

Military Support to Ukraine and Obligations to Attach Conditions in Respect for the Prohibition of Cluster Munitions

This memorandum examines whether the Netherlands is under an obligation to attach conditions to the military support it provides to Ukraine, specifically to ensure that this support does not facilitate the use of cluster munitions. For the purpose of this analysis, ‘military support’ refers to any material or financial resources that aid Ukraine's military operations.ⁱ

The below analysis examines the Convention on Cluster Munitions, focusing on its prohibition to provide assistance to others to engage in any activity that is prohibited by the Convention. It reflects on fundamental obligations under international humanitarian law (IHL) and the practical use of conditions for arms transfers between states. The analysis also reviews the relationship between state parties and non-state parties to the Convention and considers any exceptions to the prohibition of rendering assistance. Ultimately, this memorandum concludes that the Netherlands should attach conditions to its military support for Ukraine to uphold its commitments under international law.

1. Prohibition to Assist in the Use of Cluster Munitions

Cluster munitions are munitions for conventional weapons that are “designed to disperse or release explosive submunitions each weighing less than 20 kilograms”, with the submunitions being considered part of cluster munitions. They are so defined in article 2(2) of the Convention on Cluster Munitions,ⁱⁱ which was adopted on 30 May 2008 in Dublin and entered into force on 1 August 2010. The Netherlands is one of the 112 state parties to the Convention and is therefore bound by its obligations. Article 1(1) of the Convention stipulates the following:

Each State Party undertakes never under any circumstances to:

- (a) Use cluster munitions;
- (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
- (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

In accordance with paragraph (c) of this core obligation, state parties must not assist others in their use of cluster munitions, or to engage in any other activity that is prohibited by the treaty. Pursuant to the treaty text and in conformity with the international legal principle of *pacta sunt servanda* (agreements must be kept),ⁱⁱⁱ the Netherlands is bound by this prohibition “under any circumstances”. Non-state parties that have not signed and ratified the Convention are not bound by its terms and are not explicitly prohibited from using cluster munitions in armed conflict. Any use of cluster munitions must, however, be in conformity with the rules and principles governing the conduct of hostilities, in particular the principle of distinction, otherwise the use of cluster munitions may amount to a violation of IHL.^{iv}

As a state party to the Convention, the Netherlands needs to evaluate whether its military support to non-state parties, such as Ukraine, may constitute assistance for activities prohibited by the Convention. Such assistance would amount to a violation of the Netherlands’ obligations under international law. This concern becomes particularly relevant in cases where reports indicate activities by the non-state party that would be in contravention of the Convention, such as the acquisition, storage, or use of cluster munitions.^v

1.1. Assistance in Disarmament Law

'Assistance' is not defined in the Convention on Cluster Munitions. Other disarmament treaties contain similar prohibitions of rendering assistance, for example the 1997 Anti-Personnel Mine Ban Convention.^{vi} The commentary to that Convention identifies that the prohibition of rendering assistance for conduct that is prohibited by the treaty encompasses to "provide material support for it".^{vii} Recognizing that this could encompass a variety of acts, the commentary to the Anti-Personnel Mine Ban Convention provides a non-exhaustive list of examples of material support, such as supplying blue-prints for anti-personal mines or components for such mines. In the context of cluster munitions, it must be presumed that assistance in the form of material support extends, among others, to the military equipment used to disperse cluster munitions, such as F-16 fighter jets.^{viii}

In addition to material support, financial support may likewise amount to 'assistance' as prohibited by the Convention on Cluster Munitions and other disarmament treaties. For instance, the commentary to the 1997 Chemical Weapons Convention^{ix} clarifies that assistance as prohibited under that Convention "can be given not only by means of material or intellectual support [...] but also through financial resources [...] to anyone who is resolved to engage in such prohibited activity or by supporting the concealment of such activities".^x If applied to the Convention on Cluster Munitions, this interpretation entails that financial support may amount to assistance as prohibited by article 1(1)(c).

The nexus between the Netherland's military support and Ukraine's acquisition, storage, or use of cluster munitions can be interpreted to be one of causal link. Such a nexus criterion would be satisfied if the material support is used in the deployment of cluster munitions or directly facilitates such use. Financial support would meet the threshold if Ukraine used the finances to acquire cluster munitions or to build the infrastructure required for cluster munition's storage, preparation, or delivery for deployment. Such acts by Ukraine facilitated by the Netherland's military support threaten the latter's adherence to its obligations under international law and should be the subject of conditions.

1.2. Prohibition of Assistance as a Primary Obligation under International Law

It should be noted that the prohibition of 'assistance' as a primary obligation, as codified in the Convention on Cluster Munitions and other disarmament treaties, is not congruent to 'assistance' under the framework for state responsibility for internationally wrongful acts. The prohibition of aid and assistance in the latter sense is a secondary rule under general international law and codified in article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts.^{xi} It can incur state responsibility for providing aid or assistance to another state, given that the aid or assistance facilitates a violation of international law by that state.

Given that Ukraine is not a state party to the Convention on Cluster Munitions, its acquisition, storage, or use of cluster munitions does not violate the international law that is applicable to Ukraine. Thus, the Netherland's military support to Ukraine that would facilitate Ukraine's use of cluster munitions does therefore not *per se* amount to a violation of the Netherland's secondary obligation under international law to refrain from providing assistance for internationally wrongful acts. It does, however, present a violation of a primary obligation that the Netherlands is bound by. Such a primary obligation binding upon the Netherlands is the prohibition of rendering assistance to others to engage in any activity that is prohibited by the Convention on Cluster Munitions as codified in its article 1(1)(c). Acting in contravention of this prohibition to assist presents a violation of international law by the Netherlands, irrespective of the fact that Ukraine, as a non-member state to the Convention, is not *per se* prohibited from using cluster munitions.

2. Exercising Influence over Others with Conditions for Military Support

When supporting Ukraine in its defence against Russian aggression, the Netherlands needs to act in accordance with the rules of international law that are applicable to it. Pursuant to Common Article 1 to the Geneva Conventions, and as a matter of customary international law, the Netherlands is required to respect IHL, as well as to ensure respect for IHL.^{xii} The Netherlands accepts that this obligation to ensure respect bears an external dimension,^{xiii} which entails influencing other actors to abide by IHL. The Netherlands' obligation to ensure respect applies to the whole body of IHL that is applicable to the Netherlands.^{xiv}

This requires that, even if non-state parties such as Ukraine are not themselves bound by the obligations contained in the Convention on Cluster Munitions, the Netherlands should still take measures to promote the humanitarian protections of the treaty and to advance the Convention's universalization. This duty to influence other actors to act in accordance with the Convention on Cluster Munitions is mirrored in its article 21(2) which requires that state parties "shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions". Notwithstanding the general rule that international agreements do not create any rights and obligations for states that are not party to respective treaties,^{xv} the obligation to ensure respect for IHL and article 21(2) of the Convention entail obligations for the Convention's state parties, such as the Netherlands, to advance the prohibition and taboo of cluster munition's use.

These obligations are obligations of conduct, not of result.^{xvi} That means that the Netherlands is not in violation of the obligation to ensure respect for IHL or article 21(2) of the Convention if its attempts to hinder any other actor's use of cluster munitions are not successful. However, the Netherlands is required to effectively use the means available to it to actually influence the conduct of other actors.^{xvii}

Providing military support, including equipment and financial support, puts the Netherlands in a position where it has means available to influence Ukraine's conduct. The International Committee of the Red Cross commentary to Common Article 1 to the Geneva Conventions clarifies that suitable measures pursuant to the obligation to ensure respect by others include, but are not limited to, attaching conditions to any military support provided to a party in an armed conflict.^{xviii}

One condition that the Netherlands can attach to military support to Ukraine is that the support must not facilitate the use of cluster munitions. For the condition to be efficacious, it should require a positive response by Ukraine and assurances that the military support will not be utilized to facilitate the use of cluster munitions. Such assurances are not uncommon in international arms transfers.

In the transfer of conventional weapons that are covered by the Arms Trade Treaty, state practice evidences that assurances are a common tool to mitigate risks revolving around arms transfers.^{xix} Conditions and assurances are relied on to address both the risk of diversion, that is the end-use of weapons by another actor than the intended transfer recipient, as well as the risk of potential violations of international law with the transferred weapons. Conditions and assurances can also serve as a guarantee by the importer to not use the transferred weapons for any unintended purposes.^{xx} Best practices for the transfer of other military equipment, such as small arms and light weapons as well as dual-use goods, similarly indicate that exporters may demand assurances from importers that the exported goods will not be used contrary for unintended purposes.^{xxi} Thus, attaching conditions to military support presents a common and feasible measure to stipulate any purposes for which the support may not be used. One such unintended purpose that can be the subject of restrictive conditions is the use of cluster munitions.

3. Interoperability Considerations in the Convention on Cluster Munitions

During the negotiations and drafting of the Convention, relations between state parties and non-state parties was a major point of contention.^{xxii} Drafters wanted to account for the eventuality that some states, such as the United States, were not planning to become a state party to the Convention. This raised the concern that joint operations involving both state parties and non-state parties, for instance pursuant to a mandate by the UN Security Council or in the context of the North Atlantic Treaty Organization, would be hindered by the prohibition of ‘assistance’ under article 1(1)(c) of the Convention. If non-state parties decided to use cluster munitions in joint operations, state parties to the Convention feared that their military cooperation in that same mission might amount to ‘assisting’ the use of cluster munitions.

These concerns regarding interoperability eventually led to the inclusion of article 21 of the Convention. This article stipulates that state parties to the Convention and non-state parties can cooperate in joint missions, even if non-state parties engage in activities that are prohibited by the Convention. This clarification codified in article 21(3) implies that participation of a state party in a multilateral military operation in which cluster munitions are used by states that are not party to the Convention does not *per se* amount to that state party’s ‘assistance’ as prohibited by article 1(1)(c).

Article 21(3) clarifies that interoperability does not present an exemption from the prohibition to assist as stipulated by article 1(1)(c) of the Convention, as it states: “[n]otwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.” A literal reading of the term ‘notwithstanding’ as well as interpretation of the convention in light of its object and purpose indicate that article 21(3) presents a specialized rule under the Convention that does not affect the core, general obligations of article 1, from which no derogation is permissible.^{xxiii}

Other paragraphs of Article 21 provide further rules on interoperability by setting absolute limitations (paragraph 4) and by fostering universalization efforts (paragraphs 1 and 2). The temporal scope of article 21(2), as mentioned above, affects state parties’ relations with non-state parties beyond situations of interoperability; all other elements of article 21 are exclusively concerned with situations of joint operations between parties and non-parties to the Convention.

The military support provided by the Netherlands to Ukraine does not amount to military cooperation and does not create a situation requiring considerations of interoperability as envisioned by article 21 of the Convention. The Netherlands is not in a joint military operation with Ukraine, but is providing material and financial support to Ukraine. The Netherlands can therefore not derive any rights from article 21(3) of the Convention on Cluster Munitions that would serve as a waiver from the prohibition of rendering assistance to Ukraine.

4. Necessity of Attaching Conditions to the Military Support for Ukraine

The Convention on Cluster Munitions obliges the Netherlands to refrain from assisting others in any activity that is prohibited by the Convention, including the acquisition, storage, or use of cluster munitions. Such prohibited assistance includes providing material and financial support. To implement the Convention's obligations in good faith, it must be considered whether the support facilitates that Ukraine acquires, stores, or uses cluster munitions. The prohibition of assistance cannot be precluded or waived by recourse to article 21 of the Convention. In cases of a direct link between the Netherlands's military support and Ukraine's actions that would be prohibited by the Convention, the Netherlands's conduct is in violation of its international legal obligations.

Moreover, the Netherlands's duty to ensure respect for IHL entails to exert influence on actors engaged in an armed conflict to abide by IHL. This obligation of conduct encompasses to effectively use the means that are available to the Netherlands to induce other actors' adherence to IHL rules that the Netherlands has agreed to. A corresponding obligation entailing an external dimension can also be found in article 21(2) of the Convention on Cluster Munitions, pursuant to the rationale of advancing the humanitarian protections that the prohibition of cluster munitions seeks to safeguard.

Attaching conditions to the Netherlands's military support provided to Ukraine would be one measure to uphold the Netherlands's obligation to ensure respect for IHL, and, more crucially, to avert a violation of Article 1(1)(c) of the Convention on Cluster Munitions and the prohibition to render assistance. Conditions and assurances are a tool commonly used in arms transfers between states, pursuant to different legal bases or political and practical considerations. Conditions that are aimed to uphold the prohibition of cluster munitions that the Netherlands is bound by, and corresponding assurances by Ukraine, present a feasible measure to ensure that the Netherlands's continued military support for Ukraine does not amount to a violation of international law.

References

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- ⁱⁱ Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2946 UNTS 157.
- ⁱⁱⁱ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 26.
- ^{iv} Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, articles 48, 51(2), 52(2); International Committee of the Red Cross, *Customary International Humanitarian Law* (Volume I: Rules, CUP 2005) rule 1, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1>; William H. Boothby, 'Cluster Munitions and the Ukraine War' (Articles of War, Lieber Institute West Point, 7 July 2022) <https://lieber.westpoint.edu/cluster-munitions-ukraine-war/>.
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- vii Stuart Casey-Maslen, *The Anti-Personnel Mine Ban Convention: A Commentary* (3rd ed, OUP 2023) p. 76.
- viii The Economist, ‘How Much of a Difference Will Ukraine’s New F-16s Make?’ (4 August 2024) <https://www.economist.com/europe/2024/08/04/how-much-of-a-difference-will-ukraines-new-f-16s-make>.
- ix Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45, article 1(1)(d).
- x Walter Krutzsch, Eric Myjer, and Ralf Trapp, *The Chemical Weapons Convention: A Commentary* (OUP 2014), p. 67.
- xi International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (Yearbook of the International Law Commission Vol. II 2001) https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, article 16.
- xii Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, article 1; International Committee of the Red Cross, *Customary International Humanitarian Law* (Volume I: Rules, Cambridge University Press 2005) rule 139, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule139>, rule 144, <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule144>.
- xiii International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Verbatim record 2024/5 (20 February 2024) <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240220-ora-01-00-bi.pdf>, p. 48.
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- xvii International Committee of the Red Cross, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (ICRC August 2021) para. 165.
- xviii Ibid, para. 181.
- xix Arms Trade Treaty Working Group on Effective Treaty Implementation, Chair’s Report to CSP10, Annex A: Draft Voluntary Guide to Implementing Articles 6 & 7 of the Arms Trade Treaty, ATT/CSP10.WGETI/2024/CHAIR/799/Conf.Rep (19 July 2024) [https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP10_WGETI_Chair_Report%20to%20CSP10_EN%20\(incl.%20annexes\)/ATT_CSP10_WGETI_Chair_Report%20to%20CSP10_EN%20\(incl.%20annexes\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP10_WGETI_Chair_Report%20to%20CSP10_EN%20(incl.%20annexes)/ATT_CSP10_WGETI_Chair_Report%20to%20CSP10_EN%20(incl.%20annexes).pdf), paras. 117-125; see also Council of the European Union, ‘User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment’ 12189/19 (16 September 2019) <https://www.consilium.europa.eu/media/40659/st12189-en19.pdf>, p.6.
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