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# Cluster Munitions: Background and Issues for Congress

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## Summary

Cluster munitions are air-dropped or ground-launched weapons that release a number of smaller submunitions intended to kill enemy personnel or destroy vehicles. Cluster munitions were developed in World War II and are part of many governments' weapons stockpiles. Cluster munitions have been used frequently in combat, including the early phases of the conflicts in Iraq and Afghanistan. Cluster munitions have been criticized for causing a significant number of civilian deaths. The Convention on Cluster Munitions (CCM), which bans the use of cluster munitions, entered into force in 2010; the United States is not a party to this convention.

The Department of Defense (DOD) continues to argue that cluster munitions are a military necessity, but in 2008 instituted a policy to reduce the failure rate of cluster munitions (a major contributor to civilian casualties) to 1% or less after 2018. In November 2017, DOD issued a new policy that essentially reversed the 2008 policy. The 2017 policy permits combatant commanders, in extreme situations to meet immediate warfighting demands, to use cluster munitions that do not meet the 1% or less unexploded submunitions standard. In addition, the 2017 policy does not establish a deadline to replace cluster munitions exceeding the 1% rate and states that DOD "will retain cluster munitions currently in active inventories until the capabilities they provide are replaced with enhanced and more reliable munitions."

A number of governments, UN agencies, and nongovernmental organizations have accused Russia of using cluster munitions during its 2022 invasion of Ukraine. In July 2023 and again in September 2023, the United States announced cluster munitions transfers to Ukraine. Congress may consider whether these transfers signal a change in U.S. policy on cluster munitions, whether the United States is able to provide other types of cluster munitions to that country, and whether Ukrainian use of such munitions affects international and U.S.-sponsored demining efforts in the country.

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## What Are Cluster Munitions?<sup>1</sup>

Cluster munitions are weapons that open in mid-air and disperse smaller submunitions—anywhere from a few dozen to hundreds—into an area. They can be delivered by aircraft or from ground systems such as artillery, rockets, and missiles. Cluster munitions are valued militarily because one munition can kill or destroy many targets within its impact area, and fewer weapons systems are needed to deliver fewer munitions to attack multiple targets. Cluster munitions also permit a smaller force to engage a larger adversary.

## History<sup>2</sup>

Cluster bombs were first used in World War II, and inclusive of their debut, cluster munitions have been used in at least 21 states by at least 13 different countries. The United States used cluster munitions extensively in Southeast Asia in the 1960s and 1970s, and the International Committee of the Red Cross (ICRC) estimates that in Laos alone, 9 million to 27 million unexploded submunitions remained after the conflict, resulting in over 10,000 civilian casualties to date. The Soviet Union (in Afghanistan), the British government (Falkland Islands conflict), the U.S.-led Coalition (1991 Gulf War), and the warring factions in the former Yugoslavia all used cluster munitions. In Kosovo and the former Yugoslavia in 1999, the North Atlantic Treaty Organization (NATO) forces dropped 1,765 cluster bombs containing approximately 295,000 submunitions. From 2001 through 2002, the United States dropped 1,228 cluster bombs containing 248,056 submunitions in Afghanistan. U.S. and British forces used almost 13,000 cluster munitions containing an estimated 1.8 million to 2 million submunitions during the first three weeks of combat in Iraq in 2003. Senior U.S. government officials have stated that the United States has not used cluster munitions since the 2003 intervention in Iraq.<sup>3</sup> It is widely believed that confusion over U.S. cluster submunitions (BLU-97/B) that were the same color and size as air-dropped humanitarian food packets played a major role in the U.S. decision to suspend cluster munitions use in Afghanistan but not before using them in Iraq.

In 2006, Israeli use of cluster munitions against Hezbollah forces in Lebanon resulted in widespread international criticism. Israel was reported to have fired large quantities of cluster munitions—primarily during the last 3 days of the 34-day war after a U.N. cease-fire deal had been agreed to<sup>4</sup>—resulting in almost 1 million unexploded cluster bomblets to which the U.N. attributed 14 deaths during the conflict.<sup>5</sup> Reports maintained that Hezbollah fired about 113 “cluster rockets” at northern Israel and, in turn, Israel’s use of cluster munitions supposedly affected 26% of southern Lebanon’s arable land and contaminated about 13 square miles with

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<sup>1</sup> Information in this section unless otherwise noted is from Mark Hiznay, “Operational and Technical Aspects of Cluster Munitions,” United Nations Institute for Disarmament Research Disarmament Forum,” 2006, pp. 15-25.

<sup>2</sup> Ibid.

<sup>3</sup> Stephen D. Mull, Acting Assistant Secretary of State for Political-Military Affairs, U.S. Cluster Munitions Policy, On-the-Record Briefing, Washington, DC, May 21, 2008.

<sup>4</sup> Scott Peterson, “Cluster Bombs: A War’s Perilous Aftermath,” *Christian Science Monitor*, February 7, 2007, and “Israel Criticized for Cluster Bombs,” *Los Angeles Times*, February 1, 2008.

<sup>5</sup> “Major Violations on Both Sides in Israel-Lebanon Conflict, Say UN Experts,” United Nations Office at Geneva News & Media, October 4, 2006.

unexploded submunitions.<sup>6</sup> One report stated that there was a failure rate of upward of 70% of Israel's cluster weapons.<sup>7</sup>

## **Cluster Munitions Criticisms**

The main criticisms of cluster munitions are that they disperse large numbers of submunitions imprecisely over an extended area, that they frequently fail to detonate and are difficult to detect, and that submunitions can remain explosive hazards for decades. Civilian casualties are primarily caused by munitions being fired into areas where soldiers and civilians are intermixed, inaccurate cluster munitions landing in populated areas, or civilians traversing areas where cluster munitions have been employed but failed to explode. Two technical characteristics of submunitions—failure rate and lack of a self-destruct capability—have received a great deal of attention.

### **Failure Rate<sup>8</sup>**

There appear to be significant discrepancies among failure rate estimates of current cluster munitions maintained in U.S. stockpiles. Some manufacturers claim a submunition failure rate of 2% to 5%, whereas mine clearance specialists have frequently reported failure rates of 10% to 30%. A number of factors influence submunition reliability. These factors include delivery technique, age of the submunition, air temperature, landing in soft or muddy ground, getting caught in trees and vegetation, and submunitions being damaged after dispersal, or landing in such a manner that their impact fuzes fail to initiate.

### **Lack of Self-Destruct Capability**

Submunitions lacking a self-destruct capability—referred to as “dumb” munitions—are of particular concern because they can remain a hazard for decades, thereby increasing the potential for civilian casualties. Experts maintain that self-destruct features reduce—but do not eliminate—the unexploded ordnance problem caused by cluster munitions and that the advantage gained by using “smart” cluster munitions is negated when high-failure rate and/or “dumb” cluster munitions are used in the same area.<sup>9</sup>

## **International Attempts to Regulate Use**

### **U.N. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW)**

In an effort to restrict or ban specific types of weapons used in armed conflicts, 51 states negotiated the CCW in 1980.<sup>10</sup> When the treaty entered into force in December 1983, it applied only to incendiary weapons, mines and booby-traps, and weapons intended to cause casualties through very small fragments. Since then, some states-parties have added provisions through

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<sup>6</sup> Peterson, 2008.

<sup>7</sup> *Ibid.* Failure rate as described here is either a failure to detonate on impact or a failure to detonate after a predetermined time delay.

<sup>8</sup> Unless otherwise noted, information in this section is from Hiznay, p. 22.

<sup>9</sup> Hiznay, p. 23.

<sup>10</sup> Information in this section is from an Arms Control Association Fact Sheet. “Convention on Certain Conventional Weapons Convention (CCW) at a Glance,” Washington, DC, October 2007.

additional protocols to address other types of weapons. Acting in accordance with the recommendation of a group of experts established during the 2006 CCW review conference, states-parties to the convention decided in 2007 to “negotiate a proposal to address urgently the humanitarian impact of cluster munitions.”<sup>11</sup> Negotiations took place in 2008 and 2009, but the parties did not reach agreement on a new proposal. The experts group continued negotiations in 2011 based on a Draft Protocol on Cluster Munitions.<sup>12</sup> However, the CCW states-parties were unable to reach agreement on a protocol during their November 2011 review conference.

## Convention on Cluster Munitions (CCM)<sup>13</sup>

Described as “frustrated with the CCW process,” a number of CCW members—led by Norway—initiated negotiations in 2007 outside of the CCW to ban cluster munitions.<sup>14</sup> On May 30, 2008, these governments reached an agreement to ban cluster munitions.<sup>15</sup> The United States, Russia, China, Israel, Egypt, India, and Pakistan did not participate in the talks or sign the agreement. During the Signing Conference in Oslo on December 3-4, 2008, 94 states signed the convention and four of the signatories ratified the convention at the same time.<sup>16</sup> The convention was to enter into force six months after the deposit of the 30<sup>th</sup> ratification. The United Nations received the 30<sup>th</sup> ratification on February 16, 2010, and the convention entered into force on August 1, 2010. Twenty-three of 31 NATO countries are parties to the CCM.

The Convention on Cluster Munitions (CCM), *inter alia*, bans the use of cluster munitions, as well as their development, production, acquisition, transfer, and stockpiling.<sup>17</sup> The convention does not prohibit cluster munitions that can detect and engage a single target or explosive submunitions equipped with an electronic self-destruction or self-deactivating feature<sup>18</sup>—an exemption that seemingly permits sensor-fuzed or “smart” cluster submunitions. U.S. officials were concerned that early versions of the CCM would prevent military forces from non-states-parties from providing humanitarian and peacekeeping support and significantly affect NATO military operations, but the version signed May 30, 2008, does permit states-parties to engage in military cooperation and operations with non-states-parties (Article 21, Paragraph 3).

## U.S. Policy on Cluster Munitions

The U.S. has historically defended the use of cluster munitions. Then-Acting Assistant Secretary for Political-Military Affairs Stephen Mull stated in May 2008 that the United States relies on cluster munitions “as an important part of our own defense strategy,” and that Washington’s

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<sup>11</sup> Report from the November 2007 meeting of states-parties to the CCW, December 3, 2007 at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/647/29/PDF/G0764729.pdf?OpenElement>.

<sup>12</sup> A copy of the Draft Protocol is available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/605/99/PDF/G1160599.pdf?OpenElement>.

<sup>13</sup> For detailed information on the Convention on Cluster Munitions, see <https://www.clusterconvention.org/>.

<sup>14</sup> Arms Control Association Fact Sheet, “Convention on Certain Conventional Weapons Convention (CCW) at a Glance,” Washington, DC, October 2007.

<sup>15</sup> Kevin Sullivan and Josh White, “111 Nations, Minus the U.S., Agree to Cluster-Bomb Ban,” *Washington Post*, May 29, 2008.

<sup>16</sup> Convention on Cluster Munitions Homepage, at <http://www.clusterconvention.org/>, January 28, 2009.

<sup>17</sup> Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Convention on Cluster Munitions, Dublin, Ireland, May 30, 2008, <https://www.clusterconvention.org/>.

<sup>18</sup> *Ibid.*

preferred alternative to a ban is “to pursue technological fixes that will make sure that these weapons are no longer viable once the conflict is over.”<sup>19</sup> U.S. officials have noted that

Cluster munitions are available for use by every combat aircraft in the U.S. inventory, they are integral to every Army or Marine maneuver element and in some cases constitute up to 50 percent of tactical indirect fire support. U.S. forces simply cannot fight by design or by doctrine without holding out at least the possibility of using cluster munitions.<sup>20</sup>

The United States also maintains that using cluster munitions reduces the number of aircraft and artillery systems needed to support military operations, and that if cluster munitions were eliminated, significantly more money would need to be spent on new weapons systems, ammunition, and logistical resources. Officials further suggest that if cluster munitions were eliminated, most militaries would increase their use of massed artillery and rocket barrages, which would likely increase destruction of key infrastructure. Then-Department of State Legal Adviser Harold Koh stated November 9, 2009, that the United States has determined that its “national security interests cannot be fully ensured consistent with the terms” of the CCM.<sup>21</sup>

## 2008 Department of Defense (DOD) Policy on Cluster Munitions<sup>22</sup>

The Obama Administration announced on November 25, 2011, that the United States would continue to implement the DOD policy on cluster munitions issued June 19, 2008, which recognized the need to minimize harm to civilians and infrastructure but also reaffirmed that “cluster munitions are legitimate weapons with clear military utility.” The central directive in the Pentagon’s policy was the unwaiverable requirement that cluster munitions used after 2018 must leave less than 1% of unexploded submunitions on the battlefield. Prior to that deadline, U.S. use of cluster munitions that did not meet this criterion required combatant commander approval.

## Revised 2017 DOD Policy on Cluster Munitions

On November 30, 2017, then-Deputy Secretary of Defense Patrick Shanahan issued a revised policy on cluster munitions.<sup>23</sup> The memorandum describing the policy noted that

[c]luster munitions provide the Joint Force with an effective and necessary capability to engage area targets, including massed formations of enemy forces, individual targets dispersed over a defined area, targets whose precise location are not known, and time-sensitive or moving targets. Cluster munitions are legitimate weapons with clear military utility, as they provide distinct advantages against a range of threats in the operating environment. Additionally, the use of cluster munitions may result in less collateral damage than the collateral damage that results from use of unitary munitions alone.

Since the inception of the 2008 policy, in the midst of extended combat operations in Iraq and Afghanistan, we have witnessed important changes in the global security environment

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<sup>19</sup> Stephen D. Mull, Acting Assistant Secretary of State for Political-Military Affairs, U.S. Cluster Munitions Policy, On-the-Record Briefing, Washington, DC, May 21, 2008.

<sup>20</sup> Richard Kidd, Director of the Office of Weapons Removal and Abatement, U.S. Department of State, “Is There a Strategy for Responsible U.S. Engagement on Cluster Munitions?,” April 28, 2008.

<sup>21</sup> “Opening Statement for the United States Delegation by Harold Hongju Koh, Legal Adviser, United States Department of State, at the Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War,” November 9, 2009.

<sup>22</sup> Information in this section is from DoD Policy on Cluster Munitions and Unintended Harm to Civilians, June 19, 2008.

<sup>23</sup> Memorandum from the Deputy Secretary of Defense, *Subject: DoD Policy on Cluster Munitions*, November 30, 2017.

and experienced several years of budgets that under-invested in replacement systems and the modernization of the Joint Force more broadly. Our adversaries and our potential adversaries have developed advanced capabilities and operational approaches specifically designed to limit our ability to project power.<sup>24</sup>

Both Shanahan and Admiral Harry Harris Jr., then-commander of U.S. Indo-Pacific Command, have also argued that sustaining the current U.S. cluster munitions arsenal is necessary to prepare for a potential conflict with North Korea.<sup>25</sup>

The revised policy reverses the 2008 policy that established an unwaiverable requirement that cluster munitions used after 2018 must leave less than 1% of unexploded submunitions on the battlefield. Combatant commanders can use cluster munitions that do not meet the 1% or less unexploded submunitions standard in extreme situations to meet immediate warfighting demands. Furthermore, the revised policy does not establish a deadline to replace cluster munitions exceeding the 1% rate, and these munitions will be removed only after new munitions that meet the 1% or less unexploded submunitions standard are fielded in sufficient quantities to meet combatant commander requirements. However, the revised DOD policy stipulates that the department “will only procure cluster munitions containing submunitions or submunition warheads” meeting the 2008 UXO requirement or possessing “advanced features to minimize the risks posed by unexploded submunitions.”<sup>26</sup>

Specifically, DOD’s revised policy stipulates the following:<sup>27</sup>

- Continuing or beginning with their respective FY2019 budgets, the military departments were to program for capabilities to replace cluster munitions currently in active inventories that do not meet the above-described standards for procuring new cluster munitions. The department’s annual Program and Budget Review would be used to assess the sufficiency of the replacement efforts.
- The department’s operational planners should plan for the availability of cluster munitions. The approval authority to employ cluster munitions that do not meet the standards prescribed by this policy for procuring new cluster munitions, however, rests with the combatant commanders. In accordance with their existing authorities, commanders may use cluster munitions that meet the standards prescribed by this policy for procuring new cluster munitions.
- The military departments and combatant commands, in keeping with U.S. legal obligations under CCW Protocol V on Explosive Remnants of War and consistent with past practices, would continue to record and retain information on the use of cluster munitions and provide relevant information to facilitate the removal or destruction of unexploded submunitions.
- The military departments and combatant commands will maintain sufficient inventories and a robust stockpile surveillance program to ensure operational quality and reliability of cluster munitions. In extremis, to meet immediate warfighting demand, combatant commanders may accept transfers of cluster

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<sup>24</sup> Ibid.

<sup>25</sup> “Statement of Admiral Harry B. Harris Jr., U.S. Navy Commander, U.S. Pacific Command, Senate Armed Services Committee,” March 15, 2018; “Remarks by Deputy Secretary of Defense Patrick M. Shanahan at the 2018 Military Reporters & Editors Conference, Navy League Headquarters of the U.S.,” October 26, 2018.

<sup>26</sup> Memorandum from the Deputy Secretary of Defense, *SUBJECT: DoD Policy on Cluster Munitions*, November 30, 2017.

<sup>27</sup> Ibid.



munitions that do not meet the above-described cluster-munition procurement standards.

- Cluster munitions that do not meet the standards prescribed by this policy for procuring new cluster munitions will be removed from active inventories and demilitarized after their capabilities have been replaced by sufficient quantities of munitions that meet the standards in this policy.
- The department will not transfer cluster munitions except as provided for under U.S. law. The operational use of cluster munitions that include Anti-Personnel Landmines (APL) submunitions shall comply with presidential policy.

In developing a new generation of cluster munitions less dangerous to civilians, DOD will likely need to determine whether such a high level of performance is achievable under both controlled laboratory conditions and real-world conditions. Factors such as delivery technique, landing in soft or muddy ground, getting caught in trees and vegetation, and submunitions being damaged after dispersal or landing could result in an appreciable number of dud submunitions, even if they have a self-deactivation feature.

## Selected Legislation

### Consolidated Appropriations Acts

The Consolidated Appropriations Act, 2010 (P.L. 111-117), which President Obama signed into law December 16, 2009, prohibits the provision of military assistance for cluster munitions, the issuing of defense export licenses for cluster munitions, or the sale or transfer of cluster munitions or cluster munitions technology unless “the submunitions of the cluster munitions, after arming, do not result in more than 1 percent unexploded ordnance across the range of intended operational environments.” Moreover, any agreement “applicable to the assistance, transfer, or sale of such cluster munitions or cluster munitions technology” must specify that the munitions “will only be used against clearly defined military targets and will not be used where civilians are known to be present or in areas normally inhabited by civilians.” Subsequent appropriations laws have included similar provisions; the most recent is the Consolidated Appropriations Act, 2023 (P.L. 117-328, Section 7035(c)(2)), which President Biden signed into law on December 29, 2022.

## DOD Efforts to Reduce Unexploded Ordnance Rates for Its Cluster Munitions

DOD and the services have been and are involved in efforts to reduce cluster munitions failure rates. The Army’s Alternative Warhead Program (AWP) is intended to assess and recommend new technologies to reduce or eliminate cluster munitions failure rates.<sup>28</sup> The AWP program is viewed as particularly relevant, as the Pentagon estimates that “upward of 80 percent of U.S. cluster munitions reside in the Army artillery stockpile.”<sup>29</sup> In December 2008, the Army decided to cease procurement of a Guided Multiple Launch Rocket System (GMLRS) warhead—the Dual-Purpose Improved Conventional Munition (DPICM) warhead—because its submunitions had a dud rate

<sup>28</sup> Daniel Wasserbly, “Army Warhead Program to Reduce Dud Rate for Cluster Munitions,” *InsideDefense.com*, July 21, 2008.

<sup>29</sup> *Ibid.*

up to 5%.<sup>30</sup> The Army is procuring alternative warheads, for example, planning in FY2024 to procure 4,896 Standard Alternative Warheads and 120 Extended Range Alternative Warheads for its Guided Multiple Launch Rocket System (MLRS).<sup>31</sup> The Air Force has also acquired cluster munitions that comply with the less than 1% failure rate—the CBU-97 Sensor Fuzed Weapon (SFW) and the CBU-105 WCMD/SFW.<sup>32</sup>

## Cluster Munitions and the Ukraine Conflict

Since 2014, when Russia first invaded Ukraine, reports have indicated use of cluster munitions by Russian government forces, Russian-backed rebels, and the Ukrainian government in Ukraine, including against civilian targets and heavily populated areas.<sup>33</sup> The United States transferred one type of cluster munition to Ukraine in July 2023.

### Alleged Russian Use of Cluster Munitions During the 2022 Invasion of Ukraine

In late February 2022, nongovernmental organizations reported that Russia had employed cluster munitions in Ukraine. Human Rights Watch reported that on February 24, 2022, “a Russian ballistic missile carrying a cluster munition struck just outside a hospital in Vuhledar, a town in the Ukrainian government-controlled Donetsk region.”<sup>34</sup> The report further alleged that “the attack killed four civilians and injured another 10, six of them healthcare workers, and damaged the hospital, an ambulance, and civilian vehicles.”<sup>35</sup> Based on an examination of the alleged weapon’s remnants, Human Rights Watch assessed that the weapon was “a 9M79-series Tochka ballistic missile with a 9N123 cluster munition warhead.”<sup>36</sup> Amnesty International reported that on February 25, 2022, “a 220mm Uragan rocket dropped cluster munitions on the Sonechko nursery and kindergarten in the town of Okhtyrka in Sumy Oblast, where local people were seeking safety from the fighting.” The attack allegedly killed three people, including a child.<sup>37</sup>

Commenting on videos depicting alleged Russian cluster munition use, DOD officials stated during a March 1, 2022, press conference that “we’ve seen the same video that you have but we have not assessed that it is definitive with respect to the use of cluster munitions. So we are not in

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<sup>30</sup> Kate Brannen, “Army Will Stop Procurement of GMLRS-DPICM After Final Deliveries,” *InsideDefense.com*, December 1, 2008.

<sup>31</sup> Department of Defense, *Department of Defense Fiscal Year (FY) 2024 Budget Estimates: Missile Procurement*, Army, March 2023, p. 123, at <https://www.asafm.army.mil/Portals/72/Documents/BudgetMaterial/2024/Base%20Budget/Procurement/Missile%20Procurement%20Army.pdf>.

<sup>32</sup> Marina Malenic, “Dozens of Nations Sign Cluster Bomb Treaty, U.S. Begins Upgrading Related Technology,” *Defense Daily*, December 5, 2008.

<sup>33</sup> In 2015, Human Rights Watch reported cluster munitions use by “Russia-backed rebel forces,” as well as the Ukrainian government. “Ukraine: More Civilians Killed in Cluster Munition Attacks; Both Sides Have Used Widely Banned Weapon,” Human Rights Watch, March 19, 2015, at <https://www.hrw.org/news/2015/03/19/ukraine-more-civilians-killed-cluster-munition-attacks>. “Cluster Munition Use in Russia-Ukraine War,” Human Rights Watch, May 29, 2023 at <https://www.hrw.org/news/2023/05/29/cluster-munition-use-russia-ukraine-war>.

<sup>34</sup> Human Rights Watch, <https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital>, accessed February 28, 2022.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Amnesty International, <https://www.amnesty.org/en/latest/news/2022/02/ukraine-cluster-munitions-kill-child-and-two-other-civilians-taking-shelter-at-a-preschool/>, accessed February 2022.

a position to confirm the use of cluster munitions at this time.”<sup>38</sup> However, NATO Secretary General Jens Stoltenberg indicated during a March 4, 2022, press conference that Russia had used cluster munitions during the conflict.<sup>39</sup>

On March 30, 2022, the UN High Commissioner for Human Rights Michelle Bachelet cited “credible reports [which] indicate that Russian armed forces have used cluster munitions in populated areas of Ukraine at least two dozen times since they invaded on 24 February.”<sup>40</sup> One report suggests that

Weapons investigators tracking Russia’s military campaign in Ukraine believe that Moscow began using cluster munitions from almost the outset of the invasion, including repeated attacks on Kharkiv, the country’s second-largest city, and as far west as Mykolaiv, near the Black Sea port of Odesa.<sup>41</sup>

During a United Nations Security Council meeting several months later, Bostjan Malovrh, Slovenia’s Permanent Representative to the United Nations, accused Russia of using cluster munitions.<sup>42</sup>

On March 2, 2022, Karim A. A. Khan QC, Prosecutor of the International Criminal Court (ICC) announced that the court had opened an investigation into the “Situation in Ukraine,” including “any new alleged crimes” within the ICC’s jurisdiction that have been committed in Ukraine since Russia’s 2022 invasion.<sup>43</sup> This investigation could examine allegations of cluster munitions in Ukraine by any party.<sup>44</sup>

Multiple U.S. officials have recently accused Russia of using cluster munitions during the current Ukraine conflict. For example, during a July 7, 2023, press briefing, National Security Advisor Jake Sullivan asserted that “Russia has been using cluster munitions since the start of this war to attack Ukraine.”<sup>45</sup> During the conflict’s first year, Russia “fired cluster munitions deployed from a range of weapon systems [that] have likely expended tens of millions of submunitions, or bomblets, across Ukraine,” Under Secretary of Defense for Policy Colin Kahl stated during a press briefing the same day.<sup>46</sup> In a May 11, 2023, statement to Parliament, British Defense

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<sup>38</sup> U.S. Department of Defense Transcript, “Senior Defense Official Holds a Background Briefing,” March 1, 2022, <https://www.defense.gov/News/Transcripts/Transcript/Article/2950497/senior-defense-official-holds-a-background-briefing/>, accessed March 1, 2022.

<sup>39</sup> NATO, “Press conference by NATO Secretary General Jens Stoltenberg Following the Extraordinary Meeting of NATO Ministers of Foreign Affairs,” March 4, 2022.

<sup>40</sup> United Nations, “Ukraine War: Russia Used Cluster Weapons at Least 24 Times, Says UN’s Bachelet,” *UN News*, March 30, 2022, at <https://news.un.org/en/story/2022/03/1115092>.

<sup>41</sup> Sara Hagos and Jack Detsch, “Bogged-Down Russian Troops Resort to Deadly Cluster Munitions,” *Foreign Policy*, March 16, 2022.

<sup>42</sup> United Nations, “United Nations First Committee Meeting,” GA/DIS/3696, October 24, 2022.

<sup>43</sup> “Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation,” International Criminal Court, at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

<sup>44</sup> “International Criminal Court Chief Prosecutor Talks to CNN About His War Crimes Probe after Russia Invades Ukraine,” *Anderson Cooper 360 Degrees*, March 16, 2022; Anthony Deutsch and Toby Sterling, “Insight: ICC Faces ‘Myriad Challenges’ To Prosecute War Crimes in Ukraine,” *Reuters*, March 4, 2022. The ICC investigation’s scope “encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person” since November 20, 2013 (International Criminal Court, “Situation in Ukraine,” ICC-01/22, at <https://www.icc-cpi.int/situations/ukraine>).

<sup>45</sup> White House, “White House Holds Regular News Briefing,” July 7, 2023.

<sup>46</sup> “Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing,” July 7, 2023, at <https://www.defense.gov/News/Transcripts/Transcript/Article/3452000/under-secretary-of-defense-for-policy-dr-colin-kahl-holds-press-briefing/>.

Minister Ben Wallace accused Russia of using cluster munitions “with wholesale disregard for human life and civilians.”<sup>47</sup>

Russia has acknowledged possessing a stockpile of cluster munitions but has denied using those munitions. Moscow has threatened to use cluster munitions in response to Ukrainian use of such weapons.<sup>48</sup>

## Alleged Ukrainian Use of Cluster Munitions

In 2014, Human Rights Watch reported that Ukrainian government forces had used cluster munitions in populated areas in Donetsk city in early October 2014.<sup>49</sup> Reports in 2023 from Human Rights Watch and the *New York Times* suggest that Ukraine has used cluster munitions during the most recent conflict.<sup>50</sup> UN reports published in October 2022 and March 2023 also indicate that Ukraine has used cluster munitions.<sup>51</sup>

## U.S. Provision of Cluster Munitions to Ukraine

On July 7, 2023, DOD announced “the Administration’s forty-second drawdown of equipment from DOD inventories for Ukraine,” including the 155 mm Dual Purpose Improved Conventional Munition (DPICM).<sup>52</sup> The Biden Administration intends to transfer these munitions pursuant to Presidential Drawdown Authority (PDA) under the Foreign Assistance Act of 1961 (FAA; P.L. 87-195; 22 U.S.C. 2151 et seq). Ukraine requested the munitions in writing “some weeks ago,” National Security Advisor Sullivan stated the same day.<sup>53</sup> According to media reports, Ukraine previously requested munitions from the United States during the second half of 2022.<sup>54</sup>

Although the United States has been supplying Ukraine with 155 mm unitary artillery shells since 2022, the Biden Administration’s July 7 announcement allows for DPICM rounds—the first transfer of a cluster munition. 155 mm unitary artillery shells consist of a high-tensile steel body filled with a single high explosive charge. When the unitary shell is detonated, the shell’s body fragments to produce casualties in conjunction with the blast effect of the high explosive. The 155 mm (DPICM) is a type of cluster munition that contains a number of dual-purpose anti-armor and anti-personnel submunitions that are dispersed in flight over a ground target. The submunitions

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<sup>47</sup> UK Parliament, Oral Statement to Parliament: Defence Secretary Oral Statement on War in Ukraine, May 11, 2023.

<sup>48</sup> “Putin Says Russia Has Stockpiled Cluster Bombs and Will Use Them in Ukraine If It Has To,” *Reuters*, July 16, 2023; “Russia Says It May Use Similar Weapons If U.S. Supplies Cluster Bombs to Ukraine,” *Reuters*, July 11, 2023.

<sup>49</sup> Human Rights Watch, <https://www.hrw.org/news/2014/10/20/ukraine-widespread-use-cluster-munitions>, accessed July 6, 2023.

<sup>50</sup> See Victoria Kim, “U.S. Expected to Provide Cluster Munitions to Ukraine, Official Says,” *New York Times*, July 6, 2023; Jonathan Allen, “Ukraine and Russia Should Stop Using Cluster Bombs, Human Rights Watch Says,” *Reuters*, July 6, 2023; Human Rights Watch, “Cluster Munition Use in Russia-Ukraine War,” May 29, 2023, at <https://www.hrw.org/news/2023/05/29/cluster-munition-use-russia-ukraine-war#ftn21>, accessed July 6, 2023.

<sup>51</sup> “Report of the Independent International Commission of Inquiry on Ukraine,” A/77/533, October 18, 2022; “Report of the Independent International Commission of Inquiry on Ukraine,” A/HRC/52/62, March 15, 2023.

<sup>52</sup> “Biden Administration Announces Additional Security Assistance for Ukraine,” July 7, 2023.

<sup>53</sup> “White House Holds Regular News Briefing,” July 7, 2023.

<sup>54</sup> Natasha Bertrand, Alex Marquardt, Zachary Cohen, “Biden administration weighs Ukrainian requests for access to US stockpile of controversial cluster munitions,” *CNN*, December 8, 2022; Courtney Kube, “U.S. is considering sending cluster munitions to Ukraine, officials say,” *NBC News*, June 29, 2023; Victoria Kim, Gaya Gupta and John Ismay, “Here’s What Cluster Munitions Do and Why They Are So Controversial,” *The New York Times*, July 6, 2023; Ukraine Called for Cluster Munitions Last Year, Say NATO sources,” *Deutsche Presse-Agentur*, February 20, 2023.

can cover a wider area than a unitary warhead, but the DPICM's submunitions have less of an explosive effect than the single unitary charge.

Under Secretary of Defense Kahl told reporters on July 7 that the United States has “hundreds of thousands” of the DPICM rounds available, but he did not specify the number of munitions to be supplied or a timeframe for their delivery.<sup>55</sup> Sullivan told reporters on July 11 that the United States intends to supply the DPICMs to Ukraine until U.S. “unitary round production can satisfy Ukraine’s needs”—a period that could last “months.”<sup>56</sup> Ukrainian and U.S. military officials confirmed on July 13 that Ukraine has received U.S.-supplied DPICMs.<sup>57</sup>

The Biden Administration argues that supplying Ukraine with cluster munitions will sustain Ukraine’s ability to defend the country’s military gains and execute Kyiv’s current counteroffensive. Ukraine has been using unitary 155 mm artillery rounds supplied by the United States and other governments for those purposes. However, Ukrainian stockpiles of those munitions are decreasing, and, as noted, the United States and other governments are currently unable to supply an adequate number of replacement munitions.<sup>58</sup>

### **Cluster Munitions Variant Army Tactical Missile Systems (ATACMS) to Ukraine**

The United States “recently” transferred Anti-Personnel/Anti-Materiel (APAM) Army Tactical Missile System (ATACMS) to Ukraine, National Security Council spokesperson Adrienne Watson confirmed in an October 17, 2023, statement.<sup>59</sup> On September 21, DOD announced that, as part of a larger security assistance package, the department would provide Ukraine with “155mm artillery rounds, including DPICM”; the announcement did not specify that the package included ATACMS.<sup>60</sup> *Politico* reported on October 17 that “U.S. officials secretly approved sending APAM” in this package “under the category of cluster munitions.”<sup>61</sup>

The Biden Administration reportedly decided to transfer these weapons because “Ukrainian forces were struggling to penetrate Russian front lines in a slow-moving counteroffensive, and time was running out to retake significant territory before a renewed Russian offensive in the fall.”<sup>62</sup> According to press reporting, Ukrainian President Zelensky and U.S. officials have

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<sup>55</sup> Department of Defense, “Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing,” July 7, 2023.

<sup>56</sup> “Biden Administration Announces Additional Security Assistance for Ukraine,” July 7, 2023.

<sup>57</sup> “Lt. Gen. Douglas A. Sims II (USA), Director for Operations, J-3, The Joint Staff; Brigadier General Pat Ryder, Pentagon Press Secretary, Hold a Press Briefing,” July 13, 2023; “Ukraine Receives Cluster Munitions, Pledges Limited Use,” *Reuters*, July 13, 2023.

<sup>58</sup> “White House Holds Regular News Briefing,” July 7, 2023; “Memorandum of Justification For the Drawdown of Defense Articles and Services and Military Education and Training under Section 506(a)(1) and Section 614(a)(1) of the Foreign Assistance Act of 1961 to Provide Immediate Military Assistance to Ukraine,” Congressional Transmittal Letter, July 7, 2023.

<sup>59</sup> Natasha Bertrand and Oren Liebermann, “US Has Provided Ukraine Long-range ATACMS Missiles, Sources Say,” *CNN*, October 18, 2023.

<sup>60</sup> Department of Defense, “Biden Administration Announces Additional Security Assistance for Ukraine,” September 21, 2023.

<sup>61</sup> Lara Seligman, Paul McLeary, and Alexander Ward, “Inside Biden’s Decision to Secretly Send Longer-Range U.S. Missiles to Ukraine,” *Politico*, October 17, 2023.

<sup>62</sup> *Ibid.*

confirmed Ukraine use of the ATACMS.<sup>63</sup> Kyiv reportedly used the ATACMS on October 17, 2023, to

[d]estroy nine Russian military helicopters, an ammo depot and an air defense system in a large-scale attack against two airfields in Russian-occupied territory. The attacks occurred in occupied Berdyansk, a southern city in the Zaporizhzhia region and at an airfield in Luhansk, an occupied city in eastern Ukraine.<sup>64</sup>

“Two Western officials said the United States had sent about 20 of the missiles to Ukraine,” the *New York Times* reported.<sup>65</sup> It is not known if additional cluster munition variant ATACMS will be provided to Ukraine in the future.

## Risk Mitigation

Biden Administration officials argue that several factors will minimize the negative effects of Ukrainian DPICM use. First, the U.S.-supplied DPICM ammunition has an unexploded ordnance rate of less than 2.35%, Kahl stated on July 7. Cluster munitions with high unexploded ordnance rates pose the greatest threats to civilians.<sup>66</sup> Second, the United States has received written assurances from Ukraine that the government will not use the U.S.-supplied cluster munitions “in civilian-populated urban environments,” according to Kahl.<sup>67</sup> Ukraine has adhered to past assurances to the United States concerning “limitations and constraints” on the use of U.S.-supplied munitions, Sullivan told reporters on July 7, adding that Ukraine “has every incentive to minimize risk to civilians” because the government is defending Ukrainian citizens.<sup>68</sup>

Ukrainian Minister of Defense Oleksii Reznikov wrote in a July 7 Twitter post that Ukraine will abide by five “key principles” governing the use of cluster munitions.<sup>69</sup> According to these principles, Ukraine will use cluster munitions only in Ukrainian non-urban areas against Russian military forces. Ukraine will also keep records of the weapons use, prioritize those areas for later demining operations, and report to Ukraine’s partners “about the use” of cluster munitions.

Third, Kahl noted that Ukraine has pledged to record the locations where the government will use cluster munitions—a measure that will “simplify later demining efforts,”<sup>70</sup> adding that “Ukraine also has committed to post-conflict demining efforts to mitigate any potential harm to civilians.”<sup>71</sup> Deputy Pentagon Press Secretary Sabrina Singh stated during an October 17 press briefing, “[T]he way that the Ukrainians are employing the DPICMs on the battlefield is responsible. They are keeping track of where they are going.”

## Authority for Transfer

The State Department notified Congress on July 7, 2023, that Secretary of State Antony Blinken had exercised Presidential Drawdown Authority (PDA) under Section 506(a)(1) of the Foreign

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<sup>63</sup> David E. Sanger, Lara Jakes, Marc Santora, Constant Méheut, and John Ismay, “Kyiv Fires Off Powerful Arms Sent From U.S.,” *The New York Times*, October 18, 2023.

<sup>64</sup> Caleb Larson, “Ukraine Strikes Russian Airfield with ATACMS Missiles,” *Politico*, October 18, 2023.

<sup>65</sup> *The New York Times*, October 18, 2023.

<sup>66</sup> This rate has been “demonstrated through five comprehensive tests conducted by the Department of Defense between 1998 and 2020,” Kahl explained. (“Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing.”)

<sup>67</sup> *Ibid.*

<sup>68</sup> “White House Holds Regular News Briefing” July 7, 2023.

<sup>69</sup> <https://twitter.com/oleksiireznikov/status/1677410470108471298> July 7, 2023.

<sup>70</sup> “Under Secretary of Defense for Policy Dr. Colin Kahl Holds Press Briefing,” July 7, 2023.

<sup>71</sup> *Ibid.*

Assistance Act of 1961 (FAA; P.L. 87-195; 22 U.S.C. 2151 et seq.) to direct the transfer of “up to \$800 million” of DOD “defense articles and services,” including cluster munitions, to Ukraine.<sup>72</sup> The notification also specified that Blinken had exercised authority under FAA Section 614(a)(1) “to furnish up to \$122 million in assistance to Ukraine without regard to any provision of law within the purview of that section.”<sup>73</sup>

FAA Section 506(a)(1) permits the President to exercise PDA if the President “determines and reports to the Congress in accordance with [FAA] section 652” that

(A) an unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization; and

(B) the emergency requirement cannot be met under the authority of the Arms Export Control Act or any other law except this section.

A State Department Memorandum of Justification (MOJ) transmitted to Congress on July 7 explains this determination and served as the FAA Section 652-required report.<sup>74</sup>

FAA Section 614(a)(1) authorizes the President to provide assistance under the FAA “when the President determines ... that to do so is important to the security interests of the United States.” The President may exercise this authority

without regard to any provision of assistance under this Act without regard to any provision of this Act, the Arms Export Control Act, any law relating to receipts and credits accruing to the United States, and any Act authorizing or appropriating funds for use under this Act.

This authority allows the United States to transfer DPICMs “that would otherwise be subject” to the legislative prohibition in the Consolidated Appropriations Act, 2023, the July 7 MOJ explains.<sup>75</sup> “Several” uses of PDA for weapons transfers to Ukraine “have been in conjunction with the exercise of the authority under Section 614 of the FAA,” according to a June 23, 2023, State Department fact sheet.<sup>76</sup>

DOD made the ATACMS transfer described above pursuant to the DOD Ukraine Security Assistance Initiative (USAI; P.L. 114-92, §1250).<sup>77</sup>

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<sup>72</sup> “Determination Under Section 506(a)(1) and Section 614(a)(1) of the Foreign Assistance Act of 1961 (FAA) to Provide Military Assistance to Ukraine,” *Transmittal of a Determination to Congress*, July 7, 2023. For more information about Presidential Drawdown Authority and other forms of U.S.-provided security assistance to Ukraine, see CRS In Focus IF12040, *U.S. Security Assistance to Ukraine*, by Christina L. Arabia, Andrew S. Bowen, and Cory Welt. President Biden delegated this authority to Blinken on July 7 (“Delegation of Authority Under Section 506(a)(1) and Section 614(a)(1) of the Foreign Assistance Act of 1961,” Memorandum for the Secretary of State, July 7, 2023).

<sup>73</sup> *Transmittal of a Determination to Congress*, July 7, 2023. Biden delegated this authority to Blinken on July 7 (Memorandum for the Secretary of State, July 7, 2023). In January 2021, Biden delegated authority to Blinken to “determine whether it is vital to the national security interests of the United States to make up to \$6.8 million in sales of cluster munitions technology” under the Arms Export Control Act “to South Korea. Biden took this action pursuant to FAA Section 614(a)(2), which authorizes the President to “make sales, extend credit, and issue guarantees under” the AECA, “without regard to any provision” the FAA, the AECA, “any law relating to receipts and credits accruing to the United States, and any Act authorizing or appropriating funds for use under the” AECA. The President must submit a written determination to the Speaker of the House and the Chair of the Senate Foreign Relations Committee that such a sale “is vital to [U.S.] national security interests.”

<sup>74</sup> “Memorandum of Justification,” Congressional Transmittal Letter, July 7, 2023.

<sup>75</sup> See “Selected Legislation.”

<sup>76</sup> U.S. Department of State, “Use of Presidential Drawdown Authority for Military Assistance for Ukraine,” *Fact Sheet*, June 27, 2023.

<sup>77</sup> Email from State Department official to CRS, October 13, 2023. Also see CRS In Focus IF12040, *U.S. Security Assistance to Ukraine*.

## International Reaction

Some governments, such as North Korea and Spain, have opposed the U.S. transfer of cluster munitions to Ukraine.<sup>78</sup> Other governments, such as Canada, Germany, China, Japan, and the United Kingdom, either supported or refrained from criticizing the U.S. decision, even as some of these governments expressed general opposition to the use of cluster munitions.<sup>79</sup>

## Congressional Positions

Congress has both supported and opposed U.S. cluster munitions transfers prior to the Biden Administration's July 2023 announcement. For example, a March 2023 letter from the Chairs and ranking members of the Senate Foreign Relations and Armed Services Committees, as well as the House Foreign Affairs and Armed Services Committees, urged the Administration to supply cluster munitions, including DPICMs.<sup>80</sup> An April 2023 letter from 27 representatives to President Biden called on the Administration to take the actions necessary for U.S. accession to the CCM.<sup>81</sup> On July 13, the House voted 147–276 (two present) to reject a proposed amendment (H.Amdt. 243) to H.R. 2670 (National Defense Authorization Act for Fiscal Year 2024), which would have prohibited the transfer of cluster munitions to Ukraine.

## Considerations for Congress

United States policy on cluster munitions has both foreign affairs and national security considerations for Congress. In its authorization, appropriations, and oversight roles, Congress may consider a range of questions, including the following:

### Does the Provision of DPICMs and ATACMS to Ukraine Signal a Change in U.S. Policy on Cluster Munitions?

The Biden Administration's provision of DPICM and ATACMS cluster munitions to Ukraine could be a one-time exception to policy or it could constitute a major policy change regarding the future provision of cluster munitions to other countries as well. Given this ambiguity, Congress could ask the Biden Administration if it intends to issue a statement or policy regarding how the United States views CCM compliance in relation to current and future national security challenges. Furthermore, as the decision to provide cluster munitions to Ukraine could have implications for DOD, Congress might inquire to determine if there are plans to update or revise DOD's 2017 policy on cluster munitions.

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<sup>78</sup> "North Korea Condemns Us Plan to Send Cluster Munitions to Ukraine as 'Criminal,'" *Reuters*, July 11, 2023; "Spain Says Cluster Bombs Should Not Be Sent to Ukraine," *Reuters*, July 8, 2023.

<sup>79</sup> "Biden Meets King Charles and PM Sunak, Hails 'Rock Solid' UK Ties," *Reuters*, July 10, 2023; "Japan Not Opposed to U.S. Plan to Supply Cluster Munitions to Ukraine," *Kyodo News*, July 10, 2023; Foreign Ministry Spokesperson Mao Ning's Regular Press Conference," July 10, 2023; "U.S. Decision to Send Cluster Munitions to Ukraine Could Put Canada, Others on the Spot," *The Associated Press*, July 7, 2023; "Germany Should Not 'Block' U.S. Sending Cluster Munitions to Ukraine: President," *Agence France Presse*, July 9, 2023.

<sup>80</sup> At [https://www.foreign.senate.gov/imo/media/doc/03-21-23\\_dpicm\\_letter.pdf](https://www.foreign.senate.gov/imo/media/doc/03-21-23_dpicm_letter.pdf).

<sup>81</sup> "Jacobs, Keating, McGovern, and Colleagues Call on President to Ban Use of Cluster Munitions by the U.S. Military," April 22, 2022, at <https://sarajacobs.house.gov/news/documentsingle.aspx?DocumentID=502>.



## Could the United States Provide Other Types of Cluster Munitions to Ukraine?

Besides 155 mm DPICMs and cluster munitions variant ATACMs, the United States has other types of cluster munitions in its inventories. The United States is said to maintain aerial bombs and missile warheads for Guided Multiple Launch Rocket System (GMLRS), which employ cluster munitions. Although the Biden Administration's current policy is to provide 155 mm DPICMs and ATACMS, Congress might engage with the Biden Administration to determine if there are circumstances whereby the United States would transfer cluster munition-capable aerial bombs or GMLRS rocket warheads to Ukraine. Because these weapons have greater ranges and battlefield effects than DPICM and ATACMS, if they are provided to Ukraine, they could alter the operational situation, possibly entailing a greater degree of escalatory risk. In such circumstances, congressional oversight could be better informed by a more detailed knowledge of the potential risks.

## How Might Ukrainian Use of U.S. Cluster Munitions Affect International and U.S.-Sponsored Demining Efforts in Ukraine?

The United States is currently funding humanitarian demining assistance for Ukraine. On August 9, 2022, the State Department announced "its intention to provide \$89 million of FY 2022 funding to help the Government of Ukraine address the urgent humanitarian challenges posed by explosive remnants of war created by Russia's brutal war of aggression." Also, according to the State Department,

U.S. funding will deploy approximately 100 demining teams and will support a large-scale train and equip project to strengthen the Government of Ukraine's demining and explosive ordnance disposal (EOD) capacity.

International organizations, such as the HALO Trust, are also involved in demining efforts in Ukraine.<sup>82</sup>

With the provision of potentially "hundreds of thousands" of U.S. DPICM rounds, there is the possibility unexploded submunitions from these rounds could increase the Ukrainian demining effort significantly, requiring both additional financial and physical resources. In both its foreign policy and authorization and appropriation oversight roles, Congress could benefit from a more detailed examination of the potential impact of U.S. cluster munitions on demining efforts in Ukraine. A detailed examination might determine if the State Department has an estimate of the amount of increased humanitarian demining assistance necessary to address U.S. DPICM unexploded submunitions. An estimate could influence related current and future authorizations and appropriations. Another area for examination could include how U.S.-provided DPICMs might affect international demining efforts. If the impact is estimated to be substantial, a possible congressional consideration could be whether the United States will provide additional resources to foreign governments or international organizations involved in demining to compensate for the additional hazard posed by unexploded U.S. cluster munitions.

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<sup>82</sup> For a description of HALO Trust activities, see <https://www.halousa.org/where-we-work/europe-and-caucasus/ukraine/>, accessed July 28, 2023.

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