



Promoting the Prohibitions

The Need for Strong Interpretations of the Convention on Cluster Munitions

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Introduction

The Convention on Cluster Munitions, adopted in May 2008, seeks to prevent future civilian harm by establishing absolute prohibitions on a number of activities involving cluster munitions. It bans use of the weapons, which kill and injure civilians during and after strikes. It bans production, transfer, and stockpiling because they are prerequisites to use. It also bans assistance, which facilitates such activities. Each of these prohibitions applies “under any circumstances,” including international and non-international armed conflicts, and situations that do not rise to the level of armed conflicts.¹

These prohibitions are necessary to achieve the object and purpose of the convention. According to its preamble, the convention strives “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.”² In other words, it aims to eliminate cluster munitions and the harm they cause. As of November 1, 2010, 108 states had signed the convention and 43 had ratified it, showing widespread support for its goal.

While the prohibitions in the Convention on Cluster Munitions seem relatively straightforward, as in any legal instrument, the meanings and implications of some provisions are open to discussion. The most contentious issue, which carries over from the Oslo Process that produced the convention, is interoperability, specifically the relationship between the prohibitions in Article 1 and joint military operations with states not party. Other issues include transit of cluster munitions, hosting of foreign stockpiles, investment in production, and retention of cluster munitions.

¹ Convention on Cluster Munitions, adopted May 30, 2008, Dublin Diplomatic Conference on Cluster Munitions, CCM/ 77, <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> (accessed October 29, 2010), art. 1(1).

² *Ibid.*, preamble, para. 2.

Strong interpretations of these provisions will bolster national measures to implement the convention, so states should clarify their understandings through laws, policies, or public statements. Regardless of the form, states should interpret their obligations in a manner consistent with the object and purpose of the convention so that it maintains its legal power and stays true to its goal.

Prohibition on Assistance

Several of the convention's interpretive issues relate to the prohibition on assistance, so a full understanding of this provision is necessary.³ The relevant provision states:

1. 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.⁴

The convention gives the prohibition on assistance prominence as one of the general obligations in the first article of the convention, placing it on the same level as other core provisions, including the bans on use, production, transfer, and stockpiling of cluster munitions. The placement of the provision in Article 1 and its equation with other banned activities make clear that the prohibition on assistance was intended to be robust.

The Vienna Convention on the Law of Treaties provides guidelines for understanding the prohibition on assistance. Article 31 of the Vienna Convention, which articulates customary international law, states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁵ The context of the treaty includes its text and preamble.⁶ In the case of the Convention on Cluster Munitions, this rule of interpretation supports a broad understanding of the prohibition on assistance.

³ For a fuller discussion of the prohibition on assistance, see 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>, pp. 4-8.

⁴ Convention on Cluster Munitions, art. 1(1)(c).

⁵ Vienna Convention on the Law of Treaties, adopted May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, art. 31(1).

⁶ *Ibid.*, art. 31(2).

A textual analysis of Article 1 reveals that the language of the prohibition on assistance is unqualified and expansive. Article 1(1)(c) places no limits on the types of assistance.⁷ For example, it does not specify whether assistance need be direct or indirect. Nor does it indicate that the level of contribution required to count as unlawful assistance must be active or passive. The provision also adopts the language of a categorical prohibition. Article 1(1)(c) obliges states parties “never under any circumstances” to assist “anyone” with “any activity” involving cluster munitions.⁸ “Anyone” includes states parties, states not party, and non-state actors such as non-state armed groups, private companies, and individuals. The content of Article 1 thus makes clear that the prohibition on assistance is designed to extend to every situation.

The object and purpose of the Convention on Cluster Munitions, discussed above, further support a broad understanding of the ban on assistance. The preamble describes the goal of the convention, declaring that states are “determined to put an end for all time to the suffering and casualties caused by cluster munitions” during and after attacks.⁹ The preamble also emphasizes the importance of achieving the adherence of all states and says that states parties are determined to “work strenuously” toward universalization and implementation.¹⁰ Extending the convention’s scope even further, it calls on states parties to ensure that non-state armed groups do not, “under any circumstances,” engage in acts prohibited by the Convention on Cluster Munitions.¹¹ Eliminating the harm of cluster munitions entirely demands a broad prohibition on assistance.

Given the convention’s context and purpose, assistance should be understood as any act or omission that proximately contributes to anyone’s engagement in an activity prohibited for a state party under the convention. Human Rights Watch believes the understanding of the act of assistance should encompass direct assistance, that is, a link in a chain of events that leads straight to a prohibited activity, as well as indirect assistance, an action that is more removed from, but proximately facilitates, such a chain of events. It should also encompass active assistance, a form of participation that advances an activity prohibited by the convention, and passive assistance, an abdication of responsibility for matters under the state’s control that allows others to engage in a prohibited activity.¹²

⁷ Convention on Cluster Munitions, art. 1(1)(c).

⁸ *Ibid.*, art. 1(1)(c).

⁹ *Ibid.*, preamble, para. 2 (emphasis removed).

¹⁰ *Ibid.*, preamble, para. 19.

¹¹ *Ibid.*, preamble, para. 12.

¹² Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 5-6.

The Mine Ban Treaty has a comparable prohibition on assistance, and its states parties have generally understood the prohibition on assistance provision to cover a wide range of conduct. Specifically, many states parties have agreed that in the course of joint military operations with states not party, states parties may *not*:

- participate in the planning for use of antipersonnel mines;
- agree to rules of engagement that permit use of the weapon;
- accept orders to use, request others to use, or train others to use the weapon;
- knowingly derive military benefit from the use of the weapon by others; or
- provide security, storage, or transportation for antipersonnel mines.¹³

Interoperability

The complicated and hotly debated issue of interoperability, which deals with conduct during joint military operations with states not party to the Convention on Cluster Munitions, is closely linked to the prohibition on assistance. Because assistance with a prohibited act would most likely involve states not party, Article 1(1)(c) must be read in conjunction with Article 21 on Relations with States not Party to this Convention. Some have argued that Article 21 suspends the ban on assistance during joint military operations. This controversial article, however, should be understood as a clarification, and not a limitation, of Article 1(1)(c). It authorizes joint military operations only to the extent that the ban on assistance with prohibited acts is maintained.¹⁴

Paragraphs 3 and 4 of Article 21 expand on relations with states not party in the specific context of “military cooperation and operations”:

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.

¹³ See Landmine Monitor Fact Sheet, prepared by Human Rights Watch, *A Prohibition on Assistance in a Future Convention Banning Cluster Munitions: The Mine Ban Treaty Experience*, February 2008, <http://www.the-monitor.org/index.php/content/view/full/22877> (accessed October 29, 2010).

¹⁴ For a more detailed discussion of the debate surrounding the interpretation of Article 21, see Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 9-13.

4. Nothing in paragraph 3 of this Article shall authorise a State Party:
 - a. To develop, produce or otherwise acquire cluster munitions;
 - b. To itself stockpile or transfer cluster munitions;
 - c. To itself use cluster munitions; or
 - d. To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.¹⁵

Paragraph 3 clarifies that participation in joint operations is allowed. The permissibility of “mere participation” is a widely accepted principle on which states and civil society have agreed.¹⁶ Paragraph 4 identifies some of the activities not permitted during these operations. When read in light of their context and the general purpose of Article 21 and the convention, these provisions are consistent with a strong prohibition on assistance.

While clearly permitting participation in joint military operations, paragraph 3 should not be understood as encompassing military cooperation that involves assistance with prohibited acts. The paragraph does not say that states parties may participate by using, producing, transferring, or stockpiling cluster munitions, or by assisting with any of the above. Paragraph 3 requires engagement in joint operations to be “in accordance with international law,” which includes the Vienna Convention and its customary rules of treaty interpretation. The purpose of the convention, one of the guides to interpreting a treaty, is to eliminate cluster munitions and to end the suffering of cluster munition victims “for all time.”¹⁷ It would be inconsistent with that purpose to understand paragraph 3 as waiving the obligations of Article 1, including the prohibition on assistance, during joint operations. On the adoption of the text of the convention, Iceland noted that paragraph 3 “should not be read as entitling States Parties to avoid their specific obligations under the Convention for this limited purpose,” that is, for joint military operations.¹⁸

¹⁵ Convention on Cluster Munitions, art. 21(3) and (4).

¹⁶ For a discussion of mere participation in the Convention on Cluster Munitions context, see, for example, Proposition No. 7 (2008-2009) to the Odelsting, 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, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/02/norwegian-national-legislation-on-cluster-munitions.pdf> (accessed October 15, 2010), p. 9; and Steve Goose, director of the Arms Division of Human Rights Watch and co-chair of the Cluster Munition Coalition, “Dublin Diplomatic Conference on Cluster Munitions: Intervention to the Committee of the Whole on Interoperability,” May 19, 2008, <http://www.hrw.org/node/74516>. For a discussion of mere participation 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), pp. 100-102.

¹⁷ Convention on Cluster Munitions, preamble, para. 2.

¹⁸ Statement of Iceland, “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 October 29, 2010).

Paragraph 4, which specifies some activities not allowed during joint operations, should be understood as an illustrative list that reinforces the general prohibitions of the convention.¹⁹ Such a reading would accord with the intention to eliminate cluster munitions and their harm. If the list were considered exhaustive, by contrast, states parties could arguably participate in many acts of assistance that run directly counter to the convention's purpose. They could participate in planning an attack in which a state not party used cluster munitions, host foreign stockpiles, provide security for stores of the weapons, refuel vehicles transporting cluster munitions, provide transportation of cluster munitions to the battlefield, identify the targets for cluster munition attacks, or even call in the strikes. In essence, they could load the gun so long as they did not pull the trigger.

Interpreted as an exhaustive list, Article 21(4) would also directly contradict Article 21(2)'s various requirements that states parties advocate for the convention's purpose. Given that that paragraph obligates states parties to use "best efforts" to discourage use by others, paragraph 4 should not be read to permit some forms of assistance with that use.²⁰ The notion that it is an exhaustive list is even more problematic if encouragement and inducement—actions prohibited along with assistance in Article 1(1)(c) and also not included in paragraph 4—are taken into account. An article, which should have a unified and coherent purpose, cannot logically require discouragement of use in one paragraph and then by implication allow encouragement of that use in another. Paragraph 4 should therefore be understood as supporting Article 1's prohibitions, rather than excluding some of them by omission.

Several states have read paragraph 4 as an illustrative list. Ireland, which served as the host and provided the president of the final treaty negotiations, has stated that the activities "expressly enumerated in Article 21(4)" are not the only acts prohibited.²¹ Upon the convention's adoption in Dublin, Iceland said that "listing some examples in paragraph 4 cannot therefore be interpreted to allow departures in other respects."²² Also at the adoption, Norway specifically stated that Article 21 "does not create loopholes."²³ In an explanatory

¹⁹ Convention on Cluster Munitions, art. 21(4).

²⁰ *Ibid.*, art. 21(2).

²¹ Department of Foreign Affairs of Ireland, "Note on the Measures Taken by Ireland to Implement Article 21 of the Convention on Cluster Munitions," March 11, 2009, p. 1, attached to Letter from Dáithí O'Ceallaigh, ambassador, Permanent Mission of Ireland to the United Nations in Geneva, to Thomas Nash, coordinator, Cluster Munition Coalition, March 16, 2009.

²² Statement of Iceland, "Statement by the Government of Iceland upon the Adoption of the Convention on Cluster Munitions."

²³ Statement by Steffen Kongstad, ambassador of Norway, Dublin Diplomatic Conference on Cluster Munitions, May 30, 2008, <http://www.clustermunitionsdublin.ie/pdf/Norway.pdf> (accessed October 29, 2010).

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.”²⁴

Some representatives of the states that pressed for Article 21 during the Oslo Process have expressed informally to Human Rights Watch the view that assistance—even intentional or deliberate assistance—with the use, transfer, and stockpiling of cluster munitions is allowed during joint operations.²⁵ They contend that “notwithstanding the provisions of Article 1” means that paragraph 3 overrides the prohibitions laid out in the convention’s first article, except for those instances listed in paragraph 4. They also consider paragraph 4 to be an exhaustive list of activities prohibited during joint operations, which would permit states parties to engage in a wide range of other actions. As described above, such an interpretation would be incompatible with the convention’s overarching purpose and make Article 21 internally inconsistent.

In accordance with international rules of treaty interpretation, therefore, Article 21(3) and (4) should not be understood to permit states parties to assist with any action prohibited by Article 1.²⁶

²⁴ Excerpt from Proposition No. 4 (2008-2009) to the Storting, p. 23.

²⁵ Article 21 was one of the most controversial articles during the final negotiations of the convention in Dublin. Many states and the Cluster Munition Coalition argued for following the model of previous treaties, such as the Mine Ban Treaty, by including just Article 1(1)(c). They said that national declarations would be sufficient to address concerns about joint operations, as they had been in the case of the Mine Ban Treaty and five other weapons instruments. See, for example, Goose, “Intervention to the Committee of the Whole on Interoperability.” See also statements opposing inclusion of Article 21 by Argentina, Mexico, and Venezuela in “Summary Record of Tenth Session of the Committee of the Whole,” Dublin Diplomatic Conference on Cluster Munitions, CCM/CW/SR/10, May 26, 2008. Other states, primarily US allies, said that cluster munitions posed different problems than landmines because they were more likely to be used by states not party. See, for example, Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Sweden, Switzerland, and the United Kingdom, “Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations,” discussion paper distributed at the Wellington Conference on Cluster Munitions, February 18-22, 2008. Some of these states claimed to need Article 21 to continue joint operations and to protect their troops from unfair prosecution for accidental assistance. See, for example, “Summary Record of Ninth Session of the Committee of the Whole,” Dublin Diplomatic Conference on Cluster Munitions, CCM/CW/SR/9, May 23, 2008. Regardless of the motivation for the article’s inclusion, states should interpret it so that it does not undercut the humanitarian purpose of the treaty. Information on the negotiations comes from Human Rights Watch notes on the May 2008 Dublin Diplomatic Conference on Cluster Munitions as well as the sources cited.

²⁶ Other states that have expressed views on this issue similar to those of Human Rights Watch include Colombia, Ecuador, Ghana, Guatemala, Lebanon, Madagascar, Malawi, Mexico, and Slovenia. See International Campaign to Ban Landmines, *Cluster Munition Monitor 2010* (Ottawa: Mines Action Canada, 2010), <http://www.the-monitor.org/> (accessed November 1, 2010), pp. 20-21 [hereinafter *Cluster Munition Monitor 2010*].

Transit

While interoperability has attracted the most attention among the interpretive issues, states should take a strong public stand on several others. States parties should interpret the convention to prohibit transit of cluster munitions, that is, the movement of cluster munitions across, above, or through the territory and/or territorial waters of a state party.²⁷ They should understand transit as an activity banned under the prohibition on assistance because it can facilitate use, transfer, and stockpiling. For example, a state party could enable a cluster munition attack by allowing the air force of a state not party to travel through its airspace on the way to drop cluster munitions. Alternatively, states parties can treat transit as a form of transfer, which is also banned by the convention.²⁸ Regardless of the approach taken, bringing an end to the transit of cluster munitions will help achieve the convention's underlying goal of eliminating the harm caused by these weapons.

Several states parties and signatories have already clarified that they believe the convention does not permit transit. Austria and Germany ban transit in their implementation legislation.²⁹ In response to written queries from Human Rights Watch and Cluster Munition Monitor, and in other fora, Bulgaria, Burkina Faso, Colombia, Ecuador, Ghana, Lebanon, FYR Macedonia, Malawi, Malta, Mexico, Slovenia, and Zambia have all stated that they interpret the convention to proscribe transit.³⁰ Madagascar wrote that allowing transit would weaken the convention, while South Africa said that it was likely to interpret the convention as prohibiting transit.³¹ Human Rights Watch is aware of only one state—the Netherlands—that has gone on record arguing that transit of cluster munitions was not prohibited.³² Thus more support exists than not for this strong understanding of the convention.

²⁷ See Human Rights Watch and Harvard Law School International Human Rights Clinic, *Fulfilling the Ban: Guidelines for Effective National Legislation to Implement the Convention on Cluster Munitions*, June 2010, <http://www.hrw.org/node/90721>, pp. 6, 8, and 15.

²⁸ The definition of transfer is broad enough to be understood to encompass transit. Convention on Cluster Munitions, art. 2(8).

²⁹ Federal Law on the Prohibition on Cluster Munitions, *Austrian Federal Law Gazette*, no. 12/2008, as amended by *Austrian Federal Law Gazette* I, no. 41/2009, sec. 2; and *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, sec. 18(a). 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.”

³⁰ See *Cluster Munition Monitor 2010*, pp. 22-23.

³¹ Statement by Gen. Marcel Ranjeva, minister of foreign affairs of Madagascar, Convention on Cluster Munitions Signing Conference, Oslo, December 4, 2008; and Letter from Xolisa Mabhongo, chief director, UN (Political), Department of Foreign Affairs of South Africa, to Human Rights Watch, March 12, 2009.

³² Letter from Henk Swarttouw, director, Security Policy Department, Dutch Ministry of Foreign Affairs, to Human Rights Watch, February 26, 2009.

Hosting of Foreign Stockpiles

States should similarly read the provision on assistance to prohibit states parties from allowing states not party to store stockpiles of cluster munitions on their territory. This practice assists with stockpiling and potentially with use—both of which are activities banned under Article 1—and runs counter to the goal of eliminating cluster munitions. Article 3 of the convention prohibits a state party from having any stockpiles, including foreign ones, under its “jurisdiction and control.” Foreign stockpiles under a state party’s jurisdiction *or* control should also be considered prohibited.³³ The draft convention forwarded to the negotiating conference mandated destruction of stockpiles under the state party’s “jurisdiction *or* control,” thus suggesting that drafters intended states parties to have an obligation to ensure the destruction of foreign stockpiles on their territory. The final convention changed the language to “jurisdiction *and* control,” but the alteration seems to have been the result of a clerical error that was never changed back.³⁴ A few states parties do not consider foreign stockpiles to be under their jurisdiction or control. In these cases, states parties may run afoul of the ban on assistance and should insist that foreign states remove the stockpiles to be consistent with the object and purpose of the convention.

In a 2008 statement, the United Kingdom announced that although it did not consider itself legally obligated, in keeping with the convention’s spirit, it would seek the removal of US stockpiles of cluster munitions from UK territory within the eight-year deadline for stockpile destruction.³⁵ In response to letters from Human Rights Watch and in statements in other fora, several states that do not have foreign stockpiles—Bulgaria, Madagascar, Malta, and Mexico—said that they believe the Convention on Cluster Munitions prohibits states parties from allowing foreign stockpiles on their territory.³⁶

³³ Draft Cluster Munitions Convention, January 21, 2008, <http://www.clusterconvention.org/downloadablefiles/draft-cluster-convention-english-version.pdf> (accessed October 29, 2010), art. 3(2).

³⁴ Human Rights Watch conversations with member of the legal team of the president of the Dublin Diplomatic Conference on Cluster Munitions, 2009.

³⁵ Statement by Rt. Hon. Chris Bryant, House of Commons Debate, *Hansard*, March 17, 2010, Column 925, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100317/debtext/100317-0011.htm#10031743002726> (accessed September 19, 2010).

³⁶ Letter from Dr. Petio Petev, Bulgarian Ministry of Foreign Affairs, to Human Rights Watch, February 25, 2009; Statement by Gen. Marcel Ranjeva, minister of foreign affairs of Madagascar, Convention on Cluster Munition Signing Conference, Oslo, December 4, 2008; Letter from Amb. Saviour F. Borg, Permanent Mission of the Republic of Malta to the United Nations in New York, to Human Rights Watch, March 2, 2009; and Letter from Amb. Juan Manuel Gómez Robledo, Secretariat of Foreign Relations of Mexico, to Human Rights Watch, March 4, 2009.

Investment

States should also interpret the Convention on Cluster Munitions to ban investment in companies that manufacture cluster munitions or components intended for use in cluster munitions.³⁷ Investment represents a form of assistance with production, which 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 public and private funds.³⁸

Several states have prohibited investment in their implementation legislation. In 2007, Belgium became the first state to adopt a law prohibiting financial institutions, whether public or private, from investing in companies producing cluster munitions.³⁹ In their legislation implementing the convention, Luxembourg and New Zealand criminalized investment by public or private entities in companies that produce cluster munitions, and Ireland banned investment of public money.⁴⁰ France has said that its national implementation law's prohibition on assistance bans both direct and indirect financing of cluster munition production,⁴¹ while the United Kingdom's legislation bans direct financing.⁴²

³⁷ For more detailed discussion of investment issues, see IKV Pax Christi and Netwerk Vlaanderen, "Worldwide Investments in Cluster Munitions: A Shared Responsibility," April 2010, <http://www.netwerkvlaanderen.be/nl/files/documenten/campagnes/bankenwapens/Full%20Report.pdf> (accessed October 29, 2010).

³⁸ 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; and] 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.

³⁹ Human Rights Watch and Landmine Action, *Banning Cluster Munitions: Government Policy and Practice* (Ottawa: Mines Action Canada, 2009), <http://www.stopclustermunitions.org/news/?id=1534> (accessed October 29, 2010), pp. 39-40; and Loi interdisant le financement de la fabrication, de l'utilisation ou de la détention de mines antipersonnel et de sous-munitions ("Act on the prohibition of the financing of production, use and possession of antipersonnel mines and submunitions"), *Le Moniteur Belge*, April 26, 2007, p. 22122.

⁴⁰ Loi du 4 juin 2009 portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo le 3 décembre 2008 (Law of 4 June 2009 on the implementation of the Convention on Cluster Munitions, opened for signature in Oslo on 3 December 2008), *Memorial Journal Officiel du Grand-Duché de Luxembourg*, A-no. 497, 2009, art. 3; Cluster Munitions Prohibition Act 2009, Public Act 2009 no. 68, sec. 10(2) (New Zealand); and Cluster Munitions and Anti-Personnel Mines Act 2008, no. 20-2008, sec. 12-13 (Ireland).

⁴¹ Statement by Hubert Falco, secretary of state for defense, Summary Report of the National Assembly, XIII Legislature, Extraordinary Session of 2009-2010, July 6, 2010, http://www.assemblee-nationale.fr/13/cr/2009-2010-extra/20101008.asp#INTER_o (accessed October 29, 2010).

⁴² Statement by Rt. Hon. Chris Bryant, House of Commons Debate, *Hansard*, Column 2WS, December 7, 2009, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091207/wmstext/91207m0001.htm#0912073000100> (accessed October 29, 2010).

Moving in that direction, the Swiss parliament adopted in early 2010 two motions requiring the government to draft legislation that prohibits investment in the production of all banned weapons, including cluster munitions.⁴³

Besides passing legislation, states have expressed support for a ban on investment through policy and practice. In response to inquiries from Human Rights Watch and Cluster Munition Monitor, and in other fora, Bulgaria, Colombia, France, Guatemala, Lebanon, Madagascar, Malawi, Malta, Mexico, Rwanda, the United Kingdom, and Zambia indicated that they believe investment in production is prohibited.⁴⁴ Demonstrating state practice, government pension funds in Ireland, New Zealand, Norway, and Sweden divested before or immediately after adoption of the convention.⁴⁵ Finally, financial institutions and investors have taken action to stop investment in cluster munition production in Argentina, Belgium, Canada, Denmark, France, Germany, Japan, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom, and elsewhere.⁴⁶

Retention of Cluster Munitions

A final interpretive issue that is not tied to the prohibition on assistance involves retention of cluster munitions and submunitions. Article 3(6) allows states parties to retain or acquire the weapons “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,” such as armor to protect troops and equipment from the weapons.⁴⁷ Human Rights Watch opposed the inclusion of this provision because such exceptions are not clearly needed and leave room for abuse. Clearance organizations accredited by the United Nations are not known to use live submunitions for training; alternatives exist, such as using simulated submunition explosions.⁴⁸ 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.

⁴³ “Financement des armes interdites: Le Conseil national soutient l’interdiction des investissements abjects dans la production des armes interdites par la Suisse,” (Financing of banned weapons: The National Council supports the ban on abject investment in production of weapons banned by Switzerland) Handicap International press release, March 10, 2010.

⁴⁴ See *Cluster Munition Monitor 2010*, pp. 23-24; and Human Rights Watch and Landmine Action, *Banning Cluster Munitions*, p. 20.

⁴⁵ *Cluster Munition Monitor 2010*, p. 23.

⁴⁶ *Ibid.*

⁴⁷ Convention on Cluster Munitions, art. 3(6).

⁴⁸ Cluster Munition Coalition, “Policy Papers for the Dublin Diplomatic Conference on Cluster Munitions,” 2008, paper 10.

Article 3(6) should not be seen as a requirement or encouragement to retain cluster munitions or submunitions. Instead, states parties should interpret the provision on retention narrowly. It requires that the “submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.”⁴⁹ For most states parties, the minimum number absolutely necessary should be zero. Indeed, most of the stockpilers that have so far joined the convention and expressed a view on this issue have chosen not to retain any. These states include Afghanistan, Angola, Austria, Colombia, Honduras, Moldova, Montenegro, Norway, Portugal, and Slovenia.⁵⁰

States parties that still believe they must retain some submunitions should keep the number as low as possible and review its necessity every year. In addition, they should strictly comply with the requirement to report annually on the “planned and actual use ... and their type, quantity and lot numbers” and, if the states transfer retained munitions, the recipient state party.⁵¹ Such transparency provides a safeguard against abuse.

Conclusion

To ensure that the Convention on Cluster Munitions fulfills its promise, states must interpret all provisions in a manner that upholds the convention’s absolute prohibitions. They should read the prohibition on assistance to apply under all circumstances, including joint military operations. They should understand the prohibition on assistance also to encompass transit, hosting of foreign stockpiles, and investment. In addition, states should decline to retain cluster munitions and destroy *all* their stockpiles as soon as possible. In interpreting these and other provisions of the convention, states should treat the convention’s underlying purpose—to eliminate cluster munitions and the harm they cause—as their guide.

⁴⁹ Convention on Cluster Munitions, art. 3(6).

⁵⁰ *Cluster Munition Monitor 2010*, p. 19.

⁵¹ Convention on Cluster Munitions, art. 3(8).