



The Case for Condemnation

Denouncing All Use of Cluster Munitions

April 2021

The 2008 Convention on Cluster Munitions, which categorically bans the use of cluster munitions, seeks to eliminate these weapons and the unacceptable harm they cause. By adopting an unequivocal condemnation of cluster munition use at the convention's Second Review Conference, currently scheduled for June 2-3, 2021, states parties can advance this goal.

A small number of states parties have opposed including such language in the Lausanne Declaration, one of the outcome documents the Review Conference is expected to produce. These states have argued that condemning all use of cluster munitions is incompatible with Article 21(3) of the convention, which provides that states parties may participate in joint military operations with states not party.¹

It is their objections rather than the words of condemnation that are incompatible with the convention, however. As this paper demonstrates, agreeing to denounce all use of cluster munitions would in fact help states parties fulfill their obligations to promote the convention's norms and discourage use of cluster munitions. It would also uphold the convention's object and purpose. Opposition to consensus on this point is unjustified, runs counter to the spirit and letter of the convention, and could be construed as not interpreting the treaty in good faith.

Human Rights Watch and Harvard Law School's International Human Rights Clinic (IHRC), therefore, call on all states parties to adopt at their Second Review Conference a declaration that condemns the use of cluster munitions by any actor under any circumstances.

¹ Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, adopted May 30, 2008, CCM/77, entered into force August 1, 2010, 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.").

Precedent for Condemning Cluster Munition Use

Throughout the history of the Convention on Cluster Munitions, states have been motivated by the shared understanding that cluster munitions inflict “unacceptable harm to civilians.”² In the 2007 Oslo Declaration, which initiated the process that produced the convention, 46 states recognized “the grave consequences caused by the use of cluster munitions” and pledged to adopt a convention that “effectively addressed the humanitarian problems.”³ To fulfill their commitment, states adopted a convention that, *inter alia*, prohibits cluster munition-related activities “under any circumstances” and obligates states parties to promote its norms and discourage future use.⁴

Since the convention entered into force, states parties have repeatedly condemned the use of cluster munitions, underscoring the unacceptability of the weapons and the need to eliminate them. In the Vientiane Declaration, adopted at the First Meeting of States Parties in 2010, states parties proclaimed: “We condemn the use of cluster munitions that causes unacceptable harm to civilian populations and objects, *by any actor*.”⁵ The accompanying Vientiane Action Plan, which “translates the legal obligations of States Parties into concrete actions,”⁶ calls on states parties to “discourage in every way possible *all* use, development, production, stockpiling and transfer of cluster munitions.”⁷ The declaration and action plan refer to use “by any actor” and “all” use, respectively, making clear that their condemnation is absolute and without exception.

States parties reiterated their condemnation of use “by any actor” in the Beirut Declaration, adopted in 2011 at their second annual meeting. In that declaration, states parties said they “deplore the use of cluster munitions in recent conflicts and, indeed, we condemn the use of cluster munitions, which causes unacceptable harm to civilian

² Oslo Conference on Cluster Munitions, “Declaration,” February 22-23, 2007 [hereinafter Oslo Declaration]. See also, for example, Vientiane Declaration: No Cluster Munitions, From Vision to Action, in First Meeting of States Parties to the Convention on Cluster Munitions, “Final Document,” CCM/MSP/2010/5, November 9-12, 2010, Annex I, paras. 4, 9.

³ Oslo Declaration.

⁴ Convention on Cluster Munitions, arts. 1, 21(2).

⁵ Vientiane Declaration, para. 9 (emphasis added).

⁶ *Ibid.*, para. 3.

⁷ Vientiane Action Plan, in First Meeting of States Parties to the Convention on Cluster Munitions, “Final Document,” Annex II, para. 7, Action #6 (emphasis added).

populations and objects, *by any actor.*”⁸ The Beirut Declaration adds that “[s]uch acts run counter to the spirit and aim of the Convention and exacerbate the humanitarian problems already caused by prior use of these weapons,” and it calls on “all” those who use cluster munitions to cease immediately.⁹ The language again highlights that all use of cluster munitions results in unacceptable civilian harm. It also makes clear that use contravenes the object and purpose (or “spirit and aim”) of the convention.

At the convention’s First Review Conference in 2015, states parties issued a clear and pointed condemnation of the use of cluster munitions. Paragraph 6 of the Dubrovnik Declaration states:

We condemn *any* use of cluster munitions *by any actor.* Such acts run counter to the spirit, aim and letter of the Convention and exacerbate the humanitarian problem already caused by the prior use of these weapons with indiscriminate and inhumane effect.¹⁰

While the “by any actor” language draws heavily on the Beirut Declaration, for the first time, four states parties—Australia, Canada, Lithuania, and the United Kingdom—entered reservations to the inclusion of the condemnation language, contending that the absolute nature of the condemnation provision was incompatible with Article 21 of the convention, which addresses states parties’ relations with states not party.¹¹ The objections of those states parties are explained and critiqued below.

States parties modified the Dubrovnik Declaration’s condemnation language at their succeeding meetings, but the decision to do so was contentious. The final report of the Sixth Meeting of States Parties in 2016 reiterated states parties’ pledge “to reinforce the norms established by the Convention” in order to “work for a world without cluster

⁸ Beirut Declaration, Second Meeting of States Parties to the Convention on Cluster Munitions, “Final Document,” CCM/MSP/2011/5, September 16, 2011, Annex I, para. 7 (emphasis added).

⁹ Ibid.

¹⁰ Dubrovnik Declaration: Spectemur agendo (Judged by our Actions), in First Review Conference of the Convention on Cluster Munitions, “Final Report,” CCM/MSP/2015/7, Annex I, para. 6 (emphasis added).

¹¹ Reservations, in First Review Conference of the Convention on Cluster Munitions, “Final Report,” Annex II.

munitions.”¹² Bowing to pressure from the states that issued reservations in Dubrovnik, however, the final reports from the Sixth to Ninth Meetings of States Parties read: “We condemn any use of cluster munitions by any actor, *in conformity with Article 21*.”¹³ In their national statements, many countries objected to the inclusion of the reference to Article 21 and stood by the Dubrovnik Declaration’s absolute formulation, saying that they “strongly” or “unreservedly” condemned any use.¹⁴ Nicaragua and Cuba, for example, insisted on the inclusion of a footnote in the final report of the Sixth Meeting of States Parties that recorded their opposition to the new language.¹⁵ The footnote articulated Nicaragua’s view that the reference to Article 21 “is ambiguous and contravenes the spirit and purpose of the sentence,” and Cuba’s position that the phrase “introduces an element of ambiguity that weakens instead of strengthening the principle[d] position as agreed in the Dubrovnik Declaration.”¹⁶ The final reports of the next three meetings of states parties include identical condemnation language with an accompanying footnote.¹⁷

The October 2020 draft of the Lausanne Declaration, disseminated in advance of the first part of the Second Review Conference, revives the Dubrovnik Declaration’s clear and comprehensive approach to condemnation. It states: “Guided by the object and provisions of the Convention, we condemn the use of cluster munitions *by any actor under any circumstances*.”¹⁸ At the conclusion of the Second Review Conference, states parties should adopt that language, unequivocally condemning the use of cluster munitions. Such

¹² Political Declaration, in Sixth Meeting of States Parties to the Convention on Cluster Munitions, “Final Report,” CCM/MSP/2016/9, September 30, 2016, Annex I, para. 5.

¹³ Ibid. (emphasis added). See also Seventh Meeting of States Parties to the Convention on Cluster Munitions, “Final Report,” CCM/MSP/2017/12, September 25, 2017, para. 27; Eighth Meeting of States Parties to the Convention on Cluster Munitions, “Final Report,” CCM/MSP/2018/9, September 19, 2018, para. 29; Ninth Meeting of States Parties to the Convention on Cluster Munitions, “Final Report,” CCM/MSP/2019/13, September 18, 2019, para. 27.

¹⁴ See, for example, statements at the Sixth Meeting of States Parties by New Zealand (“New Zealand continues to unreservedly condemn any instance of the use of cluster munitions.”) and Belgium (“Belgium strongly condemns any use of cluster munitions by anyone.”), <https://www.clusterconvention.org/meetings/msp/6msp/> (accessed March 31, 2021).

¹⁵ At that time Nicaragua was a state party, and Cuba was an observer that had acceded in April 2016. The convention entered into force for Cuba shortly thereafter.

¹⁶ Sixth Meeting of States Parties to the Convention on Cluster Munitions, “Final Report,” n. 6.

¹⁷ Footnote 5 of the final reports from the Seventh to Ninth Meetings of States Parties reads: “Cuba and Nicaragua did not support the inclusion of the phrase ‘in conformity with article 21’ and requested to place on record that in their view this reference to Article 21 is ambiguous, contravenes the spirit and purpose of the Convention on Cluster Munitions, and is incoherent with the principled position agreed in the Dubrovnik Declaration of condemning any use of cluster munitions by any actor.”

¹⁸ Lausanne Declaration, para. 8.

an absolute condemnation would help states parties fulfill their obligations under the convention and accord with its object and purpose.

Obligations to Promote Norms and Discourage Use

Condemning “the use of cluster munitions by any actor under any circumstances” would help states parties comply with their obligations under Article 21(2) of the Convention on Cluster Munitions. That article requires each state party to “promote the norms [the Convention] establishes and ... make its best efforts to discourage States not party to this Convention from using cluster munitions.”¹⁹

Unequivocally denouncing use is one way to promote the convention’s norms. Through its categorical prohibition on the production, stockpiling, transfer, and use of cluster munitions and the requirement to destroy stockpiles, the convention establishes the unacceptability of cluster munitions as an international norm.²⁰ Norway stated at the Second Meeting of States Parties, for example, that the Convention on Cluster Munitions “establishes once and for all the norm that the use of cluster munitions is unacceptable. It is a practical illustration of the assumption that humanitarian consequences should matter more than perceived military advantages.”²¹ An absolute condemnation, adopted collectively by states parties, reinforces that norm because it makes clear that use should never be tolerated, regardless of the actor or circumstances.

Such strong language also discourages use, another obligation under Article 21(2). An expression of international opprobrium puts political pressure even on actors outside the convention to comply with its prohibitions. By stigmatizing cluster munitions, it deters use by states not party and non-state armed groups, particularly those wishing to protect their global reputations as responsible actors.

¹⁹ Convention on Cluster Munitions, art. 21(2).

²⁰ *Ibid.*, arts. 1, 3.

²¹ Statement of Norway, Second Meeting of States Parties to the Convention on Cluster Munitions, September 15, 2011, http://www.clusterconvention.org/files/2011/09/statement_norway.pdf (accessed March 31, 2021), p. 1.

Object and Purpose of the Convention

Unequivocal condemnation of cluster munition use also advances the object and purpose of the convention. Under Article 31 of the Vienna Convention on the Law of Treaties, which codifies customary international law, a treaty should be interpreted not only in accordance with the ordinary meaning of its terms, but also “in the light of its object and purpose.”²² The object and purpose of the Convention on Cluster Munitions, as articulated in its preamble, is “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.”²³ In other words, the convention seeks to eliminate cluster munitions and the harm they cause.²⁴ Condemnation, particularly when issued by a broad group of states, advances this humanitarian goal by working to end use, a major source of civilian harm. As discussed above, it stigmatizes cluster munitions as categorically unacceptable and, in turn, puts pressure on actors to cease using them.

The 1997 Mine Ban Treaty has a similar object and purpose, seeking to eliminate a category of weapons that causes unacceptable suffering, and its states parties have adopted an unequivocal condemnation of antipersonnel landmine use. In Paragraph 2 of the 2019 Oslo Declaration, adopted at the Mine Ban Treaty’s Fourth Review Conference, states parties declared, “We condemn the use of anti-personnel mines *by any actor*.”²⁵ The Mine Ban Treaty served as an important model for the Convention on Cluster Munitions because both were humanitarian disarmament treaties that sought to address the significant harm caused by weapons that can linger long after a conflict. The unexploded submunitions left by cluster munitions that fail to explode on impact as designed function like de facto antipersonnel landmines. In addition, all but three of the 110 states parties to the Convention on Cluster Munitions are also parties to the Mine Ban Treaty.²⁶ While some states distinguish the Convention on Cluster Munitions from the Mine Ban Treaty because the former includes Article 21 on relations with states not party, as discussed below, that

²² Vienna Convention on the Law of Treaties, adopted May 22, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, art. 31(1).

²³ Convention on Cluster Munitions, pmbli., para. 2.

²⁴ Human Rights Watch, “Promoting the Prohibitions: The Need for Strong Interpretations of the Convention on Cluster Munitions,” November 6, 2010.

²⁵ Oslo Declaration, in Fourth Review Conference of the Mine Ban Treaty, “Final Document: Part II,” APLC/CONF/2019/5/Add.1, November 26-29, 2019, para. 2 (emphasis added).

²⁶ Cuba, Laos, and Lebanon are states parties to the Convention on Cluster Munitions but not the Mine Ban Treaty.

argument is unpersuasive. Given the parallel purposes and prohibitions of these two treaties, states parties to the Convention on Cluster Munitions should adopt condemnation language comparable to that in the Mine Ban Treaty's Oslo Declaration.

Flawed Objections

A few states parties have opposed the broad condemnation in the draft Lausanne Declaration. Judging from the reservations of four states to comparable language in the 2015 Dubrovnik Declaration, their opposition is based on a perceived conflict with Article 21's provision permitting states parties to participate in joint military operations with states not party that may use cluster munitions. The objections are problematic on three fronts, however. First, contrary to their arguments, an unequivocal condemnation of use is in fact consistent with Article 21. Second, actively refusing to accept the Second Review Conference's proposed condemnatory language runs afoul of the convention's purpose and provisions. Third, the opposition's interpretation of the convention and efforts to block consensus raise concerns under international law's rules on good faith.

Consistency with Article 21

In objecting to the Dubrovnik Declaration's condemnation of any use of cluster munitions by any actor, Australia, Canada, Lithuania, and the United Kingdom argued that the language was incompatible with Article 21. Australia expressed its concern that the condemnation "does not fully represent Article 21 of the Convention regarding the ability of States Parties to conduct military cooperation and operations with states not party to the Convention," contending that the "the new language ... does not allow for the cooperation expressly permitted under Article 21."²⁷ Canada similarly viewed the Dubrovnik Declaration as problematic, stating that it was "inconsistent with Article 21 ... which permits military cooperation and operations with non-Parties"; it presented the interoperability provision as necessary to "meet legitimate security requirements."²⁸ Lithuania also expressed concern that the sentence in question would "affect the 'interoperability clause' of the

²⁷ Reservations, in First Review Conference of the Convention on Cluster Munitions, "Final Report"; Statement of Australia, High-Level Segment, First Review Conference of the Convention on Cluster Munitions, September 2015, https://www.clusterconvention.org/files/2015/09/Australia_High-Level-Segment2.pdf (accessed March 31, 2021), pp. 3-4.

²⁸ Reservations, in First Review Conference of the Convention on Cluster Munitions, "Final Report." See also Statement of Canada, High-Level Segment, First Review Conference of the Convention on Cluster Munitions, September 2015, https://www.clusterconvention.org/files/2015/09/Canada_High-Level-Segment1.pdf (accessed March 31, 2021), p. 3.

Article 21.”²⁹ The United Kingdom saw the language as “undermin[ing] Article 21” and argued that the declaration “may have the unintended effect of dissuading future States Parties from acceding to this Convention.”³⁰

These states’ contention that absolutely condemning cluster munition use undermines Article 21 and interferes with military cooperation is unfounded. Article 21(3), the paragraph in question, reads:

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.³¹

Condemning use “by any actor under any circumstances” does not prevent states parties from engaging in such joint military operations. It instead expresses a political position that all use of cluster munitions, including that by allies, is unacceptable. Allies often have different policies and practices that they have to reconcile, and signing onto a powerful but general political statement need not alter its legal or operational relationship with a state not party that may use cluster munitions. As explained above, rather than being inconsistent with the “intent and text” of the convention, as Canada contended, denouncing use accords with the object and purpose of the convention and states parties’ obligations under Article 21(2).³²

Refusal to Condemn

A state party’s refusal to adopt the Second Review Conference’s condemnation of all cluster munition use contravenes both the spirit and letter of the convention. The refusal is

²⁹ Reservations, in First Review Conference of the Convention on Cluster Munitions, “Final Report.”

³⁰ Statement of United Kingdom, High-Level Segment, First Review Conference of the Convention on Cluster Munitions, September 2015, https://www.clusterconvention.org/files/2015/09/UK_High-Level-Segment1.pdf (accessed March 31, 2021), p. 3. See also Reservations, in First Review Conference of the Convention on Cluster Munitions, “Final Report.”

³¹ Convention on Cluster Munitions, art. 21(3) (emphasis added).

³² In criticizing the condemnation language in the Dubrovnik Declaration, Canada noted that it was important that “the outcome documents reflect, and not run counter, to the intent and text of the Convention.” Statement of Canada, High-Level Segment, First Review Conference of the Convention on Cluster Munitions, p. 3.

contrary to the object and purpose because it excuses some use of the weapon, when the convention establishes that all use is unacceptable. It further shows that the objecting state party is not making its “best efforts to discourage” use by states not party, as required under Article 21(2). Finally, if based on interoperability grounds, rejection of the condemnation language suggests that a state party will tolerate use by its allies, potentially encouraging use in violation of Article 1(1)(c)’s prohibition on “assist[ing], encourag[ing] or induc[ing] anyone to engage in any activity [including use] prohibited to a State Party.”

Some states parties may counter that Article 21(3) creates an exception to Article 1(1)(c) and its prohibition on encouragement, but that is a flawed interpretation of the convention. Most states parties that have expressed their view on the topic interpret Article 21(3) as a clarification rather than a qualification.³³ Article 21(3) makes clear that states parties may participate in joint military operations with states not party, but its text does not say that states parties may engage in prohibited activities during those operations. An alternative interpretation makes Article 21 internally inconsistent because it suggests that the article both requires states to discourage use and allows them to encourage it. Human Rights Watch and IHRC have elaborated on these and other arguments for this understanding of Article 21(3) in multiple publications.³⁴

Good Faith

The states parties that have opposed an absolute condemnation of use could be seen as not interpreting the convention in good faith.³⁵ Article 26 of the Vienna Convention on the Law of Treaties provides that treaties “must be performed by [its parties] in good faith.”³⁶ Article 31 extends the good faith obligation to treaty interpretation, specifying that treaties “shall be *interpreted in good faith* in accordance with the ordinary meaning to be given to

³³ Cluster Munition Coalition, *Cluster Munition Monitor 2020* (November 2020), <http://www.the-monitor.org/media/3168672/cmm2020.pdf> (accessed March 31, 2021), p. 35 (finding that at least 38 states have expressed the position that Article 21 does not create an exception to Article 1’s prohibitions).

³⁴ See, for example, Human Rights Watch and IHRC, “Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions,” June 23, 2009; Human Rights Watch, “Promoting the Prohibitions: The Need for Strong Interpretations of the Convention on Cluster Munitions,” November 6, 2010.

³⁵ Case law of the International Court of Justice also enshrines the importance of good faith, calling it “one of the basic principles governing the creation and performance of legal obligations.” See *Nuclear Tests Case*, International Court of Justice Reports 1974, p. 268, para. 46.

³⁶ Vienna Convention on the Law of Treaties, art. 26.

the terms of the treaty in their context and in light of its object and purpose.”³⁷ As one authority on the Vienna Convention has noted, “good faith is of utmost importance to overcome mistrust,” especially in “sensitive fields such as arms control treaties,” which include the Convention on Cluster Munitions.³⁸

The objections to a comprehensive condemnation raise questions under some of the requirements of good faith. According to a commentary on the Vienna Convention, good faith requires parties to a treaty to interpret it “honestly, fairly and reasonably.”³⁹ It seems unreasonable to suggest that a denunciation of all use runs counter to the “intent and text” of the convention when the language promotes the convention’s object and purpose and helps states parties meet some of their Article 21 obligations.⁴⁰ Experts have also understood the Vienna Convention’s good faith provisions to obligate states parties “to refrain from taking unfair advantage” and to “tak[e] into account the just expectations of the other party/parties.”⁴¹ The vast majority of states parties legitimately expect to take full advantage of the Convention on Cluster Munitions as a tool to end civilian suffering. Opposition to an absolute condemnation of use, however, has weakened their ability to do so.

Conclusion

As the end of the Second Review Conference approaches, those states parties unwilling to accept an absolute condemnation of cluster munition use should agree to language that will maximize the humanitarian impact of the convention they have joined. If these states retract their objections, the Second Review Conference can adopt a consensus declaration that condemns the use of cluster munitions by any actor under any circumstances. Such a

³⁷ *Ibid.*, art. 31 (emphasis added). The preamble of the Vienna Convention also invokes good faith (“Noting that the principle of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized....”).

³⁸ Markus Kotzur, “Good Faith (Bona fide),” *Max Planck Encyclopedias of International Law* (last updated January 2009), para. 14.

³⁹ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 425. See also Kotzur, “Good Faith,” para. 20 (explaining that the Vienna Convention requires states parties to “to deal honestly and fairly with each other” and to “act reasonably, taking into account the just expectations of the other party/parties....”).

⁴⁰ For reference to “intent and text,” see Statement of Canada, High-Level Segment, First Review Conference of the Convention on Cluster Munitions, p. 3.

⁴¹ Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 425; Kotzur, “Good Faith,” para. 20. See also Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, pp. 425-426 (“Legitimate expectations raised in other parties shall be honoured.”).

comprehensive and collective statement will promote compliance with the convention, advance its object and purpose, and meet the requirements of good faith interpretation and implementation.