

# A Cluttered Exchange of Cluster Munitions: A Comparative Examination of Russian and American Application and Shipment of the Weapons

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## I. INTRODUCTION

Few weapons in human history have drawn as much ire, controversy, and international outcry as cluster munitions.<sup>1</sup> The international community has uniquely cracked down on cluster bombs via treaties barring their production, use, and shipment.<sup>2</sup> Despite the stigma against their use, the Russian invasion of Ukraine has seen renewed controversy and created a legal quagmire over their use from both the

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1. See Bonnie Docherty, *U.S. Cluster Munition Transfer to Ukraine Ignores, History of Civilian Harm*, HUM. RTS. WATCH (July 14, 2023), <https://www.hrw.org/news/2023/07/14/us-cluster-munition-transfer-ukraine-ignores-history-civilian-harm>.

2. See Brian L. Cox, *Biden Administration’s Decision to Transfer Cluster Munitions to Ukraine: Legal & Policy Considerations*, LIEBER INST. FOR L. & LAND WARFARE (Feb. 25, 2024), <https://lieber.westpoint.edu/biden-administrations-decision-transfer-cluster-munitions-ukraine-legal-policy-considerations/>.

United States and Russian Federation.<sup>3</sup> Within the United States, proponents of sending cluster munitions have asserted they are vital to assisting Ukraine in its defensive war against Russia's invasion.<sup>4</sup> In contrast, opponents assert cluster munitions are marred with ethical and humanitarian problems that will haunt Ukraine for decades to come.<sup>5</sup> Regardless of how the international community, American electorate, or policymakers in Washington feel, cluster bombs will continue to be utilized in the ongoing war in Ukraine.<sup>6</sup>

The arming of Ukraine with cluster munitions is a remarkable abnormality in the history of war, as two conventional armies in the twenty-first century are clashing with weapons that have seldom been used against each other.<sup>7</sup> In contrast, most instances of cluster munition strikes have historically been unilateral, meaning only one nation or side has used them in a given conflict.<sup>8</sup> American shipment of such controversial weapons to Ukraine has raised several unique caveats as a result. Namely, the Russian Federation has been *aggressively* using clusters during their invasion.<sup>9</sup> This has been further exacerbated by the indiscriminate application of cluster bombs against both civilian and military targets. Russian actions have raised the stakes for both the international community and Ukraine regarding the legal and political status of these weapons.<sup>10</sup> This raises several questions pertaining to the legal mechanisms behind the shipment, approval, and relevant international treaties surrounding these highly controversial weapons of war from the United States, Russia, and the international community that require comparative examination.

Cluster munitions are a wide-ranging, yet distinct form of conventional weaponry. The Convention on Cluster Munitions defines a cluster munition as “a conventional munition that is designed to disperse or release explosive submunitions, each weighing less than 20

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3. See Mark F. Cancian, *A Timeline of Cluster Bomb Use, Stop Cluster Munitions*, CSIS (July 14, 2023), <https://www.csis.org/analysis/cluster-munitions-what-are-they-and-why-united-states-sending-them-ukraine>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See *A Timeline of Cluster Bomb Use*, STOP CLUSTER MUNITIONS, <https://www.stopclustermunitions.org/en-gb/cluster-bombs/use-of-cluster-bombs/a-timeline-of-cluster-bomb-use.aspx>.

9. See *Russian Cluster Munition Hits Hospital*, HUM. RTS. WATCH, (Feb. 25, 2022), <https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital/>.  
<https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital>.

10. *Id.*

kilograms.”<sup>11</sup> In essence, a cluster munition is a type of larger bomb that releases hundreds of smaller bombs to destroy a larger surface area, like a shotgun. Cluster munitions can be used for a multitude of purposes and in a variety of ways. They can be dropped from a plane, fired by a traditional artillery piece, released from a rocket, and launched via ballistic missiles.<sup>12</sup> Cluster munitions are extremely effective weapons. During the Vietnam War, cluster weapons were 800 percent more effective at killing enemy combatants relative to traditional weaponry.<sup>13</sup> While they are more effective than other conventional weapons, controversy arises over these explosives because they have a notoriously high civilian casualty rate, notably through “dud rates.”<sup>14</sup> Duds are submunitions, or smaller bombs, that fail to explode upon impact and remain lodged in the ground.<sup>15</sup> A dud rate is a measurement of how many of these submunitions fail to detonate on impact.<sup>16</sup> In practice, duds create long term de facto minefields from their unexploded ordinance that pose a serious hazard to civilians. Many of these unexploded submunitions are often colorful, small, and resemble a ball, leading to children mistakenly playing with the leftover explosives.<sup>17</sup> Nearly sixty percent of cluster munition casualties in Kuwait were young boys under the age of fifteen, the result of unexploded duds after the Gulf War.<sup>18</sup> Civilians in Kuwait, Vietnam, and the former Yugoslavia continue to bear the burdens of these previous American-dropped cluster munitions.<sup>19</sup>

Given cluster bomb usage has not radically changed since these wars, it raises some key questions regarding how the international community can address them in the future. The goal and purpose of this Comment is to explore the various legal and practical effects of cluster munitions in Ukraine. Part II explores the international legal context surrounding cluster bombs. The third part of this Comment serves as commentary on the legal background and authority behind the United

11. See Convention on Cluster Munitions, art. 1, May 30, 2008, 48 I.L.M. 563.

12. See Cancian, *supra* note 3.

13. See Dominick DeMella, *The Evolution of Artillery for Increased Effectiveness* RDECOM, (June 10-11, 2008), [https://ndiastorage.blob.core.usgovcloudapi.net/ndia/2008/psa\\_peo/Demella.pdf](https://ndiastorage.blob.core.usgovcloudapi.net/ndia/2008/psa_peo/Demella.pdf), at 19.

14. See Cancian, *supra* note 3.

15. *Id.*

16. *Id.*

17. See *NATO's Use of Cluster Munitions in Yugoslavia*, HUM. RTS. WATCH (May 11, 1999), <https://www.hrw.org/report/1999/05/11/natos-use-cluster-munitions-yugoslavia>.

18. *Id.*

19. See *A Timeline of Cluster Bomb Use*, STOP CLUSTER MUNITIONS, <https://www.stopclustermunitions.org/en-gb/cluster-bombs/use-of-cluster-bombs/a-timeline-of-cluster-bomb-use.aspx>.

States' decision to send cluster bombs to Ukraine, particularly the evolving push toward restraint and legal restrictions on these weapons. Part IV examines Russia's application and indiscriminate usage during their invasion of Ukraine, notably their less restrained use of these weapons. This Comment then explores the ongoing divergent legal treatment of cluster munitions between the United States and Russia in Part V. This final Part serves as a policy recommendation as well. It is incumbent on the United States of America to advocate for future policy and law to restrain the proliferation of cluster munitions following the conclusion of the war in Ukraine.

## II. THE CLUSTER OVER THE CLUSTER: THE LAW OF CLUSTER MUNITIONS

International law is no stranger to banning the application or manufacture of certain weapons. The first multilateral agreements barring the use of specific weapons were proposed and led by Tsar Nicholas II of Russia in 1899 in the Hague Conventions.<sup>20</sup> These agreements addressed and banned the use of asphyxiation gas and particularly gruesome conventional rounds of ammunition.<sup>21</sup> Over a century later, these agreements have evolved to become highly technical and deal with uniquely dangerous or morally questionable conventional weapons. Cluster bombs have long been indirectly regulated by both customary law and the Convention on Certain Conventional Weapons.<sup>22</sup> The Oslo Convention, or the Convention on Cluster Munitions (CCM), would later create more explicit guidelines surrounding the nature of cluster bombs.<sup>23</sup>

Customary law, or the binding principles of international norms, does not address cluster bombs in any direct manner.<sup>24</sup> These norms are

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20. See Hague Convention on the Laws and Customs of War on Land art. II, July 29, 1899, I.L.M.

21. See Hague Convention on the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art IV, October 18, 1907, I.L.M.

See Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art V, October 18, 1907, I.L.M.

22. See *Customary IHL—Rule 11. Indiscriminate Attacks*, Updated as of August 2020, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule11>.

See Protocol on Explosive Remnants of War to the Convention on Certain Conventional Weapons, November 28, 2003, U.N.T.S.

23. See *Convention on Cluster Munitions*, WIKISOURCE, [https://en.wikisource.org/wiki/Convention\\_on\\_Cluster\\_Munitions](https://en.wikisource.org/wiki/Convention_on_Cluster_Munitions).

24. See William, H. Boothby, *Cluster Munitions: Ukraine War*, LIEBER INST. FOR L. & LAND WARFARE (Feb. 28, 2022), <https://lieber.westpoint.edu/cluster-munitions-ukraine--war/>.

defined by the International Court of Justice to be a general practice by law.<sup>25</sup> Despite the fact that cluster bombs are not directly regulated by the principles of international norms through customary law, their *application* is governed by international law.<sup>26</sup> In other words, cluster munitions are treated the same as conventional weapons and are limited to use against valid military targets, rather than indiscriminate usage.<sup>27</sup> Most notable within customary law are two major provisions that could govern cluster bombs and other adjacent conventional weapons.<sup>28</sup> The two major provisions are banning indiscriminate attacks against civilians and requiring “proportional” responses to acts of war.<sup>29</sup> Customary law bars indiscriminate attacks through a variety of laws, frameworks, and norms.<sup>30</sup> Military strikes are limited to legitimate or legal military targets.<sup>31</sup> Broadly, most states’ military manuals and regulations bar indiscriminate attacks.<sup>32</sup> Many civilian legislatures have explicitly banned such practices by their armed forces.<sup>33</sup>

While indiscriminate attacks themselves are barred by customary law, there is not a clear consensus whether cluster munitions are *inherently* indiscriminate weapons because of their widespread damage potential and the long-lasting consequences stemming from duds.<sup>34</sup> Organizations opposed to cluster munitions assert that Russia’s use of

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25. See International Court of Justice—Documents, Internet Archive.

26. See Stephen Pomper, U.S. Policy on Cluster Munitions and Russia’s War in Ukraine, JUST SECURITY (May 4, 2022), <https://www.justsecurity.org/81363/u-s-policy-on-cluster-munitions-and-russias-war-in-ukraine/>.

27. *Id.*

28. See Rule 14. Prohibition of Indiscriminate Attacks, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), <https://ihl-databases.icrc.org/en/customary-ihl/v1>.

29. *Id.*

30. See Indiscriminate Attacks, *supra* note 22. See Prohibition of Indiscriminate Attacks, *supra* note 28. See Ukraine: Cluster Munitions Kill Child and Two Other Civilians Taking Shelter at a Preschool, AMNESTY INT’L (Feb. 17, 2022), <https://www.amnesty.org/en/latest/news/2022/02/ukraine-cluster-munitions-kill-child-and-two-other-civilians-taking-shelter-at-a-preschool/>.

31. See Pomper, *supra* note 26. See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects (CCW), 21 Dec. 2001, United Nations Office for Disarmament Affairs (UNODA).

32. See Indiscriminate Attacks, *supra* note 22. See 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 (CCWC), Oct. 10, 1980, United Nations Office for Disarmament Affairs (UNODA).

33. *Id.*

34. See Ukraine: Cluster Munitions Kill Child and Two Other Civilians Taking Shelter at a Preschool, AMNESTY INT’L (Feb. 27, 2022), <https://www.amnesty.org/en/latest/news/2022/02/ukraine-cluster-munitions-kill-child-and-two-other-civilians-taking-shelter-at-a-preschool/>.

them is inherently indiscriminate because of their weapons' uniquely high dud rate—around twenty percent—coupled with the targeting of civilian areas.<sup>35</sup> In essence, any application of Russian cluster bombs constitutes an indiscriminate strike, regardless of their intended target. Nation-states that employ cluster weapons, notably the United States and Russia, assert that these munitions are not inherently indiscriminate.<sup>36</sup> The United States officially asserts the bombs are only unlawful when targeting civilians, but are generally lawful against military targets.<sup>37</sup> Furthermore, the United States recognizes customary law regarding the conduct of war, notably in its opposition to indiscriminate and disproportionate attacks.<sup>38</sup> Put simply, the American government is skeptical of the notion that cluster munitions are illegal *per se* under international customary law, but does accept that such weapons have the potential to be used in a way that is in violation of customary law.<sup>39</sup> As a result of this lack of international consensus, particularly from the world's superpowers, customary law does not carry significant gravitas in directly governing cluster bombs.

As international customary law cannot govern cluster munitions in a meaningful or effective way, legally binding treaties serve as cluster bombs' primary source of governance. While the 1983 Convention on Certain Conventional Weapons (CCW) does not *directly* mention cluster munitions, it partially regulates and governs these bombs in a more effective way than customary law.<sup>40</sup> This treaty was the codification of several customary law norms, notably rising from the ban on indiscriminate weapons and disproportionate attacks, referring to the latter as “excessively injurious.”<sup>41</sup> However, the CCW focuses on the weapons that tend to have such effects during conduct of war, rather than regulating general conduct or behavior.<sup>42</sup> Each section of the treaty, with the exception of Part V, governs and regulates a specific controversial weapon of war, such as: mines, eye-blinding lasers, and incendiary weapons.<sup>43</sup> Despite their reluctance to acknowledge cluster munitions as

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35. *Id.*

36. *See* Pomper, *supra* note 26.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Convention on Certain Conventional Weapons, Dec. 21, 2001, U.N.T.S.

41. *Id.*

42. *Id.*

43. *Id.*

banned by customary law's norms, the United States and Russia are both parties to the CCW.<sup>44</sup>

Part V of the treaty addresses cluster munitions, albeit in non-overt terms, and mandates specific actions rather than calling for an outright ban.<sup>45</sup> In many ways, it is the most complex and resource-intensive element of the treaty for a variety of reasons. First, Part V is not in itself a ban on any specific weapon; rather, it requires mitigation of the risks posed by explosive remnants of war (ERW).<sup>46</sup> ERWs include duds leftover from cluster bomb strikes. Mitigating actions would include the marking of unexploded ordnance, assisting third parties aimed at clearing the weapons, and taking "all feasible" precautions to protect civilians from such risks.<sup>47</sup> Second, the scope of ERWs is relatively wide and commonplace on the field of battle. Part V regulates weapons with language that includes "such as," granting a vast mandate to parties of the treaty to take proper care of grenades, mortars, artillery pieces, and "submunitions."<sup>48</sup> The use of the term "submunition" is interesting, as this seems to be addressing cluster munitions without using direct language to specify it. The United States State Department has interpreted the treaty to be regulating cluster munitions. That of course, would mean that courts will give some deference to the executive branch regarding the actual application of this treaty.<sup>49</sup> To some extent, the CCW effectively tolerates the use of cluster munitions—as long as it is cleaned up and managed in an appropriate manner. World powers are particularly skeptical and reluctant to adhere to an aggressive regulation of cluster bombs, given that they have a large supply of them and are willing to apply military strength in pursuit of their foreign policy goals. The CCW is likely favored by world powers because it passively excuses the use of cluster bombs and does not treat them as inherently indiscriminate nor excessively injurious.

The instrument that most directly addresses cluster bombs is the 2010 Oslo Convention, also referred to as the Convention on Cluster Munitions (CCM).<sup>50</sup> The CCM is a simple yet powerful treaty aimed at a

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44. See 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, 1342 U.N.T.S 137.

45. See Convention on Certain Conventional Weapons, *supra* note 40.

46. *Id.*

47. *Id.*

48. *Id.*

49. See United States Dep't of State, *Cluster Munitions Policy and U.S. National Security: Secretary of Defense Robert M. Gates Delivers Remarks to the Carnegie Endowment for International Peace*, (May 21, 2008), <https://2001-2009.state.gov/t/pm/rls/rm/105111.htm>.

50. See Convention on Cluster Munitions, *supra* note 11.

multi-faceted approach to reducing the worldwide stockpile of these weapons.<sup>51</sup> The Oslo Convention was adopted in the midst and aftermath of major powers' military campaigns from America's War on Terror, Russia's invasion of Georgia in 2008, and Israeli strikes on Lebanon in 2006.<sup>52</sup> Even though war between great powers became a page in history, the world's powerhouses still used cluster munitions in clearly uneven matches. From an international legal perspective, the CCW is a powerful and definitive treaty that contains several obligations defined in Article 1, such as an outright ban on not only the use of cluster munitions in war but also the logistics surrounding their use.<sup>53</sup> The logistics of such a treaty includes the production, transportation, storage, and development of cluster munitions in addition to assisting another nation-state in these procedures.<sup>54</sup> Article 3 further imposes obligations pertaining to existing storage and stockpiles of the explosives, requiring the destruction of any leftover munitions a signatory to the treaty might possess.<sup>55</sup> Article 4 of the CCM is clearly inspired by and similar to the CCW's obligations to take appropriate measures to clear areas within a party's jurisdiction where duds could have been left from cluster bomb strikes.<sup>56</sup> For example, if France had discovered duds within its borders, it is incumbent on France to remove the unexploded ordinance within ten years, even if Germany had been the source of the bombings.<sup>57</sup> Other obligations include providing financial assistance to the civilian victims of duds, including providing mental health and medical care for those within its jurisdiction.<sup>58</sup> These elements of the Convention on Cluster Munitions serve as the most stringent regulatory measures on these highly controversial weapons. Yet there is one major problem with the treaty. The United States, Russia, Ukraine, and several other major powers are not signatories to the treaty.<sup>59</sup>

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51. *Id.*

52. See *Georgia: Russian Cluster Bombs Kill Civilians*, HUM. RTS. WATCH, (Aug. 15, 2008), <https://www.hrw.org/news/2008/08/15/georgia-russian-cluster-bombs-kill-civilians>.

See PAUL K. KERR AND ANDREW FEICKERT., RS22907, CLUSTER MUNITIONS POLICY (2024) <https://crsreports.congress.gov/product/details?prodcode=RS22907>.

See *The Impact of Israel's Use of Cluster Munitions in Lebanon in July and August 2006* HUM. RTS. WATCH (Feb. 21, 2008), <https://www.hrw.org/reports/2008/lebanon0208/6.htm>.

53. See Convention on Cluster Munitions, *supra* note 11.

54. *Id.*

55. *Id.* at 5.

56. *Id.* at 6.

57. *Id.* at 7.

58. *Id.* at 9.

59. See *States Parties and Signatories by Region*, CLUSTER MUNITION COALITION, <https://www.clusterconvention.org/states-parties>.



## III. THE EAGLE STRIKES BACK

The United States has long been in the business of giving financial and military backing to countless conflicts since 1900. This interventionist mindset has long driven the legal dimension of American foreign policy diplomatic law. One of the seminal cases on the powers of the president is derived from arms sales during the Chaco War in the 1930s.<sup>60</sup> Despite America's constantly growing internationalist approach and presence since the dawn of twentieth century, the United States has remained deeply skeptical of international treaties and arms restrictions. The Treaty of Versailles was rejected by the Senate because of obligations imposed on the United States, and decades later, the so-called Bricker Amendments in the Senate sought to amend the Constitution in order to reject the power of binding international treaties upon the United States.<sup>61</sup> To this day, the U.S. Senate still traditionally reads George Washington's Farewell address on the floor, which contains the notable skepticism of foreign entanglements.<sup>62</sup> This seemingly contradictory series of traditions, policies, and laws ultimately steer the inconsistent course on America's policy towards cluster munitions, particularly in relation to the war in Ukraine. Regardless, the United States of America has the means to drive international norms and push for better standards with regards to cluster munitions.

The United States is the most powerful state that has refused to sign the Convention on Cluster Munitions.<sup>63</sup> France, Canada, and the United Kingdom are some notable participants to the Convention, but the United States has refused to sign, raising the question of why it has chosen not to be a signatory.<sup>64</sup> American allies have voiced displeasure at the American shipments of cluster bombs to Ukraine and have reiterated their support

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60. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

61. See *Current Opinion*, Google Books, [https://www.google.com/books/edition/Current\\_Opinion/aDgiAQAIAAJ?hl=en&gbpv=1&pg=PA139&printsec=frontcover](https://www.google.com/books/edition/Current_Opinion/aDgiAQAIAAJ?hl=en&gbpv=1&pg=PA139&printsec=frontcover). See James M. Lindsay, *TWE Remembers: The Bricker Amendment*, COUNCIL ON FOREIGN RELATIONS (Feb. 26, 2022, 10:43 AM), <https://www.cfr.org/blog/twe-remembers-bricker-amendment>.

62. See United States Senate, *About Traditions & Symbols | Washington's Farewell Address*, <https://www.senate.gov/about/traditions-symbols/washingtons-farewell-address.htm>. See George Washington, President, United States, Farewell Address (1796) in <https://constitutioncenter.org/the-constitution/historic-document-library/detail/george-washington-farewell-address-1796>.

63. See Cluster Munition Coalition, *supra* note 11.

64. *Id.*

for the CCM.<sup>65</sup> Beyond the moral displeasure at the transferal, the CCM explicitly bars assisting even allies from shipments or the logistical support of the weapons.<sup>66</sup>

America's limited obligations towards cluster bombs can only be found in the CCW and is generally insignificant in scope. In fact, the CCW arguably grants the United States a cover to continue to use cluster bombs in war. The most relevant framework for the United States can be found in Part V of the CCW, which governs unexploded ordnance.<sup>67</sup> The requirements and obligations set by the CCW have *passively* guided American policy on cluster munitions towards a clean-up stance, rather than an outright ban.<sup>68</sup> In many ways, the CCW grants the United States flexibility in its policies governing its use of cluster munitions, effectively allowing continued military application of such weapons with international legal legitimacy. The Oslo Convention itself is adamantly opposed by the United States for a variety of reasons. First, the State Department insists that cluster munitions have a unique military utility and a ban on them could undermine American defense strategy.<sup>69</sup> The second stated reason is that the CCM harms America's ability to coordinate with allies, as the treaty bars assisting other states in the production or transportation of cluster bombs.<sup>70</sup>

America's reluctance to participate in meaningful treaties that restrain and ban cluster munitions raises the obvious question: What is the United States' existing legal framework surrounding cluster bombs? Cluster munitions are an essential element to the armed forces' doctrine; every combat aircraft possessed by the United States can drop cluster bombs and provide nearly fifty percent of tactical fire support during maneuvers.<sup>71</sup> The Department of Defense (DoD) has gone even further and asserted the military cannot function as intended without cluster bombs.<sup>72</sup> Simply put, cluster munitions are not just an extra tool for the military; they are a core component. In 2008, the United States began to pivot away from cluster munitions as the War on Terror transformed into

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65. *US Allies React to Decision to Send Cluster Munitions*, VOICE OF AMERICA (VOA) NEWS, <https://www.voanews.com/a/us-allies-react-to-decision-to-send-cluster-munitions-7172724.html>.

66. *See* Cluster Munition Coalition, *supra* note 11.

67. *See* Convention on Certain Conventional Weapons, *supra* note 40.

68. *See* United States Dep't of State, *supra* note 49.

69. *Id.*

70. *Id.*

71. *See* PAUL K. KERR AND ANDREW FEICKERT, *supra* note 52.

72. *Id.*

an occupational mission rather than a clash between armies.<sup>73</sup> Within this context, the DoD began instituting internal policies to gradually reduce the amount of cluster munitions in stockpile as well as imposing a one percent dud rate requirement on future bombs that are shipped or transferred by 2018.<sup>74</sup> This was not an elimination of the use of cluster bombs. It is worth noting that a one percent dud rate is an extremely low risk relative to Russian and Israeli cluster munitions, which can both reach extreme rates such as forty percent to even ninety percent of submunitions failing to detonate upon impact.<sup>75</sup> However, this policy was reversed in 2017, which granted U.S. commanders the flexibility to use these weapons above the one percent rate in combat and stopped the destruction of the cluster munitions stockpile.<sup>76</sup>

The Department of Defense is not the only entity that regulates cluster bombs. Congress, in concert with the president, exercises significant control over discretion about the weapons' application, notably over their transfer to Ukraine. Similar to the DoD policy of 2008, Congress passed omnibus legislation in 2009 that prohibited the sale or shipment of cluster bombs that had a dud rate over .<sup>77</sup> This statute, the Consolidated Appropriations Act of 2010, also required that these weapons would exclusively be reserved for military targets when transferred to another nation and kept away from any area where there is a potential presence of civilians.<sup>78</sup> Congress passed a similar omnibus bill reiterating these requirements in late 2022, during the Russo-Ukrainian War and amidst active aid to Ukraine consisting of cluster weapons.<sup>79</sup> This statute in conjunction with internal DoD policy can be interpreted as a codification of existing customary law surrounding cluster munitions, given the fact that international law of war requires that strikes not be indiscriminate, but proportional. While the Consolidated Appropriations Act does not mandate proportional strikes, the DoD defers heavily to battlefield commanders regarding extreme situations that could warrant

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73. See Secretary of Defense, *Dep't of Defense Policy on Cluster Munitions and Unintended Harm to Civilians*, GLOBALSECURITY.ORG (June 19, 2008), <https://www.globalsecurity.org/military/library/policy/dod/d20080709cmpolicy.htm>.

74. *Id.*

75. See Karine Jean-Pierre and Jake Sullivan, Press Secretary and National Security Advisor, Press Briefing at the Briefing Room (July 7, 2023) in White House Press Briefings. See *The Impact of Israel's Use of Cluster Munitions in Lebanon in July and August 2006*, HUM. RTS. WATCH (Feb. 2008), <https://www.hrw.org/reports/2008/lebanon0208/6.htm>.

76. See PAUL K. KERR AND ANDREW FEICKERT, *supra* note 52.

77. *Id.*

78. *Id.*

79. *Id.*

cluster munitions. In essence, this is not a mandate to rely upon clusters, but to exercise restraint unless their use is absolutely necessary. These legal shifts since 2008 all seem to indicate a movement towards passively empowering customary law to further address cluster munitions on the international stage and to change the norms amongst superpowers in the application of these weapons on the battlefield.

Despite nearly sixteen years of slowly and quietly moving away from cluster munitions, the War in Ukraine has marked a relatively dramatic shift in favor of the weapons from both Congress and the Biden administration. Mixed messages regarding clusters have inhibited and delayed meaningful changes in international law. Before the conflict, the actions of the DoD, Congress, and the executive all indicated a scaling back of the weapons, but not an outright refusal to use them. Despite low dud rates imposed by Congressional statutes, President Biden utilized his presidential authority to waive cluster bombs that exceeded the one percent dud rate.<sup>80</sup> It is worth noting, however, that the cluster munitions in question instead have around a 2.35 percent dud rate.<sup>81</sup> In mid-2023, the House of Representatives overwhelmingly failed to ban the transfer of cluster munitions to Ukraine.<sup>82</sup> The inconsistent messaging from the United States over the course of nearly sixteen years, however, presents an opportunity amidst the context of current events. The Russian invasion of Ukraine has caused the law surrounding cluster munitions to find a new tone, rather than completely change. In essence, the war in Ukraine is forcing the United States to reconsider the legal future of cluster munitions in conflict. The Biden Administration and Congress both stand at a crossroads to permanently change the tone surrounding these controversial weapons. The option remains to affirm their use in warfare or forever alter their acceptance in American law.

It has been well established that cluster munitions are quintessential to American military doctrine and are very effective at destroying spread out military targets, especially in Ukraine.<sup>83</sup> The Biden administration had resisted calls to send any form of cluster munitions to Ukraine—until the

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80. See Rebecca Shabad, *Biden's Move on Ukraine Cluster Munitions Sparks Democratic Blowback*, NBC NEWS (July 7, 2023), <https://www.nbcnews.com/politics/congress/bidens-move-ukraine-cluster-munitions-sparks-democratic-blowback-rcna93136>.

81. See Dr. Colin Kahl, Under Secretary of Defense for Policy, U.S. Dep't of Defense, *Press Briefing at The Pentagon* (July 7, 2023).

82. See A resolution expressing Congress' sense that the United States should resume and increase assistance to Ukraine to defend its territorial integrity and sovereignty and for other purposes. H.R. 317 118th Congress (2023-2024), <https://www.govtrack.us/congress/votes/118-2023/h317>.

83. See Secretary of Defense, *supra* note 73.

Ukrainian counter offensive had stalled into a quagmire.<sup>84</sup> The forms of clusters sought by Ukraine came in two forms: the 155mm Howitzer fired from a traditional artillery piece known as the DPCIMS and a ballistic missile known as the ATACMS.<sup>85</sup> Both of these weapons are made to assist in counter-offensives that require removing dug-in Russian troops that have stalled Ukraine's Eastern push.<sup>86</sup> Beyond the shipment of lethal aid, the United States has authorized and continues to fund a comprehensive de-mining process that includes the removal of leftover unexploded duds.<sup>87</sup> Yet, the process approving the shipment of these weapons has undermined America's past resolve to move away from cluster bombs as a part of its doctrine.

The president of the United States wields powerful discretion in using and sending lethal aid, particularly when there is a congressional delegation over such discretionary power.<sup>88</sup> American law has long held that the president is at the highest authority to do so when this power has been explicitly delegated by Congress.<sup>89</sup> Given this context, President Biden has drawn significant statutory authority in the shipment of cluster munitions to Ukraine as an exercise of presidential authority. Section 506(a)(1) of the Foreign Assistance Act of 1961 (FAA) provides special authority to the president due to an unforeseen emergency that requires military assistance, allowing for the drawdown (withdrawal access) to military stockpiles.<sup>90</sup> This piece of legislation has proven vital for the Biden administration's shipment of lethal aid, including cluster munitions. The FAA can be best understood as a means to bypass Congressionally imposed prohibitions. However, it is not a blank check to send continuous aid.<sup>91</sup> First, pursuant to the FAA, Congress must be

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84. See Lara Seligman and Alexander Ward, *Biden Administration Has 'Concerns About Providing Ukraine Cluster Munitions*, POLITICO (Dec. 9, 2022), <https://www.politico.com/news/2022/12/09/biden-administration-ukraine-cluster-munitions-00073317>.

85. See Alexander Ward, *U.S. to Include Controversial Cluster Munitions in New Ukraine Weapons Package*, POLITICO, (July 6, 2023), <https://www.politico.com/news/2023/07/06/decision-to-send-cluster-munitions-to-ukraine-on-bidens-desk-00104903>.

86. See PAUL K. KERR AND ANDREW FEICKERT, *supra* note 52.

87. See Office of the Spokesperson, *\$89 Million in New U.S. Humanitarian Demining Assistance for Ukraine*, U.S. DEP'T OF STATE (Aug. 9, 2022), <https://www.state.gov/89-million-in-new-u-s-humanitarian-demining-assistance-for-ukraine/>.

88. See Bureau of Political-Military Affairs, *Use of Presidential Drawdown Authority for Military Assistance for Ukraine*, U.S. DEP'T OF STATE (Oct. 21, 2024), <https://www.state.gov/use-of-presidential-drawdown-authority-for-military-assistance-for-ukraine/>.

89. See *Curtis-Wright Export Corp.*, 299 U.S. 304.

90. See 22 U.S.C. § 2318 (2020).

91. See Bureau of Political-Military Affairs, *supra* note 87.

notified of the sending of the emergency arms.<sup>92</sup> When it was written in 1961, the statute capped the amount of aid to 100,000 USD.<sup>93</sup> Congress increased this cap to 11 billion USD to ease large quantities of lethal aid to Ukraine by 2022.<sup>94</sup> The drawdown authority delegated to the president is not funding in its own right and is contingent upon Congress allocating the money to this executive power.<sup>95</sup> This complex system to ensure cluster munitions are generally limited in their scope and shipment to Ukraine. While Congress has drawn lines in the sands with the power of the purse, they are easily bypassed by presidential emergency powers. Current law allows for standards to be ignored and permits the simple reversal of policy in the name of convenience.

The United States stands at a unique crossroads to alter not only its own trajectory with regard to cluster bombs, but international law itself. While never overtly stated, the American government was seemingly shell-shocked away from cluster bombs at nearly all levels—Congress, the presidency, and the Department of Defense following the Iraq War. The invasion of Ukraine radically changed the government's handling of cluster munitions, turning a growingly reluctant world power into a willing supplier of these highly controversial arms. The United States has a moral and legal imperative to ensure this is the final conflict with cluster bombs. From a legal standpoint, the American government has long been skeptical of arms limitation treaties and has interpreted the CCW as a tool to evade banning the use of cluster bombs. Customary international law currently lacks the backing of the world's most significant superpowers when it comes to norms surrounding cluster bombs. This standard can be established by reinstating DoD standards to destroy stockpiles, presidential restraint on shipments following the war in Ukraine, and Congressional statutes that outright bar their further application. In tandem, these three will form key pillars in granting authority to customary law norms that would help achieve better unwritten standards on cluster bombs. Furthermore, this must be reinforced by the ratification of and abidance by the CCM in order to hold the United States to a binding status regarding these weapons. While this cannot guarantee Russian or Chinese participation in ending cluster bombs, it remains a vital first step.

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92. See 22 U.S.C. § 2318.

93. *Id.*

94. See H.R. 133, Consolidated Appropriations Act, 2021, Pub. L. No. 117-128, Congress.gov, <https://www.congress.gov/117/plaws/pub1128/PLAW-117pub1128.pdf>.

95. See Bureau of Political-Military Affairs, *supra* note 87.

#### IV. LAVROV'S BREAD BASKETS—RUSSIAN APPLICATION OF CLUSTER BOMBS

The Russian Federation and the former Soviet Union preceding it, have long been vocal advocates and users of cluster munitions.<sup>96</sup> Soviet use of incendiary cluster bombs became especially notorious during the invasion of Finland during the Winter War in 1940, leading to the derisive nickname from Finns naming them “Molotov’s Bread Baskets” after the Soviet foreign minister Molotov who claimed the war was a humanitarian mission that included dropping food for the Finns.<sup>97</sup> Nonetheless, cluster munitions have played a vital and infamous role within the Russian arsenal ever since. In stark contrast to America’s use of cluster bombs, Russia has been extremely reluctant to disclose any information pertaining to their stockpiles, policies, or application of the weapons.<sup>98</sup> While this makes a comparative legal analysis more difficult, there are multiple examples of Russian public statements regarding policy as well as spent munitions in active war zones that allow us to infer whether or not Russia is acting according to international legal norms, whether conventional or treaty-based.

Despite its actions suggesting otherwise, Russia is still subject to the jurisdiction of international law. Just as the United States, Russia is a party to the Convention on Conventional Weapons but not to the Convention on Cluster Munitions.<sup>99</sup> Customary law is binding on Russia in its multiple armed engagements with its neighbors, including requirements to prohibit indiscriminate and disproportionate strikes. The Russian government has also claimed that cluster munitions are not inherently indiscriminate, and the issue of propriety only arises if they are applied properly.<sup>100</sup> Yet unlike the United States, the Russian government has been both directly using them in the War in Ukraine as well as supplying their separatist proxies in Eastern Ukraine.<sup>101</sup> So, what even can be inferred from Russian cluster bombs?

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96. See *Early Cluster Bomb: Molotov’s Bread Basket*, *Modern Mechanix* (Nov. 14, 2006).

97. *Id.*

98. See *Cluster Munition Ban Policy in the Russian Federation*, *MONITOR*, <https://www.the-monitor.org/en-gb/reports/2021/russian-federation/cluster-munition-ban-policy.aspx>.

99. *Id.*

100. See *United Nations, First Committee Approves 8 Drafts, Continuing Action Phase as Delegates Differ over Definition of Legitimate Arms Control Treaties*, *UN NEWS* (Nov. 2, 2021), <https://press.un.org/en/2021/gadis3677.doc.htm>.

101. See *Technical Briefing Note: Cluster Munition Use in Ukraine*, *HUM. RTS. WATCH* (June 22, 2015, 6:00 AM), <https://www.hrw.org/news/2015/06/22/technical-briefing-note-cluster-munition-use-ukraine>. See *Cluster Munition Use in the Russia-Ukraine War*, *HUM. RTS.*

The most striking legal application of Russia's use of cluster munitions is the blatant failure to abide by basic international legal norms—notably indiscriminate bombings and acting in a disproportionate manner, particularly towards Ukrainian civilians.<sup>102</sup> Russia's direct and indirect use of cluster bombs is hardly new. Spent munitions have been recovered in Syria and Ukraine prior to Russia's full invasion of the former in 2022.<sup>103</sup> While Russian munitions have a notoriously high dud rate of around thirty to forty percent, the primary issue during the war in Ukraine is not the unexploded ordnance; it is how the Russian military applying them indiscriminately.<sup>104</sup> Despite their prior insistence that cluster munitions are acceptable as legal weapons of war—as long as they do not target civilians—most evidence tends to suggest that Russia is in fact targeting civilian areas with cluster munitions.<sup>105</sup> Russia has even gone as far as to suggest it does not even use cluster weapons in Ukraine and that Ukraine is the true party responsible for the deaths of its own civilians through cluster strikes.<sup>106</sup> Regardless of Russian statements, their cluster bombs have consistently directly hit residential areas, hospitals, and farm land.<sup>107</sup> Within the first month of their invasion alone, Russia is estimated to have used cluster bombs at least two dozen times.<sup>108</sup>

International law is in something of a quagmire because of Russia's unprecedented aggression and its use of cluster bombs. Most applicable international law surrounding cluster munitions does not directly address how they are used in an indiscriminate or uniquely cruel manner, but rather only pertains to their recovery.<sup>109</sup> The CCW, the only treaty Russia is a party to on this matter, only effectively addresses the clean-up and removal of unexploded ordnance.<sup>110</sup> Russia would still be bound by international customary law regarding its overall conduct throughout the

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WATCH (May 28, 2023, 12:01 AM), <https://www.hrw.org/news/2023/05/29/cluster-munition-use-russia-ukraine-war>.

102. *Id.*

103. *See* MONITOR, *supra* note 98.

104. U.S. Dep't of Defense, *Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing*, <https://www.defense.gov/News/Transcripts/Transcript/Article/3452000/under-secretary-of-defense-for-policy-dr-colin-kahl-holds-press-briefing/#:~:text=Compare%20that%20to%20Russia%2C%20which,between%2030%20and%2040%20percent>.

105. *See* UN NEWS, *supra* note 100.

106. *Id.*

107. *Id.*

108. *See United Nations, Ukraine war: Russia Used Cluster Weapons at Least 24 Times, Says UN's Bachelet*, UN NEWS (Mar. 30, 2022), <https://news.un.org/en/story/2022/03/1115092>.

109. *See* Convention on Certain Conventional Weapons, *supra* note 40.

110. *Id.*



war, but the explicit use of cluster bombs against civilians could be subject to unique scrutiny.<sup>111</sup> In essence, the usage of cluster bombs per se is not illegal under norms of international law or the conduct of war (*jus in bello*), but the manner of their application is.<sup>112</sup> Legally challenging Russia's actions pertaining to cluster munitions against civilians will be an extremely fact-intensive and strenuous venture, particularly as it is difficult to ascertain a full picture when their government actively denies basic facts pertaining to the conflict.<sup>113</sup> Russia has shrugged off countless other *jus in bello* norms and customary practices during their onslaught in Ukraine.<sup>114</sup> The situation remains grim in terms of holding the Russian government accountable for its actions, yet it will require patience and active pressure on the international community to continue to prepare evidence for the International Criminal Court.<sup>115</sup> From a legal and practical standpoint, prosecuting President Putin and his administration will be extremely difficult.<sup>116</sup> Nonetheless, it is vital to continue to uphold international norms for future conflict and to continue to push for ratification of the CCM in order to ensure that countries stop producing cluster munitions and safely destroy the ones in their possession.

## V. UNCHARTED PATHS AND RECOMMENDATIONS

The invasion of Ukraine reignited an almost forgotten controversy surrounding cluster bombs. Russian indiscriminate strikes on civilian centers and the American shipment of the weapons both played a major role in reviving the long-standing legal debate.<sup>117</sup> February 2022 marked a critical watershed moment in the status of international law as Russia trampled upon long-standing norms by beginning its brutal invasion of Ukraine.<sup>118</sup> Russia has further accused Ukraine of inappropriately using cluster munitions as well, leading to an exchange of words as well as

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111. See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10710, THE LAW OF WAR AND THE RUSSIAN INVASION OF UKRAINE (2022), accessed April 3, 2024.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. See Sanders, Lauren, *Accountability in Ukraine: Hurdles to Prosecuting War Crimes and Aggression*, LEIBER INST. WEST POINT (Mar. 9, 2022), <https://lieber.westpoint.edu/accountability-ukraine-hurdles-prosecuting-war-crimes-aggression/> (accessed Apr. 3, 2024).

117. See Cancian, *supra* note 3.

118. *Id.*

cluster bombs.<sup>119</sup> Kiev's use of cluster munitions supplied by the United States raises the question of whether America is culpable in violations of international law as well. By comparing the developments and changes to Russian as well as American behavior surrounding cluster bombs, one could identify key changes that must be made to establish new norms and standards in the law of war.

The most notable point of comparison in Russian and American application of cluster munitions is the level of restraint and discretion exercised during the war in Ukraine. This key element trickles down effectively into ascertaining the impact on customary international law through indiscriminate and disproportionate strikes.

American statutory law explicitly prohibits indiscriminate strikes against civilians and only authorizes cluster weapons against clearly defined military targets.<sup>120</sup> Furthermore, the long-standing regulation and limitations imposed on dud rates shipped demonstrate a broad policy and legal *intent* to limit the harmful lingering impact of leftover unexploded ordnance across Ukraine. Virtually all post-Iraq policies surrounding cluster munitions signaled the United States was beginning to align itself with international law, from decreasing dud rates to the destruction of surplus stockpiles and approving vast de-mining projects. To a certain extent, one could even go so far as to assert that American law was molding itself into abiding by the CCM in all but name. Yet this long-standing march towards dismantlement has instead, transformed into an exercise in presidential power that has circumvented most of these policies that have begun to reinforce and cement customary law towards cluster munitions. Small statutory loopholes have given the executive vast authority to undo the movement away from clusters quickly and arbitrarily. By approving bombs with higher dud rates, the United States has surrendered some of its restraint and credence under international law. The unraveling of Congressional mandates will not improve the situation of Ukraine in a meaningful way as cluster bombs become more acceptable and customary law remains unclear as to its application to the circumstance. The war has the potential to challenge the powers of the president in relations to war powers and how much authority can be delegated to the executive in a proxy war. In the meantime, it is essential for the United States to continue to fund demining efforts to remove duds across Ukraine. Upholding pre-war commitments to cluster munition

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119. See *Russian Journalist Killed, Three Wounded near Ukraine Frontline*, AL JAZEERA (July 22, 2023), <https://www.aljazeera.com/news/2023/7/22/russian-journalist-killed-three-wounded-near-ukraine-frontline>.

120. See PAUL K. KERR AND ANDREW FEICKERT, *supra* note 52.

rollbacks is essential to ensuring Ukraine is not littered with unexploded duds and to eventually reset customary law to hold Russia accountable.

Holding Russia accountable to international law will prove to be one of the greatest post-war challenges for the institutions that have long upheld the laws of war. Providing policy recommendations to a nation that has openly flaunted norms is not in the scope of this comment, but recommendations are possible within the realm of international law and resetting the norms on cluster weapons in the future. The United States has an important role to play in this endeavor.<sup>121</sup> America is relatively limited in exercising hard power against Russia, as it cannot ‘police’ their usage of cluster bombs through military force. Normally, one would expect the United States to engage in limited strikes against a hostile power for indiscriminately using cluster munitions—like the strikes against Syria for using chemical weapons.

The most important tool the United States can utilize, beyond engaging in customary law and signing onto the CCM, has been the Justice for Victims of War Crimes Act.<sup>122</sup> The legislation extends already existing federal jurisdiction and power over war crimes specifically.<sup>123</sup> Earlier law permitted federal court jurisdiction only over war crimes that took place on American soil or involved an American citizen.<sup>124</sup> In direct response to the invasion of Ukraine, Congress enacted the Justice for Victims of War Crimes Act, which expanded these existing federal jurisdictional powers over war crimes.<sup>125</sup> Most notably, it removes a timed statute of limitations on war crimes, thus extending means of international criminal prosecution virtually indefinitely.<sup>126</sup> Given that indiscriminate and disproportionate use of cluster munitions are war crimes in and of themselves, it is necessary for the United States and its allies to record and gather evidence of their usage by the Russian military.

The second major component is a de facto *persona non grata* rule established by the legislation, as it grants means of prosecution for any

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121. See Beth Van Schaack, *Remarks to the Helsinki Commission: Holding Russia Accountable for War Crimes Against Ukraine: Lessons from Nuremberg*, U.S. DEP’T OF STATE (Feb. 20, 2024), in Dep’t of State Website.

122. S. 4240, 117TH CONG. (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/4240/text> (accessed March 3, 2024).

123. See Hemi Mistry, *Justice for Victims: Prosecuting War Crimes Symposium—Justice for Victim of [Some] War Crimes Act?*, LIEBER INST. WEST POINT (Feb. 15, 2023), <https://lieber.westpoint.edu/justice-victims-war-crimes-act-reflections-from-across-the-pond/> (accessed Mar. 3, 2024).

124. *Id.*

125. *Id.*

126. *Id.*

war crime, regardless of nationality, if they are merely present within the United States at any time after enactment of the law.<sup>127</sup> As a result, American prosecutors have already charged Russian military personnel with violations of international law and war crimes.<sup>128</sup> Beyond this, the United States must remain an active participant in existing institutions designed at tackling international legal violations as well as proactive in new efforts to hold Russia accountable. An effort akin to the Nuremberg Trials will be necessary to ensure war crimes of this scale are not forgotten.

Cluster bombs generally have been transitioning towards their place in history as a maligned and controversial weapon that have only left scars upon the Earth. Even amidst the war in Ukraine, the international community has worked to reinforce the weapons' pariah status and has condemned their usage across the board.<sup>129</sup> American law and policy must materialize into a more coherent and firmer stance against cluster bombs. The Biden administration needs to reconsider further authorization of cluster munitions, ensure the reconstruction of Ukraine involves thorough removal of hazardous unexploded bombs, take leadership in the prosecution of Russia's indiscriminate usage of cluster bombs, and sign on to the Convention on Cluster Munitions to protect future civilians from the scourge of long-lasting explosives.

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127. *Id.*

128. *See* Van Schaak, *supra* note 121.

129. *See* VOICE OF AMERICA NEWS, *supra* note 65.