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**ARTICLE 21 OF THE
CONVENTION ON CLUSTER
MUNITIONS: UNDERMINING
THE CLUSTER PROHIBITION?**

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A diplomatic conference leading to the Convention on Cluster Munitions (CoCM) was held on 30 May 2008 with the aim of banning the use of cluster munitions for all countries that ratified the Convention. Currently, 111 states are parties to the Convention and 12 are signatories. Despite the high number of participants in the treaty, success remains relative as some key major powers including the United States and Russia are missing. Furthermore, there is an important nuance reflected in the treaty concluded in Article 21, which explains that parties to the treaty are allowed to cooperate militarily with states that do use these weapons that are prohibited by the Convention (Convention on Cluster Munitions, 2008). Why is there controversy regarding the use of cluster munition and what are the consequences of Article 21 CoCM?

The Cluster Controversy

On 7 July 2023, the US Department of Defense officially announced its intention to further support Ukraine in its fight against the Russian invasion. In the press release of that day, the United States provided a more detailed list of the forms of military aid it will offer to Ukraine (U.S. Department of Defense, 2023). Among this list is one weapon that has caused a stir recently, notably the "DPICM". This weapon, in full "Dual-Purpose Improved Conventional Munitions", falls under the category of cluster bombs and is a controversial weapon in warfare and forbidden under Article 1 of the Convention (Convention on Cluster Munition, 2008). After this type of ammunition is fired it fragments mid-air into several smaller explosives, some of which detonate upon contact with the ground while others may remain intact until they explode by another trigger, such as human handling. This percentage of unexploded sub-munitions is referred to as the "dud rate". Apart from the low-precision method of bombing, these explosives pose a risk as they have a "second life" where they function in the same way as a mine and thus pose a potential danger to civilians inadvertently touching the fragments left behind even years later (ICRC, 2010).

Given that neither the US nor Ukraine are parties to this treaty and no other international law prohibits the use, transfer, production, or development of this type of munition, the supply to Ukraine cannot be considered unlawful. However, the use of DPICM may violate Additional Protocol 1 to the Geneva Conventions, Article 51, which prohibits indiscriminate attacks on civilians. This since in certain areas, the precision of the use on exclusively military targets cannot be guaranteed (ICRC, n.d.).

Division Within NATO

As defined in the second paragraph of Article 21 CoCM and later reiterated in the 2021 Lausanne Action Plan, there is an obligation on States Parties to discourage the use of cluster munitions by other States, which has been done extensively recently (Convention on Cluster Munitions, 2021). Following the news of the US decision, several members of NATO expressed their displeasure. British Prime Minister Sunak said in an interview that the UK discourages the use of cluster munitions (Casalicchio & McDonald, 2023). Belgian Prime Minister Alexander De Croo stated that his priorities are to stop the use of cluster munitions by the Russians rather than cooperating by sending such munitions to Ukraine himself (Struys, 2023). The Canadian and Spanish governments also expressed their concerns (Shakil, 2023).

Of the 31 NATO members, only seven aren't a party to the Convention. One of these is Türkiye, which has been accused of also supplying cluster munitions to Ukraine in late 2022, although the Turkish government has dismissed this as anti-Turkish propaganda (Detsch & Gramer, 2023). Within NATO, there is clearly no unanimous opinion on the use, supply, or development of cluster munitions. Just a year earlier, Secretary General Jens Stoltenberg declared in a press conference that Russia and Belarus should be held responsible for using cluster bombs as they violate international law (NATO, 2022). At the press conference ahead of the 2023 Summit and after the news that the US will deliver DPICM to Ukraine, Stoltenberg has been less dismissive, addressing the difficulties of ammunition shortages and thus not condemning the US decision (NATO, 2023). He further states that the choice to supply certain arms and ammunition remains a choice of individual members and is not a NATO position. Stoltenberg also makes the distinction that the cluster munitions provided by the US will be used by Ukraine for defence, while Russia uses them in an offensive strategy. However, in international humanitarian law, this distinction makes no difference on the obligations of the parties participating in the war.

Article 21.3 of the Convention on Cluster Munitions

This strange duality within NATO is partly made possible by Article 21 of the CoCM as it allows parties to the Convention to militarily cooperate with non-member states that do use, transfer or develop these weapons (Convention on Cluster Munitions, 2008). A situation can thus arise where treaty parties are on the same side of the conflict with a party that is not averse to cluster munitions. On one hand, the clause is necessary for the existence of the NATO alliance which otherwise would have been a violation of the treaty. On the other hand, it can be argued that Article 21.3 reduces the effectiveness of the Convention. After all, it does not prevent military cooperation with states that do still use cluster munitions and so does not force proponents to stop using them if they wish to cooperate with states that are party to the Convention.

Collateral Damage

According to the annual report of the Cluster Munition Coalition, an international civil society organisation whose objectives include framing the consequences of cluster bomb use, there was a decrease of almost half the number of casualties in 2021 compared to 2020. Unfortunately, this positive trend has not continued due to the use of these munitions by Russian forces during the invasion of Ukraine. The Cluster Munition Monitor (2022) already reports 689 casualties attributable to cluster munitions in the first half of 2022 in Ukraine. For civilians in particular, the lagging sub-munitions are the most dangerous, often accounting for the bulk of casualties (Cluster Munition Monitor, 2022). The US claims that the dud rate of their delivered munitions is around 2.35%, a contested percentage that is suspected to be much higher (Ismay, 2023).

The demand for cluster munition by the Ukrainian government will have possible dire consequences for the Ukrainian people, as the civilians will eventually return to their daily lives in what will effectively be minefields (Cancian, 2023).

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