

LANDMINE MONITOR FACT SHEET**A PROHIBITION ON ASSISTANCE IN A FUTURE TREATY BANNING CLUSTER MUNITIONS:
THE MINE BAN TREATY EXPERIENCE**

Prepared by Human Rights Watch

Article 1 of the 1997 Mine Ban Treaty obligates State Parties to “never under any circumstances ...assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” Initially, there was a lack of clarity regarding what types of acts are permitted or prohibited within the context of this prohibition. Subsequently, many States Parties recognized the need to address such ambiguities and to share views on policy and practice.

The issue of assistance has been raised under the guise of “interoperability” by a number of states participating in the Oslo Process to prohibit cluster munitions that cause unacceptable humanitarian harm. The United States has been lobbying several states on this issue with visits and documents. This fact sheet demonstrates that the experience of the past decade with the ban on antipersonnel mines shows that this kind of situation can be dealt with without fracturing alliances.

States need to be more specific about the nature of their concerns and what they envision as possible measures to address them. Extensive changes to the proposed text of the prohibition on assistance could serve to undermine not only the future cluster munition treaty, but also existing precedents in disarmament, namely the Chemical Weapons Convention and the Mine Ban Treaty. Instead, the states negotiating the new cluster munitions treaty should elaborate for the diplomatic record what acts are prohibited and what acts might be permissible and articulate a common understanding on the matter.

But first and foremost, states must start from the position that their objective is to stigmatize and discourage in every way possible any use of prohibited cluster munitions by any armed force. No treaty text or other measures should be contemplated that explicitly accept or facilitate in any way ongoing use of prohibited cluster munitions, even by those not party to a future treaty.

Summary of Practice

Implementation of the Mine Ban Treaty over the past decade provides some guidance on this matter, in two ways. First, a number of States Parties have national declarations and national laws addressing the potential criminal responsibility of a soldier unknowingly involved in some way in a joint operation where antipersonnel mines are present or used. Second, there have been extensive discussions about what the prohibition on assistance means.

Most States Parties have agreed that “mere participation” in joint military operations with non-States Parties, even those that stockpile antipersonnel mines, is not prohibited. The issue only comes into play when non-States Parties may contemplate using antipersonnel mines in joint operations.

Based on years of discussions, there has been general, albeit informal, understanding that States Parties may NOT:

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

INTEROPERABILITY

Moreover, most agree that transit of antipersonnel mines through or foreign stockpiling of antipersonnel mines on the national territory of a State Party is prohibited.

- A total of 43 States Parties have declared that they will not participate in planning and implementation of activities related to the use of antipersonnel mines in joint operations with a state not party to the Mine Ban Treaty which may use antipersonnel mines.
- Some States Parties have declared that only “active” or “direct” participation in joint operations in which antipersonnel mines are used is prohibited; but each country’s understanding of what constitutes “active” or “direct” assistance varies.
- A total of 32 States Parties have declared they prohibit transfer through, foreign stockpiling on, or authorizing of foreign antipersonnel mines on national territory.
- Germany, Japan, Qatar and the United Kingdom have stated that US antipersonnel mine stocks in their countries are not under their national jurisdiction or control and are thus not subject to the national implementation measures of that State Party.

Stated Positions on Joint Military Operations, Foreign Stockpiling, and Transit

Will not participate in planning and implementation of activities related to use of antipersonnel mines in joint operations	Albania, Australia, Belgium, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Rep., Denmark, Estonia, France, Germany, Hungary, Italy, Japan, Kenya, Luxembourg, Macedonia FYR, Malaysia, Mexico, Moldova, Namibia, Netherlands, New Zealand, Norway, Portugal, Qatar, Senegal, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tanzania, Turkey, United Kingdom, Uruguay, Yemen, Zambia, Zimbabwe
Interpret assistance as ‘active’ or ‘direct’	Australia, Canada, Czech Rep., New Zealand, Sweden, United Kingdom, Zambia, Zimbabwe
Reject operations if its military forces derive direct military benefit from antipersonnel mine use	Brazil, Mexico, Switzerland, United Kingdom
Reject rules of engagement permitting antipersonnel mine use or orders to use antipersonnel mines	Canada, France, Germany, Italy, Sweden, United Kingdom
Will obtain written precondition for placing forces under the command of a non-State Party	Norway
Prohibit transfer through, stockpiling of, or authorizing antipersonnel mines on national territory	Albania, Austria, Bosnia & Herzegovina, Brazil, Cameroon, Croatia, Cyprus, Czech Rep., Denmark, Estonia, France, Guinea, Hungary, Italy, Macedonia FYR, Malaysia, Mexico, Moldova, Namibia, New Zealand, Portugal, Samoa, Senegal, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, Yemen, Zambia
Non-State Party antipersonnel mine stockpiles declared	Tajikistan
Non-State Party antipersonnel mine stocks removed	Italy, Norway, Spain
Non-State Party antipersonnel mine stocks declared not to be under national jurisdiction or control	Germany, Japan, Qatar, United Kingdom

Country-by-Country Overview of Practice

Albania stated that “during joint military operations with State and Non-State Parties, Albania does not use and is not engaged in the use or transport of the antipersonnel mines.”

Australia has addressed this issue in a number of ways. A document provided by the Australian Embassy to the United States in April 2003 stated: “Australia will not participate in planning or implementation of activities related to anti-personnel mine use in joint operations... Australia would reject any orders to use anti-personnel mines and has placed limitations on its forces so as not to violate treaty commitments during these joint operations.... Those members serving with United States forces [in Iraq] have received a brief on their obligations under the Ottawa Convention and the Anti-Personnel Mines Convention Act.”

Australia submitted a National Declaration when it deposited its instrument of ratification at the United Nations in 1999. The Declaration stated that: “in the context of operations, exercises or other military activity authorised by the United Nations or otherwise conducted in accordance with international law, the participation by the Australian Defence Force, or individual Australian citizens or residents, in such operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not by itself, be considered to be in violation of the Convention.”

The National Declaration goes on to interpret the words “use,” “assist,” “encourage,” and “induce” in a very narrow fashion. It interprets the word “use” as meaning: “... the *actual physical emplacement* of antipersonnel mines and does *not* include receiving an indirect or incidental benefit from antipersonnel mines laid by another State or person.” (*emphasis added*).

It interprets the word “assist” to mean: “... *the actual and direct physical participation* in any activity prohibited by the Convention but does *not* include permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities.” (*emphasis added*).

It interprets the word “encourage” to mean “... the *actual request* for the commission of any activity prohibited by the Convention,” and “induce” to mean “the *active engagement* in the offering of threats or incentives to obtain the commission of any activity prohibited by the Convention.” (*emphasis added*).

The phrase “jurisdiction or control” is defined as meaning “within the sovereign territory of a State Party or over which it exercises legal responsibility by virtue of a United Nations mandate or arrangement with another State and the ownership or physical possession of antipersonnel mines, but does not include the temporary occupation of, or presence on, foreign territory where antipersonnel mines have been laid by other States or persons.”

In explaining a provision in Australia’s Antipersonnel Mines Convention Bill 1998, Foreign Minister Downer stated: “Clause 7(3) is not intended to be construed as a blanket decriminalization of the activities listed in clause 7(1). There may be circumstances in which there are military operations carried out jointly with the armed forces of a country which is not a party to the convention. In the course of those operations, the armed forces of that country might engage in an activity which would be prohibited under the convention. Clause 7(3) provides that a person to whom the act applies will not be guilty of an offence merely by reason of participation in such combined exercises. However, that subclause does not provide a defense in circumstances where such a person actually carries out one of the prohibited acts in the course of those combined operations. In the event of a charge being laid, the prosecution would be required to prove that the actions alleged constituted an offence prohibited under clause 7(1). If the accused wished to rely on the exception of clause 7(3), he or she would need to produce evidence that suggests a reasonable possibility that the exception applies. If the accused is able to do this, it is for the prosecution to prove otherwise if the person is to be convicted.”

Austria stated in April 2000 that, as a neutral country, it is keen to prevent any violations of the Mine Ban Treaty and has denied transit to NATO countries either across its territory or through its airspace of any transport containing any weapons, in spite of NATO requests to do so during the 1999 bombing of the Federal Republic of Yugoslavia.

Belgium stated in June 2000 and again in March 2001, “Any Belgian unit engaged in joint operations outside national territory cannot use antipersonnel mines, in any circumstances, whatever framework and subordination mode this engagement is undergoing.”

Brazil views that Article 1(c) of the Mine Ban Treaty “clearly bans joint operations with non-States Parties that may involve the use of antipersonnel mines. Even if the States Parties involved in such operations do not participate directly and actively in the laying of anti-personnel mines, the operations should be considered illegal if the use of landmines by a non-State Party is of direct military benefit to those States Parties. In the absence of such a broad interpretation of the term ‘assist,’ Article 1 would contain a serious and unfortunate loophole. All States Parties should commit strictly to observe the provisions of Article 1, which would include giving the term ‘assist’ as broad an interpretation as possible.”

Canada appended the following “understanding” to its ratification instrument: “It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with the international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in Article 1, paragraph 1(c).”

To further clarify its position, in May 2001 Canada provided an explicit statement on the issue: “For Canada, this subject is relevant in addressing matters related to interoperability as a member of the North Atlantic Treaty Organization. With this in mind, in 1998—even before the Convention entered in to force—the Chief of the Defence Staff communicated the following to all Canadian Forces personnel:

Participation in Combined Operations: Canada may participate in combined operations with a state that is not Party to the Convention. Canadian contingents may not, however, use anti-personnel mines and the Canadian Forces may not request, even indirectly, the use of anti-personnel mines by others.

Rules of Engagement: When participating in combined operations with foreign forces, Canada will not agree to Rules of Engagement which authorize the use by the combined force of anti-personnel mines. This would not, however, prevent States that are not parties to the Convention from using anti-personnel mines for their own national purposes.

Operational Plans: When engaged in combined operations with foreign forces, Canada will not agree to operational plans which authorize the use by the combined force of anti-personnel mines. While Canadians may participate in operations planning as members of a multinational staff, they may not participate in planning for the use of anti-personnel mines. This would not prevent a state that is not a signatory to the Convention from planning for the use of anti-personnel mines by its own forces.

Command and Control: The use of anti-personnel mines by the combined force will not be permitted in cases where Canada is in command of a combined Force. Likewise, if Canadian Forces personnel are being commanded by other nationalities, they will not be allowed to participate in the use of, or planning for the use of anti-personnel mines. Were Canadian Forces personnel to engage in such activities they would be liable to criminal prosecution under Canadian law.”

Cyprus stated, “The meaning of the term ‘assist’, which is included in Article 1 of the Convention, should be interpreted thus: (a) It prohibits the storage of anti-personnel mines in the territory of another state, in which that state exercises its jurisdiction; (b) It prohibits the trans-shipment of anti-personnel mines by states not parties to the Convention, through the territory of states that have ratified the Convention....”

The Foreign Ministry of the **Czech Republic** stated “mere participation in the planning or execution of operations, exercises or other military activity” where non-signatories use antipersonnel mines should not render Czech personnel liable to prosecution.

The Ministry of Defense of **Denmark** has stated “in the participation in joint military operations, Denmark does not involve itself in activities that are related to the laying of antipersonnel mines.” The Ministry of Foreign Affairs has stated that Denmark would not involve itself in the planning or implementation of activities related to the laying of antipersonnel mines. Asked for its view of the legality of the transit and/or storage of foreign antipersonnel mines on Danish territory, the Ministry of Foreign Affairs stated in 1999 that: “In accordance with Article 1 of the Ottawa Convention, Denmark cannot transfer to anyone, directly or indirectly, APMs or allow anyone to do so on Danish territory.”

The Minister of Defense of **France** already declared in 1998 that France “would unreservedly enforce the Ottawa Treaty. France will prohibit the planned or actual use of antipersonnel mines in any military operation whatsoever by its military personnel. Furthermore, France will refuse to agree to rules of engagement in any military operation calling for the use of antipersonnel mines.” In October 1999, the Minister of Foreign Affairs referred to directives forbidding French military personnel to use antipersonnel mines, to participate in planning operations employing use of antipersonnel mines, or to give their agreement to any document mentioning possible use.

Germany declared in May 2002 that it “will not support planning or use of antipersonnel mines in a joint operation. Germany prohibits the planned or actual use of antipersonnel mines in any military operation whatsoever by her military personnel.

In June 2004, the Federal Foreign Office said that “it is straightforwardly deducible from the wording of the Convention that the mere participation” in operations or exercises sanctioned by the UN or otherwise in accordance with international law “is not, by itself, assistance, encouragement or inducement in accordance with the meaning of these terms in Article 1(1)(c) of the Convention.” But, to gain the maximum reassurance that no antipersonnel mines will be used in joint operations and exercises with States not party to the Mine Ban Treaty, Germany “states the expectation, *inter alia* in the exchange of notes on agreed and applicable Rules of Engagement, that this prohibition will be observed.”

In reacting to language proposed in 2004 by the Mine Ban Treaty General Status Standing Committee co-chairs on acts forbidden during joint military operations, Germany said it “sees no merit in defining behavior which it knows it cannot live up to as a consequence of remaining limitations in its jurisdiction as a consequence of applicable Status of Forces agreements, or for which specific treaty provisions already exist – as, for instance, in the case of providing protection and maintenance for transportation and storage sites of allied stationed forces, the sending States of which are not themselves States Parties to the Convention.”

The Ministry of Foreign Affairs of **Hungary** stated, “Hungarian soldiers are not allowed to use antipersonnel mines abroad during NATO army exercises, and foreign soldiers are not allowed to use antipersonnel mines in Hungary during NATO army exercises.”

In June 2004, **Japan** objected to a proposal on these issues by the co-chairs of the Standing Committee on General Status and Operation of the Convention. It said that the proposed clarifications amount to new rules and requirements and would prevent some countries from acceding to the treaty in the future. Japan also noted, “The current provisions reflect a subtle balance and compromise arrived at through lengthy negotiations. Therefore a certain degree of abstraction is indispensable, as is always the case in multilateral treaties, so that many States facing different conditions can coexist in the same legal framework.”

FYR Macedonia stated that it “reserves the right to reject any rules of engagement permitting use of APM and refuse orders to use them.”

Moldova said, “It is our firm belief that States Parties engaging in military operations with other states of groups of states should not: participate in planning for use of anti-personnel mines; train others to use anti-personnel mines; participate in operations wherein direct military benefit is known by the State Party to be derived from the use of anti-personnel mines; agree to rules of engagement permitting the use of anti-personnel mines; or request others to use anti-personnel mines.”

Representatives of the **Netherlands** reiterated in May 2001 that Dutch forces “will not help in the laying, transporting or in any other way, nor ask for a foreign commander to do so” in joint military operations, and “if asked to do so by a foreign commander, will not do so.” The representative added that this was set out in a parliamentary answer.

In May 2003, **New Zealand** said that its domestic implementation legislation makes it clear that it cannot “actively assist” with acts prohibited by the Mine Ban Treaty and noted that providing cover for other forces laying mines would be defined as such, as would planning or training for use of antipersonnel mines. However, if New Zealand’s forces receive incidental benefit from another country’s mine-laying, that is not considered active assistance, and is not prohibited. New Zealand said, “The practical reality of New Zealand’s defence strategy, and one which is necessary for a small country that is heavily reliant on interoperability, is that we would be unable to prevent receiving an indirect benefit of cover from a minefield where our forces were under non-New Zealand command.”

The Ministry of Defense of **Norway** stated that under no circumstances will Norwegian forces use antipersonnel mines, or contribute to such use, in joint operations with other States. However, Norwegian forces can participate in joint operations with States which are not party to the Mine Ban Treaty, and in such cases may take advantage of cover from already mined areas, but cannot strengthen or renew the mining of these areas. The prohibition in Norwegian law against use also applies to soldiers operating outside Norway’s borders.

According to officials from **Portugal**, “it may participate in joint operations with armed forces which use antipersonnel mines, but it won’t gain any benefit from such use. A guarantee that Portugal will not benefit, in such case, would be assured at the operational level. The participation in any military operation comes under national sovereignty.” The Ministry of Defense added, “So it belongs to Portugal to decide on this participation, the way it would be processed and to which extent, independent of whether it is an operation with countries that use mines or not.” The Ministry of Foreign Affairs declared, “Portugal being a State Party to the Ottawa Convention, the Portuguese contingent will not use antipersonnel mines in joint operations.”

Serbia and Montenegro submitted a formal declaration with its instrument of accession stating that “it is the understanding of Serbia and Montenegro that the mere participation in the planning or conduct of operations, exercises or any other military activities by the armed forces of Serbia and Montenegro, or by any of its nationals, if carried out in conjunction with armed forces of the non-State Parties (to the Convention), which engage in activities prohibited under the Convention, does not in any way imply an assistance, encouragement or inducement as referred to in subparagraph 1 (c) of the Convention.”

Slovenia stated that its “Armed Forces will under no circumstances take any action that would lead to the use of antipersonnel mines or contribute to such use in joint operations with other States.”

South Africa stated in February 2003 that, while it is permitted to participate in joint military operations with States not party to the Mine Ban Treaty, if a contravention occurs, South Africa must terminate participation or take appropriate actions as deemed necessary.

Spain, in response to a parliamentarian's question, said that its military personnel were forbidden to use antipersonnel mines under any circumstances, that operations in which antipersonnel mines are used will not be planned, directed or carried out, and that no forces under Spanish command will use antipersonnel mines other than under the exceptions allowed by Article 3 of the Mine Ban Treaty.

In February 2004, the Ministry of Foreign Affairs of **Sweden** confirmed that Swedish policy on joint military operations remains as stated in the integrated approach to mine action of May 2002: "[I]t is prohibited for Swedish personnel participating in international missions to have anything to do with antipersonnel mines with the exception of activities relating to detection and clearance.... Swedish participation in an international mission in which any of the participating states uses antipersonnel mines could be regarded as violating the spirit of the Ottawa Convention unless Sweden [has] not in all ways counteracted the use." On 25 March 2003, then-Minister of Foreign Affairs, Anna Lindh, stated in Parliament that Sweden "can participate in activities together with countries that are not parties to the Ottawa Convention. But they can not use antipersonnel mines in these activities."

At the Fifth Meeting of States Parties Sweden announced its "preliminary interpretation that transit of antipersonnel mines (for military use in an armed conflict) through the territory of a State Party to the Convention would in fact be prohibited." The final position was stated in February 2004: "With regard to the aim and purpose of the Convention it is suggested that transit should be regarded as prohibited by the Convention. This shall mean that antipersonnel mines cannot be transferred over Swedish land, sea or air territory in violation of the regulations of the Convention."

Tanzania informed the Standing Committee on General Status and Operation of the Convention that it does not subscribe to the use of antipersonnel mines in joint operations and would not provide assistance "to anyone in activities prohibited to a State Party under this Convention." Similarly, in its June 2004 Article 7 report, Tanzania declares, "Since the United Republic of Tanzania became a party to 'The Landmine Ban Treaty of 1997,' the state has not used any type of APMs on either joint military operations or provision of assistance to anyone in activities prohibited to a state party under this convention."

In the **United Kingdom**, ratification of the convention was accompanied by a formal declaration, repeated in Article 5 of the national legislation, which seeks to protect British troops from prosecution for the "mere participation in the planning or execution of operations, exercises or other military activity," where non-States Parties use antipersonnel mines.

In February 2004, the Ministry of Defence confirmed the UK's position. UK forces may not *participate actively* in the use or in any physical activity specific to the laying of antipersonnel mines, nor gain benefit from their use, and may not request their use in support of UK forces. However, "the mere participation in the planning or execution" of activities involving antipersonnel mines with States not party to the treaty is not interpreted by the UK as prohibited by Article 1. The UK defines prohibited activities as including: planning with others for the use of antipersonnel mines, training others in their use, agreeing Rules of Engagement or operational plans permitting their use in combined operations, requesting non-States Parties to use antipersonnel mines, providing security or transport for antipersonnel mines, and accepting orders that amount to assistance. But it has added that any interpretation would take into account the military realities of the battlefield at the time.

Yemen stated that "one cannot participate in any activity related to the use of antipersonnel mines and should reject any rules of engagement permitting use of antipersonnel mines and refuse orders to use them, and reject participation in any joint operation if their military forces derive any military benefit from use of antipersonnel mines, and should not provide security or transportation for AP mines."

National legislation in **Zambia** declares that members of its armed forces can participate in operations or other military activities with the armed forces of a State not party to the Convention, "Provided that the operation, exercise or military activity is not in contravention of the Convention and that such participation does not amount to active assistance in any activity prohibited by the Convention and this Act."