



# STAYING STRONG

Key Components and Positive Precedent for Convention  
on Cluster Munitions Legislation

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**IHRC**

INTERNATIONAL HUMAN RIGHTS CLINIC  
HUMAN RIGHTS PROGRAM AT HARVARD LAW SCHOOL



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# Staying Strong

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## Summary

States parties to the Convention on Cluster Munitions should redouble their efforts to promote expeditious adoption of strong national implementation legislation. Such legislation ensures that the obligations articulated in the convention are realized at a national level. For many states, legislation is also a prerequisite of ratification or accession. Moreover, Article 9 obligates states parties to adopt measures to implement the convention's prohibitions and positive obligations, and legislation is the most binding and enduring means of doing so.

The number of statutes implementing the Convention on Cluster Munitions has grown since 2008 but remains inadequate. As of August 2014, the convention had 84 states parties and 29 signatory states that had not yet become party. Of the states parties, 22 had fulfilled their Article 9 obligations by passing national implementation legislation (see Appendix I for complete list of laws), and at least 26 others had expressed the view that their pre-existing laws were sufficient to implement the convention. At least 19 states parties in addition to several signatory states were considering or drafting implementation legislation; Canada was debating a particularly contentious bill that would permit it to ratify the convention.<sup>1</sup> The activity surrounding national legislation is a welcome development, yet if the convention is to achieve its goals, more states need to adopt laws.

This report seeks to facilitate the passage of implementation legislation that is not only timely but strong. The report identifies essential components of such legislation, explains the rationale behind them, and examines exemplary provisions of existing legislation and model laws. It updates and expands on the 2010 report *Fulfilling the Ban: Guidelines for Effective National Legislation to Implement the Convention on Cluster Munitions* by Human Rights Watch and Harvard Law School's International Human Rights Clinic (IHRC).<sup>2</sup> Since

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<sup>1</sup> International Campaign to Ban Landmines-Cluster Muniton Coalition (ICBL-CMC), *Cluster Muniton Monitor 2014*, August 2014, <http://www.the-monitor.org/index.php/LM/Our-Research-Products/Cluster-Muniton-Monitor>, p. 25. For a complete list of the 22 laws as well as two model laws and proposed legislation from Canada and Spain, see Appendix I. Appendix I also includes full citation information for each legislative source.

<sup>2</sup> Human Rights Watch and Harvard Law School's 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/sites/default/files/related\\_material/2010%2C%20June%2C%20Arms%2C%20Clusters%2C%20Fulfilling%20the%20Ban.pdf](http://www.hrw.org/sites/default/files/related_material/2010%2C%20June%2C%20Arms%2C%20Clusters%2C%20Fulfilling%20the%20Ban.pdf).

the publication of *Fulfilling the Ban*, the number of laws has more than doubled so fresh analysis is needed.

The new report begins with an assessment of two model statutes. The International Committee of the Red Cross (ICRC) model law, tailored for common law countries, and the New Zealand model law, tailored for non-affected states, both serve as valuable foundations upon which states can build. Our analysis identifies not only the strengths of the model laws but also the areas in which states can supplement them by drawing from our recommended statutory components and existing legislative precedent.

The report then introduces the key components of strong implementation legislation and explains how each component furthers compliance with the convention's aims and obligations. Because the report seeks to provide states with tools that can be adapted to different national contexts and legal systems, it provides general principles rather than specific model language. With respect to each component, the report analyzes the existing body of legislation, model laws, and proposed legislation and highlights particularly promising statutory precedent. It also critiques problematic provisions, especially those that deal with relations with states not party. In some cases, the report recommends a particular means of implementing the convention, while in others it offers a range of options that equally serve the convention's object and purpose.

The report's discussion of the components of legislation is divided into four parts:

1. negative obligations,
2. the prohibition on assistance and related interpretive issues,
3. positive obligations, and
4. breadth of coverage.

In Appendix II, the report provides a quick reference tool that highlights key components and exemplary statutory language. The positions set forth in this report are shared by the Cluster Munition Coalition.

States should adopt national legislation that addresses each of this report's four parts. First, implementation legislation should establish firm and unequivocal prohibitions on the use, development, transfer, and stockpiling of cluster munitions and on assistance with any of these prohibited activities. These prohibitions should be enforced with penal sanctions and should include no exceptions for training or development of counter-measures. Second, legislation should explicitly establish that its prohibitions remain in full force even during joint military operations with states not party. Legislation should make clear that its prohibition on assistance makes it unlawful to host foreign stockpiles, permit the transit of cluster munitions across national territory, or invest in producers of cluster munitions or cluster munitions components. Third, a state party should use its implementation legislation to express a clear intention to meet its positive obligations under the convention, including the obligations to destroy its stockpiles, clear its territory of unexploded submunitions, and provide assistance to victims of cluster munitions. Even currently unaffected states should adopt legislation that commits them to meeting their positive obligations should they become affected by cluster munitions in the future. Finally, implementation legislation should have a wide breadth of coverage by applying to explosive bomblets, imposing liability on corporations, and providing for extraterritorial jurisdiction. National legislation that includes such strong provisions is critical to establishing a framework for implementation that is clear, binding, and long lasting.



## Recommendations

To maximize the effectiveness of the Convention on Cluster Munitions, ensure realization of its obligations, reinforce its norms, and promote universalization, Human Rights Watch and IHRC call on states to:

- Move quickly to adopt strong legislation that implements the convention.
- Ensure implementation of the convention's absolute prohibitions by enforcing them with penal sanctions, such as imprisonment and/or fines.
- Make clear that the convention's prohibition on assistance applies under all circumstances, including joint military operations, and extends to hosting of foreign stockpiles, transit, and investment in production.
- Incorporate the convention's positive obligations into national legislation, even if the implementing state is currently unaffected.
- Pass implementation legislation that applies to explosive bomblets, provides for corporate liability, and establishes extraterritorial jurisdiction.

# I. Overview of the Model Laws

This report draws guidance from the model laws produced by the International Committee of the Red Cross and New Zealand.<sup>3</sup> The ICRC published its model legislation for common law states in December 2008, just seven months after the adoption of the Convention on Cluster Munitions. New Zealand presented its model law in September 2011, at the Second Meeting of States Parties, for suggested use by “small States that do not possess cluster munitions and are not contaminated by them.”<sup>4</sup> Unlike this report, which focuses on the components of strong legislation, both model laws provide sample language for the implementation of the convention. They are useful sources for states seeking to fulfill their obligations under Article 9 of the Convention on Cluster Munitions.<sup>5</sup>

The ICRC and New Zealand model laws robustly implement the treaty’s negative obligations. The ICRC model law prohibits:

- using cluster munitions;
- directly and indirectly developing, producing, and acquiring cluster munitions;
- directly and indirectly possessing, retaining, and stockpiling cluster munitions;
- directly and indirectly transferring cluster munitions; and
- assisting, encouraging, or inducing anyone to engage in any prohibited activity.<sup>6</sup>

The ICRC’s emphasis on direct and indirect action is especially notable, and states should include those terms in their national implementation legislation. New Zealand’s model law similarly prohibits: use; development, production, and acquisition; possession, retention,

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<sup>3</sup> The ICRC and New Zealand model laws are available, respectively, at: [http://www.clusterconvention.org/files/2013/03/model\\_law\\_clusters\\_munitions.pdf](http://www.clusterconvention.org/files/2013/03/model_law_clusters_munitions.pdf) and [http://www.clusterconvention.org/files/2013/03/Model-Legislation\\_Cluster-Munitions-Act-2011.pdf](http://www.clusterconvention.org/files/2013/03/Model-Legislation_Cluster-Munitions-Act-2011.pdf). For full citation information for these model laws as well as the national statutes, see Appendix I.

<sup>4</sup> New Zealand Model Legislation, cover page.

<sup>5</sup> “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.” Convention on Cluster Munitions, adopted May 30, 2008, Dublin Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, entered into force August 1, 2010, art. 9.

<sup>6</sup> ICRC Model Legislation, § 3(1)-(3).

and stockpiling of cluster munitions; direct and indirect transfer; and assistance, encouragement, or inducement.<sup>7</sup>

With respect to the prohibition on assistance and related interpretive issues, implementation legislation can provide more clarity than what is outlined in the model laws. The ICRC mentions in a footnote that states may wish to consider including a section in their legislation on Article 21 of the convention, which addresses assistance in the context of joint military operations, but it stops short of suggesting what kind of language might be employed.<sup>8</sup> This approach is akin to that taken by some states that adopt strong prohibitions on assistance without addressing interoperability. While not making explicit that the convention’s prohibitions remain in force even during joint military operations, the lack of exceptions to the ICRC’s prohibition on assistance could be interpreted as such. The New Zealand model law states in its optional annex that: “A member of the Armed Forces does not commit an offence against section 5 [enumerating prohibited acts] merely by engaging, in the course of his or her duties, in operations, exercises or other military activities with the armed forces of a State that is not a party to the Convention.”<sup>9</sup> States may take this approach to deal with interoperability while not creating an exception for joint military operations. As discussed below, Human Rights Watch and IHRC encourage states to declare explicitly—in legislation and/or policy statements—that all of the prohibitions of the convention stand regardless of the approach to interoperability.

New Zealand’s model law is fairly instructive with respect to interpretive issues related to the prohibition on assistance, namely transit and investment, although it does not address the hosting of foreign stockpiles. According to its cover page, the model law prohibits transit, that is, the movement of cluster munitions across, above, or through a state party’s territory and/or territorial waters.<sup>10</sup> In its text, the model law prohibits investment.<sup>11</sup> Nevertheless, this model law would be more effective if it explicitly banned transit and foreign stockpiles in its body. The ICRC model law does not address any of the three interpretive issues.

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<sup>7</sup> New Zealand Model Legislation, § 5(1).

<sup>8</sup> ICRC Model Legislation, § 6, n. 2.

<sup>9</sup> New Zealand Model Legislation, annex.

<sup>10</sup> *Ibid.*, cover page (“The present model ... meets the obligations applicable to those States under the Convention on Cluster Munitions (2008) to prohibit future possession of cluster munitions and to outlaw trade in them, or their transfer or transit.”).

<sup>11</sup> *Ibid.*, § 5(2) (“A person commits an offence who provides or invests funds with the intention that those funds be used, or knowing that they are to be used, in the development or production of cluster munitions.”).

The ICRC model law establishes a solid foundation for national implementation of the convention's positive obligations. It requires the collection and destruction of all stockpiled cluster munitions and includes provisions related to clearance, assistance to victims, transparency, and compliance.<sup>12</sup> These positive obligations are critical components of any humanitarian disarmament treaty.

New Zealand's model law is limited in terms of positive obligations. This omission is somewhat understandable because, as indicated on the model law's cover page, it is intended for small states that do not possess cluster munitions and are not contaminated by them; these states currently have no need to clear cluster munition remnants or assist victims. Even these states, however, could become contaminated by cluster munitions or become hosts to victims at some point in the future. Therefore, they should enshrine their positive obligations in implementation legislation.

Areas in which legislation implementing the positive obligations could be even more comprehensive than either model law include international cooperation and assistance and promotion of the convention's universalization. Although the model laws do not preclude the use of administrative measures to fulfill such obligations, Human Rights Watch and IHRC believe that legislation is preferable because it is more likely to produce a long-lasting commitment and contribute to the spread of the convention's norms.

Finally, the model laws provide some guidance on breadth of coverage issues. Explosive bomblets are munitions similar to submunitions but are released by a dispenser affixed to an aircraft.<sup>13</sup> The ICRC model statute specifically applies to both cluster munitions and explosive bomblets with respect to prohibitions, the obligation to destroy stockpiles, and the requirement that any individual possessing prohibited weapons notify the proper authority.<sup>14</sup> The New Zealand model law does not explicitly cover explosive bomblets. Both model laws permit liability to attach to corporations.<sup>15</sup> In addition, both model laws mandate extraterritorial application of the prohibitions.<sup>16</sup> In a footnote, the ICRC explains

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<sup>12</sup> ICRC Model Legislation, §§ 8, 9, 10, 13, and 12.

<sup>13</sup> Convention on Cluster Munitions, art. 2(13)-(14). Explosive bomblets pose the same humanitarian risks as cluster munitions because they have an area effect and are prone to failure.

<sup>14</sup> ICRC Model Legislation, §§ 3(4), 8, and 7.

<sup>15</sup> *Ibid.*, §4(2); New Zealand Model Legislation, §9(2).

<sup>16</sup> ICRC Model Legislation, § 5; New Zealand Model Legislation, § 9(2).

that Article 9 of the Convention on Cluster Munitions does not explicitly require extraterritorial jurisdiction for prohibited acts, but that with respect to other prohibited weapons (e.g., antipersonnel mines and chemical weapons) many states parties to the relevant conventions have provided for extraterritorial jurisdiction; the ICRC encourages states to do so here as well.<sup>17</sup>

The model laws produced by the ICRC and New Zealand provide valuable language on which national legislation implementing the Convention on Cluster Munitions can build. Where these models have gaps, however, states should look to the components of strong law identified below and to exemplary provisions of existing statutes.

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<sup>17</sup> ICRC Model Legislation, § 5, n. 1.

## II. Negative Obligations

This part discusses the prohibitions on use, production, transfer, and stockpiling of cluster munitions as well as the imposition of penal sanctions on violators.

### Prohibition on Use

National implementation legislation should:

- prohibit the use of cluster munitions.<sup>18</sup>

#### *Purpose*

Implementation legislation should ban the use of cluster munitions because 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 fulfills the overarching objective found in the convention's 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."<sup>19</sup> The prohibition on use, like all of the convention's prohibitions, should apply under all circumstances. In other words, the convention's prohibitions, including the prohibition on use, should apply in situations of international and non-international armed conflict and in times of peace.

#### *Existing Precedent*

The necessity of including an absolute prohibition on use when implementing the Convention on Cluster Munitions is undisputed. All states with existing legislation, as well as Canada's proposed legislation and both model laws, prohibit the use of cluster munitions.<sup>20</sup>

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<sup>18</sup> This component is based on Convention on Cluster Munitions, art. 1(1)(a): "Each State Party undertakes never under any circumstances to: (a) Use cluster munitions."

<sup>19</sup> *Ibid.*, pmb., ¶ 2.

<sup>20</sup> Although Japan, Liechtenstein, and Switzerland do not explicitly mention a prohibition on use in their implementation legislation, all three states treat the use of cluster munitions as unacceptable and unlawful. In Japan's case, use is controlled by the Explosive Control Act, Dajokan Act No. 38, 1884, and the Explosives Control Law, Law No. 149, 1948. A Ministry of Foreign Affairs official confirmed for Human Rights Watch that activities prohibited by the convention other than production and stockpiling are banned or regulated in separate Japanese laws. Email from Chisa Sato, Conventional Arms Division, Japanese Ministry of Foreign Affairs, to Bonnie Docherty, Human Rights Watch, June 17, 2010. Switzerland has stated that a prohibition on use results from the direct application of the convention itself and that penal sanctions for violation attach under other legislation. See "Message relatif à

## Prohibition on Development, Production, and Other Forms of Acquisition

National implementation legislation should:

- prohibit the direct and indirect development, production, and acquisition in other forms of cluster munitions;<sup>21</sup> and
- require the conversion or decommissioning of production facilities for cluster munitions.<sup>22</sup>

### *Purpose*

In accordance with Article 1(1)(b) of the convention, implementation legislation should prohibit the development and production of cluster munitions.<sup>23</sup> This prohibition is necessary to prevent the creation of new cluster munitions. To be comprehensive and thoroughly consistent with the convention, implementation legislation should also prohibit a state party from acquiring cluster munitions in other ways, such as through capture of stockpiles or confiscation from civilians.<sup>24</sup> With each of the above prohibitions, legislation should specify, as the convention requires, that the activities be banned whether they are direct or indirect.<sup>25</sup>

A statutory obligation to convert or decommission production facilities can help ensure that future production becomes impossible. Although the convention does not explicitly mandate conversion or decommissioning, Article 7 requires that states report on their progress in these areas and thus implicitly imposes a duty.<sup>26</sup>

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l'approbation de la Convention sur les armes à sous-munitions ainsi qu'à la modification de la loi sur le matériel de guerre," June 6, 2011, <http://www.admin.ch/opc/fr/federal-gazette/2011/5495.pdf> (accessed June 27, 2014), pp. 5531-5532; Swiss Criminal Code of December 1937 (status as of January 1, 2014), <http://www.admin.ch/opc/en/classified-compilation/19370083/index.html> (accessed June 27, 2014), art. 264j. Given that the Customs Union Treaty between Liechtenstein and Switzerland stipulates that "the development, manufacture, purchase, acquisition, transfer, import, export, transport, and stockpiling and possession of cluster munitions is governed by Swiss legislation in Liechtenstein," it would be incongruous if Switzerland's prohibition on use did not extend to Liechtenstein as well. ICBL-CMC, *Cluster Munition Monitor 2013*, September 2013, <http://www.the-monitor.org/cmm/2013/pdf/2013%20Cluster%20Munition%20Monitor.pdf> (accessed June 27, 2014), p. 33.

<sup>21</sup> This component is based on Convention on Cluster Munitions, art. 1(1)(b): "Each State Party undertakes never under any circumstances to: (b) Develop, produce, [or] otherwise acquire, ... directly or indirectly, cluster munitions."

<sup>22</sup> This component is based on *ibid.*, art. 7(1)(d): "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."

<sup>23</sup> *Ibid.*, art. 1(1)(b).

<sup>24</sup> 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, 2004), p. 85.

<sup>25</sup> Convention on Cluster Munitions, art. 1(1)(b).

<sup>26</sup> *Ibid.*, art. 7(1)(d).



## *Existing Precedent*

All existing laws, as well as Canada’s proposed legislation and both model laws, prohibits development, production (sometimes called “manufacture”), and/or acquisition of cluster munitions.<sup>27</sup> The statutes of Guatemala, Hungary, and Samoa and the ICRC model law extend their prohibitions to both direct and indirect development, production, and acquisition.<sup>28</sup> Similarly, Italy’s legislation prohibits development, production, and acquisition in any way.<sup>29</sup> A proposed Spanish law would also ban direct or indirect development, production, and acquisition of cluster munitions; Spain’s Congress of Deputies has adopted the law, an amendment to the country’s Mine Ban Treaty implementation legislation, but it is waiting for approval by the Senate.<sup>30</sup>

Strong legislation adopts a broad definition of the prohibited activities for maximum coverage. For example, the United Kingdom defines “acquire” as “buy, hire, borrow or accept as a gift,” and Spain defines “development” as any activity consistent with the creation of new cluster munitions or the modification of pre-existing cluster munitions.<sup>31</sup> A Ministry of Foreign Affairs analysis of Norway’s law specifies that “production” includes the production of cluster munition components “[i]f it is clear that the component can only be used in the production of cluster munitions.”<sup>32</sup> The ministry submitted this document to parliament prior to the law’s adoption to explain its intended meaning.

Some states commendably go beyond development, production, and acquisition of actual cluster munitions in their prohibitions. For example, the Czech Republic prohibits acquisition of patent rights for the development of technologies designed to manufacture cluster munitions or their components.<sup>33</sup>

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<sup>27</sup> Liechtenstein’s statute alone does not expressly prohibit production, manufacture, or development, but only because, as noted earlier, the Customs Union Treaty between Liechtenstein and Switzerland already specifies that Switzerland’s prohibition on development, manufacture, purchase, and acquisition applies in Liechtenstein. See ICBL-CMC, *Cluster Munition Monitor 2013*, p. 33.

<sup>28</sup> Guatemala Legislation, art. 3(1) (“*Se prohíbe el ... desarrollo, producción, adquisición ... directa o indirectamente de una o varias municiones en racimo.*”); Hungary Legislation, § 3, art. 1(1)(b); Samoa Legislation, § 6(1)(b) (specifying that “a person who directly or indirectly ... develops, produces, or otherwise acquires, a cluster munition” commits an offense). See also ICRC Model Legislation, § 3(2)(a)–(b).

<sup>29</sup> Italy Legislation, art. 7(1) (“*Chiunque impiega ... sviluppa, produce, acquisisce in qualsiasi modo ... e’ punito.*”).

<sup>30</sup> Spain Proposed Legislation, art. 2(1).

<sup>31</sup> United Kingdom Legislation, § 3(4); Spain Legislation, art. 567(2) (defining “*desarrollo de ... municiones en racimo*” as “*actividad consistente en la ... creación de una nueva ... munición en racimo o la modificación de una preexistente*”).

<sup>32</sup> Proposition No. 7 (2008–2009) to the Odelsting on a Bill relating to the implementation of the Convention on Cluster Munitions in Norwegian law (Norway Proposition No. 7), ¶ 4.2.2.

<sup>33</sup> Czech Republic Legislation, § 2(3) (“*Zakazuje se používat a převádět patentová práva na výrobu kazetové munice nebo jejich součástí a práva k patentům na výrobní postupy určené pro výrobu kazetové munice nebo jejich součástí.*”).

Although no existing legislation expressly provides for the conversion or decommissioning of production facilities, the statutes of Hungary, which incorporates the convention verbatim, and France require reporting on conversion and decommissioning pursuant to Article 7 of the convention, thus implying that these activities are mandatory.<sup>34</sup> Spain's proposed legislation similarly obliges producers to report on conversion or decommissioning.<sup>35</sup> Other states without statutory reporting requirements have, in accordance with the convention, included information on the topic in their annual Article 7 reports.<sup>36</sup> Austria permits courts to order owners to destroy or modify machinery and equipment used to manufacture cluster munitions.<sup>37</sup>

The convention creates an exception to the prohibition on acquisition when acquisition is necessary for training in detection, clearance, or destruction techniques, or for developing counter-measures against cluster munitions, such as armor to protect troops and equipment from the weapons.<sup>38</sup> (As discussed below, there is a similar exception to the prohibitions on stockpiling and transfer.) Legislation that does include this narrow exception should oblige anyone seeking to acquire cluster munitions to go through a rigorous high-level approval process. The Cook Islands, New Zealand, and Samoa require written authorization from the relevant minister.<sup>39</sup> Furthermore, any exception should be as limited as possible. The Cook Islands, for example, specify that the number of cluster munitions acquired pursuant to this exception must not “exceed the minimum number absolutely necessary for the purpose for which [the minister’s permission] is given.”<sup>40</sup>

For most states parties, the minimum number absolutely necessary should be zero. Clearance organizations accredited by the United Nations are not known to use live submunitions for training; alternatives exist, such as using simulated submunition

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<sup>34</sup> Hungary Legislation, § 3, art. 7(1)(d); France Legislation, art. L. 2344-5 (requiring reporting on “[l]’état des programmes de reconversion ou de mise hors service des installations de production d’armes à sous-munitions”).

<sup>35</sup> Spain Proposed Legislation, art. 3(2).

<sup>36</sup> ICBL-CMC, *Cluster Munition Monitor 2014*, p.16 (“A number of States Parties have provided information in their Article 7 transparency reports on the conversion or decommissioning of production facilities, including France, Japan, Sweden, and Switzerland.”).

<sup>37</sup> Austria Legislation, § 6(2) (“Maschinen und Anlagen zur Herstellung der dem Verbot des § 2 unterliegenden Streumunition können vom Gericht für verfallen erklärt werden. Es ist auf Kosten des Eigentümers sicherzustellen, dass diese nicht weiter entgegen dem Verbot des § 2 verwendet werden können.”).

<sup>38</sup> Convention on Cluster Munitions, art. 3(6).

<sup>39</sup> Cook Islands Legislation, § 9(1); New Zealand Legislation, § 15(1); Samoa Legislation, § 12(1).

<sup>40</sup> Cook Islands Legislation, § 9(2). Similarly narrowing language appears in Ireland Legislation, § 7(3); New Zealand Legislation, § 15(2)–(3); Samoa Legislation, § 12(2)–(3).

explosions.<sup>41</sup> At least 36 states parties have expressed the view that retention of cluster munitions for research and training purposes is not necessary, and acquisition leads to retention.<sup>42</sup> Acquisition of any number of cluster munitions goes against the absolute nature of the ban, and it creates the danger that a state that chooses to violate its obligations could readily transfer the weapons to a state not party or a non-state actor, or even use any that are left undestroyed.

## Prohibition on Transfer

National implementation legislation should:

- prohibit the direct and indirect transfer of cluster munitions to anyone.<sup>43</sup>

### *Purpose*

Pursuant to Article 1(1)(b) of the convention, implementation legislation should prohibit transfer.<sup>44</sup> Although the precise meaning of transfer has been debated, 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.<sup>45</sup> The ban on transfer should be a prohibition on transfer to anyone, including states parties, states that have not joined the convention, and non-state actors. 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 and clearly defining it to encompass transit, or, as discussed below, by prohibiting transit as a form of assistance. As with the prohibitions on development, production, and other forms of acquisition, national legislation should ban transfer whether it is direct or indirect.

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<sup>41</sup> CMC, “Policy Papers for the Dublin Diplomatic Conference on Cluster Munitions,” 2008, paper 10.

<sup>42</sup> See ICBL-CMC, *Cluster Munition Monitor 2014*, p. 24.

<sup>43</sup> This component 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.”

<sup>44</sup> *Ibid.*

<sup>45</sup> The Convention on Cluster Munitions defines transfer ambiguously as “involv[ing], in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions.” A commentary on the Mine Ban Treaty discusses the debate over the definition of transfer in the context of that treaty, which defines the term in the same way as the Convention on Cluster Munitions. There is no single interpretation because some states contend the two phrases of the definition are cumulative and others argue they are not. The commentary concludes, however, “The preponderance of State practice appears to favour a broad interpretation of the term ‘transfer,’” in other words the one advocated for in this report. Maslen, *Commentaries on Arms Control Treaties: Volume 1*, pp. 87-90.

## *Existing Precedent*

All states with implementation legislation, as well as Canada in its proposed legislation and both model laws, prohibit the transfer of cluster munitions.<sup>46</sup> At least four statutes contain definitions of “transfer” that explicitly prohibit both physical transfer and legal transfer of title.<sup>47</sup> For example, New Zealand defines “transfer” to include “(i) importation into, and exportation from, New Zealand; and (ii) the transfer of title to, and control over, cluster munitions.”<sup>48</sup> Similarly, the United Kingdom specifies that a person “transfers a prohibited munition if the person—(a) disposes of it, (b) moves it into or from the United Kingdom, or (c) enters into a contract to do anything mentioned in paragraph (a) or (b).”<sup>49</sup>

States should also ensure that legislation prohibits direct and indirect transfer. Guatemala, Hungary, and Italy, as well as Spain’s proposed legislation and both model laws, explicitly state that the prohibition on transfer extends to both direct and indirect transfer.<sup>50</sup>

The convention creates an exception to the prohibition on transfer of cluster munitions for training in detection, clearance, or destruction techniques, or for developing counter-measures against cluster munitions.<sup>51</sup> As with exceptions to the prohibition on acquisition, however, legislation that does include this narrow exception should require a rigorous high-level approval process.<sup>52</sup> For example, Japan requires anybody importing cluster munitions to obtain a governmental certification and to import only from states parties to the convention.<sup>53</sup> Furthermore, any exception should be as limited as possible

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<sup>46</sup> Japan’s legislation does not include an express ban on transfer, but transfer is covered by the Foreign Exchange and Foreign Trade Law, Law No. 228, 1949, art. 52. A Ministry of Foreign Affairs official confirmed for Human Rights Watch that the prohibition on transfer is covered by other legislation. Email from Sato, June 17, 2010.

<sup>47</sup> New Zealand Legislation, § 5(1); Cook Islands Legislation, § 2; Samoa Legislation, § 2; United Kingdom Legislation, § 3(3).

<sup>48</sup> New Zealand Legislation, § 5(1).

<sup>49</sup> United Kingdom Legislation, § 3(3).

<sup>50</sup> Guatemala Legislation, art. 3(1) (“*Se prohíbe el ... transferencia directa o indirectamente de una o varias municiones en racimo.*”); Hungary Legislation, § 3, art. 1(b) (making it a criminal offense to “transfer to anyone, directly or indirectly, cluster munitions”); Italy Legislation, art. 7(1) (“*Chiunque ... trasferisce, direttamente o indirettamente, munizioni a grappolo o parti di esse ... e’ punito.*”). See also Spain Proposed Legislation, art. 2(1) (“*Quedo prohibido el ... transferencia o exportación a cualquiera, direct o indirecta mente de las ... municiones en racimo.*”); ICRC Model Legislation, § 3(2)(d) (“[N]o person shall, directly or indirectly ... transfer cluster munitions to anyone.”); New Zealand Model Legislation, § 5(1)(d) (specifying that anybody who “[t]ransfers a cluster munition, directly or indirectly, to another person” commits an offense).

<sup>51</sup> Convention on Cluster Munitions, art. 3(7).

<sup>52</sup> For example, New Zealand and Samoa require that anybody transferring cluster munitions for training, research, or counter-measure development obtain written authorization from the relevant minister. See New Zealand Legislation, § 15(1); Samoa Legislation, § 12(1).

<sup>53</sup> See Japan Legislation, art. 10(1)–(2). Australia’s exception similarly covers transfer only to other states parties to the convention. See Australia Legislation, § 72.40(1).

and should permit transfer of only the minimum number of cluster munitions absolutely necessary.<sup>54</sup>

## Prohibition on Stockpiling

National implementation legislation should:

- prohibit the direct and indirect stockpiling of cluster munitions.<sup>55</sup>

### *Purpose*

To implement Article 1(1)(b) of the convention fully, national legislation should prohibit stockpiling. This prohibition aims to eliminate cluster munitions from national arsenals and thus states' ability to use the weapons. Legislation should apply to both direct and indirect stockpiling and should oblige a state party not only to cease stockpiling itself but also, as discussed further below, to refuse to host foreign stockpiles on its territory.

### *Existing Precedent*

All existing statutes, as well as Canada's proposed legislation and both model laws, prohibit the retention, possession, storage, and/or stockpiling of cluster munitions.<sup>56</sup> Guatemala, Hungary, and Samoa, as well as Spain's proposed legislation and the ICRC model law, prohibit both direct and indirect stockpiling, and the Norwegian government's analysis of Norway's law indicates that its prohibition is also intended to apply to direct and indirect stockpiling.<sup>57</sup> The Czech Republic goes further, prohibiting the stockpiling of cluster munition components.<sup>58</sup>

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<sup>54</sup> See, for example, Ireland Legislation, § 7(3). Similarly narrowing language appears in New Zealand Legislation, § 15(2)–(3); Samoa Legislation, § 12(2)–(3); and Spain Proposed Legislation, art. 5.

<sup>55</sup> This component is based on Convention on Cluster Munitions, art. 1(1)(b): "Each State Party undertakes never under any circumstances to: (b) ... stockpile, [or] retain ..., directly or indirectly, cluster munitions."

<sup>56</sup> Liechtenstein's statute alone does not expressly prohibit stockpiling and possession, but only because, as noted earlier, the Customs Union Treaty between Liechtenstein and Switzerland already specifies that Switzerland's prohibition on those activities applies in Liechtenstein. See ICBL-CMC, *Cluster Munition Monitor 2013*, p. 33.

<sup>57</sup> Guatemala Legislation, art. 3(1) (prohibiting "*conservación ... directa o indirectamente*"); Hungary Legislation, § 3, art. 1(1)(b); Samoa Legislation, § 6(1)(c). See also Spain Proposed Legislation, art. 2(1); ICRC Model Legislation, § 3(2)(c); Norway Proposition No. 7, ¶ 4.2.4 (explaining that the statute's prohibition on stockpiling was designed to apply to "actual stockpiling" and "facilitating stockpiling").

<sup>58</sup> Czech Republic Legislation, § 2(2)(b) ("*Nestanoví-li tento zákon jinak, zakazuje se ... nabývat, vlastnit, držet, skladovat a shromažďovat kazetovou municí nebo její součástky.*").

Strong legislation does not permit states parties to retain cluster munitions either for training in detection, clearance, or destruction or for development of counter-measures to defend against cluster munitions, even though the convention allows such an exception.<sup>59</sup> As discussed above, there is no need for such an exception; Austria, Hungary, and Japan, whose statutes contain this exception, for example, have expressly declined to retain cluster munitions.<sup>60</sup> According to the Cluster Munition Monitor, at least 36 States Parties have expressed their view that there is no need to retain any live cluster munitions or explosive submunitions for training or research in detection, clearance, and destruction techniques, or for the development of counter-measures.<sup>61</sup> As with the exceptions to the prohibitions on acquisition and transfer, however, legislation that does include this narrow exception should require that anybody possessing cluster munitions go through a rigorous high-level approval process.<sup>62</sup> It should also specify that the number of cluster munitions retained pursuant to this exception should be the minimum number absolutely necessary for the intended purposes.<sup>63</sup>

## Penal Sanctions

National implementation legislation should:

- impose penal sanctions on all natural and legal persons who knowingly and willfully violate the legislation.<sup>64</sup> The penalties should be at least as strong as those imposed for violations of the Mine Ban Treaty.

### *Purpose*

As required by Article 9 of the convention, implementation legislation should impose criminal sanctions in order to punish those who violate its prohibitions and deter others from doing so. Legislation should stipulate a period of imprisonment and/or a fine for violations. Even if a state has not been a user, producer, or stockpiler of cluster munitions, it should still attach

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<sup>59</sup> See Convention on Cluster Munitions, art. 3(6).

<sup>60</sup> ICBL-CMC, *Cluster Munition Monitor 2014*, p. 24.

<sup>61</sup> *Ibid.*, p. 22.

<sup>62</sup> See, for example, Australia Legislation, § 72.39(2); Cook Islands Legislation, § 9(1); Ireland Legislation, § 7(2)(a); Japan Legislation, art. 5; New Zealand Legislation, § 15(1); Samoa Legislation, § 12(1).

<sup>63</sup> See, for example, Cook Islands Legislation, § 9(2); Ireland Legislation, § 7(3); New Zealand Legislation, § 15(2)–(3); Samoa Legislation, § 12(2)–(3); Spain Proposed Legislation, art. 5.

<sup>64</sup> This component 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.”

penal sanctions to the basic prohibitions of its legislation because of the potential for future violations. The penalties laid out in implementation legislation will vary from state to state. In order to ensure that the penalties are appropriately severe, they should be equal to, or greater than, the penalties the state imposes for violating the Mine Ban Treaty. A state may want to provide for harsher penalties in order to, *inter alia*, strengthen legal stigmatization of cluster munitions or to address concerns about cluster munitions in its own territory.

### *Existing Precedent*

All existing implementation laws, as well as Canada's proposed legislation and both model laws, establish penal sanctions for violations of the prohibitions on use, production, transfer, and stockpiling. The statutes of at least four countries explicitly state that penal sanctions apply even in the case of negligent violations.<sup>65</sup>

Penal sanctions consist primarily of imprisonment or fines.<sup>66</sup> Every state with national implementation legislation, except for the Czech Republic, stipulates that offenses can be punished by imprisonment.<sup>67</sup> Prison terms vary by country and by the severity of the offense. Nearly every state stipulates that offenses can be punished by fine.<sup>68</sup> Allowing for fines is critical because it enables punishment of corporations (discussed below in the section on coverage of corporations).

States often apply penal sanctions to offenses beyond violations of the prohibitions on use, production, transfer, and stockpiling. The laws of at least eight countries explicitly state that their penal sanctions attach to the offenses of aid, assistance, or inducement.<sup>69</sup> Liechtenstein and Switzerland, for example, punish individuals who provide funding for

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<sup>65</sup> See Germany Legislation, § 20a(4); Liechtenstein Legislation, art. 29a(2); Norway Legislation, § 3; Switzerland Legislation, art. 35a(3). While Switzerland's implementation legislation imposes penal sanctions for negligence related to such activities as development, production, and transfer, it does not itself cover use. See Switzerland Legislation, art. 35a(3). The Swiss Criminal Code, however, imposes penal sanctions on superiors who fail to prevent prohibited acts, including use, due to negligence. See Swiss Criminal Code of December 1937 (status as of January 1, 2014), arts. 264j-264k; "Message relatif à l'approbation de la Convention sur les armes à sous-munitions ainsi qu'à la modification de la loi sur le matériel de guerre," pp. 5531-5532.

<sup>66</sup> Some states impose other types of penalties. France, for example, provides for closure of production facilities, confiscation of equipment, exclusion from public contracts, etc. See France Legislation, art. L. 2344-8.

<sup>67</sup> See Czech Republic Legislation, § 5 (providing for penal sanctions exclusively in the form of fines).

<sup>68</sup> Only Australia, Ecuador, Guatemala, Spain, and Sweden do not expressly stipulate that offenses are punishable by fine. See Australia Legislation, § 72.38; Ecuador Legislation, art. 602.58; Guatemala Legislation, art. 4; Spain Legislation, art. 566(1)-(2); Sweden Legislation, § 1.

<sup>69</sup> See Australia Legislation, § 72.38; France Legislation, art. L. 2344-7; Germany Legislation, § 20a(1)(2); Guatemala Legislation, art. 4; Liechtenstein Legislation, art. 29a(1); Norway Legislation, § 3; Spain Legislation, art. 566(1); Switzerland Legislation, art. 35a(1)(b).



the production of cluster munitions, which is a form of assistance.<sup>70</sup> The list of eight states is by no means exhaustive because many states rely on aiding and abetting provisions in separate statutes to cover such offenses.

States that have statutory exceptions permitting retention of cluster munitions for limited training or research purposes frequently impose criminal penalties on those who retain cluster munitions outside the scope of these narrow exceptions.<sup>71</sup>

Some states have relied on existing penal, criminal, or military codes to impose penal sanctions for activities involving cluster munitions.<sup>72</sup> While such provisions advance implementation of the Convention on Cluster Munitions, stand-alone legislation is preferable because it can also address other issues, such as states' positive obligations.

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<sup>70</sup> Liechtenstein Legislation, art. 29b (“*Vom Landgericht wird mit Freiheitsstrafe bis zu fünf Jahren bestraft, wer vorsätzlich und ohne dass er eiene Ausnahme ... gegen das Finanzierungsverbot.*”); Switzerland Legislation, art. 35b(1).

<sup>71</sup> For example, the Cook Islands impose a penalty on those who retain cluster munitions pursuant to its statutory exception for failure to provide information to the Foreign Affairs Minister upon request. See Cook Islands Legislation, § 11. Similarly, Samoa penalizes those permissibly retaining cluster munitions for failure to “keep records in relation to the cluster munition and the purpose to which the cluster munition is put” or failure to “prepare from those records, and send to the Chief Executive Officer, periodic reports relating to the cluster munition that are sufficient to enable the Minister to determine whether the Convention, [Samoa’s implementation statute], and any regulations made under [Samoa’s implementation statute] are being complied with.” Samoa Legislation, § 14(1)(b)–(c). New Zealand’s statute contains nearly identical language. See New Zealand Legislation, § 17(1)(b)–(c). Japan imposes penalties for failure to destroy cluster munitions once the permission to retain them has been rescinded and for failure to submit reports, undergo inspections, or keep proper records. See Japan Legislation, arts. 24–25.

<sup>72</sup> ICBL-CMC, *Cluster Munition Monitor 2014*, p. 25.

### III. Prohibition on Assistance and Related Interpretive Issues

This part discusses the obligation to prohibit assistance with the use, production, transfer, and stockpiling of cluster munitions and examines interpretive issues. It calls for prohibitions on assistance during joint military operations, hosting of foreign stockpiles, transit of cluster munitions over national territory, and investment in companies that produce cluster munitions or cluster munition components.

#### 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.<sup>73</sup>

#### *Purpose*

Implementation legislation should absolutely ban all assistance in order to ensure that states parties do not contribute to acts that violate the Convention on Cluster Munitions and to strengthen the norms and prohibitions promoted in the convention. It should ban direct and indirect assistance.<sup>74</sup> It should encompass 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 and IHRC understand assistance as any act or omission that proximately contributes to anyone's engagement in an activity prohibited to a state party under the convention.<sup>75</sup> 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 hosting of foreign stockpiles, the transit of cluster munitions, and the investment in cluster munitions, which will each be discussed below.

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<sup>73</sup> This component 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."

<sup>74</sup> 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.

<sup>75</sup> *Ibid.*, pp. 5-6.

### *Existing Precedent*

At least 14 statutes, as well as Canada’s and Spain’s proposed legislation and the ICRC and New Zealand model laws, incorporate provisions prohibiting assistance in their national implementation legislation.<sup>76</sup> Many states mirror the language of the convention in their legislation. New Zealand, for example, prohibits “in any way assist[ing], encourag[ing], or induc[ing] another person to engage in any” use, development, production, acquisition, possession, retention, stockpiling, or direct or indirect transfer of a cluster munition.<sup>77</sup>

Although Human Rights Watch and IHRC favor including the prohibition on assistance in legislation dedicated to implementing the Convention on Cluster Munitions, it should be noted that some states cover assistance under general aiding and abetting provisions in other statutes or penal codes. Sweden, for instance, regards acts of assistance as falling under chapter 23 of its penal code, and therefore it believes that no specific provisions to uphold the convention’s prohibition on assistance are required.<sup>78</sup>

Strong implementing legislation should include language specifying that direct and indirect assistance is prohibited. Samoa, for example, prohibits “a person [from] ... directly or indirectly ... assist[ing], encourag[ing] or induc[ing] another person to engage in any” use, development, production, acquisition, possession, retention, stockpiling, or transfer of a cluster munition.<sup>79</sup> As Human Rights Watch has noted, “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.”<sup>80</sup>

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<sup>76</sup> Australia Legislation, § 72.38(2); Czech Republic Legislation, § 2(2)(d); France Legislation, art. L. 2344-2; Germany Legislation, § 18a; Guatemala Legislation, art. 3(3); Hungary Legislation, § 3, art. 1(1)(c); Ireland Legislation, § 6(2); Italy Legislation, art. 7(1); Liechtenstein Legislation, art. 7a(1)(b)–(c); New Zealand Legislation, § 10(1)(e); Norway Legislation, § 3; Samoa Legislation, § 6(e); Switzerland Legislation, art. 8a(1)(b)–(c); United Kingdom Legislation, §§ 2(1)(d), 2(1)(g), 2(2). See also Canada Proposed Legislation, § 6(h); Spain Proposed Legislation, art. 2(1); ICRC Model Legislation, § 3(3); New Zealand Model Legislation, § 5(1)(e).

<sup>77</sup> New Zealand Legislation, § 10(1)(e).

<sup>78</sup> ICBL-CMC, “Sweden: Cluster Munition Ban Policy,” September 3, 2013, [http://www.themonitor.org/index.php/cp/display/region\\_profiles/theme/3066](http://www.themonitor.org/index.php/cp/display/region_profiles/theme/3066) (accessed June 28, 2014).

<sup>79</sup> Samoa Legislation, § 6(1)(e).

<sup>80</sup> Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, p. 5.

## Relations with States Not Party: Joint Military Operations

National implementation legislation should:

- ensure 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;<sup>81</sup>
- 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;<sup>82</sup> 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.<sup>83</sup>

### *Purpose*

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.

This interpretation is consistent with a literal reading of Article 1(1)(c) and Article 21(3), the object and purpose of the Convention on Cluster Munitions, and the rest of Article 21. First, a textual analysis of Article 1 reveals that language of the prohibition on assistance is unqualified and expansive. The type of assistance is not limited in any way, and Article 1(1)(c)'s chapeau provides that states parties must “never under any circumstances”

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<sup>81</sup> This component is based on Human Rights Watch's 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.” See generally Human Rights Watch, *Staying True to the Ban on Cluster Munitions*.

<sup>82</sup> This component is based on Convention on Cluster Munitions, art. 21(2): “Each State Party shall notify the governments of all States not party to this Convention [with which it is involved in joint military operations] of its obligations under this Convention.”

<sup>83</sup> This component 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.”

engage in activities, such as assistance, that are prohibited by the convention.<sup>84</sup> Paragraph 1(c) under that chapeau broadens the application by proscribing assistance to “anyone” to engage “in any activity” prohibited under the convention; “anyone” includes states parties, states not party, and non-state actors such as armed rebel groups, private companies, and individuals.<sup>85</sup> The language of Article 1 makes clear that the prohibition on assistance is designed to apply to all situations.

While clearly permitting participation in joint military operations, Article 21(3) should be understood as not encompassing military cooperation that involves assistance with prohibited acts. It states: “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.”<sup>86</sup> While explicitly allowing engagement, 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. The permissibility of engagement does not abrogate the prohibition on assistance outlined in Article 1(1)(c), which provides an unqualified and expansive prohibition on assistance. Article 21(3) should be viewed as a clarification that joint military operations are acceptable, and not a qualification of the convention’s prohibition on assistance.

Second, paragraph 3 requires engagement in joint operations to be “in accordance with international law,” which includes the Vienna Convention on the Law of Treaties and its customary rules of treaty interpretation. These rules require consideration of the object and purpose of the Convention on Cluster Munitions, which is to eliminate cluster munitions and to end the suffering of cluster munitions victims “for all time.”<sup>87</sup> To uphold the object and purpose, Article 21(3) should be interpreted as authorizing joint military operations only to the extent that the ban on assistance with prohibited acts is maintained.

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<sup>84</sup> Convention on Cluster Munitions, art. 1(1).

<sup>85</sup> *Ibid.*, art. 1(1)(c).

<sup>86</sup> *Ibid.*, art. 21(3) (emphasis added).

<sup>87</sup> *Ibid.*, pmb1, ¶2.. See also Vienna Convention on the Law of Treaties, adopted May 22, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980, art. 31.

Third, paragraphs 1 and 2 of Article 21 strengthen the convention by requiring states parties to press states not party to join it or at least accept its norms. These provisions are significant and unique in that they require states parties to advocate proactively for the convention. These paragraphs provide critical context for Article 21(3) and should inform its interpretation. It would be internally inconsistent to argue that Article 21(3) suspends the ban on assistance in Article 1(1)(c) of the convention. The same article could not logically oblige a state party to discourage use while permitting it to assist in activities that involve, or could lead to, use.

In order 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 in joint operations. If a state not party knows of the allied 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 its good relations with a state party by insisting on using cluster munitions when it is aware that the state party may not do so.

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.<sup>88</sup> 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.

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<sup>88</sup> Convention on Cluster Munitions, art. 21(2).

### *Existing Precedent*

The clearest approach to addressing interoperability would be to include a provision that explicitly bans assistance, even in joint military operations. A more common approach, which can be understood to have a similar effect, is to include the ban on assistance and remain silent on Article 21(3) and joint military operations.<sup>89</sup> The latter approach implies that in joint military operations, states parties cannot engage in any activity prohibited by the convention or the statute.

Some states have included additional provisions regarding interoperability in their implementation legislation. This approach is motivated by states' concerns about their ability to engage in joint military operations and fears that their service personnel would be vulnerable to criminal liability if they participated in a joint operation that involved a prohibited activity, even if they were only remotely associated with the activity. Human Rights Watch and IHRC do not believe adding provisions on interoperability is necessary for all states parties; it is undisputed that states parties are permitted to engage in joint military operations and that their troops would not be held criminally liable for unknowingly assisting in prohibited acts. If states feel politically compelled to incorporate the language of Article 21(3), however, they could consider New Zealand's national legislation. New Zealand prohibits "in any way assist[ing], encourag[ing], or induc[ing] another person to engage in any" use, development, production, acquisition, possession, retention, stockpiling, or transfer of a cluster munition.<sup>90</sup> It also states, "A member of the Armed Forces does not commit an offence against section 10(1) *merely by engaging*, in the course of his or her duties, in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention and that has the capability to engage in conduct prohibited by section 10(1)."<sup>91</sup> This formulation makes clear that states may engage in joint military operations, yet it does not say that states are allowed to assist with prohibited acts during such operations.<sup>92</sup>

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<sup>89</sup> States with implementing legislation that use this approach include *Austria*, the Cook Islands, the *Czech Republic*, *Ecuador*, *Germany*, Italy, Liechtenstein, Luxembourg, *Sweden*, and *Switzerland*. States in italics have also issued interpretive policy statements indicating they do not interpret Article 21(3) as permitting any state party to engage in prohibited activity. ICBL-CMC, *Cluster Munition Monitor 2014*, p. 27.

<sup>90</sup> New Zealand Legislation, § 10(1)(e).

<sup>91</sup> *Ibid.*, § (11)(6) (emphasis added).

<sup>92</sup> Other states, such as France and Spain in its proposed legislation, have selected a "cut and paste" approach, essentially adopting the language of Article 21 in their national implementation legislation. Such provisions, like Article 21 itself, are open to different interpretations but should be understood, as discussed above, as clarifications not qualifications of the prohibition on assistance. France Legislation, art. L. 2344-3; Spain Proposed Legislation, art. 2(3).



Regardless of the approach states follow, they should issue strong interpretive policy statements that clarify the obligations of Article 1, and specifically note that Article 21 should never justify any derogation from the convention's prohibitions. Ireland and Norway offer illustrative examples. In a communication to the Cluster Munition Coalition on March 16, 2009, Ireland clarified its position that the convention's prohibitions apply during joint military operations:

It is Ireland's view that 'permitted activity' in the circumstances of military co-operation is limited not just by the express prohibitions set out in Article 21(4), but further limited by two other important considerations. Firstly, Article 21(2) of the Convention requires a State Party to promote the norms established by the Convention and to make its best efforts to discourage states not party from using cluster munitions. It is Ireland's view that any deliberate assistance in the commission of an act prohibited by the Convention in the context of military co-operation with a state not party will be inconsistent with this obligation to make its best efforts to discourage the use of cluster munitions by the latter and that Article 21(3) must be interpreted accordingly.

In addition, the requirement under the law of treaties that states implement their treaty obligations in good faith means that a state that is obliged under the terms of a treaty to which it is a party to refrain from certain actions cannot evade its obligation to so refrain by arranging for another state to perform those actions on its behalf.<sup>93</sup>

In its government's analysis of its law, Norway articulates a strong understanding of the prohibitions: "[Article 21] requires the States Parties to make their best efforts to discourage non-States Parties from using cluster munitions. Article 21 also confirms that States Parties may participate in military cooperation and military operations with States not party to the Convention that might engage in activities prohibited to a State Party. *The*

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<sup>93</sup> Note on the measures taken by Ireland to implement Article 21 of the Convention on Cluster Munitions, enclosed with Letter from Dáithí O'Ceallaigh, Ambassador, Permanent Representative of Ireland to the United Nations in Geneva, to Thomas Nash, Coordinator, Cluster Munition Coalition, March 16, 2009, pp. 1–2.

*exemption for military cooperation does not authorise the States Parties to engage in activities prohibited by the Convention.”<sup>94</sup>*

If states do not follow these interpretive approaches to addressing interoperability, there is a risk of creating legislation that contravenes the spirit and letter of the Convention on Cluster Munitions. Legislation with broad exceptions for interoperability can permit assistance with cluster munition-related activities, including use. For example, Australia’s legislation states, “A person who is an Australian citizen, is a member of the Australian Defence Force or is performing services under a Commonwealth contract does not commit an offence ... by doing an act if: (a) the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions.”<sup>95</sup> According to an Australian Department of Defence policy statement submitted to Parliament during the hearing process, the legislation “does not prevent [Australian Defence Force] personnel from working in coalition headquarters (conducting planning, providing intelligence and logistics support), in operations where cluster munitions may be used.”<sup>96</sup> In other words, Australian military personnel may in effect load and aim a gun, so long as they do not pull the trigger.

Canada’s proposed legislation, Bill C-6, is similarly flawed. As written, section 11(1) of the bill allows Canadian military personnel and government officials to assist states not parties with acts that are absolutely prohibited by Article 1 of the convention, such as using, acquiring, stockpiling, and transferring cluster munitions. Section 11(1)(b) allows military personnel to “expressly request[] the use of a cluster munition, explosive submunition or explosive bomblet by the armed forces of [a state not party] if the choice of munitions used is not within the exclusive control of the Canadian Forces.”<sup>97</sup> Given the nature of joint military operations, Canada will often lack exclusive control over the choice of munitions, meaning that this provision essentially permits Canada to engage in a prohibited activity. Provisions such as this one run counter to a literal reading of the convention, its object and purpose, and the internal consistency of Article 21 and should be avoided.

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<sup>94</sup> Proposition No. 4 (2008–2009) to the Storting on consent to ratification of the Convention on Cluster Munitions (Norway Proposition No. 4), ¶ 3.5 (emphasis added).

<sup>95</sup> Australia Legislation, § 72.41(a).

<sup>96</sup> Australian Government Department of Defence, “Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010,” 2011, p. 1.

<sup>97</sup> Canada Proposed Legislation, § 11(1)(b).

International organizations have called for strong law on interoperability to ensure the obligations of the Convention on Cluster Munitions are upheld. At the Third Meeting of States Parties in September 2012, the ICRC noted that “more vigilance is needed to ensure that States Parties involved in multinational military operations adopt national implementing legislation that is consistent with both the letter of the Convention and its object and purpose.”<sup>98</sup> In a policy brief on the matter, the ICRC explained that “any exceptions or defences [related to interoperability] allowed under national law must be construed very narrowly so as to take into account the object and purpose of the Convention and to avoid any contravention of the obligations it contains.”<sup>99</sup> At the same meeting, the UN Inter-Agency Coordination Group for Mine Action called for upholding “the letter and the spirit of this important Convention,” and stated, that “[i]t is critical, in particular, that national legislation prohibit all actions that would, in any way, contribute to the continued use of cluster munitions.”<sup>100</sup> Human Rights Watch and IHRC share these sentiments.

## Prohibition on Foreign Stockpiles

National implementation legislation should:

- prohibit assistance in the form of hosting foreign stockpiles.<sup>101</sup>

### *Purpose*

In order to reinforce the convention’s prohibition on assistance and to leave no doubt as to the prohibition’s scope, national implementation legislation should ban under all circumstances the hosting of foreign stockpiles. Hosting stockpiles of cluster munitions owned by a state that has not joined the convention assists with stockpiling and potentially with use, both of which are activities banned under Article 1. Therefore, a state party violates Article 1(1)(c)’s prohibition on assistance if it permits foreign countries to

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<sup>98</sup> Christine Beerli, Vice-President, International Committee of the Red Cross, Statement at the Third Meeting of States Parties to the Convention on Cluster Munitions, Oslo, September 11, 2012, p. 2.

<sup>99</sup> “Convention on Cluster Munitions Interoperability and National Legislation: The View of the International Committee of the Red Cross,” International Committee of the Red Cross Policy Brief, released at Third Meeting of States Parties to the Convention on Cluster Munitions, Oslo, September 12, 2012, p. 3.

<sup>100</sup> Agnès Marcaillou, Inter-Agency Coordination Group for Mine Action, Statement at the Third Meeting of States Parties to the Convention on Cluster Munitions, Oslo, September 13, 2012.

<sup>101</sup> This component is based on an understanding of Convention on Cluster Munitions, art. 1(1), quoted above.

stockpile cluster munitions within its territory.<sup>102</sup> A state party should accordingly adopt a clear prohibition against the hosting of foreign stockpiles.

### *Existing Precedent*

Including an explicit ban on hosting foreign stockpiles in implementation legislation is the most effective way of ensuring that this activity is unequivocally prohibited. A state party may alternatively, or in addition, issue a policy statement that hosting foreign stockpiles is unlawful under its prohibition on assistance. At least 32 states parties and signatories, 12 of which have implementation legislation, have issued such statements.<sup>103</sup> In addition, the United Kingdom announced in 2010 that it had eliminated all foreign stockpiles of cluster munitions within the United Kingdom and its territories.<sup>104</sup>

Australia's statute contains language that seems to permit hosting foreign stockpiles.<sup>105</sup> It specifies that its prohibition on stockpiling and retention "does not apply" if the stockpiling is done by a member of the armed forces of a state not party and is done on a base, aircraft, or ship in Australia "in the course of military cooperation or operations with the Australian Defence Force."<sup>106</sup> This statutory reservation of the right to host foreign stockpiles is counter to the convention's object and purpose. It is also contrary to Australia's stated policy. Australian government officials have declared, as a matter of policy that "foreign stockpiling of cluster munitions on Australian soil will not be allowed."<sup>107</sup> In addition, there are no existing stockpiles of cluster munitions on Australian territory.<sup>108</sup>

Canada's proposed legislation similarly contains language that could be construed as permitting foreign stockpiling. For example, the bill allows Canadian personnel to direct

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<sup>102</sup> In addition, legislation should require destruction of stockpiles under a state party's jurisdiction *or* control, rather than jurisdiction *and* control. This approach would bolster the prohibition on hosting foreign stockpiles. Although the Convention on Cluster Munitions uses the word "and," as discussed below in the section on stockpile destruction, use of "and," instead of "or," was the result of a clerical error that was not corrected during negotiations.

<sup>103</sup> Austria, Belgium, the Czech Republic, Ecuador, France, Germany, Guatemala, Ireland, Luxembourg, New Zealand, Norway, and Spain have all stated that hosting foreign stockpiles is a prohibited form of assistance. See ICBL-CMC, *Cluster Munition Monitor 2014*, p. 28.

<sup>104</sup> ICBL-CMC, "United Kingdom: Cluster Munition Ban Policy," September 3, 2013, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/3135](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/3135) (accessed June 29, 2014).

<sup>105</sup> See Australia Legislation, § 72.42.

<sup>106</sup> *Ibid.*

<sup>107</sup> ICBL-CMC, "Australia: Cluster Munition Ban Policy," September 4, 2013, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/2417](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/2417) (accessed June 29, 2014).

<sup>108</sup> *Ibid.*

or authorize “possession” of cluster munitions by states not party in the context of military cooperation or joint operations.<sup>109</sup> The bill also waives the prohibition on assisting stockpiling “if it would not be an offence for [the person receiving assistance] to commit that act.”<sup>110</sup> Nevertheless, a senior Canadian government official has indicated that the prohibition on assistance in Canada’s proposed legislation will extend to hosting foreign stockpiles.<sup>111</sup>

Regardless of policy statements, Australia’s law and Canada’s bill appear to treat the countries’ obligations in a way that is inconsistent with the convention’s comprehensive ban on assistance and duty to discourage states not party from using cluster munitions. This approach leaves the door open to future hosting of foreign stockpiles and is in direct contradiction to both the literal text and intention of the treaty. Including an explicit prohibition on hosting foreign stockpiles within the statute itself is the best way to guard against misinterpretation of the statute as permitting such unlawful conduct.

## Prohibition on Transit

National implementation legislation should:

- prohibit assistance in the form of allowing transit of cluster munitions.<sup>112</sup>

### *Purpose*

In order to reinforce the convention’s prohibition on assistance and to leave no doubt as to the prohibition’s scope, national implementation legislation should prohibit transit of cluster munitions—that is, the movement of cluster munitions across, above, or through the state party’s territory and/or territorial waters. Allowing transit constitutes unlawful assistance under Article 1(1)(c) because it could facilitate several prohibited activities, including use and transfer. 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

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<sup>109</sup> See Canada Proposed Legislation, § 11(1)(a) (“[The bill] does not prohibit a person who is subject to the Code of Service Discipline ... or who is an employee ..., in the course of military cooperation or combined military operations involving Canada and a state that is not a party to the Convention, from ... directing or authorizing an activity that may involve the ... possession ... of a cluster munition, explosive submunition or explosive bomblet by the armed forces of that state.”).

<sup>110</sup> *Ibid.*, § 11(3).

<sup>111</sup> See ICBL-CMC, “Canada: Cluster Munition Ban Policy,” August 28, 2013, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/2498](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/2498) (accessed June 29, 2014).

<sup>112</sup> This component is based on an understanding of Convention on Cluster Munitions, art. 1(1), quoted above.

cluster munitions. 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.<sup>113</sup>

### *Existing Precedent*

While a prohibition on transit is implied by a state party's prohibition on assistance, Austria and Germany explicitly ban transit in their implementation legislation.<sup>114</sup> Such bans ensure that a state party's legislation coheres with the convention's object and purpose and are therefore the best way of prohibiting this form of assistance.

Although an explicit ban is the best means of addressing transit, a state party may alternatively or in addition issue a policy statement that transit is prohibited under its prohibition on assistance. At least 34 states parties and signatories, 12 of which have implementation legislation, have issued such a statement.<sup>115</sup> For example, the Czech Republic has stated that "the transit of cluster munitions across the territory of the Czech Republic ... is prohibited by the Convention."<sup>116</sup> Luxembourg's minister of foreign affairs told the media on September 13, 2011, that "there has never been an airplane transporting cluster munitions which has taken off or landed at Findel [Luxembourg's airport] and there never will be so long as I am part of the government of Luxembourg."<sup>117</sup>

Australia's statute contains language that appears to permit transit.<sup>118</sup> The statute specifies that its prohibition on transfer "does not apply" if the transfer is done by a

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<sup>113</sup> The ICRC has argued that creating exceptions to the convention's prohibition on assistance "undermine[s] the goal of the Convention 'to put an end for all time to the suffering and casualties caused by cluster munitions' ... and undermine[s] the Convention's universality by creating a perception that its implementation is inconsistent in fundamental areas." "Convention on Cluster Munitions Interoperability and National Legislation," International Committee of the Red Cross Policy Brief, p. 3 (quoting Convention on Cluster Munitions, pmbL., ¶ 2).

<sup>114</sup> Austria Legislation, § 2 ("*D]ie Ein-, Aus- und Durchfuhr ... von Streumunition sind verboten.*"); Germany Legislation, § 18a ("*Es ist verboten ... Streumunition ... einzufu]hren, auszufu]hren, durch das Bundesgebiet durchzufu]hren oder sonst in das Bundesgebiet oder aus dem Bundesgebiet zu verbringen oder sonst die tatsa]chliche Gewalt u]ber sie auszu]ben, insbesondere sie zu transportieren.*").

<sup>115</sup> Austria, Belgium, the Czech Republic, Ecuador, France, Germany, Guatemala, Ireland, Luxembourg, New Zealand, Norway, and Spain have all stated that transit is prohibited under the convention. See ICBL-CMC, *Cluster Munition Monitor 2014*, p. 28.

<sup>116</sup> ICBL-CMC, "Czech Republic: Cluster Munition Ban Policy," August 12, 2014, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/2567](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/2567) (accessed August 12, 2014) (quoting Letter from Miroslav Klíma, UN Director, Ministry of Foreign Affairs, to Mary Wareham, Human Rights Watch, No. 102870-2/2012-OSN, April 30, 2012) (internal quotation marks omitted).

<sup>117</sup> ICBL-CMC, "Luxembourg: Cluster Munition Ban Policy," August 12, 2014, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/2803](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/2803) (accessed August 12, 2014) (quoting a statement from Minister of Foreign Affairs Jean Assleborn in a September 13, 2011 article in *Le Quotidien*).

<sup>118</sup> See Australia Legislation, § 72.42.

member of the armed forces of a state not party and is in connection with the use of a base, aircraft, or ship in Australia “in the course of military cooperation or operations with the Australian Defence Force.”<sup>119</sup> Such an exception contravenes the convention’s object and purpose by weakening Australia’s prohibition on assistance and is incompatible with Australia’s obligation under the convention to “promote the norms [the convention] establishes and ... to discourage States not party ... from using cluster munitions.”<sup>120</sup>

Canada’s proposed legislation also appears to permit transit. For example, section 11(1)(a) allows Canadian military personnel to authorize the movement of cluster munitions by a state not party through Canada, and section 11(2) allows any person, in the course of “military cooperation or combined military operations,” to transport cluster munitions through Canada so long as those munitions are owned, possessed, or controlled by a foreign state.<sup>121</sup> Facilitating transit is unlawful because it contravenes the convention’s express prohibition on assistance. Therefore, Canada should amend its implementation bill to make clear that transit is absolutely prohibited, and other states should similarly prohibit transit and refrain from statutory language that could be construed to permit this activity.

## Prohibition on Investment

National implementation legislation should:

- prohibit assistance in the form of direct or indirect investment of public and private funds in companies that manufacture cluster munitions or components intended for use in cluster munitions.<sup>122</sup>

### *Purpose*

In order to reinforce the convention’s prohibition on assistance and to leave no doubt as to the prohibition’s scope, national implementation legislation should prohibit assistance in the form of investment in companies that manufacture cluster munitions or components intended for use in cluster munitions.<sup>123</sup> Providing financial support to such companies facilitates

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<sup>119</sup> Ibid.

<sup>120</sup> Convention on Cluster Munitions, art. 21(2).

<sup>121</sup> See Canada Proposed Legislation, §§ 11(1)(a), 11(2).

<sup>122</sup> This component is based on an understanding of Convention on Cluster Munitions, art. 1(1), quoted above.

<sup>123</sup> See generally Roos Boer and Suzanne Oosterwijk, PAX, *Banning Investments in Cluster Munitions Producers: National Legislation*, March 2014.

production, so investment represents a form of assistance with production, which is prohibited under Article 1(1)(c). Because private investors often provide important financial support to such companies, the ban should extend to private funds.<sup>124</sup> To account for money's fungible nature, the ban should prohibit investment in the company as a whole, rather than simply investment in cluster munition production.<sup>125</sup> Furthermore, any ban should provide tools for supervising and monitoring investments in order to ensure compliance.<sup>126</sup> Only through a prohibition on investment can legislation choke off the financial incentive for companies to produce cluster munitions or cluster munitions components.

### *Existing Precedent*

At least eight states with implementation legislation, as well as New Zealand's model legislation, prohibit investment.<sup>127</sup> Strong legislation defines investment broadly to include any form of financial link with companies that produce cluster munitions. New Zealand's national law, for example, makes it a criminal offense to "provide[] or invest[] funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions,"<sup>128</sup> and defines "funds" broadly, to include "assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired."<sup>129</sup> Belgium's legislation similarly criminalizes all forms of financial support, including credit and bank guarantees and the purchase of financial

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<sup>124</sup> Similar calls for bans on private as well as public investment have been made in the context of the Mine Ban Treaty. See, for example, European Parliament Resolution on a Mine-Free World, P6\_TA(2005)0298, July 7, 2005, ¶¶ 21–22.

<sup>125</sup> See Boer and Oosterwijk, PAX, *Banning Investments in Cluster Munitions Producers*, p. 6.

<sup>126</sup> See *ibid.*, pp. 10–11.

<sup>127</sup> See Belgium Legislation, art. 8; Ireland Legislation, §§ 12–14; Italy Legislation, art. 7(1); Liechtenstein Legislation, arts. 7b–7c; Luxembourg Legislation, art. 3; New Zealand Legislation, § 10(2); Samoa Legislation, § 6(1)(f); Switzerland Legislation, arts. 8b–8c. See also New Zealand Model Legislation, § 5(2). The Italian Campaign to Ban Landmines has advocated for a separate, more detailed law on investment. In April 2010, draft legislation on investment was introduced in the Senate. It would prohibit all Italian financial institutions from providing any form of support to Italian or foreign companies performing a range of activities, including the use, production, sale, import, export, stockpiling, or transport of cluster munitions and explosive submunitions as well as antipersonnel landmines. On March 15, 2013, the bill was presented to the new Chamber of Deputies (as Chamber Act No. 119) and Senate (as Senate Act No. 557). On June 27, 2013, Deputy Minister for Foreign Affairs Lapo Pistelli said the government favors rapid approval of the disinvestment law. Until then, Law No. 95 (the legislation referred to in this report as Italy Legislation) remains the legislative framework for investment in cluster munitions, Email from Giuseppe Schiavello, Italian Campaign to Ban Landmines, to Bonnie Docherty, Human Rights Watch, August 5, 2014. See also ICBL-CMC, "Italy: Cluster Munition Ban Policy," September 5, 2013, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/3556](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/3556) (accessed August 11, 2014).

<sup>128</sup> New Zealand Legislation, § 10(2). New Zealand's model legislation includes nearly identical language. See New Zealand Model Legislation, § 5(2).

<sup>129</sup> New Zealand Legislation, § 5(1). The definition goes on to specify that "funds" "includes legal documents or instruments (for example, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind." *Ibid.*



instruments.<sup>130</sup> Ireland, Liechtenstein, Samoa, and Switzerland all specify that their prohibitions on investment extend to both direct and indirect investment.<sup>131</sup> In Liechtenstein’s legislation, “indirect financing” includes investing in or acquiring bonds of companies that develop, produce, or acquire prohibited material.<sup>132</sup> Ireland prohibits not only “authoris[ing] any investment, direct or indirect, in a munitions company,”<sup>133</sup> but also “invest[ing] public moneys in collective investment undertakings or investment products unless, having exercised due diligence, the investor is satisfied that there is not a significant probability that the public moneys will be invested in a munitions company.”<sup>134</sup>

Just as it defines prohibited forms of investment broadly, strong legislation applies to investment in *any* producer of cluster munitions, including foreign companies and companies that produce only components of cluster munitions. For example, Belgium specifies that its prohibition applies to investment in companies abroad as well as in Belgian companies.<sup>135</sup> Italy’s legislation prohibits financial assistance to companies that develop, produce, acquire, store, or transfer *parts* of cluster munitions.<sup>136</sup>

When investment in a company that produces cluster munitions has already occurred, or when a company receiving investment begins producing cluster munitions, Belgium and Ireland require the investor to divest from that company.<sup>137</sup> Ireland’s legislation, moreover, requires an

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<sup>130</sup> Belgium Legislation, art. 8 (“*Par financement d’une entreprise figurant dans cette liste, on entend toutes les formes de soutien financier, à savoir les crédits et les garanties bancaires, ainsi que l’acquisition pour compte propre d’instruments financiers émis par cette entreprise.*”).

<sup>131</sup> Ireland Legislation, § 12(1) (“Nothing in any enactment that authorises the investment of public moneys shall be taken to authorise any investment, direct or indirect, in a munitions company.”); Liechtenstein Legislation, arts. 7b–7c; Samoa Legislation, § 6(1)(f); Switzerland Legislation, arts. 8b–8c. Switzerland’s law prohibits indirect investments only if they are meant to bypass the prohibition on direct investments. Switzerland Legislation, art. 8c (“*Il est interdit de financer indirectement le développement, la fabrication ou l’acquisition de matériels de guerre prohibés si le but visé est de contourner l’interdiction du financement direct.*”).

<sup>132</sup> Liechtenstein Legislation, art. 7c(2) (“*Als indirekte Finanzierung im Sinne dieses Gesetzes gilt: (a) die Beteiligung an Gesellschaften, die verbotenes Kriegsmaterial entwickeln, herstellen oder erwerben; (b) der Erwerb von Obligationen oder anderen Anlagprodukten, die durch solche Gesellschaften ausgegeben werden.*”). Switzerland defines “indirect investment” similarly. See Switzerland Legislation, art. 8c.

<sup>133</sup> Ireland Legislation, § 12(1).

<sup>134</sup> *Ibid.*, § 14(1).

<sup>135</sup> Belgium Legislation, art. 8 (prohibiting investment in “*de droit belge ou de droit étranger*”).

<sup>136</sup> See Italy Legislation, art. 7(1).

<sup>137</sup> Belgium requires such divestment “as long as it is contractually feasible.” Belgium Legislation, art. 8 (“*Lorsqu’un financement a déjà été accordé à une entreprise figurant dans la liste, ce financement doit être complètement interrompu pour autant que cela soit contractuellement possible.*”). See also Ireland Legislation, § 14(2) (“Where public moneys are directly invested in a company which is or becomes a munitions company, the investor shall ... establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or ... divest itself of its investment in that company in an orderly manner.”).

investor either to divest from any product that invests money in a munitions company, or else to establish that the company intends to stop producing cluster munitions and that the investment product is unlikely to invest money in such companies in the future.<sup>138</sup>

In order to ensure that investors are aware of their legal obligations, Belgium's legislation provides for the creation of a public document listing companies that qualify as cluster munitions producers within the scope of the statute. The document also lists those companies' corporate shareholders and mutual fund holders.<sup>139</sup>

Although a statutory prohibition on investment in companies producing cluster munitions is the best means of ensuring compliance with the convention's prohibition on assistance, a state party may alternatively or in addition issue a policy statement that its statutory prohibition on assistance extends to investment. At least 25 states parties and signatories, including Canada and six states with implementation legislation, have made clear that they understand investment to be a prohibited form of assistance.<sup>140</sup>

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<sup>138</sup> Ireland Legislation, § 14(2).

<sup>139</sup> Belgium Legislation, art. 8 (*"A cette fin, le Roi publiera, au plus tard le premier jour du treizième mois suivant le mois de la publication de la loi, une liste publique ... des entreprises dont il a été démontré qu'elles exercent l'une des activités visées à l'alinéa précédent ... des entreprises actionnaires à plus de 50% d'une entreprise ... des organismes de placement collectif détenteurs d'instruments financiers d'une entreprise."*).

<sup>140</sup> Australia, the Czech Republic, France, Guatemala, Hungary, and the United Kingdom have all expressed such views. See ICBL-CMC, *Cluster Munition Monitor 2014*, p. 29.

## IV. Positive Obligations

This part discusses the positive obligations for states parties to destroy cluster munitions stockpiles, clear territory of unexploded submunitions, and provide assistance to victims of cluster munitions. It also addresses positive obligations related to international cooperation and assistance, transparency, compliance, and universalization.

### 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; and
- 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.<sup>141</sup>

### *Purpose*

Even with a ban on use, cluster munitions will remain a threat as long as states continue to possess them. Existing stockpiles 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.”<sup>142</sup> Eliminating the harm—or potential harm—caused by cluster munitions requires the complete destruction of the weapons, 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

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<sup>141</sup> These components 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 the 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 into force of this Convention for that State Party.”

<sup>142</sup> *Ibid.*, pmb., ¶ 4 (emphasis removed).

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

The Convention on Cluster Munitions articulates a state party's obligation to destroy cluster munitions as applying to "cluster munitions under [a state party's] jurisdiction *and* control."<sup>143</sup> The object and purpose of the treaty, however, is more comprehensive, aimed at the total elimination of this weapon. To best serve this aim, national legislation should refer instead 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. 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 reportedly initially changed to "jurisdiction *and* control" due to a clerical error and then was never changed back.<sup>144</sup>

The Convention on Cluster Munitions mandates that each state party complete destruction of its stockpiles 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. 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.<sup>145</sup> As reported by the Cluster Munition Monitor, all states parties with stockpiles of cluster munitions have committed to destroy stockpiles within eight years, and the major stockpilers have indicated they will

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<sup>143</sup> Ibid., art. 3(1) (emphasis added).

<sup>144</sup> Declan Smyth, "Article 3: Storage and Stockpile Destruction," in *The Convention on Cluster Munitions: A Commentary*, eds. Gro Nystuen and Stuart Casey-Maslen (Oxford: Oxford University Press, 2010), p. 256 ("In fact the form of words adopted for Article 3 in the Convention is undoubtedly the result of a clerical error that occurred during the preparation of a composite text towards the end of the Diplomatic Conference.").

<sup>145</sup> 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. Ibid., art. 3(3)–(4). The Meeting of States Parties decides whether to grant an extension. Ibid., art. 3(5). It may also determine what resources should be committed to assisting those parties requesting extensions, thereby matching available resources with outstanding needs.

finalize destruction far in advance of the deadline.<sup>146</sup> National legislation should, therefore, not include a provision that allows for an extension of the destruction deadline.

### *Existing Precedent*

The national implementation laws of at least seven states, plus the proposed law of Spain (a current stockpiler), include obligations to destroy stockpiles: Austria (a former stockpiler), Belgium (a former stockpiler), the Czech Republic (a former stockpiler), France (a current stockpiler), Guatemala (never a stockpiler), Hungary (a former stockpiler), and Italy (a current stockpiler).<sup>147</sup> For instance, the Czech Republic requires that the Ministry of Defense ensure destruction of all stockpiles within the territory of the Czech Republic within eight years of the legislation taking effect.<sup>148</sup> This requirement is in line with the proposed language of the ICRC model legislation, which states: “Subject to section 10, the Minister shall ensure—(1) the destruction of all stockpiled cluster munitions, explosive bomblets and explosive submunitions owned or possessed by [INSERT COUNTRY NAME] or under its jurisdiction and control; (2) the collection and destruction of all cluster munitions notified under section 7.”<sup>149</sup> A stronger formulation would refer to stockpiles under a state party’s jurisdiction *or* control.

Though states such as the Czech Republic and France set a deadline of eight years, some states, such as Belgium and Austria, impose even shorter timelines. Belgium required destruction of all stockpiles within three years of the publication of its 2006 law.<sup>150</sup> Austria’s law states: “Existing stockpiles of ... prohibited cluster munition must be reported to the Federal Ministry of Defense 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.”<sup>151</sup>

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<sup>146</sup> ICBL-CMC, *Cluster Munition Monitor 2014*, p. 2.

<sup>147</sup> See *ibid.*; Austria Legislation, § 4; Belgium Legislation, art. 27(2); Czech Republic Legislation, § 4(1); France Legislation, art. L. 2344-4 (implicitly requiring stockpile destruction by authorizing stockpiling only for eight years or until the expiration of any deadline granted by states parties); Guatemala Legislation, art. 8; Hungary Legislation § 3, art. 3(1); Italy Legislation, art. 3. See also Spain Proposed Legislation, art. 3.

<sup>148</sup> Czech Republic Legislation, § 4(1) (“*Ministerstvo ve lhůtě do 8 let ode dne nabytí účinnosti tohoto zákona zajistí zničení veškeré kazetové munice nacházející se na území České republiky; to neplatí, jde-li o kazetovou munici podle §3.*”).

<sup>149</sup> ICRC Model Legislation, § 8.

<sup>150</sup> Belgium Legislation, art. 27(2).

<sup>151</sup> Austria Legislation, § 4 (“*Bestehende Vorräte an gemäß § 2 verbotener Streumunition sind binnen eines Monats nach dem Inkrafttreten dieses Bundesgesetzes dem Bundesministerium für Landesverteidigung zu melden und durch dieses bis längstens drei Jahre nach dem Inkrafttreten dieses Bundesgesetzes gegen Kostenersatz zu vernichten.*”).

## 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;<sup>152</sup>
- 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;<sup>153</sup>
- mandate creation of risk reduction education programs to inform civilians of the dangers presented by cluster munitions remnants;<sup>154</sup> and
- if adopted by a former user state, require the provision of assistance to states parties that the user state contaminated in the past.<sup>155</sup>

### *Purpose*

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 mitigating such threats. In order to preserve state sovereignty, the ultimate responsibility for clearance should fall upon the affected state rather than the user state. All states parties, especially former user states, however, should assist affected states with clearance; they should "provide, *inter alia*, technical, financial, material or human resources assistance to the [affected] State Party," as well as information about the type, quantity, and location of cluster munitions remnants.<sup>156</sup>

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<sup>152</sup> This component 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.

<sup>153</sup> This component is based on *ibid.*, art. 4(1)(a): "[C]learance and destruction shall be completed as soon as possible but not later than ten years" from the entry into force of the convention for that state party.

<sup>154</sup> This component is based on *ibid.*, art. 4(2)(e): "[E]ach 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."

<sup>155</sup> This component is based on *ibid.*, art. 4(4), which "strongly encourage[s]" user states parties to "provide, *inter alia*, technical, financial, material or human resources assistance" to states parties that they contaminated with cluster munition remnants. *Ibid.*, art. 4(4)(a). 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." *Ibid.*, art. 4(4)(b).

<sup>156</sup> *Ibid.*, art. 4(4)(a)–(b).

### *Existing Precedent*

At least two states, Guatemala and Hungary, include provisions on clearance in their national implementation legislation, as does the ICRC model law.<sup>157</sup> Hungary copies the text of the convention verbatim, agreeing to “clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control.”<sup>158</sup> It states that such “clearance and destruction shall be completed as soon as possible but not later than ten years from” the entry into force of the convention.<sup>159</sup>

Guatemala provides the most comprehensive guidance regarding the clearance of contaminated areas, and its clearance article serves as a good model for other states:

When an area of the country is identified as an area contaminated by cluster munitions and/or explosive submunitions and/or explosive bomblets, the Ministry of National Defense, in coordination with other relevant ministries and state institutions, should perform the following actions:

- a. Evaluation and registration of the danger caused by cluster munitions remnants, making every effort to identify all contaminated areas.
- b. Evaluation and prioritization of the needs of marking and isolating the contaminated areas, protecting the civilian population, clearing and destroying cluster munition remnants and/or explosive submunitions and/or explosive bomblets, and informational programs for civilians on risk reduction.
- c. Development of a national plan to carry out the provisions of the subsections above.
- d. Clearance and destruction of all cluster munition remnants and/or explosive submunitions and/or explosive bomblets.<sup>160</sup>

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<sup>157</sup> Guatemala Legislation, art. 9; Hungary Legislation, §3, art. 4(1). See also ICRC Model Legislation, § 9.

<sup>158</sup> Hungary Legislation, §3, art. 4(1).

<sup>159</sup> *Ibid.*, art. 4(1)(a).

<sup>160</sup> Guatemala Legislation, art. 9 (“Artículo 9. Áreas contaminadas. Cuando un área del territorio nacional sea identificada como área contaminada por municiones en racimo y/o submuniciones explosivas y/o bombetas explosivas, el Ministerio de la Defensa Nacional, en coordinación con otros ministerios e instituciones estatales competentes, deberá realizar las siguientes acciones: a) Evaluación y registro del peligro que causan los restos de municiones en racimo, haciendo todos los esfuerzos para identificar todas las áreas contaminadas. b) Evaluación y priorización de las necesidades en materia de marcaje y aislamiento de las áreas contaminadas, la protección de la población civil, limpieza y destrucción de los restos de municiones en racimo y/o submuniciones explosivas y/o bombetas explosivas y de programas de información a la población civil sobre reducción de riesgos. c) Desarrollo de un plan nacional para llevar a cabo lo establecido en el inciso anterior. d) Limpieza y destrucción de todos los restos de municiones en racimo y/o submuniciones explosivas y/o bombetas explosivas.”).

This language is very similar to that provided in the ICRC model law.<sup>161</sup> While an unaffected state, Guatemala includes in its legislation robust positive obligations related to clearance, such as the establishment of a process for the identification and destruction of all cluster munitions in contaminated areas and a mandate to create risk reduction education programs to inform civilians of the dangers presented by cluster munitions remnants. These provisions would be important if Guatemala became affected by cluster munitions in the future or in case it discovered contaminated areas. Consequently, the Guatemalan law exemplifies how unaffected as well as affected states can include clearance provisions in their national implementation legislation.

No former user states require the provision of assistance to those states they contaminated in the past in their implementation legislation, even though there are former user states that provide clearance assistance.<sup>162</sup> While provision of assistance to affected states can be covered in administrative measures, it is preferable to include it in legislation. Strong legislative implementation of the Convention on Cluster Munitions is the best approach to fulfilling its obligations.

## Victim Assistance

National implementation legislation should:

- designate a government focal point to develop, coordinate, and implement a national victim assistance plan and budget;<sup>163</sup>
- provide for consultation with victims on the development and implementation of the national plan;<sup>164</sup>
- ensure victims are given medical, rehabilitation, and psychological support that is age and gender sensitive;<sup>165</sup>

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<sup>161</sup> See ICRC Model Legislation, § 9.

<sup>162</sup> Both the Netherlands and the United Kingdom are states parties, former users, and donors, and the United Kingdom has adopted implementation legislation. ICBL-CMC, *Cluster Munition Monitor 2013*, pp. 16, 66.

<sup>163</sup> This component 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.”

<sup>164</sup> This component is based on *ibid.*, art. 5(2)(f): “[E]ach State Party shall: ... (f) Closely consult with and actively involve cluster munition victims and their representative organizations.”

<sup>165</sup> This component is based on *ibid.*, art. 5(1): “Each State Party with respect to cluster munition victims in areas under its jurisdiction or 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.”



- promote socioeconomic inclusion of victims;<sup>166</sup> and
- guarantee the victim assistance plan is non-discriminatory.<sup>167</sup>

### *Purpose*

Use of cluster munitions causes grave and ongoing harm to civilians, including death, injury, property destruction, and land contamination. To mitigate such harm and to advance its humanitarian objective, the Convention on Cluster Munitions introduced innovative measures to assist victims. It defines the term “cluster munition victims” to include those directly affected and their families and communities and dedicates a specific article to victim assistance obligations.<sup>168</sup> Article 5 lays out general obligations in paragraph 1 and discusses the requirements for implementation in paragraph 2.<sup>169</sup> The Landmine and Cluster Munition Monitor explains that “victim assistance” encompasses “data collection, medical care, rehabilitation, psychological support, social inclusion and relevant/necessary laws and policies.”<sup>170</sup> Although all states parties are encouraged to provide assistance, ultimate responsibility rests with the affected state, which is obliged to assist victims of cluster munitions under its own jurisdiction or control. To reinforce the obligations to assist victims at the national level, legislation should encompass provisions on the topic.

### *Existing Precedent*

In their national legislation implementing the Convention on Cluster Munitions, at least two states, Guatemala and Hungary, include provisions regarding victim assistance. Hungary imports the text of the convention verbatim in its implementation legislation.<sup>171</sup> Guatemala adopts the broad definition of victim provided in the convention, which includes individuals, families, and communities harmed by cluster munitions.<sup>172</sup> Its legislation provides that if there are victims of cluster munitions, the executive branch through the Ministry of Public Health and Social Assistance, in coordination with other

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<sup>166</sup> Ibid.

<sup>167</sup> This component 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.”

<sup>168</sup> *Ibid.*, art. 2(1).

<sup>169</sup> *Ibid.*, art. 5.

<sup>170</sup> Landmine and Cluster Munition Monitor, “Frameworks for Victim Assistance: Monitor Key Findings and Observations,” December 2013, <http://www.the-monitor.org/index.php/content/view/full/25067> (accessed June 29, 2014), p. 4.

<sup>171</sup> Hungary Legislation, § 3, art. 5(1).

<sup>172</sup> Guatemala Legislation, art. 2(12).

ministries and institutions, must develop a plan for protection of the human rights of the victims. It notes the plan should contain adequate budget and must be designed and implemented in consultation with the victims and their organizations.<sup>173</sup>

For states such as Guatemala that are party to the Convention on Cluster Munitions and the Convention on the Rights of Persons with Disabilities, provisions regarding victim assistance should be interpreted in conjunction with the latter. This Disability Rights Convention, which is explicitly mentioned in the preamble of the Convention on Cluster Munitions, provides, for instance, for habilitation and rehabilitation “to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.”<sup>174</sup>

Even unaffected states should incorporate obligations to assist victims in their national implementation legislation. They can become affected themselves in the case of future attacks or become host to affected people, such as refugees, who migrate to their territories. Guatemala and Hungary provide examples of how unaffected, as well as affected, states can undertake such action.

The ICRC model legislation also contains extensive victim assistance provisions:

In consultation with the relevant Ministries, the Minister shall ensure compliance with the obligations of the Convention regarding risk education and victim assistance, in particular to;

1. Assess the needs of cluster munition victims;
2. Develop, implement and enforce any necessary national laws and policies;
3. Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national

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<sup>173</sup> Ibid., art. 10 (“*En caso de existir víctimas de municiones en racimo y/o submuniciones explosivas y/o bombetas explosivas, el Organismo Ejecutivo por conducto del Ministerio de Salud Pública y Asistencia Social, en coordinación con otros ministerios e instituciones estatales competentes, deberá desarrollar un plan para la protección de los derechos humanos de las víctimas. Dicho plan deberá contar con un presupuesto adecuado y deberá diseñarse y ejecutarse en consulta con las víctimas y sus organizaciones.*”).

<sup>174</sup> Convention on the Rights of Persons with Disabilities, adopted December 13, 2006, A/RES/61/106, entered into force May 3, 2008, art. 26.

- disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
4. Take steps to mobilise national and international resources;
  5. 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;
  6. Closely consult with and actively involve cluster munition victims and their representative organisations;
  7. Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
  8. Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.<sup>175</sup>

These comprehensive provisions align with the components of the Convention on Cluster Munitions that Human Rights Watch and IHRC have emphasized as critical for the assistance of victims. Explicit provisions could be added to provide age- and gender-sensitive assistance to victims.

Existing non-legislative measures can also inform national implementation of the convention's victim assistance provisions. The Vientiane Action Plan adopted at the First Meeting of States Parties to the Convention on Cluster Munitions in November 2010 provides guidance to states on how to implement victim assistance.<sup>176</sup> As of 2013, at least 12 states parties had already undertaken efforts to create national victim assistance plans, despite not having national implementation legislation.<sup>177</sup> Specifically targeted programs have been most successful and have had the benefit of assisting communities with similar needs, especially other persons with disabilities.<sup>178</sup> As of 2013, all states parties that had

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<sup>175</sup> ICRC Model Legislation, § 10.

<sup>176</sup> Vientiane Action Plan, adopted November 12, 2010, <http://www.clusterconvention.org/the-convention/action-plan/> (accessed August 11, 2014), pp. 4-6.

<sup>177</sup> Afghanistan, Albania, Bosnia and Herzegovina, Chad, Croatia, Guinea-Bissau, Iraq, Lao PDR, Lebanon, Montenegro, Mozambique, and Sierra Leone. ICBL-CMC, *Cluster Munition Monitor 2013*, p. 60.

<sup>178</sup> Landmine and Cluster Munition Monitor, "Frameworks for Victim Assistance," p. 2.

victim assistance coordination structures in place had involved survivors or their representative organizations in those coordination mechanisms.<sup>179</sup>

## International Cooperation and Assistance

National implementation legislation could:

- establish, where necessary or advantageous, an administrative framework to facilitate the provision of at least some form of technical, materiel, and financial assistance to other states parties for:
  - stockpile destruction,<sup>180</sup>
  - clearance,<sup>181</sup>
  - victim assistance,<sup>182</sup>
  - emergency situations,<sup>183</sup> and
  - economic and social recovery;<sup>184</sup>
- promote the fullest exchange of equipment and scientific and technological information;<sup>185</sup> and
- require the facilitation of the entry and exit of personnel, materiel, and equipment from donor states.<sup>186</sup>

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<sup>179</sup> ICBL-CMC, *Cluster Munition Monitor 2014*, p. 48.

<sup>180</sup> This component 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.”

<sup>181</sup> This component 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.”

<sup>182</sup> This component 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.”

<sup>183</sup> This component 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.”

<sup>184</sup> This component 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.”

<sup>185</sup> This component 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.”

<sup>186</sup> This component 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.”

### *Purpose*

Countries that either stockpile cluster munitions or are affected by them bear the primary responsibility for fulfilling the convention's positive obligations on destruction of stockpiles, clearance, and assistance to victims. The convention's article on international cooperation and assistance strives 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 are required to provide such assistance. A state party could therefore include in its implementation legislation a provision on international cooperation and assistance that construes assistance broadly and establishes a framework to help the state party 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.

When necessary or advantageous, national legislation should require a state party to create an administrative framework to implement the convention's assistance obligations. Legislation should specify that a state party has the option to provide assistance in a variety of forms, including technical, materiel, and financial. This approach would arguably allow any state party to contribute in some way.

### *Existing Precedent*

Italy, Hungary, and Norway commit to providing international assistance and cooperation to implement key elements of the Convention on Cluster Munitions, and Spain seeks to do the same in its proposed legislation. Italy notably includes in its national legislation provisions concerning assistance to affected states for victim assistance and clearance and destruction of cluster munitions remnants. Italy's legislation provides that a fund established for the realization of its obligations under the Convention on Cluster Munitions is used for "remediation programs in areas with remnants of cluster munitions, to be implemented according to the procedures laid down in Articles 4 and 6 of the Oslo Convention ... and assistance to victims of cluster munitions, provided for in Article 5 of the Convention, including the mental and physical rehabilitation and social and economic inclusion [of victims]."<sup>187</sup>

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<sup>187</sup> Italy Legislation, art. 5(2) ("*A decorrere dall'esercizio finanziario 2011, il Fondo di cui al comma 1 e' destinato, altresì, alla realizzazione di programmi di bonifica di aree con residui di munizioni a grappolo, da attuare secondo le modalita' previste*").

Articles 4 and 5 of the Convention on Cluster Munitions concern clearance and destruction of cluster munition remnants and risk reduction education, and victim assistance, respectively.

Hungary takes a different approach and simply incorporates the text of the convention into its legislation, agreeing that each state party in a position to do so shall “provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention.”<sup>188</sup>

Though Norway does not address international assistance in its statute, a statutory analysis by the Norwegian government explains that it expects to provide international assistance: “It is ... envisaged that assistance is to be provided to affected States and areas and to cluster munition victims through international cooperation as specified in the Convention.”<sup>189</sup> While interpretive statements are welcome, a statute that explicitly provides for international assistance and cooperation would be stronger.

Spain includes a particularly strong article on international cooperation and assistance in its proposed legislation. The article requires the government to allocate funds to support clearance programs, technology transfers, and training of deminers. It further obliges the government to provide financial assistance and other forms of cooperation to help victims of cluster munitions, including individuals, families, and communities.<sup>190</sup>

In 2013, the Cluster Munition Monitor reported that 28 states, the European Union, and the UN Development Programme had supported mine action programs in the 26 states and three other areas contaminated by cluster munition remnants, including countries recognized as among the most affected by cluster munitions: Cambodia, Lao PDR, Iraq, Lebanon, and Vietnam.<sup>191</sup> States parties and non-parties are thus participating in international assistance and cooperation for cluster munitions work, despite not having legislation that covers such assistance. Human Rights Watch and IHRC strongly encourage,

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*dagli articoli 4 e 6 della Convenzione di Oslo sulla messa al bando delle munizioni a grappolo, fatta a Dublino il 30 maggio 2008, e all'assistenza alle vittime delle munizioni a grappolo, prevista dall'articolo 5 della citata Convenzione, ivi inclusi la riabilitazione psicofisica e l'inserimento sociale ed economico.” (emphasis added).*

<sup>188</sup> Hungary Legislation, § 3, art. 6(2).

<sup>189</sup> Norway Proposition No. 7, ¶ 4.4.

<sup>190</sup> Spain Proposed Legislation, art. 6.

<sup>191</sup> ICBL-CMC, *Cluster Munition Monitor 2013*, p. 65.

however, the codification in implementation legislation of mechanisms to provide international cooperation and assistance.

## 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.<sup>192</sup>

### *Purpose*

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. It is also a tool for states to make other states aware of their needs for assistance. Implementation legislation should require a state party to report annually on its efforts to meet the obligations discussed above, especially stockpile destruction, clearance, and victim assistance, but also the other subjects enumerated in Article 7. 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.

As discussed above, 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, acquires, or transfers for clearance training or development of counter-measures. Spain's proposed legislation, for example, requires the government to provide such a report to parliament and the UN Secretary-General.<sup>193</sup> Human Rights Watch and IHRC believe legislation should not permit retention, acquisition, or transfer for clearance training or development of counter-measures. If a state does permit these activities, however, reporting is essential to help prevent abuse.

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<sup>192</sup> This component is based on Convention on Cluster Munitions, art. 7(1).

<sup>193</sup> Spain Proposed Legislation, art. 5.

## *Existing Precedent*

At least six states have included in their national implementation statutes provisions related to transparency and the obligation to report on measures taken to implement the Convention on Cluster Munitions.<sup>194</sup> Some states affirm the convention’s obligation to report.<sup>195</sup> For example, Italy’s law states the Ministry of Foreign Affairs and designated authorities shall be competent to “submit to the Secretary-General of the United Nations (UN) initial and periodic declarations mentioned in Article 7 of the Convention” and that they should receive “data necessary for the compilation of national reports referred to in Article 7, paragraph 1, of the Convention.”<sup>196</sup>

Some states, such as the Cook Islands, Japan, and New Zealand, give more specific guidance and require persons to provide information to ministers that facilitates meeting state obligations under Article 7 of the convention.<sup>197</sup> This approach parallels the ICRC model law, which 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;
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.<sup>198</sup>

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<sup>194</sup> Cook Islands Legislation, § 10; France Legislation art. L. 2344-5; Hungary Legislation, § 3, art. 7; Italy Legislation, art. 4; Japan Legislation, arts. 15(1), 16, and 17(1); New Zealand Legislation, § 17(1). Additionally, Norway mentions its reporting obligations in a government analysis of its law. See Norway Proposition No. 7, ¶ 4.3.

<sup>195</sup> Hungary Legislation, § 3, art. 7; Italy Legislation, art. 4. Norway similarly affirms this obligation in the government’s analysis of its law. See Norway Proposition No. 7, ¶ 4.3.

<sup>196</sup> Italy Legislation, art. 4 (“(1) Il Ministero degli affari esteri e’ designato quale autorita’ nazionale competente a presentare al Segretariato generale dell’Organizzazione delle Nazioni Unite (ONU) le dichiarazioni iniziali e quelle periodiche indicate dall’articolo 7 della Convenzione ... (2) Il Ministero degli affari esteri, in qualita’ di autorita’ nazionale per gli adempimenti internazionali di cui al comma 1, riceve dai Ministeri competenti i dati necessari alla compilazione dei rapporti nazionali, di cui all’articolo 7, paragrafo 1, della Convenzione.”).

<sup>197</sup> Cook Islands Legislation, § 10; Japan Legislation, arts. 16 and 17(1); New Zealand Legislation, § 17(1). See also ICRC Model Legislation, § 13.

<sup>198</sup> ICRC Model Legislation, § 13.



Such provisions help the minister to obtain the information necessary to make the kinds of governmental reports required by the Convention on Cluster Munitions.

At least one state, France, details in its legislation information on the requirements of annual reporting for the holder and operator of cluster munitions:

The following are subject to annual reporting:

1. For the holder:
  - a. The set of cluster munitions, including explosive submunitions, including a breakdown of the type, quantity and, if possible, lot numbers of each type;
  - b. The status of programs for the destruction of stockpiled cluster munitions, including explosive submunitions, with details of the methods used in destruction, the location of sites and standards observed for safety and environmental protection;
  - c. The types and quantities of cluster munitions destroyed, including explosive submunitions, after the entry into force of the Oslo Convention, including details of the methods of destruction used, the location of destruction sites and standards observed for safety and environmental protection;
2. By their operator:
  - a. The facilities authorized to retain or transfer cluster munitions for the purpose of destruction or for the development of techniques for detection, clearance or destruction of cluster munitions and explosive submunitions and for training in these techniques;
  - b. The status of programs for the conversion or decommissioning of production facilities of cluster munitions.<sup>199</sup>

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<sup>199</sup> France Legislation, art. L. 2344-5 (“*Sont soumis à déclaration annuelle:/1° Par leur détenteur:/ a) L'ensemble des armes à sous-munitions, y compris les sous-munitions explosives, incluant une ventilation par type, quantité et, si cela est possible, par numéro de lot pour chaque type; b) L'état des programmes de destruction des stocks d'armes à sous-munitions, y compris les sous-munitions explosives, avec des précisions sur les méthodes utilisées pour la destruction, la localisation des sites et les normes observées en matière de sécurité et protection de l'environnement; c) Les types et quantités des armes à sous-munitions détruites, y compris les sous-munitions explosives, après l'entrée en vigueur de la convention d'Oslo, avec des précisions sur les méthodes de destruction utilisées, la localisation des sites de destruction et les normes observées en matière de sécurité et protection de l'environnement;/ 2° Par leur exploitant:/ a) Les installations autorisées à conserver ou à transférer des armes à sous-munitions à des fins de destruction ou pour la mise au point de techniques de détection, d'enlèvement ou de destruction des armes à sous-munitions et des sous-munitions explosives, et pour la formation à ces techniques; b) L'état des programmes de reconversion ou de mise hors service des installations de production d'armes à sous-munitions.*”).

Spain’s proposed legislation requires the government to provide information on destruction of its stockpiles for its annual Article 7 report until destruction is completed.<sup>200</sup>

## Compliance

National implementation legislation could:

- establish a mechanism for responding expeditiously to another state party’s request for clarification on matters relating to treaty compliance.<sup>201</sup>

### *Purpose*

The Convention on Cluster Munitions adopts a cooperative approach to compliance. It allows states parties that cannot resolve differences bilaterally to exchange information through the UN Secretary-General in an effort to amicably clarify matters of compliance.

### *Existing Precedent*

At least three states have included compliance provisions in their national implementation legislation.<sup>202</sup> Italy, for instance, establishes the Ministry of Foreign Affairs as the authority to make and receive requests pursuant to Article 8 of the Convention.<sup>203</sup> The Cook Islands permit the Foreign Affairs and Immigration Minister, “by written notice served on any person, [to] require the person to give the Minister any information or documents specified in the notice that the Minister has reason to believe is in the person’s possession, and is relevant to ... (c) the Cook Islands’ obligation to provide information under Article 8 of the Convention [on Cluster Munitions].”<sup>204</sup>

Though implementation legislation need not address compliance in great detail, states should consider adopting the ICRC’s proposal to establish an expeditious mechanism to respond to requests for clarification from other states parties. The ICRC model law states:

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<sup>200</sup> Spain Proposed Legislation, art. 3(3).

<sup>201</sup> This component is based on the process described in Convention on Cluster Munitions, art. 8.

<sup>202</sup> Cook Islands Legislation, § 10; Hungary Legislation, § 3, art. 8; Italy Legislation, art. 4(1).

<sup>203</sup> Italy Legislation, art. 4(1).

<sup>204</sup> Cook Islands Legislation, § 10.

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.<sup>205</sup>

## 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;<sup>206</sup>
- require that the government promote the convention's norms to all states;<sup>207</sup> and
- designate a government agency responsible for coordinating these activities.

### *Purpose*

Promoting universalization of the Convention on Cluster Munitions is important for two main reasons. First, binding more states as parties increases the effectiveness of the treaty. 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. 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 explicitly required by Article 21(2), use of these weapons. A state party should also encourage others to adopt the convention's 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

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<sup>205</sup> ICRC Model Legislation, § 12.

<sup>206</sup> This component 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."

<sup>207</sup> This component is based on *ibid.*, art. 21(2): "Each State Party shall ... promote the norms [the Convention] establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions."

cluster munitions. 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.

### *Existing Precedent*

At least two states, Hungary and Italy, have included provisions in their implementation legislation to promote accession to the Convention on Cluster Munitions. Hungary's legislation requires Hungary to "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."<sup>208</sup>

Italy's legislation provides that its fund dedicated to humanitarian demining and land reclamation be disbursed to raise "awareness against the use of landmines and cluster munitions and ... in favor of universalization of the Ottawa Convention against landmines and the Oslo Convention banning cluster munitions."<sup>209</sup>

At least three states, the Cook Islands, New Zealand, and Samoa, designate a government agency responsible for coordinating activities to give effect to their implementation legislation.<sup>210</sup> These agencies could conceivably coordinate government-wide efforts to encourage adherence to the convention and its norms. Stronger legislation would make such responsibilities explicit.

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<sup>208</sup> Hungary Legislation, § 3, art. 21(1).

<sup>209</sup> Italy Legislation, art. 5(1) ("Art. 5 / Modifiche alla legge 7 marzo 2001, n. 58 / 1. All'articolo 1, comma 1, della legge 7 marzo 2001, n. 58, e successive modificazioni, la lettera g) e' sostituita dalla seguente: 'g) sensibilizzazione contro l'uso delle mine terrestri e delle munizioni a grappolo ed in favore dell'adesione alla totale messa al bando delle mine e delle munizioni a grappolo nonche' in favore dell'universalizzazione della Convenzione di Ottawa contro le mine antipersona e della Convenzione di Oslo sulla messa al bando delle munizioni a grappolo.'").

<sup>210</sup> Cook Islands Legislation, § 12; New Zealand Legislation, § 19; Samoa Legislation, § 15.

## V. Breadth of Coverage

This part discusses issues related to the breadth of a law’s coverage, including application of legislation to explosive bomblets, liability for corporate offenders, and extraterritorial jurisdiction.

### Coverage of Explosive Bomblets

National implementation legislation should:

- make clear that all obligations apply equally to cluster munitions and explosive bomblets released from a dispenser affixed to an aircraft.<sup>211</sup>

#### *Purpose*

National legislation should specify that it applies equally to cluster munitions and explosive bomblets released from 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, but it is less explicit about the application of its other obligations.<sup>212</sup> To avoid any loopholes, implementation legislation should ensure that all of its obligations apply equally to cluster munitions and explosive bomblets.

#### *Existing Precedent*

At least 12 states’ implementation statutes, as well as Canada’s and Spain’s proposed legislation and the ICRC model law, explicitly apply at least in part to both cluster munitions and explosive bomblets.<sup>213</sup> These statutes make their application to explosive

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<sup>211</sup> This component is based on the definitions of “explosive bomblet” and “dispenser” in Convention on Cluster Munitions, art. 2(13)–(14) and on *ibid.*, art. 1(2), which states that the convention’s prohibitions on use, development, production, acquisition, stockpiling, retention, transfer, or assistance “appl[y], *mutatis mutandis*, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.”

<sup>212</sup> While probably an oversight, the convention does not specify that other articles, such as those on stockpile destruction, clearance of affected areas, and victim assistance, apply to explosive bomblets. See Virgil Wiebe, Declan Smyth, and Stuart Casey-Maslen, “Article 1: General Obligations and Scope of Application,” in *The Convention on Cluster Munitions: A Commentary*, eds. Nystuen and Casey-Maslen, pp. 139-141.

<sup>213</sup> See Australia Legislation, § 72.44; France Legislation, art. L. 2344–2; Guatemala Legislation, art. 3(2); Hungary Legislation, § 3, art. 1(2); Ireland Legislation, § 6(1); Liechtenstein Legislation, art. 7a(2); New Zealand Legislation, § 12; Samoa Legislation, § 9(2); Sweden Legislation, § 1; Switzerland Legislation, art. 8a(2); United Kingdom Legislation, § 1(3)(b), as well as scattered sections of Cook Islands Legislation. See also Canada Proposed Legislation, § 6; Spain Proposed Legislation, art. 2(1); ICRC Model Legislation, § 3(4).

bomblets clear in various ways; provided that implementation legislation somehow indicates that the entire statute applies to explosive bomblets, any of these methods would be effective.

One method is to include a specific statutory provision indicating that the statute applies equally to cluster munitions and to explosive bomblets. New Zealand, for example, includes a special provision following its cluster munitions prohibitions, stating that the prohibitions “apply, with any necessary modifications, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft, as if those explosive bomblets were cluster munitions.”<sup>214</sup> Australia’s statute goes further by including a provision clarifying that the *entire* statute “applies in relation to explosive bomblets in the same way as it applies in relation to cluster munitions.”<sup>215</sup>

A second method by which legislation may indicate its application to explosive bomblets is simply to mention explosive bomblets every time it mentions cluster munitions. The Cook Islands and Guatemala take this approach, as does Canada’s proposed legislation.<sup>216</sup> Similarly, Ireland includes the term “explosive bomblet” alongside “cluster munition” throughout its law.<sup>217</sup>

Finally, rather than using the term “cluster munition,” the United Kingdom’s statute throughout uses the term “prohibited munition,” which it defines as “a cluster munition, or ... an explosive bomblet that is specifically designed to be dispersed or released from dispensers affixed to aircraft.”<sup>218</sup>

As long as a state party’s implementation legislation makes clear that the entire statute applies both to explosive bomblets and to cluster munitions, any of these approaches can be effective.

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<sup>214</sup> New Zealand Legislation, § 12. France, Hungary, Liechtenstein, Samoa, and Switzerland’s statutes all similarly contain specific provisions specifying that at least the statute’s negative prohibitions apply to explosive bomblets. See France Legislation, art. L. 2344–2; Hungary Legislation, § 3, art. 1(2); Liechtenstein Legislation, art. 7a(2); Samoa Legislation, § 9(2); Switzerland Legislation, art. 8a(2).

<sup>215</sup> Australia Legislation, § 72.44. Although the provision states that only “[t]his Subdivision” applies to explosive bomblets, Australia’s cluster munitions legislation is a subdivision of a broader arms control statute. Therefore, the term “Subdivision” within the context of Article 72.44 refers to the entirety of Australia’s implementation legislation on cluster munitions.

<sup>216</sup> See generally Cook Islands Legislation; Guatemala Legislation. See also generally Canada Proposed Legislation.

<sup>217</sup> Ireland Legislation, § 6(1).

<sup>218</sup> United Kingdom Legislation, § 1(3).

## Application to Corporations and Other Legal Entities

National implementation legislation should:

- specify that all prohibitions apply equally to natural persons (human beings) and legal persons (e.g., corporations).

### *Purpose*

Implementation legislation should clarify the convention's reach by explicitly noting that its coverage extends to legal entities such as corporations. Defining "person" too narrowly 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. Legislation should therefore make clear that its provisions apply equally to both natural persons (human beings) and legal persons (e.g., corporations).

### *Existing Precedent*

At least 12 states' implementation statutes, as well as Canada's proposed legislation and both model laws, permit liability to attach to corporations.<sup>219</sup> For example, the Czech Republic, Guatemala, and Luxembourg specify that their statutory prohibitions apply equally to natural and legal persons.<sup>220</sup> Canada's proposed legislation explicitly defines "person" as including organizations.<sup>221</sup> Austria includes an explicit prohibition on the transfer of cluster munitions by means of corporate transactions.<sup>222</sup>

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<sup>219</sup> See Austria Legislation, § 1(3); Cook Islands Legislation, § 5(1)(b); Czech Republic Legislation, § 1; France Legislation, arts. L. 2344–8 and L. 2344–9; Guatemala Legislation, art. 5; Ireland Legislation, § 18; Japan Legislation, art. 26; Luxembourg Legislation, art. 2; New Zealand Legislation, § 9(2)(d); Samoa Legislation, § 8(1); United Kingdom Legislation, § 26. See also Canada Proposed Legislation, § 2; ICRC Model Legislation, § 4(2); New Zealand Model Legislation, § 9(2). Although Hungary's legislation does not explicitly mention corporate liability, it defines cluster munitions as internationally prohibited weapons, which triggers corporate liability under a separate law. Email from Géczy Balázs, Department for Security Policy and Non-proliferation, Ministry of Foreign Affairs of Hungary, to Judith Majlath, CMC-Austria, July 29, 2013 (citing Punitive Measures Applicable against Legal Entities, No. CIV/2001, art. 264/C); see also Hungary Legislation, § 5(f) (defining cluster munitions as internationally prohibited weapons).

<sup>220</sup> See Czech Republic Legislation, § 1 (specifying that the law applies to "*fyzických a právnických*" persons); Guatemala Legislation, art. 5 ("*En caso que los delitos mencionados en el párrafo anterior fueren cometidos por personas jurídicas, se aplicará lo dispuesto en el Código Penal para estos casos.*"); Luxembourg Legislation, art. 2 (specifying that the law applies to "*à toute personne physique ou morale*").

<sup>221</sup> Canada Proposed Legislation, § 2 (defining "person" as "an individual or an organization as defined in section 2 of the *Criminal Code*").

<sup>222</sup> See Austria Legislation, § 1(3) (defining transfer, or "*Vermittlung*," as a process involving an Austrian citizen or a legal person, partnership of commercial law, or registered acquisition company based in Austria ("*ein österreichischer Staatsbürger oder eine juristische Person, Personengesellschaft des Handelsrechts oder eingetragene Erwerbsgesellschaft mit Sitz im Inland*").

At least four statutes express their application to corporations less directly. The laws of the Cook Islands, France, and Japan all refer to corporations in provisions imposing penal sanctions.<sup>223</sup> New Zealand’s extraterritoriality provision states that the law “applies to all acts done or omitted outside New Zealand by ... a body corporate, or a corporation sole [a corporation consisting of a single person], incorporated in New Zealand,” thereby implying that corporations fall within the statute’s scope.<sup>224</sup>

The Cook Islands, Ireland, Samoa, and the United Kingdom as well as the ICRC model legislation all include separate provisions that provide for the individual liability of corporate officers under certain circumstances. Although the officers are natural persons, holding them liable impacts the conduct of corporations. For example, Ireland’s legislation allows liability to attach to a corporate officer, as well as to the corporation itself, when an offense is attributable to that officer’s intention or negligence.<sup>225</sup> Samoa imposes individual liability on a corporation’s officers for any offenses attributable to the corporation unless “he or she exercised all such diligence to prevent the commission of the offence as ought to have been exercised, having regard to the nature of his or her functions in that capacity and to all the circumstances.”<sup>226</sup> Similarly, the Cook Islands specify that “[a] person commits an offence who, being a director, manager or other similar officer of a body corporate (or purporting to act as a director, manager or other similar officer of a body corporate) fails or refuses to take all reasonable practicable steps to ensure that the body corporate does not commit an offence.”<sup>227</sup>

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<sup>223</sup> See Cook Islands Legislation, § 5(1)(b); France Legislation, arts. L. 2344–8 and L. 2344-9; Japan Legislation, art. 26.

<sup>224</sup> New Zealand Legislation, § 9(2)(d). See also New Zealand Model Legislation, § 9(2). Samoa and the United Kingdom’s extraterritoriality provisions similarly make clear that coverage extends to corporations. See Samoa Legislation, § 4(3)(iv); United Kingdom Legislation, § 4(3)(c) (specifying that certain provisions apply extraterritorially to “bodies incorporated under the law of any part of the United Kingdom”).

<sup>225</sup> Ireland Legislation, § 18(1) (“Where an offence under this Act is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any person who, when the offence was committed, was a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, that person, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished as if guilty of the offence committed by the body corporate.”). Similar language appears in ICRC Model Legislation, § 4(2); United Kingdom Legislation, § 26.

<sup>226</sup> Samoa Legislation, § 8(2)(b).

<sup>227</sup> Cook Islands Legislation, § 4(2).



## Extraterritorial Application

National implementation legislation should:

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

### *Purpose*

Because some of the acts prohibited by national implementation legislation can involve conduct outside a state's territorial borders, a state party should establish extraterritorial jurisdiction over cluster munition-related offenses. A state party should not allow its people or corporations to escape the consequences of violating the implementation legislation simply by leaving its territory; rather, the state party should hold them to the standard it has adopted under the convention. People and corporations that enjoy the protections of a state party also have the responsibility to abide by that state's international and domestic obligations. By declaring extraterritorial jurisdiction in its implementation legislation, a state party will help ensure that its people and corporations follow its laws and thereby uphold the prohibition on cluster munitions.

### *Existing Precedent*

At least 11 states' implementation statutes, as well as both model laws, provide for extraterritorial application.<sup>228</sup> Guatemala, for example, specifies that all its prohibitions apply extraterritorially.<sup>229</sup> Norway and Sweden note that their statutes apply extraterritorially to citizens and resident aliens.<sup>230</sup> France specifically notes that criminal liability can attach to the conduct of its citizens abroad, even when such conduct is not illegal under the laws of the state in whose territory the conduct occurs.<sup>231</sup>

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<sup>228</sup> See Australia Legislation, § 72.38(3); Cook Islands Legislation, § 6; France Legislation, art. L. 2344–10; Guatemala Legislation, art. 3(3); Ireland Legislation, § 6(3); New Zealand Legislation, § 9; Norway Legislation, § 5; Samoa Legislation, § 4; Sweden Legislation, § 2; United Kingdom Legislation, § 4. See also ICRC Model Legislation, § 5; New Zealand Model Legislation, § 9. Although Hungary's legislation does not explicitly mention extraterritorial application, it defines cluster munitions as internationally prohibited weapons, which triggers extraterritorial liability under a separate law for violations committed abroad by Hungarian citizens, violations that occur on board vessels and aircraft registered in Hungary, and, in some cases, to violations by foreign citizens outside of Hungary's territory. Email from Balázs, July 29, 2013 (citing Penal Code, art. 160/A § 3(f)). See also Hungary Legislation, § 5(f) (defining cluster munitions as internationally prohibited weapons).

<sup>229</sup> See Guatemala Legislation, art. 3(3) (“*Se prohíbe ayudar, alentar o inducir a alguien a participar en cualquiera de las actividades citadas en los dos párrafos anteriores, dentro y fuera del territorio nacional.*”).

<sup>230</sup> See Norway Legislation, § 5; Sweden Legislation, § 2.

<sup>231</sup> France Legislation, art. L. 2344–10 (“*Lorsque les infractions ... sont commises hors du territoire de la République par un Français, la loi pénale française est applicable alors, même que les faits ne seraient pas punis par la législation du pays où ils ont été commis.*”).

Other statutes go further by imposing extraterritorial liability on corporations. New Zealand’s statute, for example, contains a provision explicitly specifying that the statute “applies to all acts done or omitted outside New Zealand by ... a New Zealand citizen; or ... a person who is ordinarily resident in New Zealand but not the citizen of any State; or ... a member of the Armed Forces; or ... a body corporate, or a corporation sole, incorporated in New Zealand.”<sup>232</sup> The Cook Islands, Samoa, and the United Kingdom similarly establish that their statutory provisions apply to the extraterritorial conduct of both residents and resident corporations.<sup>233</sup>

Although extensive extraterritorial application best coheres with the convention’s object and purpose, Ireland has provided for more limited extraterritorial jurisdiction. Its statute reaches only extraterritorial conduct that is committed “on board an Irish ship, ... on an aircraft registered in the State, or ... by a member of the Defence Forces.”<sup>234</sup> The 10 other states that address extraterritorial jurisdiction, however, provide for more comprehensive coverage.

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<sup>232</sup> New Zealand Legislation, § 9.

<sup>233</sup> See Cook Islands Legislation, § 6; Samoa Legislation, § 4(3); United Kingdom Legislation, § 4(3). Australia’s statute goes further still. Within the broader context of Australia’s penal code, Australia’s implementation legislation falls into a category of statute that attaches liability to the extraterritorial conduct even of non-citizens and non-residents, provided that the *effects* of their conduct occur within Australia’s territorial borders. See Australia Legislation, § 72.38(3). See also Criminal Code Act, 1995, pt 2.7, div 15.2 (describing category B extended jurisdiction).

<sup>234</sup> Ireland Legislation, § 6(3).

## Conclusion

States parties that have not yet adopted implementation legislation must comply with their Article 9 obligations under the convention by doing so as soon as possible. States not party should also move quickly to pass legislation if it is required to ratify or accede to the convention. 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 them to meet or exceed the strongest available standard with respect to each of the substantive components delineated above. By incorporating these key components into implementation legislation and, where possible, drawing from exemplary provisions of existing legislation, states will continue to strengthen emerging international norms against cluster munitions.

## Appendix I: Table of Statutes

**Austria:** Bundesgesetz über das Verbot von Streumunition, *Bundesgesetzblatt*, No. 12, 2008, [http://ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2008\\_I\\_12/BGBLA\\_2008\\_I\\_12.pdf](http://ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2008_I_12/BGBLA_2008_I_12.pdf) (Austria Legislation)

**Australia:** Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012, No. 114, 2012, <http://www.comlaw.gov.au/Details/C2012A00114/Download> (Australia Legislation)

**Belgium:** Loi réglant des activités économiques et individuelles avec des armes, *Moniteur Belge*, 2006, [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a.pl?sql=dt=%27loi%27&rech=1&cn=2006060830&caller=image\\_a1&language=fr&tri=dd+as+rank&fromtab=loi&numero=1&la=f&pdf\\_page=2&pdf\\_file=http://www.ejustice.just.fgov.be/mopdf/2006/06/09\\_3.pdf](http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?sql=dt=%27loi%27&rech=1&cn=2006060830&caller=image_a1&language=fr&tri=dd+as+rank&fromtab=loi&numero=1&la=f&pdf_page=2&pdf_file=http://www.ejustice.just.fgov.be/mopdf/2006/06/09_3.pdf) (Belgium Legislation)

**Canada (Bill):** Bill C-6: An Act to implement the Convention on Cluster Munitions, 2014, [http://www.parl.gc.ca/content/hoc/Bills/412/Government/C-6/C-6\\_2/C-6\\_2.pdf](http://www.parl.gc.ca/content/hoc/Bills/412/Government/C-6/C-6_2/C-6_2.pdf) (Canada Proposed Legislation)

**Cook Islands:** An Act to implement the Convention on Cluster Munitions in the Cook Islands and related matters, No. 8, 2011, [http://www.ikrk.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=8A69D2C362458D89C12579490033E713&action=openDocument&xp\\_countrySelected=CK&xp\\_topicSelected=GVAL-992BUM&from=topic](http://www.ikrk.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=8A69D2C362458D89C12579490033E713&action=openDocument&xp_countrySelected=CK&xp_topicSelected=GVAL-992BUM&from=topic) (Cook Islands Legislation)

**Czech Republic:** Zákon o zákazu kazetové munice, *Sbírka Zákonů*, No. 213, 2011, <http://www.podnikatel.cz/zakony/zakon-o-zakazu-pouziti-vyvoje-vyroby-skladovani-a-prevodu-kazetove-munice-a-o-jejim-zniceni-zakon-o-zakazu-kazetove-munice/uplne/> (Czech Republic Legislation)

**Ecuador:** Ley Reformatoria al Código Penal para la tipificación de los delitos cometidos en el servicio military policial, *Registro Oficial*, No. 196, 2010, <http://www.derechoecuador.com/productos/producto/catalogo/registros->

oficiales/2010/mayo/code/19569/registro-oficial-no-196---miercoles-19-de-mayo-de-2010-suplemento, art. 602.58 (Ecuador Legislation)

**France:** Loi n° 2010-819 du 20 juillet 2010 tendant à l'élimination des armes à sous-munitions, <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022502271> (France Legislation)

**Germany:** Ausführungsgesetz zu Artikel 26 Abs. 2 des Grundgesetzes (Gesetz über die Kontrolle von Kriegswaffen), amended 2009, <http://www.gesetze-im-internet.de/bundesrecht/krwaffkontrg/gesamt.pdf> (Germany Legislation)

**Guatemala:** Ley de Municiones en Racimo y/o Bombetas Explosivas, Decreto Número 22-2012, 2012, <http://www.oj.gob.gt/es/queesoj/estructuraoj/unidadesadministrativas/centroanalisisdocumentacionjudicial/cds/CDS%20leyes/2012/pdfs/decretos/D22-2012.pdf> (Guatemala Legislation)

**Hungary:** Törvény a Kazettás Lőszerekről szóló Egyezmény kihirdetéséről, 2012, <http://jab.complex.hu/doc.php?docid=WKHU-QJ-XML-000000A1200011TV> (Hungary Legislation)

**Ireland:** Cluster Munitions and Anti-Personnel Mines Act, No. 20, 2008, <http://www.irishstatutebook.ie/pdf/2008/en.act.2008.0020.pdf> (Ireland Legislation)

**Italy:** Ratifica Convenzione di Oslo su messa al bando delle munizioni a grappolo, No. 95, 2011, <http://www.altalex.com/index.php?idnot=14797> (Italy Legislation)

**Japan:** クラスター弾等の製造の禁止及び所持の規制等に関する法律, 2009, <http://law.e-gov.go.jp/htmldata/H21/H21HO085.html> (Japan Legislation)

**Liechtenstein:** Gesetz vom 20. Dezember 2012 über die Abänderung des Kriegsmaterialgesetzes, *Liechtensteinisches Landesgesetzblatt*, No. 197, 2013, <http://www.gesetze.li/chrono/o/pdfs/2013197000> (Liechtenstein Legislation)

**Luxembourg:** 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, *Memorial*, No. 147, 2009, <http://www.legilux.public.lu/leg/a/archives/2009/0147/a147.pdf> (Luxembourg Legislation)

**New Zealand:** Cluster Munitions Prohibition Act, No. 68, 2009, <http://www.legislation.govt.nz/act/public/2009/0068/latest/whole.html#DLM2171615> (New Zealand Legislation)

**Norway:** Lov om gjennomføring av Konvensjonen om klaseammunisjon, No. 28, 2009, [http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=A07A543CDAE9A19EC12577BD0045ED47&action=openDocument&xp\\_countrySelected=NO&xp\\_topicSelected=GVAL-992BUM&from=topic](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=A07A543CDAE9A19EC12577BD0045ED47&action=openDocument&xp_countrySelected=NO&xp_topicSelected=GVAL-992BUM&from=topic) (Norway Legislation)

**Samoa:** An Act to give effect to the 2008 Convention on Cluster Munitions, and for related matters, No. 11, 2012, [http://www.ikrk.org/ihl-nat.nsf/0/9a2e217084ca86f6c1257b4a004a5604/\\$FILE/Cluster%20Munition%20Act.pdf](http://www.ikrk.org/ihl-nat.nsf/0/9a2e217084ca86f6c1257b4a004a5604/$FILE/Cluster%20Munition%20Act.pdf) (Samoa Legislation)

**Spain:** Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, *Boletín Oficial del Estado*, 2010, <http://www.boe.es/boe/dias/2010/06/23/pdfs/BOE-A-2010-9953.pdf> (Spain Legislation)

**Spain (Bill):** Proyecto de Ley de modificación de la Ley 33/1998, de 5 de octubre de prohibición total de minas antipersonal y armas de efecto similar, 121-000061, *Boletín Oficial de las Cortes Generales: Congreso de los Diputados*, 2013, [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-61-1.PDF](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-61-1.PDF) (Spain Proposed Legislation)

**Sweden:** Lag om straff för olovlig befattning med klusterammunition, No. 179, 2012, <http://rkrattsdob.gov.se/SFSdoc/12/120179.pdf> (Sweden Legislation)

**Switzerland:** Loi fédérale sur le matériel de guerre (Modification du 16 mars 2012), <http://www.admin.ch/opc/fr/federal-gazette/2012/3213.pdf> (Switzerland Legislation)

**United Kingdom:** Cluster Munitions (Prohibitions) Act, ch. 11, 2010, [http://www.legislation.gov.uk/ukpga/2010/11/pdfs/ukpga\\_20100011\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/11/pdfs/ukpga_20100011_en.pdf) (United Kingdom Legislation)

**ICRC (Model Legislation):** Model Law, Convention on Cluster Munitions: Legislation for Common Law States on the 2008 Convention on Cluster Munitions, 2008, [http://www.clusterconvention.org/files/2013/03/model\\_law\\_clusters\\_munitions.pdf](http://www.clusterconvention.org/files/2013/03/model_law_clusters_munitions.pdf) (ICRC Model Legislation)

**New Zealand (Model Legislation):** Model Legislation: Cluster Munitions Act 2011[], CCM/MSP/2011/WP.6, 2011, [http://www.clusterconvention.org/files/2013/03/Model-Legislation\\_Cluster-Munitions-Act-2011.pdf](http://www.clusterconvention.org/files/2013/03/Model-Legislation_Cluster-Munitions-Act-2011.pdf) (New Zealand Model Legislation)

## **Appendix II:**

# **Implementing the Convention on Cluster Munitions**

### **Components of Strong Law and Supporting Examples**

Article 9 of the Convention on Cluster Munitions obliges states parties to implement the convention nationally through all appropriate legal, administrative, and other measures. Legislation is the most powerful form of implementation because it is binding and more difficult to change than administrative measures.

This reference document presents the essential components of strong national legislation, grouped under the following headings:

- negative obligations under the convention,
- prohibition on assistance and related interpretive issues,
- positive obligations under the convention, and
- breadth of coverage.

For each component, the relevant source in the Convention on Cluster Munitions is given in parentheses. Under each component, this document also bulleted examples of provisions in existing statutes that will be useful for states looking to incorporate the convention's obligations into their domestic law.

To date, 22 of 84 states parties have adopted national legislation. For more information on the components of strong legislation, the reasons behind them, and exemplary existing provisions, see Human Rights Watch and Harvard Law School's International Human Rights Clinic, *Staying Strong: Key Components and Positive Precedent for Convention on Cluster Munitions Legislation*, September 2014.



## Negative Obligations

### Use

Legislation should **prohibit the use** of cluster munitions. (Article 1(1)(a))

- All existing legislation recognizes a prohibition on the use of cluster munitions.

### Development, Production, and Other Forms of Acquisition

Legislation should **prohibit the development, production, and acquisition** of cluster munitions. (Article 1(1)(b))

- All existing legislation recognizes a prohibition on the development, production, and acquisition of cluster munitions.
- *Guatemala, Hungary, and Samoa* prohibit direct and indirect development, production, and acquisition, and *Italy* prohibits these activities in any way.
- *Spain* prohibits as development any activity consistent with the creation of new cluster munitions or the modification of pre-existing cluster munitions.
- The *Czech Republic* prohibits acquisition of patent rights for the development of technologies designed for the purpose of manufacturing cluster munitions or their components.

Legislation should **require the conversion or decommissioning of production facilities** for cluster munitions. (Articles 1(1)(b) and 7(1)(d))

- *France and Hungary* require reporting on conversion and decommissioning.
- *Austria* permits courts to order owners to destroy or modify equipment and facilities used to manufacture cluster munitions.

### Transfer

Legislation should **prohibit the transfer** of cluster munitions to anyone. (Article 1(1)(b))

- All existing legislation recognizes a prohibition on the transfer of cluster munitions.
- The *Cook Islands, New Zealand, Samoa, and the United Kingdom* define “transfer” as meaning either physical transfer or legal transfer of title.
- *Guatemala, Hungary, and Italy* prohibit direct and indirect transfer.

## Stockpiling

*Legislation should **prohibit the stockpiling** of cluster munitions. (Article 1(1)(b))*

- All existing legislation recognizes a prohibition on the stockpiling of cluster munitions.
- *Guatemala, Hungary, and Samoa* prohibit direct and indirect stockpiling.
- The *Czech Republic* prohibits stockpiling of cluster munition components.

## Penal Sanctions

*Legislation should **impose penal sanctions** on all natural and legal persons who knowingly and willfully violate the prohibition on use, production, transfer, and stockpiling. (Articles 1 and 9)*

- All existing legislation imposes some kind of penal sanctions—imprisonment and/or fine—for use, production, transfer, and stockpiling.

## Prohibition on Assistance and Interpretive Issues

### Prohibition on Assistance

*Legislation should **prohibit in any way assisting, encouraging, or inducing anyone to engage in any activity prohibited** by the convention. (Article 1(1)(c))*

- *At least 14 states* explicitly prohibit assistance in legislation that is specific to cluster munitions, and 6 of those explicitly impose penal sanctions for assistance.<sup>235</sup> Other states establish prohibitions and create penalties for assistance in general codes.
- *Samoa* prohibits direct or indirect assistance.

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<sup>235</sup> *Australia*, the Czech Republic, France, *Germany*, *Guatemala*, Hungary, Ireland, Italy, *Liechtenstein*, New Zealand, *Norway*, Samoa, *Switzerland*, and the United Kingdom. States explicitly imposing penal sanctions for assistance are italicized.

## Relations with States Not Party: Joint Military Operations

*Legislation should ensure that the prohibitions in the convention, especially on assistance, apply under all circumstances, including joint military operations with states not party. It should also require governments to give notice of their obligations and discourage others from using cluster munitions. (Articles 1 and 21)*

- *Some states* prohibit assistance without making any exceptions for joint military operations, implying that their militaries may not engage in any activity prohibited by the convention during such operations.
- *New Zealand* both prohibits assisting, encouraging, or inducing another person to engage in any prohibited activity and clarifies that a member of the armed forces does not commit an offense merely by engaging in joint military operations with a state not party. Although unnecessary because it is undisputed that states parties may participate in joint military operations and that their troops would not be criminally liable for unknowingly assisting in prohibited acts, such a provision represents a possible model for states wishing explicitly to permit participation without saying assistance is ever allowed.
- *A number of states*, including *Ireland* and *Norway*, have issued interpretive policy statements clarifying that Article 21 of the convention does not justify derogation from the convention's core prohibitions.

## Prohibition on Foreign Stockpiles

*Legislation should prohibit assistance in the form of hosting foreign stockpiles. (Article 1(1)(c))*

- *At least 12 states* with existing implementation laws have issued policy statements declaring the hosting of foreign stockpiles unlawful.<sup>236</sup>
- The *United Kingdom* has eliminated all foreign stockpiles of cluster munitions from its territory.

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<sup>236</sup> Austria, Belgium, the Czech Republic, Ecuador, France, Germany, Guatemala, Ireland, Luxembourg, New Zealand, Norway, and Spain. See International Campaign to Ban Landmines-Cluster Munition Coalition (ICBL-CMC), *Cluster Munition Monitor 2014*, August 2014, <http://www.the-monitor.org/index.php/LM/Our-Research-Products/Cluster-Munition-Monitor>, p. 28.

## Prohibition on Transit

*Legislation should **prohibit assistance in the form of allowing transit of cluster munitions.** (Article 1(1)(c))*

- *Austria* and *Germany* explicitly prohibit transit of cluster munitions across national territory or through national airspace.
- *At least 12 states* with existing implementation laws have issued policy statements declaring the transit of cluster munitions unlawful.<sup>237</sup>

## Prohibition on Investment

*Legislation should **prohibit assistance in the form of direct or indirect investment of public and private funds** in companies that manufacture cluster munitions or components intended for use in cluster munitions. (Article 1(1)(c))*

- *New Zealand* criminalizes the investment of “funds,” which it defines broadly to include “assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired.”
- *Belgium* criminalizes all forms of financial support, including credit and bank guarantees and the purchase of financial instruments.
- *Ireland, Liechtenstein, Samoa, and Switzerland* prohibit both direct and indirect investment.
- *Belgium* prohibits investment in both foreign and domestic companies.
- *Italy* criminalizes financial assistance to companies that develop, produce, acquire, store, or transfer *parts* of cluster munitions.
- *Belgium* and *Ireland* require divestment when a company receiving investment begins manufacturing cluster munitions.
- *Belgium* provides for the creation of a public document listing companies that qualify as cluster munitions producers.

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<sup>237</sup> Austria, Belgium, the Czech Republic, Ecuador, France, Germany, Guatemala, Ireland, Luxembourg, New Zealand, Norway, and Spain. Ibid.

## Positive Obligations

### Stockpile Destruction

*Legislation should **require the separation and destruction of all stockpiles** of cluster munitions within the state party's territory or under its control. Legislation should set a deadline of as soon as possible, but **no more than eight years** after entry into force of the convention for that state party. (Article 3)*

- *Austria, Belgium, the Czech Republic, France, Guatemala, Hungary, and Italy* require stockpile destruction.
- *Austria and Belgium* set three-year deadlines for stockpile destruction.

### Clearance

*Legislation should **establish a process for the identification and destruction of all cluster munitions in contaminated areas** under the states party's jurisdiction or control. Legislation should set a deadline of as soon as possible, but **no more than ten years** after entry into force of the convention for that state party. (Article 4)*

- *Guatemala and Hungary* oblige the state to undertake clearance in the event of becoming affected by cluster munitions.

### Victim Assistance

*Legislation should **designate a governmental focal point for victim assistance, provide for consultation with victims** on the development and implementation of a national plan, **ensure victims are given medical care, rehabilitation, and psychological support that is age and gender sensitive, promote socioeconomic inclusion, and guarantee the victim assistance plan is non-discriminatory.** (Article 5)*

- *Guatemala and Hungary* include comprehensive victim assistance provisions in their implementation legislation.

## International Cooperation and Assistance

*Legislation could establish an administrative framework to **facilitate provision of assistance to other states parties** for fulfillment of the convention's positive obligations, **promote the exchange of equipment and scientific and technological information**, and **require the facilitation of entry and exit of personnel, materiel, and equipment from donor states.** (Article 6)*

- *Hungary* and *Italy* commit to international assistance and cooperation in their legislation.
- *Italy* requires establishment of a fund to be used to provide assistance to affected states for clearance and destruction of cluster munitions remnants and victim assistance.

## Transparency

*Legislation should **require reporting on the implementation of the government's obligations.** (Article 7)*

- *Hungary* and *Italy* affirm their obligations to report on implementation.
- The *Cook Islands*, *Japan*, and *New Zealand* empower a minister to require persons to provide information related to the state's Article 7 obligations.
- *France* details requirements for annual reporting on activities related to cluster munitions.

## Compliance

*Legislation could **establish a mechanism for responding expeditiously to another state party's request for clarification on matters relating to treaty compliance.** (Article 8)*

- The *Cook Islands*, *Hungary*, and *Italy* address Article 8 compliance requests in their legislation.
- *Italy* designates the Ministry of Foreign Affairs as the authority to make and receive requests pursuant to Article 8 of the convention.
- The *Cook Islands* empower the Minister of Foreign Affairs and Immigration to require persons to provide information related to the state's Article 8 obligations.

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

*Legislation could require that the government **encourage states that have not joined the convention to become states parties**, require the government to **promote the convention's norms**, and **designate a government agency** responsible for coordinating these activities. (Article 21(1 and 2))*

- *Hungary* adopts the language of the convention to encourage states to ratify, accept, approve, or accede to the convention with the goal of universal adherence.
- *Italy* stipulates that its assistance fund be disbursed in part to raise awareness against the use of cluster munitions and promote universalization.

## Breadth of Coverage

### Explosive Bomblets

*Legislation should make clear that all obligations **apply equally to cluster munitions and explosive bomblets**. (Article 1(2))*

- *At least 12 states* clarify that their laws apply, as a whole or in part, to both cluster munitions and explosive bomblets.<sup>238</sup>
- *Australia* and *New Zealand* include special provisions specifying that their statutes apply to explosive bomblets.
- The *Cook Islands* and *Guatemala* refer to “explosive bomblets” each time they refer to cluster munitions.
- The *United Kingdom* employs the term “prohibited munition,” which is statutorily defined to include cluster munitions and explosive bomblets.

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<sup>238</sup> Australia, the Cook Islands, France, Guatemala, Hungary, Ireland, Liechtenstein, New Zealand, Samoa, Sweden, Switzerland, and the United Kingdom.

## Application to Corporations and Other Legal Entities

*Legislation should specify that all prohibitions **apply equally to natural persons (human beings) and legal persons (e.g., corporations).** (Article 9)*

- *At least 12 states* permit liability to attach to corporations.<sup>239</sup>
- The *Czech Republic, Guatemala, and Luxembourg* specify that their statutory prohibitions apply equally to natural and legal persons.
- The *Cook Islands, France, and Japan* impose penal sanctions on corporate offenders distinct from those imposed on human offenders.
- The *Cook Islands, Ireland, Samoa, and the United Kingdom* have provisions providing for the individual liability of corporate officers under certain circumstances.

## Extraterritorial Application

*Legislation should stipulate that the state party's jurisdiction **extends extraterritorially to all its citizens and to all legal persons incorporated in the state.** (Article 9)*

- *At least 11 states* provide for extraterritorial application.<sup>240</sup>
- *Norway and Sweden* impose extraterritorial liability on citizens and resident aliens.
- *France* attaches criminal liability to the conduct of its citizens abroad, even where such conduct is not illegal in the territory in which it occurs.
- The *Cook Islands, New Zealand, Samoa, and the United Kingdom* impose liability for the extraterritorial activities of both residents and resident corporations.

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<sup>239</sup> Austria, the Cook Islands, the Czech Republic, France, Guatemala, Hungary, Ireland, Japan, Luxembourg, New Zealand, Samoa, and the United Kingdom.

<sup>240</sup> Australia, the Cook Islands, France, Guatemala, Hungary, Ireland, New Zealand, Norway, Samoa, Sweden, and the United Kingdom.



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# STAYING STRONG

## Key Components and Positive Precedent for Convention on Cluster Munitions Legislation

The Convention on Cluster Munitions is the cornerstone of international efforts to eliminate weapons that have caused civilian casualties for decades. Its promise can only be fully realized, however, if countries implement it at the national level, especially through legislation. National laws help countries meet the treaty's obligations and reinforce its norms. For some states, such laws are prerequisites to ratification of the 2008 convention.

*Staying Strong* calls on countries to adopt effective legislation in a timely manner. To facilitate that process, the report identifies key components of strong implementation legislation and examines more than 20 existing laws for supporting precedent.

National legislation should ban use, production, transfer, and stockpiling of cluster munitions as well as assistance with these activities, and adopt penal sanctions to punish offenses. Legislation should clarify that its prohibitions apply at all times, even during joint military operations with states not party. It should specify that it is unlawful to host foreign stockpiles, allow transit of cluster munitions across national territory, and invest in the weapons' production.

Legislation should also implement the convention's positive obligations. It should set deadlines for destroying stockpiles and clearing land contaminated by cluster munition remnants. It should lay the groundwork for a national program to assist victims. Finally, implementation legislation should be broad enough to apply the guarantees of the convention to explosive bomblets, impose liability on corporations, and provide for extraterritorial jurisdiction.

National laws are the most binding and enduring means of implementing a treaty. *Staying Strong* therefore urges countries to adopt laws that adhere to the standards set by the Convention on Cluster Munitions and help it achieve its humanitarian ends.

*(cover) The remnant of a tail unit from an RBK-250 cluster bomb that penetrated the ground outside of a home near Azaz in Aleppo governorate in Syria, February 25, 2013*

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