

Convention on Cluster Munitions

Interoperability and National Legislation

The View of the International Committee of the Red Cross

"Interoperability" was an issue that generated considerable debate during the negotiation of the Convention on Cluster Munitions (CCM). This term refers to the ability of armed forces or other State agents to operate jointly in the performance of a task, mission or operation.¹ Given that the proponents of the CCM sought a strong ban with broad prohibitions on cluster munitions, a number of countries involved in the negotiations expressed concern that their capacity to engage in military cooperation and operations with non-party States, who may possess cluster munitions, would be heavily impacted by the Convention. More specifically, these States were worried that certain activities that occur regularly in combined military operations could potentially violate the Convention's prohibition on assisting, encouraging or inducing activities prohibited by the Convention.

Article 21 of the CCM was introduced to address these concerns.² This provision allows CCM States Parties to continue to cooperate and engage in military operations with States that are not party to the Convention even though such non-party States may continue to use, stockpile and transfer cluster munitions. Article 21 therefore allows military cooperation and operations to continue despite the risk that CCM States Parties may, due to their role in such operations, be associated with the use, stockpiling and transfer of cluster munitions. The clarification set out in Article 21 was seen as critical for a limited number of States in order for them to support, sign and eventually ratify the Convention.

Yet, in addition to recognizing the right of a State Party to engage in military cooperation and operations with a State not Party to the CCM, Article 21 also seeks to ensure that the humanitarian goals of the CCM are not undermined through such activities. Paragraphs 1 and 2 of Article 21 require States Parties to both encourage their non-party counterparts to join the Convention, and also to make their best efforts to discourage such non-party States from using cluster munitions. Thus, even though some States Parties may be associated with cluster munitions through combined military operations with non-Party States, they are nevertheless obliged to further the goals of the Convention, in particular the goal to "to put an end for all time to the suffering and casualties caused by cluster munitions...." For this reason the provisions of Article 21 should be read together as a whole and not separated into distinct obligations. This is particularly important to bear in mind when States with interoperability requirements begin to implement the provisions of Article 21 on military cooperation and operations.

Interoperability and national legislation

The development of national legislation in accordance with Article 9 of the CCM is one area where some States have taken steps to implement Article 21's provisions on interoperability. Article 9 requires that "each State Party take all appropriate legal, administrative, and other measures to implement the Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party undertaken by persons or on territory under its jurisdiction or control." A number of States, particularly those with a common law legal tradition, have adopted domestic laws to criminalize activities prohibited by the CCM. Yet, these laws also provide defences to exclude or limit criminal liability for

¹ CCM commentary, p. 542.

² The full text of Article 21 is attached in the annex.

acts that may occur as part of military cooperation and operations with States not party to the Convention but that the State Party considers do not violate the Convention.

States have taken different approaches in developing such legislation.

The law of New Zealand, for instance, incorporates all the prohibitions of the Convention into national law but stipulates that a member of the Armed Forces does not commit an offence **merely by engaging** (emphasis added), in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention.³ As a result, the law removes the potential for criminal liability for merely participating in joint military activities with a non-party State. Yet, more direct and substantial conduct leading to the use, stockpiling and transfer of cluster munitions would seem to remain prohibited and a crime under national law.

Similarly, the national legislation of Ireland makes the prohibitions of the Convention offences under its national law and goes on to explicitly exclude as offences acts or omissions done in the planning or conduct of operations with UN forces or with States not party to the Convention.⁴ In subsequent statements on these exclusions, Ireland has clarified that "The purpose of section 7(4) of the Act is not to enable assistance with prohibited acts in the context of military co-operation and operations with States not party to the Convention. Rather, this provision is intended to ensure that no person may be prosecuted for an act or omission that might otherwise constitute assistance but is **unintended or inadvertent, or has only a remote or indirect relationship** (emphasis added) to the commission of a prohibited act by a State not party to the Convention and that does not in any event engage the responsibility of Ireland under international law."⁵

Some States, however, exclude or are planning to exclude a broader range of activity from the ambit of national criminal law. Legislation adopted or under consideration in some States could, for example, permit the armed forces to be **directly** involved in the use, possession and transport of cluster munitions taking place in the context of military cooperation and operations. This includes activities such as training and planning for the use of cluster munitions, assisting or allowing foreign forces to stockpile cluster munitions on territory under a State Party's jurisdiction or control and transporting cluster munitions on behalf of a non-party State.

Concerns about the scope of interoperability exclusions in national law

The ICRC is increasingly concerned about the scope of the exceptions allowed in national legislation, and more specifically, about exceptions that would permit members of the armed forces to be directly involved in the use, possession, stockpiling and transport of cluster munitions. It is also concerned by the development of language in national legislation that would seem to allow a non-party State to stockpile cluster munitions on territory under the jurisdiction or control of a State Party.

In the view of the ICRC, excessively broad exceptions or defences in national legislation are a concern for the following reasons:

³ Cluster Munitions Prohibition Act 2009, Section 11 (6). (NZ)

⁴ Cluster Munitions and Anti-personnel Mines Act 2008, Sections 6 and 7. (IRE)

⁵ See, note circulated by Ireland on its measures taken by it to implement Article 21 of the Convention on Cluster Munitions.

- Broad exceptions undermine the goal of the Convention “to put an end for all time to the suffering and casualties caused by cluster munitions” and contribute to the continued use of cluster munitions rather than further their elimination.
- Broad exceptions can also undermine the Convention's universality by creating a perception that its implementation is inconsistent in fundamental areas. Specifically, a perception may emerge that while some States have comprehensively banned the use, production, stockpiling and transfer of cluster munitions for themselves due to the weapon's severe humanitarian consequences, they remain directly engaged in their use by others in the context of military cooperation and multinational operations.

The ICRC believes that any exceptions or defences 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. In addition, it is essential that all obligations of Article 21 (i.e. furthering the goals of the treaty and permitting continued military cooperation and operations with States not party) be taken into account when States develop national legislation as well as military orders, regulations and rules of engagement.

Although the ICRC is not an organization with in-depth knowledge on the decision-making processes of multinational operations, the institution believes certain types of activities by States Parties or their nationals are inconsistent with the object and purpose of this Convention and the positive obligation in Article 21 to discourage non-party States from using cluster munitions. These include but are not limited to

- transporting cluster munitions;
- specifically requesting others to use of cluster munitions;
- ordering the use of cluster munitions (as opposed to passing an order in a chain of command);
- allowing the stockpiling of cluster munitions on territory under a States Party's jurisdiction or control;
- training others in the use of cluster munitions.

ICRC
DC/JUR/ARMES
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Annex

Article 21

Relations with States not party to this Convention

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.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.
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.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
 - (a) To develop, produce or otherwise acquire cluster munitions;
 - (b) To itself stockpile or transfer cluster munitions;
 - (c) To itself use cluster munitions; or
 - (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.