



Interoperability and the Prohibition on Assistance

One of the convention's most basic and important provisions is the prohibition on assistance with prohibited acts. Article 1 of the convention obliges States Parties "never under any circumstances to...assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention." Yet during the Oslo Process, some states expressed concern about the application of the prohibition on assistance during joint military operations with countries that have not joined the convention. In response to these "interoperability" concerns, Article 21 on "Relations with States not Party to this Convention" was included in the convention. The CMC strongly criticized Article 21 for being politically motivated and for leaving a degree of ambiguity about how the prohibition on assistance would be applied in joint military operations.

Article 21 says that States Parties "may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party." It does not, however, negate a State Party's obligations under Article 1 to "never under any circumstances" assist with prohibited acts. Allowing assistance during joint military operations contravenes the object and purpose of the convention—to eliminate cluster munitions and the suffering they cause. Furthermore, the article requires States Parties to discourage use of cluster munitions by those not party and to promote universalization of the convention. Together Article 1 and Article 21 should have a unified and coherent purpose, as the convention cannot logically both require States Parties to discourage the use of cluster munitions and, by implication, allow them to encourage it.

In late 2010 and the first half of 2011, United States (US) Department of State cables made public by Wikileaks have shown the extent to which the US worked to influence the outcome of the Oslo Process on interoperability issues, despite not itself participating in the Oslo Process.¹ The US diplomatic cables made public by Wikileaks also show how the US has sought to interpret key provisions of the convention, particularly Article 21, since the adoption of the convention in May 2008. For example, in a December 2008 diplomatic demarche to Afghanistan, the State Department affirmed, "The United States reads the phrase 'military cooperation and operations' in Article 21 to include all preparations for future military operations, transit of cluster munitions through the territory of a State Party, and storage and use of cluster munitions on the territory of a State Party."²

The CMC has said, "States must make it clear that States Parties must not intentionally or deliberately assist, induce, or encourage any activity prohibited under this treaty—including use, transfer or stockpiling of cluster munitions—when engaging in joint operations with non-States Parties."³

¹ As of 1 August 2011, Wikileaks had made public a total of 57 US diplomatic cables, originating from 24 locations that relate to US concerns over the Oslo Process initiative. See www.cablegatesearch.net.

² US Department of State, "DEMARCHE TO AFGHANISTAN ON CLUSTER MUNITIONS," Cable 08STATE134777, 29 December 2008, released by Wikileaks on 1 December 2010, www.wikileaks.ch.

³ CMC, "CMC Briefing Paper on the Convention on Cluster Munitions," www.stopclustermunitions.org.

State policy and practice to date indicates a predominant view that the convention's Article 21 provision on interoperability should not be read as allowing states to avoid their specific obligation under Article 1 to prohibit assistance with prohibited acts.

At least 17 States Parties and signatories to the convention have indicated their basic agreement with this position, including four during the past year: Bosnia and Herzegovina (BiH), Hungary, Lao PDR, and Nicaragua. Eight other states have expressed more ambiguous views: Belgium, France, Montenegro, the Netherlands, New Zealand, Portugal, Sweden, and Switzerland. Three have stated disagreement with this view: Australia, Canada, and the United Kingdom (UK).

States that have indicated basic agreement with this view include:

- BiH's Ministry of Foreign Affairs informed the Monitor in July 2011 that "under Article 21, para 3, we may engage in joint military operations with non-states Parties that might engage in activities prohibited by the Convention, however our personnel or nationals should not provide assistance with activities prohibited by the Convention."⁴
- Colombia said in 2010 it "absolutely rejects and prohibits...military operations with states not party to the convention in which they carry out exercises or actions prohibited by the Convention."⁵
- Ecuador stated in 2008 that Article 21 should never be used to justify any derogation from the convention's core prohibitions and the article should not be interpreted as suspending other obligations under the convention. It said the spirit of Article 21 is to promote universalization of the convention.⁶
- Ghana said in 2008 that States Parties must not intentionally assist other states in using cluster munitions or committing other acts prohibited by the convention.⁷
- Guatemala said in 2009, "Guatemala would not participate in any military operation with States that use cluster munitions."⁸
- Holy See stated in 2008, "In relation to Article 21, joint military operations do not imply, in any way, a suspension of the obligations under the Convention. 'States Parties, their military personnel or nationals' shall never engage in activities prohibited by the Convention. On the contrary, joint military operations should be opportunities for States Parties to promote the standards introduced by the new instrument with the objective to protect civilians during and after armed conflicts."⁹
- Hungary's Minister of Foreign Affairs stated in 2011 that Hungary "believes that the Convention prohibits assistance of acts prohibited by the Convention to non-State Parties."¹⁰

⁴ Email from Anesa Kundurovic, Minister-Counsellor, Ministry of Foreign Affairs, 14 July 2011. Ms. Kundurovic noted that the views expressed to the Monitor "represent the position of MFA and may or may not differ from the interpretation of other relevant institutions, including but not limiting to the Ministry of Defence, Armed Forces, etc."

⁵ Response to Monitor questionnaire by the Ministry of Foreign Affairs, Colombia, 26 March 2010.

⁶ Presentation by Ecuador, "Interpretive Statement," Regional Conference on Cluster Munitions, Quito, 6 November 2008.

⁷ CMC, "Report on the Kampala Conference on the Convention on Cluster Munitions," 29–30 September 2008, www.stopclustermunitions.org.

⁸ Letter No. 136/ONU/09 from the Permanent Mission of Guatemala to the UN in Geneva, 19 March 2009.

⁹ Vatican, "Declaration Attached to the Instrument of Ratification to the Convention on Cluster Munitions," 21 November 2008, www.vatican.va.

¹⁰ Letter KÜM/6777/2011/ADM from János Martonyi, Minister of Foreign Affairs, 27 April 2011.

- Iceland said at the adoption of the convention in 2008 that the convention’s provision on interoperability “should not be read as entitling states parties to avoid their specific obligations under the convention for this limited purpose.”¹¹
- Ireland stated in 2009, “It 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.” It also noted that the purpose of a relevant provision in its national implementation law “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.”¹²
- Lao PDR’s Ministry of Foreign Affairs informed the Monitor in June 2011, “For us it is clear that we strongly support the full prohibition of cluster munitions, including those activities during the joint military operations....”¹³
- Lebanon wrote in 2009 that the convention’s prohibition on assistance took precedence over joint operations, and that Article 21 did not “allow any assistance with prohibited acts.”¹⁴
- Madagascar said in 2010 that “assistance to prohibited acts during joint military operations with non State Parties is not permitted by the Convention.”¹⁵
- Malawi stated in 2010 that “States Parties must not intentionally or deliberately assist, induce or encourage any prohibited activity” under the convention during joint military operations with states not party that may use cluster munitions.¹⁶
- Mexico stated in 2009 that “deliberately providing assistance for the execution of prohibition activities” is not allowed under the convention.¹⁷
- Nicaragua informed the Monitor in May 2011 that it “considers that assistance in prohibited acts performed in joint military operations is not permitted to the States Parties.”¹⁸
- Norway, in an explanatory annex to its 2009 implementing legislation, stated that “the exemption for military cooperation does not authorize states parties to engage in activities prohibited by the convention.”¹⁹

¹¹ Statement of Iceland, Dublin Diplomatic Conference on Cluster Munitions, 30 May 2008.

¹² Department of Foreign Affairs, “Note on the Measures Taken by Ireland to Implement Article 21 of the Convention on Cluster Munitions,” 11 March 2009.

¹³ Email from Maytong Thammavongsa, Director of UN, Political, and Security Affairs Division, Department of International Organizations, Ministry of Foreign Affairs, 1 June 2011.

¹⁴ Letter from Permanent Mission of Lebanon to UN in Geneva, 10 February 2009.

¹⁵ Letter from Amb. Rajemison Rakotomaharo, Permanent Mission of Madagascar to the UN in Geneva, 2 April 2010.

¹⁶ Statement by Maj. Dan Kuwali, Malawi Defence Force, “Promoting a Common Understanding of the Provisions of the Convention in Africa,” Africa Regional Conference on the Universalization and Implementation of the Convention on Cluster Munitions, Pretoria, 25 March 2010.

¹⁷ Letter from Amb. Juan Manuel Gómez Robledo, Secretariat of Foreign Relations of Mexico, to Human Rights Watch, 4 March 2009.

¹⁸ Response to Monitor from Alvaro Miguel Padilla Lacayo, Legal Advisor, Department of Democratic Security, Ministry of Foreign Affairs, 31 May 2011.

¹⁹ Excerpt from Proposition No. 4 (2008–2009) to the *Storting* of Norway on consent to ratification of the Convention on Cluster Munitions, p. 23.

- Slovenia said in 2010 that it will “not to participate in any military operation using cluster munitions during joint military operations with non-States Parties to the Convention.”²⁰

States that have expressed a more ambiguous view include:

- Belgium stated in 2009, “In the case where a State Party engages in cooperation or military operations with States non-parties, a series of guaranties are provided: the cooperation or the military operation must be in conformity with international law; each State Party must notify non-states parties of its obligations under the Convention; it must promote the norms established by the Convention and discourage non-states parties from using cluster munitions. Similarly, paragraph 4 [of Article 21] affirms the primacy of the fundamental obligations of the Convention, which cannot be derogated from, even in the framework of cooperative activities or military operations with States-non-party.”²¹
- France’s national implementation law of 2010 allows for participation in military operations with states not party that might engage in activities prohibited by the convention, but prohibits any French person acting in a joint military operation to use, develop, manufacture, otherwise acquire, stockpile, or transfer cluster munitions, or to use or request the use of cluster munitions, where the choice of ammunition is under their exclusive control.²²
- Montenegro said in 2010 that “participation in planning or implementation of operations, exercises or other military activities by the armed forces of Montenegro, performed in joint actions with armed forces of states not parties to the [Convention on Cluster Munitions] CCM, undertaking in activities prohibited by the CCM, are by itself not assistance, encouragement or initiative [sic] in accordance with Article 1, par (c) of the Convention.”²³
- The Netherlands noted in 2009 that States Parties should encourage others to accede to the convention and “try to discourage them from using cluster munitions.” But, “military cooperation with States not Party is still permitted, including operations where the use of cluster munitions cannot be ruled out.... The consequences of this article for NATO operations are currently being clarified.”²⁴ The ministers of foreign affairs and defense informed Parliament in March 2010 that the Netherlands would urge military partners from states not party to the convention not to use cluster munitions. In situations during joint military operations with states not party where the rules of engagement permit the use of cluster munitions, certain national

²⁰ Letter from Samuel Žbogar, Minister of Foreign Affairs, Slovenia, 20 April 2010.

²¹ This is contained in an explanatory memorandum to the decree approving the convention adopted by the Parliament of Brussels and to the draft law in the Senate. See Parliament of Brussels, “Ontwerp van ordonnantie houdende instemming met: het Verdrag inzake cluster munitie, gedaan te Dublin op 30 mei 2008 en ondertekend te Oslo op 3 december 2008” (“Draft decree approving the Convention on Cluster Munitions, adopted in Dublin on 30 May 2008 and signed in Oslo on 3 December 2008”), 13 October 2009, Legislative document A-14/1-G.Z. 2009, www.weblex.irisnet.be.

²² National Assembly, “Projet de loi tendant à l’élimination des armes à sous-munitions, Texte Adopté no. 508” (“Bill on the elimination of cluster munitions, Adopted text no. 508”), XIII Legislature, Extraordinary session of 2009–2010, 6 July 2010, Art. L. 2344-3, www.assemblee-nationale.fr.

²³ Response to Monitor questionnaire by Maja Boskovic, Third Secretary, Directorate for UN and Other International Organizations, Ministry of Foreign Affairs, 16 April 2010.

²⁴ Letter from Henk Swarttouw, Director, Security Policy Department, Dutch Ministry of Foreign Affairs, to Human Rights Watch, 26 February 2009.

reservations or “caveats” would be made by the Dutch government.²⁵ In June 2010, the Minister of Defense stated that these “caveats” would be presented to Parliament for confidential inspection in the case that the Netherlands would be sending troops.²⁶

- New Zealand’s national implementation legislation of 2009 clarifies that mere participation in joint operations is allowed, but a member of the armed forces may not expressly request the use of cluster munitions. The legislation does not explicitly or implicitly waive the prohibition on assistance during joint military operations.²⁷
- Portugal stated in 2010 that it will not use cluster munitions, “regardless of what country might be commanding military forces.”²⁸
- Sweden’s Article 7 report submitted in January 2011 states, “Article 21.3 makes clear that States Parties can participate in military cooperation and military operations with states not party to the Convention and which may engage in activities that are prohibited for a State Party. This does not imply any right of States Parties in these situations to violate the obligations of Article 1 of the convention or to explicitly request that cluster munitions shall be used in situations where the State Party has exclusive control over the selection of the munition used.”²⁹
- Switzerland’s Federal Department of Foreign Affairs’ report on the convention issued in October 2010 states that Switzerland cannot ask its allies to use cluster munitions in the framework of joint military operations, provided that the choice of munitions used is under its exclusive control.³⁰

Some states have indicated their view that the Article 1 prohibition on assistance with prohibited acts can be overridden by the Article 21 interoperability provisions.

- In Australia, the convention’s “interoperability” provisions have been widely debated as national implementing legislation has made its way through parliament since late 2010. The Australian Department of Defence has openly enumerated several activities banned by the convention that, under Australia’s proposed implementing legislation, would be allowed in joint military operations.³¹ For example, during joint military operations, Australian military personnel could help plan, provide intelligence for, and/or contribute logistical support to an operation, which may involve a cluster

²⁵ Maxime Verhagen, Minister of Foreign Affairs, and Eimert van Middelkoop, Minister of Defense, “Approval of the Convention on Cluster Munitions adopted on May 30 2008 in Dublin, Note with regard to the report,” 5 March 2010, zoek.officielebekendmakingen.nl. The Ministers further elaborated on the relation between Article 1c and Article 21: “Art 21, 3d paragraph, is an exception to article 1 and the 4th paragraph of art 21 is an exception to the 3d paragraph of art 21. Art 21 3d paragraph prevails above art 1, as long as it meets the criteria as laid out in the 4d paragraph. ... Art 21 3d paragraph is an exception to art 1, which does not free a state party from the obligation to abide with the core of the treaty.”

²⁶ Summary of the plenary debate on the “Approval of the Bill on the Convention on Cluster Munitions adopted on 30 May 2008 in Dublin,” 30 June 2010.

²⁷ New Zealand, Cluster Munitions Prohibition Act 2009, Public Act 2009 No. 68, 17 December 2009, sec. 10(3) and 11(6), www.legislation.govt.nz.

²⁸ Email from Luis Filipe Cunha, Directorate for Security and Defense Affairs, Unit of Disarmament and Non Proliferation, Ministry of Foreign Affairs, 5 July 2010.

²⁹ “Sveriges tillräde till konventionen om klusterammunition” (“Accession of Sweden to the Convention on Cluster Munitions”), Regeringskansliet Utrikesdepartementet (“Government Offices of Sweden”), Ds 2010:46, 2010, p. 27, www.svenskafreds.se.

³⁰ Federal Department of Foreign Affairs, “Ratification de la Convention du 30 mai 2008 sur les armes à sous-munitions et modification de la loi du 13 décembre 1996 sur la materiel de guerre: Rapport explicatif (projet) pour la procédure de consultation” (“Ratification of the Convention of 30 May 2008 on Cluster Munitions and the Amendment of the Law of 13 December 1996 on War Materials, Explanatory Report (Draft) for the Consultation Procedure”), October 2010, Section 6.2.

³¹ CMC, “Australia: Fix the Bill,” 10 May 2011, www.stopclustermunitions.org.

munition attack.³² The Australian government has stated that the prohibition on assistance “is subject to the exception contained in Article 21,” noting this provision “does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions.”³³

- In Canada, internal disagreement over how draft implementing legislation seeks to interpret Article 21 has apparently delayed Canada’s ratification of the convention and resulted in the resignation of the Canadian foreign affairs official who led Canada’s negotiating team during the Oslo Process.³⁴ Canada stated in June 2011 that its adoption of the convention text in Dublin was based on the understanding that “Article 21, paragraph 4, expressly and fully delineates activities prohibited” in the context of joint operations with states not party.³⁵
- The UK’s national implementation legislation contains a clause on interoperability.³⁶ In response to concerns that the clause could provide a loophole that would undermine the purpose of the convention and the UK’s legislation, the government responded that UK troops “would not be allowed to request use of [cluster] munitions where the choice of munitions was within their exclusive control,” but that “they could facilitate operations where [cluster munitions] might be used by a partner.”³⁷
- Japan has been reluctant to publicly discuss its views on Article 21,³⁸ but a June 2008 State Department cable made public by Wikileaks in June 2011, a senior Japanese official apparently told the US that Japan interprets the convention as enabling the US and Japan to continue to engage in military cooperation and conduct operations that involve US-owned cluster munitions.³⁹

³² Department of Defence, “Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010,” March 2011, senate.aph.gov.au.

³³ Australia, “Government Response to Joint Standing Committee on Treaties Report No 103 on the Convention on Cluster Munitions,” undated but released on 13 May 2010.

³⁴ Canadian disarmament diplomat Earl Turcotte resigned in March 2011 due to his concern over how the government planned to interpret Article 21 in its draft implementing legislation to, in Turcotte’s view, essentially allow Canada to “aid and abet’ the continued use of cluster bombs. Chris Cobb, “Cluster munitions expert Earl Turcotte to leave Foreign Affairs,” *The Ottawa Citizen*, 7 February 2011; and Mike Blanchfield, “Canadian ex-arms negotiator breaks silence on cluster bombs,” *The Star*, 1 April 2011, www.thestar.com.

³⁵ Statement of Canada, Convention on Cluster Munitions Intersessional Meetings, Session on Other Implementation Measures, Geneva, 30 June 2011.

³⁶ The clause states: “It is a defence for a person charged with an offence specified in any of paragraphs 1 to 6 of Schedule 2 [the prohibitions of the convention] to show that the person’s conduct took place in the course of, or for the purposes of, an international military operation or an international military co-operation activity.” Members in the UK House of Commons went to great lengths to seek clarification on the scope of this clause.

³⁷ Statements by John Redwood and Chris Bryant, UK House of Commons Debate, *Hansard* (London: Her Majesty’s Stationary Office, HMSO, 23 March 2010), Column 162, www.publications.parliament.uk.

³⁸ In June 2011, Japan stated that the use of cluster munitions in joint military operations is “totally under control” and warned the meeting that, “we should not discuss Article 21 here while the appropriate military officials are absent.” Statement of Japan, Convention on Cluster Munitions Intersessional Meetings, Geneva, 30 June 2011. Notes by the CMC and HRW.

³⁹ US Department of State, “Oslo convention on cluster munitions will not prevent U.S.-Japan military operations,” Cable dated 25 June 2008, released by Wikileaks on 16 June 2011, www.cablegatesearch.net.