

# The Lesser of Two Evils: Whether the United States is Legally Justified in Its Decision to Send Cluster Munitions to Ukraine

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## ABSTRACT

Over the past five years, the global community has seen a rapid influx of military hostility. Now, probably more than ever, people fear a nuclear holocaust or a third World War. Superpower States like Russia, China, and Israel exacerbate this fear with their recent military activity. History teaches us that maintaining international peace is vital. Nonetheless, some nations are presently invading other sovereign states, killing and injuring civilians, and ignoring well-recognized international conventions and treaties.

For example, in February 2022, Russia launched a large-scale invasion into Ukraine, completely disregarding the United Nations's prohibition on the crime of aggression and its Articles demanding respect for the sovereignty of nations. Throughout the hostilities of the Russo/Ukrainian war, both parties have perpetrated human rights atrocities, although more often from Russia than Ukraine. Specifically, cluster munition (hereinafter "CM") deployment advanced to the forefront of the global community's attention. As the deadly weapons are dropped from the sky, submunitions decimate markets, hospitals, apartment buildings, and schools. Despite global outcry, both Russia and Ukraine deem these weapons essential to their military efforts. And now, the United States has joined the conflict by supplying the Ukrainian military with CMs.

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This Comment analyzes the history of CMs, the legal authorities supporting and opposing their use, and potential avenues for legal relief relating to violative CM use. More specifically, this Comment assesses the legal justifications and implications for the United States's decision to send CMs into the Russo/Ukrainian conflict. Finally, this Comment concludes that the United States is legally justified in its decision to send CMs to the Ukrainian military.

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## I. INTRODUCTION

Ukraine has a unique history.<sup>1</sup> The European nation survived “centuries of bloodshed, foreign domination, and internal divisions [that] have left Ukraine in a precarious position between [the] East and West.”<sup>2</sup> Ukraine’s ties to Russian rule have spanned 1,000 years.<sup>3</sup> Despite these ties, competing powers have subjected the region to “carving” for the past [ten] centuries.<sup>4</sup> These powers divided control between the eastern and western regions of Ukraine. Consequently, the western region aligned with Democratic ideals while the eastern region adhered to traditional Soviet values.<sup>5</sup>

Upon the fall of the Soviet Union in 1991, Ukraine became a sovereign democratic and capitalistic nation.<sup>6</sup> Unfortunately, Ukraine only avoided hostility for 23 years.<sup>7</sup> In 2014, Russia occupied and annexed Crimea—then a province of Ukraine.<sup>8</sup> In 2021, Russia began amassing troops at the Ukrainian border, claiming that Russians and Ukrainians are “one people.”<sup>9</sup> Eight years after the annexation of Crimea, on February 24, 2022, Russia launched a full-scale invasion into the western region of Ukraine.<sup>10</sup> Artillery fire and foreign invaders decimated a once tranquil country, destroying beautiful countryside and vital infrastructure.<sup>11</sup> Ukraine’s citizens were forced to hide in subway stations or to flee from their homes with no sign of safe return.<sup>12</sup>

From the outset of the invasion, Russia employed cluster munitions (“CMs”).<sup>13</sup> CMs damaged apartment buildings, markets, hospitals, maternity clinics, and even schools.<sup>14</sup> As of November 2023, scholars estimate that “[m]ore than 10,000 civilians have been killed,” although they struggle to accurately account for deaths and injuries due to ongoing

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1. See Eve Conant, *Russia and Ukraine: The Tangled History That Connects—and Divides—Them*, NAT’L GEOGRAPHIC (Feb. 24, 2023), <https://perma.cc/Q5H9-E2G2>.

2. *Id.*

3. *See id.*

4. *Id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See Ukraine Events of 2022*, HUMAN RTS. WATCH, <https://perma.cc/QHW2-CENQ> (last visited Feb. 2, 2024).

11. *See id.*

12. *See id.*; see also AP PHOTOS: *Ukrainians Shelter in Subway Stations, Basements*, AP NEWS (Feb. 25, 2022, 2:14 PM), <https://perma.cc/QS5W-DXZF>.

13. *See Cluster Munition Use in Russia-Ukraine War*, HUMAN RTS. WATCH (May 29, 2023, 12:01 AM), <https://perma.cc/4KVN-G8R7>.

14. *See id.*

fighting.<sup>15</sup> Many outlets suggest that number to be much higher.<sup>16</sup> In addition to loss of life, the Russo/Ukrainian conflict has had devastating economic consequences. As of March 2023, scholars estimate that “the cost of reconstruction and recovery in Ukraine has grown to \$411 billion dollars.”<sup>17</sup>

In response to the massive destruction and death in Ukraine, the United States decided to send CMs to the Ukrainian military in July 2023—a decision that sparked humanitarian concerns.<sup>18</sup> Estimates show that the cost of the aid package furnishing CMs to Ukraine was valued at approximately \$800 million.<sup>19</sup> According to the United States, “the weapons . . . sen[t] to Ukraine ha[ve] a failure rate of [2.35%] or less, far better than the usual rate that is common for cluster weapons.”<sup>20</sup> While recognizing the humanitarian concerns associated with CMs, the United States justifies its decision to send these munitions to Ukraine on the grounds that they believe they are necessary to ward off Russia. The United States further justifies its decision by citing that Russia already utilized CMs throughout the conflict.<sup>21</sup>

This Comment seeks to address the possible legal implications surrounding the United States’s decision to send CMs to the Ukrainian military. More specifically, this Comment explores whether the use of CMs is consistent with international law and, if not, whether the United States exposed itself to legal consequences for aiding a country in the commission of war crimes.

First, Section II.A. discusses the history of CMs, as a basic understanding of the weapon’s past and development is essential to resolution of these legal issues.<sup>22</sup> Particularly, Section II.A. addresses the issue of whether CMs are *per se* violative of humanitarian principles, which are outlined by the law of armed conflict.<sup>23</sup> Further, this Section outlines CMs, their military utility, and the potential problems inherent in their use, all of which should inform policy decisions regarding CMs.<sup>24</sup>

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15. See *Civilian Death Toll in Ukraine Tops 10,000 – U.N. Human Rights Office*, REUTERS (Nov. 21, 2023, 10:21 AM), <https://perma.cc/3BPJ-H8B9>.

16. See, e.g., *id.*

17. Press Release, *Updated Ukraine Recovery and Reconstruction Needs Assessment*, THE WORLD BANK (Mar. 23, 2023), <https://perma.cc/A8EW-4R63>.

18. See *US to Send Cluster Bombs to Ukraine Despite Humanitarian Concerns*, ALJAZEERA (July 7, 2023), <https://perma.cc/QL69-FSNT>.

19. See *id.*

20. John Ismay, *Cluster Weapons U.S. is Sending Ukraine Often Fail to Detonate*, N.Y. TIMES (July 7, 2023), <https://perma.cc/C3JG-U6G9>.

21. See *id.*

22. See *infra* Section II.A.

23. See *id.*

24. See *id.*

Then, Section II.B. discusses the current state of the international law on war with respect to CMs.<sup>25</sup> Notably, this Section discusses the Geneva Conventions of 1949, Additional Protocol 1 of 1977, International Humanitarian Law (“IHL”), and the broad concept of *Jus in bello*.<sup>26</sup> Further, this Section discusses the ability of the International Criminal Court (“ICC”) and the International Court of Justice (“ICJ”) to exercise jurisdiction and to implement meaningful change regarding the conflict.<sup>27</sup>

Finally, Section II.C. discusses legal authority that may be implicated in the Russo/Ukrainian war.<sup>28</sup> First, Section II.C. delves into widely recognized international treaties like the 1980 Convention on Conventional Weapons (“CCW”) and the 2008 Convention on Cluster Munitions (“CCM”).<sup>29</sup> Subsequently, this Section explains the body of law known as Customary International Humanitarian Law (“CIHL”) and the ways that body of law came into existence.<sup>30</sup> Finally, Section II.C. outlines the ways that tribunals can impute legal responsibility for one State’s violations to another State.<sup>31</sup>

Part III begins by addressing which international authorities will govern the United States’s decision to send CMs to Ukraine.<sup>32</sup> Sections III.A.1. and III.A.2. explain the applicability of the Geneva Conventions, Additional Protocol 1, the CCW, and the CCM, regarding U.S. action.<sup>33</sup> Next, Part III analyzes the likelihood of involvement from international tribunals.<sup>34</sup> In particular, Sections III.B.1. and III.B.2. explain the jurisdictional problems associated with the ICC and the ICJ regarding U.S. involvement.<sup>35</sup> Finally, Part III concludes by addressing the possible future of CM use.<sup>36</sup> Section III.C. speaks to the ineffectiveness that international tribunals encounter due to their lack of enforcement means. Finally, Section III.C. presents potential solutions to alleviate that ineffectiveness.<sup>37</sup>

Ultimately, this Comment argues that the United States is legally justified in its decision to send CMs to the Ukrainian government.<sup>38</sup> The United States’s legal justification is supported by the inapplicability of the

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25. *See infra* Section II.B.

26. *See id.*

27. *See id.*

28. *See infra* Section II.C.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See infra* Section III.A.

33. *See infra* Sections III.A.1.–2.

34. *See infra* Sections III.B.1.–2.

35. *See id.*

36. *See infra* Section III.C.

37. *See id.*

38. *See infra* Part IV.

aforementioned international authorities and tribunals, the weak nexus between sending ordinance and the actual employment of that ordinance, and the stringent international framework for imputing legal responsibility from one State to another.<sup>39</sup>

## II. BACKGROUND

This Part provides historical and legal context relevant to determining international liability for the use of CMs.<sup>40</sup> Additionally, this Part explains fundamental characteristics of CMs, which may be applied to legal analyses regarding their use and furnishment in war.<sup>41</sup> Finally, this Part describes international legal doctrines regarding the imputation of legal responsibility for a country and the international tribunals able to adjudicate claims under them.<sup>42</sup>

### A. *History of Cluster Munitions*

Before this Comment can adequately analyze legal issues concerning CMs, an understanding of CMs, is necessary. Specifically, legal analysis requires comprehension of the manner in which CMs function,<sup>43</sup> the utility of CMs,<sup>44</sup> the probability that a CM will detonate properly,<sup>45</sup> and the recent, prior use of CMs in armed conflict.<sup>46</sup> This context will aid any

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39. See *infra* Parts III–IV.

40. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, UNITED NATIONS (Dec. 8, 1949), <https://perma.cc/8U68-UV4D>; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, ICRC (June. 8, 1977), <https://perma.cc/Z5BY-FW7T>; *Convention Text, CONVENTION ON CLUSTER MUNITIONS* (2008), <https://perma.cc/BJG9-695G>; *High Contracting Parties and Signatories CCW, CONVENTION ON CERTAIN CONVENTIONAL WEAPONS* (Nov. 28, 2003) <https://perma.cc/2TKM-DZNG>; Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893, 1895 (2016); *What is International Humanitarian Law?*, ICRC (Apr. 6, 2022), <https://perma.cc/E7ZA-FQ52>; *About the Court*, INT'L CRIM. CT., <https://perma.cc/3AEG-UVDA> (last visited Feb. 25, 2024); *How the Court Works*, INT'L CT. OF JUST., <https://perma.cc/H9MV-NGHS> (last visited Feb. 25, 2024).

41. See *infra* Sections II.A.1.–2. (discussing what CMs are and how they have been used in armed conflict).

42. See *infra* Sections II.B.3.a.–b., II.C.4. (discussing the frameworks that international tribunals use to impute legal responsibility).

43. See Joseph Anzalone, *The Virtue of a Proportional Response: The United States Stance Against The Convention On Cluster Munitions*, 22 PACE INT'L L. REV. 183, 185–87 (2010).

44. See Karl C. Ching, *The Use of Cluster Munitions in The War on Terrorism*, 31 SUFFOLK TRANSNAT'L L. REV. 127, 163 (2007); see also Eitan Barak, *None To Be Trusted: Israel's Use of Cluster Munitions In The Second Lebanon War and The Case For The Convention on Cluster Munitions*, 25 AM. U. INT'L L. REV. 423, 436 (2010)

45. See Ching, *supra* note 44, at 130–32.

46. See *id.* at 154–58.

attempt to conduct legal analysis, policy analysis, or both, concerning the propriety of CM use.

Additionally, as is often the case with legal issues and other disciplines, the past informs the future. Both international and domestic law, regarding armed conflict, is regularly developed with the benefit of hindsight.<sup>47</sup> Lawmakers pay close attention to the context in which an issue arises, the prior policy approaches, and the results of those approaches. This Section seeks to lay the basic foundation for taking an informed and pragmatic approach regarding CM use in armed conflict.

### 1. What Cluster Munitions Are

Beginning in WWII, the first cluster munition used extensively in combat was the German SD-2 or *Sprengbombe Dickwandig 2 kg* (“Butterfly Bomb”).<sup>48</sup> The Germans developed this bomb in 1943.<sup>49</sup> The primary purpose behind the Butterfly Bomb was not to destroy buildings or vehicles, but to “kill and maim people.”<sup>50</sup> In fact, the first German design of the Butterfly Bomb incorporated a “delay fuse.”<sup>51</sup> This fuse allowed Butterfly Bombs to detonate intermittently, which was effective in causing damage, beyond initial impact, to military first responders and unassuming citizens.<sup>52</sup> Although States have subjected CMs to stricter regulation and significant development, modern CMs still face the same humanitarian criticisms that the Butterfly Bomb did in the 1940s.<sup>53</sup>

Since their first use in 1943, CMs drastically changed, while still maintaining their nature and purpose. Modern-day CMs “open in midair and scatter a number of submunitions over an area that can be as large as one to five football fields.”<sup>54</sup> States deliver CMs through a variety of carriers; most often they are dropped from the air, but they can also be delivered from ground mechanisms like artillery, missiles, or rockets.<sup>55</sup> Contemporary CMs are so devastating because “[o]nce a submunition hits

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47. See, e.g., *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40 (developed after WWII).

48. See GENEVA INTERNATIONAL CENTRE FOR HUMANITARIAN DEMINING & CONVENTION ON CLUSTER MUNITIONS, A GUIDE TO CLUSTER MUNITIONS 21 (3d ed. 2016) [hereinafter A GUIDE TO CLUSTER MUNITIONS]; see also James Rogers, *Remembering the Terror the Luftwaffe’s Butterfly Bombs Brought to the North*, *GUARDIAN* (June 21, 2013, 5:00 AM), <https://perma.cc/QNB3-K2EE>.

49. See A GUIDE TO CLUSTER MUNITIONS, *supra* note 48; see also Rogers, *supra* note 48.

50. See Rogers, *supra* note 48.

51. See *id.*

52. See *id.*

53. See *supra* Section II.A.1.; see also *infra* Section II.B.1.; *infra* Section II.B.2. (discussing the humanitarian concerns associated with CMs).

54. Anzalone, *supra* note 43, at 185.

55. See *id.* at 186.

its impact point, its casing breaks apart into more than 300 pieces of shrapnel that can travel with enough force to pierce armor.”<sup>56</sup> This armor-piercing capability marks a significant advancement in the deadliness of CMs since their use in WWII.<sup>57</sup>

Additionally, CMs now incorporate “parachute-like” devices to improve accuracy while they descend toward their target.<sup>58</sup> Further, “[t]he newest generations of submunitions include guidance packages that correct for winds[] and sensor-fuses . . . designed to detect and destroy armored vehicles without producing a wide anti-personnel effect.”<sup>59</sup> Thus, despite the increased lethality of modern CMs, modern CM guidance systems may reduce the impact of CMs on civilians.<sup>60</sup> Despite these additional measures towards safety, the international community increasingly asserts that the unnecessary suffering caused by CMs, and abandonment of other accepted international principles, outweighs the military advantages implicit in CM use.<sup>61</sup>

States often use CMs due to their military utility, which “lies in the weapon’s ability to destroy numerous targets at once.”<sup>62</sup> CMs have high military utility because they are a means of quickly carrying and delivering significant quantities of explosive devices to a wide area in a short timeframe.<sup>63</sup> In addition, CMs are adept at destroying targets that do not have a fixed location, such as general area targets or moving targets.<sup>64</sup> However, the military advantages that CMs confer are a double-edged sword. “One of the major humanitarian concerns regarding the use of cluster munitions is the number[] [of CMs] that fail to explode as intended, [and become duds].”<sup>65</sup> Many factors contribute to a CM’s failure to explode, including design, storage, drop metrics, ground conditions, and interaction with other bomblets.<sup>66</sup> Presently, CM failure rates rest anywhere between 2% and 30%.<sup>67</sup> Consequently, many argue that the risk of failure for CMs is too high to justify its military advantage.<sup>68</sup> However, despite the growing popularity of this position internationally, many States

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56. *Id.* at 185–86.

57. *See id.* at 186–87.

58. *Id.*

59. *Id.* at 187.

60. *See id.*

61. *See* Barak, *supra* note 44, at 475–483.

62. Anzalone, *supra* note 43, at 185.

63. *See* A GUIDE TO CLUSTER MUNITIONS, *supra* note 48, at 17–18.

64. *See id.* at 17–18, 28–32.

65. *Id.* at 40.

66. *See id.* at 40–41.

67. CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS 2 (2024).

68. *See* Ching, *supra* note 44, at 163.



continue to use CMs and stand steadfast in their belief that international law does not bar CM use.<sup>69</sup>

## 2. Cluster Munition Use in Armed Conflicts

Since their creation in the late 1930s, warring nations have frequently deployed CMs in international armed conflicts.<sup>70</sup> In fact, since WWII, “cluster munitions have been used in at least 21 [S]tates by at least 13 different countries.”<sup>71</sup> Some of the notable territories subjected to the impact of CMs since 1945, include Vietnam, Lebanon, Afghanistan, Iraq, Yugoslavia, Libya, and Ukraine.<sup>72</sup> Additionally, “[33] States have produced . . . [CMs], while [70] States are known to stockpile the weapon.”<sup>73</sup> Some of the notable States that continue to manufacture or use CMs include the United States, Ukraine, Russia, China, Israel, Iran, India, and North Korea.<sup>74</sup> Conversely, other States like Afghanistan, Iraq, Japan, France, Germany, United Kingdom, Canada, and Mexico have signed the CCM, which nearly bans the use of CMs outright.<sup>75</sup> Currently, there are 112 partied States to the CCM and 73 non-partied States, with 12 signatory States.<sup>76</sup> The global community’s fractured adoption of the CCM eloquently depicts the current global divide both on what the law calls for and what the law should be with respect to CMs. Regardless, a universal approach has not been adopted, making legal analysis on actions involving CMs uncertain at best.

### B. Laws Governing War & Weapons

While analysis of the legal issues arising from CMs can be ambiguous, some guidance on the topic is available.<sup>77</sup> However, with

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69. See Anzalone, *supra* note 43, at 187–88.

70. See A GUIDE TO CLUSTER MUNITIONS *supra* note 48, at 21–23.

71. CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS *supra* note 67, at 1.

72. See Anzalone, *supra* note 43, at 186–88; see also Ching *supra* note 44, at 137–47.

73. See Anzalone, *supra* note 43, at 188.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40; see also *Convention Text*, *supra* note 40; *High Contracting Parties and Signatories CCW*, *supra* note 40; Scoville, *supra* note 40; *What is International Humanitarian Law?*, *supra* note 40; *About the Court*, *supra* note 40; *How the Court Works*, *supra* note 40.

respect to international law on armed conflict, the law is fairly clear, albeit piecemealed together from diverse sources.<sup>78</sup>

First, this Section discusses the Geneva Conventions of 1949 (“GC”), along with Additional Protocol 1 of 1977 (“AP1”),<sup>79</sup> which govern international armed conflict and seek to reduce the damage to civilians stemming from war. Subsequently, this Section discusses the more general concept of *Jus in bello*, which is the law governing armed conflict. *Jus in bello* is a compilation of IHL (also known as “the law of armed conflict”), international treaties, CIHL, and general principles of law.<sup>80</sup> Finally, this Section explains the interplay between the GC, AP1, IHL, and CIHL, making up the general body of *Jus in bello*.

### 1. Geneva Conventions of 1949 & Additional Protocol 1 of 1977

The GC and AP1 are the legal cornerstones of international armed conflict. The purposes of the GC and AP1 are to “protect victims and noncombatants, including the wounded, prisoners of war, and civilians.”<sup>81</sup> “The [GC] are binding on almost all countries in the world, including the United States.”<sup>82</sup> Additionally, “although the United States . . . declined to ratify [AP1], [AP1] is considered indicative of [CIHL] based on the legal norms that are derived from common state practice that bind all nations despite any specific legal commitments.”<sup>83</sup> For the purposes of this Section, this Comment assumes that AP1 governs the conduct of the parties involved in the present dispute.<sup>84</sup>

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78. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40; see also *Convention Text*, *supra* note 40; *High Contracting Parties and Signatories CCW*, *supra* note 40; Scoville, *supra* note 40; *What is International Humanitarian Law?*, *supra* note 40; *About the Court*, *supra* note 40; *How the Court Works*, *supra* note 40.

79. Ching, *supra* note 44 at 135 n.39 (stating that no treaty exists to regulate cluster munitions, however, “Protocol I . . . offers ‘internationally accepted legal standards for evaluating the problems posed by these weapons’”) (quoting HUMAN RIGHTS WATCH, MEMORANDUM TO CCW DELEGATES, CLUSTER MUNITIONS AND INTERNATIONAL HUMANITARIAN LAW: THE NEED FOR BETTER COMPLIANCE AND STRONGER RULES 2 (2004)).

80. See *What is International Humanitarian Law?*, *supra* note 40.

81. Ching *supra* note 44, at 135.

82. *Id.*

83. *Id.*

84. See *infra* Section II.C.3. (discussing the application of Customary International Humanitarian Law).

AP1 protects civilians by establishing the rule of distinction,<sup>85</sup> as well as prohibitions against indiscriminate attacks,<sup>86</sup> disproportionate attacks,<sup>87</sup> and attacks that cause unnecessary suffering.<sup>88</sup> The rule of distinction requires that, “[p]arties . . . shall . . . distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>89</sup> Beyond the requirement of distinct attacks, AP1 also prevents indiscriminate attacks, which are:

(a) those which are not directed at a specific military objective; (b) [t]hose which employ a method or means of combat which cannot be directed at a specific military objective; or (c) [t]hose which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [Indiscriminate attacks include] an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.<sup>90</sup>

Moreover, AP1 protects against disproportionate attacks, which are defined under the AP1 as “attack[s] which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>91</sup> Finally, while AP1 does not explicitly define “unnecessary suffering,” the drafters likely intended this to mean any suffering incurred by civilians that is not justified by a “concrete and direct military advantage,” thereby incorporating this requirement into a proportionality analysis.<sup>92</sup>

Reasonable debate exists as to whether the core principles of AP1 apply to the Russo/Ukrainian war. However, if these principles are found to apply, then their application is relevant to determining the legality of CM use in the conflict.<sup>93</sup> Moreover, a majority of the positions arguing

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85. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Protocol 1) at art. 48.

86. *Id.* at art. 51(5)(b).

87. *See id.* at art. 51(5)(b).

88. *See id.* at art. 35.

89. *Id.* at art. 48.

90. *Id.* at arts. 51(4)–(5)(a).

91. *Id.* at art. 51(5)(b).

92. *See id.* at art. 51(5)(b).

93. *See What is International Humanitarian Law?*, *supra* note 40.

against CM use assert that at least one of these aforementioned principles have been infringed upon.<sup>94</sup>

## 2. Jus in bello

“Jus in bello” is a Latin term which roughly translates to “justice in war.”<sup>95</sup> In legal settings, scholars and practitioners use the term when referring to proper “conduct in the midst of battle, after the war has started.”<sup>96</sup> Further, the GC and AP1 would properly be included under the concept of *Jus in bello*.<sup>97</sup> However, the concept is not limited to just those two authorities.<sup>98</sup> *Jus in bello* also incorporates IHL, CIHL, international treaties, and general principles of law.<sup>99</sup> *Jus in bello* is an especially important concept for this Comment because it includes CIHL. CIHL is a body of law that operates similarly to the United States’s common law system.<sup>100</sup> CIHL comprises “legal norms that are derived from common state practices that bind all nations despite any specific legal commitments.”<sup>101</sup> For example, most nations consider the principles included in AP1 to be part of CIHL, thus applying to a State’s actions despite a State’s refusal to ratify the amendment to the GC.<sup>102</sup> Despite refusing to ratify AP1, the United States clearly recognizes and conforms to the protocol’s requirements, evidencing the adoption of these principles into CIHL. Indeed, the United States has recognized the AP1 as binding upon them, illustrating the AP1’s adoption as CIHL.

## 3. Avenues for Relief

This Section examines the possible avenues for legal relief in the context of war crimes or deviation from CIHL. The two most likely avenues for relief, relating to the Russo/Ukrainian war, would be through either the ICC or the ICJ.<sup>103</sup>

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94. See Anzalone, *supra* note 43, at 191–98; see also Ching *supra* note 44, at 153–63.

95. BRIAN OREND, *Jus in Bello—Just Conduct in War, in The Morality of War* 105, 105 (1st ed., Broadview Press 2006).

96. *Id.* (making it clear that *Jus in bello* is an appropriate concept for this Comment because this Comment does not seek to analyze justification for the Russo/Ukrainian war at the outset).

97. *What is International Humanitarian Law?*, *supra* note 40.

98. See, e.g., Ching, *supra* note 44, at 163.

99. See *What is International Humanitarian Law?*, *supra* note 40.

100. See Scoville, *supra* note 40.

101. Ching, *supra* note 44, at 135.

102. See *id.* at 134.

103. See *About the Court*, *supra* note 40; see also *How the Court Works*, *supra* note 40.

a. International Criminal Court

The 1998 Rome Statute established the ICC as “the world’s first permanent international criminal court.”<sup>104</sup> The tribunal, a court of last resort, serves as a venue for the prosecution of individuals who violate international law.<sup>105</sup> However, the court does not seek to replace national courts. Rather, it serves in a complementary role to domestic tribunals.<sup>106</sup>

Under the Rome Statute, the ICC has subject matter jurisdiction over criminal matters involving genocide, crimes against humanity, grave breaches of the GC, and the crime of aggression.<sup>107</sup> Crimes against humanity are “serious violations committed as a part of a large-scale attack against any civilian population.”<sup>108</sup> Grave breaches are the “killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science[,] or charitable purposes.”<sup>109</sup> The crime of aggression is “the use of armed force by a State against the sovereignty integrity, or independence of another State.”<sup>110</sup> Based on the ICC’s subject matter jurisdiction, the court would seem to be a straightforward choice as an authoritative body over the Russo/Ukrainian war, with respect to CM use.

However, there are some significant limits on the ICC which make its role regarding the Russo/Ukrainian war ambiguous.<sup>111</sup> First, “the ICC cannot investigate or prosecute governments, corporations, political parties, or rebel movements, but may investigate individuals who are members of groups.”<sup>112</sup> Second, the ICC can “only exercise jurisdiction over nationals from a State within the Court’s jurisdiction.”<sup>113</sup> Third, the ICC’s territorial jurisdiction further limits the court’s reach.<sup>114</sup> Specifically, “the ICC can only exercise jurisdiction in the territory of State parties, non-State parties that consent to jurisdiction, or non-State parties that are referred to the court by the U.N. Security Council.”<sup>115</sup> Fourth, and finally, “the ICC has no police force of its own[,]” thus “[relying] on the cooperation of the country where the fugitive is located,

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104. *About the Court*, *supra* note 40.

105. *See id.*

106. *See id.*

107. *See id.*

108. *How the Court Works*, INT’L CRIM. CT., <https://perma.cc/N8RC-UZEV> (last visited Feb. 25, 2024).

109. *Id.*

110. *Id.*

111. *See About the Court*, *supra* note 40.

112. *How the Court Works*, *supra* note 108.

113. *Id.*

114. *See id.*

115. *Id.*

and of that country's police force."<sup>116</sup> Despite the limits on the ICC, and neither Russia nor Ukraine being State parties to the 1998 Rome Statute, several countries are already calling for the court's involvement in Ukraine.<sup>117</sup>

#### b. International Court of Justice

Like the ICC, the ICJ may attempt to assert jurisdiction over the Russo/Ukrainian war. Article 14 of the Covenant of the League of Nations originally established the ICJ in 1945 under the name "The Permanent Court of International Justice."<sup>118</sup> Along with creating the tribunal, Article 14 deemed the court "competent not only to hear and determine any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory opinion upon any dispute or question referred to it by the Council or Assembly of the League of Nations."<sup>119</sup> The Permanent Court of International Justice developed into the ICJ in 1946, with substantially the same functions, following the devastation of WWII.<sup>120</sup>

Today, "[t]he ICJ may resolve disputes if States accept the Court's jurisdiction in one or more of the following ways:

- (1) By entering into a special agreement to submit the dispute to the Court;
- (2) By virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
- (3) Through the reciprocal effect of declarations made by them under the statute, whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations, which must be deposited with the United Nations Secretary General, contain reservations excluding certain categories of dispute.<sup>121</sup>

Additionally, the ICJ statute contains Article 36, which is often referred to as the "optional clause."<sup>122</sup> Jurisdiction is sometimes complicated under this clause, as Article 36(5) allows "declarations . . . which are still in force

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116. *Id.*

117. *See id.*; *see also* Ykpaïhecbka Moba, *Ukraine Accepts ICC Jurisdiction over Alleged Crimes Committed Since 20 February 2014*, INT'L CRIM. CT. (Sept. 8, 2015), <https://perma.cc/8L42-QLHH> [hereinafter *Ukraine Accepts ICC Jurisdiction*].

118. *History*, INT'L CT. OF JUST., <https://perma.cc/2AD2-4KVN> (last visited June 24, 2024).

119. *Id.*

120. *See id.*

121. *How the Court Works*, *supra* note 40.

122. *See* Renata Szafarz, *Poland Accepts the Optional Clause of the ICJ Statute*, 85 AM. J. INT'L L. 374, 374–75 (1991).

[to] be deemed . . . acceptances of . . . [the ICJ's] jurisdiction.”<sup>123</sup> However, “[b]y signing the UN Charter, a Member State of the United Nations undertakes to comply with the decision of the Court in any case to which it is a party.”<sup>124</sup> Russia, Ukraine, and the United States are all Member States to the U.N. and original members to the ICJ, making the court’s decisions binding upon them, unlike the decisions of the ICC.<sup>125</sup> Further, unlike the ICC, the ICJ can attribute guilt or liability to a Member State’s government, not to individuals.<sup>126</sup>

### C. Potentially Implicated Legal Authority

Going beyond legal authority that courts will certainly use to ascertain the legality of the United States’s decision to send CMs to Ukraine, Section II.C. addresses legal authority with the potential to be authoritative. First, Section II.C. explores widely recognized treaties applicable to CM use, including the 1980 Convention on Certain Conventional Weapon and the 2008 Convention on Cluster Munitions. Then, Section II.C.3. explains the concept of CIHL. Finally, Section II.C.4. explains two competing views regarding the imputation of legal authority to indirectly involved third party States, as set out in *United States v. Nicaragua* and *Prosecutor v. Tadić*.<sup>127</sup>

#### 1. 1980 Convention on Certain Conventional Weapons

The CCW went into force in 1983. The CCW “seeks to protect combatants and noncombatants from certain types of weapons.”<sup>128</sup> The treaty focuses on “incendiary weapons, mines, booby-traps, and fragmentary weapons.”<sup>129</sup> The most relevant portion of the CCW to CM use is Protocol V. Protocol V provides:

- (1) Parties which become participants in an armed conflict bear responsibility with respect to all explosive remnants of war in territory under their control.
- (2) After the cessation of active hostilities, and as soon as feasible, such a [P]arty to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control.
- (3) Parties shall, to the maximum extent

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123. *Statute of the International Court of Justice*, INT’L CT. OF JUST., <https://perma.cc/2G2D-LLZV> (last visited Feb. 25, 2024).

124. U.N. Charter art. 94 ¶ 1.

125. *See id.*; *see also* Member States, UNITED NATIONS, <https://perma.cc/M9S5-DPFN> (last visited June 22, 2024).

126. *See id.*

127. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 5 ¶ 1 (June 27); *see also* Prosecutor v. Tadić, Judgment, Case No. IT-94-I (Oct. 2).

128. Anzalone, *supra* note 43, at 199.

129. *Id.*

possible, record and retain information on the use of explosive remnants of war, and make available such information to the [P]arty in control of the affected areas. (4) Parties shall take all feasible precautions to protect civilian population from the risks and effects of explosive remnants of war. (5) Parties shall cooperate among themselves and with other States and organizations, and shall assist each other in order to fulfill their duty of clearance, removal, or destruction of explosive remnants of war.<sup>130</sup>

The parties to the CCW, especially the Group of Governmental Experts (“GGE”), repeatedly tried to draft amended protocols explicitly restricting CMs, but failed to reach consensus.<sup>131</sup> All three of the States discussed in this Comment—Russia, Ukraine, and the United States—are high-contracting parties to the CCW.<sup>132</sup> Nevertheless, in its current state, the GGE does not interpret the convention to regulate the manufacture, stockpiling, or use of CMs. This interpretation will likely remain the norm unless the GGE agrees on an amended protocol.<sup>133</sup>

## 2. 2008 Convention on Cluster Munitions

More recently, in 2008, 111 States finalized and signed the CCM in Dublin.<sup>134</sup> “The [CCM] bans the use, production, and trade of [certain] cluster munitions.”<sup>135</sup> Therefore, in comparison to the CCW, the CCM more explicitly addresses the CM issue. “The CCM defines a cluster munition as a ‘conventional munitions that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms.’”<sup>136</sup> However, despite this strong language purporting to ban all CMs, the CCM allows CM use so long as the munitions comply with specific requirements.<sup>137</sup>

For instance, munitions that have the following characteristics are permissible:

- (1) Each munition contains fewer than ten explosive submunitions;
- (2) Each explosive submunition weighs more than four kilograms;
- (3) Each explosive submunition is designed to detect and engage a single target object;
- (4) Each explosive submunition is equipped with an electronic self-destruction mechanism; and
- (5) Each explosive

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130. *CCW Protocol V on Explosive Remnants of War* UNITED NATIONS (Nov. 28, 2003), <https://perma.cc/E6Y5-YVEL>.

131. See Barak, *supra* note 44, at 426–28.

132. See *Convention on Certain Conventional Weapons Protocol V, Protocol on Explosive Remnants of War*, *supra* note 130.

133. See Barak, *supra* note 44, at 426–30.

134. See *Convention on Cluster Munitions* art. 1, May 30, 2008, 2688 U.N.T.S. 42.

135. Anzalone, *supra* note 43, at 184.

136. *Id.* at 202 (quoting *Convention on Cluster Munitions* art. 1, May 30, 2008).

137. See *id.* at 202–03.



submunition is equipped with an electronic self-deactivating feature.<sup>138</sup>

Moreover, the CCM “set[] out an eight-year deadline for member-[S]tates to destroy stockpiles of [CMs].”<sup>139</sup> Furthermore, the final clause of the CCM permits “[S]tate parties to ‘engage in military cooperation and operations with States not party’ to the treaty.”<sup>140</sup> For example, NATO members who have signed the CCM may still participate in military operations with States like the United States, who have CMs in their arsenal. The clause protects parties from potential aggression by States which are unlikely to become parties to the CCM.<sup>141</sup> Currently, 113 States are parties to the CCM, 73 are not, and 12 States are signatories.<sup>142</sup> More importantly, Russia, Ukraine, and the United States are not members of the CCM.<sup>143</sup>

### 3. Customary International Humanitarian Law

As previously mentioned, CIHL is “based on the legal norms that are derived from common [S]tate practices that bind all nations despite any specific legal commitments.”<sup>144</sup> A State practice becomes CIHL when the “general and consistent [State] practice [is] followed [out of] . . . a sense of legal obligation.”<sup>145</sup> For a practice to be general, the practice must be followed by a “large share of [the] affected States.”<sup>146</sup> For a practice to be considered consistent, that practice need not be followed with “absolute[] rigorous conformity.” Instead, a practice need only attain “steady adherence . . . over a substantial period of time.”<sup>147</sup> With respect to a “sense of legal obligation,” this phrasing “ensur[es] that measures undertaken as a matter of mere courtesy, habit, or policy do not automatically acquire the status of law.”<sup>148</sup> Essentially, for law to become CIHL, a State must recognize and consent to its legitimacy.<sup>149</sup> As an example, several States, including the United States, decided not to ratify

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138. *Id.* at 202–03 (quoting Convention on Cluster Munitions art. 1, May 30, 2008).

139. *Id.* at 203.

140. *Id.* (quoting Convention on Cluster Munitions art. 1, May 30, 2008)

141. *See id.* at 203–04.

142. *Convention Text, supra* note 40.

143. *See id.*

144. *See supra* Section II.B.2; Ching, *supra* note 44, at 135.

145. Scoville, *supra* note 40, at 1895 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 102 (AM. LAW INST. 1987)).

146. *Id.* (quoting Andrew T. Guzman, *Saving Customary International*, 27 MICH. J. INT’L L. 115, 150 (2005)).

147. *Id.* at 1896 (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 98 ¶ 186 (June 27)).

148. *Id.*

149. *See id.*

API to the GC, but do recognize most of the Protocol as CIHL.<sup>150</sup> The International Committee of the Red Cross authored a list of 161 rules that they consider to be CIHL.<sup>151</sup> Although this list does not bind any State, it accurately reflects current State practices.

#### 4. Imputation of Legal Responsibility

Finally, this Section seeks to explain the competing legal tests courts employ to hold States accountable for assisting other States involved in armed conflict. Traditionally, international tribunals reserve legal attribution to a State for the actions of another for when those States maintain control over organized armed groups (“OAG(s)”)<sup>152</sup> However, international tribunals have extended and applied this concept to State control over another State, albeit less frequently.<sup>153</sup>

When deciding whether to impute legal responsibility to a State, tribunals employ one of several legal tests, the first being the overall control test. The overall control test—allows for a broad attribution of legal responsibility to States for their indirect actions.<sup>154</sup> This test allows for imputation of legal responsibility if a State, “not only financ[es], equip[s] . . . but also coordinat[es] or help[s] in the general planning of [another State’s] activity.”<sup>155</sup>

In contrast, the ICJ announced a different standard—the effective control test—in the case of *United States v. Nicaragua*.<sup>156</sup> The effective control standard requires that a State “direct[] or enforce[] the perpetration of the acts contrary to . . . [IHL] alleged by the applicant State.”<sup>157</sup> In *Nicaragua*, the Nicaraguan government asserted that the United States was liable for training, arming and encouraging *contras*—an OAG in active opposition of the established government—through a legal claim in the ICJ.<sup>158</sup> Applying the effective control standard, the court held that the United States was not responsible for the actions of the *contras* because

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150. See George H. Aldrich, *Prospects For United States Ratification Of Additional Protocol I To The 1949 Geneva Conventions*, 85 AM. J. INT’L L. 1, 12–20 (1991).

151. See INTERNATIONAL COMMITTEE OF THE RED CROSS, RULES (2023).

152. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 86 (June 27); see also *Prosecutor v. Tadic*, Judgment, Case No. IT-94-I, ¶¶ 69–73 (Oct. 2).

153. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 1996, I.C.J. 6 ¶ 1 (July 11).

154. See Antonio Cassese, *The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649, 651 (2007).

155. *Id.* at 657.

156. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 20 (June 27).

157. Cassese, *supra* note 154, at 653 (emphasis omitted).

158. See *id.*

inadequate evidence existed to prove that the United States directed the *contras* actions.<sup>159</sup> However, even under that test, the United States still bore responsibility for the material support through their “obligation[s] not to intervene in the affairs of other States as well as the obligation not to use force in breach of [CIHL] corresponding to Article 2(4) of the U.N. [c]harter.”<sup>160</sup>

While no clear answer exists as to which test should or will apply to the Russo/Ukrainian war, the United States will likely advocate for the effective control standard to lessen the chance of legal liability for supplying the Ukrainian military with CMs. Further, should any claim be brought under ICJ jurisdiction, the court will likely apply the effective control test, like in the *Nicaragua* and *Bosnia* cases.<sup>161</sup>

### III. ANALYSIS

This Part analyzes whether the United States will incur legal repercussions stemming from its decision to send CMs to the Ukrainian military. However, answering this question requires examining which laws will apply, and which courts possess the means to enforce those laws.<sup>162</sup> This Section addresses the applicability of previously described legal doctrines, analyzes the likelihood of involvement from various international tribunals, and ultimately assesses the strength of a potential case against the U.S. government.<sup>163</sup>

#### A. *Applicable Law*

The United States’s provision of CMs during the Russo/Ukrainian war directly implicates numerous international legal authorities.<sup>164</sup> However, even more international authorities are tangentially related to the conflict, but are not binding upon some or all of the parties involved,

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159. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 20 (June 27).

160. Cassese, *supra* note 154, at 652.

161. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 5 ¶ 1 (June 27); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 1996, I.C.J. 6 ¶ 1 (July 11).

162. See *infra* Section III.A. (analyzing the likely application of relevant international legal authorities).

163. See *id.*; see *infra* Sections III.B.1. and III.B.2. (analyzing the likelihood of involvement from the ICC and the ICJ).

164. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40; see also *Convention Text*, *supra* note 40; see also *High Contracting Parties and Signatories CCW*, *supra* note 40; see also Scoville, *supra* note 40; see also *What is International Humanitarian Law?*, *supra* note 40; see also *About the Court*, *supra* note 40; see also *How the Court Works*, *supra* note 40.

or simply do not apply.<sup>165</sup> This Section distinguishes between the areas of international law that may be implicated in a case regarding the use of CMs during the Russo/Ukrainian war, with respect to the United States, and those that likely will not be implicated.

#### 1. Geneva Conventions of 1949 & Additional Protocol of 1977

First, all States involved in the Russo/Ukrainian war, relevant to this Comment, are parties to the GC.<sup>166</sup> Additionally, either through specific signature and ratification or by acquiescence and a sense of legal obligation, all of the States have also adopted AP1.<sup>167</sup> Therefore, all of the principles referred to in Section II.B.1. are legally binding on Russia, Ukraine, and the United States.<sup>168</sup> Those principles include the rule of distinction and the prohibitions against indiscriminate attacks, disproportionate attacks, and attacks that cause unnecessary suffering.<sup>169</sup>

Regarding the principles of distinction and the prohibition against indiscriminate attacks, advocates calling for the extinction of CM use have argued that the weapons are *per se* violative of the aforementioned treaties.<sup>170</sup> For instance, a large portion of the global community argues that CMs always violate principles of distinction and indiscriminate attacks by failing to distinguish between military and civilian targets.<sup>171</sup> Similarly, advocates against CM use argue that CMs create unnecessary suffering. Furthermore, they argue that the negative impacts of CMs

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165. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40; see also *Convention Text*, *supra* note 40; see also *High Contracting Parties and Signatories CCW*, *supra* note 40; see also Scoville, *supra* note 40; see also *What is International Humanitarian Law?*, *supra* note 40; see also *About the Court*, *supra* note 40; see also *How the Court Works*, *supra* note 40; *infra* Section III.A.2.

166. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40.

167. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40.

168. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, *supra* note 40; see also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 40.

169. See *supra* Section II.B.1. (listing and defining the common principles included in Additional Protocol 1).

170. See also Barak *supra* note 44, at 440–44.

171. See *id.*; see generally *supra* Section II.B.1. (listing and defining the common principles included in Additional Protocol 1).

significantly outweigh the military advantages gained from their use.<sup>172</sup> The reasoning supporting the argument that CMs violate these principles rests on the broad range of the weapons impact, the inability to accurately drop CMs, and the possibility of unexploded ordinance left behind, given a CM's dud rate.<sup>173</sup>

However, some States, including the United States, have taken the position that CMs are within the bounds of *Jus in bello* principles "when properly targeted and employed."<sup>174</sup> Further, the United States argues that advances in CM technologies have adequately alleviated international concerns relating to civilian harm.<sup>175</sup> Additionally, States supporting continued CM use may assert that CMs can only be accurately scrutinized by international tribunals on a case-by-case analysis.<sup>176</sup> Under this view, international tribunals must specifically investigate the suffering, proportionality, target, and civilian harm, in every instance, to determine whether a State is justified in using CMs.<sup>177</sup> This view, which the U.S. government will likely take, is similar to a quip used with respect to Second Amendment issues in the United States, namely that "Guns Don't Kill People, People Kill People."<sup>178</sup> Applied to CMs, this line of reasoning asserts that CMs do not inherently violate the law of armed conflict. Rather, only individuals who order CM strikes without adhering to well recognized *Jus in bello* principles are the perpetrators of war crimes.

## 2. 1980 Convention on Certain Conventional Weapons & 2008 Convention on Cluster Munitions

Although the 1980 CCW and the 2009 CCM are directly on point with the issues in this Comment, they are not likely to be implicated regarding the United States's decision to send CMs to Ukraine. Despite Russia, Ukraine, and the United States all being high contracting parties to the CCW, this treaty is likely inadequate to address the issue of transferring CMs to another State.<sup>179</sup> First, the CCW does not specifically

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172. See Ching *supra* note 44, at 158–61; see also Barak *supra* note 44, at 438–44; Anzalone *supra* note 43, at 189–200.

173. See *supra* Section II.A.1. (describing the nature of cluster munitions); see also Ching *supra* note 44, at 158–61; Barak *supra* note 44, at 438–44; Anzalone *supra* note 43, at 189–200.

174. Anzalone *supra* note 43, at 205 (quoting U.S. Dep't of Def., Report to Congress: Kosovo/Operation Allied Force After-Action Report 90 (Jan. 31 2000)).

175. See *id.* at 206.

176. See Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229, 256–269 (2001).

177. See *id.*

178. See generally F E Zimring and G Hawkins, *Firearms and Assault: "Guns Don't Kill People, People Kill People"*, DEP'T OF JUST. (1990), <https://perma.cc/5T6E-8ZKQ> (outlining an argument used with respect to gun control in the United States).

179. See *High Contracting Parties and Signatories CCW*, *supra* note 40.

restrict CMs—despite the GGE’s attempts to amend the treaty to do so.<sup>180</sup> While continued efforts to amend protocols to the CCW persist, until such an amendment is adopted, the CCW likely does not apply here.<sup>181</sup>

Similarly, tribunals will likely not apply the CCM to the actions of the United States regarding their decision to transfer CMs to Ukraine.<sup>182</sup> The CCM does not apply, in large part, because neither Russia, Ukraine, nor the United States agreed to ratify the CCM.<sup>183</sup> However, should the parties decide to adopt the CCM, or should the CCM garner enough support to become a part of the GC or CIHL, then its regulations regarding CM use would apply to States that employ, manufacture, stockpile, or transfer CMs.<sup>184</sup>

### B. Court Involvement

Although several international legal authorities ostensibly may govern the use of CMs in the Russo/Ukrainian war, the question remains: what body will decide upon and enforce them?<sup>185</sup> This Section discusses the relative likelihood that the ICC or ICJ will impart judgment upon the United States regarding their contributions to the Ukrainian forces.

#### 1. International Criminal Court

The ICC may have at least a practical chance of becoming involved in the Russo/Ukrainian war.<sup>186</sup> However, the ICC, like most courts, has specific jurisdictional requirements.<sup>187</sup> Because neither Russia, nor Ukraine, nor the United States—are parties to the 1998 Rome Statute, the ICC does not have automatic jurisdiction.<sup>188</sup> Nevertheless, Ukraine agreed to accept ICC jurisdiction within their territory, which allows prosecutors from the ICC to investigate and determine whether prosecutable crimes have been committed.<sup>189</sup> Since the acceptance of jurisdiction, the ICC issued arrest warrants for top Russian officials, including Vladimir Putin and Maria Lvova-Belova, for allegedly committing war crimes in

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180. See Barak, *supra* note 44, at 426—30.

181. See *id.*

182. See Anzalone, *supra* note 43, at 202.

183. See *Convention Text*, *supra* note 40.

184. See Convention on Cluster Munitions art. 1, May 30, 2008.

185. See *supra* Sections II.B.3.a. and II.B.3.b. (discussing the ICC and ICJ international tribunals).

186. See Moba, *supra* note 117.

187. See *supra* Section II.B.3.a. (outlining the requirements for ICC jurisdiction).

188. See *State Parties to the Rome Statute*, INT’L CRIM. CT., <https://perma.cc/3AEG-UVDA> (last visited Jan. 10, 2024).

189. See Press Release, Ykpaïhcbka Moba, International Criminal Court, *supra* note 117.

Ukrainian territory, with respect to the deportation of children to Russia.<sup>190</sup> This prosecution would presumably be done under Article 28(b) of the 1998 Rome Statute regarding “superior responsibility.”<sup>191</sup> While these arrest warrants are indicative of the ICC’s willingness to prosecute actions stemming from the Russo/Ukrainian war, any prosecutor would realistically face enforcement challenges.<sup>192</sup> In essence, either Russia would have to cooperate with the ICC by delivering the fugitives to the court or another State’s police force would need to deliver the fugitives.<sup>193</sup>

In a potential case involving ICC prosecution of individuals from the United States, for their decision to send weapons to Ukraine, the ICC’s jurisdiction would be even more attenuated.<sup>194</sup> To establish jurisdiction, the ICC would have to impute responsibility to the United States by establishing (1) evidence of improper use of CMs by Ukraine and (2) evidence that the impropriety was done at the direction of the U.S. government.<sup>195</sup> Additionally, given the structure of the U.S. government, it is difficult to associate the decision to send CMs to a single individual.<sup>196</sup> Finally, like with the arrest warrants already issued to top Russian officials, there is a substantial likelihood that if the ICC issued arrest warrants to any U.S. individual, the ICC would have a difficult time enforcing them.<sup>197</sup> Therefore, any expectation of U.S. official implication should be tempered by the practicalities of the circumstances.<sup>198</sup>

## 2. International Court of Justice

Regarding the involvement of the ICJ in the Russo/Ukrainian war, the court will likely recognize jurisdiction over applicable legal questions submitted throughout the duration of these hostilities.<sup>199</sup> In fact, since September 2023, the ICJ has been deliberating on a preliminary

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190. See Press Release, Ykpaїncbka Moba, *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevana Lvova-Belova*, International Criminal Court (Mar. 17, 2023), <https://perma.cc/QE4J-9N73> [hereinafter ICC Judges Issue Arrest Warrants].

191. *Id.*

192. See *supra* Section II.B.3.a. (explaining the ICC’s ability to enforce its rulings); see also *Ukraine Accepts ICC Jurisdiction*, *supra* note 117.

193. See *supra* Section II.B.3.a. (explaining the ICC’s ability to enforce its rulings).

194. See *id.*

195. See *supra* Section II.B.3.b. (explaining the concepts of legal imputation and effective control).

196. See Zeke Miller et al., *The US Will Provide Cluster Bombs to Ukraine and Defends the Delivery of the Controversial Weapon*, AP NEWS (July 7, 2023, 8:11 AM), <https://perma.cc/AKB9-8V5K>.

197. See *supra* Section II.B.3.a. (explaining the ICC’s ability to enforce its rulings).

198. See *id.*

199. See *supra* Section II.B.3.b. (explaining the means for the ICJ to exercise jurisdiction).

jurisdictional question regarding Russia and Ukraine.<sup>200</sup> The claim, submitted to the ICJ by Ukraine, alleges that Russia violated the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>201</sup> Given that 32 States have intervened on Ukraine's behalf and none have intervened on behalf of Russia, Ukraine has likely met the lowered pleading standard for establishing a claim, on its face, that the court can hear.<sup>202</sup> Moreover, the court may also look to Article 36(5) to dispose of any jurisdictional disputes brought by the United States, Russia, or Ukraine.<sup>203</sup>

Although the ICJ likely has jurisdiction over war crimes and crimes against humanity perpetrated in Ukraine, the ICJ likely cannot hold the United States liable in a case regarding their barring something unforeseeable.<sup>204</sup> At this time, the United States is merely supplying the Ukrainian military with weaponry, albeit not globally accepted weaponry.<sup>205</sup> Therefore, to establish liability, the ICJ would need to impute legal responsibility to the United States for actions taken by another State, i.e. Ukraine.<sup>206</sup>

Typically, the ICJ would employ the “effective control” legal test when determining whether to impute legal responsibility, as they did in the *Nicaragua* case.<sup>207</sup> Under this test, a State must “direct[] or enforc[e] the perpetration of the acts contrary to . . . [IHL],” for liability to be imputed to that State.<sup>208</sup> Consequently, an applicant State would need to show the ICJ receive evidence that the U.S. directed or enforced acts contrary to IHL—evidence which is not apparent at this time.<sup>209</sup> Further still, should the ICJ decide to now adopt the broader “overall control” test announced by the ICC in the *Tadic* case, which they rejected in *Nicaragua*, that test likely would not apply to the United States's decision to send CMs to Ukraine.<sup>210</sup> That test requires “not only . . . equipping,

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200. See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)* Preliminary Objections, INT'L CT. OF JUST. ¶¶ 17–23 (Feb. 2, 2024), <https://perma.cc/5MXN-6YWT>.

201. See *id.*

202. See *id.*

203. See *supra* Section II.B.3.b. (referring to the ICJ's powers under art. 36(5)).

204. See *supra* Section II.B.3.b. (explaining the means for the ICJ to exercise jurisdiction).

205. See Miller, *supra* note 196; see also Anzalone, *supra* note 43 at 191–98; Ching, *supra* note 44, at 153–63.

206. See *supra* Section II.B.4. (defining available legal tests for holding States accountable for the actions of other States).

207. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14 ¶ 20 (June 27).

208. *Id.*

209. See *id.*

210. See *id.*; see also *Prosecutor v. Tadic*, Judgment, Case No. IT-94-I (Oct. 2).



financing or training and providing operational support to the group, but also . . . coordinating or helping in the general planning of its military or paramilitary activity.”<sup>211</sup>

### C. *The Future of Cluster Munitions*

Given the complicated history and nature of CM use, the international community faces an uphill battle in its effort to facilitate an outright ban on the weapon.<sup>212</sup> The lack of global agreement regarding the jurisdiction of international courts and the inability to reach consensus on a weapons treaty regulating CMs exacerbates this difficulty.<sup>213</sup> Lackluster international compliance with tribunal decisions further complicates the international regulation of CMs.<sup>214</sup> Those tribunals, quite simply, lack an adequate enforcement mechanism.<sup>215</sup>

One possible solution would be a U.N. resolution establishing a stronger global law enforcement agency. Although adoption of such a resolution would require a vote by the general assembly and the dodging of a Security Council veto, an enforcement mechanism would provide greater assurance of State compliance with ICJ decisions.<sup>216</sup> Given the substantial membership of State parties to the U.N., a plausible assumption exists that the member States believe the ICJ is a necessary asset to the protection of global peace. Presently, ICJ decisions often amount to nothing more than written condemnations of heinous actions.<sup>217</sup> Rather than repeatedly attempting and failing to establish unanimity for the CCM, a global law enforcement agency could attack the problem from a different angle. The agency would be composed of representatives from the U.N. member States, would answer directly to the ICJ justices, and would carry out ICJ decisions against resistant States. More importantly, rather than only addressing CMs, the court could use a global law enforcement agency to prosecute any weapon use which violates the well-established API

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211. Cassese, *supra* note 154, at 657; *see also supra* Section II.B.4. (comparing the “overall” and “effective” control tests); Miller, *supra* note 196.

212. *See supra* Section II.C.1. (emphasizing the difficulty that the GGE had in its efforts to restrict CMs).

213. *See id.*; *see supra* Sections II.C.2., III.B. (discussing the CCM and international tribunal jurisdiction).

214. *See* Marko Milanovic, *ICJ Delivers Preliminary Objections Judgement in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects*, EJIL: TALK! (Feb. 2, 2024), <https://perma.cc/24PU-L69F> (stating that the ICJ “ordered Russia to stop the invasion (which it of course refused to do)”).

215. *See id.*

216. *See Voting System*, UNITED NATIONS, <https://perma.cc/4D2D-UHN2> (last visited July 4, 2024) (showing that adverse action following an ICJ decision relies on unanimity amongst the permanent members of the UN Security Council).

217. *See id.*

principles of necessity, proportionality, distinction, and unnecessary suffering.<sup>218</sup>

#### IV. CONCLUSION

At a time when international hostilities threaten global peace, nations are uncertain about where to place blame for egregious humanitarian violations.<sup>219</sup> The sole purpose of international law is to reduce the threat to global peace.<sup>220</sup> However, the proffered effectiveness of this jurisprudence does not comport with the current state of global hostilities.<sup>221</sup> Difficulties in achieving uniform adoption of international laws and general enforcement issues plague international tribunals, preventing them from implementing real change, with no clear solution in sight.<sup>222</sup> Despite the pitfalls of international law, this is the only body of rules which governs the Russo/Ukrainian war and the United States's involvement in the war.<sup>223</sup>

Given the current state of international jurisprudence, the United States is legally, and possibly morally, justified in its decision to send CMs to the Ukrainian military.<sup>224</sup> Due to the lack of global uniformity regarding the adoption of treaties regulating CMs, the international community cannot assert that the weapon is banished from use in conflict.<sup>225</sup> And in fact, the Russian military has made frequent use of CM attacks against the Ukrainian people, rendering them practically defenseless without an ordinance supply of their own.<sup>226</sup> Ultimately, careful legal analysis supports the conclusion that both the ICC and the ICJ will have an attenuated case, at best, for asserting jurisdiction over the United States for furnishing CMs to Ukraine as a part of their lethal aid support package.<sup>227</sup> While the future of CMs is ambiguous, one constant remains abundantly clear; international law must evolve to effectively combat the escalation of global conflict. However, given its current state, the United States is within the bounds of international law concerning its decision to supply CMs to the Ukrainian military.<sup>228</sup>

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218. *See supra* Section II.B.1. (discussing AP1 principles).

219. *See discussion supra* Sections III.A–C.

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See discussion supra* Part I.

227. *See discussion supra* Sections III.B.1–2.

228. *See discussion supra* Sections III.A–C.