



## FACTSHEET

### Interpretative Issues and the 2008 Convention on Cluster Munitions

Prepared by Human Rights Watch

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States Parties and signatories to the Convention on Cluster Munitions should make their views known on key issues related to interpretation and implementation of the convention, including:

1. The prohibition on assistance during joint military operations with states not party that may use cluster munitions;
2. The prohibition on transit and foreign stockpiling of cluster munitions; and,
3. The prohibition on investment in production of cluster munitions.

Several strong implementation laws have been enacted that provide useful models for how to implement certain provisions of the Convention on Cluster Munitions. For example, New Zealand and Norway allow for participation in joint military operations with states not party yet preserve the convention's prohibitions. Austria, Germany, and Switzerland explicitly ban transit. Several states have enacted laws that prohibit certain forms of investment in cluster munition production.

Since the 2008 Convention on Cluster Munitions entered into force on 1 August 2010, an increasing number of States Parties have made their views known on important interpretative issues.<sup>1</sup> This Factsheet highlights the summary of interpretative issues presented in *Cluster Munition Monitor 2012*, with a few updates received since publication.

More than half of the 81 States Parties to the Convention on Cluster Munitions have made their views known on at least one of the interpretative issues listed above.<sup>2</sup> However, 34 States Parties have not yet provided their views on any: Afghanistan, Albania, Andorra, Antigua and Barbuda, Botswana, Cape Verde, Chad, Cook Islands, Costa Rica, Côte d'Ivoire, Dominican Republic, El Salvador, Fiji, Guinea-Bissau, Honduras, Lesotho, Lithuania, Mauritania, Moldova, Monaco, Mozambique, Nauru, Niger, Panama, Peru, Saint Vincent and the Grenadines, Samoa, San Marino, Seychelles, Sierra Leone, Swaziland, Trinidad and Tobago, Tunisia, and Uruguay.

All States Parties should engage in open discussions on key issues related to interpretation and implementation of the convention in order to establish a uniform view and reach common understandings. The strength and credibility of the convention is undermined when States Parties do not have a uniform understanding of what acts are banned and what acts are not.

<sup>1</sup> See ICBL-CMC, *Cluster Munition Monitor 2012* (Geneva: ICBL-CMC, October 2012); ICBL-CMC, *Cluster Munition Monitor 2011* (Ottawa: Mines Action Canada, October 2011), pp. 24–31; ICBL, *Cluster Munition Monitor 2010* (Ottawa: Mines Action Canada, October 2010), pp. 19–24; and Human Rights Watch and Landmine Action, [Banning Cluster Munitions: Government Policy and Practice](#) (Ottawa: Mines Action Canada, May 2009), pp. 24–26.

<sup>2</sup> As of 12 April 2013, a total of 112 countries had joined the convention, of which 81 are States Parties and legally bound by all of the convention's provisions.

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## **Prohibition on assistance and interoperability**

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Article 1 of the convention obliges States Parties “never under any circumstances to...assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.” Yet during the Oslo Process, some states expressed concern about the application of the prohibition on assistance during joint military operations with countries that have not joined the convention. In response to these “interoperability” concerns, Article 21 on “Relations with States not Party to this Convention” was included in the convention.

Article 21 states that States Parties “may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.” This clarification does not, however, negate a State Party’s obligations under Article 1 to “never under any circumstances” assist with prohibited acts. Article 21 also requires States Parties to discourage use of cluster munitions by those not party and to encourage them to join the convention. Together Article 1 and Article 21 should have a unified and coherent purpose, as the convention cannot both require States Parties to discourage the use of cluster munitions and, by implication, allow them to facilitate it. Furthermore, to interpret Article 21 as qualifying Article 1 would run counter to the object and purpose of the convention, which is to eliminate cluster munitions and the harm they cause to civilians.

The CMC position is therefore that States Parties must not intentionally or deliberately assist, induce, or encourage any activity prohibited under the Convention on Cluster Munitions, even when engaging in joint operations with non-States Parties.

At least 36 States Parties and signatories have agreed that the convention’s Article 21 provision on interoperability should not be read as allowing states to avoid their specific obligation under Article 1 to prohibit assistance with prohibited acts: Austria, Belgium, Bosnia and Herzegovina (BiH), Bulgaria, Burundi, Cameroon, Chile, Colombia, Croatia, Czech Republic, Democratic Republic of Congo, Ecuador, France, Germany, Ghana, Guatemala, Holy See, Hungary, Iceland, Ireland, Lao PDR, Lebanon, Madagascar, Malawi, Mali, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Portugal, Samoa, Senegal, Slovenia, Sweden, and Switzerland.

Guatemala announced in September 2012 that its implementing legislation prohibits the use, development, production, acquisition, retention, transfer, and import or export of cluster munitions, as well as assistance with these activities. Samoa’s implementing legislation for the Convention on Cluster Munitions came into effect on 27 April 2012 and includes a specific prohibition on assistance with acts banned by the convention.

Some states—most notably State Party Australia and signatory Canada—however, have indicated their view that the Article 1 prohibition on assistance with prohibited acts can be overridden by the Article 21 interoperability provisions.

## **Transit and foreign stockpiling**

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The CMC has stated that the ban on direct or indirect assistance with prohibited acts contained in Article 1 of the Convention on Cluster Munitions should be seen as a ban on the transit of cluster munitions across or through the national territory, airspace, or waters of a State Party. It has also said that it should be seen as prohibiting the stockpiling of cluster munitions by a state not party on the territory of a State Party.

At least 33 States Parties and signatories have unambiguously stated that transit and/or foreign stockpiling are prohibited by the convention: Austria, Belgium, BiH, Bulgaria, Burkina Faso, Burundi, Cameroon, Colombia, Comoros, Croatia, Czech Republic, Democratic Republic of Congo, Ecuador, France, Germany, Ghana, Guatemala, Holy See, Ireland, Lao PDR, Luxembourg, FYR Macedonia, Madagascar, Malawi, Malta, Mexico, New Zealand, Norway, Senegal, Slovenia, Spain, Sweden, and Zambia.

A small number of States Parties have expressed the opposite view, that transit and foreign stockpiling are not prohibited by the convention, including Japan, the Netherlands, and Portugal. Signatory Canada's draft implementing legislation does not explicitly address transit or foreign stockpiling of cluster munitions and could be read to implicitly allow these activities.

Australia and the United Kingdom (UK) each have implementing legislation that appears to permit transit and foreign stockpiling, but both have stated that these activities would not be permitted:

- Australia's ministers of defense and foreign affairs and the attorney-general issued a joint statement in November 2011 that said, "Australian Defence Force (ADF) personnel will not be permitted to use, develop, produce or otherwise acquire cluster munitions, or to make the decision to do so. This includes while serving on combined operations with Defence forces of other countries, in combined headquarters, or on exchange with a foreign force." In May 2012, the Department of Foreign Affairs and Trade informed the Monitor that, "ADF personnel must not specifically request the use of cluster munitions where the choice of munitions is within their exclusive control."
- The UK stated in June 2008 that it does not view the prohibition on foreign stockpiling as a legal requirement under the treaty, but said it would seek the removal of foreign stockpiles of cluster munitions from UK territories and, in November 2010, announced that there were no foreign stockpiles of cluster munitions in the UK or on any UK territory. The UK government in March 2010 informed Parliament that transit of cluster munitions through UK territory is not prohibited by the UK's national implementing legislation, but said that "a direct application would have to be made to the Secretary of State who would have to grant permission before it [transit] could happen. We would be reluctant to grant such permission."

## **Disinvestment**

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The CMC believes that the convention's Article 1 prohibition on assistance with prohibited acts constitutes a prohibition on investment, both direct and indirect, in the production of cluster munitions. It calls on governments to legislate against financing of cluster munition producers and to rein in financial institutions and investors on the issue of investment in cluster munition producers.<sup>3</sup>

Nine states have enacted legislation that explicitly prohibits investment in cluster munitions: Belgium (2007), Ireland (2008), Italy (2011), Liechtenstein (2013), Luxembourg (2009), the Netherlands (2013), New Zealand (2009), Samoa (2012), and Switzerland (2012).

At least 23 States Parties and signatories to the convention have stated their view that investment in cluster munitions production is a form of assistance that is prohibited by the convention: Australia, BiH, Cameroon, Canada, Colombia, Croatia, Czech Republic, Democratic Republic of the Congo, France, Guatemala, Holy See, Hungary, Lao PDR, Lebanon, Madagascar, Malawi, Malta, Mexico, Rwanda, Senegal, Slovenia, UK, and Zambia.

A few states have expressed the contrary view that the convention does not prohibit investment in cluster munition production, including Denmark, Germany, Japan, and Sweden.

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<sup>3</sup> See Stop Explosive Investments website: [www.stopexplosiveinvestments.org](http://www.stopexplosiveinvestments.org).