



Fulfilling the Ban

Guidelines for Effective National Legislation to Implement the Convention on Cluster Munitions

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Introduction

The Convention on Cluster Munitions establishes powerful international law to end the high human toll of cluster munitions. The convention's full potential, however, will be best realized by the passage of national implementation legislation by each state party. Article 9 of the convention requires states parties to take implementation measures, and adopting comprehensive national legislation is the strongest means of fulfilling this obligation.¹ National legislation enshrines the convention's provisions at the domestic level, where the process of implementation occurs. It reinforces the overall purpose of the convention while tailoring the key provisions to the circumstances of individual states parties. Some states may choose to rely on national policies instead of laws, but implementation legislation is important because it provides binding, enduring, and unequivocal rules that leave less room for interpretation.²

The Convention on Cluster Munitions aims to eliminate cluster munitions and the harm they cause to civilians.³ It bans the use, production, transfer, and stockpiling of cluster munitions. It also requires states parties to address the existing problems attributable to cluster munitions, notably by clearing unexploded submunitions and providing victim assistance.

On May 30, 2008, at the end of negotiations in Dublin, 107 states adopted the convention; it opened for signature in Oslo in December of the same year. As of April 22, 2010, 106 states had signed the convention, meaning that they were obligated to uphold its object and purpose. Thirty-six of those states had taken the next step and ratified the convention, agreeing to become legally bound by all of its provisions.⁴ The convention will enter into force on August 1, 2010, after which states will accede to, rather than sign and ratify, the convention; the effect, however, is the same.

In addition to passing laws allowing for ratification or accession, states should develop national legislation to implement the convention. The domestic law of some states requires them to pass legislation before ratification or accession; others may do so afterwards.

¹Convention on Cluster Munitions (CCM), adopted May 30, 2008, Dublin Diplomatic Conference on Cluster Munitions, CCM/77, <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> (accessed June 1, 2010), art. 9.

² Article 9 allows for a variety of implementation measures including "legal, administrative and other measures." Ibid.

³ The second preambular paragraph, for example, states that states parties are "[d]etermined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned." Ibid., pmb.

⁴ For the current list of signatories and ratifying states, see Cluster Munition Coalition, "30th Ratification Milestone Reached," <http://www.stopclustermunitions.org/treatystatus/> (accessed June 2, 2010).

Regardless, such legislation should cover all of the convention's core obligations, both negative and positive. The negative obligations, notably the prohibitions on use, production, transfer, and stockpiling outlined in Article 1, are largely disarmament oriented and designed to prevent future harm. The positive obligations, including clearance, victim assistance, and international cooperation and assistance, primarily further the convention's humanitarian goals and are aimed at alleviating present suffering. To fulfill the requirements of Article 9, each state party must implement both types of obligation.⁵

This paper enumerates elements that are essential to strong implementation legislation. In identifying and analyzing the essential elements, it draws from the language of the model law distributed by the International Committee of the Red Cross (ICRC Model Law)⁶ and—given the similarities between cluster munitions and landmines and between the treaties banning these weapons—from Mine Ban Treaty implementation legislation. The paper also looks at implementation legislation for the Convention on Cluster Munitions that eight states (Austria, Germany, Luxembourg, Ireland, Japan, New Zealand, Norway, and the United Kingdom) have already passed.

Adopting the elements laid out below would fully and strongly implement the Convention on Cluster Munitions. They encompass the convention's prohibitions as well as all its major positive obligations, including stockpile destruction, clearance, victim assistance, international cooperation and assistance, transparency, facilitating compliance by other states parties, encouraging other states to join the convention, and promoting universal adherence to the convention's norms. They require penal sanctions and extra-territorial jurisdiction. The elements proposed here also address important interpretive issues, notably the strength of the convention's prohibitions during joint military operations; prohibitions on transit, foreign stockpiling, and investment; and the need to limit retention of cluster munitions. Legislation that includes these elements would be comprehensive and clear, uphold a state party's international legal obligations, and help ensure that the goals of the convention are met.

⁵ While Article 9 obliges each state party to impose penal sanctions to prevent prohibited activities, it also requires more generally that a state party "take all legal, administrative and other measures *to implement this Convention*." "To implement this Convention" requires implementing its positive as well as negative obligations. Convention on Cluster Munitions, art. 9 (emphasis added).

⁶ International Committee of the Red Cross, Model Law, Convention on Cluster Munitions: Legislation for Common Law States on the 2008 Convention on Cluster Munitions, [http://icrc.org/Web/eng/siteeng.nsf/htmlall/cluster-munitions-model-law-010109/\\$File/Model%20Law%20Clusters%20Munitions.pdf](http://icrc.org/Web/eng/siteeng.nsf/htmlall/cluster-munitions-model-law-010109/$File/Model%20Law%20Clusters%20Munitions.pdf), (accessed June 1, 2010).

Prohibition on Use

National implementation legislation should:

- prohibit the use of cluster munitions under all circumstances.⁷

Analysis

Implementing legislation should ban the use of cluster munitions under all circumstances. The phrase “never under any circumstances” means that the prohibition applies to situations of international and non-international armed conflict as well as times of peace. Anything short of a complete ban would run counter to the Convention on Cluster Munitions and its stated purpose of ending the humanitarian harm caused by the weapons. The prohibition on use is the convention’s first general obligation and fulfills the convention’s overarching objective found in its preamble: “to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.”⁸ To date, all states that have passed implementation legislation, except for one outlier, have adopted an absolute prohibition on use.⁹ These states include Austria, Germany, Ireland, Luxembourg, New Zealand, Norway, and the United Kingdom.¹⁰ The ICRC Model Law also prohibits use.¹¹

⁷ This element is based on Convention on Cluster Munitions, art. 1(i)(a): “Each State Party undertakes never under any circumstances to: (a) Use cluster munitions.”

⁸ *Ibid.*, pmb.

⁹ Japan is the only state with implementation legislation that fails to prohibit use. Ministry of Foreign Affairs officials told the Japan Campaign to Ban Landmines that activities prohibited by the convention other than production and stockpiling are banned or regulated in separate Japanese laws. Email communication from Junko Utsumi, Japan Campaign to Ban Landmines, to Human Rights Watch, April 8, 2010. See also Act on the Prohibition of the Production of Cluster Munitions and the Regulation of the Possession of Cluster Munitions, no. 95, 2009 (Japan).

¹⁰ Federal Law on the Prohibition on Cluster Munition[s], *Federal Law Gazette*, no. 12/2008, as amended *Federal Law Gazette I*, no. 41/2009, sec. 2 (Austria); Ausführungsgesetz zu Artikel 26 Abs. 2 des Deutschen Grundgesetzes (Gesetz über die Kontrolle von Kriegswaffen) (Act Implementing Article 26(2) of the Basic Law (War Weapons Control Act)), 1961, as amended 2009, <http://www.gesetze-im-internet.de/krwaffkontrg/BJNR004440961.html#BJNR004440961BJNG000404160> (accessed June 1, 2010), sec. 18(a) (Germany); Cluster Munitions and Anti-Personnel Mines Act 2008, no. 20 of 2008, <http://www.oir.ie/viewdoc.asp?fn=/documents/bills28/acts/2008/a2008.pdf> (accessed June 1, 2010), sec. 6(1)(a) (Ireland); Projet de Loi portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo, le 3 décembre 2008, no. 5981, 2009, http://www.sousmunitions.lu/fileadmin/images/projet_loi_lux_ratification.pdf (accessed June 1, 2010), art. 2 (Luxembourg); Cluster Munitions Prohibition Act 2009, 2009 no. 68, <http://www.legislation.govt.nz/act/public/2009/0068/latest/DLM2171615.html> (accessed June 1, 2010), sec. 10(1)(a) (New Zealand); Legislative Provisions, in Excerpts from Proposition No. 7 (2008-2009) to the Odelsting on a Bill relating to the implementation of the Convention on Cluster Munitions in Norwegian law and Proposition No. 4 (2008-2009) to the Storting on consent to ratification of the Convention on Cluster Munitions, sec. 1 (Norway); Cluster Munitions (Prohibitions) Act 2010, 2010 Chapter 11, http://www.opsi.gov.uk/acts/acts2010/ukpga_20100011_en_1 (accessed June 1, 2010), sec. 2(1)(a) (United Kingdom).

¹¹ ICRC Model Law, sec. 3(1).

Prohibition on Production, Development, and Other Forms of Acquisition

National implementation legislation should:

- prohibit the direct and indirect development, production, and acquisition in other forms of cluster munitions;¹² and
- require the conversion or decommissioning of production facilities for cluster munitions.¹³

Analysis

In accordance with Article 1(1)(b) of the convention,¹⁴ implementation legislation should prohibit the development and production of cluster munitions. All countries that have passed implementation legislation thus far have done so, and the ICRC Model Law also prohibits the development and production of cluster munitions.¹⁵

With regard to development, although the convention does not ban all weapons with submunitions,¹⁶ legislation should require a state party to take extreme care not to direct research and development at the creation of systems that could be inconsistent with the definition of cluster munition.

National legislation should also both prohibit production itself and require the conversion or decommissioning of production facilities for cluster munitions. The prohibition on production is necessary to prevent creation of new cluster munitions, and Article 1(1)(b) bans all production. An obligation to convert or decommission production facilities would help to ensure that future production becomes impossible. Although the Convention on Cluster

¹² This element is based on Convention on Cluster Munitions, art. 1(1)(b): “Each State Party undertakes never under any circumstances to: (b) Develop, produce...,directly or indirectly, cluster munitions.”

¹³ This element is based on *ibid.*, art. 7(1)(2): “Each State Party shall report to the Secretary-General of the United Nations...on: (d) The status and progress of programmes for the conversion or decommissioning of production facilities for cluster munitions.”

¹⁴ *Ibid.*, art. 1(1)(b).

¹⁵ Federal Law on the Prohibition on Cluster Munition[s], sec. 2 (Austria); War Weapons Control Act, sec. 18(a) (Germany); Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 6(1)(b) (Ireland); Act on the Prohibition of the Production of Cluster Munitions and the Regulation of the Possession of Cluster Munitions, art. 3 (Japan); Projet de Loi portant approbation de la Convention sur les armes à sous-munitions, art. 2 (Luxembourg); Cluster Munitions Prohibition Act 2009, sec. 10(1)(b) (New Zealand); Legislative Provisions, sec. 1 (Norway); Cluster Munitions (Prohibitions) Act 2010, sec. 2(1)(b) (United Kingdom); ICRC Model Law, sec. 3(2)(a).

¹⁶ See Convention on Cluster Munitions, art. 2(2)(a-c) for a list of weapons excluded from the definition of cluster munitions because they do not cause the same humanitarian harm as cluster munitions.

Munitions does not explicitly require conversion and decommissioning, it does so implicitly in Article 7 on transparency by requiring reporting on the status and progress of such activities.¹⁷

To be comprehensive and thoroughly consistent with the convention, implementation legislation should also prohibit a state party from otherwise acquiring cluster munitions. Acquisition other than production overlaps somewhat with transfer, discussed below. It encompasses, for example, importing cluster munitions, receiving gifts of the weapons, and capturing the stockpiles of another state.¹⁸ The UK legislation defines acquire as “buy, hire, borrow or accept as a gift.”¹⁹

With each of the above prohibitions, legislation should specify, as the convention requires, that the activities be banned whether they are direct or indirect.²⁰ For example, it should prohibit a state party from directly running its own production facilities or from indirectly supporting production by investing in it through national pension funds. If a state party so chooses, it could elaborate on what activities are direct and indirect in national policies rather than in the legislation itself.

¹⁷ Ibid., art. 7(1)(d).

¹⁸ For examples of acquisition in the Mine Ban Treaty Context, see Stuart Maslen, *Commentaries on Arms Control Treaties: Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Oxford: Oxford University Press, 2005), p. 88.

¹⁹ Cluster Munitions (Prohibitions) Act 2010, sec. 3(4).

²⁰ Convention on Cluster Munitions, art. 1(1)(b).

Prohibition on Transfer and Transit

National implementation legislation should:

- prohibit the direct and indirect transfer of cluster munitions to anyone;²¹ and
- specify that transfer encompasses transit.

Analysis

Implementation legislation, like the Convention on Cluster Munitions itself, should prohibit transfer.²² To end proliferation, such legislation should ban as forms of transfer (1) the physical movement by air, land, or sea of cluster munitions into or from national territory, and (2) the conveyance of title to and control over cluster munitions.²³ The ban should extend to transfer to anyone, including states parties, states that have not joined the convention, and non-state actors, notably non-state armed groups. Legislation should also explicitly ban transit of cluster munitions, i.e., the movement of cluster munitions across, above, or through the territory and/or territorial waters of a state party. It can do so by prohibiting transfer, as discussed here, and clearly defining it to encompass transit, or by prohibiting transit as a form of assistance. Both options will be analyzed in more depth below. As with the prohibitions on development, production, and other forms of acquisition, national legislation should ban transfer whether it is direct or indirect.

All states that have passed implementation legislation, with one exception, prohibit the transfer of cluster munitions.²⁴ The ICRC Model Law also bans transfer.²⁵

²¹ This element is based on Convention on Cluster Munitions, art. 1(1)(b): “Each State Party undertakes never under any circumstances to: (b) ...transfer to anyone, directly or indirectly, cluster munitions.”

²² *Ibid.*

²³ A debate exists over the meaning of transfer as defined in Article 2(8). In the context of the Mine Ban Treaty, which defines transfer in the same way, many states take the position that transfer requires *either* physical movement *or* conveyance of title and control. Other states argue that it requires both. Maslen, *Commentaries on Arms Control Treaties*, pp. 90-93. Human Rights Watch believes that, to be strong, implementation legislation should explicitly adopt the former approach.

²⁴ Japan’s legislation does not include a ban on transfer of cluster munitions. This omission appears again to be because the government believes such prohibitions are covered by other legislation. Email communication from Junko Utsumi, Japan Campaign to Ban Landmines, to Human Rights Watch, April 8, 2010. See also Act on the Prohibition of the Production of Cluster Munitions and the Regulation of the Possession of Cluster Munitions (Japan). The following laws ban transfer: Federal Law on the Prohibition on Cluster Munition[s], sec. 2 (Austria); War Weapons Control Act, sec. 18(a) (Germany); Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 6(1)(e) (Ireland); *Projet de Loi portant approbation de la Convention sur les armes à sous-munitions*, art. 2 (Luxembourg); Cluster Munitions Prohibition Act 2009, sec. 10(1)(d) (New Zealand); *Legislative Provisions*, sec. 1 (Norway); Cluster Munitions (Prohibitions) Act 2010, sec. 2(1)(f) (United Kingdom).

²⁵ ICRC Model Law, art. 3(2)(d).

Prohibition on Stockpiling

National implementation legislation should:

- prohibit the direct and indirect stockpiling of cluster munitions.²⁶

Analysis

To implement Article 1(1)(b) of the convention fully, national legislation should also prohibit stockpiling. As with the above elements, this prohibition should apply to the activity whether it is done directly or indirectly. Legislation should oblige a state party not only to cease stockpiling itself but also to end the hosting of foreign stockpiles on its territory (also called for by the treaty's prohibition on assistance). Legislation should in addition discourage states parties from retaining cluster munitions either for training in clearance or destruction or for development of counter-measures to defend against the weapons; this issue will be discussed below under stockpile destruction. All states that have passed implementation legislation, with one exception, prohibit the stockpiling of cluster munitions.²⁷ The ICRC Model Law also bans stockpiling.²⁸

²⁶ This element is based on Convention on Cluster Munitions, art. 1(1)(b): "Each State Party undertakes never under any circumstances to: (b) ... stockpile, retain..., directly or indirectly, cluster munitions."

²⁷ Japan's legislation only regulates the stockpiling of cluster munitions. Ministry of Foreign Affairs officials told the Japan Campaign to Ban Landmines that the law only regulates stockpiling, in part, because it is taking into account the retention exceptions that the convention allows. Email communication from Junko Utsumi, April 8, 2010. Act on the Prohibition of the Production of Cluster Munitions and the Regulation of the Possession of Cluster Munitions, arts. 4-15 (Japan). The following laws ban stockpiling: Federal Law on the Prohibition on Cluster Munition[s], sec. 2 (Austria); War Weapons Control Act, sec. 18(a) (Germany); Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 6(1)(d) (Ireland); Projet de Loi portant approbation de la Convention sur les armes à sous-munitions, art. 2 (Luxembourg); Cluster Munitions Prohibition Act 2009, sec. 10(1)(c) (New Zealand); Legislative Provisions, sec. 1 (Norway); Cluster Munitions (Prohibitions) Act 2010, sec. 2(1)(e) (United Kingdom).

²⁸ ICRC Model Law, art. 3(2)(c).

Prohibition on Assistance

National implementation legislation should:

- prohibit in any way assisting, encouraging, or inducing anyone to engage in any activity prohibited by the convention;²⁹ and
- prohibit in particular assistance in the form of transit of cluster munitions, hosting of foreign stockpiles, and investment of public and private funds in companies that manufacture cluster munitions or components intended for use in cluster munitions.

Analysis

Consistent with the convention itself,³⁰ implementation legislation should ban direct and indirect as well as passive and active assistance.³¹ Its provision should apply to assistance given to anyone, including states that have not ratified or acceded to the convention and non-state actors, such as non-state armed groups or private corporations.

Human Rights Watch understands assistance as any act or omission that proximately contributes to anyone's engagement in an activity prohibited to a state party under the convention.³² To be consistent with the object and purpose of the convention and with this understanding, a state party's implementation legislation should explicitly ban under all circumstances a range of activities, such as the transit of cluster munitions and the hosting of foreign stockpiles. Allowing transit could constitute assistance with several prohibited activities, including use, transfer, and stockpiling.³³ Hosting stockpiles of cluster munitions owned by a state that has not joined the convention similarly assists with stockpiling and

²⁹ This element is based on Convention on Cluster Munitions, art. 1(1)(c): "Each State Party undertakes never under any circumstances to: (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention."

³⁰ Ibid.

³¹ Human Rights Watch, *Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions*, June 2009, <http://www.hrw.org/node/83975>, p. 5. In that paper, Human Rights Watch stated, "The understanding of the act of assistance should encompass direct assistance, i.e., a link in a chain of events that leads straight to a prohibited activity, and indirect assistance, i.e., an action that is more removed from, but proximately facilitates, such a chain of events. It should also encompass active assistance, i.e., a form of participation that advances an activity prohibited by the convention, or passive assistance, i.e., an abdication of responsibility for matters under the state's control that allows others to engage in a prohibited activity."

³² Ibid., pp. 5-6.

³³ In response to letters from Human Rights Watch and Landmine Action (now known as Action on Armed Violence) querying states on their views about foreign stockpiling, Bulgaria, Burkina Faso, Ecuador, Lebanon, Malta, Mexico, and Zambia wrote that they believe the Convention on Cluster Munitions prohibits the transit of cluster munitions. Madagascar wrote that allowing transit would weaken the convention, while South Africa said it was likely to interpret the convention as prohibiting transit. *Banning Cluster Munitions: Government Policy and Practice* (Mines Action Canada: Canada, 2009), pp. 24-25 ("Banning Cluster Munitions").

potentially with use.³⁴ Legislation should also ban certain activities that could occur during joint military operations.

They include but are not limited to:

- securing, storing, or transporting cluster munitions that belong to a state not party;
- agreeing to rules of engagement that allow cluster munition use by a state not party;
- accepting orders from a state not party to use cluster munitions;
- requesting a state not party to use cluster munitions;
- participating in planning for use of cluster munitions by a state not party; and
- training others to use cluster munitions.³⁵

National legislation should also ban investment of both public and private funds in companies that manufacture cluster munitions or components intended for use in cluster munitions.³⁶ Such investment represents a form of assistance with production. Production cannot be curtailed if a state party allows financial support to these companies. Because private investors often provide important financial support to such companies, the ban should extend to private funds.³⁷

Many states have already expressed support for a ban on investment. In 2007, Belgium, now a party to the Convention on Cluster Munitions, became the first state to adopt a law prohibiting financial institutions, whether public or private, from investing in companies

³⁴ In response to letters from Human Rights Watch and Landmine Action (now known as Action on Armed Violence) querying states on their views about foreign stockpiling, Bulgaria, Madagascar, Malta, and Mexico wrote that they believe the Convention on Cluster Munitions prohibits the hosting of foreign stockpiles. *Banning Cluster Munitions*, pp. 24-25.

³⁵ Many states have agreed in the Mine Ban Treaty context that the prohibition on assistance prohibits such activities. For a more detailed discussion of the issue, see Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, p. 7.

³⁶ For more detailed discussion of investment issues, see IKV Pax Christi and Netwerk Vlaanderen, "Worldwide Investments in Cluster Munitions: A Shared Responsibility," October 2009, <http://www.netwerkvlaanderen.be/nl/files/documenten/campagnes/bankenwapens/Full%20Report.pdf> (accessed June 1, 2010).

³⁷ Similar calls for bans on private as well as public investment have been made in the context of the Mine Ban Treaty. For example, in 2005, the European Parliament passed a resolution that stated that the parliament:

21. Calls on the EU and its Member States to prohibit through appropriate legislation financial institutions under their jurisdiction or control from investing directly or indirectly in companies involved in production, stockpiling or transfers of anti-personnel mines and other related controversial weapon systems such as cluster sub-munitions;

22. Calls on the EU and its Member States to ensure compliance with the legislation prohibiting investment in companies involved in anti-personnel mines, by creating effective control and punishment mechanisms; considers that this implies the obligation for financial institutions to adopt a policy of full transparency regarding the companies in which they invest.

European Parliament Resolution on a Mine-Free World, P6_TA(2005)0298, July 7, 2005.

producing cluster munitions.³⁸ Since the adoption of the convention, Luxembourg and New Zealand have criminalized investment by public or private entities in companies that produce cluster munitions, and Ireland has banned investment of public money.³⁹ Moving in that direction, the Swiss parliament has adopted two motions requiring the government to draft legislation prohibiting investment in the production of all banned weapons, including cluster munitions.⁴⁰ Although they have not yet passed implementation legislation, in response to inquiries from Human Rights Watch and Landmine Action (now known as Action on Armed Violence), Bulgaria, Lebanon, and Mexico wrote that they interpret the convention to ban investment in cluster munition production.⁴¹ Demonstrating state practice, government pension funds in Ireland, New Zealand, Norway, and Sweden have divested. Some companies, such as the French insurance company Axa and multiple Dutch pension funds, have also voluntarily withdrawn their assets from cluster munition manufacturers.⁴²

³⁸ *Banning Cluster Munitions*, pp. 39-40; Act Prohibiting the Financing of the Production, Use and Possession of Anti-Personnel Mines and Submunitions, 2007, art. 2 (Belgium).

³⁹ *Projet de Loi portant approbation de la Convention sur les armes à sous-munitions*, art. 3 (Luxembourg); and Cluster Munitions Prohibition Act 2009, sec. 10(2) (New Zealand); and Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 12-13 (Ireland).

⁴⁰ “Financement des armes interdites: Le Conseil national soutient l’interdiction des investissements abjects dans la production des armes interdites par la Suisse,” Handicap International press release, March 10, 2010.

⁴¹ *Banning Cluster Munitions*, pp. 18-20.

⁴² *Ibid.*

Relations with States Not Party: Joint Military Operations

National implementation legislation should:

- specify that the prohibitions enumerated in the convention, notably that on assistance, apply under all circumstances, including during joint military operations with a state that is not party to the convention;⁴³
- require that the government give notice of its obligations under the convention through both political and military channels before and during joint operations with a state not party;⁴⁴ and
- require that the government discourage use of cluster munitions through both political and military channels in all circumstances, including before and during joint operations with a state not party.⁴⁵

Analysis

The world will never be free of cluster munitions if states parties allow exceptions to the absolute prohibitions outlined above. In its implementation legislation, a state party should therefore explicitly express that its prohibitions, including the prohibition on assistance, apply in all circumstances, even during joint military operations. It should understand Article 21(3) of the convention to mean that while a state party may participate in a joint operation with a state not party, it must not engage in any activity prohibited by the convention during such operations.⁴⁶

Some states have already articulated this view of interoperability, which adheres to the object and purpose of the convention.⁴⁷ At the adoption of the convention, for example,

⁴³ This element is based on an understanding of Convention on Cluster Munitions, art. 1(1)(c), quoted above, and art. 21(3): “Notwithstanding 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.”

⁴⁴ This element is based on *ibid.*, art. 21(2): “Each State Party shall notify the governments of States not party to this Convention [with which they are involved in joint military operations] of its obligations under this Convention.”

⁴⁵ This element is based on *ibid.*, art. 21(2): “Each State Party shall ... make its best efforts to discourage States not party to this Convention from using cluster munitions.”

⁴⁶ Some states have expressed informally to Human Rights Watch that the convention allows assistance during joint operations. They contend that the phrase “notwithstanding the provisions of Article 1” means that Article 21(3) overrides Article 1, except for those instances listed in Article 21(4). It would be inconsistent with the object and purpose of the Convention on Cluster Munitions, however, to understand Article 21(3) as waiving the obligations of Article 1, including the prohibition on assistance, during joint operations. Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 10-13.

⁴⁷ Several states wrote letters to Human Rights Watch expressing this viewpoint. For example, Mexico stated that “deliberately providing assistance for the execution of prohibition activities” was not allowed under the Convention. Letter

Iceland stated that the convention's provision on interoperability "should not be read as entitling states parties to avoid their specific obligations under the convention for this limited purpose."⁴⁸ In an explanatory annex to its implementing legislation, Norway explained that "the exemption for military cooperation does not authorize states parties to engage in activities prohibited by the convention."⁴⁹ While it could be even stronger, New Zealand's legislation clarifies that mere participation in joint operations is allowed, but a member of the armed forces may not expressly request the use of cluster munitions.⁵⁰

As a means to help prevent violations during joint operations, implementation legislation should require a state party to notify allies of its obligations under the Convention on Cluster Munitions. The convention lays out this requirement in Article 21(2). Notification should take place at both the military and political levels in order to reach all the relevant players. To ensure that obligations are met throughout the joint operations, the military and political channels of the state party should reiterate these obligations before operations, at the planning phase, and during operations themselves.

Raising awareness of a state party's obligations is important for two reasons. First, if a state not party knows of the state party's obligations, the state not party is less likely to suggest a plan that involves cluster munitions because it would not want to put its ally in the uncomfortable situation of having to choose between its legal duties and the military operation. States that work together in joint operations normally have relationships that are deeper and stronger than any one military operation. A state not party may be reluctant to jeopardize or disturb its good relations with a state party by insisting on using cluster munitions when it is aware that the state party cannot do so. Second, notification should reduce the chance of a state party's inadvertently violating its implementation legislation on the battlefield. Armed conflicts often require troops to make last-minute judgment calls about weapons and attacks. If all parties know of each other's obligations, they will be better able to avoid unintentional violations.

from Amb. Juan Manuel Gómez Robledo, Secretariat of Foreign Relations of Mexico, to Human Rights Watch, March 4, 2009, quoted in *Banning Cluster Munitions*, p. 26. Lebanon wrote that the Convention's prohibition on assistance took precedence over joint operations, and that Article 21 did not "allow any assistance with prohibited acts." Letter from Permanent Mission of Lebanon to UN in Geneva to Human Rights Watch, February 10, 2009, quoted in Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, p. 17.

⁴⁸ Statement by the Government of Iceland upon the Adoption of the Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, CCM/CRP/2, May 30, 2008, http://www.clustermunitionsdublin.ie/pdf/CCMCRP2.Icelandicstatementpdf_000.pdf (accessed June 1, 2010).

⁴⁹ Excerpt from Proposition No. 4 (2008-2009) to the Storting, p. 23 (Norway).

⁵⁰ Cluster Munitions Prohibition Act 2009, sec. 10(3) and 11(6) (New Zealand). For a discussion of Ireland's view on this subject, see Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 14-16.

Finally, national implementation legislation should require a state party to discourage states not party from using cluster munitions. Article 21(2) obliges each state party to make its “best efforts” to do so.⁵¹ A state party should discourage use in the same way as it notifies its allies of its obligations under the convention. It should convey the message at the political and military levels and before operations, at the planning phase, and during operations themselves. The requirement to discourage use of cluster munitions makes clear that the prohibition on assistance applies even during joint military operations. It is illogical that the same instrument would oblige a state party to discourage use and at the same time permit it to assist in activities that involve, or could lead to, use.

⁵¹ Convention on Cluster Munitions, art. 21(2).

Definitions

National implementation legislation should:

- state that definitions have the same meaning as in the Convention on Cluster Munitions;⁵²
- define person as both a natural person (human being) and a legal person (corporation);
- clarify explicitly that the definition of transfer incorporates transit;⁵³ and
- make clear that all obligations apply equally to cluster munitions and explosive bomblets.⁵⁴

Analysis

Even if a state party's implementation legislation encompasses all of the convention's obligations, employing definitions that do not conform to the Convention on Cluster Munitions could create loopholes. Therefore, implementation legislation should include a provision that ensures that its terms are defined in the same way as those found in the convention. New Zealand's legislation serves as a useful model.⁵⁵

Where appropriate, however, legislation should supplement or clarify the convention's definitions. For example, a narrow definition of person may inadvertently allow corporations to engage in activities that are prohibited by the convention. This possibility is especially troubling in light of the fact that corporations often produce and export cluster munitions. National implementation legislation should include a definition of person that encompasses both a natural person (human being) and a legal person (corporation). Luxembourg's legislation extends the convention's prohibitions to both natural and legal persons: "il est

⁵² This element refers to the definitions in Convention on Cluster Munition, art. 2.

⁵³ This element refers to the definition of transfer in *ibid.*, art. 2(8): "*Transfer* involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants."

⁵⁴ This element is based on the definitions of explosive bomblet and dispenser in *ibid.*, art. 2(13-14) and on art. 1(2), which states: "Paragraph 1 of this Article [1] applies, *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft."

⁵⁵ The New Zealand law states, "Unless the context otherwise requires, terms and expressions used but not defined in this Act but defined in the Convention have the same meaning as in the Convention." Cluster Munitions Prohibition Act 2009, sec. 5(2) (New Zealand).

interdit à toute personne physique ou morale. . .”⁵⁶ The ICRC Model Law includes a penalty for corporate bodies, which implies that a person includes a natural and legal person.⁵⁷

To help ensure that states not party and non-state armed groups do not cross a state party’s territory with cluster munitions, implementation legislation should clarify that transit is covered by the definition of transfer. Austria and Germany ban transit in their legislation.⁵⁸ In response to queries from Human Rights Watch and Landmine Action, Bulgaria, Burkina Faso, Ecuador, Lebanon, Malta, Mexico, and Zambia all stated that they interpret the convention to proscribe transit.⁵⁹ As mentioned above, transit should be understood as banned under both the prohibition of transfer and the prohibition of assistance. To clarify that point, the definition of transfer should be modified accordingly.

Finally, national legislation should specify that it applies equally to cluster munitions and explosive bomblets. Explosive bomblets are munitions similar to submunitions but are released by a dispenser affixed to an aircraft. They pose the same humanitarian risks as cluster munitions because they have an area effect and are prone to failure. The convention states that its Article 1 obligations apply to these munitions although it is less explicit about the application of other obligations.⁶⁰ To avoid any loopholes, implementation legislation should ensure that all of its obligations apply equally to cluster munitions and explosive bomblets. A state party could do that with a new definition of an overarching term. For example, the United Kingdom covers the two types of weapons by using the term “prohibited weapons” throughout its legislation and defining the term as encompassing cluster munitions and explosive bomblets.⁶¹ Other states have adopted different approaches. In its legislation, Ireland simply adds “explosive bomblet” to each relevant reference to cluster munition.⁶² New Zealand specifies in its law that all prohibitions apply to explosive bomblets.⁶³ The ICRC Model Law merges the Irish and New Zealand approaches.⁶⁴

⁵⁶ *Projet de Loi portant approbation de la Convention sur les armes à sous-munitions*, art. 2 (Luxembourg).

⁵⁷ ICRC Model Law, sec. 4(i)(b).

⁵⁸ Federal Law on the Prohibition on Cluster Munition[s], sec. 2 (Austria); and War Weapons Control Act, sec. 18(a) (Germany). An unofficial English translation of Austria’s law specifically uses the word transit, while Germany bans transit by declaring it is prohibited to “transport [cluster munitions] through or otherwise bring them into or out of a federal territory.”

⁵⁹ *Banning Cluster Munitions*, pp. 24-25.

⁶⁰ The Convention does not specify that other articles, such as those on victim assistance and international cooperation and assistance, apply to explosive bomblets.

⁶¹ Cluster Munitions (Prohibitions) Act 2010, sec. 1(3) (United Kingdom);

⁶² Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 6-7 (Ireland).

⁶³ Cluster Munitions Prohibition Act 2009, sec. 12 (New Zealand).

Stockpile Destruction

National implementation legislation should:

- require the separation and destruction of all stockpiles of cluster munitions within the state party's territory or under its control;
- set a deadline for the completion of stockpile destruction as soon as possible, but no more than eight years after entry into force of the Convention on Cluster Munitions for that state party;⁶⁵ and
- not include provisions for extension of the destruction deadline or retention of cluster munitions for training or the development of counter-measures unless deemed absolutely necessary.⁶⁶

Analysis

Even with a ban on use, cluster munitions will remain a threat as long as states continue to possess them. Existing stockpiles physically enable states to use cluster munitions, although in violation of their international and domestic legal obligations. In both its preamble and Article 3, the Convention on Cluster Munitions underlines the need to destroy stockpiles as rapidly as possible. The preamble says that states parties are “[d]eeply concerned at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and *determined* to ensure their rapid destruction.”⁶⁷ Eliminating the harm—or potential harm—caused by cluster munitions requires the complete destruction of cluster munitions, including all stockpiles.

In accordance with Article 3 of the Convention on Cluster Munitions, national implementation legislation should require the separation of all cluster munitions from other

⁶⁴ The ICRC Model Law states that its prohibitions apply equally to explosive bomblets. ICRC Model Law, sec. 3(4). In other places, it supplements references to cluster munitions with references to explosive bomblets. For example, section 8 calls for “the destruction of all stockpiled cluster munitions, explosive bomblets and explosive submunitions.” ICRC Model Law, sec. 8.

⁶⁵ The first two elements of stockpile destruction are based on Convention on Cluster Munitions, art. 3(1-2): “1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction. 2. Each State Party undertakes to destroy or ensure destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry in to force of this Convention for that State Party.”

⁶⁶ The Convention on Cluster Munitions allows for a four-year deadline extension “if a State Party believes that it will be unable” to destroy its stockpiles within eight years. *Ibid.*, art. 1(3). It also permits retention of a “limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures.” States, however, may only retain “the minimum number absolutely necessary.” *Ibid.*, art. 3(6). As discussed below, however, Human Rights Watch believes that these provisions are unnecessary and should not be included in implementation legislation.

⁶⁷ *Ibid.*, pmb.

weapons in a state party's arsenal and their ultimate destruction. Destruction should comply with international and environmental health standards. The legislation should also specify the date by which a state party must complete stockpile destruction. To guarantee prompt and safe destruction of cluster munitions, the national implementation legislation should designate an appropriate and competent authority to guide the process and provide oversight.

The Convention on Cluster Munitions appears to narrow a state party's obligation to destroy cluster munitions through the use of "and" at the end of the following sentence: "Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction *and* control."⁶⁸ To achieve the object and purpose of the treaty, national legislation should refer to stockpiles under a state party's jurisdiction *or* control. That broader formulation would prevent loopholes and require a state party to ensure destruction of any foreign stockpiles in its territory. Furthermore, the existing language in the treaty seems to have been the result of a drafting accident rather than a conscious effort to narrow the obligations of states parties: the phrase was apparently initially changed to "jurisdiction *and* control" due to a clerical error and then was never changed back.⁶⁹

The Convention on Cluster Munitions mandates that each state party complete stockpile destruction as soon as possible but at least within eight years after entry into force for that state party, and national implementation legislation should reflect this obligation. The inclusion of a deadline emphasizes the essential and urgent nature of the task. While the convention allows eight years to complete stockpile destruction, a state party should aim to finish it as soon as possible, taking into account national resources and stockpile levels when setting internal deadlines. To promote the humanitarian aims of the Convention on Cluster Munitions, a state party should pass legislation with a deadline of less than eight years, thereby emphasizing its commitment to destruction. Most states that have signed the convention to date have small enough stockpiles to be destroyed in one to four years. Spain, for example, destroyed its stockpile of more than 220,000 submunitions in about one year's time; it was the first signatory to complete destruction after the signing of the convention.⁷⁰ Austria's legislation exemplifies this approach by requiring that existing cluster munition

⁶⁸ *Ibid.*, art. 3(1).

⁶⁹ Human Rights Watch conversations with member of the legal team of the President of the Dublin Diplomatic Conference on Cluster Munitions, fall 2009.

⁷⁰ *Banning Cluster Munitions*, p. 156.

stockpiles be destroyed within three years of entry into force of its national implementation legislation.⁷¹

Implementation legislation should set firm deadlines to encourage destruction of stockpiles. The Convention on Cluster Munitions, however, establishes procedures to be followed by states parties that cannot meet their stockpile destruction deadline.⁷² While the convention allows for an extension of the eight-year deadline, none of the states that have signed the convention thus far should be in need of more time. National legislation should, therefore, not include a provision that allows for such an extension.

The Convention on Cluster Munitions also allows for limited exceptions for retention of cluster munitions. It permits retention for training in clearance of unexploded submunitions or destruction of stockpiles, for development of clearance or destruction techniques, or for development of counter-measures, such as armor to protect troops from the weapons.⁷³ Such exceptions leave room for abuse, as the danger remains that a state party may transfer cluster munitions to a state not party or a non-state actor, or even use any cluster munitions left undestroyed. Exceptions are also unnecessary. For example, clearance organizations accredited by the United Nations are not known to use live submunitions for training; alternatives exist, such as using simulated submunition explosions.⁷⁴ Therefore, national legislation should not include a provision permitting such retention.

⁷¹ Federal Law on the Prohibition of Cluster Munitio[n]s, sec. 4 (Austria): “Existing stockpiles of cluster munitio[n]s prohibited under Section 2 must be reported to the Federal Ministry of Defence and Sports within one month after entry into force of this Federal Law and must be destroyed by it against reimbursement of costs within a maximum of three years after entry into force of this Federal Law.” Austria’s Mine Ban Treaty legislation similarly requires that all stockpiled landmines be destroyed within one year of the Mine Ban Treaty’s entry into force for Austria, significantly less time than the four years allowed by the Mine Ban Treaty itself. Federal Law on the Prohibition of Anti-Personnel Landmines, http://www.mineaction.org/docs/1773_.asp, art. 4 (Austria). Also in the Mine Ban Treaty context, France and Spain set domestic deadlines for destruction of stockpiled antipersonnel mines at least one year shorter than required by the treaty. Loi no 98-564 du 8 juillet 1998 tendant à l’élimination des mines antipersonnel (“Law No. 98-564 of 8 July 1998 on the Elimination of Anti-Personnel Mines”), <http://icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/54c2ed6311b3857e4125683c005f0be8!OpenDocument> (accessed June 1, 2010), art. 3 (France); ICRC summary of Ley 33/1998, de 5 de octubre, de prohibición total de minas antipersonal y armas de efecto similar, (“Law 33/1998 on the Total Prohibition of Anti-Personnel Mines and Weapons Having a Similar Effect”), Boletín Oficial del Estado, no. 239, <http://icrc.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/4077ef9eb367e75b412566ce003f78ba!OpenDocument> (accessed June 1, 2010) (Spain).

⁷² Convention on Cluster Munitions, art. 3(3-5). To apply for an extension, a state party must demonstrate the need for additional time through the presentation of such information as the length of the requested extension, an explanation of its need, an updated destruction plan, and the number and type of cluster munitions already destroyed and remaining to be destroyed. The Meeting of States Parties decides whether to grant an extension. It may also determine what resources should be committed to assisting those parties requesting extensions, thereby matching available resources with outstanding needs.

⁷³ *Ibid.*, art. 3(6).

⁷⁴ Cluster Munition Coalition, “Policy Papers for the Dublin Diplomatic Conference on Cluster Munitions,” 2008, paper 10.

If a state party's implementation legislation specifically allows for retention, however, it should lay out restrictions, both narrow and detailed, to ensure the number of retained cluster munitions is as small as possible—limited to the number deemed absolutely necessary for training and development of counter-measures—and is reviewed every year.⁷⁵ In addition to setting such limits, a state should adopt safeguards to prevent the abuse of retained stockpiles, including an annual report to the United Nations on their type, quantity, and use.⁷⁶ An annual report could be attached to an Article 7 report, discussed below, or submitted separately.

⁷⁵ The Irish legislation, for example, states that only “the minimum number absolutely necessary” can be retained. Cluster Munitions and Anti-Personnel Mines Act, 2008, sec. 7(3) (Ireland). A state party could alternatively place numerical limits on retention, which allow less room for interpretation than the more general limit of “the minimum number absolutely necessary for that purpose,” but the state party must make sure that the cap is set, clearly and transparently, at the minimum number necessary and that it is reviewed annually. In its Mine Ban Treaty legislation, for example, France permits the retention of 5,000 landmines for training purposes, and Colombia caps its number at 1,000. Loi no 98-564 du 8 juillet 1998 tendant à l'élimination des mines antipersonnel, art. 3 (France); Law 759 of 25 July 2002 establishing rules for compliance with the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, and enacting provisions for eradicating the use of anti-personnel mines, <http://icrc.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/2812cc1ea66e4572c1256d2000552ec6!OpenDocument> (accessed June 1, 2010), art. 2 (Colombia).

⁷⁶ Convention on Cluster Munitions, art. 3(8).

Clearance

National implementation legislation should:

- establish a process for the identification and destruction of all cluster munitions in contaminated areas under the state party's jurisdiction or control;⁷⁷
- set a deadline for the completion of clearance as soon as possible, but no later than 10 years after entry into force of the Convention on Cluster Munitions for that state party;⁷⁸
- mandate creation of risk reduction education programs to inform civilians of the dangers presented by cluster munitions remnants;⁷⁹ and
- if a user state, require the provision of assistance to those states it contaminated with cluster munition remnants.⁸⁰

Analysis

Even if states fulfill all of their negative obligations under the Convention on Cluster Munitions and bring a halt to cluster munitions use, cluster munitions remnants from previous conflicts will continue to pose a threat to civilians. The incorporation of the convention's clearance duties into a state party's national implementation legislation plays a key role in preventing such harm. In order to preserve state sovereignty, the ultimate responsibility for clearance should fall upon the affected—rather than the user—state.⁸¹ All states parties, especially user states, however, should assist affected states with clearance.⁸²

⁷⁷ This element is based on Convention on Cluster Munitions, art. 4(1): "Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction and control." Article 4(2) provides details about how states parties must fulfill that obligation.

⁷⁸ This element is based on *ibid.*, art. 4(1): "clearance and destruction shall be completed as soon as possible but not later than ten years."

⁷⁹ This element is based on *ibid.*, art. 4(2)(e): "Each State Party shall take the following measures...: (e) Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risk posed by such remnants."

⁸⁰ This element is based on *ibid.*, art. 4(4), which "strongly encourage[s]" user states parties to "provide, *inter alia*, technical financial, material or human resource assistance" to states parties that they contaminated with cluster munition remnants. User states that choose to give assistance must provide "where available, information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located."

⁸¹ *Ibid.*, art. 4(1).

⁸² Describing the responsibilities of user states parties, the convention states: "In such cases, upon entry into force of this Convention for both States Parties, the former State Party [the user state] is strongly encouraged to provide, *inter alia*, technical, financial, material or human resources assistance to the latter State Party [the affected state], either bilaterally or through a mutually agreed third party, including through the United Nations system or other relevant organisations, to

National implementation legislation should outline the steps necessary to clear cluster munition contaminated areas. Specifically, drawing from Article 4 of the convention, the legislation should require the assessment of contamination levels and clearance needs; the demarcation and fencing of contaminated areas; the actual clearance and destruction of any cluster munition remnants; and the creation of risk reduction education programs.⁸³ The ICRC Model Law lays out a parallel checklist of related tasks for a state party to include in its implementation legislation.⁸⁴ These steps not only outline the process of clearance but also address the various ways in which a state must prevent cluster munition remnants from causing harm to civilians.

Several states parties to the Mine Ban Treaty have incorporated into their implementation legislation comparable language regarding that treaty's similar clearance obligations. Jordan's law, for example, details essential steps of the clearance process from the identification of areas contaminated by landmines to contracting with experienced deminers to requesting assistance when necessary.⁸⁵ Other states, such as Cambodia, designate specific bodies to oversee and ensure clearance.⁸⁶

facilitate the marking, clearance and destruction of such cluster munition remnants." Convention on Cluster Munitions, art. 4(4).

⁸³ *Ibid.*, art. 4(2).

⁸⁴ ICRC Model Law, sec. 9:

Where an area is identified as a cluster munition contaminated area or is suspected to be a cluster munition contaminated area, the Minister shall ensure the following, as soon as possible, in areas under the State's jurisdiction or control;

- (1) A survey, assessment and recording of the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas;
- (2) An assessment and prioritisation of needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities;
- (3) The taking of all feasible steps to ensure that all cluster munition contaminated areas are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians;
- (4) The clearance and destruction of all cluster munition remnants; and
- (5) The conduct of risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.

⁸⁵ Anti-Personnel Mine Ban Law, Law Number 10 for the year 2008, [http://icrc.org/ihl-nat.nsf/6fa4d35e3025394125673e00508143/1e55bb87193b076ac12575b3003f5971/\\$FILE/Jordan%20Anti-Personnel%20Mine%20Ban%20Law_English.pdf](http://icrc.org/ihl-nat.nsf/6fa4d35e3025394125673e00508143/1e55bb87193b076ac12575b3003f5971/$FILE/Jordan%20Anti-Personnel%20Mine%20Ban%20Law_English.pdf) (accessed June 1, 2010), art. 5 (Jordan).

⁸⁶ Cambodia empowers the Cambodian Mine Action Centre to make decisions regarding the discovery and destruction of landmines within its national territory. Law to Ban Anti-personnel Mines, 1999, <http://icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/begaacd4425cf47aec125708b00455bce!OpenDocument> (accessed June 1, 2010), art. 4.

A state party's national implementation legislation should include a maximum 10-year deadline for completing the clearance of cluster munition contaminated areas. Given the threat posed by cluster munitions remnants, however, the legislation should, if possible, set deadlines for the completion of clearance shorter than those required by the convention itself. This approach mirrors that outlined above for stockpile destruction deadlines.⁸⁷

Even under the best circumstances, clearance will not occur instantaneously, so states must develop means by which to protect and educate civilians. A state party should incorporate all possible measures in implementation legislation to limit the risk of contaminated areas to civilians. The International Mine Action Standards suggest that a state suffering from contamination undertake a variety of risk reduction activities developed to reduce the incidence and level of harm from explosive remnants of war, including cluster munitions.⁸⁸ The risk reduction elements of implementation legislation should cover both physical demarcation of contaminated areas and educational programs directed towards increasing awareness and changing behavior.⁸⁹

The implementation legislation of a state party responsible for previous contamination of another state should provide for clearance assistance to the affected state. While, as discussed below, all states parties should lend assistance to affected states, the Convention on Cluster Munitions “strongly encourages” former user states parties to “provide, *inter alia*, technical, financial, material or human resources assistance to the [contaminated] State

⁸⁷ While implementation legislation should set firm deadlines, the Convention allows for some rare instances in which a state party cannot complete clearance in time. For example, one estimate says that about 80 million unexploded submunitions remained in Laos following the end of conflict that lasted from 1964 to 1973, which may make it difficult for Laos to meet the 10-year deadline. *Banning Cluster Munitions*, p. 103. In such cases, according to the convention, a state party must request an extension from the Meeting of States Parties. An extension request should include details such as the new date for clearance, completion, the various impediments to timely clearance, and specific information regarding remaining contaminated areas. Convention on Cluster Munitions, art. 4(6).

⁸⁸ For a definition of mine risk reduction, see International Mine Action Standards, “Glossary of mine action terms, definitions and abbreviations,” second ed., January 1, 2003, http://www.mineactionstandards.org/IMAS_archive/archived/Final/IMAS_o410.pdf (accessed June 1, 2010), § 3.184. IMAS also provides details on the creation of risk education programs, which “seek to reduce the risk of injury from mines/ERW by raising awareness of men, women, and children in accordance with their different vulnerabilities, roles and needs, and promoting behavioural change including public information dissemination, education and training, and community mine action liaison.” International Mine Action Standards, “Glossary of mine action terms, definitions and abbreviations,” § 3.184 (emphasis removed).

⁸⁹ For example, Jordan's national implementation legislation for the Mine Ban Treaty includes provisions for mine risk education, as mandated by the National Mine Action Standards, meant to “reduce the social, economic and environmental impact of mines.” Anti-Personnel Mine Ban Law, art. 6 (Jordan). The Cook Islands' national implementation legislation for the Mine Ban Treaty requires the “marking, monitoring and protection” of any area identified as or suspected of being contaminated. Anti-Personnel Mines Act 2007, no. 35, [http://icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/5f42864365071532c12574f10053c495/\\$FILE/Cook%20Islands%20AP%20Min.es.pdf](http://icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/5f42864365071532c12574f10053c495/$FILE/Cook%20Islands%20AP%20Min.es.pdf) (accessed June 1, 2010), sec. 9.

Party.”⁹⁰ Allowing for a variety of types of assistance facilitates compliance by enabling any user state party, regardless of resources, to offer aid. In particular, user states should incorporate into their implementation legislation the requirement to provide to affected states “information on types and quantities of the cluster munitions used, precise locations of cluster munition strikes and areas in which cluster munition remnants are known to be located.”⁹¹

This information will not only expedite the clearance process by sending deminers directly to contaminated sites, but it will also reduce the risks facing deminers, who may properly prepare for the types of munitions they are likely to encounter.⁹²

⁹⁰ Convention on Cluster Munitions, art. 4(4).

⁹¹ *Ibid.*, art. 4(4)(b).

⁹² The possibility of providing assistance through “a mutually agreed third party, including through the United Nations system or other relevant organizations” may allow for the exchange of assistance between states still in tension following conflict. *Ibid.*, art. 4(4)(a).

Victim Assistance

National implementation legislation should:

- designate a government focal point to develop, coordinate, and implement a national victim assistance plan and budget;⁹³
- consult with victims on the development and implementation of the national plan;⁹⁴
- provide victims with medical, rehabilitation, and psychological support that is age and gender sensitive;⁹⁵ and
- ensure the victim assistance plan is non-discriminatory.⁹⁶

Analysis

Cluster munitions cause grave and ongoing harm to civilians, including death, injury, and property destruction. To mitigate such harm and to advance its humanitarian objective, the Convention on Cluster Munitions introduced innovative victim assistance measures. Although influenced by the Mine Ban Treaty, the convention establishes a novel and higher standard for victim assistance by moving beyond its predecessor in a number of ways, notably by defining the term “cluster munition victims” and dedicating a specific article to victim assistance obligations.⁹⁷ Article 5 lays out general obligations in paragraph 1 and discusses the requirements for implementation in paragraph 2. The ICRC Model Law also defines cluster munition victim and borrows much of its language on victim assistance from Article 5(2).⁹⁸

Victim assistance measures will not be effective unless they are comprehensive and well coordinated. Implementation legislation should therefore designate a focal point in the

⁹³ This element is based on Convention on Cluster Munitions, art. 5(2)(c) and (g): “[E]ach State Party shall: (c) Develop a national plan and budget...; (g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article.”

⁹⁴ This element is based on *ibid.*, art. 5(2): “[E]ach State Party shall ... closely consult with and actively involve cluster munition victims and their representative organizations.”

⁹⁵ This element is based on *ibid.*, art. 5(1): “Each State Party with respect to cluster munition victims in areas under its jurisdiction and control shall...adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.”

⁹⁶ This element is based on *ibid.*, art. 5(2)(e): “[E]ach State Party shall: (e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs.”

⁹⁷ For further discussion of the evolution of victim assistance and its relationship to human rights, see Survivor Corps, “Connecting the Dots: Victim Assistance and Human Rights in the Mine Ban Treaty, Convention on Cluster Munitions, Convention on the Rights of Person with Disabilities,” December 2008, <http://www.survivorcorps.org/NetCommunity/Document.Doc?id=17> (accessed June 1, 2010).

⁹⁸ ICRC Model Law, sec. 2 and 10.

government to organize the provision of victim assistance.⁹⁹ This focal point should begin by ensuring development of a national plan for establishing and implementing assistance programs. The plan should include a budget and timeframe, and the government should incorporate it into “existing national disability, development and human rights frameworks and mechanisms.”¹⁰⁰ Incorporation will help make the plan more affordable and enduring.¹⁰¹ In addition, the government should find resources—whether from national funds or international contributions—to facilitate implementation of victim assistance programs.

Implementation legislation should require that a state party consult with cluster munition victims at all stages of the national plan.¹⁰² In particular, victims should have a voice in development and implementation of the plan. Consultation will help designers assess the needs of victims and ensure that the resulting measures meet those needs. Legislation should also obligate a state party to collect general data on victims, such as the number of victims, types of injuries suffered, and gender and age breakdown.¹⁰³ This information will further shape national plans and their implementation.

While victims’ input will shape the details of victim assistance programs, in general implementation legislation should provide for medical, rehabilitative, and psychological care for cluster munition victims.¹⁰⁴ Legislation should ensure, for example, that emergency care is available immediately after a victim is injured, that rehabilitative care such as physical therapy is provided when a debilitating injury occurs, and that psychological support services are available throughout the treatment process. The specifics of such assistance measures should be spelled out clearly in the legislation itself or in regulations or policies. Legislation that covers this wide range of assistance will not only help victims heal and reintegrate into their communities more fully, but will also help those injured to deal with the added costs of medical care and livelihood support.

Finally, as required by the convention, implementation legislation should ensure that assistance measures are non-discriminatory and based only on victims’ “medical, rehabilitative, psychological or socio-economic needs.”¹⁰⁵ For example, the legislation

⁹⁹ See Convention on Cluster Munitions, art. 5(2)(g).

¹⁰⁰ *Ibid.*, art. 5(2)(c).

¹⁰¹ Survivor Corps, “Connecting the Dots,” p. 8.

¹⁰² See Convention on Cluster Munitions, art. 5(2)(f).

¹⁰³ See *ibid.*, art. 5(1).

¹⁰⁴ See *ibid.*, art. 5(1).

¹⁰⁵ *Ibid.*, art. 5(2)(e).

should guarantee that cluster munition victims have equal access to public places and services, health care, and economic and educational opportunities.¹⁰⁶

¹⁰⁶ Survivor Corps, “Connecting the Dots,” pp. 15-17.

International Cooperation and Assistance

National implementation legislation should:

- establish, where necessary or advantageous, an administrative framework to facilitate the provision of at least some form of technical, material, and financial assistance to other states parties for:
 - stockpile destruction,¹⁰⁷
 - clearance,¹⁰⁸
 - victim assistance,¹⁰⁹
 - emergency situations,¹¹⁰ and
 - economic and social recovery;¹¹¹
- require the facilitation of the fullest exchange of equipment and scientific and technological information;¹¹² and
- require the facilitation of the entry and exit of personnel, material, and equipment from donor states.¹¹³

Analysis

Countries that either stockpile cluster munitions or are affected by them bear the primary responsibility for fulfilling the convention's positive obligations, notably stockpile destruction, clearance, and victim assistance. The convention's international cooperation and assistance article seeks to alleviate that burden by establishing the right to seek and receive assistance. If states parties have the right to receive assistance, then it follows that other states parties should provide such assistance. A state party should therefore include

¹⁰⁷ This element is based on Convention on Cluster Munitions, art. 6(5): "Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions."

¹⁰⁸ This element is based on *ibid.*, art. 6(4): "[E]ach State Party in a position to do so shall provide assistance for clearance and destruction of cluster munition remnants."

¹⁰⁹ This element is based on *ibid.*, art. 6(7): "Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention."

¹¹⁰ This element is based on *ibid.*, art. 6(6): "[E]ach State Party in a position to do so shall urgently provide emergency assistance to the affected State Party."

¹¹¹ This element is based on *ibid.*, art. 6(8): "Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties."

¹¹² This element is based on *ibid.*, art. 6(3): "Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention."

¹¹³ This element is based on *ibid.*, art. 6(10): "Each State Party that seeks and receives assistance shall take all appropriate measures in order to facilitate the timely and effective implementation of this convention, including facilitation of the entry and exit of personnel, materiel and equipment, in a manner consistent with national laws and regulations, taking into consideration international best practices."

in its implementation legislation a provision on international cooperation and assistance that construes assistance broadly and establishes a framework to help the state party to aid other states parties in some way. By facilitating international cooperation and assistance, such a provision will contribute to and expedite the realization of the convention's objectives. It will also promote universalization. Some states might be reluctant to join the convention because they believe that they will not be able to fulfill its obligations on their own; knowing that they can receive outside assistance will encourage them to become states parties. Zambia's Prohibition of Anti-Personnel Mines Act provides a model of such an international cooperation and assistance provision. This Act allows Zambia to provide or receive various types of assistance, including for humanitarian demining and victim assistance, and to exchange material, equipment, and scientific and technological information.¹¹⁴

International cooperation and assistance is especially necessary to facilitate states parties' compliance with their international and domestic obligations related to stockpiling, clearance, and victim assistance. The importance of these obligations and the need to include them in national implementation legislation has been discussed above. In accordance with the convention, implementation legislation should also allow for and encourage assistance for emergency situations and economic and social recovery.¹¹⁵

Where necessary or advantageous, national legislation should require a state party to create an administrative framework to implement the convention's assistance obligations, including by designating a government focal point to coordinate programs. Legislation should specify that a state party has the option to provide assistance in a variety of forms, including technical, material, and financial.¹¹⁶ This approach would arguably allow any state party to contribute in some way. In addition, the legislation should obligate a state party to participate in the exchange of scientific and technological information and equipment.¹¹⁷ It could dictate that the assistance be provided through various channels, such as the United Nations system and regional, national, and international organizations.

In order for international assistance to be effective, legislation should also obligate a recipient state party to facilitate provision of any aid from donor states. It should strive to

¹¹⁴ Prohibition of Anti-Personnel Mines Act, no. 16 of 2003, <http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/677a86d53ab7ec7dc1257161004602b9!OpenDocument> (accessed June 1, 2010), sec. 33(3)(a-c) (Zambia).

¹¹⁵ Convention on Cluster Munitions, art. 6 (6, 8).

¹¹⁶ See *ibid.*, art. 6(2).

¹¹⁷ See *ibid.*, art. 6(3).

ensure, consistent with other national laws and policies, the expedient entry and exit of personnel, material, and equipment. For example, a recipient state party should not impose undue customs taxes on equipment or burdensome visa requirements on deminers or doctors.¹¹⁸

¹¹⁸ See *ibid.*, art. 6(10)

Transparency

National implementation legislation should:

- require reporting on the status and progress of the implementation of the government's obligations. Reports should address, but not be limited to, the 14 subjects identified in Article 7 of the convention and the retention of cluster munitions under Article 3.¹¹⁹

Analysis

Transparency surrounding a state party's implementation of the Convention on Cluster Munitions promotes compliance with its provisions and thus advances the realization of its objectives. Implementation legislation should require a state party to report on its efforts to meet the obligations discussed above. If a state has fallen short in any of its responsibilities, such reports can inform the international community of what kinds of assistance are required. As an added benefit, transparency allows public monitoring of state conduct at the international and national levels, which in turn encourages a state party to fulfill its obligations to the best of its ability.

Implementation legislation should require a state party to submit annual reports on the subjects enumerated in Article 7.¹²⁰ As mandated by the convention, it should oblige a state party to submit its reports by April 30 each year and cover the previous calendar. Its reports should address each of the 14 topics listed in Article 7. With regard to stockpile destruction, a state party should convey information on the number and type of cluster munitions and submunitions it possesses, its plans for destroying them, and the progress it has made so far.¹²¹ It should provide details about the status and progress of clearance, including the size and location of cluster munition contaminated areas and the types and quantities cleared and to be cleared.¹²² A state party should describe the implementation of its victim assistance programs.¹²³ It should give information about its national implementation measures.¹²⁴ It should report on the amount of national resources it has allocated to

¹¹⁹ This element is based on Convention on Cluster Munitions, art. 7(1).

¹²⁰ *Ibid.*, art. 7.

¹²¹ *Ibid.*, art. 7(1)(b, e, and f).

¹²² *Ibid.*, art. 7(1)(h and i). In a related provision, a state party must report on the technical characteristics of cluster munitions that it produced before the Convention entered into force or that it possesses in order to facilitate clearance. *Ibid.*, art. 7(1)(c).

¹²³ *Ibid.*, art. 7(1)(k).

¹²⁴ *Ibid.*, art. 7(1)(a).

implement the convention and the amount, type, and destination of any international assistance it has provided.¹²⁵ A state party should also file updates on newly discovered stockpiles, decommissioning of production facilities, risk reduction education programs, and contact points for the reports themselves.¹²⁶ Legislation should require a state party to make these reports public domestically and to pass them on to the UN secretary-general. It should identify which government unit is to compile reports and send them on to the secretary-general.¹²⁷

In addition to requiring transparency with regard to the subjects listed in Article 7, national implementation legislation should obligate a state party to submit a detailed report on any cluster munitions or explosive submunitions it retains for clearance training or development of counter-measures. As discussed above, Human Rights Watch believes legislation should not allow for retention. If it does, however, reporting is essential to help prevent abuse. A retention report should include information on the type, quantity, and lot numbers of the weapons retained and outline their planned and actual use. If retained weapons are transferred, the report should identify the recipient state party. Legislation could require a retention report to be attached to an Article 7 report or completed separately. Regardless, it should be submitted annually to the UN secretary-general and made available to the public.¹²⁸

Some states have adopted provisions related to transparency in their implementation legislation. In particular, New Zealand requires anyone who uses, produces, possesses, or transfers cluster munitions to report on those activities to the relevant minister so that he or she can determine if there has been a violation of the legislation.¹²⁹ The ICRC Model Law proposes the following language:

The Minister may, by written notice served on any person, require such person to give the Minister such information or documents as is specified in the notice if the Minister has reason to believe that he or she has information or a document relevant to –

(1) the administration or enforcement of this Act;

¹²⁵ *Ibid.*, art. 7(1)(m and n).

¹²⁶ *Ibid.*, art. 7(1)(g, d, j, and l).

¹²⁷ For example, in its legislation implementing the Convention on Cluster Munitions, Ireland appoints the Minister of Defense, in consultation with the Minister of Foreign Affairs, as overseer of these processes. Cluster Munitions and Anti-Personnel Mines Act 2008 (Ireland).

¹²⁸ Convention on Cluster Munitions, art. 3(8).

¹²⁹ Cluster Munitions Prohibition Act 2009, sec. 17(1) (New Zealand).

- (2) [COUNTRY's] obligation to report under Article 7 of the Convention; or
- (3) [COUNTRY's] obligation to provide information under Article 8 of the Convention.¹³⁰

This kind of provision would help the minister to obtain the information necessary to make the kinds of governmental reports discussed above.

¹³⁰ ICRC Model Law, sec. 13.

Compliance

National implementation legislation should:

- establish a mechanism for responding expeditiously to another state party's request for clarification on matters relating to treaty compliance.¹³¹

Analysis

The Convention on Cluster Munition adopts a cooperative approach to compliance.¹³² It allows states parties who cannot resolve differences bilaterally to exchange information through the UN secretary-general in an effort amicably to clarify matters of compliance. Implementation legislation does need to include great detail on this subject, but it should adopt the ICRC's proposal to establish an expeditious mechanism to respond to requests for clarification from other states parties. The ICRC Model Law states:

The Minister, if in receipt of a Request for Clarification by another State Party, relating to a matter of compliance with the provisions of the Convention, shall provide, through the Secretary-General of the United Nations, within 28 days, all information that would assist in clarifying the matter.¹³³

¹³¹ This element is based on the process described in Convention on Cluster Munitions, art. 8.

¹³² *Ibid.*

¹³³ ICRC Model Law, art. 12.

Relations with States Not Party: Promotion of Universal Adherence and Norms

National implementation legislation could:

- require that the government encourage states that have not joined the convention to become states parties in order to achieve universal adherence;¹³⁴
- require that the government promote the convention's norms to all states;¹³⁵ and
- designate a government agency responsible for coordinating these activities.

Analysis

Promoting universalization of the Convention on Cluster Munitions is important for two main reasons. First, multilateral treaties are more effective if they bind more states as parties. Second, as more states join the convention, the norm against using cluster munitions will grow stronger and influence states that have not ratified or acceded to the convention. Even before the ban on cluster munitions becomes customary international law, a global stigma against cluster munitions could develop. The stigma against antipersonnel landmines exemplifies this phenomenon; very few states, even those not party to the Mine Ban Treaty, have used mines since that treaty's adoption.¹³⁶ Implementation legislation could require a state to work toward universal adherence to advance these ends and accord with Article 21(1) of the Convention on Cluster Munitions.

Implementation legislation could also oblige a state party to promote the norms of the convention to states not party. A state party should discourage production, transfer, stockpiling, and particularly, as required by Article 21(2), use of these weapons. A state party should also encourage others to adopt the standards for stockpile destruction, clearance, victim assistance, and international cooperation and assistance because a state does not have to be a party to help minimize the effects of cluster munitions. As with the Mine Ban Treaty, states that have not joined the convention can still be persuaded follow its key

¹³⁴ This element is based on Convention on Cluster Munitions, art. 21(1): "Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention."

¹³⁵ This element is based on *ibid.*, art. 21(2): "Each State Party shall...promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions."

¹³⁶ Landmine Monitor has confirmed only two states—Russia and Myanmar—that have used landmines since 2007. Landmine Monitor, "Landmine Monitor Report 2009: Toward a Mine-Free World," http://www.lm.icbl.org/index.php/publications/display?act=submit&pqs_year=2009&pqs_type=lm&pqs_report=&pqs_section= (accessed June 1, 2010).

provisions. To ensure that a state party takes its obligations to promote the convention and its norms seriously and fulfills them systematically, implementation legislation could designate a government agency that will coordinate government-wide efforts to encourage adherence to the convention and its norms.

Penal Sanctions

National implementation legislation should:

- impose penal sanctions on all natural and legal persons who violate the legislation.¹³⁷ The penalties should be at least as strong as those imposed for violations of the Mine Ban Treaty.

Analysis

A state party should impose criminal sanctions in order to punish those who violate its implementation legislation and to deter others from doing so. Article 9 of the Convention on Cluster Munitions requires each state party to “impos[e] penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention...”¹³⁸ In its implementation legislation, a state party should stipulate a period of imprisonment and/or a fine for violations. Even if a state party has not been a user, producer, or stockpiler of cluster munitions, it should still impose penal sanctions for the basic prohibitions of its legislation because there could be future violations, for example during joint military operations or peacekeeping operations with states not party. The ICRC Model Law provides:

Any person who [commits a prohibited act] shall be guilty of an offence and liable upon conviction to:

- (a) in the case of an individual, imprisonment for a term not exceeding [] years or to a fine not exceeding [] or both;
- (b) in the case of a body corporate, a fine not exceeding [].¹³⁹

As the ICRC recognizes, the penalties laid out in implementation legislation will vary from state to state. In order to help ensure that the penalties are appropriately severe, they should be equal to, or greater than, the penalties for violating the Mine Ban Treaty. As noted elsewhere in this document, there are parallels between cluster munitions and antipersonnel mines and between the two treaties that govern them. A state party may also want to provide for harsher penalties to, *inter alia*, strengthen international humanitarian

¹³⁷ This element is based on Convention on Cluster Munitions, art. 9: “Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.”

¹³⁸ *Ibid.*

¹³⁹ ICRC Model Law, art. 4(1).

law's stigmatization of cluster munitions or to address concerns about cluster munitions in its own territory.

Several states parties have created penalties for violating legislation implementing the Convention on Cluster Munitions that are as strong as, or stronger than, the penalties for violating their legislation implementing the Mine Ban Treaty. Austria¹⁴⁰ and Norway¹⁴¹ have the same sanctions for violating the implementation legislation of the Mine Ban Treaty and the Convention on Cluster Munitions. Luxembourg provided stronger penalties in its implementation legislation than it did for both the Mine Ban Treaty and the Convention on Conventional Weapons.¹⁴²

¹⁴⁰ Federal Law on the Prohibition on Cluster Munition[s], sec. 5 (Austria); Federal Law on the Prohibition of Anti-personnel Mines, <http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/e913ec7adob47c314125661300513ceec!OpenDocument> (accessed June 1, 2010), art. 5 (Austria).

¹⁴¹ Legislative principles, sec. 3 (Norway); Act No. 54 of 17 July 1998 relating to the implementation of the Convention on the prohibition of the use, stockpiling production and transfer of anti-personnel mines and on their destruction, <http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/3bae1e43117c44b5c1256a9c002a97e7!OpenDocument> (accessed June 1, 2010), sec. 5 (Norway).

¹⁴² Compare Luxembourg, Loi du 29 avril 1999 portant approbation de la Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, signée à Ottawa, le 4 décembre 1997, art. 3, with Luxembourg, Projet de Loi portant approbation de la Convention sur les armes à sous-munitions, art. 4.

Extra-Territorial Jurisdiction

National implementation legislation should:

- stipulate that the state party's jurisdiction extends extra-territorially to all its citizens and to all legal persons incorporated in the state.

Analysis

Because some of the acts prohibited by national implementation legislation, such as the transfer of cluster munitions, can involve cross-border activities, a state party should establish extra-territorial jurisdiction. A state party should not allow its citizens to violate the implementing legislation simply by leaving its territory; rather, the state party should hold all its citizens to the standard it has adopted under the convention. Citizens and corporations incorporated in a state party enjoy the protections of the state; the corollary to this protection is the responsibility to abide by that state's international and domestic obligations. By declaring extra-territorial jurisdiction in its implementation legislation, a state party will help ensure that its citizens and corporations follow its laws and thereby uphold the prohibition on cluster munitions.

At least four states parties have established extra-territorial jurisdiction in their implementation legislation. Germany claims jurisdiction over German citizens violating its law extra-territorially.¹⁴³ Luxembourg has provided for extra-territorial application of its legislation.¹⁴⁴ New Zealand's legislation asserts extra-territorial jurisdiction over New Zealand citizens, stateless individuals who normally reside in New Zealand, members of the armed forces, and companies incorporated in New Zealand.¹⁴⁵ The United Kingdom applies its law to UK nationals, Scottish partnerships, and companies incorporated under UK law regardless of whether their conduct is "in the United Kingdom or elsewhere."¹⁴⁶ The ICRC also establishes extra-territorial jurisdiction in its Model Law.¹⁴⁷ While the ICRC notes that

¹⁴³ War Weapons Control Act, sec. 21 (Germany).

¹⁴⁴ *Projet de Loi portant approbation de la Convention sur les armes à sous-munitions, commentary to art. 2* (Luxembourg). Norway also provides for extra-territorial application of its implementation legislation to the extent that it complies with Norwegian domestic law. See Excerpt from Proposition No. 7 (2008-200) to the Odelsting, pp. 17-18 (Norway).

¹⁴⁵ Cluster Munitions Prohibition Act 2009, sec. 9 (New Zealand).

¹⁴⁶ Cluster Munitions (Prohibitions) Act 2010, sec. 4 (United Kingdom).

¹⁴⁷ ICRC Model Law, sec. 5. The Model Legislation states that the jurisdiction "extends to conduct outside the territory of [INSERT COUNTRY NAME] by citizens of [INSERT COUNTRY NAME] and bodies corporate incorporated under the laws of [INSERT COUNTRY NAME]." This approach mirrors the ICRC Model Law for the Mine Ban Treaty, which had the same language as quoted above. ICRC Model Legislation for Common Law States to Implement the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, sec. 5.

Article 9 of the convention does not explicitly require extra-territorial application, it encourages states parties to include this provision in their implementation legislation.¹⁴⁸

Several states that have not yet passed legislation implementing the Convention on Cluster Munitions established extra-territorial jurisdiction in their Mine Ban Treaty legislation. For example, Australia's Anti-Personnel Mines Convention Act 1998 applies to all Australians, regardless of whether they are on Australian territory.¹⁴⁹ France and South Africa also provide extra-territorial jurisdiction over their citizens for violations of the Mine Ban Treaty implementing legislation.¹⁵⁰ South Africa extends this extra-territorial jurisdiction to permanent residents.¹⁵¹

¹⁴⁸ ICRC Model Law, p. 6, n. 1.

¹⁴⁹ Anti-Personnel Mines Convention Act 1998, no. 126 of 1998 as amended, http://www.austlii.edu.au/au/legis/cth/consol_act/amca1998346.txt, sec. 7(5) (Australia).

¹⁵⁰ Loi no. 98-564 du 8 juillet 1998 tendant à l'élimination des mines antipersonnel, art. 8 (France); Anti-Personnel Mines Prohibition Act, *Government Gazette*, no. 36 of 2003, <http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/f10c96f02ffd8b1fc1256e2a00416a9e!OpenDocument> (accessed June 1, 2010), sec. 4(1)(a) (South Africa).

¹⁵¹ *Ibid.*, sec. 4(1)(b) (South Africa).

Conclusion

In addition to signing and ratifying or acceding to the Convention on Cluster Munitions as soon as possible, states should prioritize adopting national legislation to implement it. The strength of the legislation, however, is as important as the speed with which it is passed. While states should adopt specific language appropriate for their legal systems, we urge inclusion of all of the substantive elements delineated above to set a high standard for implementation of the convention.

Implementing legislation should address states parties' negative and positive obligations under the convention, including preventive and remedial measures. The legislation should ensure that the convention's object and purpose are fully met so that the convention succeeds in eliminating cluster munitions and the harm they cause. Supplementing legislation with regulations and administrative measures would likely be beneficial because those measures could provide more details of how to fulfill specific obligations.

Strong national legislation is critical to establish a framework for implementation that is clear, binding, and long lasting.

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