

**Mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

Ref.: UA USA 18/2023  
(Please use this reference in your reply)

14 July 2023

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolution 52/7.

In this connection, I write to express my serious regret regarding the announced decision of the Government of the United States of America to transfer cluster munitions to the Government of Ukraine, as part of a new military aid package, and to plead that a review is undertaken of that decision in light of your Excellency's Government's obligations under international human rights law and international humanitarian law.

Please note that, at this stage, a copy of the present urgent appeal will be sent to the Government of Ukraine and to the Government of the Russian Federation for their information, without prejudging the obligations that they may respectively have in relation to the use of cluster munitions in the context of the ongoing armed attack of the Russian Federation against Ukraine, which I may raise separately in due course.

According to the information received:

On 7 July 2023, the Department of Defense of the United States of America announced a new security assistance package to Ukraine in order to support the country's security and defence needs.

This package will include "additional artillery systems and ammunition, including highly effective and reliable dual-purpose improved conventional munitions (DPICM), on which the Administration conducted extensive consultations with Congress and [its] Allies and partners."<sup>1</sup>

It will also include "additional air defense munitions, armored vehicles, anti-armor weapons, and other equipment to help Ukraine protect its people and counter Russia's ongoing war of aggression."<sup>2</sup>

The US Government explained that the decision to transfer additional weapons was based "on Ukraine's needs on the ground"<sup>3</sup>, which included "artillery to

<sup>1</sup> See US Department of Defense, Biden Administration Announces Additional Security Assistance for Ukraine: <https://www.defense.gov/News/Releases/Release/Article/3451570/biden-administration-announces-additional-security-assistance-for-ukraine/>

<sup>2</sup> *Ibid.*  
See The White House, Press Briefing by Press Secretary Karine Jean-Pierre and National Security Advisor Jake Sullivan: <https://www.whitehouse.gov/briefing-room/press-briefings/2023/07/07/press-briefing-by-press-secretary-karine-jean-pierre-and-national-security-advisor-jake-sullivan-5/>.

sustain its offensive and defensive operations”<sup>4</sup>; that cluster munitions that will be sent to Ukraine “have dud rates far below”<sup>5</sup> cluster ammunitions used by Russia; and that relevant US authorities will be “closely coordinating with Ukraine”<sup>6</sup>, and will continue to assist it “with de-mining efforts no matter what, given the significant use of cluster munitions already perpetrated by Russia.”<sup>7</sup>

The US Government “recognize[d] that cluster munitions create a risk of civilian harm from unexploded ordnance.”<sup>8</sup> However, they considered that “there [was] also a massive risk of civilian harm if Russian troops and tanks roll[ed] over Ukrainian positions and [took] more Ukrainian territory and subjugate[d] more Ukrainian civilians because Ukraine [did] not have enough artillery.”<sup>9</sup>

Furthermore, according to the US Government, Ukraine would be using these munitions to defend its own territory and citizens and “not (...) in some foreign land”<sup>10</sup>, and “they [were] motivated to use any weapons system they [had] in a way that minimize[d] risks to those citizens.”<sup>11</sup>

In a media interview, the President of the United States noted that the US was not party to the Convention on Cluster Munitions. Nevertheless, he stated that sending those ammunitions to Ukraine “[had not been] an easy decision.”<sup>12</sup>

Without prejudging the accuracy of the above information, I wish to reiterate at the outset that the invasion of Ukraine by the Russian Federation is a violation of the United Nations Charter and international law<sup>13</sup>. The sovereignty, independence, unity and territorial integrity of Ukraine must be upheld, within its internationally recognized borders<sup>14</sup>.

Notwithstanding the right of the Government of Ukraine to self-defence, I express my serious concern that cluster munitions, which can indiscriminately and seriously injure civilians both at the time of use and in post-conflict, would be

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> See CNN Exclusive: Biden says sending cluster munitions to Ukraine was ‘difficult decision,’ but ‘they needed them’: <https://edition.cnn.com/2023/07/07/politics/joe-biden-cluster-munitions-ukraine/index.html>

<sup>13</sup> See General Assembly resolution A/RES/ES-11/1 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement>; General Assembly resolution A/RES/68/262: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/455/17/PDF/N1345517.pdf?OpenElement>; as well as United Nations Secretary-General’s press encounter in Kyiv, Ukraine (March 2023): <https://www.un.org/sg/en/countries/ukraine>

<sup>14</sup> *Ibid.*

transferred to any country worldwide<sup>15</sup>.

In the course of hostilities, cluster munitions pose an immediate danger of injury or death to civilians when used during strikes, especially in built-up areas. They have been considered to be “inaccurate”, because they cannot be precisely targeted once they are released from the cluster munition container, thus raising questions as to their compatibility with the principle of distinction<sup>16</sup>. This means that civilians, children and adults alike, are at risk of injury or death.

Cluster munitions have also been considered to be “unreliable”, due to the submunitions’ high-rate failure to explode as intended on impact, which raises questions as to their compatibility with the principle of proportionality<sup>17</sup>.

Unexploded submunitions pose a long-term, unpredictable threat to the population, with the potential to cause death or physical harm, as well as significant psychological trauma, including post-traumatic stress disorder (PTSD)<sup>18</sup>, particularly because of the strain of the constant anticipation of danger placed on those living in cluster munition-contaminated areas and the fear that such danger may generate in them<sup>19</sup>.

Furthermore, efforts to reduce cluster munitions’ contamination are dangerous, expensive and can take years. Hence, unexploded submunitions can also prevent or hinder the safe return of refugees and internally displaced persons, and hamper humanitarian, peacebuilding, and development efforts<sup>20</sup>.

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<sup>15</sup> See United Nations Institute for Disarmament Research (UNIDIR), *The Humanitarian Impact of Cluster Munitions*: [https://www.files.ethz.ch/isn/55674/2008-03\\_The-Humanitarian-impact-of-Cluster-Munitions.pdf](https://www.files.ethz.ch/isn/55674/2008-03_The-Humanitarian-impact-of-Cluster-Munitions.pdf); importantly, the United States of America, Ukraine and the Russian Federation are not parties to the Convention on Cluster Munitions. Accordingly, the use of these weapons remains regulated by the basic principles related to the conduct of hostilities under international humanitarian law, namely the principle of distinction, proportionality, and precautions in attack. Furthermore, asked about the aid package from the United States of America to Ukraine, the Spokesperson for the UN Secretary-General said the Secretary-General “supports the Convention on Cluster Munitions (...) and he wants countries to abide by the terms of that Convention. (...) as a result, (...) he does not want there to be continued use of cluster munitions on the battlefield.”, see Daily Press Briefing by the Office of the Spokesperson for the Secretary-General: <https://press.un.org/en/2023/db230707.doc.htm>.

<sup>16</sup> See UNIDIR and also International Committee of the Red Cross, *Cluster Munitions, Why do we need a new treaty?*: <https://www.icrc.org/en/doc/assets/files/other/cluster-munition-treaty-factsheet.pdf> ; as well as ICRC, *Cluster Munitions, What are they and what is the problem?*: <https://www.icrc.org/en/doc/assets/files/other/cluster-munition-factsheet.pdf>

<sup>17</sup> *Ibid.*

<sup>18</sup> See, *mutatis mutandis*, Fares J, Gebeily S, Saad M, Harati H, Nabha S, Said N, Kanso M, Abdel Rassoul R, Fares Y. Post-traumatic stress disorder in adult victims of cluster munitions in Lebanon: a 10-year longitudinal study. *BMJ Open*. 2017 Aug 18;7(8):e017214. doi: 10.1136/bmjopen-2017-017214. PMID: 28821528; PMCID: PMC5724068: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5724068/>

<sup>19</sup> See UNIDIR, quoted above, footnote 13: “while individuals with traumatic injury, for example the loss of a limb, will progress differently for reasons of personality, age, family, economic situation, and social and cultural environment, the initial reactions to the trauma can include denial, anger, depression, disconnection, disempowerment, and vulnerability. In trying to adjust to their new situation, survivors may have different feelings depending on their stage of life: for example, children may have difficulty to establish independence or trust, youth may be concerned with physical appearance and prospects for social or romantic relationships, adults may be concerned with the ability to provide for families or contribute to society, and the elderly may be faced with feelings of abandonment. Furthermore, some are unable to psychologically adjust - for them the result can be the inability to reintegrate into society, or perhaps even suicide”. On this, see also ICRC, *Cluster Munitions, What is known and what is needed?*: <https://www.icrc.org/en/doc/assets/files/other/cluster-munition-victims-factsheet-2010.pdf>

<sup>20</sup> See UNIDIR and ICRC, quoted above, footnotes 13, 14 and 17.

I believe that, due to their inherently indiscriminate nature, cluster munitions should never be used. Given the physical and psychological harmful consequences that they may cause to individuals and communities, either individually or cumulatively, I warn against the risk that the use of such weapons may be contrary to the absolute, non-derogable prohibition of torture or other cruel, inhuman or degrading treatment or punishment, set forth in article 5 of the Universal Declaration of Human Rights (UDHR); article 7 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992; and, at least, articles 1, 2, 15 and 16 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), also ratified by the US in 1994<sup>21</sup>.

I stress that States have an obligation to protect persons from torture and other cruel, inhuman or degrading treatment or punishment whenever they are in a position to do so by virtue of their control or influence extraterritorially over an area, place, transaction or persons. The obligation to prevent prohibited acts includes action that States take in their own jurisdictions to prevent such acts in another jurisdiction<sup>22</sup>.

Furthermore, pursuant to the Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>23</sup>, no State should aid or assist another State in the commission of an internationally wrongful act (articles 16-18). In such cases, responsibility is incurred if a State provides aid or assistance to another State “a) with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State”. In this regard, it is deeply worrying that, in the course of the ongoing armed attack of the Russian Federation against Ukraine, both the Ukrainian and the Russian armed forces have reportedly been found to have used cluster munitions that have caused numerous deaths and serious injuries to civilians<sup>24</sup>.

I further recall that, in situations of armed conflicts, the use of lethal force consistent with international humanitarian law (IHL) and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with IHL, entailing a risk to the lives of civilians and other protected persons, such as indiscriminate attacks and the failure to apply the principles of precaution and proportionality, would violate article 6 of the ICCPR, which recognizes and protects the right to life of all human beings<sup>25</sup>.

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<sup>21</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/77/502): <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/610/77/PDF/N2261077.pdf?OpenElement>

<sup>22</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/70/303): <https://undocs.org/Home/Mobile?FinalSymbol=A%2F70%2F303&Language=E&DeviceType=Desktop&LangRequested=False>

<sup>23</sup> [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>24</sup> See Report of the Independent International Commission of Inquiry on Ukraine (A/HRC/52/62): [https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A\\_HRC\\_52\\_62\\_AUV\\_EN.pdf](https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/A_HRC_52_62_AUV_EN.pdf).

<sup>25</sup> See Human Rights Committee, General Comment No. 36, Article 6: right to life (CCPR/C/CG/36): <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsrdB0H115979OVGGB%2bWPAXhNI9e0rX3cJImWwe%2fGBLmVrGmT01On6KBQgqmxPNIjrLLdefuuQjiN19BgOr%2fS93rKPWbCbgoJ4dRgDoh%2fXgwn>

The United States of America is under an obligation to take appropriate measures to protect individuals against deprivation of life by other States. They must also take appropriate legislative and other measures to ensure that all activities taking place within their territory but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, are consistent with article 6 of the ICCPR.

In light of the above, I respectfully urge Your Excellency's Government to reconsider the decision to transfer cluster munitions and to halt any plan towards the implementation of such decision.

I also respectfully call on Your Excellency's Government to consider becoming a party to the Convention on Cluster Munitions and to commit, as a result, to never use, produce, stockpile or transfer cluster munitions.

The full texts of the human rights instruments and standards recalled above are available on [www.ohchr.org](http://www.ohchr.org) or can be provided upon request.

In view of the urgency of the matter, I would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of civilians who may be affected by the transfer of cluster munitions, including alternative weapons transfers, in compliance with international instruments.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide your assessment as to the compatibility of the announced decision to transfer cluster munitions to Ukraine with the obligations that the Government of the United States of America has under international law, particularly in relation to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment; and to protect the right to life of all human beings.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

I would welcome a discussion on the above-mentioned matter at your earliest convenience, noting that I may publicly express my concerns in the near future as, in my view, the information in this letter is of public interest and the information is sufficiently reliable to indicate a matter warranting immediate attention. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Alice Jill Edwards  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or  
punishment