



LANDMINE & CLUSTER MUNITION MONITOR FACT SHEET



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 yet preserve the convention's prohibitions. Austria and Germany explicitly ban transit. Laws by Belgium, Ireland, Luxembourg, New Zealand, and, most recently, Italy prohibit certain forms of investment.

Since the 2008 Convention on Cluster Munitions entered into force on 1 August 2010, an increasing number of parties have made their views known on important interpretive issues.¹ This Fact Sheet highlights the summary of interpretive issues presented in *Cluster Munition Monitor 2011*, with a few updates received since publication.

Nearly half of the 70 States Parties to the Convention on Cluster Munitions have made their views known on at least one of the interpretive issues listed above.² However, 36 States Parties have not made their views known: Afghanistan, Albania, Antigua and Barbuda, Botswana, Burundi, Cape Verde, Chile, Cook Islands, Costa Rica, Côte d'Ivoire, Czech Republic, Denmark, Dominican Republic, El Salvador, Fiji, Guinea-Bissau, Honduras, Italy, Japan, Lesotho, Lithuania, Mauritania, Moldova, Monaco, Mozambique, Niger, Panama, 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.

¹ See ICBL, *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.

² As of 2 April 2012, a total of 111 countries had joined the convention, of which 70 are States Parties and legally bound by all of the convention's provisions.

Prohibition on assistance and interoperability

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 says 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 28 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, Colombia, Croatia, Ecuador, France, Ghana, Guatemala, Holy See, Hungary, Iceland, Ireland, Lao PDR, Lebanon, Madagascar, Malawi, Mali, Mexico, Montenegro, New Zealand, Nicaragua, Norway, Portugal, Slovenia, Sweden and Switzerland.

Some states—most notably signatories Australia and 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

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

On 3 April 2012, Norway provided its views on transit and foreign stockpiling to the

Monitor.³ On the subject of transit, it referred back to its implementation legislation adopted on 20 November 2008 and associated commentary, which explains that the prohibition on assistance encompasses transit.⁴

With regard to the issue of foreign stockpiling of cluster munitions on the national territory of a State Party, Norway noted that it is “prohibited under Article 1 to stockpile cluster munitions, and that it would be contrary to the prohibition on assistance etc. in Article 1 c to allow another state to stockpile cluster munitions on its territory.”

A small number of states have expressed the opposite view, that transit and foreign stockpiling are not prohibited by the convention, including Australia, Japan, the Netherlands, Portugal, and the UK.

Disinvestment

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 cluster munition financing and to rein in financial institutions and investors on the issue of investment in cluster munition production.⁵

Five states have enacted legislation that explicitly prohibits investment in cluster munitions: Belgium, Ireland, Luxembourg, New Zealand and, most recently in 2011, Italy.⁶

At least 20 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, Colombia, Croatia, France, Guatemala, Holy See, Hungary, Lao PDR, Lebanon, Madagascar, Malawi, Malta, Mexico, Rwanda, Senegal, Slovenia, the UK, and Zambia.

On 14 March 2012, Slovenia informed the Monitor that, “Slovenia has no intention of allowing investment in cluster munitions production.”⁷

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.

³ Email to Mary Wareham, Human Rights Watch from May-Elin Stener, Deputy Director-General, Section for Humanitarian Affairs, Ministry of Foreign Affairs, 3 April 2012.

⁴ Act relating to the implementation of the Convention on Cluster Munitions in Norwegian law of 15 May 2009 No. 28 (adopted 20 November 2008). Proposition No. 7 (2008–2009) to the *Odelsting* on a Bill relating to the implementation of the Convention on Cluster Munitions in Norwegian law; and Proposition No. 4 (2008–2009) to the *Storting* on consent to ratification of the Convention on Cluster Munitions, p. 8.

<http://www.clusterconvention.org/files/2011/01/NationallegislationNorway.pdf>

⁵ See Stop Explosive Investments website: <http://www.stopexplosiveinvestments.org>

⁶ Law No. 95 bans financial assistance to anyone for any act prohibited by the convention, a provision that supports a ban on investment in the production of cluster munitions. However, the Italian Campaign to Ban Landmines has advocated for a separate, more detailed law.

⁷ Letter from Karl Erjavec, Minister of Foreign Affairs of the Republic of Slovenia, 14 March 2012.