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## **Interoperability and the Prohibition on Assistance**

### **Memorandum to Delegates of the Dublin Diplomatic Conference on Cluster Munitions**

#### **Introduction**

A provision obliging states parties not to assist with prohibited acts is an accepted and essential part of a modern weapons treaty. The draft cluster munitions convention includes such a provision in Article 1(c). It says:

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.<sup>1</sup>

Article 1(c) is based on extensive precedent from past weapons treaties and is indispensable to the humanitarian goal of the convention. Because it prevents states parties from contributing even indirectly to the use of cluster munitions, it promotes the object and purpose of the treaty, which is to minimize civilian harm from the weapons. It also stigmatizes cluster munitions by declaring that states parties will not tolerate their use by anyone and contributes to deterring use by non-states parties.

Despite being critical to the convention, the “assistance provision”<sup>2</sup> caused a great deal of controversy at the Wellington Conference on Cluster Munitions in February 2008. Several states argued that it would make it much more difficult for them to conduct joint military operations with non-states parties, including because it might expose their troops to criminal liability. These states were primarily concerned with operations with the United States, an ally that has used

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<sup>1</sup> Draft Cluster Munitions Convention, January 21, 2008, <http://www.mfat.govt.nz/clustermunitionswellington/index.php> (accessed May 10, 2008), art. 1 [hereinafter Cluster Munitions Convention].

<sup>2</sup> This memorandum will frequently use “assist” as shorthand for “assist, encourage or induce.”

cluster munitions in multiple conflicts. Opponents have proposed deleting or amending the provision in the final negotiations in Dublin in May 2008. Their concerns, however, are overstated.

This memorandum lays out the strong legal precedent for the provision and several reasons why it is necessary. It also challenges the notion that Article 1(c) will unduly inhibit joint operations by explaining that: 1) states parties to other treaties, most notably the Mine Ban Treaty, have clarified the interpretation of assistance through national declarations and laws<sup>3</sup> and 2) states parties to other treaties have developed practical methods to deal with having different legal obligations than their allies. The alleged military utility of cluster munitions for states parties' allies is not an appropriate factor to consider in this discussion and regardless is declining. Given the humanitarian nature of the treaty and the demonstrated success in reconciling other treaties' prohibition on assistance provisions with joint operations, this memorandum concludes that states' proposals to eliminate or modify Article 1(c) are unacceptable and unnecessary. States should instead preserve the existing language. They can accomplish their goal to protect interoperability through discussions about the meaning of assist recorded in the diplomatic history from Dublin, national declarations including those submitted with ratification instruments, and national implementation laws that have definitions, interpretations, or clarifications.

## **Precedent for a Provision Prohibiting Assistance**

Prohibiting states parties to “assist, encourage or induce” a violation of the convention reflects a firmly established principle of international arms control and humanitarian law. The language of Article 1(c) comes from a long line of treaties with language very similar to that of the draft cluster munitions convention. The inclusion in weapons treaties of a provision prohibiting assistance dates back to at least 1968 when the Nuclear Non-Proliferation Treaty was opened for signature.<sup>4</sup> Since then major treaties aimed at restricting the

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<sup>3</sup> See generally Landmine Monitor Fact Sheet, prepared by Human Rights Watch, “A Prohibition on Assistance in a Future Treaty Banning Cluster Munitions: The Mine Ban Treaty Experience,” February 2008, [http://www.icbl.org/lm/content/download/29239/471039/file/2008\\_Ban\\_Factsheet.pdf](http://www.icbl.org/lm/content/download/29239/471039/file/2008_Ban_Factsheet.pdf) (accessed May 12, 2008).

<sup>4</sup> Nuclear Non-Proliferation Treaty, opened for signature June 12, 1968, 7 I.L.M. 868 (1968), 21 U.S.T. 483, entered into force March 5, 1970, art. 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.” (Emphasis added.)

development, proliferation, and use of certain weapons—including the Seabed Arms Control Treaty (1972),<sup>5</sup> the Biological Weapons Convention (1975),<sup>6</sup> the Environmental Modification Convention (1978),<sup>7</sup> the Comprehensive Nuclear Test Ban Treaty (opened for signature 1996),<sup>8</sup> the Chemical Weapons Convention (CWC) (1997),<sup>9</sup> and the Mine Ban Treaty (MBT) (1999)<sup>10</sup>—have such a provision. All, except for the Comprehensive Nuclear Test Ban Treaty, use the exact phrase “to assist, encourage or induce” and apply it to the substance of the instrument. The Nuclear Non-Proliferation Treaty, the Seabed Arms Control Treaty, the Biological Weapons Convention, and the Comprehensive Nuclear Test Ban Treaty aim to limit proliferation of certain weapons by banning various activities such as manufacturing, transfer, and acquisition; they have comparable provisions to the cluster munitions convention. The CWC and MBT, the treaties most parallel to the cluster munitions convention because they not only limit proliferation but also explicitly prohibit the use of certain weapons, contain virtually identical language as the new convention.<sup>11</sup> The language of the Environmental Modification Convention, which also covers use of weapons, is very similar.

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<sup>5</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (Seabed Arms Control Treaty), opened for signature February 11, 1971, 23 U.S.T. 701, T.I.A.S. No 7337, entered into force May 18, 1972, art. 1, “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 1 of this article.” (Emphasis added.)

<sup>6</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), opened for signature April 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, entered into force March 26, 1975, art. 3, “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 this Convention.” (Emphasis added.)

<sup>7</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (Environmental Modification Treaty), opened for signature May 18, 1977, 1108 U.N.T.S. 152, entered into force October 5, 1978, art. 1(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 1 of this article.” (Emphasis added.)

<sup>8</sup> Comprehensive Nuclear Test Ban Treaty, opened for signature September 24, 1996, 35 I.L.M. 1439, (draft text as contained in U.N. Doc. A/50/1027 was adopted by the U.N. General Assembly in Res. 50/245), art. 1(2), “Each State Party undertakes, furthermore, to refrain from *causing, encouraging, or in any way participating* in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.” (Emphasis added.)

<sup>9</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), opened for signature January 13, 1993, 32 I.L.M. 800, entered into force April 29, 1997, art. 1(1), “Each State Party to this Convention undertakes never under any circumstances: . . . (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.)

<sup>10</sup> Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty), opened for signature December 3, 1997, 2056 U.N.T.S. 211, entered into force March 1, 1999, art. 1(1)(c), “Each State Party undertakes never under any circumstances: . . . (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.)

<sup>11</sup> Article 1(c) of the draft cluster munitions convention differs only in the absence of the phrase “in any way.” This phrase was in the initial draft text circulated in Lima in May 2007 but deleted in the next draft circulated in Vienna in December 2007.

According to the diplomatic histories, the language prohibiting assistance was included in very early versions of the CWC and MBT. In the case of the CWC, the provision was present in drafts submitted as early as 1986, and there is no indication in the negotiating history that states actively disputed the inclusion of such language.<sup>12</sup> In Krutzch and Trapp's authoritative commentary on the CWC, the provision is mentioned only once, and there are no references to documents or communications reflecting debate over the provision.<sup>13</sup> As for the MBT, although the provision was not a part of the first draft of the treaty, it was inserted in the second draft in March 1997.<sup>14</sup> Interoperability concerns led to objections to the assistance provision during the negotiations of the MBT that are similar to those raised in the context of cluster munitions. However, proposals to alter the language were ultimately rejected.<sup>15</sup> The provision remained unchanged through to the final text adopted at the Oslo Diplomatic Conference in September 1997.<sup>16</sup> The early inclusion of an assistance provision during these negotiations shows that states considered it an essential part of a weapons treaty.

The CWC and MBT are particularly relevant models for the cluster munitions convention. Because they prohibit the use of certain weapons in addition to prohibiting production, stockpiling, and transfer, they implicate the very same interoperability concerns as the cluster munitions convention. (Although most states are unlikely to use chemical weapons, even the CWC has raised interoperability questions because of the differing interpretations of riot control agents.) In addition, these two treaties are not only arms control agreements but also humanitarian treaties that seek to minimize civilian harm during armed

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<sup>12</sup> UN Conference on Disarmament, Report of the Conference on Disarmament 1986, UN Doc A/41/27, January 1, 1986, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N86/234/79/img/N8623479.pdf?OpenElement> (accessed May 6, 2008), paras. 85, 87; UN Conference on Disarmament, Report of the Conference on Disarmament 1988, UN Doc A/43/27, March 10, 1988, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N88/241/39/pdf/N8824139.pdf?OpenElement> (accessed May 6, 2008), paras. 75-77; Report of the Conference on Disarmament 1989, UN Doc A/44/27, January 1, 1989, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N89/224/30/img/N8922430.pdf?OpenElement> (accessed May 6, 2008), paras. 85-87; UN Conference on Disarmament, Report of the Conference on Disarmament 1990, A/45/27(SUPP), September 21, 1990, <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N90/230/27/img/N9023027.pdf?OpenElement> (accessed May 6, 2008), paras. 113-115. Drafts of the CWC text in each of these reports contained the assistance provision. Although these reports referenced debates over numerous provisions of the CWC drafts, including disagreement over provisions on definitions and use of riot control agents, the reports make no mention of debate over the assistance provision.

<sup>13</sup> Walter Krutzch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (Boston: Dordrecht, 1994). See also Lisa Woollomes Tabassi, ed., *OPCW: The Legal Texts* (Cambridge, MA: TMC Asser Press, 1999).

<sup>14</sup> Stuart Maslen, *Commentaries on Arms Control Treaties, Vol. 1* (Oxford: Oxford University Press, 2005), p. 94.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 100.

conflict. That states adopted this language, despite interoperability concerns, is a testament to the importance they placed on an assistance provision.

## The Need for the Assistance Provision

While it has some characteristics of an arms control or disarmament treaty, the cluster munitions convention is primarily a humanitarian instrument, and the prohibition on assistance provision is necessary to achieve its objective. It will help ensure that the treaty fulfills its object and purpose, stigmatizes the weapon, and deters use.

### *A Humanitarian Treaty*

The cluster munitions convention is humanitarian in nature because of both its aim and its approach. The reduction of civilian harm is a foundation of international humanitarian law.<sup>17</sup> Following this principle, the text and especially the preamble of the convention convey that its primary object and purpose is to minimize the human suffering caused by the use of cluster munitions.<sup>18</sup>

Structurally, humanitarian treaties address the effects of the conduct of war.<sup>19</sup> The convention bans the use of cluster munitions,<sup>20</sup> a means of regulating armed conflict, and reduces the effects of cluster munitions through articles on the clearance and destruction of cluster munition duds<sup>21</sup> and assistance to victims of

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<sup>17</sup> The International Committee of the Red Cross (ICRC) defines international humanitarian law as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.” ICRC, “What is International Humanitarian Law?,” July 31, 2004, <http://www.icrc.org/web/eng/siteeng.nsf/html/humanitarian-law-factsheet> (accessed May 10, 2008).

<sup>18</sup> The preamble begins by saying states parties are “deeply concerned that civilian populations and individual civilians continue to suffer most from armed conflict” and are “determined to put an end for all time to the suffering and casualties caused by the use of cluster munitions that kill or maim innocent and defenceless civilians.” While the draft treaty text next mentions “peace and security,” it goes on to highlight the rights and dignity of victims of cluster munitions, the implementation of human rights, and “the global call for an end to civilian suffering caused by cluster munitions.” The preamble of the draft treaty text closes by stating that cluster munitions “cause unacceptable harm to civilians” and that the treaty is guided by principles of international humanitarian law, particularly distinction. Cluster Munitions Convention, preamble. The preamble of the treaty thus focuses on humanitarian principles and demonstrates that the object and purpose of the treaty is humanitarian. The text of a treaty, including its preamble, is the primary evidence of a treaty's intent. See, for example, Vienna Convention on the Law of Treaties (Vienna Convention), 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980, art. 31(1), “A treaty 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.” Article 31(2) says that the preamble and text of a treaty comprise the treaty's primary content: “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.” *Ibid.*, art. 32(2).

<sup>19</sup> ICRC, “What is International Humanitarian Law?”

<sup>20</sup> Cluster Munitions Convention, preamble.

<sup>21</sup> *Ibid.*, art. 4.

the weapons.<sup>22</sup> Like other humanitarian treaties, which recognize the urgency of their mission, the cluster munitions convention also has a low entry-into-force requirement,<sup>23</sup> designed so the treaty takes effect as soon as possible.<sup>24</sup> The provisions on use and entry into force combined with the preamble's focus on furthering humanitarian principles shows the treaty is aimed at protecting civilians.

### *Object and Purpose*

Article 1(c) is necessary because prohibiting assistance, encouragement, and inducement of acts that violate the convention ensures that states uphold the treaty's humanitarian object and purpose. As stated, the goal of the treaty is to minimize the civilian harm caused by cluster munitions. If states parties could facilitate the use of the weapon by assisting non-states parties in activities prohibited under the treaty, they would be acting contrary to this goal. The absence of Article 1(c) would allow states parties to contribute to activity that causes civilian death and injury by cluster munitions.

Because of the importance of a convention's object and purpose, well-established treaty law requires states parties to follow a treaty "in good faith." The Vienna Convention on the Law of Treaties (Vienna Convention) says that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>25</sup> International law considers states parties' obligations not to frustrate the object and purpose of a treaty so important that they also exist upon signature or acknowledgement of intent to be bound by the treaty, even prior to ratification or entry into force.<sup>26</sup> Article 1(c) promotes state parties' commitment in good faith to ban cluster munitions and eliminate the humanitarian harm the weapons cause.

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<sup>22</sup> *Ibid.*, art. 5.

<sup>23</sup> *Ibid.*, art. 17.

<sup>24</sup> Humanitarian treaties often have low entry into force requirements. The Geneva Conventions, for example, require only two states parties. See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, art. 153.

<sup>25</sup> Vienna Convention, art. 26.

<sup>26</sup> *Ibid.*, art. 18, "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

## *Stigmatization*

While the rest of the convention contributes to the stigmatization of cluster munitions, Article 1(c) is essential as well. First, it shows non-states parties that their allies will not tolerate or support their use of cluster munitions. It broadens the scope of the ban by stigmatizing actions related to cluster munitions regardless of whether these actions are taken by states parties or non-states parties. Deleting or weakening the provision may legitimize the weapon by suggesting that states parties do not care if others use it. Second, stigmatization is easier with a clear and simple message that promotes a widespread refusal to use a weapon. Article 1(c) restricts states parties from facilitating activity that the treaty prevents states parties from undertaking; such an all-encompassing restriction enhances stigmatization of cluster munitions. “Complex or nuanced” provisions, by contrast, leave a treaty’s obligations less clear and may interfere with international adoption and consistent implementation. During negotiations for the Mine Ban Treaty, then International Committee of the Red Cross president Cornelio Sommaruga said:

Experience in international humanitarian law has shown that clear and unambiguous norms, such as those being endorsed in this Conference, are more compelling, easier to promote and more readily implemented than complex and nuanced regimes. The result is that they are more easily universalized over time, even if all States cannot subscribe to a given rule at the outset. Examples include the absolute prohibitions on the use of exploding and expanding bullets and of chemical and biological weapons—all of which were far from universal at their adoption but have now become customary law.<sup>27</sup>

The comprehensive and far-reaching stigmatization of cluster munitions facilitated by Article 1(c) will reduce acceptability of cluster munitions and promote universalization of the treaty.

## *Deterrence of Use*

In addition to stigmatizing the weapon, the assistance provision will help, in the shorter term, deter use of cluster munitions by non-states parties in joint

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<sup>27</sup> International Campaign to Ban Landmines, “An Explosion Every Twenty Minutes: Conference Report: Brussels International Conference for the Total Ban of Anti-Personnel Landmines 24-27 June 1997,” <http://www.icbl.org/layout/set/print/layout/set/print/tools/banned/bibliography/key/brussels> (accessed May 12, 2008), p. 63.

operations. States parties will no longer be allowed to assist the latter with their use of cluster munitions. If the example of the MBT is followed, there will be a general, if informal, understanding that states parties may not: 1) participate in the planning for use of the weapon; 2) agree to rules of engagement permitting use of the weapon; 3) accept orders to use the weapon; 4) request others to use the weapon; 5) knowingly derive military benefit from the use of the weapon by others; 6) train others to use the weapon; or 7) provide security, storage or transportation for the weapon.<sup>28</sup> As a result non-states parties will face increased practical difficulties to using the weapon. Non-states parties may also avoid use out of respect for their allies' legal obligations in order to ensure that joint operations continue. Either way, Article 1(c) will help the convention better achieve its goal of reducing the deployment of cluster munitions that cause unacceptable harm to civilians.

### **The Meaning of Assistance**

Despite the essential nature of Article 1(c), some states have suggested that the provision will seriously interfere with interoperability with non-states parties.<sup>29</sup> Interpretations of the provision in the Mine Ban Treaty, however, show that it is only violated if there is a nexus between the actions of the state party and non-state party that uses cluster munitions.

Interpretations of assistance provisions in past conventions suggest that Article 1(c) will allow states parties to participate in joint operations with non-states parties that have traditionally used cluster munitions. According to Stuart Maslen's commentary on the MBT, participation in joint operations does not in and of itself amount to assistance.<sup>30</sup> Maslen wrote, "[A] State Party could provide logistical support to a non-party State that, in general, uses anti-personnel mines as long as it did not furnish such support for any specific operation involving anti-personnel mines."<sup>31</sup> A violation of the provision instead requires a nexus between the action of the state party and a non-state party's engagement in acts prohibited by the treaty, and "there is no nexus between mere participation in

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<sup>28</sup> For a compilation of states' understandings related to the prohibition on assistance provision, see Landmine Monitor Fact Sheet, "A Prohibition on Assistance in a Future Treaty Banning Cluster Munitions: The Mine Ban Treaty Experience."

<sup>29</sup> Cluster Munition Coalition, "Policy Notes: Dublin 2008."

<sup>30</sup> Maslen, *Commentaries on Arms Control Treaties*, pp. 93-106.

<sup>31</sup> *Ibid.*, p. 97.

such an operation and any specific instance of prohibited activity.”<sup>32</sup> The nexus requirement thus defines the parameters of states parties’ joint operations with non-state party landmine users.

In a variety of statements, states parties have clarified what they believe the scope of the nexus is.<sup>33</sup> The United Kingdom has listed “planning with others for the use of anti-personnel mines (APM); training others for the use of APM; agreeing operational plans permitting the use of APM in combined operations; requests to non-States Parties to use APM;...providing security or transport for APM....[and] accept[ing] orders that amount to assistance in the use of APM” as among “unacceptable activities” under Article 1 of the MBT.<sup>34</sup> Canada has stated that “the Canadian Forces may not request, even indirectly, the use of anti-personnel mines by others.”<sup>35</sup> Defining the limitations of the provision, Sweden has said that the MBT assistance provision “ought not to be interpreted so that any kind of participation in a joint military operation with a non-party would be considered as an encouragement.”<sup>36</sup> For example, providing medical care to a soldier injured while laying landmines falls outside the assistance provision because it does not contribute to the commission of prohibited activity.<sup>37</sup> States parties have thus interpreted the assistance provision of the MBT in a way that allows them to honor both treaty commitments to reduce humanitarian harm and military commitments to support their allies. Given that the cluster munitions convention uses virtually identical language to that of the MBT, this interpretation of assistance should apply equally to the cluster munitions context.

## Reconciling Different Legal Obligations in Past Joint Operations

Concerns about the impact of the prohibition on assistance provision are not merely theoretical; states have encountered actual military situations that have raised questions of interoperability. While different legal obligations and

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<sup>32</sup> *Ibid.*, p. 95.

<sup>33</sup> See generally Landmine Monitor Fact Sheet, “A Prohibition on Assistance in a Future Treaty Banning Cluster Munitions: The Mine Ban Treaty Experience.”

<sup>34</sup> Maslen, *Commentaries on Arms Control Treaties*, p. 96, citing “United Kingdom Intervention on Article 1,” Statement to the Standing Committee on the General Status and Operation of the Convention (Geneva, May 16, 2003).

<sup>35</sup> *Ibid.*, p. 99, citing instructions issued by the Chief of the Canadian Defence Staff in 1998, “Anti-Personnel Mines,” annex A, para. 3(a).

<sup>36</sup> *Ibid.*, p. 99, citing the Swedish Position on the Significance of Article 1(c) [sic] of the Ottawa Convention as regards Participation in International Peace Operations, Memorandum, Ministry of Foreign Affairs, September 1, 2001).

<sup>37</sup> *Ibid.*, p. 97.

interpretations of treaty provisions have presented challenges to conducting joint military operations, states have historically shown flexibility and innovation in fashioning solutions that reconcile the practical demands of joint operations and respect for their partners' legal obligations.

The interoperability challenges presented by the assistance provision in the cluster munitions convention are nothing new, and indeed are quite familiar to many militaries. The United States, for example, has considered these challenges in depth, not only with respect to differing legal obligations but also with respect to differences in intelligence and policy among coalition partners. In response to such challenges, the US Judge Advocate General's Corps has advised its lawyers to anticipate such differences and craft solutions, or "workarounds."<sup>38</sup>

In several cases, the United States and other countries have faced situations where "workarounds" were necessary. During NATO's Operation Allied Force in Kosovo and Serbia in 1999, there were significant differences among the 19 member states with regard to their legal obligations in relation to protection of civilian objects, proportionality analysis, and consequently targeting decisions.<sup>39</sup> As a result, NATO policy allowed member states to refuse bombing assignments or facilitation of bombing missions they considered to be a violation of their legal obligations.<sup>40</sup> A similar flexibility was worked out to accommodate the differing legal responsibilities of coalition partners with respect to targeting decisions in joint operations in Iraq.<sup>41</sup>

Military partners have had to reconcile different legal obligations arising from the MBT, which contains an assistance provisions almost identical to that in the draft

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<sup>38</sup> Center for Law and Military Operations (CLAMO), "Forged in the Fire: Legal Lessons Learned During Military Operations, 1994-2006" (2006), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/forged-in-the-fire.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/forged-in-the-fire.pdf) (accessed May 15, 2008), p. 335.

<sup>39</sup> Amnesty International, "Collateral Damage or Unlawful Killings: Violations of the Laws of War by NATO during Operation Allied Force," 2000, <http://www.amnesty.org/en/library/asset/EUR70/018/2000/en/dom-EUR700182000en.html> (accessed April 15, 2008). Not only did states interpret these provisions differently, but states such as the United States and France were not parties to Geneva Protocol I and instead derived their legal obligations from customary international law, which includes the proportionality test found in Protocol I's Articles 51 and 57.

<sup>40</sup> Michael Kelly, "Legal Factors in Military Planning for Coalition Warfare and Military Interoperability," *Australian Army Journal*, vol. II, no. 2, Autumn 2005, [http://www.apcml.org/documents/aa\\_j\\_autumno5\\_kelly\\_17.pdf](http://www.apcml.org/documents/aa_j_autumno5_kelly_17.pdf) (accessed May 6, 2008), p. 163. See also Amnesty International, "Collateral Damage or Unlawful Killings."

<sup>41</sup> During the major hostilities in Iraq in 2003, coalition members adopted a "red card" system in order to accommodate differences between coalition members' perceived legal obligations under Protocol I. They could issue a "red card" to oppose a targeting decision they believed violated their legal obligations. A state could use a "red card" even in cases where it was providing tactical support for the mission and not conducting the strike itself. According to former Australian military lawyer Col. Michael Kelly, "the US generally accepted these decisions by its allies." Kelly, "Legal Factors in Military Planning for Coalition Warfare," p. 165; see also CLAMO, "Forged in the Fire," pp. 332-333.

cluster munitions convention. A report by the US Judge Advocate General cautions military lawyers that the MBT's prohibition on assistance "may impact the mission in many subtle, but important ways, such as on coalition partner ability to be involved in air-to-air refueling, transport, or even mission planning."<sup>42</sup> Guidelines were thus formulated in advance by the United States to avoid assistance issues when US Special Forces operated in Iraq with United Kingdom and Australian Special Forces.<sup>43</sup>

Differences in legal obligations have therefore not prevented states from conducting joint military operations and developing large military coalitions. States have historically formulated and implemented procedures, guidelines, and strategies to reconcile different legal obligations among military partners conducting joint operations. As this past experience has shown, there are practical solutions capable of minimizing the interoperability issues arising under the assistance provision of the cluster munitions convention. At the same time, the firmer legal standards have discouraged non-party states that wish to engage in acts prohibited under the treaty.

### **The Role of Military Utility**

While previous legal instruments offer valuable precedent for both interpretive and practical solutions to interoperability concerns, some states have argued that the cluster munition context is too different for it to be relevant. They have said that cluster munitions are more likely to be used by their allies, i.e. the United States. Given that the goal of the treaty is to minimize humanitarian harm, however, the likelihood of an ally's use should not be part of the calculation surrounding Article 1(c). Even if it were included, our assessment is that the military utility of cluster munitions is in fact declining.

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<sup>42</sup> CLAMO, "Forged in the Fire," p. 325.

<sup>43</sup> *Ibid.*, p. 335. Under the CWC, differences of interpretation exist on the legality of the use of Riot Control Agents (RCAs). The United States interprets the prohibition of the use of RCAs as a "method of warfare" as permitting the use of RCAs during military operations for a number of purposes, such as controlling rioting prisoners. The United Kingdom, by contrast, interprets the CWC provision as prohibiting all uses of RCAs during armed conflict. As a result, the United Kingdom will neither participate in any operations that use such chemical agents nor transport them. The United States and United Kingdom, however, frequently conduct joint operations. Eric Schmitt and Nicolas Wade, "Bush Approves Use of Tear Gas in Battlefield," *New York Times*, April 3, 2003; CLAMO, "Forged in the Fire," p. 335; CLAMO, *Legal Lessons Learned from Afghanistan and Iraq, Volume I: Major Combat Operations*, August 2004, <http://www.fas.org/irp/doddir/army/clamo-v1.pdf> (accessed May 7, 2008), p. 115; Kerry Boyd, "Military Authorized to Use Riot Control Agents in Iraq," *Arms Control Today*, May 2003, <http://www.fas.org/irp/doddir/army/clamo-v1.pdf> (accessed April 15, 2008).

In joining cluster munitions treaty negotiations, states agreed that they should end the use cluster munitions that cause unacceptable harm to civilians. As discussed above, such a clear position is necessary to ensure that the object and purpose of the treaty is met, widespread stigmatization is realized, and future use is deterred. If states try to amend the draft text because they fear the treaty will interfere with their allies' deployment of cluster munitions, they are ignoring the goals of the instrument and their future responsibilities under it. They are in effect accepting use of the weapons by others instead of discouraging future deployment.

Even if states do consider future use by others in their negotiations, the changing nature of warfare has decreased the military utility of cluster munitions. The weapons were designed for Cold War-style battles in which they could target large tank or troop formations with their broad footprint. Today's wars are often fought in urban areas where cluster munitions are inappropriate from humanitarian and military perspectives.<sup>44</sup> When used in populated areas, they almost always cause civilian casualties. Over the past decade, this harm has been documented in depth so armed forces cannot deny that it was foreseeable.<sup>45</sup> In addition to violating international humanitarian law, such attacks undermine militaries' efforts to win the hearts and minds of local people, a critical aspect of counter-insurgency.

Even members of the US military have acknowledged that cluster munitions are of decreasing value. After major hostilities in Iraq in 2003, a lesson learned report from the Third Infantry Division asked if one model of submunition (the Dual Purpose Improved Conventional Munition, or DPICM) was a "Cold War relic" and called it a battlefield "loser." It specifically noted that these weapons were "not for use in urban areas."<sup>46</sup> Army officers said they used cluster munitions not because of their area effect but because ground forces did not have another

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<sup>44</sup> Human Rights Watch, *Myths and Realities about Cluster Munitions*, February 2007, [http://www.hrw.org/campaigns/clusters/myths0307/index.htm#\\_Toc160865770](http://www.hrw.org/campaigns/clusters/myths0307/index.htm#_Toc160865770).

<sup>45</sup> See, for example, Human Rights Watch, *Flooding South Lebanon: Israel's Use of Cluster Munitions in Lebanon in July and August 2006*, vol. 20, no. 2(E), February 2008, <http://www.hrw.org/reports/2008/lebanon0208/>; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003), <http://www.hrw.org/reports/2003/usa1203/>; Human Rights Watch, *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan*, vol. 14, no. 10(C), December 2002, <http://www.hrw.org/reports/2002/us-afghanistan/>.

<sup>46</sup> Third Infantry Division, "Fires in the Close Fight: OIF [Operation Iraqi Freedom] Lessons Learned, undated, [https://sill-www.army.mil/Fa/Lessons\\_Learned/3d%20ID%20Lessons%Learned.pdf](https://sill-www.army.mil/Fa/Lessons_Learned/3d%20ID%20Lessons%Learned.pdf) (accessed November 10, 2003) (quoted in Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003), <http://www.hrw.org/reports/2003/usa1203/>, p. 114).

rocket with such a long range; they said a unitary weapon with a similar range would have accomplished their military objective with less civilian harm.<sup>47</sup> Concerned in particular by the dangers duds posed to soldiers and civilians alike, individual officers expressed a reluctance to use cluster munitions because of their aftereffects.<sup>48</sup> One Marine officer told Human Rights Watch, “We wouldn’t use cluster bombs in battle even if it degraded [our capacity].”<sup>49</sup> Military personnel repeatedly called for an alternative weapon.<sup>50</sup>

In addition to causing unnecessary civilian casualties, cluster munitions, like landmines,<sup>51</sup> have interfered with military operations because they endanger friendly forces. In Afghanistan in 2001-2002, US troops could not take advantage of their night vision capabilities because they feared stepping on duds.<sup>52</sup> In Iraq, a British officer described having to stop his advance on the first night of the war when his unit drove into a field of unexploded submunitions.<sup>53</sup> US and UK duds also killed at least five of their own soldiers in the first month after the fall of Baghdad.<sup>54</sup> Although states opposing the cluster munitions convention’s assistance provision are most worried about US potential to use cluster munitions, the United States has not employed the weapons since 2003, and some of its officers seem hesitant to change that. Because cluster munitions are unsuited for modern, urban warfare, their continued use is increasingly less likely, making interoperability concerns less persuasive.

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<sup>47</sup> Human Rights Watch, *Off Target*, pp. 95-96.

<sup>48</sup> *Ibid.*, pp. 114-115.

<sup>49</sup> *Ibid.*, p. 115.

<sup>50</sup> *Ibid.*, pp. 95-96, 114.

<sup>51</sup> In the Vietnam War, “although the Army kept asking for more mines, one fifth to one third of all U.S. deaths were caused by these devices, while they killed relatively few enemy in exchange.” Deborah Shapley, *Promise and Power: The Life and Times of Robert McNamara* (Boston: Little Brown and Co., January 1993), p. 414. Shapley notes that factual information of this sort was published in *Southeast Asia Report*, a classified journal. In the early 1990s, a US Army mine warfare expert noted that mines were unsuitable to both “today and tomorrow’s battlefield” because it is impossible to find and neutralize mines quickly enough to “reduce their impact on our maneuver forces and soldiers.” Charles Gardenes, US Army Office of the Project Manager for Mines, Countermine and Demolitions, presentation to the ADPA symposium, September 7-9, 1993, Asheville, NC, pp. 1-2.

<sup>52</sup> Human Rights Watch, *Fatally Flawed*, p. 31-32.

<sup>53</sup> Human Rights Watch, *Off Target*, p. 111

<sup>54</sup> *Ibid.*, pp. 110-111.

## States' Proposals to Remove or Alter Article 1(c)

A number of states have put forward proposed revisions of Article 1(c) that, according to their proponents, would address the interoperability concerns posed by the current text. Each proposal, however, also exempts a wide range of activity that facilitates the continued use of cluster munitions. Permitting actions so blatantly in contradiction with the humanitarian purpose of the treaty cuts against extensive legal precedent and would severely undermine its credibility and effectiveness.

### *Removal of the Provision: The United Kingdom's Proposal*

The UK proposal to remove the text of Article 1(c) altogether is the most extreme.<sup>55</sup> It would undo all the benefits of the provision discussed earlier. First, permitting states parties to assist others in the use of cluster munitions would facilitate and promote the deployment of the weapons, which contravenes the treaty's object and purpose of decreasing harm to civilians. Second, the stigmatization effect of the treaty would be weakened; states parties would legitimize use by non-states parties and remove the unambiguous and comprehensive prohibition of all activities supporting the use of clusters, which is key to promoting and universalizing norms against the weapon. Finally, the removal of the assistance provision would mean the treaty has limited practical effect on the use by non-states parties.

A principal object and purpose of the cluster ban treaty is to reduce humanitarian suffering, and one could argue that a prohibition on assistance would be considered implied even without an explicit provision. If Article 1(c) is removed, however, that is unlikely to be the legal interpretation. Article 31 of Vienna Convention, which is considered customary international law,<sup>56</sup> states that “[a] treaty 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.”<sup>57</sup> Legal scholars have noted the primary importance of the text and

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<sup>55</sup> “Compendium of Proposals Submitted by Delegations during the Wellington Conference: Addendum 1,” undated, <http://www.mfat.govt.nz/clustermunitionswellington/conference-documents/WCCM-Compendium-v2.pdf> (accessed May 10, 2008), p. 7 [hereinafter Wellington Compendium].

<sup>56</sup> Sir Ian Robinson Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, UK: Manchester University Press, 1984), p. 153, “There is no doubt that Articles 31 and 33 of the Convention constitute a general expression of the principles of customary international law relating to treaty interpretation.”

<sup>57</sup> Vienna Convention, art. 31(1).

its supremacy over a treaty's general object and purpose: "[A]lthough paragraph 1 [of the Vienna Convention] contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence to the textual."<sup>58</sup> An interpreter of the treaty would therefore be reluctant to presume an obligation that the parties have not textually expressed.<sup>59</sup>

Moreover, the act of deleting the provision at this stage in the negotiation would remove any interpretive ambiguity as to whether the humanitarian object and purpose of the treaty prohibited such acts. Article 32 of the Vienna Convention states that when ordinary treaty interpretation as defined by Article 31 leaves ambiguity, supplementary interpretive materials such as "the preparatory work of the treaty and the circumstances of its conclusion" may be used for clarification.<sup>60</sup> The preparatory work and the circumstances of the cluster munitions convention's conclusion would show that the drafters purposefully deleted it. This diplomatic history would likely be interpreted as if the drafters did not intend to prohibit state party assistance to actions prohibited under the treaty.<sup>61</sup> The removal of the assistance provision conflicts with the rest of the treaty and would create substantial confusion for interpreting and applying it.

### *Exclusion of Use from Prohibited Activities under Assistance Provision: Japan's Proposal*

Other states' proposals that seek to facilitate joint operations would also severely undermine the credibility and effectiveness of the treaty. Japan's proposal would remove the language "engage in any activity prohibited to a State party under this Convention" from Article 1(c) and substitute it with "to develop, produce, or otherwise obtain cluster munitions."<sup>62</sup> The effect of the proposal would be to limit the prohibition on assistance only to development, production, and acquisition—

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<sup>58</sup> Sinclair, *The Vienna Convention*, p. 235.

<sup>59</sup> This is supported by the comments of noted treaty expert Judge Sir Gerald Fitzmaurice in an opinion in which he refused to read in an object and purpose that had not been textually expressed by the parties: "But what I find it impossible to accept is the implied suggestion that...the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties." *National Union of Belgian Police v. Belgium*, European Court of Human Rights, Series A, no. 19, Judgment, October 27, 1979, Separate Opinion of Judge Sir Gerald Fitzmaurice, <http://www.echr.coe.int/echr/> (accessed May 12, 2008), para. 9(ii).

<sup>60</sup> Vienna Convention, art. 32.

<sup>61</sup> This conclusion would be supported by the principle of contemporaneity, which means that "[t]he ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty." Sinclair, *The Vienna Convention*, p. 124.

<sup>62</sup> Wellington Compendium, p. 7. Japan was supported by Australia, Czech Republic, Denmark, Germany, France, Italy, Turkey, and the United Kingdom.

and to permit assistance in the use of cluster munitions, the most important element of the treaty from a civilian harm perspective. While states parties would not be able to assist others in purchasing cluster munitions, they could enable others to use clusters by providing them, *inter alia*, with logistical and intelligence support. By deleting the prohibition on assistance to use, Japan's proposal creates an explicit loophole, which enables states to circumvent key requirements of the convention. Permitting states parties to assist in the use of cluster munitions would result in state practice that would be patently inconsistent with its declared humanitarian ends.

### *Addition of Interoperability Article: France's Proposal*

France has proposed adding a new article to the convention, which would read, "Nothing in this Convention shall be interpreted as in any way preventing military interoperability between States Parties and non-States Parties to the Convention."<sup>63</sup> The French proposal's language is overly broad and ambiguous.

First, by beginning with "Nothing in this Convention," the article applies to the entire Convention, not just Article 1. As a result, every obligation, not just those relating to assistance, would be qualified and subject to interoperability concerns. Even the use or production of cluster munitions might be permitted in the interests of interoperability. This proposal would eviscerate the entire treaty as well as Article 1.

Second, the phrase "in any way" suggests interoperability concerns will not only predominate but will also be determinative in case of conflicting interpretations. In other words, a wide range of activities—perhaps any activity—that facilitates the use of cluster munitions (and as a result, would otherwise be prohibited under Article 1) would be permitted because prohibiting such activities may interfere with interoperability.

Third, the term "interoperability" is vague and undefined and, as a result, could be construed broadly by states to include a wide range of military activity that may require very minimal cooperation between states. This proposal therefore does not carve out a narrow, manageable allowance for joint operations. It is a catchall that qualifies the entire treaty and creates opportunities for states to

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<sup>63</sup> *Ibid.*, pp. 7-8.

evade and circumvent the stated purpose of putting “to an end for all time the suffering and casualties caused by the use of cluster munitions.”<sup>64</sup>

### *Addition of “Mere Participation” Clause: Germany’s Proposal*

Germany has proposed expressly excluding “mere participation” from the scope of Article 1(c). Its proposed addition to the existing article says:

This provision does not preclude the mere participation in the planning or the execution of operations, exercises or other military activities by the Armed Forces or by an individual national of a State party to this convention, conducted in combination with the Armed Forces of States not parties to this Convention which engage in activity prohibited under this Convention.<sup>65</sup>

As discussed above, there have been numerous examples where treaty obligations have been interpreted not as prohibiting “mere participation” in joint operations, but as prohibiting very specific acts of facilitation. Were these standard modes of interpretation employed with the present treaty, there would be no question that “mere participation” is already excluded under the existing language of Article 1(c). The cluster munitions convention does not require the addition of Germany’s language, which could go beyond what is already the accepted interpretation. The proposal is dangerously broad and prioritizes interoperability over the treaty’s humanitarian objective of preventing civilian harm. “Participation in the planning or execution of operations” could be construed to permit a wider range of activities than usual in such situations. “Participation” in the “execution” of operations, in particular, suggests operational cooperation beyond planning, such as the provision of resources or intelligence to forces employing cluster munitions. As a result, states parties could, for example, provide its non-state party military partner with all the intelligence and information related to targets it desires to strike with cluster munitions, effectively circumventing its other obligations under the treaty. No other weapons treaty provides for such an exception, and by explicitly exempting a category of activity that facilitates the use of cluster munitions, the proposal implicitly condones such activity.

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<sup>64</sup> Cluster Munitions Convention, preamble.

<sup>65</sup> Wellington Compendium, p. 8.

## Conclusion

The cluster munitions convention's prohibition on assistance provision comes from a long line of weapons treaties with similar or virtually identical language. Their drafters recognized that such a provision is essential to the goals of a weapons treaty and does not unduly inhibit joint operations, including by putting troops at excessive risk of criminal liability. Experience shows that there are solutions other than removing or weakening Article 1(c) that can address interoperability concerns while also respecting the humanitarian purpose of a treaty. In the context of past treaties, particularly the MBT, states parties have clarified—through negotiating history, national declarations, and domestic laws—that the scope of assistance does not require interference with all joint operations. In real-world situations, states have developed a range of guidelines, strategies, and capacities to reconcile different legal obligations among military partners conducting joint operations. States' arguments that the cluster munitions situation is different than past ones because their allies are more likely to use the weapons are misplaced because they run counter the goal of the treaty; regardless the military utility of cluster munitions is on the decline.

States parties could adopt approaches under the cluster munitions convention similar to those under past conventions that would clarify legal obligations, segregate prohibited actions, and facilitate joint operations. There is not only significant precedent for a prohibition on assistance but also sufficient flexibility in the time-tested existing language of Article 1(c) to address states parties' interoperability concerns. Preserving the provision will both allow for joint operations and protect the convention's goal of minimizing the harm of cluster munitions to civilians.