



# Staying True to the Ban on Cluster Munitions

## Understanding the Prohibition on Assistance in the Convention on Cluster Munitions

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### Introduction

The Convention on Cluster Munitions, which opened for signature in December 2008, contains two provisions that at first glance seem to pose a conflict. On the one hand, Article 1(1)(c) prohibits states parties from assisting non-states parties with acts banned by the convention.<sup>1</sup> On the other hand, Article 21(3) allows states parties to engage in joint military operations with non-states parties that might use cluster munitions.<sup>2</sup> Some states have argued that Article 21(3) suspends the ban on assistance in Article 1(1)(c) of the convention. The normal rules of treaty interpretation, however, require that provisions must be interpreted in light of their context and the object and purpose of the convention.<sup>3</sup> States designed the Convention on Cluster Munitions to eliminate cluster munitions and to bring an end to the civilian harm they cause. Read in accordance with this purpose, Article 21(3) does not conflict with Article 1(1)(c). Instead, it should be understood as authorizing joint military operations only to the extent that the ban on assistance with prohibited acts is maintained.

The Convention on Cluster Munitions establishes an absolute ban on cluster munitions. These large weapons carry dozens or hundreds of smaller submunitions that endanger civilians both during attacks and afterwards. The convention also requires states to destroy stockpiles of cluster munitions within eight years, clear their territory of unexploded submunitions within 10 years, and provide assistance to victims. As of June 2009, there were

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<sup>1</sup> Convention on Cluster Munitions, Dublin Diplomatic Conference on Cluster Munitions, adopted May 30, 2008, CCM/ 77, <http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf> (accessed May 31, 2009), art. 1(1)(c).

<sup>2</sup> *Ibid.*, art. 21(3).

<sup>3</sup> Vienna Convention on the Law of Treaties, adopted May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, art. 31. It is considered to articulate a norm of customary international law.

98 signatories to the convention, ten of which had ratified: Albania, Austria, the Holy See, Ireland, Laos, Mexico, Niger, Norway, Sierra Leone, and Spain. It will enter into force six months after the thirtieth ratification is deposited.

The convention bans not only the use, production, transfer, and stockpiling of cluster munitions, but also, in the same article, assistance with such activities.<sup>4</sup> Article 1(1)(c) prohibits states parties from assisting anyone in any circumstances with any banned activity.<sup>5</sup> It creates an absolute prohibition and contains no qualifiers that limit the scope of the term “assist.” To realize the convention’s goal of ending the scourge of cluster munitions, the prohibition should be understood to cover a broad range of assistance. A decade of experience from the Mine Ban Treaty context provides precedent supporting such an interpretation.

Unlike the six other weapons treaties that contain a prohibition on assistance,<sup>6</sup> the Convention on Cluster Munitions also includes a provision—Article 21—that was inserted at the final stage of negotiations and governs relations with non-states parties. The first two paragraphs of Article 21 require states parties to advocate proactively for the convention, and the second two address its application during joint military operations. Some states, notably US allies, view Article 21(3) and (4) as creating an exception; they argue the paragraphs mean that the prohibition on assistance does not fully apply during joint operations. The international law of treaty interpretation, however, leads to a different understanding. While paragraph 3 clearly states that participation in joint operations is permitted, it would contradict the object and purpose of the convention to understand it to waive the prohibition on assistance during these operations. Paragraph 4 reiterates that activities specifically banned in Article 1 of the convention are prohibited during joint operations, but it should be read as merely an illustrative list that reinforces Article 1’s overall obligations. Reading it as exhaustive would permit a wide range of otherwise

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<sup>4</sup> Convention on Cluster Munitions, art. 1(1).

<sup>5</sup> *Ibid.*, art. 1(1)(c).

<sup>6</sup> For articles prohibiting assistance, see 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; 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; 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); 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); 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); 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).

prohibited activities that amount to assistance—as if loading the gun for another to fire—that would facilitate use of cluster munitions contrary to the convention’s object and purpose. It would undermine other obligations of advocacy against cluster munitions included in Article 21 and render these provisions incoherent.

The interpretation of the relationship between Articles 1 and 21 is the most debated legal issue surrounding the Convention on Cluster Munitions. The issue was contentious during negotiations, and a uniform understanding of its implications has yet to be reached. Addressing this dispute head on is crucial and timely because signatories to the convention are starting to craft or pass implementation legislation and make public their understandings of the prohibition on assistance and Article 21. Some states claim that during joint military operations, they can provide certain kinds of assistance to non-state party allies that may use cluster munitions. Most states that have issued public statements so far, however, have argued that the prohibition on assistance applies under all circumstances. While strong legislation has yet to be drafted, the latter states’ broad understandings of the prohibition on assistance should help guide the development of laws, policies, and interpretations of the new convention.

Human Rights Watch recommends that, to meet the object and purpose of the Convention on Cluster Munitions, states implementing and interpreting the convention:

- Prohibit assisting anyone with the use, production, transfer, and stockpiling of cluster munitions in any situation, including in joint military operations.
- Understand the term “assist,” used in Article 1(1)(c), broadly to include providing direct and indirect, active and passive assistance.
- Comply with their obligations under Article 21(1) and (2) proactively to advocate for the convention.
- Notify non-state party allies of their obligations under the treaty at the military as well as political level.
- Understand Article 21(3) as allowing participation in joint military operations but not waiving the prohibition on assistance during such operations.
- Understand Article 21(4) as an illustrative, not exhaustive, list of acts prohibited during joint operations.
- Pass implementation legislation, develop domestic policies and practices, and issue national interpretive statements that accord with these understandings.

## Article 1(1)(c): The Prohibition on Assistance

### Understanding of the Prohibition

The Convention on Cluster Munitions clearly and strongly prohibits states parties from assisting non-states parties with activities that violate the convention. The relevant provision, Article 1(1)(c), in full states:

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

(c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.<sup>7</sup>

The convention gives this prohibition on assistance prominence as one of the “general obligations” in the first article of the convention. It puts it on the same level as other core provisions, including the bans on use, production, transfer, and stockpiling of cluster munitions.<sup>8</sup> The placement of the provision in Article 1 and its equation with other banned activities make clear the prohibition on assistance was intended to be robust.

The Vienna Convention on the Law of Treaties provides guidelines for understanding the Convention on Cluster Munitions’ prohibition on assistance. Article 31 of the Vienna Convention on the Law of Treaties, which articulates customary international law, states: “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>9</sup> The context of the treaty includes its text and preamble.<sup>10</sup> In the case of the Convention on Cluster Munitions, this rule of interpretation supports understanding the prohibition on assistance broadly.

A textual analysis of Article 1 reveals that the language of the prohibition on assistance is unqualified and expansive. Article 1(1)(c) does not qualify the type of assistance.<sup>11</sup> For example, it does not specify that the assistance must be direct or active. Nor does it indicate

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<sup>7</sup> Convention on Cluster Munitions, art. 1(1)(c). This document will not address in detail the terms “encourage” and “induce” because state interpretations usually focus on the term “assist” and often ignore the other terms completely.

<sup>8</sup> *Ibid.*, art. 1(1).

<sup>9</sup> Vienna Convention on the Law of Treaties, art. 31(1).

<sup>10</sup> *Ibid.*, art. 31(2).

<sup>11</sup> Convention on Cluster Munitions, art. 1(1)(c).

the level of contribution required to count as unlawful assistance. The provision also adopts the language of a categorical prohibition. Article 1(1)'s chapeau states that states parties must "never under any circumstances" engage in activities, such as assistance, that are prohibited by the convention.<sup>12</sup> Paragraph 1(c) under that chapeau broadens the application by proscribing assistance to "anyone" to engage "in any activity" involving cluster munitions; "anyone" includes states parties, non-states parties, and non-state actors such as armed rebel groups, private companies, and individuals.<sup>13</sup> The language of Article 1 makes clear that the prohibition on assistance is designed to apply to all situations.

The object and purpose of the Convention on Cluster Munitions evident in the preamble and other articles also support a broad understanding of the ban on assistance. The preamble articulates the goal of the convention: to eliminate cluster munitions and to bring an end to their harm. It declares that states are "determined to put an end for all time to the suffering and casualties caused by cluster munitions" during and after attacks. It says that states parties are determined to ensure the "rapid destruction" of stockpiles and efficient and effective clearance of cluster munition duds, both of which will reduce the ongoing threat of the weapons. The preamble also emphasizes the importance of achieving adherence of all states and says that states parties are determined to "work strenuously" towards universalization and implementation. Extending the convention's scope even further, it calls on states parties not to permit non-state armed groups, "under any circumstances," to counter prohibitions of the Convention on Cluster Munitions.<sup>14</sup> Other articles, such as Article 3 on stockpile destruction and Article 4 on clearance, reinforce that the purpose is to rid the world of cluster munitions.<sup>15</sup> Together the preamble and text clearly convey the convention's intent to apply in all situations and to all forces. To fulfill the convention's expressed purpose, the prohibition on assistance must have an equally broad application.

The understanding of the act of assistance should encompass direct assistance, i.e., a link in a chain of events that leads straight to a prohibited activity, and indirect assistance, i.e., an action that is more removed from, but proximately facilitates, such a chain of events. It should also encompass active assistance, i.e., a form of participation that advances an activity prohibited by the convention, or passive assistance, i.e., an abdication of responsibility for matters under the state's control that allows others to engage in a prohibited activity. Assistance should be understood as any act or omission that proximately

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<sup>12</sup> *Ibid.*, art. 1(1).

<sup>13</sup> *Ibid.*, art. 1(1)(c).

<sup>14</sup> *Ibid.*, pmb. (emphasis removed).

<sup>15</sup> *Ibid.*, arts. 3 and 4.

contributes to anyone's engagement in an activity prohibited to a state party under the convention.

## **Precedent from Mine Ban Treaty Interpretation and Policy**

Experience with the 1997 Mine Ban Treaty, the most important precedent for the Convention on Cluster Munitions, can inform interpretation of Article 1(1)(c). Cluster munitions that fail to explode on impact as designed leave behind large numbers of so-called "duds" that function like antipersonnel landmines, and comparable concerns regarding the significant humanitarian harm caused by the two weapons led to the treaties banning them. The treaties themselves are also parallel in many ways. The Convention on Cluster Munitions borrows its structure and much language from the Mine Ban Treaty. The prohibitions on assistance are nearly identical.<sup>16</sup> The history of mine ban interpretation and policy can therefore provide guidance on how to understand assistance in the analogous cluster munition context.

States expressed similar concerns about joint military operations and the prohibitions on assistance in the Mine Ban Treaty and the Convention on Cluster Munitions. In both cases, states were worried about the treaties' effects on joint operations because allies that did not become states parties might use the banned weapons.<sup>17</sup> In the Mine Ban Treaty context, states addressed the issue by clarifying their positions in national statements and national laws, rather than adopting a separate article, as was done with Article 21 of the Convention on Cluster Munitions. While the states negotiating these treaties dealt with the same fears in different ways, more than a decade of Mine Ban Treaty experience shows that a broad prohibition on assistance is compatible with joint operations, such as those under UN or NATO auspices. Over a decade of discussions, most states parties to the Mine Ban Treaty have agreed that the treaty allows participation in such operations, yet they have maintained an expansive understanding of the prohibition on assistance.

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<sup>16</sup> The two treaties have identical prohibitions on assistance, except that the Convention on Cluster Munitions does not contain the phrase "in any way." The Mine Ban Treaty states: "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." Mine Ban Treaty, art. 1(1)(c).

<sup>17</sup> For a discussion of the issue in the landmine context, see International Campaign to Ban Landmines, *Landmine Monitor Report 1999: Executive Summary* (New York: Human Rights Watch, 1999), p. 10. For individual country studies, see International Campaign to Ban Landmines, *Landmine Monitor Report 1999: Toward a Mine Free World* (New York: Human Rights Watch, 1999), pp. 348-350 (on Australia), 221-223 (on Canada), and 676-678 (on the United Kingdom). For a discussion of the issue in the cluster munition context, see, for example, Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, and United Kingdom, "Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations," discussion paper distributed at the Wellington Conference on Cluster Munitions, February 18-22, 2008.

Since entry into force of the Mine Ban Treaty, states parties have generally understood the prohibition on assistance provision to cover a wide range of conduct.<sup>18</sup> A large number of states parties have accepted the following principles as governing relations with non-states parties that may use antipersonnel mines. At least 43 states parties have declared they will not participate in planning and implementation of activities tied to the use of antipersonnel mines in joint operations.<sup>19</sup> More specifically, many states parties have agreed that states parties may NOT:

- participate in the planning for use of antipersonnel mines;
- agree to rules of engagement that permit use of the weapon;
- accept orders to use, request others to use, or train others to use the weapon;
- knowingly derive military benefit from the use of the weapon by others; or
- provide security, storage, or transportation for antipersonnel mines.

Moreover, nearly all states parties expressing views have agreed that transit of antipersonnel mines through the national territory of a state party is prohibited,<sup>20</sup> and many have asserted that investment in the production of antipersonnel landmines constitutes unlawful assistance.<sup>21</sup>

Nations that often conduct joint operations, such as Australia, Canada, and the United Kingdom, are among those that have expressed such understandings. In a 2003 document, Australia wrote that it “will not participate in planning or implementation of activities related to anti-personnel mine use in joint operations.”<sup>22</sup> States including Canada, France, Germany, Italy, and the United Kingdom (all of which are NATO members) have said they would reject

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<sup>18</sup> Unless otherwise noted, information for this section comes from Landmine Monitor Fact Sheet, prepared by Human Rights Watch, “A Prohibition on Assistance in a Future Convention Banning Cluster Munitions: The Mine Ban Treaty Experience,” February 2008, <http://www.icbl.org/lm/factsheets> (accessed May 30, 2009).

<sup>19</sup> The states parties referenced are: Albania, Australia, Belgium, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Japan, Kenya, Luxembourg, Macedonia FYR, Malaysia, Mexico, Moldova, Namibia, the Netherlands, New Zealand, Norway, Portugal, Qatar, Senegal, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tanzania, Turkey, the United Kingdom, Uruguay, Yemen, Zambia, and Zimbabwe.

<sup>20</sup> The states parties referenced include: Albania, Austria, Bosnia & Herzegovina, Brazil, Cameroon, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Guinea, Hungary, Italy, Macedonia FYR, Malaysia, Mexico, Moldova, Namibia, New Zealand, Portugal, Samoa, Senegal, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom, Yemen, and Zambia.

<sup>21</sup> For example, in a memorandum to Norway’s Ministry of Finance, the Petroleum Fund Advisory Commission on International Law stated that because the Mine Ban Treaty “goes far in prohibiting any form of assistance...[i]t is presumed that even a *modest* investment could be regarded as a violation.” Memorandum from the Petroleum Fund Advisory Commission on International Law to the Norwegian Ministry of Finance, “Question of Whether Investments in Singapore Technologies Engineering Can Imply a Violation of Norway’s International Obligations,” March 22, 2002, <http://www.regjeringen.no/nb/dep/fin/tema/andre/Etiske-retningslinjer/Advisory-Commission-Documents/Advisory-Commission-220302si-.html?id=413581> (accessed May 30, 2009) (emphasis added).

<sup>22</sup> Landmine Monitor Fact Sheet, “A Prohibition on Assistance,” p. 3.

rules of engagement permitting antipersonnel landmine use or orders to use the weapons.<sup>23</sup> Canada stated in 2001 that it would “not agree to Rules of Engagement which authorize the use by the combined force of anti-personnel mines.”<sup>24</sup> The United Kingdom said in 2003 that it “has a broad interpretation of assistance” and went on to state, “Unacceptable activities include: planning with others for the use of anti-personnel mines (APM); training others for the use [of] APM; agreeing [to] Rules of Engagement permitting the use of APM; agreeing [to] operational plans permitting the use of APM in combined operations; requests to non-States Parties to use APM; and providing security or transport for APM.... UK forces should not seek to derive direct military benefits from the deployment of APM in combined operations.”<sup>25</sup>

Despite their generally broad interpretation of assistance, Australia and Canada were among eight states parties to say they believe only “direct” or “active” assistance is prohibited, maintaining that such a distinction is needed to offer adequate legal protections to their soldiers.<sup>26</sup> While they should ideally have included indirect and passive assistance as well, their statements on specific policies support a generally broad prohibition on assistance.

Most of the Mine Ban Treaty states parties that have taken broad positions on the prohibition on assistance have signed the Convention on Cluster Munitions. All but 9 of the 43 Mine Ban Treaty states that have prohibited assistance with planning and implementation of antipersonnel landmine use in joint operations, for example, are signatories of the Convention on Cluster Munitions, including Australia, Canada, France, Germany, and the United Kingdom. Given the overlapping support for the Mine Ban Treaty and the Convention on Cluster Munitions, these examples of a broad understanding of assistance in the context of the former treaty should apply equally well in the context of the latter.

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<sup>23</sup> *Ibid.*, p. 2.

<sup>24</sup> *Ibid.*, p. 4.

<sup>25</sup> Statement of the United Kingdom, “Intervention on Article 1,” Standing Committee on the General Status and Operation of the Convention, Mine Ban Treaty Intersessional Standing Committee Meetings, Geneva, May 16, 2003, [http://www.apminebanconvention.org/fileadmin/pdf/mbc/IWP/SC\\_may03/speeches\\_gs/UK\\_Art\\_1.pdf](http://www.apminebanconvention.org/fileadmin/pdf/mbc/IWP/SC_may03/speeches_gs/UK_Art_1.pdf) (accessed May 30, 2009).

<sup>26</sup> The states parties referenced are: Australia, Canada, the Czech Republic, New Zealand, Sweden, the United Kingdom, Zambia, and Zimbabwe. Australia’s 1999 National Declaration on the Mine Ban Treaty stated that it “will interpret the word ‘assist’ to mean the actual and direct physical participation” in any banned activity, “but does not include permissible indirect support.” Australia’s Declaration upon Ratification [of the Mine Ban Treaty], January 14, 1999, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-5&chapter=26&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-5&chapter=26&lang=en) (accessed May 31, 2009).



## **Article 21: Relations with States Not Party to the Convention**

Assistance with a prohibited act would most likely involve states that are not party to the Convention on Cluster Munitions. Article 1(1)(c) thus must be read in conjunction with Article 21 on “Relations with States not party to this Convention.” Analyzed according to its context and the object and purpose of the convention, the article should be understood as a clarification and not a limitation of Article 1(1)(c).

### **Paragraphs 1 and 2**

Article 21’s first two paragraphs strengthen the convention by requiring states parties to press non-states parties to join it or at least to accept its norms. They state:

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.
2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.<sup>27</sup>

Article 21(1) requires states parties to strive for universalization of the convention. In other words, it binds states parties to urge other states both to join and to act in accordance with the convention. As discussed above, states parties make a commitment to work toward universalization in the preamble; this paragraph makes meeting that pledge obligatory.<sup>28</sup>

Article 21(2) lays out three further steps states parties must take when relating to non-states parties. First, they must notify non-states parties of their “obligations under this Convention.” During joint military operations, such notification should occur at the military as well as political level. In addition to demonstrating opposition to cluster munitions, rigorous notification would help insulate state parties against participation in prohibited acts because, once informed, allies would presumably not want to put them in problematic situations. The duty of notification entails repetition at various military levels for the same

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<sup>27</sup> Convention on Cluster Munitions, art. 21(1-2).

<sup>28</sup> *Ibid.*, pmb. and art. 21(1).

reason: to help ensure states parties are protected against unlawful participation as new rules of engagement are developed or successive operations are planned or undertaken. Second, states parties must take positive action to “promote the norms” of the convention. The norms are found in the rest of the convention and include both preventive and remedial measures. Finally, and particularly important to this discussion, states parties shall make their “best efforts” to discourage non-states parties from using cluster munitions. This provision is more than a mere notification requirement. In the context of joint military operations, it would imply that states parties have a positive duty both to ascertain whether and how a non-state party is intending to use cluster munitions and actively to discourage such use at every stage of military planning and operations, including by withholding assistance.<sup>29</sup>

Paragraphs 1 and 2 of Article 21 are groundbreaking provisions for a weapons treaty. At least six other treaties, including the Mine Ban Treaty and the Chemical Weapons Convention, have provisions prohibiting assistance, yet none establishes comparable obligations guiding relations with non-states parties.<sup>30</sup> These innovative paragraphs go beyond banning the use, production, transfer, and stockpiling of cluster munitions and assistance with any of the above activities. They also impose positive duties on states parties to ensure that the convention’s norms are spread widely. They require states parties to abide by the rules of the convention in all contexts and to try to persuade others to do the same. Signatory states have said little so far on how they intend to implement these two important paragraphs; Human Rights Watch encourages them to do so as soon as possible, and publicly, in order to establish appropriate state practice in these new areas.

### **Paragraphs 3 and 4**

Paragraphs 3 and 4 expand on relations with non-states parties in the specific context of “military cooperation and operations.” They state:

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

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<sup>29</sup> *Ibid.*, art. 21(2).

<sup>30</sup> For articles prohibiting assistance, see *Seabed Arms Control Treaty*, art. 1; *Biological Weapons Convention*, art. 3; *Environmental Modification Treaty*, art. 1(2); *Comprehensive Nuclear Test Ban Treaty*, art. 1(2); *Chemical Weapons Convention*, art. 1(1); *Mine Ban Treaty*, art. 1(1)(c).

4. Nothing in paragraph 3 of this Article shall authorise a State Party:
  - a. To develop, produce or otherwise acquire cluster munitions;
  - b. To itself stockpile or transfer cluster munitions;
  - c. To itself use cluster munitions; or
  - d. To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.<sup>31</sup>

Paragraph 3 clarifies that participation in joint operations is allowed. The permissibility of “mere participation” is a widely accepted principle on which states and civil society have agreed.<sup>32</sup> Paragraph 4 identifies some of the activities not permitted during these operations. When read in light of their context and the general purpose of Article 21 and the convention, these provisions are consistent with a strong prohibition on assistance.

While clearly permitting participation in joint military operations, paragraph 3 should be understood as not encompassing military cooperation that involves assistance with prohibited acts. The paragraph does not state that states parties may participate by using, producing, transferring, or stockpiling cluster munitions, or by assisting with any of the above. Paragraph 3 requires engagement in joint operations to be “in accordance with international law,” which includes the Vienna Convention and its customary rules of treaty interpretation. As discussed above, the purpose of the convention is to eliminate cluster munitions and to end the suffering of cluster munition victims “for all time.”<sup>33</sup> It would be inconsistent with that purpose to understand paragraph 3 as waiving the obligations of Article 1, including the prohibition on assistance, during joint operations. On the adoption of the text of the convention, Iceland noted that paragraph 3 “should not be read as entitling States Parties to avoid their specific obligations under the Convention for this limited purpose,” i.e., joint military operations.<sup>34</sup>

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<sup>31</sup> Convention on Cluster Munitions, art. 21(3-4).

<sup>32</sup> For a discussion of mere participation in the Convention on Cluster Munitions context, see, for example, Proposition No. 7 (2008-2009) to the Odelsting, in Excerpts from 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,” <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/02/norwegian-national-legislation-on-cluster-munitions.pdf> (accessed May 30, 2009) (“Norwegian Legislation and Commentary”), p. 9; Statement of the Cluster Munition Coalition, “Intervention to the Committee of the Whole on Interoperability,” Dublin Diplomatic Conference on Cluster Munitions, May 19, 2008, <http://www.hrw.org/en/news/2008/05/19/dublin-diplomatic-conference-cluster-munitions-intervention-committee-whole-interope> (accessed June 17, 2009). For a discussion of mere participation in the Mine Ban Treaty context, see Stuart Maslen, *Commentaries on Arms Control Treaties: Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Oxford: Oxford University Press, 2005).

<sup>33</sup> Convention on Cluster Munitions, pmbl.

<sup>34</sup> Statement of Iceland, “Statement by the Government of Iceland upon the Adoption of the Convention on Cluster Munitions,” Dublin Diplomatic Conference on Cluster Munitions, CCM/CRP/2, May 30, 2008, [http://www.clustermunitionsdublin.ie/pdf/CCMCRP2.Icelandicstatementpdf\\_000.pdf](http://www.clustermunitionsdublin.ie/pdf/CCMCRP2.Icelandicstatementpdf_000.pdf) (accessed June 14, 2009).

Paragraph 4, which specifies some activities not allowed during joint operations,<sup>35</sup> should be understood as an illustrative list that reinforces the general prohibitions of the convention. Such a reading would accord with the intention to eliminate of cluster munitions and their harm. If the list were considered exhaustive, by contrast, states parties could arguably participate in many acts of assistance that run directly counter to the convention's purpose. They could participate in planning an attack in which a non-state party used cluster munitions, host foreign stockpiles, provide security for stores of the weapons, refuel vehicles transporting cluster munitions, provide transportation of cluster munitions to the battlefield, identify the targets for cluster munition attacks, or even call in the strikes. They could, in essence, load the gun so long as they did not pull the trigger.

Interpreted as exhaustive, Article 21(4) would also directly contradict Article 21(2)'s various requirements that states parties advocate for the convention's purpose. Given that that paragraph obligates states parties to use "best efforts" to discourage use by others, paragraph 4 should be read not to permit some forms of assistance with that use. The notion that this is an exhaustive list is even more problematic if encouragement and inducement, actions prohibited along with assistance in Article 1(1)(c) and also not included in paragraph 4, are taken into account. An article, which should have a unified and coherent purpose, cannot logically require discouragement of use in one paragraph and then by implication allow encouragement of that use in another. Paragraph 4 should therefore be understood as supporting Article 1's prohibitions, rather than excluding some of them by omission.

Several states have read paragraph 4 as an illustrative list. Ireland, which served as the host and the president of the negotiations, has stated that the activities "expressly enumerated in Article 21(4)" are not the only acts prohibited.<sup>36</sup> Upon the adoption of the text of the convention in Dublin, Iceland said that "listing some examples in paragraph 4 cannot therefore be interpreted to allow departures in other respects."<sup>37</sup> Also at the adoption, Norway specifically stated that Article 21 "does not create loopholes."<sup>38</sup>

Article 21 was one of the most controversial articles during the final negotiations of the convention in Dublin.<sup>39</sup> Many states and the Cluster Munition Coalition (CMC) argued for

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<sup>35</sup> Convention on Cluster Munitions, art. 21(4).

<sup>36</sup> Department of Foreign Affairs of Ireland, "Note on the Measures Taken by Ireland to Implement Article 21 of the Convention on Cluster Munitions," March 11, 2009, p. 1, attached to Letter from Dáithí O'Ceallaigh, ambassador, Permanent Mission of Ireland to the United Nations in Geneva, to Thomas Nash, coordinator, Cluster Munition Coalition, March 16, 2009.

<sup>37</sup> Statement of Iceland, May 30, 2008.

<sup>38</sup> Statement by Steffen Kongstad, ambassador of Norway, Dublin Diplomatic Conference on Cluster Munitions, May 30, 2008, <http://www.clustermunitionsdublin.ie/pdf/Norway.pdf> (accessed June 16, 2009).

<sup>39</sup> Information on the negotiations comes from Human Rights Watch notes on the May 2008 Dublin Diplomatic Conference on Cluster Munitions, as well as the sources cited.

following the model of previous treaties, such as the Mine Ban Treaty, by including just Article 1(1)(c). They said national declarations would be sufficient to address concerns about joint operations, as they had been in the case of the Mine Ban Treaty and five other weapons instruments.<sup>40</sup> Other states, primarily US allies, said that cluster munitions posed different problems than landmines because they were more likely to be used by non-states parties.<sup>41</sup> These states claimed to need Article 21 to continue joint operations and to protect their troops from unfair prosecution for accidental assistance.<sup>42</sup> Regardless of the motivation for the article's inclusion, states should interpret it so that it does not undercut the humanitarian purpose of the treaty.

Some of the states that pressed for Article 21 have expressed informally to Human Rights Watch the view that assistance—even intentional or deliberate assistance—with the use, transfer, and stockpiling of cluster munitions is allowed during joint operations. They contend that “notwithstanding the provisions of Article 1” means that paragraph 3 overrides the prohibitions laid out in the convention's first article, except for those instances listed in paragraph 4. They also consider paragraph 4 to be an exhaustive list of activities prohibited during joint operations, which would permit states parties to engage in a wide range of other actions. As described above, such an interpretation would make Article 21 internally inconsistent and be incompatible with the convention's overarching purpose. In accordance with international rules of treaty interpretation, Article 21(3) and (4) should not be understood to permit states parties to assist with any action prohibited by Article 1.

While the meaning of Article 21 has been debated, too little emphasis has been placed on the role it plays in strengthening the Convention on Cluster Munitions. The positive obligations to universalize and proactively to advance the convention are groundbreaking provisions in weapons regulation. Paragraphs 3 and 4, when read in light of the object and purpose of Article 21 and the rest of the convention, clarify the acceptable relations between states parties and states not party and are consistent with a strong understanding of Article 1.

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<sup>40</sup> See, for example, Statement of the Cluster Muniton Coalition, May 19, 2008. See also statements opposing inclusion of Article 21 by Argentina, Mexico, and Venezuela in “Summary Record of Tenth Session of the Committee of the Whole,” Dublin Diplomatic Conference on Cluster Munitions, CCM/CW/SR/10, May 26, 2008.

<sup>41</sup> See, for example, Australia et al., “Cluster Munitions and Inter-Operability,” p. 2.

<sup>42</sup> See, for example, “Summary Record of Ninth Session of the Committee of the Whole,” Dublin Diplomatic Conference on Cluster Munitions, CCM/CW/SR/9, May 23, 2008.

## Implementation and Interpretation of the Prohibition on Assistance

While the Convention on Cluster Munitions has not yet entered into force, signatories are already beginning to implement and interpret the new convention.<sup>43</sup> On December 2, 2008, Ireland became the first state to pass domestic legislation as a precursor to its signature and ratification the next day. Its Cluster Munitions and Anti-Personnel Mines Act 2008 includes multiple provisions related to assistance.<sup>44</sup> The parliaments of Austria, Germany, Luxembourg, and Norway have also produced legislation to implement the Convention on Cluster Munitions; however, these countries' laws either do not address the prohibition on assistance or mention it only briefly.<sup>45</sup> These five states and others have also issued statements explaining their understandings of Article 1(1)(c) and Article 21. Most initial understandings accord with a strong reading of the prohibition on assistance.

Ireland was a leader in the process that created the Convention on Cluster Munitions and in its implementation legislation adopted an all-encompassing general article on assistance. Its law includes a strong prohibition on assistance, borrowing language directly from the convention to criminalize it. Section 6(2) states, “[A] person who assists, encourages or induces a person to commit an offence under *subsection (1)* [a list of activities prohibited by the convention] is guilty of an offence.”<sup>46</sup> This language does not qualify “assist” and allows for an expansive understanding of the term.

Section 7(4) of the Irish legislation, however, could be seen as overriding this broad prohibition during joint military operations with non-states parties. It states, “*section 6(2)* does not apply to any act done or omission made by any person” during joint military operations involving forces from states not party to the convention.<sup>47</sup> This provision could be read as making legal under domestic law a wide range of assistance with acts prohibited by

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<sup>43</sup> Article 9 of the Convention on Cluster Munitions requires states parties to take national implementation measures, including the imposition of penal sanctions for convention violations. Convention on Cluster Munitions, art. 9.

<sup>44</sup> Cluster Munitions and Anti-Personnel Mines Act 2008, No. 20 of 2008, <http://www.oir.ie/viewdoc.asp?fn=/documents/bills28/acts/2008/a2008.pdf> (accessed May 31, 2009).

<sup>45</sup> Federal Law on the Prohibition of Cluster Munition[s], *Federal Law Gazette*, no. 12/2008, as amended *Federal Law Gazette 1*, no. 41/2009; Gesetz zu dem Übereinkommen vom 30. Mai 2008 über Streumunition (Law for the Convention on Cluster Munitions from the 30<sup>th</sup> of May 2008), Drucksache 74/09, 2009, [http://www.umwelt-online.de/PDFBR/2009/0074\\_2Do9.pdf](http://www.umwelt-online.de/PDFBR/2009/0074_2Do9.pdf) (accessed May 31, 2009); Projet de Loi portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo, le 3 décembre 2008, Chambres des Deputé No. 5981, 2009, <http://www.sousmunitions.lu/la-position-luxembourgeoise/nouveau-projet-de-loi-du-19-decembre-2009/> (accessed May 31, 2009); Legislative Provisions, in Norwegian Legislation and Commentary.

<sup>46</sup> Cluster Munitions and Anti-Personnel Mines Act 2008, section 6(2).

<sup>47</sup> *Ibid.*, section 7(4).

the Convention on Cluster Munitions. During joint operations, the legislation prohibits only “expressly request[ing] the use of cluster munitions in cases where the choice of munitions used is within his or her exclusive control.”<sup>48</sup> This section’s permissiveness makes it a poor model for states that seek to uphold the absolute prohibition laid out in Article 1(1)(c) of the convention.

Ireland provided some important clarifications regarding its legislation in a March 11, 2009 statement attached to a letter to the CMC. This statement made similar points to those the government made during parliamentary debates on the legislation in 2008. The March 11 statement argues that the law must be read in light of other measures the country has taken to implement the convention. It highlights “amendment of military doctrine and training, review of Ireland’s policy on international peacekeeping and the deployment overseas of the Defence Forces, and integration into Irish Aid programmes of funding for assistance with clearance and destruction of cluster munitions and for their victims.”<sup>49</sup> While valuable supplements to legislation, such actions do not reduce the importance of a strong, unequivocal law that leaves little or no room for interpretation. National laws are binding, enduring, and critical to successful implementation of the Convention on Cluster Munitions.

Although it does not go as far as Human Rights Watch is advocating, the Irish March 11 statement supports a strong and broad understanding of the prohibition on assistance. Referring to Ireland’s implementation legislation, it explains, “The purpose of section 7(4) of the Act is not to enable assistance with prohibited acts.... Rather, this provision is intended to ensure that no person may be prosecuted for an act or omission that might otherwise constitute assistance but is unintended or inadvertent, or has only a remote or indirect relationship to the commission of a prohibited act by a state not party to the Convention.”<sup>50</sup>

The statement also says with regard to the Convention on Cluster Munitions that “Ireland shares the concerns of others” that Article 21 might lead to a broad interpretation of activities allowed during joint operations. It continues: “It is Ireland’s view that ‘permitted activity’ in the circumstances of military co-operation is limited not just by the express prohibitions set out in Article 21(4), but further limited by two other important considerations.”<sup>51</sup> First, Article 21(2) requires states parties to promote the convention’s norms and discourage use by others, obligations that are inconsistent with assistance with

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<sup>48</sup> *Ibid.*, section 7(5).

<sup>49</sup> Department of Foreign Affairs of Ireland, “Note,” p. 1.

<sup>50</sup> *Ibid.*, p. 1. As discussed earlier, however, the prohibition on assistance should be understood to encompass indirect assistance, which this statement seems to permit.

<sup>51</sup> *Ibid.*

prohibited acts. According to the statement, “[i]t is Ireland’s view that any deliberate assistance in the commission of an act prohibited by the Convention in the context of military co-operation with a state not party will be inconsistent with this obligation to make its best efforts to discourage the use of cluster munitions by the latter and that Article 21(3) must be interpreted accordingly.”<sup>52</sup> Second, under international law, treaties must be interpreted in good faith, which, the statement asserts, means that states parties cannot arrange for non-states parties to take prohibited actions on their behalf.<sup>53</sup> Ireland thus treats Article 21(4)’s list of activities prohibited during joint operations as non-exhaustive. Such a reading of the Convention on Cluster Munitions generally accords with a strong prohibition on assistance.

The March 11 statement notes that, for Ireland, joint peacekeeping operations with non-states parties are the most likely scenarios in which Article 21 would apply. It explains that during these operations, “in accordance with Article 21(2) every effort will be made in the elaboration of codes of conduct, rules of engagement, caveats and similar agreements prepared for the mission to ensure that there is no prospect of cluster munitions being used in such a mission. This is a policy imperative for Ireland.”<sup>54</sup> The statement adds that “appropriate orders” will be issued to the Irish peacekeeping contingent “to ensure that under no circumstances does any member of it deliberately assist, encourage or induce the commission of an act prohibited by the Convention by a non-party state. Any breach of such orders will constitute an offence punishable under military law.”<sup>55</sup> This position on peacekeeping reiterates that presented by the minister of foreign affairs during the parliamentary debates about the legislation.<sup>56</sup>

Like Ireland’s statement, Norway’s draft implementation legislation and two accompanying explanatory commentaries for parliament support a strong understanding of the prohibition on assistance. The law itself, which is expected to enter into force when the convention does, criminalizes assistance, which it refers to as “aiding and abetting.”<sup>57</sup> It does not address joint operations or elaborate on how aiding and abetting apply in such circumstances, but

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* While noting the importance of Article 21(2), the statement explains that the first two paragraphs of Article 21 do not require domestic legislation so do not appear in the 2008 Act. The obligations “are implemented on the plane of policy. Military doctrine has been amended to reflect them. Any failure to observe them will engage Ireland’s responsibility in international law.” *Ibid.*, pp. 3-4.

<sup>54</sup> *Ibid.*, p. 2.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, p. 1.

<sup>57</sup> Legislative Provisions, section 3, in Norwegian Legislation and Commentary, p. 1. According to that section, a person who aids and abets with acts that are prohibited under the Convention on Cluster Munitions is subject to a fine or imprisonment not exceeding two years.



the commentaries discuss these issues. They specify that the prohibition on assistance applies even during joint operations. One commentary states, “Article 21 cannot be interpreted as meaning that co-responsibility [i.e., responsibility for assistance] is generally excluded in international operations.”<sup>58</sup> The other adds, “The exemption for military cooperation does not authorise the States Parties to engage in activities prohibited by the Convention.”<sup>59</sup> As laid out in Article 1, assistance is one of those activities. This broad application of the prohibition on assistance shows that Norway does not view Article 21(4) as an exhaustive list of activities banned during joint operations. According to Norway, the final language of Article 21 “does not circumvent other provisions of the Convention, which if it had, could have undermined confidence in the Convention.”<sup>60</sup> Norway, which initiated the Oslo Process that produced the Convention on Cluster Munitions, understands the new convention to prohibit assistance even during joint operations.

Other signatories have taken a similarly strong position on assistance since the adoption of the Convention on Cluster Munitions. They have not yet passed implementation legislation but have offered their interpretations in public statements and letters solicited by Human Rights Watch for a recent report on government policy and practice.<sup>61</sup> Human Rights Watch sent letters to 165 countries, including all signatories of the convention, requesting information on use, production, transfer, and stockpiling, as well as on issues of treaty interpretation, such as the meaning of the prohibition on assistance. Forty-one states replied.

Ecuador called for vigilance to ensure that Article 21 is never used to justify any derogation from the convention’s core prohibitions, which would include assistance.<sup>62</sup> Lebanon asserted that Article 1(1)(c) of the convention takes precedence over Article 21, which “does not allow any assistance with prohibited acts.”<sup>63</sup> Mexico wrote that “even when a State Party does not itself engage in prohibited activities during a joint military operation with States not Party to the Convention, deliberately providing assistance for the execution of prohibited

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<sup>58</sup> Proposition No. 7 (2008-2009) to the Odelsting, in Norwegian Legislation and Commentary, p. 11.

<sup>59</sup> Excerpt from Proposition No. 4 (2008-2009) to the Storting, in Norwegian Legislation and Commentary, p. 23.

<sup>60</sup> *Ibid.*

<sup>61</sup> Human Rights Watch and Landmine Action, *Banning Cluster Munitions: Government Policy and Practice* (Canada: Mines Action Canada, 2009), <http://lm.icbl.org/index.php/publications/display?url=cm/2009/> (accessed June 16, 2009). For information on the prohibition on assistance, see pp. 24-26.

<sup>62</sup> Presentation of Ecuador, “Interpretive Statement,” Quito Regional Conference on the Convention on Cluster Munitions, November 6, 2008, <http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/11/ecuador-interpretative-statement.pdf> (accessed May 31, 2009); and Cluster Munition Coalition, “Quito Regional Conference on the Convention on Cluster Munitions,” November 2008, <http://www.stopclustermunitions.org/calendar/?id=807> (accessed May 31, 2009).

<sup>63</sup> Letter from the Permanent Mission of Lebanon to the United Nations in Geneva, to Human Rights Watch, February 10, 2009.

activities is not allowed.”<sup>64</sup> Zambia stated that it does not believe that states parties should “in any way assist the use [or] transfer of cluster bombs within or without their territories in the name of joint operations.”<sup>65</sup> Bulgaria declared Article 21(4) exhaustive, but it also stated that participation in joint operations “shall not authorise a State Party’ to engage in acts prohibited under the terms of the Convention,” which would include assistance.<sup>66</sup> The majority of states that have to date publicly expressed opinions on the subject of assistance have supported a strong prohibition even during joint operations.

A few specific forms of assistance have attracted attention in early implementation and interpretation of the Convention on Cluster Munitions. Nine states—Bulgaria, Burkina Faso, Ecuador, Lebanon, Madagascar, Malta, Mexico, South Africa, and Zambia—have publicly stated or written to Human Rights Watch that they view transit of cluster munitions across their territory to be unlawful under the convention.<sup>67</sup> Of those that responded to Human Rights Watch’s inquiry, only the Netherlands has condoned transit of cluster munitions owned by non-states parties across its territory.<sup>68</sup> Several states—including Lebanon, Luxembourg, Mexico, and Norway—have also identified investment among the prohibited forms of assistance.<sup>69</sup> Norway noted that “investment, for example, in companies that develop or produce cluster munitions may fall within the scope of the Convention’s prohibition on aiding and abetting.”<sup>70</sup> Luxembourg’s new implementation legislation prohibits knowingly financing cluster munitions.<sup>71</sup> Although Ireland’s legislation does not limit its related rule to cluster munitions, it obligates investors to avoid investment of public money in munitions companies.<sup>72</sup> The Netherlands again, by contrast, explained that it

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<sup>64</sup> Letter from Ambassador Juan Manuel Gómez Robledo, undersecretary for multilateral affairs and human rights, Secretariat of Foreign Relations of Mexico, to Human Rights Watch, March 4, 2009 (courtesy translation provided by the Embassy of Mexico to the United States, Washington, DC).

<sup>65</sup> Letter from Kabinga J. Pande, minister of foreign affairs of Zambia, to Human Rights Watch, April 9, 2009.

<sup>66</sup> Letter from Dr. Petio Petev, director, Security Policy Directorate, Ministry of Foreign Affairs of Bulgaria, to Human Rights Watch, February 25, 2009.

<sup>67</sup> *Ibid.*; Letter from Paramanga Ernest Yonli, ambassador of Burkina Faso to the United States, to Human Rights Watch, April 6, 2009; Presentation of Ecuador, “Interpretive Statement,” November 6, 2008; Letter from the Permanent Mission of Lebanon, February 10, 2009; Statement by Marcel Ranjeva, minister of foreign affairs of Madagascar, Convention on Cluster Munitions Signing Conference, Oslo, December 3, 2008, [http://www.clusterconvention.org/pages/pages\\_i/documents/Madagascar312.pdf](http://www.clusterconvention.org/pages/pages_i/documents/Madagascar312.pdf) (accessed June 17, 2009); Letter from Saviour F. Borg, ambassador, Permanent Mission of Malta to the United Nations, to Human Rights Watch, March 2, 2009; Letter from Robledo, March 4, 2009; Letter from Xolisa Mabhongo, chief director, United Nations (Political), Department of Foreign Affairs of South Africa, to Human Rights Watch, March 12, 2009; Letter from Pande, April 29, 2009.

<sup>68</sup> Letter from Henk Swarttouw, director, Security Policy Department, Ministry of Foreign Affairs of the Netherlands, to Human Rights Watch, February 26, 2009.

<sup>69</sup> Letter from the Permanent Mission of Lebanon, February 10, 2009; *Projet de Loi portant approbation de la Convention sur les armes à sous-munitions*, art. 3; Letter from Robledo, March 4, 2009; Proposition No. 7 (2008-2009) to the Odelsting, in *Norwegian Legislation and Commentary*, p. 12.

<sup>70</sup> Proposition No. 7 (2008-2009) to the Odelsting, in *Norwegian Legislation and Commentary*, p. 12.

<sup>71</sup> *Projet de Loi portant approbation de la Convention sur les armes à sous-munitions*, art. 3.

<sup>72</sup> Cluster Munitions and Anti-Personnel Mines Act 2008, sections 11-15.

prefers to leave divestment to self-regulation by private parties.<sup>73</sup> While assistance encompasses much more, transit and investment exemplify types of activities that should be covered by a general prohibition.

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<sup>73</sup> Letter from Swarttouw, February 26, 2009.

## **Conclusion**

According to the law of treaty interpretation, the Convention on Cluster Munitions should be read to treat assistance broadly and to prohibit it in all situations. Initial state practice, in the main, is consistent with this understanding of Articles 1 and 21. Although there are to date few laws implementing the convention, national statements offer guidance for how to articulate a strong interpretation of assistance. These positions should inform future implementation measures. In particular, new laws should take a broad view of assistance and prohibit it explicitly during joint military operations.