IALANA

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The Illegality of U.S. Cluster Munitions Delivery to Ukraine under International Law – and the Positive Obligation of the U.S. to Avoid or Minimise the Humanitarian Suffering Caused by These Weapons

Legal analysis by International Association of Lawyers Against Nuclear Arms (IALANA)

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I. Introduction

Since the beginning of the Russian aggression against Ukraine in February 2022, both parties to the conflict, but in particular Russian armed forces, have used cluster munitions on a massive scale, causing hundreds of casualties and deaths among the civilian population.[i] This is regrettable and condemnable. The present analysis, however, focuses on the decision by the United States (U.S.) to transfer cluster munitions to Ukraine. On July 7, 2023, the U.S. Government announced that, in spite of the humanitarian concerns, it would send cluster munitions to the Ukrainian armed forces. The decision to transfer these controversial weapons gave rise to considerable criticism due to particular characteristics of these weapons.[ii]

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Cluster munitions scatter "bomblets" across large areas, which would allow Ukrainian forces to target larger concentrations of Russian forces. According to military experts, the weapons could also help Ukrainian sappers as they clear the dense mine-fields protecting Russian defensive lines.[iii] The two main problems with cluster munitions are, first, the distribution of their explosive force and fragmentation effect over a wide area, and second, the fact that often some of the submunitions fail to explode on impact, posing a long-term humanitarian risk to the civilian population, similar to landmines. The weapons delivered to Ukraine are M864 and M483A1 models and, according to the U.S. government, have a dud rate at 2.4%.[iv]

The aim of the present analysis is to assess the legality of the transfer of these controversial weapons to Ukraine under international law, especially under international humanitarian law (IHL) and human rights law. It will end with some concluding remarks, including considerations on how the U.S. could avoid or at least minimise humanitarian suffering caused by these weapons.

II. The illegality of the U.S. transfer of cluster munitions as such

A. Under the Oslo Convention and the Arms Trade Treaty

Contrary to its European allies France, UK and Germany, the U.S. has not ratified the Oslo Convention on Cluster Munitions, adopted in 2008, that prohibits "transfer" of these weapons under its Article 1 § 1 b). 111 States have so far ratified the treaty. The Arms Trade Treaty, adopted in 2013, also imposes certain limits to arms transfers on the 113 states that have joined that treaty. The U.S. has signed but not ratified the Arms Trade Treaty.[v] Pending ratification, signing triggers some legal duties prior to actual ratification of the treaty. Article 18 of the 1969 Vienna Convention on the Law of Treaties (VCLT) requires that a state that has signed a treaty not act in a manner that would defeat the object and purpose of the treaty pending its entry into force:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty (...).

It is not necessary, however, to examine more closely whether the cluster munitions transfer by the U.S. would actually run counter to the object and purpose of the Arms Trade Treaty insofar as the U.S. revoked its signature from the treaty via a 26 April 2019 declaration of former President Trump.[vi] Assuming this act was made in conformity with U.S. constitutional requirements for such an act and even if the VCLT does not explicitly provide a right to revoke a signature of a treaty, the declaration

can be interpreted as a clear expression of the intention of the U.S. "not to become a party to the treaty", in conformity with Article 18 VCLT.

Moreover, in light of the considerably high number of ratifications of the two treaties, it could be argued that these two provisions prohibiting or limiting the transfer of such weapons based on the Oslo Convention and the Arms Trade Treaty are customary in nature and, as a result, are binding also on the U.S. Any more solid assessment on this point, however, in particular by assessing relevant State practice, exceeds the reach of this analysis, and is unnecessary considering that the transfer of cluster munitions by the U.S. likely is illegal on other grounds.[vii]

B. Under Common Article 1 to the 1949 Geneva Conventions

Common Article 1 of the 1949 Geneva Conventions, to which the U.S. is a party, imposes on States the duty "to respect and to ensure respect for the present Convention in all circumstances." This rule is also part of customary international law.[viii] The unconditional obligation enshrined in common Article 1 does not depend on reciprocity and, by virtue of its wording, applies also in peacetime.[ix]

In the context of arms transfers, the ICRC commentary on common Article 1 indicates that this provision requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.[x] To take just one example, Article 27 § 1 of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War stipulates that "protected persons are entitled, in all circumstances, to respect for their persons" and "shall at all times be humanely treated …and be protected especially against all acts of violence or threats thereof …".

Considering the second characteristic effect of cluster munitions cited above, namely their deadly legacy after the end of hostilities, killing members of the civilian population including children, common Article 1, considered together with Article 27 § 1 of the Fourth Geneva Convention, seems very relevant in the context of U.S. cluster munitions transfer to Ukraine.

As a result, that munitions transfer can be considered in breach of the duty of the U.S. to respect and ensure respect for IHL.

III. Illegality of the U.S. delivery as an act of "aiding or assistance" in the commission of an internationally wrongful act

In this section, we consider whether the U.S. could be held responsible for illegally transferring cluster munitions to the extent that it facilitates the commission of an internationally wrongful act by Ukraine, the recipient of these weapons. In particular, it must be assessed whether the U.S. can be held

accountable for the transfer based on the *Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001, considered to reflect customary international law.

A. General conditions

Article 16 of the *Articles the Responsibility of States for Internationally Wrongful Acts* states as follows:

Aid or assistance in the commission of an internationally wrongful act:
A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

Applied to the U.S. cluster munitions transfer, three main questions have to be answered: First, there is little doubt that a weapons transfer constitutes "aid" or "assistance" within the meaning of Article 16 § 1. Second, considering the generally acknowledged humanitarian concerns that these weapons raise the U.S. government must be considered to be aware of the "circumstances of the internationally wrongful act" (sub-paragraph a). The language of Article 16 subparagraph a) does not require that the U.S. must have been aware of or recognize the wrongfulness of the act.

The key question here lies in the element of sub-paragraph a), namely whether the act would be wrongful under international law if committed by that (*i.e.* the aiding or assisting) State. Here, the question we must resolve is whether the U.S. would be committing an internationally wrongful act if they, in the same circumstances as Ukraine, used cluster munitions against the Russian aggressors.

B. Assessment of the legality of the use of cluster munitions

1. In light of IHL

a) Principle of distinction

First, neither Ukraine nor the U.S. have ratified the Oslo Convention, which in its Article 1 § 1 a) prohibits the use of these weapons. The question remains, however, whether such a prohibition exists in customary IHL.

In the database of the International Committee of the Red Cross (ICRC), cluster munitions are not listed among the types of weapons of which the use, or certain uses, would be prohibited by IHL,

contrary for example to chemical weapons, biological weapons, and nuclear weapons. The absence of a specific rule prohibiting a certain type of weapon does not, however, mean that it is permitted, insofar as its use can still be prohibited by general principles of IHL.

The Oslo Convention itself reiterates the most relevant IHL principles in its preamble:

"*The States Parties (...)*

Basing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injuries or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants (...)".

Of particular relevance in the context of cluster munitions is the principle of distinction, according to which States must never make civilians the object of attack and, therefore, never use weapons that are incapable of distinguishing between civilian and military targets.[xi] This principle was already implicit in Article 25 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land.[xii] Today, it can be found in Article 48 of Additional Protocol No. 1.[xiii] Regarding cluster munitions, the risk that these weapons pose to the civilian population due to the wide distribution and the fragmentation effect of their submunitions was one of the main concerns that lie at the origin of the Oslo Convention.[xiv]

Moreover, it is well-documented that unexploded remnants of war may kill and maim any person, including children, not only during armed conflict but for years after hostilities have ended.[xv] It should be noted that the U.S. government insists that the dud rate of the cluster munitions at issue are at 2.4%;[xvi] this still suggests, however, that a significant number of unexploded submunitions may remain after large-scale use of these munitions.

In other words, cluster munitions must be considered contrary to the principle of distinction and, as a result, illegal under IHL. This conclusion is confirmed by the database on customary IHL of the ICRC of which Rule 71 states that "the use of weapons which are by nature indiscriminate is prohibited."[xvii] According to the commentary accompanying that Rule, cluster bombs are among the examples cited in state practice.

b) The "Martens Clause"

Wider principles of international law underlie the specific rules and, if the use of a new weapon violates these principles, it violates international law without requiring any specific rule.[xviii] The *Shimoda*

judgment concerning the bombing of Hiroshima and Nagasaki in August 1945, delivered by the Tokyo District Court in 1963, reaffirmed this by considering that

"we cannot regard a weapon as legal only because it is a new weapon and it is still right that a new weapon must be exposed to the examination of positive international law."[xix]

It is in this context where the so-called "Martens Clause" becomes relevant. From our point of view, this clause might provide further arguments for the illegality of the use of cluster munitions. It is named after the Russian jurist Fedor Federovitch Martens, who was instrumental in drafting it and who ensured its adoption. The clause was enshrined for the first time in the preamble of the 1907 Hague Convention on the laws and customs of war on land (IV), which codified existing customary international law.[xx]

It is relevant to mention that a contemporary version of the Martens Clause has been inserted in the preamble of both the Ottawa Convention on Anti-Personnel Mines as well as the Oslo Convention:

"The States Parties to this Convention (...)

Reaffirming that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection of and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience (...)."

The International Court of Justice (I.C.J.) in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* considered that the "Martens Clause" "has proved to be an effective means of addressing the rapid evolution of military technology."[xxi] In the case of the use of cluster munitions, the clause might fill a gap in the absence of a prohibition that has not yet been accepted universally, *i.e.* in relation to those States that have not adhered to the Oslo Convention, of which Article 1 § 1 a) prohibits the use of these weapons.

In light of what precedes, the use of cluster munitions appears at minimum to be contrary to the principle of distinction within the meaning of IHL, as well as to the "Martens Clause." As a result, the question whether these weapons run counter to other principles and rules of IHL can be left open for the purpose of the present analysis.

2. In light of human rights law

Apart from IHL, human rights law may come into play in the present discussion, in particular once the actual hostilities have ceased.

In a case against Russia in the context of the war in Chechnya, the European Court of Human Rights (ECtHR) concluded that there had been a violation of the right to life (Article 2 ECHR), in particular for having exceeded what was necessary in the concrete situation:

"[The Court] is, however, not convinced, having regard to the materials at its disposal, that the necessary degree of care was exercised in preparing the operation of 19 October 1999 in such a way as to avoid or minimise, to the greatest extent possible, the risk of a loss of life, both for the persons at whom the measures were directed to and for civilians (...)."[xxii]

In this case, the Russian operation resulted in six deaths, 16 injuries, and 13 houses destroyed by the use of high-explosive 250-270kg fragmentation bombs. These weapons were considered "indiscriminate" by the Court,[xxiii] which concluded that the use of such bombs in inhabited areas was "manifestly disproportionate" to the aim of dislodging the extremists.[xxiv]

Moreover, the deadly post-conflict legacy might also render the use of cluster munitions contrary to basic human rights. In the context of anti-personnel mines, of which the post-conflict legacy is similar to unexploded cluster munitions, the ECtHR has found States Parties in violation of the right to life because the local authorities have not duly informed the population about the dangers of mines, or have failed in their duty to locate and deactivate the mines or to mark and seal off the mined area. As a result, the Court has found States in breach of the positive obligation to protect the lives of the victims imposed by Article 2 ECHR (right to life); in a case against Turkey the victim was a 9 year old boy who was grazing his sheep.[xxv]

3. Intermediate conclusion

In light of the preceding, the use of cluster munitions likely is illegal under international law, both under IHL and human rights law. It remains to be seen whether Ukraine could invoke certain circumstances precluding the wrongfulness of such use. The most obvious rationale for the present discussion is self-defense.

C. Circumstances precluding wrongfulness?

Self-defence is defined as follows under Article 21 of the ILC Articles:

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

In principle, it is undisputed that Ukraine is the victim of an "armed attack" within the meaning of Article 51 of the U.N. Charter and that it is, as a result, entitled to the "inherent right of individual or

collective self-defence". It is nevertheless important to recall what the I.C.J. in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* held what follows:

"The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law."[xxvi]

The logic behind this statement is that the fundamentals of IHL must be observed in all circumstances, even if the other party to an armed conflict does not respect them – in other words, the observation of IHL rules are not conditioned by reciprocity. As a result, Ukraine cannot rely on IHL breaches by Russian forces in order not to respect the relevant rules. If Ukraine breaches IHL--for example by the use of cluster munitions -- it would not be able to successfully invoke the right to self-defence, within the meaning of Article 51 of the U.N. Charrter, as a defence to that violation of IHL.

IV. Concluding remarks and recommendations

In light of what precedes, the following conclusions can be drawn:

1. IALANA condemns the massive use of cluster munitions in Russia's war against Ukraine, already the cause of many civilian casualties. It urges the States that have not yet done so to ratify the Oslo Convention, in particular Russia and Ukraine.

2. IALANA believes that the use of cluster munitions by Russian and Ukrainian forces does not vitiate the clear trend towards the establishment of a customary international law norm prohibiting, at least, the use of these weapons, as their use has been widely condemned by States and civil society.[xxvii]

3. Regarding the role of the U.S., IALANA is of the opinion that the transfer of cluster munitions to Ukraine, examined in light of IHL and human rights law, likely is illegal under international law, due in particular to the wide distribution of their explosive force and their fragmentation effect, as well as the deadly legacy and threat unexploded bomblets constitute for years after the end of hostilities, especially for the civilian population.

This triggers the responsibility of the U.S. under Article 16 of the *Articles the Responsibility of States for Internationally Wrongful Acts*. In addition, a direct responsibility of the U.S. is argued based on common Article 1 to the 1949 Geneva Conventions.

4. In order to avoid or minimize humanitarian suffering caused by any cluster munitions that the U.S. nonetheless transfers to Ukraine, IALANA urges the U.S. to take all necessary steps to

avoid the use of the transferred cluster munitions in inhabited areas, and that areas contaminated by unexploded remnants of war will be marked and neutralised as soon as possible. The latter is not only a moral, but also a legal duty.

In this regard, it can be recalled that the U.S is party to the Fifth Protocol to the 1980 Convention on Conventional Weapons,[xxviii] according to which, after the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control (Article 3 § 2).[xxix] In other words, the main responsibility remains on the territorial State, which is not the U.S. However, the treaty also imposes on States Parties the legal duty to cooperate ("each High Contracting Party in a position to do so *shall*…") in different areas by virtue of its Article 8, such as marking and clearance, removal and destruction of remnants of war,[xxx] risk education to the civilian population, assistance to victims, or contribution to trust funds within the United Nations system or elsewhere. It is argued here that this duty must be taken even more seriously in the case of a State Party, like the U.S. in the present case, whose weapons are used and potentially leave unexploded remnants of war within the meaning of the Fifth Protocol to the 1980 Convention.

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[i] See, among others the report by Human Rights Watch, August 2022: https://www.hrw.org/news/2022/08/25/growing-civilian-toll-russian-cluster-munition-attacks

[ii] See, for example, John Paul Rathbone, "U.S. cluster bombs offer way to breach Russian lines despite risks to civilians", in: *Financial Times*, 12 July 2023, p. 3.

[iii] Ibid.

[iv] Ibid.

[v] See: https://www.armscontrol.org/act/2019-05/news/us-quit-arms-trade-treaty

[vi] There are some weighty arguments in favour of the claim that such a transfer would be contrary to Article 18 VCLT. Quite exceptionally for an international treaty, the Arms Trade Treaty itself defines its object and purpose: in Article 1, it states that one of its purposes is to "reducing human suffering". It could be argued that the transfer of a type of weapon having disastrous humanitarian consequences that are well known and documented might well be at odds with this provision.

[vii] See, for the norm-building effect of a multilateral treaty, Daniel Rietiker, "New Hope for Nuclear Disarmament or "Much Ado About Nothing?": Legal Assessment of the New "Treaty on the Prohibition of Nuclear Weapons" and the Joint Statement by the USA, UK, and France Following its Adoption", *Hardvard International Law Journal* (online); available at: https://harvardilj.org/2017/12/new-hope-for-nuclear-disarmament-or-much-ado-about-nothing-legal-assessment-of-the-new-treaty-on-the-prohibition-of-nuclear-weapons-and-the-joint-statement-by-the/

[viii] ICJ, Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),* Judgments (Merits), June 27, 1986, ICJ Reports 1986, § 220.

[ix] S. Vöneky, "implementation and Enforcement of International Humanitarian Law", in: D. Fleck (ed.), The *Handbook of Humanitarian Law,* 3rd ed., Oxford 2013, pp. 647-700, 650.

[x] ICRC Commentary on common Article 1 of the 1949 Geneva Conventions (edition 2016), § 162.

[xi] ICJ Reports 1996, § 78.

[xii] The Regulations are an Annex to the 1907 Hague Convention (IV). Article 25 reads as follows: "The attack or bombardment, of towns, villages, dwellings, or buildings which are undefended is prohibited."

[xiii] Article 48 (Basic rule): "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."
[xiv] T. Nash, "Preamble" (2nd Paragraph), in G. Nystuen and S. Casey-Maslen (eds.), The Convention on the Cluster Munitions, A Commentary, Oxford and New York, 2010, pp. 45-50, Maslen, commentary, p. 48.
[xv] A. Breitegger, Cluster Munitions and International Law: Disarmament with a Human Face, Routledge, London and New York 2012, pp. 44-45.
[xvi] See note 2, *supra.*
[xvii] See: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule71
[xviii] Richard A. Falk, The *Shimoda* Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki, AJIL, 1965, Vol. 59, pp. 759-793, 771.
[xix] Japanese Annual of International Law (J.A.I.L.), 1964, page 236.
[xx] It reads as follows: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."
[xxi] ICJ Reports 1996, § 78.
[xxii] *Khamzayev and Others v. Russia*, No. 1503/02, May 3, 2011, § 180.
[xxiii] Ibid., § 185.
[xxiv] Ibid., § 189.
[xxv] See, in particular, *Albekov and Others v. Russia*, No. 68216/01, Judgment of October 9, 2008, and *Paşa and Erkan Erol V. Turkey*, No. 51358/99, December 12, 2006.
[xxvi] I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996.
[xxvii] See in this sense, I.C.J., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J., Reports 1986, § 186: "In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule (…)."
[xxviii] Its full title is *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.*
[xxix] In certain circumstances, in particular where the State has no actual control of the affected territory, the actual user of the weapons is responsible for clearance, etc.
[xxx] See also Article 3 § 5.