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Explosive Investments. How International Law Regulates the Financing of Cluster Munitions

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Explosive Investments

How International Law Regulates the Financing of Cluster Munitions

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Abstract

This paper investigates the question how international law regulates the financing of cluster munition producers. Due to their indiscriminate and long-lasting effects, cluster munitions cause a lot of civilian suffering. Although their use and production are prohibited in the 108 member states of the Convention on Cluster Munitions, cluster bombs are still produced and used in military conflicts worldwide. Moreover, states, private individuals, and banks provide billions of dollars in investments to the companies manufacturing cluster munitions. It will be argued that such financial assistance is illegal under the Convention on Cluster Munitions. State practice and domestic laws provide further evidence for this argument. Different ways of holding states, individuals, and corporations accountable for the provision of financial assistance will be compared by analyzing concepts from the law of state responsibility, international criminal law, corporate responsibility, and a selection of domestic laws.

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Content

List of Acronyms

ACHR	African Charter on Human and Peoples' Rights
ACtHR	African Court on Human and Peoples' Rights
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
ARIO	Draft Articles on the Responsibility of International Organizations
ASR	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ATT	Arms Trade Treaty
BWC	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction
CCM	Convention on Cluster Munitions
CCW	Convention on Certain Conventional Weapons
CMC	Cluster Munition Coalition
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
HRL	Human Rights Law
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
SCSL	Special Chambers for Sierra Leone
TPNW	Treaty on the Prohibition of Nuclear Weapons
UNIDIR	United Nations Institute on Disarmament Research
UXO	Unexploded Ordnance
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

Around 11.45am on 1 January 2020, a Russian-made 9M79M Tochka ballistic missile, equipped with a 9N24 fragmentation cluster munition warhead, struck the Abdo Salama School in Sarmin (Idlib, Syria) (Human Rights Watch 2020). This attack by the Syrian army caused nine fatalities – among them five children between the ages of 6 to 13. 16 more civilians (twelve children) were injured and three of them died later (ibid.). This recent incident shows that cluster munitions are still an imminent threat to civilian lives in today's armed conflicts. Cluster bombs present a particular risk to accidentally affect civilian areas and cause superfluous human suffering during and after armed attacks.

Cluster munitions are missile-mounted warheads which contain hundreds of small explosive bomblets. These submunitions are released at a certain altitude and spread over wide areas – making it hard to direct them towards a single target (Docherty et al. 2010, 160 et seqq.; Maresca 2006). As a consequence, attacks with cluster munitions often end up being indiscriminate and hit civilian areas (Docherty 2007, 54 et seq.). In the past, a high number of submunitions have failed to explode upon impact. Active munitions often remain undetected and turn into de-facto mines which pose a considerable danger to civilians living in contaminated areas long after the end of an armed conflict (Woudenberg 2007, 447 et seqq.). According to one estimate, up to 76.000 civilian lives may have been taken by cluster munitions since the 1960s (Cluster Munition Coalition 2019, 45)

In 2008, the international community acknowledged the humanitarian consequences of cluster munitions in the Convention on Cluster Munitions (CCM) (Convention on Cluster Munitions, 2008, 2688 UNTS 39). Article 1 of the CCM bans their 'use, development, production, acquisition, stockpiling, retention, and transfer.' Since then, the Convention has been ratified by 108 states and cluster munitions have been removed from many state arsenals (United Nations Office for Disarmament Affairs 2020). However, the CCM is far away from universal acceptance and many states still produce, stockpile, and actively use cluster munitions.

Today, all cluster munitions are produced in countries which are not a party to the CCM, which means the ban on cluster munitions is not binding on those states. Moreover, investigations by Non-Governmental Organizations (NGOs) over the last decade have found that banks, pension funds, and other financial institutions from CCM member states invest millions of dollars in those companies abroad. How can it be that Switzerland ratified the CCM in 2012 (Switzerland 2012) and UBS, *Credit Suisse*, Publica (Switzerland's biggest pension fund), and even the Swiss Central Bank still invested millions in cluster munition producers until recently thereby effectively outsourcing the production while making a healthy profit (Ecofact 2017; Swissinfo 2017; Swissinfo 2016; Swissinfo 2015; Boer et al. 2016, 76; Boer et al. 2014, 89)?

This problem is especially salient since Article 1(1)(c) of the CCM prohibits states to "assist, encourage, or induce anyone to engage in any activity prohibited [...] under this Convention." An argument can be made that investments in cluster munition producers are banned under this prohibition as 'illegal assistance' for the production of cluster bombs.

Therefore, I would like to investigate the following research question in this paper: **"How does international law regulate the financing of cluster munition producers?"** I will argue that the expansive language in Article 1(1)(c) indeed prohibits all forms of investments in cluster munition producers. States are under an obligation not to invest themselves and also to ban all investments from corporate and private investors within their jurisdiction. Furthermore, I will demonstrate that 49 members of the CCM support this interpretation, out of which eleven states have already enacted domestic laws banning such investments. My conclusion will make a number of policy recommendations for states, financial institutions, NGOs, and private individuals to help enforce the prohibition on investments in cluster munition producers.

Overall, this thesis will be divided into four chapters with the first chapter introducing the legal definition of cluster munitions and explaining how they are generally regulated under international law. Chapter 1 will show that many rules of international humanitarian law (IHL) and human rights law (HRL) govern the use of cluster munitions, but still leave a regulatory void which has permitted civilian suffering in the past. A comprehensive ban on investments in cluster munitions would therefore be a desirable step towards their elimination. Due to its introductory character, this chapter will mainly rely on academic literature covering the status of cluster munitions in international law.

The second chapter goes on to explain the worldwide situation concerning investments into producers of cluster munitions. It will be explained and criticized how researchers compiled evidence and created statistical models on investments in cluster munition producers over the past eleven years. The chapter will present the numbers and trends on global investments in cluster munitions and argue that those results likely represent only a fraction of the overall issue. The main source for this analysis is a compilation of nine reports by the "Stop Explosive Investments" campaign on worldwide investments in cluster munitions.

The third chapter focuses on Article 1(1)(c) of the CCM, its legal interpretation, and application. In the first part, it will analyze the language, context, object and purpose, preparatory work, reservations, and states' statements in order to argue that financial assistance to cluster munition producers is prohibited. The second part examines how states, individuals, and financial institutions can be held responsible for the provision of prohibited financial assistance to a cluster munition producer. Therefore, the legal idea underlying Article 1(1)(c) will be compared to complicity in the law of state responsibility, the concept of 'aiding and abetting' in international criminal law and the emerging idea of corporate responsibility for financial institutions. The third chapter is the core of the legal analysis in this thesis and therefore relies on methods of treaty interpretation supplemented with the relevant case law, UN documents, commentaries, leading scholarship, and the statements of CCM member states collected in Annex 2.

The fourth chapter contains a comparative analysis of elven countries' domestic laws which implement the CCM's ban on investments in cluster munitions. The chapter will elaborate four criteria which determine the efficacy of domestic legislation by looking at various examples. The main source of this chapter is a collection of all domestic laws contained in Annex 3.

All findings will be summarized in a conclusion which contains a number of brief policy recommendations.

This thesis aims to fill a small void in existing research. Since the CCM is a comparatively recent multilateral treaty and a restricted amount of raw data is available, only limited attention has been drawn to the constant stream of revenue of companies manufacturing these controversial munitions from the standpoint of international law. Most studies gloss over this problem or only dedicate of few paragraphs to it (e.g. Boothby 2016, 270, fn. 36; Koningisor 2012, 28; Wiebe/Smith/Casey-Maslen 2010, 130 et seqq.). Yet, more often than not, the aforementioned weapons are produced by conglomerates which maintain steady financial ties with investors from countries already party to the international treaties specifically banning them. Therefore, the objective of this thesis is to provide a compelling argument for a comprehensive and universal prohibition on investments in cluster munitions by analyzing and ordering all available materials.

2. Cluster munitions in international law

How international law regulates investments in cluster munition manufacturers and why such investments should be prohibited can only be explained within the broader context of the general prohibition on cluster munitions. Therefore, the first chapter serves as an introduction to cluster munitions, explains their definition, past uses, and current regulation under international law.

During the First World War, British engineers developed a bomb which contained smaller incendiary submunitions – the origin of modern cluster bombs (Breitegger 2012, 18). The idea of one container with several smaller bomblets inside became the blueprint for the German SD1- and SD2-cluster bombs.[1] Those were first deployed in combat starting in 1940 against British and Soviet targets (Wiebe/Borrie/Smyth 2010, 1 et seqq.). The first large-scale use occurred in June 1943 against the British town of Grimsby where the German *Luftwaffe* dropped approximately 1.000 bomblets (King 2007, 11; Conway 2007, 13).[2] This incident devastated the civilian population for months and according to eyewitnesses, the actual attack caused as many fatalities as the cleaning-up of unexploded submunitions in the aftermath (Breitegger 2012, 18).

A government warning film from the time bluntly describes some of the features which make cluster munitions such a gruesome weapon (Johnson 2018). First, cluster munitions cover a wide region and bomblets may be found all over the area where the bomb was dropped. Consequently, cluster munitions are an indiscriminate weapon when deployed in civilian areas because the submunitions cannot distinguish between civilian objects and military targets (Blum 2008, para. 3). Second, many of the submunitions do not detonate upon impact and remain dangerous until they are professionally removed. The high dud rate poses a particular danger for civilians who come upon unexploded bomblets in places like fields, gardens, forests, etc. and, as a result of unknowingly handling unexploded ordnance, may sustain severe injuries (Blum 2010).

Although the terror caused by cluster munitions to civilians already became apparent during WWII, they experienced their widest proliferation and use afterwards. During the Korean War (1950-1953), U.S. forces were frequently outnumbered by enemy soldiers. Innovative area weapons were needed against enemy combatants and their equipment (Breitegger 2012, 18). As a consequence, the U.S. started the mass use of a new generation of cluster munitions with an increased number of submunitions and metal fragments during the wars in Indochina in the 1960s and 1970s (Prokosch 1995, 84 et seq; Krepon 1974).

The U.S. conflict in Vietnam and subsequent interventions in Laos and Cambodia are good demonstrations of the claimed military uses of cluster munitions. First, as so-called area weapons, cluster bombs are intended for deployment against area targets such as

[1] SD is an abbreviation for "*Sprengbombe Dickwandig*" – a cluster bomb which could contain be-tween 6 and 108 bomblets and was commonly referred to as "butterfly bomb" because of the butterfly-like shape of the submunitions. As a consequence of its enormous destructiveness, the German *Luftwaffe* started calling them "devil's eggs" during the eastward expansion known as "*Operation Barbarossa*."

[2] Other sources claim between 2.000 and 3.000 butterfly bombs were dropped, see: Rogers 2013.

military installations and infrastructure (airfields, camps) and against large formations of enemy combatants or vehicles (Boothby 2016, 256 et seq.; United States Department of Defence 2016, 404, para. 6.13.2; Group of Governmental Experts 2005). Second, cluster munitions are also dropped in areas adjacent to frontlines to force enemies to retreat or deter them from entering certain areas (Breitegger 2016, 19).

During and after the Cold War, cluster munitions proliferated widely and became part of the arsenals of many countries (Wiebe/Borrie/Smyth 2010, 1-11). They were most publicly used with devastating effects on the civilian populations in Korea, Vietnam, Laos, Lebanon, Western Sahara, Afghanistan, Croatia, Iraq, Kosovo, during the Falklands conflict, the Gulf War, the Chechen wars, and the Ethiopia-Eritrea conflict (Conway 2007). In 2019, 93 countries stockpiled an estimated 1.5 million cluster munitions with more than 179 million explosive submunitions (Cluster Munition Coalition 2019, 19).

From a humanitarian perspective, cluster munitions are particularly harmful because they do not only kill or maim civilians indiscriminately during an attack, but become *de-facto* landmines once the conflict is over. Although states have always claimed very low failure rates, examinations by NGOs such as Human Rights Watch or Handicap International and the UN Institute on Disarmament Research (UNIDIR) suggest an average dud rate of over ten percent (Feickert/Kerr 2019, 2; Hiznay 2006, 19 et seqq.). Cluster munitions harm those who already suffer most during an armed conflict, i.e., children who often mistake the bomblets as toys, internally displaced persons who return to their contaminated homes, and farmers who need to harvest their fields for subsistence (Breitegger 2016, 16-33). According to the 2019 annual report by the Cluster Munition Coalition (CMC), data collected since the 1960s shows direct evidence of 21.764 casualties from cluster munitions.[3] Due to limited or incomplete data, the authors suggest that the actual number of casualties is much higher in the range between 56.000 and 76.000 cases since the 1960s (Cluster Munition Coalition 2019, 45). It should be noted that this number does not even account for all the victims of physical and psychological terror caused by cluster munitions and the hardships their families have to endure even long after a conflict came to an end.

Those numbers are harrowing, taking into account the harm already caused by cluster munitions, and the future damage which those stockpiled cluster bombs could potentially inflict. Meanwhile, the military usefulness of cluster munitions remains questionable since there is no clear evidence that past military operations in which cluster bombs were used could not have been conducted with other conventional weapons which would cause less damage and achieve the same objective. However, the wide proliferation of cluster munitions underlines the urgency of this topic because stockpiles can only be built and maintained with the financial assistance of investors all around the world. In order to reduce worldwide cluster bomb stockpiles, it would be an important and necessary step to hinder the cash flow to companies which help manufacturing and keeping cluster munitions. How international law generally defines and regulates cluster munitions will be examined next.

[3] This number accounts for casualties occurring both during and after the attack.

2.1. Definition

The question of what exactly constitutes a cluster munition remains controversial and several ideas have been proposed. In a brief by the U.S. Congressional Research Service cluster munitions are defined rather general as:

> *[...] weapons that open in mid-air and disperse smaller submunitions - anywhere from a few dozen to hundreds - into an area. They can be delivered by aircraft or from ground systems such as artillery, rockets, and missiles.* (Feickert/Kerr 2019, 1)

In contrast, the most recent version of the 'Law of War Manual' issued by the U.S. Department of Defense gives the following definition:

> *Cluster munitions may be described as munitions composed of a non-reusable canister or delivery body containing multiple, conventional explosive submunitions. Some munitions that may contain submunitions are not considered cluster munitions. For example, nuclear, chemical, and biological weapons, as well as obscurants, pyrotechnics, non-lethal systems (e.g., leaflets), non-explosive kinetic effect submunitions (e.g., flechettes or rods), and landmines, generally are not considered cluster munitions.* (2016, 404, para. 6.13.1)

The first attempt to arrive at an international definition was made with a proposal by Germany during a Meeting of the Group of Governmental Experts in the context of the Convention on Certain Conventional Weapons (CCW) (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980, 1342 UNTS 162) in 2006:

> 1. *"Cluster munitions" means a munition, which contains submunitions with explosives. These are deployed by means of delivery and are designed to detonate on impact with a statistical distribution in a pre-defined target area.*
> 2. *Cluster munition delivery means include artillery shells, missiles or aircrafts.*
> 3. *The characteristics of cluster munitions are a lack of an autonomous target detection capability and a usually high number of dangerous duds that pose serious humanitarian concerns after the use.*
> 4. *The term "cluster munitions" does not cover direct-fire munitions, flares and smoke ammunition, sensor-fused ammunition with an autonomous target detection capability, submunition without explosives and landmines.* (Group of Governmental Experts, German Understanding of Cluster Munitions 2006, 10)

At the moment, the most widely accepted definition can be found in Article 2(2) of the 2008 Convention on Cluster Munitions (CCM), which as of May 2020, has 108 signatories and ratifications:

> *"Cluster munition" means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:*
>
> *(a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;*
> *(b) A munition or submunition designed to produce electrical or electronic effects;*
> *(c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics;*
> *i. Each munition contains fewer than ten explosive submunitions;*
> *ii. Each explosive submunition weighs more than four kilograms;*
> *iii. Each explosive submunition is designed to detect and engage a single target object;*
> *iv. Each explosive submunition is equipped with an electronic self-destruction mechanism;*
> *v. Each explosive submunition is equipped with an electronic self-deactivating feature;* (United Nations Office of Disarmament Affairs 2020)

This general definition is followed by thirteen additional definitions of other terms closely related to the question of what exactly classifies as a cluster munition.[4] Comparing the selected definitions above, it can be noticed that their phrasing varies considerably.[5] Moreover, their scope became narrower with Article 2(2) of the CCM being more limited with some exceptions in letters a-c. However, all those definitions have some commonalities and vary most in their specifics. Since this thesis will mainly analyze how Article 1 of the CCM regulates investments in cluster munition manufacturers, it will rely on the definition in Article 2(2) cited above.

Article 2(2) of the CCM was one of the most contentious issues during the 2007 and 2008 conferences drafting and adopting the CCM. The result is a compromise between those who wanted to ban "all cluster munitions" and others who saw some military usefulness in more innovative cluster munitions and only wanted to prohibit old cluster munitions which "cause unacceptable harm to the civilian population" (Docherty et al. 2010, 162 et seq.).

Article 2(2) of the CCM starts with a very general definition of cluster munitions with a broad scope, basically describing cluster munitions as:

> *[...] a conventional munition designed to disperse or release explosive submunitions — conventional munitions dispersed and released by cluster munitions and which are designed to detonate an explosive charge before, upon, or following impact, typically with the target object or the ground - each weighing less than 20 kilograms.* (ibid., 160)

It is important to note that this provision defines both, the container and the submunitions, i.e., the entire weapon system, as a cluster munition (ibid., 190). The general definition is supplemented by several exceptions which were drafted to couch the specific demands of certain states. The weight limit of 20 kilograms in the *chapeau* serves to exclude the French Apache anti-runway system, with ten submunitions weighing 50 kilograms each (ibid., 191). Moreover, the exceptions in subparagraphs 2(2)(a) exclude weapon systems which share most of the technical features of cluster munitions but do not cause the same harm to civilians (ibid., 192 et seq.).

During the negotiations, the most controversial part of the definition was the exclusion in subparagraph 2(2)(c). Those states which did not support a comprehensive ban argued that there are two very different kinds of cluster munitions. On one side, there are mechanical cluster munitions which have the undesired area and UXO effects.[6] Those "old" cluster munitions make up the vast majority of states' stockpiles. On the other side, some states were developing or already deploying so-called sensor-fused cluster munitions. These newer munitions are equipped with several sensors and are set up to identify and engage only certain targets (e.g., armored vehicles, or generators).

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[4] The additional terms defined in Article 2(3-12) of the CCM are: explosive submunition, failed cluster munition, unexploded submunition, abandoned cluster munitions, cluster munition remnants, transfer, self-destruction mechanism, self-deactivating, cluster munition contaminated area, mine, explosive bomblet, dispenser, unexploded bomblet.

[5] For other definitions see: Group of Governmental Experts of the States Parties to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects 2007.

[6] The UXO (unexploded ordnance) effect describes the common situation when after an attack many unexploded cluster munitions are spread over a wide area. They are often accidentally exploded by civilians.

Additionally, newer "cluster munitions" rely on electronic self-deactivation and self-destruction mechanisms.[7]

Considering all those new technological developments, some states have argued that those weapons have a significantly lower failure rate than older cluster munitions and should therefore not be covered by the Convention (See statements by Australia, Canada, France, the Netherlands, Norway, and the UK in: Diplomatic Conference for the Adoption of a Convention on Cluster Munitions 2008a, 4).

A number of other states, however, were reluctant to fully accept this argument for two reasons. First, new generations of cluster munitions had rarely been used in combat and there was no evidence from the battlefield that the failure rates were actually low. States had often made claims about low failure rates of their cluster munitions during tests which did not match the actual combat failure rates.[8] Second, the Convention should be "future-proof" and not *per se* exempt cluster munitions which will be developed in the years to come (e.g., Indonesia, Jamaica, Guatemala, Mexico, and Venezuela in Diplomatic Conference for the Adoption of a Convention on Cluster Munitions 2008a, 5).

The final version of subparagraph 2(2)(c) represents a compromise between those two positions. Munitions which cumulatively fulfill all the requirements listed in Article 2(2)(c)i-v are excluded from the cluster munitions definition. It is worth noting that those standards are fairly high and the narrow scope of the exclusion was considered a success by the Cluster Munitions Coalition and the ICRC (Docherty et al. 2010, 189 et seq.). Moreover, the *chapeau* of Article 2(2)(c) emphasizes that only munitions which are constructed "in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions" are excluded. This shifts the burden of proof to the users to demonstrate that all technical standards are met and that the munition avoids indiscriminate area and UXO effects – the very reasons for the CCM in the first place (ibid., 194 et seqq.).

Although the definition of cluster munitions in Article 2(2) of the CCM may not be as broad as other definitions, it still has a wide scope. As Norway remarked during the CCM negotiations, Article 2(2) "will in practice eliminate up to 99% of all cluster munitions currently in stocks, and all existing cluster munitions that have ever been used in war" (Diplomatic Conference for the Adoption of a Convention on Cluster Munitions 2008b, 4). While it was important for this paper to get a general understanding of the definition of cluster munitions under Article 2(2) of the CCM, a detailed commentary can be found elsewhere (see Docherty et al. 2010, Art. 2 Definitions).

[7] Usually, those mechanisms use a battery which runs out of electricity shortly after it has triggered the self-deactivation mechanism. Once there is no electricity anymore, the fusing-mechanism is permanently defunct.

[8] Before the use of cluster munitions in South Lebanon in 2006 Israel claimed that most of its cluster munitions stockpile has a proven dud rate below one percent which later investigations found extremely inaccurate, see: Human Rights Watch 2008, 44 et seqq.

After having clarified the definition and technical specifics of cluster munitions, the next section will explain their incompatibility with international humanitarian and human rights law.

2.2. International humanitarian law

When cluster munitions are used in international or non-international armed conflicts, they fall under the regulatory ambit of international humanitarian law. While IHL provides some provisions on how cluster munitions can be used in armed conflicts, it fails to provide the necessary rules to counter the disastrous humanitarian impact described above (Docherty 2007, 82 et seq.). Theoretically, the fundamental IHL principles of distinction, proportionality, and precaution in attack should have precluded widespread civilian suffering from cluster munitions, but have consistently failed to do so. This is partly due to the way those principles are interpreted and partly due to states' failure to apply them properly (Breitegger 2012, 60 et seq.). The following section will provide a brief overview over some of the problems in relation to IHL and cluster munitions.

First, although IHL prohibits indiscriminate attacks against civilians under Article 51 of Additional Protocol I (API) (Protocol Additional to the Geneva Conventions of 12 August 1949, 1977, 1125 UNTS 3), it does not prohibit the usage of cluster munitions as such. Article 51(2) of API, which is also customary international law in international and non-international armed conflict (Henckaerts/Doswald-Beck 2005, 25-45), states that "The civilian population as such, as well as individual civilians, shall not be the object of attack. [...]". However, this would only prohibit an intentional attack with cluster munitions against civilians and not their use in general.

Article 51 additionally prohibits indiscriminate attacks, most importantly attacks with "means of combat which cannot be directed at a specific military objective" (Art. 51(4)(b) of API). Problematically, this provision has been interpreted to only prohibit weapons which are intentionally designed in an uncontrollable manner.[9] While some authors argue that this is the case for free falling cluster munitions (Group of Governmental Experts of State Parties to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Working Group on Explosive Remnants of War 2006a), the prevailing view is that cluster munitions are designed to engage military area targets and, if used correctly, can be directed against a specific military target (see statement by ICRC in Diplomatic Conference for the Adoption of a Convention on Cluster Munitions 2008b, 8 et seq.).

Article 51(4)(c) of API labels weapons as indiscriminate when their effects cannot be controlled in compliance with IHL. While this provision was developed with biological weapons in mind, it may also cover landmines and cluster munition duds. In contrast, cluster munitions are developed to detonate upon impact and not to become *de-facto*

[9] For instance, weapons with a randomized targeting mechanism. In that case the deploying officer would have no chance of specifying the target or knowing the impact of the weapon. See: Breitegger 2012, 44 et seqq.

mines. Theoretically, cluster munitions have no uncontrollable effects – a presumption which is far away from the battlefield reality as discussed previously. The most stringent prohibition on the use of cluster munitions under IHL may be found in the prohibition on area bombardments in Article 51(5)(a). Accordingly, the use of cluster munitions near a concentration of civilians may be prohibited (Breitegger 2012, 47).

Article 51(5)(b) outlines the principle of proportionality according to which any attack is indiscriminate if the anticipated "concrete and direct military advantage" is disproportionate to the incidental civilian losses (including civilian lives, injuries, damage to objects). This test needs to be conducted prior to an attack under the standard of what information is available to a reasonable commander (Henderson/Reece 2018, 835-855; Dinstein 2016, 149-162; Heintschel von Heinegg 2015; Bell/Pfeiffer 2011). With regards to cluster munitions, they can be used in a way not to violate the principle of proportionality if incidental losses to civilians are avoided or do not exceed the military advantage gained through them (Breitegger 2012, 47).

Other rules of IHL, including the precautionary duties under Article 57 of API or clearance obligations under Protocol V to the CCW (ibid., 58 et seqq.), also apply to cluster munitions. This paper will not further explore the regulation of cluster munitions under IHL for space reasons.

It is important to note, however, that ultimately, IHL rules on indiscriminate attacks do not ban cluster munitions but rather permit their use on a case-by-case assessment and with opaque guidelines which have proven ineffective in combat. IHL leaves a lot of leeway to states in deciding when and where to use cluster munitions. This created a regulatory void which caused a lot of civilian suffering until it was filled by the 2008 CCM.

2.3. Human rights law

International human rights law is also relevant to the use of cluster munitions since it fills certain voids left by IHL. However, the application of HRL in armed conflicts is also subject to some general limitations, all of which are subject to academic debates which cannot be comprehensively addressed here.

First, the territorial scope of HRL is limited to the territory and jurisdiction of states and thus may not necessarily apply on battlefields abroad (Oberleitner 2015, 144-168; Milanovic 2011, 11-17; Doswald-Beck 2011, 5-29; Wenzel 2008).[10] Second, HRL addresses states as duty bearers and it is subject to an ongoing scholarly debate how it regulates the conduct of non-state actors (Henckaerts/Wiesener 2020, 195-228; Rodenhäuser 2018, 121-129; Murray 2016, 157-171; Geneva Academy 2016, 18 et seqq.). Third, in cases of national emergencies, including armed conflicts, in which cluster munitions are usually used, states may derogate from a number of their human rights obligations (Oberleitner 2015, 169-175; Hafner-Burton et al. 2011, 676 et seqq.; Kretzmer 2008). Importantly, the human rights most relevant to the use of cluster munitions, i.e., the right to life and the

[10] The academic debate on the extraterritorial application of human rights law has a very large scope which cannot be properly explained here, for more sources on this ongoing discussion see the extensive bibliography: Abrisketa/Casas 2016.

right not to be subject to inhuman or degrading treatment, are considered non-derogable (see Art. 4(2) of the ICCPR; Human Rights Committee 2001, para. 7). Fourth, there has been a long debate on the relationship between IHL and HRL during armed conflict. While it is not debated anymore that HRL applies during international and non-international armed conflicts, different suggestions of the interplay between the two legal regimes exist. Some authors have advocated for a clear *lex specialis* relationship, applying whichever rule from either IHL or HRL is more specific to the situation (Heintze 2011, 87 et seq.). More recent statements from the ICJ (*Legal Consequences of the Construction of a Wal in the Occupied Palestinian Territory*, ICJ 2004, para. 106) and the Human Rights Committee (2004 para. 11) suggest that IHL and HRL can be applied in a complementary way and should be interpreted in harmony in the context of armed conflicts (Oberleitner 2015, 83-104; Graf-Brugère 2013, chap. 13; d'Aspremont/Tranchez 2013, chap. 12).

When it comes to civilian fatalities caused by cluster munitions, IHL and the human right to life (Art. 6 ICCPR) (International Covenant on Civil and Political Rights, 1966/1976, 999 UNTS 171) work hand in hand. Several courts and quasi-judicial bodies have already held states accountable (Wiebe, 2008) for violations of the right to life when they killed civilians disregarding the IHL rules on targeting, proportionality, and precautions (*Behrami and Behrami v. France*, ECtHR 2007; *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR 2005, paras. 190-195; *Bámaca-Velásquez v. Guatemala*, IACtHR 2000, paras. 207 et seqq.).[11] The right to life affords an additional layer of protection to civilians because it requires a prompt and comprehensive examination of fatalities caused by cluster munitions and policy measures to prevent the recurrence of such violations. Moreover, for victims it is often easier to hold state forces or non-state actors accountable in front of human rights bodies in contrast to bodies in charge of investigating IHL violations (Breitegger 2012, 92 et seqq.)

In addition, the right to life also includes a positive 'obligation to ensure' which requires states' due diligence to protect people on their territory or under their jurisdiction from threats to their lives (Human Rights Committee 2019, para. 7; Human Rights Committee 2004, paras. 5 et seq.). In the context of cluster munitions this would mean that states have to protect individuals from unexploded submunitions by the way of warnings, barriers, and, most importantly, by de-mining (Breitegger 2012, 98 et seqq.)

Another rule which exists both in IHL and HRL is the prohibition against torture, cruel, inhuman or degrading treatment which might be relevant in the context of cluster munitions.[12] However, the definitions in IHL and HRL vary considerably. Although no human rights body has yet made any statement on the use of certain weapons as a form of cruel, inhuman or degrading treatment, international criminal tribunals have found violations of international criminal law (i.e. war crimes and crimes against humanity) in

[11] This obligation was made particularly clear when the ECtHR hold Turkey accountable for not exercising due diligence in relation to a dangerous garbage plant in Istanbul where an explosion killed several nearby residents; see: *Öneryildiz v. Turkey*, ECtHR 2004.

[12] In HRL, e.g., Articles 1, 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 UNTS 85; Article 7 ICCPR and in all regional Conventions. In IHL, see: common Article 3 of the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, 1949, 75 UNTS 31; Article 75(2)(a) API.

this regard (*Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, ICTY 2001, paras. 470-497; *Prosecutor v. Stanilav Galic*, ICTY 2003, para. 559; *Prosecutor v. Stanilav Galic*, ICTY 2006, paras. 154 et seqq.; *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic*, ICTY 1998, paras. 442 et seq.). In the noteworthy *Martic* case, the ICTY found that the use of cluster munitions during an attack on Zagreb in May 1995 constitutes war crimes under Articles 2 and 3 of its statute (UN Security Council 1993) and crimes against humanity under Article 5 (*Prosecutor v. Milan Martic*, ICTY 2007, para. 471).

Various other human rights can also be applied to the use and consequences of cluster munitions indirectly. Socio-economic rights like the 'right to the highest attainable standard of health' (International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3, Art. 12), the 'right to just and favorable conditions at work' (ibid., Art. 7), or the 'right to an adequate standard of living' (ibid., Art. 11) are very likely to be curtailed in areas covered with unexploded cluster munition duds.

The rights of the child, enshrined in the 1989 International Convention on the Rights of the Child (CRC) (1989, 1577 UNTS 3), provide children with additional legal protection from the damages of cluster munitions. This includes a strong provision on the right to life (ibid., Art. 6), an extensive 'right to the highest attainable standard of health' (ibid., Art. 24), and rights to an adequate standard of living, rest, leisure, or recreational activities (ibid., Arts. 27, 31).

Important steps towards a better protection of victims of certain weapons were first included in the Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, 2056 UNTS 256, Art. 6), copied in Protocol V to the Convention on Certain Conventional Weapons (CCW) (Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects, 2003, 2399 UNTS 100, Art. 8), and elaborated in the Convention on the Rights of Persons with Disabilities (CRPD) (2006, 2515 UNTS 3, Arts. 5, 8, 26, 27).

Due to the limited space of this paper, only a broad overview over the international law applicable to cluster munitions is possible. However, this section showed that on one side, there are many provisions from different areas of international law which regulate cluster munitions to a certain extent. On the other side, many of those provisions were ambiguous regarding cluster bombs and lacked consistent application. Most importantly, IHL and HRL proved to be insufficient to stop the wide proliferation and humanitarian suffering caused by cluster munitions. This regulatory void was filled with the Convention on Cluster Munitions in 2008.

2.4. The 2008 Convention on Cluster Munitions

After the widespread use of cluster munitions in Southeast Asia, the ICRC brought international attention to their humanitarian effects for the first time during meetings in Lucerne and Lugano in 1974 and 1976 (ICRC 1975; ICRC 1976). The issue remained mute until the ICRC published a report on unexploded submunitions after the Kosovo conflict in 2001 (ICRC 2001). Through joined efforts by civil society movements and the

ICRC, the states parties to the CCW agreed on negotiating an additional protocol on explosive remnants of war which was adopted as 'Additional Protocol V' in 2003 (Wiebe/Borrie/Smyth 2010, 12 et seq.). Protocol V also covered some general aspects of cluster munitions, but a number of states kept advocating for more specific regulations. Discussions on cluster bombs in the CCW framework were discontinued in 2011 after the necessary consensus for the adoption of an additional protocol could not be achieved several times (Boothby 2016, 267).

In 2006, with the use of cluster munitions in Lebanon during the 34-day conflict between Israel and Hezbollah in mind and the failure of the CCW to take decisive actions, the government of Norway announced at the third review conference of the CCW that it would convene an international conference to negotiate a comprehensive convention prohibiting cluster munitions (Wiebe/Borrie/Smyth 2010, 16).

Conferences were held on a record-fast schedule in Oslo, Lima, Vienna and Wellington during 2007 and 2008 (Corsi 2008; Woudenberg 2007). The final Convention was adopted in Dublin on 30 May 2008 by 107 states and entered into force only two years later (Diplomatic Conference for the Adoption of a Convention on Cluster Munitions 2008c, 8).

Building on the success of the Ottawa Convention banning anti-personnel mines, the CCM included a broad prohibition on the development, production, acquisition, stockpiling, retention, or transfer of cluster munitions (Art. 1). Moreover, a set of key terms were defined for the first time (Art. 2) and ambitious provisions on stockpile destruction (Art. 3), clearance of unexploded submunitions (Art. 4), victim assistance (Art. 5), and international cooperation (Art. 6) were included.

The CCM was largely perceived as a success and has been ratified by 110 states.[13] Many of the voids in the regulation of cluster munitions in international law were filled by the CCM. However, some issues have remained unclear or only gained international attention afterwards. One such issue is the question whether the CCM, in particular the so-called assistance clause in Article 1(1)(c), prohibits investments by public and private entities in companies which manufacture parts of cluster munitions. The legal side of this question will be analyzed in chapter three, while the next chapter presents a general introduction into the of the problem of investments in cluster munition manufacturers.

[13] Last updated 18 July 2022 under: http://disarmament.un.org/treaties/t/cluster_munitions.

3. Global investments in cluster munitions

Investments in companies manufacturing internationally prohibited weapons have not yet received a lot of attention for primarily two reasons. First, the major non-proliferation treaties focus on states' obligations and do not address arms producers directly. Second, only very limited information/data on such companies and their investors is publicly available. Despite those obstacles, the investments in companies producing controversial weapons have been a side-issue since the negotiations of the Chemical Weapons Convention (CWC) in 1992 (Convention on the Prohibition of the Development, Production, Stockpilling and Use of Chemical Weapons and on their Destruction, 1992, 1974 UNTS 45) and the 1997 Ottawa Convention banning anti-personnel mines (Convention on the Prohibition of the Use; Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, 2056 UNTS 256) (Krutzsch 2014, 67; Casey-Maslen 2005, 95).

The issue gained momentum during the negotiations leading to the CCM in 2007/2008. Due to the efforts of a number of NGOs including the Cluster Munitions Coalition, Landmine Action, Human Rights Watch, Handicap International, and the ICRC, a fair number of states commented on investments in firms manufacturing cluster munitions (Landmine Action et al. 2009). Although the CCM quickly reached a fair number of signatories and ratifications until it came into force on 1 August 2010, only very few states and investors took concrete actions to uncover and stop investments in cluster munition producers (Docherty/Mei 2019).

Consequently, the Cluster Munitions Coalition and the Dutch NGO PAX started the "Stop Explosive Investments" campaign in 2008 (Docherty/Mei 2019). The Cluster Munitions Coalition is a "global civil society campaign working to eradicate cluster munitions" active in over 100 countries and with several big supporters like Amnesty International, Human Rights Watch, or Handicap International (Cluster Munitions Coalition 2020; Stop Explosive Investments 2019). Initially, the CMC coordinated civil society movements during the preparations and conferences culminating in the CCM. Afterwards, it shifted its focus to monitoring and assisting states in implementing the Convention. PAX is a Dutch organization formed by the Christian Interchurch Peace Council and Pax Christi. It supports and coordinates campaigns on humanitarian disarmament (PAX 2020).

The goal of the "Stop Explosive Investments" campaign is to stigmatize and end the funding of companies involved in manufacturing cluster munitions (Stop Explosive Investments 2019). Apart from a number of informative campaign materials, the campaign's main contribution are re-ports on global investments in cluster munition producers. The campaign has published its first report in 2009 which was updated eight times, last in 2018, under the ongoing title "Worldwide investments in cluster munitions – a shared responsibility" (Beenes/Uiterwaal 2018; Beenes et al. 2017; Boer et al. 2013; Boer et al. 2012; Vandenbroucke/Boer 2011; Vandenbroucke/Boer 2010; Vandenbroucke/Boer 2009).

Those nine reports are the only source of aggregated information on the scale of global investments in cluster munitions and who profits from them. On one side, those reports

are immensely helpful in giving international publicity to the problem of investments in cluster munitions and uncovering the actors involved. On the other side, the information they provide is inherently limited and biased due to the methodology on which the reports rely.

Therefore, this section will first present the premise behind the "Stop Explosive Investments" reports and their research approach. Second, in a critical reflection on the methodological defects of the reports, it will be argued that they probably underestimate the global investments in cluster munition producers. Third, the reports' main results and trends over the last decade will be discussed.

3.1. The 'Stop Explosive Investments' campaign

Before discussing the reports' methodology, it is worthwhile reflecting on the underlying premise. The authors' idea is that stigmatizing all kinds of investments as illegal will lead to a decrease of investments in arms producers which manufacture cluster munitions. Those companies usually produce all kinds of military goods and might not want to jeopardize their funding over one specific item. Thus, the potential decrease in available corporate funding will incentivize arms producers to discontinue their production of cluster munitions to secure their finances (PAX n.d.).

This argument seems convincing in theory and there is some evidence that a causal link exists between an arms producer being mentioned in the "Stop Explosive Investments" reports, a declining number of investments, and a production stop for cluster munitions. Several major industrial conglomerates have discontinued their involvement in cluster munitions after being included in the "Stop Explosive Investments" reports and worldwide investments in those firms were affected. Those companies include Textron (Stop Explosive Investments 2017; Inside Defense 2016), Lockheed Martin (PAX 2013), Orbital ATK (Stop Explosive Investments 2017), and Singapore Technologies Engineering – although they all operate in states not parties to the CCM.

This preliminary observation suggests that the premise of the "Stop Explosive Investments" campaign, put simply "no money means no more cluster munitions," is true – at least to some extent. Arms producers appear to take into account the reputational costs and financial risks of producing cluster munitions and stop their production although they might not even be formally bound by any obligations under the CCM. A more thorough analysis of the reports' results will be provided below after a brief overview of the methodology.

3.2. Methodological considerations

The "Stop Explosive Investments" reports use a three-step approach to identify investments and investors. First, a research team draws up a list of companies for which they have found concrete evidence suggesting that they manufacture cluster munitions (so called "Red Flag list of cluster munitions producers") (Beenes/Uiterwaal 2018, 14). Second, the financial research firm Profundo creates a list of investors who maintain financial links to those companies identified in the first step (so-called "Hall of shame") (ibid.). Third, they contact the investors and look into their policies on investments into

cluster munitions to create two additional lists of investors who are on a good way to divestment from cluster munitions (so called "Runners-Up") and those who have already divested (so called "Hall of Fame") (ibid., 15).

This subsection will critically explore the methodology of how those four lists are compiled to put the reports' results and trends presented in the next sub-section into the right perspective.

3.2.1. Identification of cluster munitions producers

The reports rely on a rather broad definition of 'cluster munitions producers' to avoid the exclusion of enterprises which only manufacture some components or when cluster munitions are only a small part of its business activities. Accordingly, a 'cluster munitions producer' is:

> *Any company or group of companies that, in its own name or through a subsidiary, develops or produces cluster munitions and/or explosive submunitions according to the definitions in the Convention on Cluster Munitions, or key components thereof. Key components are components which form an integral and indispensable part of the cluster munitions or explosive submunitions.* (Beenes/Uiterwaal 2018, 18)

This definition also addresses the problem of large holdings with subsidiary companies manufacturing cluster munitions. It considers the whole group as a cluster munition producer if any subsidiary is engaged in building cluster bombs. This makes sense since invested capital can be reallocated freely within a holding and it is almost impossible to tell for which part of the business it will be used.

A key problem is that arms producers are not particularly transparent about their business activities (Surry 2006). For the time periods covered by the reports, the authors searched all kinds of publicly available documents for mentions of cluster munitions and those who were involved in their production. This includes companies' brochures, military exhibition catalogs, tax filings, annual business reports, export certificates, or public contracts. If such evidence is found, the company will be included in a 'long list.' Companies only make it to the "red flag list of cluster munitions producers" if any investment links to them can be found.

This research approach most likely results in an underinclusive list of cluster munition producers for several reasons. First, public information on companies in the cluster munitions business may not be available. This is probably even more true for countries with big arms producers but limited public reporting duties on arms production (e.g., Russia or China) (Stockholm International Peace Research Institute 2020). Another problem are state-owned companies which are often exempt from any reporting and no outside financial links exist to them at all (Surry 2006, 16 et seq.). All this suggests that the real number of cluster munition producers might be higher than reported which would lead to an overall lower estimate of total investments in cluster munitions

3.2.2. Identification of investors

After the "red flag list of cluster munitions producers" is completed, the re-searchers begin to look for links to financial institutions (Beenes/Uiterwaal 2018, 30 et seq.). According to the report

> *Financial Institutions (FIs) include banks, insurance companies, pension funds, sovereign wealth funds and asset managers from all over the world* (ibid.)

Under the definition for financial links, i.e., investments, the researchers include commercial banking activities (issuance, participation, and underwriting of loans and other corporate credits), investment banking (assistance in the issuing and sale of shares and bonds), and asset management (management of shares and bonds on behalf of investors) (IKV PAX CHRISTI 2011, 1 et seq.). It is important to highlight that the reports cover all three categories of investments. The question if some forms of investments should be prohibited and others should not, will resurface in the next chapter which discusses the legality of such investments under international law. For now, this discussion can be set aside.

Uncovering investments in cluster munition producers is a complicated undertaking because financial institutions maintain a high level of confidentiality concerning their clients and activities (BankTrack 2019). The researchers go through the cluster munitions producers' and financial institutions' annual audits, tax filings, and public statements, but often those documents only contain general information and are not helpful in identifying specific investments. Most of the information in the campaign's reports is derived from records provided by stock exchange oversight agencies[14] on the publicly traded stocks of cluster munition producers (Beenes/Uiterwaal 2018, 31). Additionally, for better readability, the "Stop Explosive Investments" reports only list investments/investors that make up for at least one percent of the issued stocks and bonds of a cluster munitions producer (0.1 percent for Asian companies) (ibid.).[15]

All in all, this method of reporting global investments into cluster munition producers also contributes to understating the overall volume of investments for several reasons. First, most of the commercial and investment banking services cannot be included due to very limited information in the public domain. Second, the available information on investments in stocks and bonds is likely incomplete. Some cluster munitions producers, like the Chinese state owned 'China Aerospace Science and Industry' or 'Norinco,' have never issued publicly traded stocks or bonds (Boer et al. 2014, 17, fn. XI). Other cluster munitions producers' assets may be traded in stock exchanges which do not provide as extensive public records on investments as the U.S. Securities and Exchange Commission does. Third, the one percent (0.1 percent) threshold may enhance the readability of the reports but probably excludes a number of smaller investors. Regrettably, the reports do not state how many financial institutions fall below the threshold and what the gross volume of their investments would have amounted to.

This leads to the conclusion that the total volume of investments found in the "Stop Explosive Investments" reports is likely only a fraction of global investments in cluster munition producers. It also highlights another problem: financial institutions could

[14] Such as the U.S. Securities and Exchange Commission or the German *Börsenaufsicht*.

[15] The authors chose a 0.1 percent threshold for Asian companies because of their different investment structure. They usually have a small number of large local investors and a smaller number of international investors. The 0.1 percent threshold avoids pushing those smaller international investors out of the report.

adjust their investment strategies in order to fall out of the reports' methodology (e.g., by intentionally falling below the one percent threshold).

3.2.3. Reporting on divestment

The "Stop Explosive Investments" campaign seems well aware of the limited scope of the quantitative information they compiled in their reports (Boer et al. 2014, 17, fn. XI). In addition to their "shaming" of cluster munition producers and their investors, they also included two lists outlining financial institutions which are in the process of divesting from cluster munitions or have already ceased their financial involvement with cluster munition producers (ibid., 36, 57).

In contrast to the "hall of shame" list describing and quantifying financial institutions' investments, the "runners up" (ibid., 36-54) and "hall of fame" lists (ibid., 57-89) follow a qualitative research approach. They outline what kind of policies certain financial institutions already have in place, how they avoid investments in cluster munitions, and point to their potential loopholes and shortcomings.

Those two lists create a positive incentive for financial institutions to put divestment policies into place and to be more transparent about their investments in controversial weapons. This approach avoids the methodological shortfalls of the "red flag list" since it does not rely on limited quantitative data. However, if a financial institution simply has no divestment policy or chooses not to make it public, it may just not appear in the report at all.

At this point, it can be summarized that despite of its length and plethora of compiled information, the "Stop Explosive Investments" reports only provide a limited picture of the actual volume of highly problematic investments in cluster munition producers and fall short of scientific standards. This criticism can mainly be attributed to the very limited and incomplete public data with which the researchers have to work. Nevertheless, a closer inspection of the results and trends identified in the nine reports still has some merit and will be conducted in the next section.

3.3. Analysis of investment trends

In the most recent report from 2018, the authors identified seven cluster munition producers from four countries – none of them party to the CCM (i.e. Brazil, China, India, South Korea) (Beenes/Uiterwaal 2018, 9).[16] The researchers found financial ties to 88 institutions located in 12 countries (ibid., 29) including states parties to the CCM (i.e., Australia, Canada, Norway, Switzerland, United Kingdom). The total investments in cluster munition producers in the 2018 report amounted to 8.77 billion USD – which, by comparison, roughly equals the GDP of Haiti in 2019 (ibid.; International Monetary Fund 2019). This already shows that although the production of cluster munitions takes place outside of CCM members' territory, some investments still originate from there.

[16] The listed companies are Avibras (Brazil), Bharat Dynamics Limited (India), China Aerospace Science and Industry (China), Hanwha (South Korea), LigNex1 (South Korea), Norinco (China), Poongsan (South Korea).

It is quite worrying that the researchers could find overall seven financial institutions from CCM member states which still invested in cluster munitions, but it needs to be noted that those investments only make up for 27.5 million USD (0.32% of the total investments in cluster munition producers in 2018). Moreover, the fact that 81 investors (92% of all investors) are from non-CCM states and only 8% from CCM parties, indicates the success of the CCM in stopping states' financial involvement in cluster munitions.

The vast majority of investments originates from China (58.49%) and South Korea (32.28%), with the U.S. in third place with a significantly lower share of 5.18% of global investments in cluster munitions producers. China and South Korea, both non-CCM states, make up for 90 percent of all investments and almost 98% of all investments go to the five cluster munition producers in those countries (Incoming investments to China: 5.12 billion USD or 58.38% of global CM investments and to South Korea: 3.48 billion USD or 39.71%).

Those numbers show that although cluster munitions are a global problem, the largest share of investments comes from and goes to China and South Korea (internal investments). Nevertheless, those two countries are neither the only two producers nor the only investors. As mentioned above, the report found the involvement of other countries, most worryingly of CCM members. In addition, it is important to keep the very limited data and scope of this report in mind which was criticized before and probably lead to a significant underreporting of global investments in cluster munition producers.

Figure 1: cluster munition investments by country

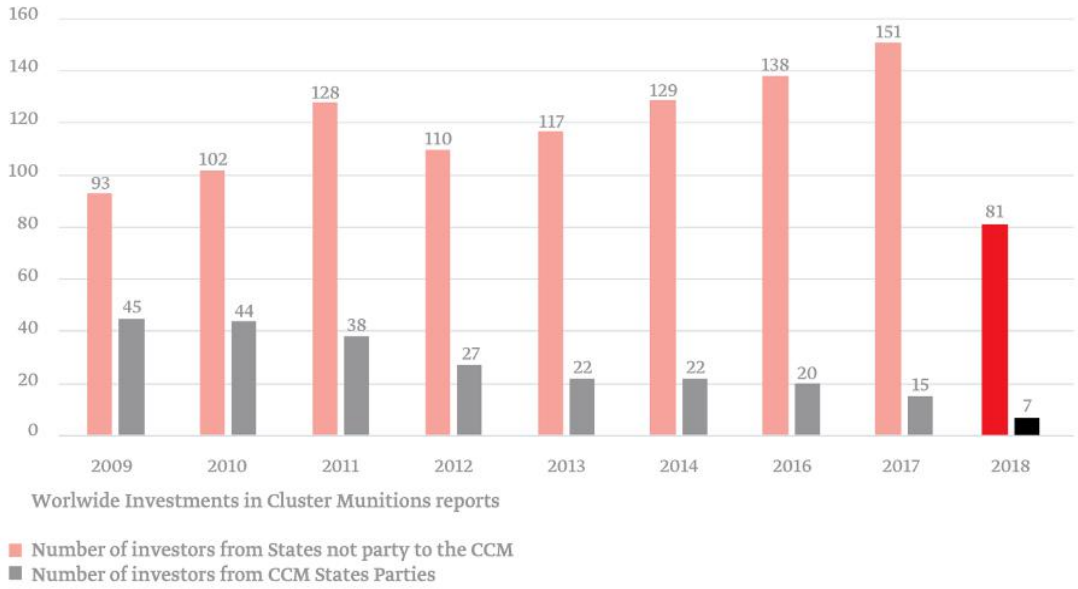
Country	Number of financial institutions investing in cluster munitions	Total amount of investments (in USD)	Share in total investments (in percent)
Australia	1	1.6	0.02
Brazil	1	4.7	0.05
Canada	1	3.3	0.04
China	27	5132.2	58.49
India	4	162.1	1.85
Norway	1	4.4	0.05
Singapore	1	73.2	0.83
South Korea	26	2831.9	32.28
Switzerland	1	1.5	0.02
Taiwan	1	88	1.00
United Kingdom	3	16.7	0.19
United States	21	454.4	5.18
TOTAL	88	8774	100

Source: own compilation, calculated with data from: Beenes/Uiterwaal 2018, 9, fig. 1.

Comparing the nine reports, some interesting developments can be observed. First, the 2018 report (9, fig. 2) describes the largest drop in the number of investing financial institutions so far (from 166 investors in the 2017 report to 88 investors in 2018). This significant decline can mainly be explained by two major U.S. companies (Textron and Orbital ATK) discontinuing their production of cluster munitions after fulfilling their last contracts (Stop Explosive Investments 2017). This is a good example of how financial and reputational pressure played a part in the decision of those cluster munitions producers to abandon their production although they are not even located within a CCM member state (Inside Defense 2016).

The graph below (fig. 2) shows that from 2009 to 2017 the number of investors located in non-CCM states rose while at the same time the number of investors from CCM states constantly declined. There appears to be a correlation between CCM-membership and financial institutions in those countries ceasing their investments in cluster munitions.

Figure 2: global number of investors, comparison from 2009-2018



Source: Copied from Beenes/Uiterwaal 2018, 9, fig. 2.

The total amount of investments was first recorded in the 2012 report and cannot be aggregated by country since the campaign did not make the raw data available until its 2018 report. The summary starts at 43 billion USD in investments in 2012 and shows two major drops. The first drop of 19 billion USD from 2012 to 2013 and the second drop of 22,23 billion USD from 2017 to 2018. Both declines can be explained by major American arms companies denouncing the production of cluster munitions and thus leaving the report. As explained above, the second drop can be attributed to Textron and Orbital ATK, while the first decline was caused by Lockheed Martin ceasing its production of cluster munitions (Boer et al. 2014, 41 et seq.).

Other companies which stopped their production over the years include Alliant Techsystems (U.S.) (Vandenbroucke/Boer 2011, 40), L-3 Communication (U.S.) (ibid.), Singapore Technologies Engineering (Singapore) (Boer et al. 2014, 44), and Roketsan (Turkey) (Vandenbroucke/Boer 2010, 32).

Figure 3: total investments per year (since 2012)

Year	Investments (in billion USD)
2012	43
2013	24
2014	27
2016	28
2017	31
2018	8.77

Source: Table compiled from: Beenes et al. 2017, 12; Beenes/Uiterwaal 2018, 8; Boer et al. 2016, 13; Boer et al. 2014, 10; Boer et al. 2013, 11; Boer et al. 2012, 10, fig. 3.

3.4. Interim conclusion: global investments in cluster munitions

This chapter has demonstrated that despite a decade of campaigning, the global amount of investments in cluster munition producers is still at a high level of 8.77 billion USD. In contrast, the significant decrease from 43 billion USD in 2012 reflects the success of stigmatizing cluster munitions and financial institutions which invest in them. Only few investors from CCM member states remain active and the bulk of all worldwide investments originates from China and South Korea and goes to these two countries.

Apart from those statistics, this chapter provides several important takeaways for discussing the regulation of investments in cluster munitions below. First, the "Stop Explosive Investments" reports provide limited information and probably underreport the number of investors and investments significantly. This limited scope and bias is caused by (a) a methodologically weak statistical foundation and (b) scarce raw data. This points to an important problem, i.e., the lack of transparency in the financial and arms sectors. It is well-nigh impossible to find out who produces cluster munitions and who provides those producers with funding. When discussing the international regulation of investments in cluster munitions and national laws below, this lack of transparency should be kept in mind because it may also pose problems to the enforcement of a legal prohibition.

Second, the reports show how elemental the definitions of "cluster munitions producers" and "investment" are. The scope of those definitions can severely limit the effectiveness of a prohibition on investments in cluster munitions. Moreover, the reports apply certain thresholds for in- or excluding investments. While this is to enhance the reports' readability, it is important to avoid such thresholds in an international prohibition of investments in cluster munitions. Investors could easily trick a threshold

by limiting their investments to stay right below them. This would undermine an effective prohibition on all investments in cluster munitions.

Third, the limited statistics which were available in the reports seem to point to a trend that financial institutions in CCM member states are far more likely to end their investments in cluster munitions. Supporting the universality of this Convention should therefore remain a priority.

4. International prohibition on investments in cluster munition producers

This section will focus on how international law regulates investments in cluster munition producers. It will further argue, that the broad prohibition on assistance to produce cluster munitions bans investments in companies producing cluster bombs or parts thereof. This issue has only received cursory attention and a complete legal analysis of the regulation of investments in cluster munitions has not yet been conducted.

The main moral argument against cluster munitions is the severe harm they cause to civilians, and, therefore, they should be banned comprehensively and universally (see chapter 1). In order to enforce a comprehensive and universal ban, it is imperative to prohibit financial participation in companies producing cluster munitions. Once companies realize that investing in them is illegal for their investors from CCM-states, they might get concerned about their finances. Ideally, arms producers would prefer profitability and being an attractive investment over the production of cluster munitions. Thus, a clear prohibition on investments would make cluster munitions unprofitable and thus incentivize producers, even outside of the territorial scope of the CCM, to end their production.

I will argue that this moral argument is also reflected in the wording and obligations of the CCM, especially Article 1(1)(c) – the so-called 'assistance clause.' Relying on common techniques of treaty interpretation, set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) (1969, 1155 UNTS 331), which are customary international law (Aust 2013, 207; Sorel/Eveno 2011, 818 et seqq.; *Kasikili/Sedudu Island (Botswana v. Namibia)*, ICJ 1999, para. 18; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, ICJ 1994, para. 41), I will demonstrate that Article 1(1)(c) includes a comprehensive prohibition on financial assistance, i.e. investments in cluster munition producers. Additionally, an increasing number of states supports such an interpretation in their executive statements or domestic laws. To understand how exactly the prohibition on financial assistance works this chapter is going to investigate the meaning of 'assistance' in other areas of international law, i.e., state- and corporate responsibility and international criminal law.

4.1. Meaning of 'assistance' in the CCM

The general prohibition on cluster munitions can be found in Article 1 of the CCM which the leading commentary characterizes as "the core of the Convention on Cluster Munitions" (Wiebe/Smith/Casey-Maslen 2010, 96). Since this Article is essential for the argument of this chapter it is reproduced below:

> ***Article 1***
>
> ***General Obligations and Scope of Application***
>
> *1. Each State Party undertakes never under any circumstances to:*
>
> *a) Use cluster munitions;*
>
> *b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;*

> c) *Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.*
>
> *[paras. 2 and 3 intentionally left out]*

According to the title of Article 1, the provision defines the "general obligations" of states as well as the "scope of application" of the Convention. States are obligated to "never under any circumstances" 'use, develop, produce, acquire, stockpile, retain, or transfer' cluster munitions as defined in Article 2(2). Article 1 can be structured into three parts: First, the strongly worded phrase "never under any circumstances," used in the *chapeau* of Article 1(1), indicates a very wide scope of application and a firm prohibition of cluster munitions. This formulation excludes the possibility for states to justify any breach of their duties due to extraordinary circumstances. It also makes clear that the CCM applies both during armed conflict and peacetime. Second, letters (a) and (b) outline a number of prohibited acts which make the use or any form of procurement of cluster munitions illegal for states parties. Third, letter (c) is the so-called assistance clause which outlaws any "assist[ance], encourage[ment], or induce[ment]" in relation to the prohibited acts in letters (a) and (b). Thus, the assistance clause supplements the second part of Article 1(1) and further extends the scope of the provision.

In order to analyze the question whether Article 1(1)(c) entails an obligation to prohibit investments in cluster munitions, further inspection of the assistance clause is required. At first glance, it appears reasonable to assume that the financial backing of a cluster munition producer might constitute an act of "assist[ance], encourage[ment] or induce[ment]" in the development or production of cluster munitions. Such assistance would be prohibited under Article 1(1)(c). Since the meaning of "assist, encourage or induce" is not defined in the Convention itself, common means of treaty interpretation will help to prove this hypothesis and further delineate the exact scope of the provision in relation to investments in cluster munitions.

According to Article 31(1) of the VCLT, the assistance clause in Article 1(1)(c) of the CCM "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

4.1.1. Textual interpretation

For assessing if Article 1(1)(c) covers financial assistance, the ordinary meaning of the phrase "assist, encourage or induce"[17] needs to be determined first.[18] The Oxford English Dictionary (OED 2020a) provides the following definition of "to assist" in common language: "To help, aid: (a) a per-son in doing something [...] (b) an action, process, or result; to further, promote." This definition can be applied to the specific context of the assistance clause in Article 1(1)(c) and leads to a reasonable interpretation. Investments in companies manufacturing cluster munitions "help, aid, further, [or] promote" the production process of cluster bombs. An investor who provides any funding to a firm which produces cluster munitions, helps it to succeed in this mission, simply because

[17] The phrase reads "*assister, encourager ou inciter*" in the equally authentic French text of the Convention.

[18] Richard Gardiner explains that the "ordinary meaning" of the terms of a treaty in their particular context and object and purpose are the usual starting point for any interpretation of a treaty provision, see: Gardiner 2015, 184 et seqq.

the investor helps the firm to stay in business. Under this definition, investments in cluster munition producers would amount to prohibited assistance in the development or production. Additionally, the interpretation of "assist" as "help or aid" is supported by the equally authentic Russian text which uses the verb "*помогать*" the direct translation of which is "to help." In Russian, verbs can be used as a perfective aspect (when a process is completed) and as an imperfective aspect (when a process is still ongoing). Here, the use of the imperfective aspect indicates that the process of helping or assisting someone is decisive and not the successful completion of assistance.

The 1992 Chemical Weapons Convention (CWC) contains an almost similar assistance clause in its Article I(1)(d)[19] and a widely accepted commentary explains that assistance, which is not defined in the CWC either:

> *can be given not only by means of material or intellectual support, e.g., supplying chemicals or technology needed for the production of chemical weapons, but also through* ***financial resources****, technological-scientific know-how, or provision of specialized personnel, military instructors, etc. to anyone who is resolved to engage in such prohibited activity [...]* (emphasis added) (Krutzsch 2014, 67).

Drawing an analogy to this interpretation of the CWC, the provision of financial resources to cluster munition producers would amount to prohibited assistance.

"Encourage" is commonly used as

> *embolden, make confident; to incite, induce, instigate; in weaker sense, to recommend, advise; to stimulate (persons or personal efforts) by assistance, reward, or expressions of favour or approval; also, in bad sense, to abet* (OED 2020b)

And for "induce" the Oxford English Dictionary gives the following definition:

> *persuasion or some influence or motive that acts upon the will, to [...] some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) to do something. (a) Of persons, personal action, influence, etc.* (OED 2020c)

In contrast to the above interpretation of "assist," the terms "encourage" and "induce" are even more ambiguous. The commentary on Article 1 of the CCM suggests that "encourage or induce" may encompass acts and omissions by a state "with a view to generating violations of the Convention" (Wiebe/Smith/Casey-Maslen 2010, 129). The commentary on the CWC resorts to the following definition: "encouragement or inducement, which means contributing to the emergence of the resolve of anyone to commit a prohibited activity by, inter alia, instigating or promising assistance" (Krutzsch 2014, 67).

All those definitions point to some kind of mental element. A state which encourages or induces another actor does so with the expectation that a certain course of action will be

[19] The clause reads: "To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." Thus, the only difference between Article I(1)(d) of the CWC and Article 1(1)(c) of the CCM is the omission of the words "in any way." In the commentary to the CCM it is explained that this omission has no larger significance since the drafters only removed redundant language in order to streamline the article. They also argue that the removal of "in any way" was related to concerns of interoperability between parties and non-parties, see: Wiebe/Smith/Casey-Maslen 2010, 127.

taken. Perhaps, this is reflected even better in the French version which uses "*inciter*" which is closer to the English "incite" than to "induce."[20]

In the context of investments in cluster munitions, this would mean that a financial institution would make an investment under the expectation that the weapons producer will use that money to develop and produce cluster bombs. A conditionality between the provision of funding and the production of cluster munitions is implied in "encourag[ing] or induc[ing]." However, this would only be the case for project finance where funding is specifically allotted to the development or production of cluster munitions. With regard to other investments like general loans or the acquisition of stocks and bonds it cannot be reasonably asserted that financial institutions make those transactions with the expectation that this money goes into the production of cluster munitions. In contrast, financial institutions would rather focus on return on investment and often even insert clauses into loan agreements which exclude their use for the production of internationally prohibited weapons. Therefore, apart from specific project finance, general investments in cluster munitions producers do not seem to cross the threshold implied by "encourage or induce."

Up to this point the textual interpretation of Article 1(1)(c) has revealed that the three verbs "assist, encourage or induce" are of increasing specificity, with "assist" having the broadest meaning. While "encourage or induce" may only cover very specific investments, the above interpretation of "assist" shows that its broad meaning includes all forms of investments in cluster munition producers as prohibited financial assistance for the production of cluster bombs. For this reason, the rest of this chapter will mainly focus on "assistance" – since it is the more inclusive term.

4.1.2. Context and object and purpose

The plain and ordinary meaning of the assistance clause is confirmed upon closer examination of the context and the object and purpose of the Convention. As noted above, the position of the assistance clause in Article 1, outlining the "general obligations and scope of application," emphasizes the overall importance of the provision for the whole Convention. This is supported by the generally firm and all-encompassing wording used in Article 1, i.e., "**never under any circumstances** [...] assist, encourage or induce **anyone** to engage in **any activity** [...]" (emphases added).

As stated in the preamble, the object and purpose of the Convention is "[...] to put an end for all time to the suffering and casualties caused by cluster munitions [...]." The CCM seeks to comprehensively and universally ban cluster munitions (Boutruche et al. 2010, 45). Keeping in mind all the actions explicitly prohibited under Article 1(1)(a, b), aimed at eliminating cluster munitions as a weapons category, it would be counterintuitive to argue that financial assistance to cluster munitions producers would not be prohibited.

The overall importance of Article 1 and its object and purpose of freeing the world from cluster munitions support the argument that the assistance clause in subparagraph (c)

[20] It is not clear from the *travaux preparatoires* why the authentic French version uses *inciter* rather than *induire,* which would be the closest literal translation of "induce."

needs to be interpreted broadly, including financial assistance through investments in those companies producing cluster munitions.

4.1.3. Similar assistance clauses in related treaties

Clauses banning the assistance or encouragement of certain prohibited acts in relation to prohibited weapons are fairly common in disarmament treaties. Annex 1 includes a commented list of 13 disarmament treaties which have different assistance clauses. The first treaty to use the "assist, encourage or induce" language was the 1968 Nuclear Non-Proliferation Treaty (Treaty on the Non-Proliferation of Nuclear Weapons, 1968, 729 UNTS 168, Art. 1). Subsequently, Article 1(1)(d) of the 1992 CWC used a formulation which became the blueprint for assistance clauses of later disarmament treaties. The CWC-assistance clause was reproduced almost verbatim in the 1997 Ottawa Convention (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, 1974 UNTS 45, Art. 1(1)), the 2008 CCM, and the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) (Art. 1).

Commentaries to disarmament treaties with a similar assistance clause to Article 1(1)(c) of the CCM affirm the interpretation that investments in banned weapons constitute prohibited financial assistance. In relation to chemical weapons, Walter Krutzsch explains that assistance includes support through "financial resources" (2014, 67). Although mainly focused on questions of interoperability, Stuart Casey-Maslen, in his commentary to the Ottawa Convention, shortly comments that "assistance" would also include financing (2005, 96, fn. 118). The most extensive analysis of this question can be found in the 2010 commentary on the CCM. Wiebe, Smyth, and Casey-Maslen note the wide scope of the assistance clause and analyze the state practice which was available in 2010. They conclude that the interpretation of the assistance clause covering investments is still somewhat ambiguous: but they suggest that, "on the other hand, there seems to be sufficient State practice to assert that such an interpretation cannot be excluded" (2010, 135). They conclude that more state practice and domestic legislation will help to clarify the exact scope of the assistance clause and confirm that investments in cluster munition producers are covered (ibid., 137).

In contrast, in her comprehensive comparison of the text, *travaux preparatoires*, and state practice of the assistance clauses in the NPT, the Biological Weapons Convention (BWC) (Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, 1972, 1015 UNTS 163, Art. III.), the CWC, and the CCM, Koningisor concludes: "There is no common definition of "assist, encourage, or induce." The international community has deliberately and actively preserved the provision's ambiguity." (2012, 1). She continues to portray a trend in which the phrasing and interpretation of assistance clauses in those four treaties got more expansive over time (ibid., 35 et seqq.) – a finding which is supported by Casey-Maslen (Casey-Maslen 2018b, 43; Casey-Maslen 2018a).

Quite to the opposite, in his commentary to the TPNW, the latest disarmament treaty which is not yet in force, Casey-Maslen argues: "A blanket prohibition on investment is not provided for by Article 1(1)(e) [the assistance clause in the TPNW] but funding a nuclear weapons programme is" (2019, 167). This conclusion that only specific

investments in nuclear weapons programs constitute prohibited assistance is surprising because it goes against the broad phrasing of the assistance clause and Casey-Maslen's own interpretation in previous literature (Casey-Maslen 2019, fn.143, 142). Moreover, financial institutions virtually never provide direct project finance for controversial weapons programs (PAX 2017; IKV PAX CHRISTI 2011). Therefore, limiting financial assistance only to direct investments in specific projects would undermine such a provision and make it ineffective. Financial institutions could just provide "general corporate funding" which could be used by the receiving company for the production of controversial arms and the effect would be the same. Thus, assistance cannot be reasonably limited to specific project financing but must include all forms of investments. This interpretation has so far been supported by a number of statements by states and is reflected in domestic laws which will be analyzed below.

4.1.4. Preparatory work and reservations

Article 32 of the VCLT permits resorting to the *travaux preparatoires* of the CCM in order to confirm the above interpretation of the assistance clause (Gardiner 2015, 353 et seqq.; Aust 2013, 217 et seqq.). Although Article 1(1)(c) was a major point of discussion, the conversations among the negotiators focused on its effects on interoperability between member and non-member states (Wiebe et al. 2010, 131). This was a direct consequence of the United States' announcement that it would not participate in an international treaty prohibiting cluster munitions. NATO members were concerned whether participation in military operations with the U.S. would be illegal under the assistance clause in Article 1(1)(c). This became the focus of the conference discussions and the topic of investments was not touched upon (Koningisor 2012, 27 et seq.; Smith/Casey-Maslen 2010, 137).

Additionally, reservations might indicate how states interpret the assistance clause. However, under Article 19 of the CCM reservations are not permitted.

4.2. State practice

According to Article 31(3)(b) of the VCLT "any subsequent practice in the application of the treaty" is also relevant for its interpretation (see, for example: Gardiner 2018, 253-288; ILC 2018). This subsection will present and analyze the practice of member states regarding the interpretation of the assistance clause in Article 1(1)(c) of the CCM. Therefore, all available state practice was collected in two annexes – Annex 2 contains a list of executive statements by member states and Annex 3 a list of national legislation on investments in cluster munitions. Together, both lists present the most comprehensive collection of state practice on investments in cluster munitions so far.

Although the Cluster Munitions Coalition called upon all states present at the end of the Dublin Diplomatic Conference on the CCM to make declarations that the Convention prohibits investments in cluster munitions, initially no one followed up (Wiebe/Smith/Casey-Maslen 2010, 131). Twelve years later, the picture has changed considerably and over the past decade 40 states have made at least one statement concerning the regulation of investments in cluster munitions under the Convention. In addition, 11 countries have enacted legislation implementing the CCM in which

investments in cluster munitions are regulated. Considering that 108 states have ratified the CCM, the supportive practice of at least 49 states[21] suggests a clear trend towards interpreting the assistance clause in Article 1(1)(c) as covering investments. In addition, the ICRC recently broke its longstanding silence on the matter and included a recommendation to prohibit investments as a form of financial assistance in its 'checklist of domestic measures to implement the CCM' (2020).

The scope and language of states' statements vary considerably. Some states made rather general declarations of support for a prohibition of investments in cluster munitions.[22] An example would be the Republic of Congo's statement:

> *[...] the Republic of Congo agrees with the views of a number of States Parties to the convention and the Cluster Munition Coalition that investment in the production of cluster munitions is also prohibited by the convention.* (Stop Explosive Investments 2020)

A number of other states[23] has made clearer declarations that they view investments as prohibited assistance with reference to Article 1(1)(c) like, for instance, Chad:

> *L'investissement ou le financement de la production des armes prohibées défait le cadre juridique international qui régit leur interdiction. Nous sommes donc d'avis que les investissements dans la production des armes à sous munitions sont une violation del'Article 1 de la CCM.* (Sahanai 2018, 12)

Yet, other states have made even more specific statements, often in the context of the domestic implementation of the assistance clause.[24] It is interesting to note, that all of those statements set out certain thresholds for holding someone criminally liable for investing in cluster munitions. Such thresholds consist of (a) a mental element (knowingly or intentionally investing) and (b) a causal link between the investor and the cluster munitions producer. An example stressing the mental element of knowledge or intention would be this statement by the Attorney General of Australia:

> *An example of conduct that would fall within this offence is where a person provides financial assistance to, or invests in, a company that develops or produces cluster munitions, but only* ***where that person intends*** *to assist, encourage or induce the development or production of cluster munitions by that company.* (Emphasis added) (McClelland 2010, 1775)

The French Deputy Minister of Defense remarked with an even clearer reference to the CCM that all "financial help," whether direct or indirect, is prohibited and individuals are liable for complicity if they had knowledge that they were providing financial assistance to a cluster munitions producer:

> *Concernant le financement, il est clair, dans notre esprit, que toute aide financière, directe ou indirecte,* ***en connaissance de cause*** *d'une activité de fabrication ou de commerce d'armes à sous-munitions constituerait une assistance, un encouragement ou une incitation tombant sous le coup de la loi pénale au titre de la complicité ou de la commission des infractions prévues par le présent projet de loi.* (Emphasis added) (Falco, 2010)

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[21] Two of the states did not affirm that investments are included in Article 1(1)(c). See statements of Sweden and Japan in Annex 2.

[22] See statements in Annex 2 of: Bosnia and Herzegovina, Cameroon, Chile, Colombia, Croatia, Czech Republic, DRC, Ecuador, Republic of Congo, The Gambia, The Holy See, Hungary, Iceland, Lao PDR, Madagascar, Mexico, Niger, Philippines, Rwanda, Senegal, Slovenia, Trinidad and Tobago, and Zambia.

[23] See statements in Annex 2 of: Chad, Costa Rica, France, Ghana, Guatemala, Lebanon, Malawi, Malta, Mauretania, Montenegro, Norway, Peru.

[24] See statements in Annex 2 of: Australia, Canada, France, Norway, United Kingdom.

All in all, the 38 supportive statements and 11 domestic laws (which will be scrutinized in the next chapter) confirm the above interpretation of Article 1(1)(c). Investments in companies manufacturing cluster munitions are prohibited as illegal assistance in the CCM. Nevertheless, states and the civil society should encourage the remaining states which have not yet declared that Article 1(1)(c) bans investments in cluster munition producers to do so as soon as possible.

Apart from state practice, an examination of 'assistance' in other areas of international law helps to better understand Article 1(1)(c) of the CCM and how it can possibly be applied to states, individuals, and corporations. This is the subject of the next section.

4.3. Accountability for investments in cluster munitions

4.3.1. Assistance and the law of state responsibility

The notion of assistance has no settled understanding in general international law, however, it is widely used in what Aust refers to as "a network of rules on complicity" (Aust 2011, 376). The most prominent incarnation of assistance is included in Article 16 of the 'Draft Articles on responsibility of states for internationally wrongful acts,' (ASR) adopted by the International Law Commission (ILC) in 2001 (ILC 2001). In 2007, the ICJ held that Article 16 reflects customary international law (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ 2007, 43, para. 420). Wiebe and Smyth (2010), Casey-Maslen (2019), and the ICRC (2018) suggest that drawing an analogy between the assistance clauses in disarmament treaties and the law of state responsibility can inform the determination of the scope of the former and clarify states' obligations under the CCM.[25]

First, it is important to highlight the differences between the assistance clause in Article 1(1)(c) of the CCM and Article 16 of the ASR. Article 1(1)(c) prohibits states from assisting "anyone," i.e., any private or public actor, regardless of the fact whether this actor is a party to the CCM or under the jurisdiction of a member state. In contrast, Article 16 of the ASR only applies to assistance between states and the *chapeau* presumes that all involved states commit an internationally wrongful act. Under Article 16, the act in question needs to be in breach of an obligation of both states, the assisting and the assisted state (so-called opposability requirement) (Wiebe/Smith/Casey-Maslen 2010, 127). In his commentary to the ASR, ILC Special Rapporteur Crawford draws a difference between what he calls "direct or independent responsibility" and "derivative responsibility or *responsabilité dérivée*" (ILC 2001, chap. IV, para 7). A state incurs independent responsibility for the violation of a substantive obligation of international law incumbent on it. Derivative responsibility, in contrast, comes from the assistance of one state in the internationally wrongful conduct of another (*British Claims in the Spanish Zone of Morocco (Great Britain v Spain)* 1924, para. 648). The assisted state is directly

[25] **Article 16. Aid or assistance in the commission of an internationally wrongful act**
A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) the act would be internationally wrongful if committed by that State.

responsible while the assisting state is only responsible as far as it actually contributed to the original internationally wrongful act. It can now be asked whether Article 1(1)(c) of the CCM is a primary/substantive norm entailing independent responsibility or whether it just enshrines a specific version of the general idea of derivative responsibility found in Article 16 of the ASR. An argument for both cases can be made.[26]

First, one could argue that assistance under Article 1(1)(c) of the CCM would be a breach of a substantive obligation and thus entails independent responsibility in contrast to assistance under Article 16 of the ASR which embodies derivative responsibility. For example, take the U.S. and Switzerland. While the U.S. has not joined the CCM, Switzerland is a member since 2012 (Switzerland 2012). Evidently the U.S. is not prohibited from producing cluster munitions because it is not a party to the CCM. But for Switzerland it would be prohibited under Article 1(1)(c) to assist the U.S. in the production. Switzerland has a direct obligation not to provide assistance for the production of cluster munitions. In contrast, this would not be the case under Article 16 of the ASR because Switzerland would assist the U.S. in something which does not violate any international obligation of the U.S. Since the U.S. would not violate any of its international obligations, no independent state responsibility for the U.S. arises from which Switzerland could receive derivative responsibility. This imaginary scenario shows that in contrast to Article 16 ASR, Article 1(1)(c) CCM does not include an opposability requirement. It also illustrates that the assistance clause in Article 1(1)(c) has the broader scope of a primary/ substantive obligation under the CCM and applies in situations in which Article 16 would not apply.

To the contrary, one could also argue that there is a striking similarity between Article 1(1)(c) of the CCM and Article 16 of the ASR and that the former is merely a concretization of the latter. The concept underlying Article 16 is that states can be held responsible for the violation of substantive rules of international law by other states if they provided assistance. There is a primary norm of international law prescribing a certain conduct which is violated, and assistance only comes secondary. Therefore, state responsibility for assistance is only derivative/ supplementary.

The same structure is embodied in Article 1 of the CCM. Letters a) and b) of Article 1(1) contain a number of direct/ substantive obligations under the CCM, for instance, the prohibition on the production of cluster munitions. Those are the acts "Each State Party undertakes never under any circum-stances to [do]." The assistance clause in letter c) can be seen as an additional/ secondary safeguard and is dependent on the primary violation of one of the substantive obligations in letters a) and b). Assistance can only be triggered if there is wrongful conduct under letters a) and b) in the first place. If there was no production of cluster munitions, there cannot be any financial assistance. Therefore, Article 1 of the CCM can be seen as a more specific version of the idea incorporated in Article 16 of the ASR. The ILC's commentary even acknowledges that "Various specific substantive rules exist, prohibiting one State from providing assistance [to another]" (ILC 2001, Art. 16, para. 2). Furthermore, those substantive provisions prohibiting assistance "[...] do not rely on any general principle of derived responsibility, [...]" (ibid.). This

[26] A more extensive discussion of the difference between primary and secondary rules can be found here: Nolte/Aust 2009, 5 et seq.

exactly describes the main difference between Article 1(1)(c) of the CCM and 16 of the ASR - Article 1(1)(c) works more like a primary/ substantive rule and can give rise to independent responsibility while Article 16 is strictly limited to derivative responsibility. Still, the concept of a secondary rule prohibiting assistance in the violation of a primary rule is similar for both provisions.

Therefore, there is a lot of merit in looking into the way Article 16 ASR was interpreted by the ILC in order to better inform the exact scope of the assistance clause in the CCM by analogy. Since this thesis is investigating investments in cluster munition producers, it is important to note that the ILC's commentary to Article 16 of the ASR explicitly includes financial assistance within the provision's ambit.[27]

Article 16 outlines a three-prong test for establishing assistance in an internationally wrongful act of another state (ILC 2001). First, the assisting state is required to have a certain degree of knowledge or intent when providing assistance (subjective element). Second, the provided assistance must actually facilitate the wrongful act (material element - causal link). Third, the act in question needs to breach an international obligation of both states, i.e., if committed by either state, it would be internationally wrongful (opposability requirement).[28] It was established above that this third element is not included in Article 1(1)(c) of the CCM, but rather that the occurrence of one of the prohibited acts under letters a) and b) is the only prerequisite for assistance. Consequently, only the first two conditions will be further analyzed.

Subjective element

Letter (a) of Article 16 ASR points out that assistance requires "knowledge of the circumstances of the internationally wrongful act" on the side of the assisting state. In its commentaries, the ILC clarifies "that the assisting State be aware of the circumstances" (ILC 2001, Art. 16, para. 4.). States which are fully unaware of their aid and assistance being used to commit an internationally wrongful act "bear no international responsibility" (ibid.). However, the applicable standard of knowledge is not settled (Lanovoy 2016, 100; Jackson 2015, 159 et seqq.; Aust 2011, 235 et seqq.; Nolte/Aust 2009, 14 et seq.). Especially two phrases within the ILC's commentary have attracted interpretive creativity.[29] Scholars and states are divided whether the subjective element of assistance is a general standard of "knowledge of the circumstances" or an "intent to facilitate" the internationally wrongful act of the assisted state – a broad or a narrow

[27] The very first paragraph of the ILC's commentary states: "[...] a State voluntarily assists or aids another State [...] by knowingly providing [...] financing of the activity in question." See: ibid., Art. 16, para. 1. The notion of assistance in the law of state responsibility clearly covers financial assistance, see: Lanovoy 2016, 176 et seqq.

[28] This is clearly spelled out in Article 16(b): "the act would be internationally wrongful if committed by that [the assisting] state."; see also: Lanovoy 2016, 94.

[29] ILC 2001, Art. 16, para. 5; reads: "[...] aid or assistance must be given **with a view** to facilitating the commission of the wrongful act, and must actually do so. [...] A State is not responsible for aid or assistance under Article 16 unless the relevant State organ **intended**, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. [...]" (emphases added).

reading of Article 16(a) respectively.[30] Good arguments can be made for both sides and all authors are convinced that state practice, the text of Article 16 ASR, and case law support their opposing positions.[31]

On one side, Nolte, Aust, and Crawford maintain Ago's position (1978) that the notion of complicity necessarily involves the fault requirement of intent (Crawford 2013, 405 et seqq.; Aust 2013, 237-249; Nolte/Aust 2009, 13 et seqq.). They argue that the phrases "**with a view** to facilitating the commission of the wrongful act" (emphasis added) and "A State organ is not responsible for aid or assistance under Article 16 unless the relevant State organ **intended**" (emphasis added), limit the broader language of "knowledge of the circumstances" in Article 16(a) ASR (Aust 2011, 235). Moreover, they point to the wording which the ICJ used in the Bosnian Genocide Case and argue that the phrases "at the least" and "in particular [awareness of the special intent]" suggest a narrower standard of fault than mere "knowledge of the circumstances" (ibid., 236). On the policy side, they maintain that any standard below intent would open Article 16 up to an extent that almost any cooperation or association between states could become complicity (Crawford 2013, 408.) The effect of this would be international distrust and decreased cooperation – Article 16 would become "unworkable" (Aust 2011, 240 et seq.).

On the other side, Jackson (2015, 159 et seqq.) and Lanovoy (2016, 218-240), contend that "knowledge of the circumstances" of the internationally wrongful act suffices and even Aust (2011, 236) admits that the recent trend goes into this direction. Following the knowledge standard is closest to the actual text of Article 16(a) (Jackson 2015, 161) and the recent jurisprudence points in this direction (*Husayn (Abu Zubaydah) v. Poland*, ECtHR 2014, paras. 441 et seq., 517 et seqq.; *Al Nashiri v. Poland*, ECtHR 2014, paras. 441 et seq., 517 et seqq.; *El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR 2012, paras. 97, 239; *Mohammed Alzery v. Sweden*, HRC 2006, paras. 11.5 et seq.; *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT 2005, para. 13.4).

Generally, state responsibility is ascertained objectively when an "action or omission" contrary to an international obligation is attributable to a state (ILC 2001, Art. 2). Since

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[30] Authors supporting a 'general knowledge requirement' include: Lanovoy 2016; Jackson 2015; Felder 2007; Boivin 2005; Corten 2004; Nahapetian 2002; Lowe 2002; Quigley 1986; Klein 1981; Authors supporting the 'intent requirement' include: Crawford 2013; Aust 2011; Dominicè 2010; Nolte/Aust 2009; Palchetti 2009; Brehm 2007; Stein 1992; State practice on the subject of fault is far from being unified or conclusive. Statements are collected in: ILC 2001. Only eight states commented on Article 16 ASR, an analysis of which can be found in: Lanovoy 2016.

[31] Analyzing 'complicity in genocide' under Article III(e) of the Genocide Convention, the ICJ also interpreted Article 16 ASR in the Bosnian Genocide Case: "But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless **at the least that organ or person acted knowingly**, that is to say, in particular, **was aware of the specific intent (*dolus specialis*)** of the principal perpetrator." (emphases added, at para. 421) Crawford 2013, 407, for instance, argues that: "[...] the use of the term 'at the least' by the Court in Bosnian Genocide indicates that, as a general rule, something more than mere knowledge is required, namely the need for actual intent that aid and assistance be given to the illegal act." Commenting on the same paragraph of the judgment, Lanovoy 2016, 231; argues: "Commentators have given this passage a life of its own, suggesting that the general regime of international responsibility should be construed restrictively so as to require at least the showing of the knowledge of the intent. In this author's view, such an interpretation misconstrues the Court's statement placing it outside a very peculiar context of the case." Jackson 2015, 160; comments: "Strangely, some scholars have taken this holding to imply that, in general, complicity requires more than knowledge."

proof of fault is not a requirement for establishing independent state responsibility under Article 2 ASR it would be counterintuitive to use such a standard in Article 16 for derivative responsibility (Lanovoy 2016, 219).[32] In addition, Lanovoy explains that those scholars reading an intent requirement into the Bosnian Genocide Case are misconstruing the convoluted language of the decision (230 et seqq.) The ICJ applied the higher standard of 'knowledge of the specific intent' in the particular context of 'complicity in genocide' and made an analogy to Article 16 ASR in an attempt to safeguard a coherent interpretation between criminal law and state responsibility.[33] Thus, the ICJ's statement should not be overemphasized or overinterpreted. Furthermore, "knowledge of the circumstances" is a more objective standard than a psychological element such as intent which is difficult to prove for states (237 et seqq.)

All in all, this ancient debate in the law of state responsibility cannot be resolved in this thesis. Fortunately, there is no need to choose between "knowledge of the circumstances" or an "intent to facilitate" because financial assistance by states to cluster munition producers meets both standards.

Although Article 1(1)(c) of the CCM does not expressly mention any subjective element, it makes sense to include it because of the Article's close relation to Article 16 ASR, an argument which is supported in the literature (Casey-Maslen 2018, 44 et seq.; ICRC 2018, 5 et seqq.). As demonstrated in chapter two, states usually provide financial assistance to cluster munition producers by granting loans or acquiring shares and bonds. States which provide funding to arms companies in this way do so with the knowledge of the circumstances that their money will be used for the prohibited production of cluster munitions. Likewise, an "intent to facilitate" the production of cluster munitions can be reasonably inferred from the fact that a state knowingly invested despite the apparent risk of the misuse of its financial assistance for the production of cluster munitions. States can hardly claim that they were not aware of the circumstances that a weapons producer, which a state organ chose to financially assist, is producing cluster munitions. Necessarily, the intent can only be inferred from the factual circumstances because there will usually be no conclusive evidence giving an objective insight into a state's intent. Moreover, the justification that a state did not provide money for the purpose of producing cluster munitions, but for another reason such as profit, should be inacceptable, because it would give states a universal defense. Some authors suggest that such a mental element should also come with a due diligence obligation for states to investigate before placing investments in controversial industries with a high risk of participating in the production of cluster munitions (Talmon 2008, 219). Inspiration can be drawn from the control regime for arms transfers in the 2013 Arms Trade Treaty (ATT, 2013/2014, 3013 UNTS 1). Article 7 of the ATT requires states to conduct a detailed export assessment before they authorize arms transfers in order to ensure that they will not be used for illegal activities.[34] Such an assessment could also be

[32] On the role of fault in the ASR, see: Gattini 1999.

[33] On the court's flawed comparison of individual criminal liability for genocide and state responsibility see: Gaeta 2007b; Gaeta 2007a.

[34] It was argued that Articles 6 and 7 of the ATT embody and are closely related to Article 16 ASR, see: Jorgensen 2014, 729 et seqq; DiPerna 2008, 66-75. For more information on the export control regime see: Casey-Maslen et al. 2016.

helpful for states investing in the military industry in order to ensure that they do not fund the production of internationally prohibited weapons.

In addition, a mental element requiring 'knowledge' or 'intent' would protect states which provide general financial aid or assistance to other states (for example development aid, inter-state loans) from being held responsible if such funds are used for cluster munitions without their awareness (Nolte/Aust 2009, 13 et seqq.). In this context, Special Rapporteur Crawford recalls that states collaborate all the time and "For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful" (ILC 2001, chap. IV, para. 8.). However, such general financial aid should only be provided under the strict condition that it shall not be used for illegal activities, such as the production of cluster munitions.[35]

Material element

The second threshold of Article 16 of the ASR is the requirement of a causal link or nexus between the assistance and the actual internationally wrongful act: "[...] aid or assistance must be given with a view to facilitating the commission of the wrongful act, and **must actually do so**" (emphasis added) (ILC 2001, Art. 16, para. 5). The reason for this threshold is to exclude aid or assistance which is too insignificant or too remote from the internationally wrongful act (Lanovoy 2016, 95; Nolte/Aust 2009, 10 et seqq.; Felder 2007, 236 et seqq.). The commentary further clarifies: "There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act" (ILC 2001, chap. IV, para. 8). Although such a nexus requirement is not mentioned in Article 1(1)(c) of the CCM, a causal link between an act of assistance and one of the prohibited acts under Article 1(1)(a-b) should exist to keep the proximity between the illegal act and the perpetrator. Otherwise, the notion of assistance would include states who are several steps removed from the illegal act and might not have had any knowledge that they were providing assistance (connection between the subjective and the material elements). This can be illustrated by looking at investments. Direct investments in financial products or cluster munition producers establish a clear link between the investing state organ and the illegal production of cluster munitions. Thus, those investments are prohibited under the assistance clause. In contrast, a state which, for example, provided humanitarian aid to another state which, in turn, invested in cluster munitions, should not be held responsible for assistance. The distance between the prohibited act and the investor is too far to argue that there is a causal link.

Be that as it may, the threshold cited by the ILC that "[...] aid or assistance should have [...] contributed significantly to that [internationally wrongful] act" is unclear in itself. Simma, Lanovoy, and Aust point out that the ILC failed to clarify what amounts to a 'significant contribution' and the specifics of the nexus requirement remain vague

[35] Such conditions are common in international aid agreements. It should be noted, however, that the mere inclusion of conditionalities cannot categorically exempt a state from international responsibility for complicity in an internationally wrongful act if that state was aware that its aid was used for such illegal activities.

(Lanovoy 2016, 97; Aust 2011, 197 et seqq.; ILC 1999, para. 41). Some indication can be found by looking at international financial institutions which provided financial aid to states or projects involved in human rights violations. This scenario is strikingly similar to states providing financial assistance to cluster munition producers. The responsibility for assistance by international organizations is discussed under Article 14 of the 'Draft Articles on the responsibility of international organizations' (ARIO) (ILC 2011) which is essentially similar to Article 16 of the ASR. It is generally accepted that "an international organization could incur responsibility for assisting a State, through financial support [...], in a project that would entail an infringement of human rights [...]" (ILC 2005, para. 28). The issue, however, came up what kind of financial support by an international organization qualifies as prohibited assistance under Article 14 of the ARIO. The discussion was not at all focused on the amount of financial support but rather on the nexus requirement. The International Monetary Fund (IMF) argued that its financial help to states' payment balances was too non-specific for establishing a causal link between the provided money and the internationally wrongful conduct. Therefore, the IMF's loans do not cross the threshold of assistance even if the money is used by a recipient state for internationally wrongful acts (ILC 2007, 22; for a similar view from the former general counsel of the world bank see also: Shihata 1992).

In contrast, other international financial institutions, for example multilateral development banks, usually provide financial support which is directly linked to a certain cause or project. If such project-related funds were used to commit an internationally wrongful act, a sufficient nexus would exist to qualify the funds as financial assistance and the international organization would be responsible under Article 14 of the ARIO (Reinisch 2010; Dann 2006; Bradlow 2005; Suzuki/Nanwani 2005). It seems like the nature of the financial assistance and not the overall amount is decisive for the nexus requirement.

The discussion above locates the causal link threshold for financial assistance between general lending schemes without a lot of "influence and control over the actual money and project-oriented lending where the organization has a stronger degree of control over the flow and use of money" (quoted from: Lanovoy 2016, 99; Reinisch 2010, 69). Lanovoy trenchantly summarizes that

> *[...] as long as there is a proven de minimis link between the financial assistance and particular circumstances of the wrongful act, the [...] responsibility for aid or assistance cannot be excluded in principle.* (2016, 99)

The same conclusion can be made for financial assistance under Article 1(1)(c) of the CCM. Any threshold based on a certain amount of financial assistance given to a cluster munition producer would be contrary to the language of the assistance clause and the above interpretation of the nexus requirement. Moreover, relying on a certain amount of money to define "significant contribution" would necessarily be arbitrary and exclude smaller investments which, in sum, may very well amount to a 'significant contribution.' The scope of the prohibition in Article 1(1)(c) includes all "assist[ance], encourage[ment], or induce[ment]" and any kind of financial assistance is only limited by the subjective element and the existence of a causal link. Once a sufficient nexus can be proven between the financial assistance provided by a state party to the CCM and the production of cluster munitions, the state is responsible for a breach of Article 1(1)(c). The threshold

for a sufficient causal link or nexus lies between the provision of general/ non-specific financial aid (for example humanitarian assistance, general loans to another state, etc.) and specific funding provided to cluster munition producers. A state which issues loans to a cluster munition producer or acquires its shares, bonds, or other financial instruments fulfills the nexus-requirement and thus provides prohibited financial assistance.

Looking at Article 16 of the ASR in analogy to the assistance clause of the CCM has been helpful to further determine the scope of the latter. First, it could be clarified that the notion of assistance in the general law of state responsibility clearly includes financial assistance of any form. Moreover, the concept of complicity in international law, of which Article 1(1)(c) CCM is a part, is limited by two distinct conditions. First, for investments to be prohibited assistance under Article 1(1)(c) of the CCM, states need to have knowledge of the circumstances of their investment. Second, a causal link needs to exist between the investing state and the cluster munition producer. Applying those two thresholds, it became clear that direct investments in cluster munition producers, such as the granting of loans, export guarantees, or the acquisition of shares, bonds or other financial instruments by a state party to the CCM, qualifies as prohibited financial assistance. In contrast, non-specific funding such as humanitarian aid, inter-state loans, and so forth, usually do not cross the subjective or material thresholds of assistance.

It follows from the structure of the general law on state responsibility that a state engaging in prohibited financial assistance is breaching its international obligations under Article 1(1)(c) of the CCM. As a consequence, this state has to cease its internationally wrongful investments, guarantee non-repetition, and grant "full reparation for all injury caused by the internationally wrongful act" (ILC 2001, Arts. 28, 30, 31.). If and what kinds of reparation are required may vary from case to case.

While those standards are generally aimed at states, it might be necessary to use different requirements when holding private persons accountable for investments in cluster munitions. Another mental element or standard of evidence for a causal link may be required to bring civil or criminal claims against individuals. This issue will be examined more thoroughly in the next chapter when comparing different domestic laws which are aimed at prohibiting investments by private individuals and companies.

4.3.2. Individual criminal responsibility

The CCM is clearly addressing its member states and only entails direct international obligations for them. This is reflected in the unambiguous language of the *chapeau* of Article 1 stating that "**Each state party** undertakes never under any circumstances [...]" (emphasis added). However, Article 9 on "national implementation measures" requires states to extend the prohibitions under the CCM to "any activity [...] by persons or on territory under its jurisdiction [...]".

This essentially means that all acts prohibited under Article 1(1) may not only be prohibited to states parties, but also private and legal persons within their jurisdiction. This includes private and corporate investors and thus has the potential to extend the regulatory scope of the assistance clause significantly. Moreover, states have an additional obligation under Article 9 to "take all appropriate legal, administrative and

other measures [...] including the imposition of penal sanctions" to enforce the Convention.

However, one important caveat needs to be emphasized. The CCM does not create any direct obligations for natural or legal persons, but exclusively for states parties. Individuals or corporations cannot be held responsible or liable under the CCM. Any criminal or civil claims against natural or legal persons can only be brought in domestic courts on the basis of national statutes making the prohibited acts under Article 1(1)(c) CCM illegal for individuals or corporations. As explained above, states indeed have an unequivocal obligation under Article 9 to make prohibited actions under the Convention illegal in their domestic laws, however, they may choose not to implement this part of the Convention or avoid creating any criminal or civil offences. At best, even if states insert grounds of action in their domestic laws, those may vary considerably. As a consequence, conduct which is prohibited in one member state may be legal in another – ultimately, it all depends on the way states implement the CCM.

It was made clear above that Article 1(1)(c) of the CCM does not give rise to any individual criminal responsibility under international law. The only way natural persons can be held criminally responsible for providing financial assistance to cluster munition producers is through domestic laws. However, international criminal law offers some interesting insights into how individuals could be held accountable. There is a considerable similarity between the way assistance is envisaged in Article 1(1)(c) of the CCM and the criminal law concept of 'aiding and abetting' as a mode of criminal liability. It was argued above that the assistance clause in the CCM is closely related to the concept of complicity in the law of state responsibility. In turn, many authors have suggested a close link between complicity in state responsibility and the criminal law concept of aiding and abetting (Lanovoy 2016, 69 et seqq.; Jackson 2015, 69-85; Palchetti 2009).

Aiding and abetting essentially consists of an act or omission which knowingly assists, encourages or supports the principal perpetration of a proper international crime (Cassese et al. 2013, 193). Similar to our discussion of state responsibility, aiding and abetting also requires a subjective/ mental element (*mens rea*) and a material/ objective element (*actus reus*).

The material element generally "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" (*Prosecutor v. Anto Furundzija*, ICTY 1998, para. 249; confirmed by the Appeals Chamber in: *Prosecutor v. Tihoir Blaskic*, ICTY 2004, para. 2004; the Appeals Chamber of the SCSL held that this language reflects customary international law: *Prosecutor v. Charles Ghankay Taylor*, SCSL 2013, para. 362). This common formulation includes two parts: (a) "practical assistance, encouragement, or moral support" with (b) "a substantial effect on the perpetration of the crime" (nexus requirement). With regard to the meaning of part (a), international courts and tribunals have found, for instance, the provision of weapons or means of transport, the sharing of intelligence, and, in some cases, even the encouraging presence at the crime scene, to be sufficient assistance for aiding and abetting an international crime (*Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, ICTR 2004, paras. 530 et seqq; *Prosecutor v Anton Furundzija*, ICTY

1998, para. 232; *Prosecutor v. Jean-Paul Akayesu*, ICTR 1998, para. 693). Part (b) requires a nexus between the assistance and the crime, i.e., "support which has a substantial effect on the perpetration of the crime." Interestingly, the "substantial effect" requirement seems to mirror the "significant contribution" threshold used in the framework of state responsibility. So far, international courts and tribunals have interpreted the "significant contribution" standard broadly (Werle 2007, 968), emphasizing that not even a causal link or "cause-effect relationship" is required (*Prosecutor v. Blaskic*, ICTY 2004, para. 48). The Trial Chamber in *Perisic*, referring back to *Tadic* (*Prosecutor v. Dusko Tadic*, ICTY 1999), tried to add a new element that the practical or moral support "be specifically directed to the assistance of [the] crimes [in question]" (*Prosecutor v. Momcilo Perisic*, ICTY 2011, para. 33; confirmed upon appeal: *Prosecutor v. Momcilo Perisic*, ICTY 2013, paras. 41 et seqq.). The 'specific direction' requirement was subsequently reversed multiple times (*Prosecutor v. Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic, Sreten Lukic*, ICTY 2014, paras. 1617-1650; confirming the Appeals Chambers in: *Prosecutor v. Milan Lukic et al.*, ICTY 2012, para. 424; *Prosecutor v. Mrksic et al.*, ICTY 2009, para. 159). Still, it is worth mentioning this controversial issue, since it parallels the 'knowledge' versus 'intent' debate we saw earlier with regard to state responsibility.

Drawing an analogy to investments in cluster munitions, it would appear that under such a broad material element an individual who invests in a cluster munition producer would in fact provide financial assistance with a substantial effect on the prohibited production of cluster munitions. Thus, it seems reasonable that this individual would fulfill the criminal act of aiding and abetting the illegal production of cluster munitions.

The subjective/*mens rea* element requires knowledge that one's "actions assist the perpetrator in the commission of the crime" (*Prosecutor v. Mrksic et al.*, ICTY 2009, paras. 49, 63; *Prosecutor v. Blagoje Simic*, ICTY 2006, para. 86; *Prosecutor v. Mitar Vasiljevic*, ICTY 2004, para. 102; *Prosecutor v. Tihomir Blaskic*, ICTY 2004, paras. 45, 49; *Prosecutor v. Anton Furundzija*, ICTY 1998, paras. 236-249). This, in turn, suggests that the aider and abettor should be aware of the "essential elements" of the principle's crime (*Prosecutor v. Blagoje Simic*, ICTY 2006, para. 86; Cassese et al. 2013, 194). Again, it is interesting to observe the general similarity between the subjective element for aiding and abetting on one side, and the subjective requirement of 'knowledge of the circumstances of an internationally wrongful act' for state responsibility on the other side. In contrast, Article 25(3)(c) of the Statute of the International Criminal Court (ICC) (Rome Statute of the International Criminal Court, 1998/2002, 2187 UNTS 3) potentially introduced a new mental element by requiring that the support for aiding or abetting the commission of a crime needs to be provided "For the purpose of facilitating the commission of such a crime [...]" (emphasis added). This new purpose requirement would raise the bar for aiding and abetting, reduce its scope considerably, and be in conflict with much of the existing case law of other tribunals (Cassese et al. 2013, 195).

This concludes the brief discussion of aiding and abetting in international criminal law. It should be duly noted that many aspects of this concept remain highly debated and cannot be portrayed comprehensively in this paper for space reasons.[36]

In relation to the provision of financial assistance by private persons to cluster munition producers, the requirement that those investors know about the production of cluster munitions could be an obstacle for holding them accountable. This is for two reasons. First, we have seen that cluster munition producers are usually big industrial conglomerates manufacturing a wide array of products. They are often not transparent about their involvement in the production of controversial weapons. Second, how much do investors actually know about the companies they invest in? This probably depends on the kind of investment relationship a specific investor has to a cluster munition producer. If investors provide major direct loans or hold considerable shares of a company, one can assume that they are well-informed about the firm's activities. In contrast, someone who has bought a few stocks or invested in an index fund containing a cluster munition producer is probably not aware of the fact that the company is involved in the production of cluster bombs. The determination of the mental element comes down to how much evidence is required to prove that an investor indeed had a knowledge of the firm's involvement in the production of cluster munitions.

Moreover, if the mental element was the ICC Statute's "purpose of facilitating" it might become impossible to establish aiding or abetting by the way of investments, because investors could reasonably argue that they provided financial assistance for another purpose such as generating a profit.

As described above, there is a considerable difference between the situation in which aiding and abetting is normally applied in international criminal law and the situation of investments in cluster munition producers. However, this brief examination has helped us to demonstrate a few important takeaways for the domestic implementation and application of a criminal prohibition on financial assistance. First, the criminal law concept of aiding and abetting is a useful blueprint for holding individuals accountable for financial assistance to cluster munition producers. Second, if states choose to hold individuals criminally responsible, they need to carefully define the criminal act and mental element of the offence. Otherwise, general modes of criminal liability such as aiding and abetting may not cover such investments like the acquisition of shares and bonds because the required knowledge or intent thresholds are not met.

4.3.3. Corporate Responsibility

It has been established in chapter two that financial institutions are the main facilitators of investments in cluster munition producers. Virtually all investments in cluster munitions are administered by banks, asset managers, or other financial service providers on behalf of individual, corporate, or sovereign clients. Therefore, financial service providers are uniquely positioned to support the international prohibition on financial assistance to the production of cluster munitions. Many cluster munition producers are dependent on financial institutions to successfully run their businesses

[36] More comprehensive overviews can be found here: Ventura 2019; Hathaway et al. 2019.

which gives them considerable leverage. Quite similar to natural persons, the CCM does not entail any direct obligations for legal persons such as corporations. This leaves two possible pathways for holding financial institutions accountable for facilitating investments in cluster bombs: on one side, the evolving concept of corporate responsibility under international law, and, on the other side, domestic laws regulating corporate conduct. Both alternatives will be discussed briefly.

It is still debated if and to which extent corporations, including financial institutions, are subjects of international law and which international rights and obligations they carry (Kelly/Moreno-Ocampo 2016; Alvarez 2011; Clapham 2006). As a consequence, a number of soft law instruments were developed by different international organizations calling upon corporations to respect international law, in particular human rights law, environmental law, and good governance standards.[37] Problematically, those soft law standards do not refer to disarmament law and treaties such as the CCM are not explicitly included as a reference point.

But what exactly do those soft law standards require from financial service providers? Simply put, businesses are expected to "respect human rights [which] means that they should avoid infringing on the human rights of others [...]" (Human Rights Council 2011, principle 11). Businesses are required to avoid "contributing to adverse human rights impacts" and "seek to prevent or mitigate adverse human rights impact" (ibid., principle 13). To ensure that businesses meet those expectations, they are encouraged to establish (a) a human rights policy, which is (b) enforced through a due-diligence mechanism, and (c) appropriate remediation (ibid., principle 15). In relation to the production of cluster munitions, those principles could be applied in two ways. On one side, it could argue that the production and use of cluster munitions adversely affects human rights and should therefore be included in companies' human rights policies. On the other side, it is reasonable to include international humanitarian and disarmament law in companies' corporate responsibility policies, especially in the arms sector.

It has been argued that the financial sector has been at the forefront of pioneering this three-step approach to corporate responsibility for a couple of reasons (Durmaz 2016, 38 et seqq.). First, the success of financial institutions is built on trust by their customers. The risk for financial institutions of being involved with companies and projects potentially violating international law is high because they fear losing the trust of their customers. Second, investments in controversial industries such as the arms sector are also financially risky, since profits in those industries are unpredictable as an effect of the uncertainty about the legality of the weapons they produce (ibid., 41 et seqq.). Consequently, financial institutions have started to adopt and implement corporate responsibility standards (UNEP 2015, 40 et seqq.).

Most financial institutions adopted socially responsible investment policies in which they determine the factors which ought to be taken into account apart from maximizing profits. Regrettably, it needs to be emphasized that out of the banks which have adopted such a policy only a minority includes investments in internationally prohibited arms as

[37] Those instruments include most prominently: Human Rights Council 2011; Organisation for Economic Co-operation and Development 2011; International Finance Corporation 2012.

a no-go.[38] During the research for this paper, I contacted major Swiss banks, but only *Credit Suisse* responded telling me that: "Credit Suisse's policies are internal documents that we do not share externally" (Heinzmann 2020).

In a second step, financial institutions should set up an implementation mechanism for internally enforcing their investment policies. Screenings of potential companies in which the financial institutions plan to invest are the most common method (Baker/Nofsinger 2012, 425). For instance, if a bank has a policy excluding cluster munition producers as investments, thorough screenings should be conducted before an arms producer is added to the bank's portfolio. In a third step, if any problems arise with regard to a company in which a bank has already invested or plans to invest, the financial institution can engage with the firm and clarify the issue (Richardson 2008, 91). For instance, a bank which wants to buy shares of Lockheed Martin, a former cluster munition producer, should contact the company and ensure that they have indeed ceased their production of cluster munitions, before the bank invests. In a final step, if a financial institution cannot establish that its policy's criteria are met, it should not invest or immediately divest.

In conclusion, it needs to be underlined that the adoption and execution of an investment policy by financial institutions is completely voluntary. No international organization can hold a financial service provider accountable for not having such a policy or for violating it. In contrast, financial institutions have a reputational and risk-based incentive to adopt and follow such a policy. Unfortunately, not all banks have adopted investment policies excluding investments in cluster munition producers and some policies have considerable loopholes.

If members of the CCM want to hold financial institutions accountable for facilitating investments in cluster munitions, it would be most effective to implement this into their domestic legislation. States should explicitly prohibit financial service providers from investing in cluster munition producers, require them to adopt according policies and safeguard mechanisms, and, in case of a violation, impose sanctions on them. How this might look in practice will be examined in the next chapter.

4.4. Interim conclusion: financial assistance to cluster munition producers

This chapter has demonstrated that the assistance clause in Article 1(1)(c) of the CCM should be interpreted broadly and prohibits any kind of investments in cluster munition producers as illegal assistance for the production of cluster bombs. This interpretation is supported by the context as well as the object and purpose of the CCM. Other authentic texts of the assistance clause are equally clear, the preparatory work does not contain any contravening interpretation, and reservations are prohibited. Moreover, statements by 49 out of 108 parties and the ICRC indicate support for banning such investments. All collected evidence supports this interpretation and there is no compelling reason or evidence for following a different reading of the assistance clause.

[38] For the most recent list of such investment policies see: Beenes/Uiterwaal 2018, 36-89.

An examination of the concept of "aid and assistance" in Article 16 of the ASR helped to better understand the contours of assistance in Article 1(1)(c) of the CCM. This analogy clarified that prohibited financial assistance requires a subjective element (i.e., "knowledge of the circumstances") and a causal link between the investment and the illegal production of cluster munitions. By looking at the concept of aiding and abetting in international criminal law those two elements were confirmed, and it was found that states need to be careful to not set the subjective and material thresholds too high, because this would be an obstacle to holding private investors accountable. Although legally not binding, emerging standards of corporate responsibility may help financial institutions to avoid the reputational and financial risks of facilitating investments. All three analogies can potentially help states in drafting more effective prohibitions on sovereign, private, and corporate investments in the production of cluster munitions.

5. Domestic laws on investments in cluster munition producers

In the previous chapter, it was established that any investments by states in cluster munitions producers are prohibited under Article 1(1)(c) of the CCM. Additionally, Article 9 of the CCM also requires states to extend the ban to natural or legal persons under a state's jurisdiction. Thus, states are under an international obligation to prohibit investments in cluster munition producers in their domestic laws. Such prohibitions may vary widely – since different domestic legal systems incorporate international treaties in various ways (Aust 2013, 159-177). While in some legal systems the CCM may be directly applicable, in most states additional legislation is required in order to create an enforceable prohibition on investments in cluster munition producers (ibid.).

In any case, an explicit ban on investments in national laws is strongly preferred because it creates a clearly visible rule and serves as an authoritative domestic interpretation of the CCM. Moreover, a national law can include more details about how exactly this ban works and who is concerned. Thus, enforcement gets simpler and state-specific issues regarding the implementation can be fixed at the outset. Overall, national legislation on banning investments in cluster munitions is the most effective and transparent means of realizing states' obligations under the CCM.

So far, eleven states have taken legislative action in order to illegalize investments in cluster munitions: Belgium, Ireland, Italy, Liechtenstein, Luxembourg, The Netherlands, New Zealand, Saint Christopher and Nevis, Samoa, Spain, and Switzerland.[39] The way they proceeded varies significantly. Some states chose to clarify that investments in cluster munitions are prohibited in the legislative act implementing the CCM.[40] Those states usually inserted an additional paragraph right after the equivalent of the assistance clause explaining the way investments are prohibited. Other states amended already existing laws on war materials or financial regulations.[41] Italy is a somewhat outstanding example because in addition to including a brief ban on investments in the general law implementing the CCM, (Italy 2011) it adopted an additional law in 2017 (*Senato Della Republica* 2017) with the most comprehensive ban on investments in cluster bombs hitherto.

This chapter will systematically compare the examples of domestic laws prohibiting investments in cluster munitions producers against four particular criteria which are crucial for their effectiveness: (a) Definition and identification of banned cluster munition producers; (b) definition of "investing" or "financing;" (c) which actors are liable under the domestic laws, and (d) enforcement mechanisms. Since eleven bills are slightly too many to conduct a country-by-country comparison, the comparative analysis follows these four criteria and analyzes the relevant domestic examples by looking at

[39] For a detailed report and explanation of the national legislation see Annex 3.

[40] Those states include Ireland, Italy (in part), Luxembourg, New Zealand, Saint Christopher and Nevis, and Samoa.

[41] Those states include Belgium, Liechtenstein, The Netherlands, Spain, and Switzerland.

those laws which represent the best practices in comparison to those which still have room for improvement.

This chapter will conclude that the scope and effectiveness of the national laws regulating investments in cluster munitions differs significantly. Additionally, the most common shortcomings and loopholes will be outlined in order to give a policy recommendation of how states should approach national regulation.

5.1. Comparative analysis of domestic laws

In cooperation with Human Rights Watch and PAX, the Cluster Munitions Coalition has elaborated a guide on domestic legislation prohibiting investments in cluster munitions (Boer/Oosterwijk 2014). The document sets out four criteria for evaluating the effectiveness of a law or draft legislation. In this context, effectiveness is to be understood as how comprehensively the respective laws limit investments in cluster munition producers. A detailed law with a very broad scope under all four criteria would be labeled as very effective, while a brief and general prohibition on investments would not perform equally well. The analysis is without prejudice to how effectively those laws actually work in a given state because their real-word performance depends on other factors (for example good governance, administrative capacity). This section will outline the four criteria and their main components while applying them to the eleven already existing domestic laws.

5.1.1. Material scope 1: which cluster munition producers should be covered?

The first criterion relates to the inclusiveness of a law regarding cluster munitions producers. The objective is to come up with a formulation which covers all cluster munition producers and does not leave any loopholes. Thus, a prohibition of investments in 'cluster munition producers' is preferred over a prohibition of the 'production of cluster munitions.' The reason for this is that capital can be easily redistributed within a company. Even if funding is not formally designated to the production of cluster munitions it may still be used for exactly that purpose.

Some laws prohibit investments in cluster munition producers in a rather general manner without specifying the nature of such an enterprise. Ireland's law,[42] for instance, refers to investments "in a munitions company" while The Netherland's law[43] uses the slightly more specific description of "an enterprise that produces, sells or distributes cluster munitions."

[42] "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**." (emphasis added), see: Ireland 2008.

[43] "[…] a financial instrument that has been issued by **an enterprise that produces, sells or distributes cluster munitions** as referred to in Article 2 of the Convention on Cluster Munitions" (emphasis added), see: The Netherlands 2012, Art. 21a(1)(a).

In contrast, the Belgian law has a very comprehensive definition of enterprises prohibited from receiving investments.[44] Belgium's definition does not simply focus on investments in the production of cluster munitions, but has a much broader scope. This is achieved by prohibiting investments in enterprises which "manufacture, use, repair, market, sell, distribute, import or export, stockpile, or transport" cluster munitions. This provision ensures that companies along all stages of the production and distribution chain of cluster bombs are excluded from investments as mandated by Article 1(1)(b) of the CCM.

Most other domestic laws are less specific and simply ban investments in the "production" of cluster munitions which leaves a problematic loophole.[45] Since most cluster munition producers are major military conglomerates, they produce a wide range of military and civilian goods. Under such non-specific prohibitions, investors could continue to invest claiming that their funding is limited to the production of civilian goods or non-controversial weapons. However, this is a flawed argument because there is no definite way of telling whether a company is going to use its funding for the civilian production or for cluster munitions. In addition, even the financing of civilian projects helps a cluster munitions producer to stay profitable and continue the production of cluster munitions. Therefore, domestic laws which only prohibit investments in the "production" of cluster munitions are unreasonably narrow.

Additionally, the legislation should make clear that the relative importance of cluster munition production for a company is irrelevant. In the end, it makes no difference if a company only generates a certain percentage of its revenue with cluster bombs, but it still produces them. Therefore, revenue or turnover thresholds should be avoided. In this context, laws should be careful to also include subsidiaries which are used by a company or group to produce cluster munitions. Otherwise, cluster munition producers could simply circumvent an investment ban by outsourcing their cluster munitions operations into a subsidiary. Most laws do not address this issue. The Dutch law, in contrast, includes a provision which extends the investment ban to all companies which own at least 50 percent of the shares of a cluster munition producer.[46] In this scenario an investor is prohibited from "carrying out transactions" with an "enterprise that holds more than half of the share capital" of a cluster munitions producer. The logic behind this is that a cluster munitions producer is a subsidiary of its majority shareholder. It is

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44 *"Est également interdit le financement* ***d'une entreprise de droit belge ou de droit étranger dont l'activité consiste en la fabrication, l'utilisation, la réparation, l'exposition en vente, la vente, la distribution, l'importation ou l'exportation, l'entreposage ou le transport de mines antipersonnel, de sous-munitions et/ou de munitions****"* (emphasis added), see: Belgium 2007; Belgium 2006.

45 For example: "*(1) Die direkte* ***Finanzierung der Entwicklung, der Herstellung oder des Erwerbs*** *von verbotenem Kriegsmaterial ist verboten.*" (emphasis added), see: Liechtenstein 2013, Art. 7(b)(1); Article 3. "*Il est interdit à toute personne physique ou morale de financer, en connaissance de cause,* ***des armes à sous munitions*** *ou des sous-munitions explosives.*" (emphasis added), see: Luxembourg 2009; "1A - A person commits an offence who provides or invests 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.**" (emphasis added), see: New Zealand 2009, Art. 11(1A).

46 "2. The first section above is equally applicable to carrying out transactions, or having them carried out, with a view to acquiring or offering a financial instrument that has been issued by **any enterprise that holds more than half of the share capital** of an enterprise as referred to in subsection 1 (a) and also to loans to, or non-marketable holdings in such an enterprise." (emphasis added), see: The Netherlands 2012, Art. 21a(2).

not clear though whether it is useful to rely on a percentage threshold to define a subsidiary and its parent company. Problematically, definitions of what degree of control by a parent company over a subsidiary is required, vary between jurisdictions and areas of law (Thomson Reuters Practical Law 2020). Therefore, it is recommended that every state carefully implements its definition of a subsidiary into its prohibition on investments in cluster munitions, ensuring that investments in both subsidiaries and parent companies are illegal.

Effective laws should also include companies which do not assemble the end product, but only produce essential parts of cluster munitions. This might be practically challenging because cluster munitions may contain dual-use parts from a plethora of other firms and a proper threshold of what constitutes an "essential part" needs to be established. The Netherlands simply included the phrase "or parts thereof" to extend the scope of its prohibition in this direction – a very common approach.[47]

Another important element is that the prohibition extends to cluster munitions producers within the respective jurisdiction and abroad. Since the production of cluster munitions at home is already prohibited by Article 1(1)(b) of the CCM, it is especially important to clarify that investments in cluster munition producers abroad are also illegal. Although it seems implied in most domestic regulations, the Belgian law, for instance, makes it very clear by simply making the general prohibition applicable to 'enterprises under Belgian or foreign law.'[48]

After having compared the different laws with regard to their inclusiveness of cluster munition producers, it is worthwhile pointing out that one country not mentioned so far has adopted an especially broad provision. In its 2017 law on "measures for the prevention of financing the manufacturers of anti-personnel mines, cluster munitions and submunitions," Italy relied on the following text which, under the above standards, is the most inclusive/ effective:

> 1. *This law totally prohibits the financing of any companies, whatever their legal personality, whether registered in Italy or abroad, which directly, or through their subsidiaries or affiliated companies within the meaning of Article 2359 of the civil code, engage in the manufacture, production, development, assembly, servicing, use, utilisation, stockpiling, storage, possession, promotion, sale, distribution, importation, exportation, transfer or transportation of anti-personnel mines, cluster munitions and submunitions, regardless of their nature or composition, or their component parts. It also prohibits to engage in technological research, fabricate, sell or lease, by whatever title, export, import, and possess cluster munitions and submunitions, regardless of their nature or composition, or their component parts.* (see: *Senato Della Repubblica* 2017, Art. 1(1); English translation from the official website of the CCM: Italy 2017)

[47] "[…] an enterprise that produces, sells or distributes cluster munitions as referred to in Article 2 of the Convention on Cluster Munitions which was concluded in Dublin on 30 May 2008 (published in the Bulletin of Treaties 2009, 45) **or essential parts thereof**;" (emphasis added), see: The Netherlands 2012, Art. 21a(1)(a).

[48] "*Est également interdit le financement d'une entreprise de droit belge* ***ou de droit étranger*** *dont l'activité consiste en […]*" (emphasis added), see: Belgium 2007.

5.1.2. Material scope 2: which investments should be covered?

Although it is quite challenging to draft a law which explicitly bans all current and future forms of investments in cluster munition producers, states should attempt to be as comprehensive as possible. Definitions should include an exemplary list of all forms of investments which are commonly used in their jurisdictions. This list should clearly state that all financial links through commercial banking, investment banking, and asset management are prohibited. Rendering this list as non-exclusive is a way to avoid leaving a regulatory void.

An example of a detailed description of the meaning of "financing" is provided in Liechtenstein's war materials act. The law differentiates between "direct" and "indirect" investments and prohibits both. It first defines direct investments as 'credits, loans, endowments or equal financial benefits for the payment of costs and other expenditures related to the development, production, or acquisition of banned war materials.'[49] Indirect investments are described as all forms of participation in a cluster munition producer particularly the acquisition of bonds and other investment products.[50]

A very comprehensive definition of "funds" which are excluded from being transferred to a cluster munitions producer, can be found in New Zealand's law[51] which is also used almost verbatim by Samoa (Samoa 2012). Those definitions first provide a comprehensive overview of what is generally understood to be an investment (i.e., "assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired"). In a second part, a non-exclusive list enumerates all imaginable forms of investments which could be given to a cluster munition producer without prejudice to other forms which might exist in the future.

A number of the laws under scrutiny have exceptions for investments in index funds which is an important loophole.[52] Index funds are financial products which track the structure of common indices (for example Dow Jones or S&P 500) so that private actors can invest into funds which mirror the performance of a given index. Some of those index funds include cluster munition producers, for instance, the S&P 500 lists

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49 "*2) Als direkte Finanzierung im Sinne dieses Gesetzes gilt die unmittelbare Gewährung von Krediten, Darlehen und Schenkungen oder vergleichbaren finanziellen Vorteilen zur Bezahlung oder Bevorschussung von Kosten und Aufwendungen, die mit der Entwicklung, der Herstellung oder dem Erwerb von verbotenem Kriegsmaterial verbunden sind. […]*
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 Anlageprodukten, die durch solche Gesellschaften ausgegeben werden." See: Liechtenstein 2013, Arts. 7(b)(2), 7(c)(2).

50 Ibid., Art. 7(c)(2).

51 "funds - (a) means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and (b) 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" See: New Zealand 2009.

52 For instance, Belgium: *"[…] Cette interdiction ne s'applique pas aux organismes de placement dont la politique d'investissement, conformément à leurs statuts ou à leurs règlements de gestion, a pour objet de suivre* ***la composition d'un indice*** *d'actions ou d'obligations déterminé. […]"* (emphasis added), see: Belgium 2007; or The Netherlands: "3. Section 1 above will not apply to: (a) **transactions based on an index** in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total; […]" (emphasis added), see: The Netherlands 2012, Art. 21a(3)(a).

Lockheed Martin Corp. and Textron Inc. – both former cluster munition producers. The argument for an exclusion of index trackers is that investors cannot possibly know what they are investing in when they acquire a fund with hundreds of companies and the potential sum of money which ends up in a cluster munition producer is relatively small. This argument is valid with regard to liability, but financial institutions should not be allowed to offer index funds including cluster munition producers in the first place. Instead of drafting an exception for index funds, states should include a duty for financial service providers to review all the investment products they offer for cluster munitions producers.

Some countries such as Switzerland or Liechtenstein differentiate between 'direct' and 'indirect' investments in cluster munitions.[53] According to their laws, a 'direct investment' is funding directly given to a cluster munitions producer through loans, endowments etc. 'Indirect investments' are understood as the acquisition of shares and bonds. In both states direct investments are illegal but indirect investments are only prohibited when they are used to circumvent the prohibition on direct investments. This differentiation between direct and indirect investments is artificial and creates a loophole. In both scenarios cluster munition producers receive the same corporate funding – only through different channels. Furthermore, it was demonstrated in chapter two that most investments in cluster munition producers are in fact provided through the acquisition of shares and bonds. Therefore, only banning direct investments leaves a big loophole and investors can just use indirect investments. It is therefore advised that states try to avoid a differentiation between direct and indirect financing and ban both like, for example, the Irish law which expressly forbids both, direct and indirect, investments.[54]

In addition, comprehensive laws should contain a rule governing ongoing investments, i.e., those investments which began before the law came into force and continue afterwards. It would be reasonable to require investors to cease those investments within an appropriate amount of time according to common timeframes in the respective jurisdiction. Examples can be found in the laws of Belgium (investment stop as soon as

[53] "*2 Est considéré* ***comme financement direct*** *au sens de la présente loi l'octroi direct de crédits, de prêts, de donations ou d'avantages financiers comparables en vue de couvrir ou d'avancer les coûts du développement, de la fabrication ou de l'acquisition de matériels de guerre prohibés ou les frais liés à de telles activités. [...]*
2 Est considéré comme ***financement indirect*** *au sens de la présente loi:*
a. la participation à des sociétés qui développent, fabriquent ou acquièrent des matériels de guerre prohibés;
b. l'achat d'obligations ou d'autres produits de placement émis par de telles sociétés." (emphases added), see: Switzerland 2012, Arts. 8(b)(2), 8(c)(2).

[54] "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." (emphasis added), see: Ireland 2008, Art. 12(1).

contractually possible),[55] Ireland (investment stop so far as contractually possible),[56] or The Netherlands ("within a reasonable period of time").[57]

Once again, the Italian law seems to set the standard in this second category when it comes to an inclusive definition of "financing." According to Article 4 of the law, it also demands the cancellation of investments in cluster munitions producers within 90 days after the publication of an official list of banned companies:

> *b) "Financing" means the provision of any kind of financial support, also channeled through subsidiary companies registered in Italy or abroad which, purely by way of example and not exhaustively, grant credit in any form, issue financial guarantees, acquire shares, acquire or underwrite financial instruments issued by the companies referred to in this Article;*
>
> *1. Within ninety days of the publication of the list referred to in Article 3 (1), the financial intermediaries shall exclude from the range of the products they offer, any component which may provide financial support to the companies included in the aforementioned list.*
> (see: *Senato Della Repubblica* 2017, Art. 1(1); English translation from the official website of the CCM: Italy 2017,)

5.1.3. Personal scope: which investors should be covered?

When it comes to the personal scope of the prohibition on investments in cluster munition producers, the objective of domestic legislation should be to cover every potential investor. This generally includes three groups: First, the state itself should be prohibited from investing. This encompasses a state's agencies (for example the central bank), state-affiliated funds (for example pension or unemployment funds), and state-run companies (for example public banks, insurance companies etc.). Second, private individuals should not be allowed to invest their money into cluster munition producers (for example through the acquisition of shares or bonds). Third, companies and, most importantly, banks or financial service providers have to be banned from investing. Not including all three groups would leave potential legislation incomplete and, depending on the respective legal system, it is important to expressly include all three groups and create different sanctions applicable to them.

An example of an incomplete act is the Irish legislation which exclusively prohibits the investment of "public moneys," i.e., only addresses the state.[58] The laws of Switzerland and Liechtenstein do not mention to which actors they are applicable and who can be held liable. Other bad examples are the Dutch law which only applies to "a [financial] enterprise [...] not being a clearing institution" (The Netherlands 2012, Art. 21(a)(1)) or

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[55] "*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***." (emphasis added), see: Belgium 2007.

[56] "(b) so far as possible, taking into account any contractual obligation it has assumed, divest itself of its investment in that collective investment undertaking or investment product in an orderly manner." See: Ireland 2008.

[57] "4. Without prejudice to the provisions of section 1 above, enterprises that do hold financial instruments, loans or non-marketable holdings as described in that section should dispose of them or terminate them within a reasonable period of time." See: The Netherlands 2012.

[58] ""public moneys" means moneys provided by the Oireachtas out of the Central Fund, or the growing produce thereof. [...] 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." See: Ireland 2008, sec. 11, 12(1).

New Zealand's law (New Zealand 2009, Art. 11(1A)), which only covers natural persons[59] (replicated in the laws of St. Christopher and Nevis and Samoa; see: Saint Christopher and Nevis 2014; Samoa 2012, Art. 6(1)). In contrast, Luxembourg's law provides a concise example of how to broadly define the personal scope (Luxembourg 2009, Art. 3):

"*Article 3. Il est interdit à* ***toute personne physique ou morale*** *de financer, en connaissance de cause, des armes à sous-munitions ou des sous-munitions explosives.*" (emphasis added)

5.1.4. Enforcement: how should the law function in practice?

An important aspect of enforcement is supervision. Domestic laws should stipulate a clear supervisory mechanism or assign the responsibility for oversight to an already existing agency. The majority of the eleven laws which are under scrutiny in this chapter have no explicit supervisory mechanism, but there are some notable exceptions. First, the Italian law provides a definition for "oversight authorities" which have the task of implementing the ban and investigating potential violations.[60] According to Article 3 of the Italian law, the Bank of Italy, IVASS, and COVIP (the acronyms stand for other Italian authorities) are tasked with creating and enforcing a list of banned cluster munitions producers. This list is to be renewed annually and the 'Financial Intelligence Unit for Italy' monitors cash flows to the banned companies. Additionally, under Article 5 the Bank of Italy can request any information from alleged investors or even conduct searches in order to verify compliance with the law.

Another key element of ensuring that investments in cluster munition producers stop is the clear identification of cluster munition producers which are banned. Otherwise, sovereign, private, and corporate investors may simply not know or be confused regarding the question which companies are illegal to invest in. Therefore, it is recommended to curate a government blacklist of cluster munition producers which are barred from investments. The Belgian law has a clear provision on this issue,[61] although a couple of members of the Belgian parliament have complained that the required list was never published (Boring 2016, 4; Gilkinet 2015, 37; Mahoux 2008, 35). The only other country which has adopted the list approach so far is Italy.[62]

The last important element for the effective enforcement of a prohibition on investments in cluster munition producers are penal sanctions which are expressly mentioned as a means of implementation in Article 9 of the CCM. Sanctions should

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59 Since the penal law creates an offence of "intentionally or knowingly investing in cluster munitions" it is only applicable to natural persons who can commit such an offence.

60 "f) "Oversight authorities", means the Bank of Italy, *l'Istituto per la vigilanza sulle assicurazioni (IVASS), la Commissione di vigilanza sui fondi pensione (COVIP)* and any other authorities with the statutory responsibility to oversee the registered intermediaries referred to in letter a)." see: *Senato Della Repubblica* 2010, Art. 2(1)(f); English translation from the official website of the CCM: Italy 2017.

61 "*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 i) des entreprises dont il a été démontré qu'elles exercent l'une des activités visées à l'alinéa précédent; ii) des entreprises actionnaires à plus de 50 % d'une entreprise au point i). iii) des organismes de placement collectif dé tenteurs d'instruments financiers d'une entreprise aux points i) et ii).*" See: Belgium 2007.

62 "Within the same deadline, the oversight authorities shall also draft and publish the list of companies referred to in Article 1(1), and shall indicate the office which is responsible for publishing the annual list." See: *Senato Della Repubblica* 2017, Art. 3(1); English translation from the official website of the CCM: Italy 2017.

exist to discourage private and corporate investors from engaging in illegal investments and they may vary depending on the penal system of each jurisdiction. The majority of the eleven laws comes with sanctions in the form of fines or imprisonment. In accordance with the domestic penal system, most laws require some level of intent or knowledge as mental element of the offence. Take, for instance, Luxembourg's law which prohibits all natural or legal persons to knowingly finance cluster munitions.[63]

So far, no jurisprudence originating from a lawsuit under any of the eleven laws is available. Therefore, no definitive conclusion can be made on how natural or legal persons may be held accountable in the future. Hopefully, this will not even be necessary due to the deterrent effect of the penal sanctions and the effectivity of other means of enforcement.

5.2. Interim conclusion: domestic laws on investments in cluster munitions

Domestic laws implementing the prohibition of financial assistance for the production of cluster munitions vary significantly from one to another. This starts with their form (for example, implementing act of the CCM or amendment to existing laws) and continues with their structure, language, and scope. By comparing eleven domestic laws prohibiting investments in cluster munition producers, this chapter has elaborated four criteria determining the effectiveness of domestic legislation. These criteria might prove useful for some states to review their laws and for others it may help them draft effective legislation.

First, all cluster munitions producers should be covered by a domestic investment ban. Therefore, legislation should explicitly prohibit investments in 'cluster munitions producers,' regardless of how important cluster bombs are for their overall business, instead of only banning investments in the 'production' of cluster munitions. Moreover, domestic rules should extend to subsidiaries, companies which manufacture essential parts, and importantly to cluster munition producers abroad

Second, all possible forms of investments should be prohibited in a non-exclusive list. Effective laws avoid a differentiation between direct and indirect investments and have a rule in place for terminating ongoing transactions.

Third, domestic laws should prohibit sovereign, corporate, and private investors from financing cluster munition producers.

Fourth, an effective law requires a strong enforcement mechanism. Therefore, a supervisory authority should be put in place to monitor the implementation of the ban. In this regard, a regularly updated blacklist of banned cluster munition producers might help potential investors to avoid those companies and it increases the administrative transparency. Penal sanctions should be put in place to deter investors and eventually hold them accountable.

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[63] *"Article 3. Il est interdit à toute personne physique ou morale de financer,* ***en connaissance de cause****, des armes à sous-munitions ou des sous-munitions explosives."* (emphasis added), see: Luxembourg 2009, Art. 3. The laws of New Zealand, Saint Christopher and Nevis and Samoa also mention an explicit mental element.

Annex 4 contains a spreadsheet with all the criteria that were developed in this chapter. States or campaigners can use these as guidelines in order to evaluate national laws and policies.

6. Conclusion and policy recommendation

In response to the overarching research question "How does international law regulate the financing of cluster munition producers?" this paper established that Article 1(1)(c) of the CCM prohibits all forms of investments in companies which manufacture cluster bombs as illegal assistance in the production of cluster munitions. The main moral argument presented in this analysis is that cluster munitions cause unacceptable harm to civilians and should therefore be eliminated universally. To this end, stopping financial flows to cluster munition producers can be one method to bring the ongoing global production to an end. Once companies have to fear considerable financial and reputational risks, they will eventually cease their production which would be a step into the direction of removing the danger of cluster munitions from today's battlefields. The four analytical chapters of this paper focused on different parts of this argument.

The first chapter provided a general overview of the international rules applying to cluster munitions, including certain rules of IHL and HRL, which led to essentially two takeaways. First, cluster munitions have a history of causing widespread destruction and civilian casualties due to the fact that they cannot be targeted properly and disperse over large areas. Moreover, many of the submunitions fail to detonate upon impact and turn into de-facto landmines – they remain dangerous long after the attack is over. According to one estimate, cluster munitions may have caused up to 76.000 casualties since 1960 (Cluster Munition Coalition 2019, 45). The second takeaway is that the use of cluster munitions is theoretically limited under certain rules of IHL (for example, principles of distinction, proportionality, and precaution in attack) or HRL (for example, right to life, prohibition of inhumane and degrading treatment). However, those rules continuously failed to stop the use of cluster munitions in a way to reduce the suffering of civilians. As a consequence, a coalition of states adopted the CCM in 2008 with the aim of eliminating cluster munitions as a weapons category. Article 1 of the CCM presents a broad ban on cluster munitions even prohibiting any assistance for their production. It was left unclear, however, whether investments in cluster munition producers are banned as prohibited assistance as well.

Before discussing the legal dimension of this question, chapter two presented the scope of the problem. According to reports by the "Stop Explosive Investments" campaign, global investments in cluster munition producers amounted to 8.77 billion USD in 2017 – roughly the GDP of Haiti in 2019. Although this number is still unacceptably high, global investments in cluster munitions decreased from 43 billion USD in 2012 and major companies have ceased their production as a consequence of the campaign's pressure. It was also noted that all cluster munitions producers operate outside of CCM member states and only 0.32% of global investments in those firms originate from financial institutions in CCM member states. This indicates a correlation between CCM-membership and decreasing investments. In contrast, the reports, their methodology, and the underlying data were criticized and it was concluded that they are probably underinclusive and underestimate the actual amount of global investments in cluster munition producers. This is mainly due to the lack of transparency and scarce quantifiable information from the arms and financial sectors. Overall, it was established

that investments in cluster munitions present a major problem and clarity on the legal situation is desirable.

Therefore, the third chapter focused on the legal regulation of such investments under international law, in particular Article 1(1)(c) of the CCM. This provision, the so-called assistance clause, prescribes that states undertake "never under any circumstances to [...] assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention." An analysis of the language, context, and object and purpose of this provision leads to a broad interpretation that assistance also includes any financial assistance for the production of cluster munitions, i.e., investments. This interpretation is supported by 38 executive statements of parties to the CCM, the ICRC, and reflected in 11 domestic laws. In addition, drawing an analogy between the prohibition of assistance in the CCM and the law of state responsibility helped to clarify two elements regarding the application of the assistance clause. First, states need to have a knowledge of the circumstances of their illegal investments (subjective element). Second, a causal link between the investment and the actually prohibited act, i.e., the production of cluster munitions, needs to exist (material element).

Importantly, it needs to be highlighted that the CCM only entails direct obligations for its state parties. Although Article 9 requires domestic implementation, natural and legal persons cannot be held responsible under the CCM directly. Moreover, most investments are not made by states, but by private and corporate investors operating with the help of financial service providers. Therefore, and to collect ideas on how to hold natural persons liable for financial assistance to cluster munition producers, the chapter also investigated the criminal law concept of aiding and abetting. It was discovered that this mode of liability works in parallel to the concept of assistance in the law of state responsibility. Problematically, the ordinary standards for complicity in international criminal law may be too high to hold individuals accountable. A similar problem arises regarding corporate responsibility for investments in cluster munitions. Although a number of financial institutions have adopted socially responsible investment policies excluding investments in cluster munitions, it is hard to tell how effective this mechanism of voluntary self-control actually is. Ultimately, individual and corporate responsibility largely rely on clearcut domestic laws

Therefore, chapter four scrutinized and compared eleven domestic laws implementing the ban on investments in cluster munition producers. It was found that those laws varied considerably regarding four criteria. First, how inclusive their definition of cluster munition producers is. Second, how many different forms of investments they cover. Third, to which investors (public, private, corporate) the laws apply. And fourth, what kinds of enforcement mechanisms they include. These four criteria mainly influence how comprehensive a domestic ban on financial assistance in the production of cluster munitions is and potentially how effective it will be. It was recommended, that states undertake to adopt laws which follow these four criteria as much as possible in order to adequately implement the CCM.

The above analysis allows me to finish this paper with a number of policy recommendations and a brief outlook into the future of arms control. I consistently argued in this paper that a comprehensive and universal ban on investments in cluster

munitions is a desirable step in order to force companies to abandon their production and slowly eliminate cluster munitions from states' arsenals. I believe that this goal can only be achieved if several actors take a number of united measures.

First, states should continue to accede to the CCM and promote its universality. Moreover, more members to the CCM should make interpretive declarations clearly stating that they read Article 1(1)(c) as prohibiting financial assistance. Furthermore, all member states should implement the CCM into their domestic legal systems, keeping in mind the four criteria outlined in chapter four.

Second, corporations and particularly financial institutions have an important role to play. As the main facilitators of illegal investments in cluster munitions, they are uniquely positioned to solve the problem. I recommend that banks adopt socially responsible investment policies clearly banning all investments into companies suspicious of producing cluster bombs. Moreover, they should review all financial products on their portfolios for cluster munition producers and remove them on a regular basis. Transparency and strict divestment are key to following the expectations of the CCM.

Third, NGOs and the civil society have brought the topic of cluster munitions and investments in their producers to the attention of the international community in the first place. They should continue their work on lobbying states, monitoring the activity of financial institutions, and holding all actors accountable.

Fourth, private individuals can also take precautions in order to avoid assisting cluster munition producers financially. They should be cautious when acquiring financial products and ask their banks whether those contain any investments in controversial arms manufacturers. Responsible investors should also ask banks for their policies and whether they adhere to domestic and international regulations. Should that not be the case, investors always have the choice to switch to another more responsible bank.

I hope that the united efforts of states, financial institutions, NGOs, and private actors will help to stop investments in cluster munition producers and thereby uphold international law. Anyone who financially assists in the production of cluster munitions carries responsibility for the civilians who pay with their lives to guarantee a good return on investments. The stakes are high, especially since similar provisions potentially banning financial assistance can be found in most disarmament treaties. Perhaps by making the production of internationally ostracized weapons unprofitable, ultimately their use and proliferation can be brought to an end.

7. Annex

7.1. Annex 1 - List of assistance clauses in international disarmament treaties

This list is a collection of 'general obligation clauses' from all arms control treaties concluded after 1945 which include one. Most of these general obligation clauses have a very broad scope in prohibiting states' actions with regard to the respective weapon. This list especially highlights the varying phrasing concerning indirect ways of making or acquiring a prohibited weapon.

Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (adopted 5 August 1963, entered into force 10 October 1963), 480 UNTS 44, Art. I(2):

> *2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing,* ***encouraging****, or* ***in any way participating*** *in, the carrying out of any nuclear weapon test explosion of any other nuclear explosion, anywhere which would take place in any of the environments describes, or have the effect referred to, in paragraph 1 of this article.*

Treaty for the Prohibition of Nuclear Weapons in Latin America (adopted 14 February 1967, entered into force 22 April 1968), 634 UNTS 281, Art. 1(2):

> *2. The Contracting Parties also undertake to refrain from engaging in,* ***encouraging*** *or authorizing,* ***directly or indirectly****, or* ***in any way participating*** *in the testing, use, manufacture, production, possession or control of any nuclear weapon.*

Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970), 729 UNTS 168, Arts. 1 and 2:

> ***Article 1****: Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and* ***not in any way to assist, encourage, or induce*** *any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.*
>
> ***Article 2****: Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transfer or whatsoever of nuclear weapons or other nuclear devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and* ***not to seek or receive any assistance*** *in the manufacture of nuclear weapons or other nuclear explosive devices.* (emphasis added)

Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (adopted 10 April 1972, entered into force 26 March 1975), 1015 UNTS 163, Art. III:

> *Each State Party to this Convention undertakes not to transfer to any recipient whatsoever,* ***directly or indirectly****, and* ***not in any way to assist, encourage, or induce*** *any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.* (emphasis added)

Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (adopted 11 February 1971, entered into force 18 May 1972), 955 UNTS 115, Art. 1(3):

> *The States Parties to this Treaty undertake* ***not to assist, encourage or induce*** *any State to carry out activities referred to in paragraph 1 of this article and* ***not participate in any other way*** *in such actions.* (emphasis added)

Convention on the prohibition of military or any other hostile use of environmental modification techniques (adopted 10 December 1976, entered into force 5 October 1978), 1108 UNTS 151, Art. 1:

> 1. *Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.*
> 2. *Each State Party to this Convention undertakes* ***not to assist, encourage or induce*** *any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 2 of this article.* (emphasis added)

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997), 1974 UNTS 45, Art. I:

> *1. Each State Party to this Convention undertakes never under any circumstances:*
>
> *a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;*
>
> *b) To use chemical weapons;*
>
> *c) To engage in any military preparations to use chemical weapons;*
>
> *d)* ***To assist, encourage or induce****, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.* (emphasis added)

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999), 2056 UNTS 256, Art. 1(1):

> *1. Each State Party undertakes never under any circumstances:*
>
> *a) To use anti-personnel mines;*
>
> *b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;*
>
> *c)* ***To assist, encourage or induce****, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.* (emphasis added)

African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba), adopted 11 April 1996, entered into force 15 July 2009, Art. 3:

> *Each Party undertakes:*
>
> *a) Not to conduct research on, develop, manufacture, stockpile or otherwise acquire, possess or have control over any nuclear explosive device by any means anywhere;*
>
> *b)* ***Not to seek or receive any assistance*** *in the research on, development, manufacture, stockpiling or acquisition, or possession of any nuclear explosive device;*
>
> *c)* ***Not to take any action to assist or encourage*** *the research on, development, manufacture, stockpiling or acquisition, or possession of any nuclear explosive device.* (emphasis added)

Treaty on the Southeast Asia Nuclear Weapon-Free Zone (adopted 15 December 1995, entered into force 27 March 1997) 1981 UNTS 129, Art. 3(4):

> *4. Each State Party undertakes not to:*

a) ***seek or receive any assistance*** *in the commission of any act in violation of the provisions of Paragraphs 1, 2 and 3 of this Article; or*

b) ***take any action to assist or encourage*** *the commission of any act in violation of the provisions of Paragraphs 1, 2 and 3 of this Article.* (emphasis added)

Treaty on a Nuclear-Weapon-Free Zone in Central Asia (adopted 8 September 2006, entered into force 21 March 2009) 2970 UNTS, Art. 3:

1. *Each Party undertakes:*

a) *Not to conduct research on, develop, manufacture, stockpile or otherwise acquire, possess or have control over any nuclear weapon or other nuclear explosive device by any means anywhere;*

b) *Not to seek or receive any assistance in research on, development, man ufacture, stockpiling, acquisition, possession or obtaining control over any nuclear weapon or other nuclear explosive device;*

c) ***Not to take any action to assist or encourage*** *the conduct of research on, development, manufacture, stockpiling, acquisition or possession of any nuclear weapon or other nuclear explosive device;*

d) *Not to allow in its territory:*

i. *The production, acquisition, stationing, storage or use, of any nuclear weapon or other nuclear explosive device;*

ii. *The receipt, storage, stockpiling, installation or other form of possession of or control over any nuclear weapon or other nuclear explosive device;*

iii. ***Any actions, by anyone, to assist or encourage*** *the development, production, stockpiling, acquisition, possession of or control over any nuclear weapon or other nuclear explosive device.*

2. *Each Party undertakes not to allow the disposal in its territory of radioactive waste of other States.* (emphasis added)

Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010), 2688 UNTS 3, Art. 1:

1. Each State Party undertakes never under any circumstances to:

a) *Use cluster munitions;*

b) *Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;*

c) ***Assist, encourage or induce anyone*** *to engage in any activity prohibited to a State Party under this Convention.* (emphasis added)

Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017 UNGA Res. A/CONF- 229/2017/8), Art. 1:

1. Each State Party undertakes never under any circumstances to:

a) *Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;*

b) *Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;*

c) *Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;*

d) *Use or threaten to use nuclear weapons or other nuclear explosive devices;*

e) ***Assist, encourage or induce, in any way, anyone*** *to engage in any activity prohibited to a State Party under this Treaty;*

f) ***Seek or receive any assistance, in any way, from anyone*** *to engage in any activity prohibited to a State Party under this Treaty;*

g) *Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.* (emphasis added)

7.2. Annex 2 - List of states' statements on the prohibition of investments in cluster munition producers

The following lists contains a comprehensive collection of statements made by states parties to the CCM regarding investments in cluster munitions producers. This list was mainly drawn from the website of the "Stop Explosive Investments" campaign, a report on state practice by Human Rights Watch and further independent investigation (Stop Explosive Landmines 2019; Landmine Action et al. 2009):

Australia

In a debate about an amendment to the criminal code incorporating the CCM on 27 October 2010 the attorney general of Australia stated:

> *An example of conduct that would fall within this offence is where a person provides financial assistance to, or invests in, a company that develops or produces cluster munitions, but only where that person intends to assist, encourage or induce the development or production of cluster munitions by that company.* (McClelland 2010, 1775)

Bosnia and Herzegowina

In an email dated 14 July 2011, an official of the ministry of foreign affairs made the following statement to the 'Landmine & Cluster Munition Monitor' campaign:

"Bosnia and Herzegovina considers "investment in the production of cluster munitions to be prohibited." (Landmine & Cluster Munition Monitor 2015a)

Cameroon

An official of the ministry of foreign affairs of Cameroon made the following statement in an email to Handicap International dated 12 May 2011:

> *Le Cameroun, n'est producteur, ni utilisation, ni stockeur encore moins une plate-forme de transit et de transfert des armes à sous-munitions. Il approuve par conséquent a) l'interdiction de transfert des sous-munitions; b) l'interdiction d'assistance en opérations militaires conjointes; c) l'interdiction de stocker des armes à sous-munitions étrangères; d)* ***l'interdiction d'investir dans les armes à sous-munitions.*** (emphasis added) (Landmine & Cluster Munition Monitor 2019a)

Canada

In relation to a bill implementing the CCM the following statements were made during the parliamentary debate:

> *What is more, under the bill it is prohibited to assist, encourage or induce anyone to engage in any prohibited activity including knowingly and directly investing in the production of cluster munitions.* (Fortin-Duplesis 2012, 1724)

In an email John MacBride, a senior defense advisor with the Department of Foreign Affairs and International Trade, to Mary Wareham of Human Rights Watch made the following statement:

> *[...] an investment that is executed with the knowledge and intention that it will encourage or assist cluster munitions production would be captured by the legislation's prohibition on aiding*

> *and abetting any primary offence.* (PAX 2020; Landmine & Cluster Munition Monitor 2015b)

During a parliamentary debate senator Fortin-Duplesis made a statement in a similar direction:

> *For example, one proposed amendment was to make it an offence for a person to knowingly invest in a company that makes cluster munitions. That is already covered by the bill, since direct and intentional investments in a commercial organization that produces cluster munitions would fall under the prohibition against aiding and abetting. Those terms are clear in Canadian criminal law, and they cover all forms of investment that entail a sufficient proximity to the actual making of the munitions and the necessary criminal intent.* (Fortin-Duplesis 2014, 2095)

Chad

During the 8th meeting of states parties to the CCM from 3 to 5 September 2018 in Geneva, an official of the ministry of the economy and development planning made the following statement on behalf of Chad:

> *L'investissement ou le financement de la production des armes prohibées défait le cadre juridique international qui régit leur interdiction. Nous sommes donc d'avis que les investissements dans la production des armes à sous munitions sont une violation del'Article 1 de la CCM.* (Sahanai 2018, 12)

Chile

During the 9th meeting of states parties to the CCM from 2 to 4 September 2019 in Geneva, an official of the ministry of external relations made the following statement on behalf of Chile:

"En tal sentido, nos unimos al llamado de invertir o financiar la producción de municiones en racimo, por ser contrario a la convención y su fundamento humanitario." (Ministerio de Relaciones Exteriores de Chile 2019, 5 et seq.)

Colombia

Responding to a questionnaire by the "Landmine & Cluster Munition Monitor" campaign on 26 March 2010, the ministry of external relations made the following statement:

"[...] "it views investments by any government in the production of cluster munitions" as prohibited by the Convention on Cluster Munitions." (Stop Explosive Investments 2020; Landmine & Cluster Munition Monitor 2019b)

Costa Rica

During the first review conference of the CCM from 7 to 11 September in Dubrovnik (Croatia), the representative of Costa Rica declared:

"[...] investment in the production of cluster munitions [...] as a form of assistance that is prohibited by the convention." (Original quotation could not be retrieved, quotation taken from: Stop Explosive Investments 2020)

Croatia

In a response dated 23 March 2011 to a questionnaire by the "Landmine & Cluster Munition Monitor" campaign, Hrvoje Debač of the ministry of foreign and European affairs, made the following statement:

"[...] investment in the production of cluster munitions is prohibited [by the Convention on Cluster Munitions]." (Quotation from: Stop Explosive Investments 2020; original source found here: Landmine & Cluster Munition Monitor 2018, fn. 15)

Czech Republic

In a letter dated 30 April 2012 from Miroslav Klíma, UN director at the ministry of foreign affairs, to Mary Wareham of Human Rights Watch he made the following statement on behalf of the Czech Republic:

"[The ministry also expressed the Czech Republic's view that under the Convention on Cluster Munitions,] "investment in the production of cluster munitions is prohibited." (Quotation from: Landmine & Cluster Munition Monitor 2015c, fn. 9)

Democratic Republic of Congo

According to the "Landmine & Cluster Munition Monitor" campaign, a government official made statements during a meeting with the campaign in Brussels on 15 April 2012 to the effect of:

> *In 2012, the government's national mine action coordinator said that the DRC agreed with the views of the Cluster Munition Coalition (CMC) that the provisions of the convention forbid transit in, foreign stockpiling of, and investment in the production of cluster munitions, and also forbid assistance with the use of cluster munitions in joint military operations with states not party.* (Quotation from: Landmine & Cluster Munition Monitor 2019c, fn. 8)

Ecuador

During a meeting of the First Committee of the UN General Assembly on 25 October 2019, the delegation of Ecuador made the following statement:

> *Reiteramos nuestro firme compromiso con la Convención sobre Municiones de Racimo y promovemos su universalización. Hoy hacemos un llamado a detener definitivamente el financiamiento y la inversión en empresas productoras de municiones en racimo, por tratarse de un arma de particular crueldad que afecta especialmente a los grupos más vulnerables.* (Ecuador 2019, 1)

Republic of Congo

During a phone interview dated 8 June 2013 with the "Landmine & Cluster Munition Monitor" Colonel Lucien Nkoua, an official of the 'National Focal Point of the Struggle Against Mines' made the following statement:

> *[...] the Republic of Congo agrees with the views of a number of States Parties to the convention and the Cluster Munition Coalition that investment in the production of cluster munitions is also prohibited by the convention.* (Quotation from: Stop Explosive Investments 2020; original source found here: Landmine & Cluster Munition Monitor 2019d, fn. 7)

France

The deputy minister of defense, Hubert Falco, gave the following interpretation of the assistance clause during a debate in the French National Assembly on 6 July 2010:

> *Concernant le financement, il est clair, dans notre esprit, que toute aide financière, directe ou indirecte, en connaissance de cause d'une activité de fabrication ou de commerce d'armes à sous-munitions constituerait une assistance, un encouragement ou une incitation tombant sous le coup de la loi pénale au titre de la complicité ou de la commission des infractions prévues par le présent projet de loi. Si les travaux de suivi de l'application de la loi par la Commission nationale pour l'élimination des mines antipersonnel, la CNEMA, amenaient à constater une insuffisance de la loi sur ce point, le Gouvernement en tirerait les conclusions qui s'imposent, en proposant au Parlement les modifications législatives nécessaires.* (Falco 2010)

The Gambia

During the 8th meeting of states parties to the CCM from 3 to 5 September 2018 in Geneva, Bulli Dibba, the permanent secretary of the ministry of defense, made the following statement on behalf of the Gambia:

> *The production, sale and use of cluster munitions should stop and states could do more by stopping the investment in companies either state on [sic] non-state, that produce cluster munitions.* (Dibba 2018)

Ghana

During the 4th meeting of states parties to the CCM from 9 to 13 September 2013 in Lusaka (Zambia), Leonard Tettey, made the following statement on behalf of Ghana:

> *Article 1(1) c of the CCM prohibits States Parties from assisting, encouragingor inducing anyone to engage in activities banned by the Convention, such as the production of cluster munitions. In this regard, Ghana considers investments in the production of cluster munitions a form of assistance that is banned by the Convention.*
>
> *Ghana has observed a positive trend: a growing number of States Parties consider investments in cluster munitions to be banned under the Convention. Additionally, a growing number of States Parties have developed national legislation prohibiting investments in cluster munitions.*
>
> *Ghana welcomes this development and would be emulating the positive example shown by these States, by ensuring that her National Legislation criminalizes the investments in the production of cluster munitions. We wish to encourage States Parties to follow this excellent example and make their views known, that investments in the production of cluster munitions is prohibited by the Convention.* (Tettey 2013)

Guatemala

In a letter dated 14 May 2010 to the UN, the permanent mission of Guatemala in Geneva made the following statement:

> *[T]he stockpiling of cluster munitions of other countries in the territory of a State Party to the Convention, as well as the investment in its production is prohibited according to Article 1 of the Convention.* (Landmine & Cluster Munition Monitor 2015d, fn. 8)

The Holy See

During the 1st meeting of states parties to the CCM from 9 to 12 November 2010 in Vientiane (Lao PDR), Khamse Vithavong, the representative of the Holy See, made the following statement:

> *In a world ever more globalized and interdependent, some countries produce or possess production methods or invest in the military industry, outside their national borders. It is important for the integrity of the Convention and for its application to include these investments in the list of prohibitions.* (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2015e, fn. 7)

Hungary

In a letter dated 27 April 2011 from János Martonyi, Minister of Foreign Affairs, made the following statement:

"Hungary believes that investment into the production of cluster munitions is prohibited by the Convention." (Quotation from: Stop Explosive Investments 2020; original source found here: Landmine & Cluster Munition Monitor 2015f, fn. 7)

Iceland

During the 1st review conference of the CCM from 7 to 11 September 2015 in Dubrovnik (Croatia), the representative of Iceland made the following statement on 7 September:

"I would also like to mention that Iceland supports prohibiting investments in producers of cluster munitions." (Iceland 2015)

Japan

During an intersessional meeting of the CCM-parties from 27-30 June 2011 in Geneva, Mitsuhiro Kohno, the director of the conventional arms division of the ministry of foreign affairs, made the following statement on 30 June 2011 on behalf of Japan:

> *With regard to the financing activities by the private sector, it seems there is no clear agreement on the interpretation of the relevant articles. So long as we have the historical fact, it would be realistic that each State Party tries its best to keep communication with their private sector.* (Kohno 2011)

Lao PDR

In an email dated 1 June 2011 from Maytong Thammavongsa, the director of UN, political, and security affairs division at the ministry of foreign affairs, made the following statement:

> *For us it is clear that we strongly support the full prohibition of cluster munitions, including those activities during the joint military operations, transiting, foreign stockpiling and investment in the production of cluster munitions.* (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2015g, fn. 10)

Lebanon

A letter dated 10 February 2009 from the permanent mission of Lebanon to the UN in Geneva includes the following statement:

> *It is the understanding of the Government of Lebanon that Article /1/ paragraph (c) of the Convention prohibits the investment in entities engaged in the production or transfer of cluster munitions or investment in any company that provides financing to such entities. In the view of Lebanon 'assistance' as stipulated in Article /1/ paragraph (c) includes investment in entities engaged in the production or transfer of cluster munitions and is thus prohibited under the Convention.* (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2016a, fn. 11)

Madagascar

During the 1st meeting of states parties to the CCM from 9 to 12 November 2010 in Vientiane (Lao PDR), the representative of Madagascar made the following statement:

> *[...] there should be no exceptions when it comes to cluster munitions, which has a negative impact on all human beings, causing unacceptable suffering, therefore any investment in cluster munitions should indeed be prohibited.* (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2019e, fn. 6)

During a meeting of the First Committee of the UN General Assembly on 25 October 2019, the delegation of Madagascar made the following statement:

> *Madagascar saisit également cette occasion pour exhorter une nouvelle fois les parties prenantes à la restriction et à l'élimination des financements favorisant les armes prohibées et de là, permettre aux Traités qui régissent cette prohibition d'être entière dans leur valeur intrinsèque, d'être à même d'atteindre, effectivement, la vision à laquelle ces instruments ont été euxmêmes consacrés.* (Madagascar 2019, 2)

Malawi

During the 'Africa Regional Conference on the Universalization and Implementation of the Convention on Cluster Munitions' on 25 March 2010 Dan Kuwali, the director of legal services of the Malawi defense force, made the following statement:

"[Article 1(c) of the convention's prohibition on assistance] should read to prohibit investments in CM [cluster munition] producers." (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2016b, fn. 8)

Malta

In two separate emails Mariella Grech (dated 26 April 2010 to Handicap International France) and Laura Sammut (dated 8 April 2011), both officials of the ministry of foreign affairs, made the following statement on behalf of Malta:

> *Malta interprets Article 1(b) of the Convention on Cluster Munitions as prohibiting this activity. Malta believes that the assistance prohibition under Article 1(c) of the Convention precludes financing and investment in corporations linked with the production of cluster munitions.* (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2015h, fn. 6)

Mauritania

During the 8th meeting of states parties to the CCM from 3 to 5 September 2018 in Geneva, an official made the following statement on behalf of Mauritania:

> *I would like to use this opportunity to work together with other states against the financing of or assistance to companies for cluster bombs (companies that produce these bombs). These bombs, that kill hundreds of innocent people every day, are an obstacle to development, peace and security.* (Stop Explosive Investments 2020)

Mexico

In letter dated 4 March 2009 from Juan Manuel Gómez Robledo to Human Rights Watch, a Mexican ambassador and deputy minister of foreign affairs, made the following statement:

"Also, it is Mexico's opinion that investment for the production of cluster munitions is also prohibited by the Convention." (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2015i, fn. 12)

Montenegro

During the 8th meeting of states parties to the CCM from 3 to 5 September 2018 in Geneva, the representative of Montenegro made the following statement:

> *We emphasize that investing in or financing prohibited weapons production undermines the international legal framework that governs their ban. Therefore Montenegro understands that any investment in producers of cluster munitions is a contravention of Article 1 (1) c of the CCM.* (Montenegro 2015)

Niger

During a meeting between Allassan Fousseini and the 'Landmine & Cluster Munition Monitor on 28 May 2013, an official of the 'Expert Mines Action and Small Arms and Light Weapons of the National Commission for the Collection and Control of Illicit Weapons,' he gave the following explanation which is paraphrased below:

> *[…], Niger considers assistance during joint military operations with states not party that may use cluster munitions and investment in the production of cluster munitions to be banned by the*

> *convention.* (Summary of the conversation found here: Landmine & Cluster Munition Monitor 2019f, fn. 7)

Norway

In a proposition for legislation following Norway's ratification of the CCM, a ministry made the following statement in 2008:

> *The Ministry agrees that investment, for example, in companies that develop or produce cluster munitions may fall within the scope of the Convention's prohibition of aiding and abetting. [...] [...] it cannot be excluded that private investment [...] in companies that develop or produce cluster munitions, may be incompatible with the Convention.* (Original could not be retrieved; quotation from PAX 2014, 2)

In relation to a similar assistance clause in the 1997 Ottawa Convention, a government appointed advisory council on international law discussed the question about investments in companies producing anti-personnel mines rather detailed:

> *The provision in article 1 (1) (c) says nothing about which forms of assistance etc. that are meant to be covered. The provision is widely formulated and must be presumed to be intended to cover all forms of assistance. [...] The question is whether investments in Singapore Technologies Engineering (STE) can be perceived as assisting within the meaning of the convention. [...]*
>
> *According to the rules of the Petroleum Fund, the fund cannot acquire more than 3% ownership of an individual company. [...] It can, however, hardly be demanded that the investment shall be of a specific amount in order for it to be covered by the Convention. According to article 31 of the Vienna Convention on the Law of Treaties, a convention shall be interpreted in accordance with its wording and in compliance with the object and purpose of the convention. Neither the wording of the convention nor its purpose supports such a restrictive interpretation.*
>
> *Furthermore, the prohibition against assistance is not limited to cover only new offers of shares, in order for the company to be supplied with 'new' capital. According to the Advisory Commission's view, the point is that any investment of money in a company can be regarded as a form of support to the company even though the sums, relatively speaking, are low. The mere fact that the Petroleum Fund invests at all in a company, could, for example, contribute to other states and investors following suit. And even if an investment in a company was so modest that it probably would not reach the threshold of the prohibition on states to 'assist' in landmine production, this would probably nevertheless be covered by the alternatives 'encourage or induce in any way'. To own shares in Singapore Technologies Engineering as long as the company (or its subsidiary) continues to produce anti-personnel mines, can, according to the view of the Advisory Commission, therefore be affected by the accessory provision in article 1 (1) (c).* (The Petroleum Fund Advisory Commission on International Law 2002)

Peru

During the 7th meeting of states parties to the CCM, from 4 to 6 September 2017 in Geneva, the delegation of Peru made the following interpretive declaration:

> *El Perú es consecuente con su vocación pacifista y respetuosa de los derechos humanos y del derecho internacional humanitario, por cuanto entendemos la interpretación del Artículo 1.c de la Convención, que a la letra señala:*
>
> *"Cada Estado Parte se compromete a nunca, y bajo ninguna circunstancia: ayudar, alentar o inducir a nadie a participar en una actividad prohibida a un Estado parte según lo establecido en la presente Convención."*
>
> *Incluye una prohibición a las inversiones en municiones en racimo, es decir, proveer de asistencia financiera a los productores de dichas armas.* (Peru 2017)

Phillipines

During the 7th meeting of states parties to the CCM, from 4 to 6 September 2017 in Geneva, the delegation of the Philippines made the following statement:

> *As a signatory to the Convention on Cluster Munitions, it continues to defend its position to prohibit the use, local and foreign stockpiling, investment production and transit of cluster munitions in the country.* (Manalo 2017)

This statement was reiterated during the 8th meeting of states parties to the CCM, from 4 to 6 September 2018 in Geneva:

> *From these experiences stem our continued commitment to prohibit the use, local and foreign stockpiling, investment, production and transit of cluster munitions in our country.* (Manalo 2018)

Rwanda

In a letter dated 6 April 2009 by Rosemary Museminali, minister of foreign affairs, to Human Rights Watch, she made the following statement:

"[...] any investment in the production of cluster munitions is prohibited." (Stop Explosive Investments 2020)

Senegal

In a letter dated 3 February 2011 to Human Rights Watch by Meïssa Niang, the director of control research and legislation of the ministry of armed forces of Senegal, he made the following statement:

"[Senegal] considers the transfer and foreign stockpiling of cluster munitions, and investment in cluster munitions to constitute a violation of the CCM." (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2015j, fn. 12)

Slovenia

In a letter dated 14 March 2012 by Karl Erjavec, the minister of foreign affairs of Slovenia, to Mary Wareham of Human Rights Watch, he made the following statement:

"[Slovenia] "has no intention of allowing investment in cluster munition production." (Original could not be retrieved; quotation from Landmine & Cluster Munition Monitor 2018, fn. 12, 13)

Sweden

A 2012 parliamentary report expresses the view that the CCM does not prohibit investments in cluster munition producers, but that there is a strong ethical incentive to abstain from such financial activity:

> *According to the report, Sweden does not see the need for additional legislation prohibiting investment in companies that produce cluster munitions, but it believes it is important that ethical investment strategies are developed.* (Quotation from: Landmine & Cluster Munition

Monitor 2016c; original report can be found here: https://data.riksdagen.se/fil/E3FC826A-4497-4CDC-B282-190874DC40CF)

Trinidad and Tobago

During a meeting of the first committee of the UN General Assembly on 20 October 2017, the representative of Trinidad and Tobago made the following statement:

> *It is unambiguously clear that investing in or financing prohibited weapons undermines the international legal framework that governs their prohibition. My country's accession to the CCM demonstrates our continued commitment to join efforts to end the terrible harm posed by these indiscriminate weapons. We therefore share the perspective that investment in the production of these weapons are a contravention of the CCM.* (Live recording found here: https://media.un.org/en/asset/k1a/k1axr5ral1)

United Kingdom

Responding to questions on the implementing bill of the CCM, the UK government issued the following statement on 7 December 2009:

> *[...] under the current provisions of the Bill, which have been modelled upon the definitions and requirements of the convention, the direct financing of cluster munitions would be prohibited. The provision of funds directly contributing to the manufacture of these weapons would therefore become illegal.* (Stop Explosive Investments 2020)

Zambia

> *During the National Committee on Anti-personnel Landmines (NCAL) on 11 September 2009 in Lusaka, the Director of Zambia Mine Action Centre stated that it is the understanding of Zambia that the Convention on Cluster Munitions includes a prohibition on investments in companies that manufacture cluster munitions.* (Quoted from: Stop Explosive Investments 2020; source found here: Landmine & Cluster Munition Monitor 2016d)

7.3. Annex 3 - Domestic laws on investments in cluster munition producers

Belgium

The Belgian "*Loi réglant des activités économiques et individuelles avec des armes,*" commonly referred to as *"Loi sur les armes*" was adopted in 2006 (Belgium 2006) and amended in 2007 (Belgium 2007) to also ban financial involvement in companies manufacturing controversial weapons (Boring 2016). Article 23 of this law sets out a penalty of imprisonment from one month to five years or a fine of 100 to 25000 euros:

> *[...] Est également interdit le financement d'une entreprise de droit belge ou de droit étranger dont l'activité consiste en la fabrication, l'utilisation, la réparation, l'exposition en vente, la vente, la distribution, l'importation ou l'exportation, l'entreposage ou le transport de mines antipersonnel, de sousmunitions et/ou de munitions inertes et de blindages contenant de l'uranium appauvri ou tout autre type d'uranium industriel au sens de la présente loi en vue de leur propagation.*
>
> *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*
>
> *i) des entreprises dont il a été démontré qu'elles exercent l'une des activités visées à l'alinéa précédent;*
>
> *ii) des entreprises actionnaires à plus de 50 % d'une entreprise au point i).*
>
> *iii) des organismes de placement collectif détenteurs d'instruments financiers d'une entreprise aux points i) et ii).*
>
> *Il fixera également les modalités de publication de cette liste. 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. 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. Cette interdiction ne s'applique pas aux organismes de placement dont la politique d'investissement, conformément à leurs statuts ou à leurs règlements de gestion, a pour objet de suivre la composition d'un indice d'actions ou d'obligations déterminé. L'interdiction de financement ne s'applique pas non plus aux projets bien déterminés d'une entreprise figurant dans cette liste, pour autant que le financement ne vise aucune des activités mentionnées dans cet article. L'entreprise est tenue de confirmer ceci dans une déclaration écrite.* (Belgium 2007)

Ireland

The implementing legislation for the CCM which entered into force in Ireland in 2008 includes the following prohibitions on investments of "public monies" into cluster munitions producers:

> ***11.***—*In this Part—*
>
> *"components" means components specifically designed for use in prohibited munitions;*
>
> *"investor" means a person or body responsible for the investment of public moneys owned by a Minister of the Government;*
>
> *"munitions company" means a company involved in the manufacture of prohibited munitions or components;*
>
> *"prohibited munition" means a cluster munition, explosive bomblet or antipersonnel mine;*
>
> *"public moneys" means moneys provided by the Oireachtas out of the Central Fund, or the growing produce thereof.*

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.

(2) Notwithstanding any other enactment, an investor, in the performance of any function conferred on it by or under any enactment, shall endeavour to avoid the investment of public moneys in a munitions company.

(3) In pursuing the objective set out in subsection (2) an investor shall have regard to the matters set out in this Part.

13.—(1) An investor shall endeavour to avoid the direct investment of public moneys in equity or debt securities issued by a munitions company.

(2) Where public moneys are directly invested in a company which is or becomes a munitions company, the investor shall— (a) establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or (b) divest itself of its investment in that company in an orderly manner.

14.—(1) An investor shall avoid investing 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.

(2) Where public moneys are invested in a collective investment undertaking or investment product which invests these moneys in a company which is or becomes a munitions company, the investor shall—

(a) establish to its satisfaction that—

(i) the company intends to cease its involvement in the manufacture of prohibited munitions or components, or

(ii) the collective investment undertaking or investment product intends to divest itself of its investment in the company, and that there is not a significant probability that the collective investment undertaking or investment product will again invest public moneys in a munitions company,

or

(b) so far as possible, taking into account any contractual obligation it has assumed, divest itself of its investment in that collective investment undertaking or investment product in an orderly manner.

15.—Nothing in this Part shall prevent an investor from contracting derivative financial instruments based on a financial index. (Ireland 2008)

Italy

In its 2011 implementing legislation of the CCM, Italy inserted a short passage criminalizing investments in cluster munitions:

Art. 7

Sanzioni

1. Chiunque impiega, fatte salve le disposizioni di cui all'articolo 3, comma 3, sviluppa, produce, acquisisce in qualsiasi modo, stocca, conserva o trasferisce, direttamente o indirettamente, munizioni a grappolo o parti di esse, ovvero assiste anche finanziariamente, incoraggia o induce altri ad impegnarsi in tali attivita', e' punito con la reclusione da tre a dodici anni e con la multa da euro 258.228 a euro 516.456.

[para. 1 intentionally left out] (Italy 2011)

During the drafting process of this bill, the Italian campaign against landmines and a number of senators criticized the narrow scope and vagueness of Article 7 and circulated

an alternative draft (*Senato Della Republica* 2010) which was adopted in the following form in October 2017:

Art. 1.

(Finalità)

1. *La presente legge introduce il divieto totale al finanziamento di società in qualsiasi forma giuridica costituite, aventi sede in Italia o all'estero, che, direttamente o tramite società controllate o collegate, ai sensi dell'articolo 2359 del codice civile, svolgano attività di costruzione, produzione, sviluppo, assemblaggio, riparazione, conservazione, impiego, utilizzo, immagazzinaggio, stoccaggio, detenzione, promozione, vendita, distribuzione, importazione, esportazione, trasferimento o trasporto delle mine antipersona, delle munizioni e submunizioni cluster, di qualunque natura o composizione, o di parti di esse. È altresì fatto divieto di svolgere ricerca tecnologica, fabbricazione, vendita e cessione, a qualsiasi titolo, esportazione, importazione e detenzione di munizioni e submunizioni cluster, di qualunque natura o composizione, o di parti di esse.*

2. *Alle società di cui al comma 1 è pre- clusa la partecipazione ad ogni bando o programma di finanziamento pubblico.*

3. *I divieti di cui al comma 1 valgono per tutti gli intermediari abilitati come definiti dall'articolo 2, comma 1, lettera a). È altresì fatto divieto alle fondazioni e ai fondi pen- sione di investire il proprio patrimonio nelle attività di cui al comma 1.*

Art. 2.

(Definizioni)

1. *Ai fini della presente legge si intende per:*

   a) *«intermediari abilitati»: le società di intermediazione mobiliare (SIM) italiane, le banche italiane, le società di gestione del risparmio (SGR) italiane, le società di investimento a capitale variabile (SICAV), gli intermediary finanziari iscritti nell'elenco di cui all'articolo 106 del testo unico di cui al decreto legislativo 10 settembre 1993, n. 385, ivi inclusi i confidi, le banche di Paesi membri dell'Unione europea, le imprese di investimento di Paesi membri del- l'Unione europea, le banche extracomunitarie, gli agenti di cambio iscritti nel ruolo unico nazionale tenuto dal Ministero dell'economia e delle finanze, nonché le fondazioni di origine bancaria e i fondi pensione;*

   b) *«finanziamento»: ogni forma di supporto finanziario effettuato anche attraverso società controllate, aventi sede in Italia o all'estero, tra cui, a titolo esemplificativo e non esaustivo, la concessione di credito sotto qualsiasi forma, il rilascio di garanzie finanziarie, l'assunzione di partecipazioni, l'acquisto o la sottoscrizione di strumenti finanziari emessi dale società di cui al presente articolo;*

   c) *«mina antipersona»: ai sensi dell'articolo 2, commi 1 e 2, della Convenzione sul divieto d'impiego, di stoccaggio, di produzione e di trasferimento delle mine antipersona e sulla loro distribuzione, firmata a Ottawa il 3 dicembre 1997, di cui alla legge 26 marzo 1999, n. 106, una mina progettata in modo tale da esplodere a causa della presenza, prossimità o contatto di una persona e tale da incapacitare, ferire o uccidere una o più persone. Le mine progettate per essere detonate dalla presenza, prossimità o contatto di un veicolo, invece che di una persona, e dotate di dispositivi di anti manipolazione, non sono considerate mine antipersona per il solo fatto di essere così congegnate;*

   d) *«mina»: una munizione progettata per essere posta sotto, sopra o presso il terreno o qualsiasi altra superficie, e per essere fatta esplodere dalla presenza, prossimità o contatto di una persona o veicolo;*

   e) *«munizioni e submunizioni cluster»: ai sensi dell'articolo 2 della Convenzione di Oslo sulla messa al bando delle munizioni a grappolo, fatta a Dublino il 30 maggio 2008, di cui alla legge 14 giugno 2011, n. 95, ogni munizione convenzionale idonea a disperdere o*

rilasciare submunizioni esplosive ciascuna di peso inferiore a 20 chilogrammi, fatte salve le specifiche di esclusione indicate dalle lettere a), b) e c) del comma 2 del medesimo articolo 2 della Convenzione;

f) «organismi di vigilanza»: la Banca d'Italia, l'Istituto per la vigilanza sulle assicurazioni (IVASS), la Commissione di vigilanza sui fondi pensione (Covip) e gli eventuali altri soggetti cui sia attribuita in forza della normativa vigente la vigilanza sull'operato degli intermediari abilitati di cui alla lettera a).

Art. 3.

(Compiti degli organismi di vigilanza)

1. Entro sei mesi dalla data di entrata in vigore della presente legge, gli organismi di vigilanza emanano, di concerto tra loro, apposite istruzioni per l'esercizio di controlli rafforzati sull'operato degli intermediari abilitati onde contrastare il finanziamento della produzione, utilizzo, assemblaggio, riparazione, promozione, vendita, distribuzione, importazione, esportazione, stoccaggio, detenzione o trasporto delle mine antipersona, delle munizioni e submunizioni cluster e di loro singoli componenti. Nello stesso termine, i medesimi organismi di vigilanza provvedono a redigere e pubblicare l'elenco delle società di cui all'articolo 1, comma 1, e ad indicare l'ufficio responsabile della pubblicazione annuale del medesimo elenco.

2. Nell'ambito dei compiti riguardanti l'Unità di informazione finanziaria per l'Italia (UIF), istituita presso la Banca d'Italia dal decreto legislativo 21 novembre 2007, n. 231, i controlli dei flussi finanziari sono estesi alle imprese e alle società di cui all'articolo 1, comma 1.

Art. 4.

(Compiti degli intermediari)

1. Entro novanta giorni dalla pubblicazione dell'elenco di cui all'articolo 3, comma

1, gli intermediari finanziari provvedono ad escludere dai prodotti offerti ogni componente che costituisca supporto finan-ziario alle società incluse nel predetto elenco.

Art. 5.

(Verifiche)

1. Al fine di verificare il rispetto dei divieti di cui all'articolo 1, la Banca d'Italia può richiedere dati, notizie, atti e documenti agli intermediari abilitati di cui all'articolo 2, comma 1, lettera a), e, se necessario, può effettuare verifiche presso la sede degli stessi.

2. Gli organismi di vigilanza provvedono, nell'ambito delle ispezioni e dei controlli a carico dei soggetti vigilati, anche a controlli specifici di valutazione dell'attività connessa alla funzione di compliance in relazione ai divieti di cui alla presente legge.

Art. 6.

(Sanzioni)

1. Gli intermediari abilitati i quali non osservino i divieti di cui all'articolo 1 sono puniti con la sanzione amministrativa pecuniaria da euro 150.000 a euro 1.500.000, per i casi di cui all'articolo 5 del decreto legislativo 8 giugno 2001, n. 231.

2. I soggetti che svolgono funzioni di amministrazione o di direzione degli intermediari abilitati o che, per loro conto, svolgono funzioni di controllo, i quali non osservino i divieti di cui all'articolo 1, sono puniti con la sanzione amministrativa pecuniaria da euro 50.000 a euro 250.000.

> *3. L'applicazione delle sanzioni amministrative pecuniarie previste dal presente articolo comporta la perdita temporanea, per una durata non inferiore a due mesi e non superiore a tre anni, dei requisiti di onorabilità per i rappresentanti legali dei soggetti abilitati, delle società di gestione del mercato, nonché per i revisori e i promotori finanziari e, per i rappresentanti legali di società quotate, l'incapacità temporanea ad assumere incarichi di amministrazione, direzione e controllo nell'ambito di società quotate e di società appartenenti al medesimo gruppo di società quotate.*
>
> *[art. 7 intentionally left out]* (*Senato Della Republica* 2017)

Liechtenstein

In 2013, Liechtenstein amended its war material act (*Kriegsmaterialgesetz*) to include an article on direct/indirect financing of cluster munitions. According to Article 29(b) of the war material act, any individual who intentionally violates the prohibition on direct financing may be imprisoned for up to five years:

> *Art. 7b*
>
> *Verbot der direkten Finanzierung*
>
> *1) Die direkte Finanzierung der Entwicklung, der Herstellung oder des Erwerbs von verbotenem Kriegsmaterial ist verboten.*
>
> *2) Als direkte Finanzierung im Sinne dieses Gesetzes gilt die unmittelbare Gewährung von Krediten, Darlehen und Schenkungen oder vergleichbaren finanziellen Vorteilen zur Bezahlung oder Bevorschussung von Kosten und Aufwendungen, die mit der Entwicklung, der Herstellung oder dem Erwerb von verbotenem Kriegsmaterial verbunden sind.*
>
> *Art. 7c*
>
> *Verbot der indirekten Finanzierung*
>
> *1) Die indirekte Finanzierung der Entwicklung, der Herstellung oder des Erwerbs von verbotenem Kriegsmaterial ist verboten, wenn damit das Verbot der direkten Finanzierung umgangen werden soll.*
>
> *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 Anlageprodukten, die durch solche Gesellschaften ausgegeben werden.* (Liechtenstein 2013)

Luxembourg

In 2009, Luxembourg ratified the CCM. Accompanying the French text of the CCM is the following declaration clarifying certain duties under the law. According to Article 4, violations may be punished with five to ten years of imprisonment or a fine of 25.000 to one million euros:

> ***Art. 3.*** *Il est interdit à toute personne physique ou morale de financer, en connaissance de cause, des armes à sous-munitions ou des sous-munitions explosives.* (Luxembourg 2009)

Netherlands

After a lengthy forth and back between the parliament and government of the Netherlands, an amendment to the 'Market Abuse (Financial Supervision Act)' was passed in January 2013. Financial institutions violating article 21a may be subject to a category 2 fine which ranges from 500.000 to one million euros and may be increased in relation to the specific circumstances of a case:

Art. 21a

1. *An enterprise as referred to in Article 5:68 of the Act, not being a clearing institution, will take adequate measures to ensure that it does not:*
    a. *carry out transactions or has transactions carried out with a view to acquiring or offering a financial instrument that has been issued by an enterprise that produces, sells or distributes cluster munitions as referred to in Article 2 of the Convention on Cluster Munitions which was concluded in Dublin on 30 May 2008 (published in the Bulletin of Treaties 2009, 45) or essential parts thereof;*
    b. *provide loans to an enterprise as referred to in subsection (a) above;*
    c. *acquire non-marketable holdings in the capital of any enterprise described under (a) above.*
2. *The first section above is equally applicable to carrying out transactions, or having them carried out, with a view to acquiring or offering a financial instrument that has been issued by any enterprise that holds more than half of the share capital of an enterprise as referred to in subsection 1 (a) and also to loans to, or non-marketable holdings in such an enterprise.*
3. *Section 1 above will not apply to:*
    a. *transactions based on an index in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total;*
    b. *transactions in investment funds operated by third parties in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total; and*
    c. *investments in clearly defined projects carried out by an enterprise described in subsection 1 (a) insofar as such funding is not utilised for the production, sale or distribution of cluster munitions.*
4. *Without prejudice to the provisions of section 1 above, enterprises that do hold financial instruments, loans or non-marketable holdings as described in that section should dispose of them or terminate them within a reasonable period of time.* (The Netherlands 2012; English translation: Oosterwijk 2015)

New Zealand

New Zealand's 2009 implementing legislation of the CCM includes an additional provision (sec. 11(1A)) which prohibits investments in cluster munitions:

5 ***Interpretation***

(1) In this Act, unless the context otherwise requires,—

funds-

(a) means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and

(b) 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 5 kind*
>
> *[...]*
>
> *11 **Offences relating to cluster munitions***
>
> *[...]*
>
> *1A A person commits an offence who provides or invests 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.*
>
> *[...]* (New Zealand 2009)

The official commentary to the legislation includes the following explanations in relation to investments in cluster munitions:

> ***Offences relating to cluster munitions—investment***
>
> *We are aware that the Convention does not contain any explicit prohibition on investment in cluster munitions. The offence provisions in clause 11(1) include a prohibition on conduct that "in any way assists, encourages, or induces another person to engage in" (11(1)(e)) various activities, including developing and producing cluster munitions. This can be interpreted to cover investing in the development or production of cluster munitions. We also understand that in respect of an offence against these provisions the general provision in the Crimes Act 1961 relating to secondary liability applies, for example, to a person who aids and abets the production of cluster munitions, or conspires with another person to produce cluster munitions.*
>
> *We are not persuaded, however, that these provisions are sufficiently clear to prohibit a person or a company unequivocally from investing in cluster munitions. We consider that the bill should create an offence in order to expressly prohibit investing in cluster munitions. We recommend the insertion of new clause 11(1A) which would create an offence for when a person provides or invests funds with the intention that the funds will be used, or knowing that they are to be used in the development or the production of cluster munitions. This new offence would be subject to the same penalties as the other offences in clause 11.*
>
> *We also recommend amending clause 5 to provide a definition of funds to explicitly make clear what is meant by funds in this context.*
>
> ***Government investment***
>
> *We have considered whether there should be a statutory prohibition on investment by Government funds in companies involved in the manufacture of cluster munitions. We have also explicitly considered the application of our recommended amendment as set out in clause 11(1A) to Crown financial institutions who might invest funds in companies involved in the manufacture of cluster munitions. We are advised that the New Zealand Superannuation Fund and the Government Superannuation Funds, the Natural Disaster Fund (Earthquake Commission) and the Accident Compensation Corporation Fund have voluntarily divested stocks in companies involved in the manufacture of such munitions. These funds also have specific policies that preclude such investments. We interpret the bill to impose the obligations under clause 11(1A) on Crown financial institutions and therefore conclude that there is no need for a separate subclause to effect that.*

Saint Christopher and Nevis

In the 2014 implementing legislation, following Saint Kitts and Nevis's accession in 2013, investments in cluster munitions are expressly prohibited. A violation may lead to a penalty of not more than ten years or a fine of not more than 50.000 USD:

> ***4. Offences relating to cluster munitions***
>
> *[…]*
>
> *(2) A person shall not provide or invest funds with the intention that those funds are to be used, or knowing that they are to be used, in the development or production of cluster munitions.*
>
> *[…]* (Saint Christopher & Nevis 2014)

Samoa

Samoa's implementing legislation of 2012 provides a prohibition of investments in cluster munitions and a clear definition of what funds are meant. For violations corporations may be fined with 100.000 'penalty units' and natural persons with 10.000 'penalty units' or up to seven years of imprisonment:

> 2. ***Interpretation****-(1) In this Act, unless the context otherwise requires:*
>
> *[…]*
>
> ***"funds":***
>
> *(a) means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and*
>
> *(b) includes legal documents or instruments in any form evidencing title to, or interest in, assets of any kind.*
>
> *[…]*
>
> 6. ***Offences****-(1) Subject to section 7, a person who directly or indirectly does one (1) or more of the following commits an offence:*
>
> *[…]*
>
> *(f) invests 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.* (Samoa 2012)

Spain

In a 2015 amendment to a 1998 law banning anti-personnel mines, investments in cluster munitions are included as a prohibited action:

> ***Artículo 2. Prohibición total del empleo, almacenamiento, producción y transferencia.***
>
> *(1) […] Asimismo, queda prohibida la financiación o la publicidad de este tipo de armas, y de los conceptos explicitados en el párrafo anterior, por cualquier medio.* (Spain 2015)

Switzerland

As part of the ratification process Switzerland amended its 'Federal Law on War Materials' with new provisions on direct and indirect financing of cluster munitions producers:

> *Art. 8b Interdiction du financement direct*
>
> *1 Il est interdit de financer directement le développement, la fabrication ou l'acquisition de matériels de guerre prohibés.*
>
> *2 Est considéré comme financement direct au sens de la présente loi l'octroi direct de crédits, de prêts, de donations ou d'avantages financiers comparables en vue de couvrir ou d'avancer les*

coûts du développement, de la fabrication ou de l'acquisition de matériels de guerre prohibés ou les frais liés à de tells activités.

Art. 8c Interdiction du financement indirect

1 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.

2 Est considéré comme financement indirect au sens de la présente loi:

a. la participation à des sociétés qui développent, fabriquent ou acquièrent des matériels de guerre prohibés;

b. l'achat d'obligations ou d'autres produits de placement émis par de tells sociétés. (Switzerland 2012)

7.4. Annex 4 - Evaluation of domestic prohibitions on investments in cluster munition producers

The following list is a summary of the four evaluation criteria for domestic prohibitions on investments in cluster munition producers which were elaborated in chapter 4 of this thesis. This concise list may be useful for different actors in order to analyze domestic laws and policies.

Evaluation criteria for domestic laws prohibiting investments in cluster munition producers

1. **Material scope 1: which cluster munition producers are covered under the law?**

    (a) Law bans investments in **producers** not only in the production

    (b) Total amount of business in cluster munitions is irrelevant

    (c) Subsidiaries are included

    (d) Companies producing essential parts of cluster munitions are included

    (e) Companies within the jurisdiction of a state and abroad are included

2. **Material scope 2: which investments should be covered?**

    (a) Law includes a non-exclusive list of possible forms of investments

    (b) No differentiation between direct and indirect investments

    (c) Regulation covering ongoing investments

3. **Personal scope: which investors should be covered?**

    (a) Sovereign investors (e.g. central bank, state insurances, state pension funds)

    (b) Corporate investors (legal persons)

    (c) Individual investors (natural persons)

4. **Enforcement: how should the law work in practice?**

    (a) Effective supervisory mechanism

    (b) Blacklist of banned cluster munition producers

    (c) Penal sanctions for violations

8. References

Treaties

Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31.

Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (adopted 5 August 1963, entered into force 10 October 1963) 480 UNTS 44.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

Treaty for the Prohibition of Nuclear Weapons in Latin America (adopted 14 February 1967, entered into force 22 April 1968) 634 UNTS 281.

Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 168.

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (adopted 11 February 1971, entered into force 18 May 1972) 955 UNTS 115.

Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (adopted 10 April 1972, entered into force 26 March 1975), 1015 UNTS 163.

Convention on the prohibition of military or any other hostile use of environmental modification techniques (adopted 10 December 1976, entered into force 5 October 1978) 1108 UNTS 151.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1987) 1125 UNTS 3.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III) (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 162.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) (adopted 25 May 1993) UN Doc S/RES/827.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45.

Treaty on the Southeast Asia Nuclear Weapon-Free Zone (adopted 15 December 1995, entered into force 27 March 1997) 1981 UNTS 129.

Rome Statute of the International Criminal Court (adopted 10 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba) (adopted 11 April 1996, entered into force 15 July 2009) accessed July 21, 2022, https://treaties.unoda.org/t/pelindaba.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 256.

Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) (adopted 28 November 2003, entered into force 12 November 2006) 2399 UNTS 100.

Treaty on a Nuclear-Weapon-Free Zone in Central Asia (adopted 8 September 2006, entered into force 21 March 2009) 2970 UNTS.

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.

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