



BOFAXE

Dissecting the Debate on Cluster Munitions (Part 1)

On July 7th, the Biden administration announced that it would be sending 155mm dual-purpose improved conventional munition (DPICM), a type of artillery-fired cluster munition, in its next military assistance package to Ukraine. The announcement led to criticism, albeit sometimes indirect, from NGOs and states concerned about the potential long-term consequences for civilians. It also led to a rather intense debate about the status of the weapon in international law and international norms. As highlighted in this debate, there is an international convention prohibiting the production, storage, and use of cluster munitions which has, to date, been ratified by 111 countries. However, missing from those 111 are the key countries in this debate – the United States, Ukraine, and Russia. While the inclusion of Russia in this list is not legally relevant for the transport of cluster munitions from the US to Ukraine, it is worth noting that Russia is not a party to the convention and has itself used cluster munitions in the war.

Importantly, this piece should not be seen as a moral or political argument for or against the transport and use of cluster munitions in Ukraine. As highlighted by Marc Garlasco, cluster munitions have devastating impacts for those in their crosshairs and for years after due to the number of submunitions left unexploded on the ground afterward. While proponents will highlight that modern DPICMs only have a 2 % to 3 % failure rate, a massive difference to the supposed up to 40 % failure rate of Russian cluster munitions, the New York Times reported that the DPICMs that Ukraine will receive are older and have a failure rate near 15 %. With likely over 100,000 DPICMs to be transferred and dozens of submunitions in each DPICM, even a 2 % rate would result in well over 100,000 unexploded munitions.

However, the case of cluster munitions is potentially the clearest example of a norm-law gap. I would argue that it points to an emerging disconnect between attempts to expand International Humanitarian Law (IHL) and the appropriateness of such limits by the armed actors most frequently tasked with ensuring IHL's implementation. Along these lines, in this piece, I will first discuss the relationship between norms in international relations and international law, with special attention to IHL. Then, I will dissect further the case of the ban on cluster munitions and, finally, extrapolate as to what one can take from this debate to the larger understanding of the role of international law in international relations and armed conflict.

Whose Norms?

While the international relations scholar Elvira Rosert presented a quite nuanced overview of the debate on Twitter, she stated that, even if not illegal, the arms transfer still violated a norm (in the international relations sense) against cluster munitions. But is that really the case? Norms are meant to reflect the perceived appropriateness, or oughtness, of a behaviour and, in theory, norms in international relations should serve as the foundation of international law. Political actors and states begin to view a behaviour, i.e. the use of cluster munition, as inappropriate or “bad” and, assuming there is enough international support, may choose to codify this in a treaty. Thus, states that do not agree with the prohibition enough to sign up to the convention surely do not view themselves as acting against something they “should” be doing.

Crucially, the oughtness of a norm is collectively defined by the international community both in norm forming, i.e. defining a norm, and in judging norm compliance of others. Furthermore, the perceived appropriateness of a norm should reflect how engrained a given norm is amongst both states and their citizens, particularly those involved in the sector most affected by the norm. In the case at hand, cluster munitions are not only banned by a treaty (the law) but should also be viewed as inappropriate weapons to use on the battlefield by both the government but also by those actors tasked with implementing the norm.

As a teenager, I remember reading BuzzFeed articles about “silly” laws that exist around the world. One prime example is the prohibition on kite flying, should it be an annoyance to others, in Victoria, Australia. This law is on the books and could be fined, however, could one say that there is a social norm behind it? Can the people of Victoria agree that flying a kite to the annoyance of someone else is inappropriate behaviour? While I've never lived in Victoria, I have my doubts as to whether this is an engrained belief amongst the population. Likewise, as described by Kratochwil and Ruggie (pp. 764-765), where there is a norm, one can act in violation of it and still agree with the norm itself. To use their example, one can drive drunk one time while still believing that driving drunk is not appropriate behaviour.

So how does IHL fit in to all of this? International conventions often reflect the collectively defined limits to armed conflict that states feel are appropriate. Thus, unlike the kite law in Victoria, there should not be a gap between a law and the social or international norm that underpins it. However, in cases where a law may extend beyond what is deemed appropriate by armed actors and not reflect *their* reality on the ground, then there is a sincere risk that these more contested norms aimed limiting armed conflict, like those against the use of cluster munitions, weaken the perceived strength and applicability of the entire system.

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BOFAXE

Dissecting the Debate on Cluster Munitions (Part 2)

— Where Does That Leave Us With Cluster Munitions?

The ban on cluster munitions is a relatively recent development in international law, the respective treaty only entering into force in 2010. In comparison to the Ottawa Treaty (164 State Parties minus 3 P5 members), the Chemical Weapons Convention (193 State Parties including all P5 members) or even the Certain Conventional Weapons (126 State Parties including all P5 members), the Convention on Cluster Munitions lags behind both in state parties and in support by the critical P5. This reflects that, in many cases, this limit to warfare is not yet viewed as appropriate by all those tasked with implementing it. While international norms and international law can be viewed independent of one another, international treaties and state parties to those treaties are often used in research on norms as a means of tracking norm diffusion.

This sentiment was, more or less, reflective of the personal opinion of a *Bundeswehr* officer in a personal conversation at a conference last year. While he would respect Germany's treaty commitments, he highlighted that, for him, the use of cluster munitions against enemy armoured vehicles outside of an urban environment would be effective and, in theory, morally appropriate. While this was an individual opinion, it does not reflect well on how engrained the international norm against the use of cluster munitions is in terms of being viewed as appropriate by those tasked with implementation. I do not believe the same officer would have said the same thing about chemical weapons or weapons with fragments undetectable by x-rays.

Perhaps, this is related to the perceived utility of cluster munitions. Particularly in peer-to-peer conflicts away from population centres, the cluster munitions would be particularly effective without endangering civilians, in the short-term at least. Then the question becomes whether or not norm entrepreneurs of IHL moved too hastily in codifying the norm against the use of cluster munitions during an era where conventional warfare, as we see in Eastern Ukraine, was thought to be long gone.

Conclusion

As highlighted by many in the debate over the weekend on social media, cluster munitions are neither a *Wunderwaffe*, which will turn the tide of war, nor are they mustard gas or explosives with non-detectable fragments, meant to cause unnecessary suffering. They unfortunately fall into a grey area of weapons which are effective and, often enough, devastating for years after as unexploded ordinance. Likewise, this piece should not be read to say that the Convention on Cluster Munitions is not an admirable attempt to reduce suffering of civilians during and after armed conflict – it certainly is.

However, when viewed within a larger context of frequent violations of IHL in armed conflict through the targeting of civilians and the use of indiscriminate force, the chance of a weakening of those precious protections that do exist and are viewed by all as morally appropriate should be avoided. Given that the use of cluster munitions does not appear to be widely viewed inappropriate on today's battlefield between like powers, perhaps humanitarians could take the opportunity to highlight the challenges to the principle of distinction that these munitions present, particularly in urban areas, and encourage those that insist on their use to do so sparingly and only in those situations where they are perceived as particularly effective.

Unfortunately, in cases where norms and laws diverge, it is often the law that is left to look silly and not the collectively defined norm. Along these lines, the international community should prioritise underscoring those key international norms which are widely accepted, like those of distinction and against the targeting of civilians, rather than international law that is not applicable to the conflict at hand and does not seem to fit the understandings of appropriateness of those tasked with putting the norm into practice.