others doing likewise. And that, in turn, could increase the chances of cluster bombs' being deployed illegally.

Effective or indiscriminate?

Cluster munitions have been [part of nations' arsenals since World War II](#). Delivered by air or ground artillery, they have been used by the [United States in Laos and Vietnam](#) during the Vietnam War, [Israel in southern Lebanon](#), [the U.S. and U.K. in Iraq](#), Russia and Syria [in the ongoing Syrian civil war](#), and the [Saudis in Yemen](#). And now they are being [deployed in Ukraine](#).

If deployed responsibly, they can be an effective military tool. Because they can spread hundreds of bomblets across a wide area, they can prove a potent weapon against concentrations of enemy troops and their

weapons on a battlefield. In 2017, a [U.S. Department of Defense memo](#) said cluster munitions provided a "necessary capability" when confronted with "massed formation of enemy forces, individual targets dispersed over a defined area, targets whose precise location are not known, and time-sensitive or moving targets." And on June 22, [it was reported](#) that the Department of Defense has concluded that cluster bombs would be useful if deployed against "dug-in" Russian positions in Ukraine.

Indeed, [the Department of Defense argued](#) that in some limited circumstances cluster bombs can be less destructive to civilians. In Vietnam, the U.S. sanctioned the use of cluster bombs—over more powerful bombs—to disrupt transport links and enemy positions while [minimizing the risk of destroying nearby dikes](#), which would have flooded rice fields and caused widespread suffering to villagers.

Still, their use has always been controversial. The problem is that not all the bomblets explode on impact. Many remain on the ground, unexploded until they are later disturbed—and that increases the chances of civilians' being maimed or killed. Their use in urban settings is particularly problematic, as they cannot be directed at a specific military target and are just as likely to strike civilians and their homes.

Cluster bombs under international law

Concern over the risk to civilian harm led in 2008 to a [Convention on Cluster Munitions](#), which bans their use, production or sale by member states.

But as of 2023, the convention is legally binding for only the 123 states that are signatories—and Ukraine, Russia and the U.S. are not among them. Nor can they—or any of the other countries yet to sign up to the convention—be compelled to join the ban.

As such, there is no legal reason that Ukraine or Russia cannot deploy cluster bombs in the current conflict—as [both have done](#) since the invasion of February 2022. Nor is there any legal reason the Biden administration can't sell the munitions to Ukraine.

But there are laws that set out how cluster bombs can be used, and how they must not.

The relevant part of international humanitarian law here is 1977's [Additional Protocol I](#) to the [Geneva Conventions](#), which both Ukraine and Russia have ratified. The additional protocol sets out rules the warring parties must observe to limit harm to civilians. Acknowledging that [civilian deaths](#) are an inevitable part of war, [Article 51 of Additional Protocol I](#) prohibits "indiscriminate" attacks. Such attacks include those employing a weapon that cannot be directed at a specific military target or of such a nature to strike military targets and civilians and civilian objects without distinction.

Meanwhile, [Article 57 of the additional protocol](#) stresses that attacking armies have a duty of care to spare civilian populations. This includes taking "all feasible precautions in the choice of means and method of attack."

Neither article specifies any weapons deemed off-limits. Rather, it is how the weapons are used that determines whether the attack constitutes an indiscriminate one and hence a crime under international law.

More than an 'optical' risk?

Even if cluster bombs are not inherently indiscriminate—a claim that [advocates of an international ban](#) put forward—their use in urban settings greatly increases the chance of civilian harm. In 2021, [97% of cluster bomb casualties were civilians](#), two-thirds of whom were

children. And the experience of cluster bomb use in Syria and Yemen shows that it can be difficult to hold governments to account.

Which is why Ukraine's request for U.S. cluster munitions has led to concerns. The [Cluster Munitions Monitor](#), which logs international use of the bombs, found that as of August 2022, Ukraine was the only active conflict zone where cluster bombs were being deployed—with Russia using the weapon "extensively" since its invasion, and Ukraine also deploying cluster bombs on a handful of occasions.

Ukraine is [reportedly seeking some of the United States' stockpile](#) of Cold War-era MK-20 cluster bombs, which it intends to drop on Russian positions via drones. The potential move has backers in Congress, but the White House has so far been noncommittal—not ruling out the transfer, but also [airing "concern."](#)

The Biden administration hesitancy is [reportedly over the "optics"](#) of selling cluster bombs and introducing a wedge between the U.S. and other NATO countries over the weapon's use.

Certainly, there would be very little legal risk under international law of providing cluster bombs to Ukraine—or any other nation—even if that country were to use the weapon illegally.

There is no case I know of in which a state has been found legally responsible for providing weapons to another that flagrantly misuses them—there is no equivalent to efforts in the U.S. seeking to hold gun manufacturers [legally responsible for mass shootings](#), or state "[dram shop laws](#)" that hold the suppliers of alcohol culpable for the actions of an inebriated driver.

Yet one of the things that worried people in Congress regarding the sale of cluster bombs to Saudi Arabia was that the Saudis' [consistently](#)

[indiscriminate use of those weapons](#) in Yemen could be seen at home and abroad as making the U.S. complicit in those violations.

I would argue that it became difficult for Washington to continue to supply the Saudis on moral ground. But still, there was and is presently no clear-cut [legal obligation](#) for the U.S. to stop supplying other nations with cluster bombs.

It is highly unlikely that Ukraine will deliberately use U.S.-supplied cluster munitions to target civilians and their environs. But nonetheless, providing Ukraine with [cluster](#) weapons could serve to destigmatize them and runs counter to international efforts to end their use. And that, in turn, could encourage—or excuse—their use by other states that may be less responsible.

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