

**THE MEANING OF “ASSIST, ENCOURAGE, OR INDUCE”
IN THE WEAPONS BAN CONTEXT**

Christina Koningisor¹

December 10, 2012

Executive Summary

More than half of all multilateral disarmament treaties currently in force prohibit member states from “assist[ing], encourag[ing], or induc[ing]” another party in its pursuit or use of the prohibited weapon. This report examines this provision across five major disarmament treaties and arrives at three key findings:

(1) *The provision is deliberately ambiguous.* There is no common definition of “assist, encourage, or induce.” The international community has deliberately and actively preserved the provision’s ambiguity. The evidence for this conclusion is found in the following:

- *Text:* The assistance provisions of the five weapons ban treaties were written over a span of forty years, and yet they have rarely been altered. The few modifications that have been made have generally not clarified its meaning.
- *Travaux Préparatoires:* Discussion of the assistance provision rarely appears. One issue that has received sustained attention is the impact of the assistance provision on interoperability between signatory and non-signatory states. But in an effort to accommodate the national security needs of states parties, the drafters of recent treaties have generally narrowed, rather than expanded, the reach of the assistance provision.
- *State Practice:* An analysis of a cross-section of various countries’ implementing legislation demonstrates that states’ implementing statutes have rarely clarified the meaning of the assistance provision. Moreover, there has been little state-driven effort to chastise member states for stretching or even violating the assistance provision’s terms.

(2) *The enforcement mechanisms are weak.* There are few mechanisms for enforcement embedded in the text of these treaties, and those that do exist have been weakened by member states’ right to unilateral withdrawal. Moreover, the international community has proven reluctant to enforce the assistance provision through extra-treaty sanctions. This suggests a tacit acceptance of the current approach toward interpreting and applying the provision.

(3) *There are both benefits and drawbacks to ambiguity.*

- *Ambiguity allows states latitude.* The ambiguity in the provision gives states wide latitude, lowering the cost of joining the treaties that contain it. In addition, states are able

¹ J.D. Candidate, Yale Law School. This report was prepared in connection with a course at Yale Law School, *International Law and Foreign Relations*, under the supervision of Professor Oona A. Hathaway and with the assistance of Sally Pei, Spencer Amdur, Julia Brower, Carlton Forbes, Ryan Liss, Aadhithi Padmanabhan, Michael Shih, Tina Thomas, and Jacob Victor.

to contract around the assistance provision—for example, a signatory state may engage in joint military operations with a non-signatory.

- *The United States has taken advantage of the provision's ambiguity.* In the United States, the provision has been interpreted differently in different contexts. When considering a bill to expand nuclear assistance to India, Congress applied a narrow understanding of the provision. Conversely, when faced with opposition to the passage of the Chemical Weapons Convention, advocates of the bill painted the provision as broad and powerful.
- *There are drawbacks to ambiguity.* The ambiguity in the provision enables states to circumvent the purpose of the treaties.

Contents

| | |
|--|----|
| I. FIVE WEAPONS BAN TREATIES | 4 |
| A. The Nuclear Non-Proliferation Treaty | 4 |
| 1. Travaux Préparatoires | 5 |
| 2. United States Ratification and Implementation | 7 |
| 3. State Practice..... | 8 |
| B. The Biological Weapons Convention..... | 12 |
| 1. Travaux Préparatoires | 13 |
| 2. United States Ratification and Implementation | 15 |
| 3. State Practice..... | 16 |
| C. The Chemical Weapons Convention..... | 17 |
| 1. Travaux Préparatoires | 17 |
| 2. United States Ratification and Implementation | 19 |
| 3. State Practice..... | 22 |
| D. The Mine Ban Treaty | 23 |
| 1. Travaux Préparatoires | 23 |
| 2. United States Ratification and Implementation | 24 |
| 3. State Practice..... | 24 |
| E. The Cluster Munitions Convention | 26 |
| 1. Travaux Préparatoires | 27 |
| 2. United States Ratification and Implementation | 28 |
| 3. State Practice..... | 28 |
| II. ENFORCEMENT MECHANISMS | 30 |
| A. Treaty Language..... | 30 |
| B. Unilateral Withdrawal | 32 |
| C. External Methods of Enforcement | 34 |
| III. THE BENEFITS AND DRAWBACKS TO AMBIGUITY | 35 |

This report examines the meaning of the phrase “assist, encourage, or induce” in the context of modern weapons-ban treaties. More than half of all multilateral disarmament treaties currently in force prohibit member states from “assist[ing], encourag[ing], or induc[ing]” another party in its pursuit or use of the prohibited weapon.² Yet despite the prevalence of these assistance provisions,³ there is no common definition of “assist, encourage, or induce” in the context of the multilateral disarmament treaty.⁴ This report concludes that this is deliberate. It argues that the international community has actively preserved the provision’s ambiguity.

The discussion surveys five major weapons ban treaties⁵: the 1968 Nuclear Non-Proliferation Treaty (NPT)⁶; the 1972 Biological Weapons Convention⁷; the 1993 Chemical Weapons Convention (CWC)⁸; the 1997 Mine Ban Treaty⁹; and the 2008 Convention on Cluster Munitions.¹⁰ It analyzes the text, *travaux préparatoires*, domestic legislative history, and state

² According to the United Nations Disarmament Treaties Database, there are 22 multilateral disarmament treaties currently in force. Eleven of these treaties contain an assistance provision. UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, DISARMAMENT TREATIES DATABASE, <http://disarmament.un.org/treaties/> (last visited Oct. 20, 2012) [hereinafter DISARMAMENT TREATIES DATABASE].

³ This memorandum uses the term “assistance provision” interchangeably with “assist, encourage, or induce.”

⁴ The meaning of “assistance” is not well-defined in international law. However, Article 16 of the Draft Articles on Responsibility of States for Intentionally Wrongful Acts may offer some guidance. It provides that “[a] state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that state.” Int’l L. Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 16, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 47, U.N. Doc. A/56/10 (2001).

⁵ This report examines the five category-specific weapons ban treaties that are global, currently in force, and contain an assistance provision. The United Nations lists twenty-four multilateral disarmament treaties in its database of disarmament treaties. DISARMAMENT TREATIES DATABASE, *supra* note 2. Only twenty-two of these treaties are currently in force. Of those treaties, only twelve contain an assistance provision. Five of those eleven treaties are regional treaties. Of the remaining seven treaties, only five govern a specific and entire category of weapon—nuclear weapons, biological weapons, chemical weapons, anti-personnel mines, and cluster munitions. The remaining two treaties prohibit certain environmental modification techniques, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151, and the placement of nuclear weapon on the sea-bed floor. 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 Convention), Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115.

⁶ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Non-Proliferation Treaty]. This memorandum will also refer to this treaty as the Non-Proliferation Treaty or the NPT.

⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention]. This memorandum will also refer to this treaty as the Biological Weapons Convention or the BWC.

⁸ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 45 [hereinafter Chemical Weapons Convention]. This memorandum will also refer to this treaty as the Chemical Weapons Convention or the CWC.

⁹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Mine Ban Treaty]. This memorandum will also refer to this treaty as the Mine Ban Treaty.

¹⁰ Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357 [hereinafter Cluster Munitions Convention]. This memorandum will also refer to this treaty as the Cluster Munitions Convention.

practice for each treaty.¹¹ It then considers mechanisms for enforcing each assistance provision, as well as the policy implications of preserving a vague conception of the provision's scope.

The assistance provisions of these five weapons ban treaties were written over a span of forty years. The drafters had time to observe the impact of the previous treaties and to make adjustments accordingly. And yet the assistance provision has rarely been altered. Moreover, the few modifications that have been sustained have generally expanded the reach of the provision rather than clarified its meaning.¹² This suggests that the international community has been reluctant to lend a specific meaning to the words "assist, encourage, or induce."

The *travaux préparatoires* of these five treaties support this conclusion. The travaux of the earlier weapons ban treaties contain only limited discussion of meaning or scope of the provision.¹³ Only more recently, as powerful states have declined to embrace new disarmament agreements,¹⁴ have drafters of weapons ban treaties directly addressed the scope of the assistance provision.¹⁵ But even these discussions have been largely confined to the question of interoperability between signatory and non-signatory states.¹⁶ And in an effort to accommodate the national security needs of party states, the drafters of these later treaties have generally narrowed, rather than expanded, the reach of the assistance provision.¹⁷

Examples of state practice further support the conclusion that the "assist, encourage, or induce" provision is deliberately under-defined. Analysis of a cross-section of implementing

¹¹ The 1969 Vienna Convention on the Law of Treaties divides sources that may be used for the purpose of treaty interpretation into two categories. Article 31 describes the first category, which consists of primary sources, including the treaty text, preamble, and annexes, as well as any subsequent agreements between the parties. This 'primary source' category also provides that "there should be taken into account, together with the context . . . [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 330 [hereinafter Vienna Convention]. Under Article 32, when primary sources fail to clarify the meaning of any particular treaty provision, the Convention provides, "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." This Article establishes the basis for relying on *travaux préparatoires* as a valid method of treaty interpretation. *Id.* art. 32. Although the United States has not ratified the Vienna Convention, it views many of the Convention's provisions as codifications of customary international law on the law of treaties. *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Oct. 25, 2012). Indeed, domestic law supports the practice of relying on the Vienna Convention's categories for treaty interpretation. The Supreme Court has explicitly stated that "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989). And in a 2006 Senate Foreign Relations Committee report, the committee engaged with questions regarding the proper interpretation of a disarmament treaty's assistance provision by examining the text of the treaty, "its negotiating history," and "the practice of the parties." S. REP. NO. 109-288, at 86 (2006).

¹² A comparison between the first assistance provision, opened for signature in 1968, and the most recent assistance provision, opened for signature in 2008, reveals three major changes. The Cluster Munitions Convention assistance provision (a) governs all prohibits acts rather than just the manufacturing or acquiring of a prohibited weapon; (b) broadens its application to apply to individuals as well as states; and (c) adds a new article governing interoperability between signatory and non-signatory states. *Compare* Nuclear Non-Proliferation Treaty, *supra* note 6, art. 1, with Cluster Munitions Convention, *supra* note 10, arts. 1, 21.

¹³ See *infra* Subsection I(A)(1), Subsection I(B)(1), Subsection I(C)(1), and Subsection I(D)(1).

¹⁴ The United States has not ratified the two most recent non-regional, multilateral disarmament treaties: the Mine Ban Treaty, *supra* note 9, and the Cluster Munitions Convention, *supra* note 10. For a list of states parties to these treaties, see DISARMAMENT TREATIES DATABASE, *supra* note 2.

¹⁵ See *infra* Section I(E)(1).

¹⁶ See *infra* Section I(E)(1).

¹⁷ See *infra* Section I(E)(1).

legislation demonstrates that states' implementing statutes have rarely clarified the meaning of the assistance provision. This suggests a more global desire to preserve the phrase's current ambiguity. Moreover, there has been little state-driven effort to chastise member states for stretching or even violating the terms of the assistance provision.

The treaties' legislative histories reveal that the United States has also accepted and even exploited the ambiguity of each treaty's assistance provision. The phrase "assist, encourage, or induce" has been repeatedly tailored to fit various needs. When considering a bill to expand nuclear assistance to India, for example, the legislature applied only a narrow understanding of the United States' obligations under the NPT assistance provision.¹⁸ But when faced with opposition to the passage of the CWC, senators supporting the bill painted that treaty's assistance provision as exceedingly broad and powerful.¹⁹

The benefit of this vagueness is that it strikes a rare balance in international law: it allows states to impose some cost on non-signatory states while still fulfilling their national security needs. States have generally been granted wide latitude in interpreting and applying the assistance provision language. This flexibility has allowed states to ratify weapons ban treaties even when a crucial military ally is not a signatory. Preventing states from contracting around this assistance provision may have a chilling effect on the passage of weapons ban treaties more broadly. The drawback of this approach is that a thinly drawn assistance provision enables states to stretch or even break its boundaries without incurring international condemnation. The provision can serve as an escape hatch for disaffected members. Member states may circumvent the central purpose of the treaty by exploiting the ambiguity of the phrase "assist, encourage, or induce."

This memorandum proceeds in three parts. Part I examines the treaty text, *travaux préparatoires*, legislative history, and examples of state practice of the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention, the Chemical Weapons Convention, the Mine Ban Treaty, and the Cluster Munitions Convention. Part II examines the internal and external enforcement mechanisms of these treaties. Finally, Part III considers the benefits and drawbacks of maintaining a deliberately vague definition of the assistance provision.

I. FIVE WEAPONS BAN TREATIES

A. The Nuclear Non-Proliferation Treaty

Article I of the Nuclear Non-Proliferation Treaty provides:

Each nuclear-weapon State Party to the Treaty²⁰ 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

¹⁸ See *infra* Section I(A)(3).

¹⁹ See *infra* Section I(C)(2).

²⁰ The Nuclear Non-Proliferation Treaty divides nations into two categories: nuclear weapons states, encompassing all states that "manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967," and non-nuclear weapons states, commonly understood to include both those states that had not acquired a nuclear weapon by the 1967 deadline and those states that have not ratified the treaty. Non-Proliferation Treaty, *supra* note 6, arts. 1-3; Steven G. Stransky, *The Nuclear Nonproliferation Treaty and Pakistan: Interpreting Nuclear Security Assistance Prohibitions*, 23 FLA. J. INT'L L. 1, 16-17 (2011).

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.²¹

Article II commits non-nuclear weapons state parties to the treaty to not “seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”²² Article III § 2 commits state parties to “undertake[] not to provide . . . equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.”²³

This treaty marks the first appearance of the weapons ban assistance provision.²⁴ But the treaty itself provides no definition or clarification of the meaning of the phrase “assist, encourage, or induce” in either Article I or the related assistance provisions in Articles II and III. The treaty leaves large swaths of state behavior unregulated. For example, nothing in the treaty prohibits a non-nuclear weapon state from assisting another state in manufacturing nuclear weapons, nor does it prohibit a nuclear weapon state from receiving such assistance. Moreover, the NPT assistance provisions place restrictions on only state action, not on the action of individuals.

To shed light on the meaning of the assistance provisions, this report turns first to the *travaux préparatoires*, then to the domestic ratification process and state practice. Together, these sources reveal that there was no common understanding of this first assistance provision at the time of drafting, and that states have subsequently applied a fairly narrow interpretation of the provision’s scope. They also reveal that the international community has repeatedly failed to respond to outright violations of the Article I assistance provision.

1. *Travaux Préparatoires*

Though the 1968 Nuclear Non-Proliferation Treaty marked the first appearance of the phrase “assist, encourage, or induce” in the weapons-ban context, this assistance provision received only “limited attention” during treaty negotiations.²⁵ Most of the work defining the scope of the assistance provision was left for states to complete after ratification. The limited *travaux* sources that do exist, however, suggest the drafters’ failed to arrive at a common understanding of the meaning of the Articles I and II assistance prohibitions.

The origins of the assistance provision can be traced back to Cold-War efforts to reconcile competing NPT drafts drawn up by the United States and the Soviet Union.²⁶ The United States’ August 17, 1965 draft prohibited a nuclear weapon state from “assist[ing]” any non-nuclear weapon state “in the manufacture of nuclear weapons.”²⁷ In contrast, the Soviet Union draft, submitted a few weeks later, contained a broader prohibition, forbidding states

²¹ Non-Proliferation Treaty, *supra* note 6, art. 1.

²² *Id.* art. 2

²³ *Id.* art. 3(2).

²⁴ This report defines the weapons ban assistance provision as a disarmament treaty provision requiring the party state not “assist, encourage, or induce” another state or individual to engage in certain prohibited acts.

²⁵ Stransky, *supra* note 20, at 30.

²⁶ Stransky, *supra* note 20, at 30.

²⁷ *Id.* (quoting U.S. ARMS CONTROL AND DISARMAMENT AGENCY, INTERNATIONAL NEGOTIATIONS ON THE TREATY ON THE NONPROLIFERATION OF NUCLEAR WEAPONS 133-34 (1969) [hereinafter NEGOTIATIONS]).

from providing assistance with “*preparations for the manufacture*” of nuclear weapons,” including the transmission of “*manufacturing . . . information or documentation.*”²⁸ It is unclear how many causal steps in the nuclear weapons manufacturing process that the phrase “*preparations for the manufacture*” was intended to encompass.

A third amended draft, submitted by the United States in March of 1966, attempted to accommodate the Soviet Union’s more expansive conception of the assistance provision. This new draft prohibited a nuclear weapon state from providing a non-nuclear weapon state with “(a) assistance in the manufacture of nuclear weapons, in preparation for such manufacture . . . ; or (b) encouragement or inducement to manufacture . . . nuclear weapons.”²⁹

By the time the treaty was opened for signature, however, the Soviet-sponsored prohibition on assistance with “*preparations for the manufacture*” had been dropped from Article I. In light of the earlier drafts, the words “*induce*” and “*encourage*” may have been viewed as an acceptable stand-in for the vaguer and potentially farther-reaching phrase “*preparations for the manufacture.*” They may have been intended to expand the scope of the provision beyond direct assistance, but not so far as to reach the vast expanse of causal steps that may constitute assistance with “*preparations for the manufacture*” of nuclear weapons. On the other hand, they may instead have been seen as sufficiently broad enough to encompass “*preparations for manufacture,*” in which case the proposed subsection (a) would be redundant. Without a written record, it is impossible to know for certain.

These attempts to untangle the drafters’ unstated intent provide some additional insight into the meaning of the assistance provision. But the travaux as a whole demonstrate the state parties’ established only a limited understanding of the scope of the NPT at the time of ratification. For example, the text of the treaty itself fails to prohibit a non-nuclear weapon state from *providing* nuclear assistance, and a nuclear weapons state from *receiving* it. Yet in the months before the treaty was ratified, both the United States and the Soviet Union—the two key states in the negotiation process—signaled an intention for the treaty to govern these activities.

The United States representative to the Eighteen Nation Drafting Committee³⁰ stated on February 27, 1968 that “it seems clear that a non-nuclear-weapon State which accepts the treaty’s restrictions on itself would have no reason to assist another country not accepting the same restrictions to gain advantage from this fact.”³¹ And if a non-nuclear state were to attempt to provide assistance to a state that was not party to the treaty, “the presumption would immediately arise that these acts had the purpose of developing nuclear weapons for itself, in violation of the treaty.”³² The Soviet Union representative, speaking on the same day, made a similar statement. “If a non-nuclear weapon State party to the treaty were to assist another non-

²⁸ *Id.* (quoting NEGOTIATIONS, *supra* note 27, at 136) (emphasis added).

²⁹ *Id.* (quoting NEGOTIATIONS, *supra* note 27, at 140). For an explanation of the reconciliation of these drafts, see *id.* at 30-32. The addition of the verbs “*encourage*” and “*induce,*” absent from both nations’ prior drafts, may have been inspired by an effort to adhere more closely to the language of the 1963 Limited Nuclear Test Ban Treaty, which prohibits any party from “*causing, encouraging, or in any way participating in*” a nuclear weapons test. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, art. 1(2), Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

³⁰ The Eighteen Nation Drafting Committee consisted of five NATO members, five WTO members, and eight neutral and non-aligned countries. It met periodically in Geneva between 1962 and 1969. THOMAS BERNAUER, THE CHEMISTRY OF REGIME FORMATION: EXPLAINING INTERNATIONAL COOPERATION FOR A COMPREHENSIVE BAN ON CHEMICAL WEAPONS 24 (1993).

³¹ MASON WILLRICH, NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL 96 (1969) (quoting Statement by United States Representative to ENDC, Feb. 27, 1968, ENDC/PV. 370, at 27-28).

³² *Id.* at 97 (quoting Statement by United States Representative to ENDC, Feb. 27, 1968, ENDC/PV. 370, at 27-28).

nuclear-weapon State to manufacture, produce, or acquire nuclear weapons,” he testified, “such a case . . . would be regarded as a violation of the treaty.”³³ Five months later, however, when the treaty was opened for signature, the treaty language remained unaltered. This discrepancy between the superpowers’ clear intent regarding the provision and the ambiguity of the final text of treaty underscores the extent to which the scope of this first assistance provision remained undefined.

2. *United States Ratification and Implementation*

The NPT was received in the Senate in on July 9, 1968.³⁴ While President Johnson pushed for the treaty to move quickly through the legislative body, the Soviet invasion of Czechoslovakia in August ultimately dampened domestic support for ratification.³⁵ The Senate did not give its advice and consent until March of 1969, after President Nixon had taken office.³⁶ Because of this delay, the Senate Foreign Relations Committee reported the treaty out of committee twice: once in 1968, and again in 1969.

In its 1968 report, the Committee quoted Secretary of State Rusk’s testimony that “the treaty deals only with what is prohibited, not with what is permitted.”³⁷ Secretary Rusk implied that any activity not explicitly banned by these articles was allowed. He then proceeded to lay out the ways in which the United States may continue to provide assistance to its allies, including providing consultations and planning with allies on nuclear defense, as well as arrangements for deployment of nuclear weapons within allied territory.³⁸ The assistance provision would not, the committee report summarized, “inhibit the United States from meeting its responsibilities under existing nuclear weapons arrangements within the Western alliance, from deploying its nuclear forces around the world, or from transferring nuclear weapons or control over them in a war situation.”³⁹

The 1969 committee report reiterated that the assistance provisions in Articles I and II would not prohibit the United States from fulfilling its defense obligations. This second report cited the Chairman of the Joint Chiefs of Staff’s testimony that the treaty does not “disrupt any existing defense alliances in which the United States is pledged to assist in protecting the political independence and territorial integrity of other nations.”⁴⁰ In its commentary, the Committee emphasized that it “also wishe[d] to make the record unmistakably clear that the treaty in no way affects the right of the United States to enter into agreements to station nuclear weapons under U.S. control on the soil of an ally.”⁴¹

³³ *Id.* (quoting Statement by Soviet Union Representative to ENDC, Feb. 27, 1968, ENDC/PV. 370, at 28).

³⁴ See *Thomas: Treaties*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/thomas.php> (entry for Treaty no. 90-24) (last visited Oct. 23, 2012).

³⁵ EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE, HISTORICAL SERIES, S. PRT. NO. 111-23, at 255 (1968), available at http://www.fas.org/irp/congress/2010_rpt/sfrc-v20.pdf.

³⁶ *Id.*

³⁷ S. REP. NO. 90-9, at 3 (1968).

³⁸ *Id.*

³⁹ S. REP. NO. 90-9, at 3 (1968).

⁴⁰ S. REP. NO. 91-1, at 16 (1969).

⁴¹ *Id.* at 16.

Collectively, these reports demonstrate that the Senate had been repeatedly assured that the assistance provision did not intrude on the United States' national security needs.⁴² This position contradicted the broader understanding of the NPT conveyed during the negotiation process. The United States likely tailored its interpretation of the NPT to meet the requirements of these different audiences. On the global stage, it made sense for the United States to advocate for a broad and far-reaching treaty. But in front of Congress, the most pressing matter was likely easing the senators' national security concerns. This marked the Senate's first occasion to consider the meaning of "assist, encourage, or induce" in the disarmament treaty context. It had been asked to interpret an assistance provision that—notwithstanding the broad understandings suggested by the United States and the Soviet Union during negotiation—was vaguely worded; the NPT travaux offered little further clarification. This allowed the government wide latitude in how it would interpret this first assistance provision. These early committee reports signaled the United States intended to pursue a narrow understanding of the Articles I and II assistance obligations.

3. *State Practice*

States have widely ignored the NPT assistance provisions. Four "non-nuclear" states—India, Pakistan, North Korea, and Israel—currently possess nuclear capabilities.⁴³ South Africa successfully developed a bomb before relinquishing its nuclear program.⁴⁴ Iran is widely believed to be in the process of developing a nuclear weapons program, although the evidence is inconclusive.⁴⁵ And many other countries have pursued a nuclear weapons program at some point, including Argentina, Brazil, Egypt, Iraq, Japan, Libya, Sweden, and South Korea.⁴⁶ Iran, if it is pursuing a nuclear weapons program in violation of the NPT, joins Libya, North Korea and Iraq as some of the few countries that have pursued a nuclear weapons program while a

⁴² The treaty did not explicitly require implementing legislation. However, the Nuclear Non-Proliferation Act of 1978, which tightened the criteria for nuclear cooperation, employs language that closely mirrors the NPT. Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2153b(a)(5) (2006). The legislative history of this bill, however, does not contain any further discussion of the meaning of the assistance provision language.

⁴³ Hans M. Kristensen, *Status of World Nuclear Forces*, FED'N OF AM. SCIENTISTS (2012), <http://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html>.

⁴⁴ Angela Kane, High Rep. for Disarmament Affairs, United Nations, Remarks at the 2012 World Conference Against Atomic and Hydrogen Bombs: Public Participation in Disarmament 1 (Aug. 9, 2012), http://www.un.org/disarmament/HomePage/HR/docs/2012/2012-08-09-HR_Nagasaki_A+H_Bomb_rally.pdf.

⁴⁵ PAUL K. KERR, CONG. RESEARCH SERV., RL34544, IRAN'S NUCLEAR PROGRAM: STATUS 31-33 (2012).

⁴⁶ For a discussion of Argentina, Brazil, Iraq, Sweden, and South Korea's nuclear programs, see MARY BETH NITIKIN, PAUL K. KERR & STEVEN A. HILDRETH, CONG. RESEARCH SERV., RL31559, PROLIFERATION CONTROL REGIMES: BACKGROUND AND STATUS 8 (2010). For a discussion of Egypt's nuclear weapons program, see James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int'l Studies, *Country Profiles: Egypt*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/egypt/> [hereinafter James Martin Ctr., *Egypt*] (last visited Nov. 2, 2012). For a discussion of Japan's nuclear weapon program, see James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int'l Studies, *Country Profiles: Japan*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/japan/> [hereinafter James Martin Ctr., *Japan*] (last visited Nov. 2, 2012). For a discussion of Libya's nuclear weapons program, see James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int'l Studies, *Country Profiles: Libya*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/libya/> (last visited Nov. 2, 2012).

party to the treaty.⁴⁷ As non signatories, countries such as India, Pakistan, North Korea, and Israel did not technically transgress the terms of the NPT.

However, any nuclear states that assisted these programs did so in violation of Article I.⁴⁸ The precise nature of the foreign assistance these countries received is unclear; the programs were cloaked in secrecy. Moreover, the treaty does not prohibit an individual from providing nuclear assistance to a non-nuclear state, further complicating the calculation.⁴⁹ A party to the NPT may distance itself from the terms of the assistance provision by casting a state agent who provides nuclear assistance to a foreign country as a rogue actor, operating without the endorsement of the state.

Given the ambiguity surrounding the assistance provision, it is difficult to classify aid as either permissible or impermissible under the terms of Article I. There is no definitive understanding of what acts actually constitute a violation of the NPT. As a result, this report instead looks to examples of nuclear states providing “sensitive nuclear assistance,” defined in a recent study as “state-sponsored transfer of key materials and technologies necessary for the construction of nuclear weapons arsenal to a nonnuclear weapon state.”⁵⁰ This definition is closely aligned with the NPT prohibition against assisting nonnuclear states “to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices.”⁵¹ Acts that meet this

⁴⁷ India, Pakistan, and Israel have not joined the NPT. *Status of the Treaty on the Non-Proliferation of Nuclear Weapons*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/npt> (last visited Oct. 21, 2012). South Africa joined the NPT only after it had relinquished its nuclear weapons program. See NITIKIN, KERR & HILDRETH, *supra* note 45, at 8. Although North Korea’s status as a state party to the NPT has been contested, see discussion *infra* Part II(B), it very likely engaged in developing nuclear weapons while a party to the treaty. In 2002, the Bush administration declared North Korea to be in “material breach” of its obligations. MARY BETH NIKITIN, CONG. RESEARCH SERV., RL34256, NORTH KOREA’S NUCLEAR WEAPONS: TECHNICAL ISSUES 2 (2012). Iraq joined the NPT in 1969, but pursued an illicit nuclear weapons program into the early 1990s. James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int’l Studies, *Country Profiles: Iraq*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/iraq/> (last visited Nov. 2, 2012). Libya also maintained a nuclear weapons program after it had joined the NPT in 1975. James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int’l Studies, *Country Profiles: Libya*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/libya/> (last visited Nov. 2, 2012). Argentina pursued its nuclear weapons program before it joined the NPT. James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int’l Studies, *Country Profiles: Argentina*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/argentina/> (last visited Nov. 2, 2012). Brazil pursued its nuclear weapons program before it joined the NPT. James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int’l Studies, *Country Profiles: Brazil*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/brazil/> (last visited Nov. 2, 2012). Sweden pursued its nuclear weapons program before it joined the NPT. Thomas B. Johansson, *Sweden’s Abortive Nuclear Weapons Project*, BULL. ATOMIC SCIENTISTS, March 1986, at 31, 31-33. South Korea pursued its nuclear weapons program before it joined the NPT. James Martin Ctr. for Nonproliferation Studies at the Monterey Inst. of Int’l Studies, *Country Profiles: South Korea*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/south-korea/> (last visited Nov. 2, 2012). Egypt pursued its nuclear weapons program before it joined the NPT. James Martin Ctr., *Egypt*, *supra* note 46. Japan pursued its nuclear weapons program before it joined the NPT. James Martin Ctr., *Japan*, *supra* note 46.

⁴⁸ Non-Proliferation Treaty, *supra* note 6, art. I (“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.”).

⁴⁹ *Id.*

⁵⁰ MATTHEW KROENIG, EXPORTING THE BOMB: TECHNOLOGY TRANSFER AND THE SPREAD OF NUCLEAR WEAPONS 10-11 (2010).

⁵¹ Non-Proliferation Treaty, *supra* note 6, art II.

standard would likely be found to constitute a violation of the NPT assistance provision. And in lieu of an articulated understanding of what constitutes prohibited assistance, a survey of knowledge and material necessary for constructing nuclear weapons offers a second-best method of analysis.

Kroenig's 2010 study determined that acts meeting this definition include "the international transfer of nuclear weapon designs, weapons-grade fissile material, and sensitive nuclear-fuel cycle facilities to nonnuclear weapon states, and excludes everything else."⁵² The study then surveys all nuclear transfers from 1951 to 2000,⁵³ and finds seven historical examples of nuclear states providing sensitive nuclear assistance to nonnuclear states after the signing of the NPT.⁵⁴ France offered plutonium reprocessing assistance to Japan in 1971, to Pakistan in 1974, to Taiwan in 1975, and Egypt in 1980.⁵⁵ China provided plutonium reprocessing aid to Pakistan in 1974 and to Algeria in 1986,⁵⁶ and it also offered uranium enrichment aid and nuclear weapon designs to Iran in 1984.⁵⁷ And more recently, reports emerged in 2006 that China had sold unsafeguarded ring magnets, which can be used in centrifuges to enrich uranium, to Pakistan.⁵⁸ China is also reported to have provided missile technology and blueprints for a small nuclear weapon to Pakistan.⁵⁹

States have also exploited the space left ungoverned by the narrow scope of the NPT assistance provision. Most recently, a 2006 statute modified the terms of the Atomic Energy Act of 1954 to exempt India from some of its terms.⁶⁰ The statute set the stage for nuclear cooperation agreement, enacted two years later, eliminating many of the restrictions the United States had placed on India for its pursuit of a nuclear weapons program, and reversing a 30-year moratorium on transfers of nuclear fuel and reactors from the United States to India.⁶¹ In the months leading up to the 2006 vote, the obligations imposed by Article I took center stage in the negotiations. And collectively, these preparatory documents stand as the most cogent and explicit articulation to date of the U.S. government's understanding of the scope of the NPT assistance provision.

⁵² *Id.* at 14.

⁵³ *Id.* at 50-66.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ SHIRLEY A. KAN, CONG. RESEARCH SERV., RL31555, CHINA AND PROLIFERATION OF WEAPONS OF MASS DESTRUCTION AND MISSILES: POLICY ISSUES 3 (2012).

⁵⁹ PAUL K. KERR & MARY BETH NIKITIN, CONG. RESEARCH SERV., RL34248, PAKISTAN'S NUCLEAR WEAPONS: PROLIFERATION AND SECURITY ISSUES 3 (2012).

⁶⁰ Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, 120 Stat. 2726 (2006) (codified at 22 U.S.C. § 8001 (2006)); Recent Legislation, *Foreign Relations Law—Nuclear Nonproliferation—Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India*. - Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, 120 HARV. L. REV. 2020, 2020-21 (2007) (noting that "President George W. Bush signed into law the Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006 (USIPAECA), implicitly acknowledging India as a nuclear power and opening the door to civil nuclear cooperation between the two nations. . . . The USIPAECA exempts India from certain provisions of the Atomic Energy Act of 1954.").

⁶¹ United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, Pub. L. No. 110-369, 122 Stat. 4028 (2006) (codified at 22 U.S.C. § 8001 (2006)); see also Jim Yardley, *America and India: The Almost-Special Relationship*, N.Y. TIMES, Nov. 6, 2010, <http://www.nytimes.com/2010/11/07/weekinreview/07yardley.html>.

The United States-India Nuclear Cooperation Act was reported out of the Senate Committee on Foreign Relations in 2006. During committee hearings, members of the Committee repeatedly asked whether providing uranium to India for peaceful purposes, thereby freeing up the entirety of India's domestic uranium supply for military purposes, violated Article I of the NPT. The State Department argued that such assistance would not transgress the United States' treaty obligations. In a letter quoted at length by the committee, two State Department representatives wrote,

As previously noted, nothing in the NPT, its negotiating history, or the practice of the parties supports the notion that fuel supply to safeguarded reactors for peaceful purposes could be construed as 'assisting in the manufacture of nuclear weapons' for purposes of Article I. Nuclear material and equipment exported by the U.S. would not be involved in any stage of the process of manufacturing nuclear weapons.⁶²

The Senate Committee on Foreign Relations stated in its report that, while it "accept[ed]" the historical veracity of the administration's assertion that other states had previously provided nuclear fuel assistance to India without being accused of violating the NPT,⁶³ it did not accept the position that fuel donations for peaceful purposes would never constitute a violation of the treaty. "If it should become evident that U.S. civil nuclear commerce with India is indirectly assisting India's nuclear weapons program by freeing up uranium for nuclear weapons purposes that would otherwise have been devoted to civil pursuits," warned the Committee, "then it would be incumbent upon the United States, under the NPT, to cease those contributing elements of its civil nuclear commerce with India."⁶⁴

The bill likewise forced the House to clarify its views on the obligations imposed by the NPT assistance provision. The House Committee on International Relations expressed in its report on the proposed legislation that the "overriding purpose" of the NPT is to prevent nuclear proliferation.⁶⁵ As a result, the treaty's Article IV articulation of states' right to research, produce, and use nuclear energy "for peaceful purposes without discrimination" is necessarily subjugated to the broader prohibitions imposed by Articles I-III.⁶⁶ The Committee further recognized that, "because the processes of enriching uranium or separating plutonium for peaceful or military purposes are essentially identical, they inherently pose an enhanced risk of proliferation."⁶⁷ The Committee stopped short, however, of finding that the bill violated the treaty. Instead, it articulated the obligations imposed by the NPT assistance provision as follows: "The U.S. cannot recognize a claim by any non-nuclear country of a right to develop or possess a complete nuclear fuel cycle if that country has not provided convincing evidence that its nuclear activities are fully safeguarded from contributing to a nuclear weapons capability."⁶⁸ The "assistance" calculation is divorced from the original dual-category scheme of distinguishing between nuclear states and non-nuclear states. It becomes instead contingent upon whether the assistance provided is for peaceful or non-peaceful purposes. This constitutes

⁶² S. REP. NO. 109-288, at 86 (2006).

⁶³ *Id.* at 23.

⁶⁴ *Id.*

⁶⁵ H.R. REP. NO. 109-590, pt. 1, at 16 (2006).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

a fairly significant reinterpretation of the assistance provision, demonstrating just how disjointed the Senate’s understanding of the NPT assistance provision was at the time of this bill’s passage.

The text of the final bill reflects a narrow interpretation of the NPT assistance provision. The bill states: “Pursuant to the obligations of the United States under Article I of the NPT, nothing in this title constitutes authority to carry out any civil nuclear cooperation between the United States and a country that is not a nuclear weapon State Party to the NPT that would in any way assist, encourage, or induce that country to manufacture or otherwise acquire nuclear weapons or nuclear explosive devices.”⁶⁹ Under this view, the assistance provision extends only to prohibit assistance with the “manufactur[ing]” or “acqui[sition]” of nuclear weapons, and no further. India’s status as a non-nuclear state is not a factor in the calculation of the NPT obligations.

Nevertheless, the government’s efforts to ensure the United States would not violate NPT assistance provision by opening up nuclear trade with India persisted. When Congress finally lifted many restrictions on the transfer of nuclear material to India in 2008, it explicitly provided that “[n]othing in this chapter constitutes authority for any action in violation of an obligation of the United States under the NPT.”⁷⁰ The 2008 bill also directed the president to certify to Congress that the bill “is consistent with the obligation of the United States under the Treaty on the Non-Proliferation of Nuclear Weapons . . . not in any way to assist, encourage, or induce India to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices.”⁷¹ President Bush then stated for the public record that United States did not consider the provision of nuclear material to India as a violation of the NPT assistance provision.⁷² When confronted with the need to interpret the obligations imposed by the assistance provision, the United States took advantage of the phrase’s ambiguity. It applied only the most constricted understanding of its terms.

B. The Biological Weapons Convention

The Biological Weapons Convention was opened for signature on April 10, 1972, and entered into force on March 26, 1975. Article III of the Convention provides:

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

⁶⁹ Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, Pub. L. No. 109-401, § 104(d)(1), 120 Stat. 2726 (2006) (codified at 22 U.S.C. § 8001 (2006)).

⁷⁰ 22 U.S.C. § 8004 (2006).

⁷¹ United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, Pub. L. No. 110-369, 122 Stat. 4028, 4030 (2008).

⁷² Presidential Determination No. 2009-6, 73 Fed. Reg. 63841, *available at* 22 U.S.C § 8001 (2006); *see also* Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT’L L. & POL. 217, 234 (1999) (“[A] certification forces the President to go on record as having stated that the substantive claims of a certification are true. A President—whether acting in good faith, wanting to avoid the embarrassment of being proven wrong, or simply unwilling to be caught in a lie—will consider carefully whether there are grounds for making such a representation.”).

otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention.⁷³

The BWC assistance provision preserves the narrow scope of prohibited activities articulated by the NPT. It governs only assistance, encouragement, or inducement of with the manufacturing and acquisition of biological weapons. However, it broadens out the categories of recipients subject to the treaty's terms. Whereas the NPT prohibited assistance only to other states, the BWC prohibits assistance to states, groups of states, and international organizations. Yet despite this alteration to the provision's language, the travaux, domestic ratification, and examples of state practice offer only limited insight into the provision's intended meaning.

I. Travaux Préparatoires

Following its success with the widely ratified Nuclear Non-Proliferation Treaty, the Eighteen Member Disarmament Committee turned its attention to the problem of biological weapons. The treaty was negotiated over a period of just four years, from 1969 to 1972.⁷⁴ This smooth negotiation process was due in part to states' decreasing reliance on biological weapons in warfare.⁷⁵ But it was also a result of the treaty's weak enforcement and verification regime.⁷⁶ Biological weapons, by definition, contain components that are both ubiquitous and naturally occurring.⁷⁷ This makes it extremely difficult to distinguish between peaceful and non-peaceful applications of biological components.⁷⁸ States likely viewed BWC ratification as a relatively low-cost commitment.

This low-stakes view may help explain the absence of any meaningful discussion of the scope of the assistance provision, despite the fact that its language underwent fairly serious revision over the course of negotiations. When England submitted a draft biological weapons convention to the committee on August 18, 1970, the language of its assistance provision tracked the NPT fairly closely. Article II provided that parties to the convention not "assist in or permit the production or acquisition of" biological weapons and equipment to facilitate the use of biological weapons.⁷⁹ It also prohibited party states from assisting others with "research aimed at production" of biological weapons.⁸⁰

A second draft, submitted by a collection of communist states on March 30, 1971, expanded the range of activities covered by this provision. This amended draft prohibited assistance with any "action contrary to the provisions of this Convention."⁸¹ Despite this fairly considerable change, the statement by the Soviet representative that accompanied the draft did

⁷³ Biological Weapons Convention, *supra* note 7, art. 3.

⁷⁴ BERNAUER, *supra* note 30, at 24-25.

⁷⁵ *Id.* at 24.

⁷⁶ STEVE BOWMAN, CONG. RESEARCH SERV., RL31059, BIOLOGICAL WEAPONS: A PRIMER 15-16 (2001).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ British Proposal Submitted to the Conference of the Committee on Disarmament: Revised Draft Convention for the Prohibition on Biological Methods of Warfare, art. II(a), Aug. 18, 1970, CCD/225/Rev.2, *reprinted in* U.S. CONTROL AND DISARMAMENT AGENCY, DOCUMENTS ON DISARMAMENT 1970, at 429 (1971).

⁸⁰ *Id.*

⁸¹ Communist Draft Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) Weapons and Toxins and on Their Destruction, art. III, Mar. 30, 1971, CCD/325/Rev. 1, *reprinted in* U.S. CONTROL AND DISARMAMENT AGENCY, DOCUMENTS ON DISARMAMENT 1971, at 192 (1971).

not include any explanation of the motivation driving this revision.⁸² By the time a third draft convention had been submitted—this time by a collection of communist nations and by the United States—the assistance provision’s scope had been contracted to that of its NPT counterpart. This third draft applied its terms to only the “manufacture or . . . acqui[sition]” of biological weapons,⁸³ rather than to “any action contrary to the provisions in this convention.” This constricted language was enshrined in the final text of the treaty.⁸⁴

But perhaps the most notable aspect of the travaux is their silence on the topic of the assistance provision. The Soviet representative to the Conference on the Committee of Disarmament submitted a lengthy explanation of the changes incorporated into this third draft convention, along with reasons for making these changes. Yet this clarifying statement fails even to refer to the alterations made to the Article III assistance provision.⁸⁵ The seven review conferences convened after the BWC’s entry into force have likewise failed to clarify the bounds of the assistance provision in any meaningful way.⁸⁶

The only hint at the reasons driving the abandonment of a more broadly applicable assistance provision is an oblique reference embedded in the U.S. representative’s statement on the language of the third draft: “As a result of the biological and toxin weapons convention, all parties would cease to possess or manufacture weapons. It should therefore be clearly in the interest of all parties that the non-proliferation provisions be as precise and effective as possible.”⁸⁷ The United States may have pushed for a more constricted range of activities governed by the BWC assistance provision in an effort to sacrifice breadth for clarity. The United States may have calculated that two clearly enumerated prohibitions—assisting with the

⁸² Statement by the Soviet Representative (Roshchin) to the Conference on the Committee on Disarmament: Chemical and Bacteriological Weapons, Mar. 30, 1971, *reprinted in* DOCUMENTS ON DISARMAMENT 1971, *supra* note 81, at 183-90.

⁸³ Draft Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Aug. 5, 1971, CCD/338 (United States version), CCD/337 (USSR, Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, and Romania version), *reprinted in* DOCUMENTS ON DISARMAMENT 1971, *supra* note 81, at 457-58 (showing that the U.S. and seven-nation versions are identical except that the latter is entitled “Revised Draft Convention . . .”).

⁸⁴ Biological Weapons Convention, *supra* note 7, art. 3.

⁸⁵ Statement by the Soviet Representative (Roshchin) to the Conference of the Committee on Disarmament: Draft Convention on Bacteriological (Biological) and Toxin Weapons, August 5, 1971, *reprinted in* DOCUMENTS ON DISARMAMENT 1971, *supra* note 81, at 460-67.

⁸⁶ The Final Declaration of the First Review Conference merely notes “the importance” of the Article III provisions, Final Declaration of the First Review Conference, BWC/CONF.I/10, Mar. 3-21, 1980. The Second, Third, and Fourth, and Sixth Review Conferences merely established that Article III should not be used to escape the affirmative assistance obligations provided for in Article X. Final Declaration of the Second Review Conference BWC/CONF.II/13/II, Sept. 8-26, 1986; Final Declaration of the Third Review Conference BWC/CONF.III/23, Sept. 9-27, 1991; Final Declaration of the Fourth Review Conference, BWC/CONF.IV/9, Nov. 26-Dec. 6, 1996; Final Declaration of the Sixth Review Conference, BWC/CONF.VI/6, Nov. 20-Dec. 8, 2006. The Fifth Review Conference failed to mention Article III specifically, Final Declaration of the Fifth Review Conference, BWC/CONF.V/17, Nov. 19-Dec. 7, 2001 and Nov. 11-22, 2002. The Final Declaration of the Seventh Conference adds only that state parties should enact “effective national export controls . . . in order to ensure that direct and indirect transfers relevant to the Convention, to any recipient whatsoever, are authorized only when the intended use is for purposes not prohibited under the Convention.” Final Declaration of the Seventh Review Conference, BWC/CONF.VII/7, Dec. 5-22, 2011.

⁸⁷ Statement by the United States Representative (Leonard) to the Conference on the Committee on Disarmament: Draft Convention on Bacteriological (Biological) and Toxin Weapons, Aug. 5, 1971, *reprinted in* DOCUMENTS ON DISARMAMENT 1971, *supra* note 81, at 469-70.

manufacturing and assisting with the acquisition—were more likely to be enforced than a vague ban on “all actions” contrary to the treaty.⁸⁸

2. *United States Ratification and Implementation*

The United States announced on November 25, 1969, that it had unilaterally renounced the use of all biological weapons in wartime and that it would destroy any remaining biological weapons stockpiles.⁸⁹ Yet although the duties imposed by the Biological Weapons Convention were entirely consistent with the United States’ articulated position, the treaty still took nearly three years to ratify. This delay was due in part to the United States’ failure to ratify the 1925 Geneva Protocol, which served as a direct predecessor to the BWC.⁹⁰ There was concern in the Senate that the Protocol would prohibit the military from relying on herbicides and riot control agents.⁹¹ As a result, much of the Senate discussion of the BWC revolved around the national security implications of both the Geneva Protocol and the Biological Weapons Convention.⁹² The scope of the Article III assistance provision received little attention throughout the course of the Senate Foreign Relations Committee hearings.⁹³

The language of the legislation implementing the treaty, the Biological Weapons Anti-Terrorism Act of 1989,⁹⁴ closely tracks the BWC Article III assistance provision.⁹⁵ The text of the bill thus provides little additional insight into the government’s conception of the bill’s assistance provision. But the bill’s legislative history emphasizes the applicability of the assistance provision to parties other than states, specifically to domestic companies and to individual citizens. Whereas the travaux and legislative history of the NPT addressed the assistance provision in fairly broad and state-driven terms, by the time the BWC implementing legislation was considered, Congress was ready to apply the assistance provision to the private sector and the individual U.S. citizen.

⁸⁸ The United States would later retreat from this push to clarify the terms of the provision, favoring instead a more vague understanding, one that could be conformed to meet shifting national security needs. *See supra* Subsection I.A.2.

⁸⁹ *See* S. REP. NO. 93-36, at 1 (1974).

⁹⁰ *See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and On Their Destruction; S. Res. 48, Relating to a Comprehensive Interpretation for the Geneva Protocol: Hearing Before the S. Comm. on Foreign Relations, 93d Cong. 3-5 (1974) (statement of Sen. Humphrey).*

⁹¹ *Id.* at 5 (statement of Sen. Humphrey).

⁹² *Id.* at 28-30 (statement of Dr. Fred C. Ikle, Director, Arms Control and Disarmament Agency).

⁹³ *Id.*

⁹⁴ Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175(a) (2006). There are a number of reasons for this long delay in passing implementing legislation. There was some debate within the international community as to whether the BWC even required implementing legislation. The head of the U.S. delegation to the BWC negotiations, however, concluded that the Article IV obligation that states “take any necessary measures to prohibit and prevent” the spread of biological weapons requires party states to pass implementing legislation criminalizing the manufacture or possession of biological weapons. S. REP. NO. 101-210, at 4 (1989).

⁹⁵ One notable exception is that the domestic legislation contains an added scienter requirement. The domestic bill provides that “[w]hoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so . . . shall be fined under this title or imprisoned for life or any term of years, or both. Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175(a) (2006).

The Senate Judiciary Committee Report, for example, lists “authoriz[ing] the punishment of those who attempt to help foreign nations acquire” biological weapons among the bill’s central aims.⁹⁶ There is currently no “comprehensive law that forbids Americans from helping foreign nations acquire biological weapons,”⁹⁷ the report continues, and the proposed Act is “intended to close th[is] dangerous loophole[.]”⁹⁸ The report then refers to the specific problem that the “U.S. and other western companies may have aided the efforts of a number of third world countries to develop chemical weapons” as a reason to support the bill’s passage.⁹⁹

Yet despite this effort to define the scope of the assistance provision’s applicability, the legislative history of both the BWC and the Biological Weapons Anti-Terrorism Act fail to clarify its meaning. On the eve of the collapse of the Soviet Union, the United States had not yet clarified its understanding of the phrase “assist, encourage, or induce.”

3. State Practice

The BWC contains no mechanisms for enforcement or verification of compliance with its provisions.¹⁰⁰ Nor does it bind the population of a state party to the treaty. However, Article IV mandates that each party “take any necessary measures to prohibit and prevent” the use and spread of biological weapons.¹⁰¹ The international community has generally understood this to mean that states parties must establish implementing legislation criminalizing the acts prohibited in the treaty.¹⁰²

Despite this consensus, however, many domestic statutes implementing the treaty fail to contain an assistance provision. They criminalize only direct involvement with biological weapons, not the provision of aid to a state or individual seeking to acquire or use the prohibited weapon. Australia’s 1976 Act implementing the BWC, for example, provides only that “[i]t is unlawful to develop, produce, stockpile, or otherwise acquire or retain” the prohibited weapon.¹⁰³ England’s 1974 Biological Weapons Act, although not explicitly acknowledged as legislation implementing the BWC, criminalizes only the development, stockpiling, production, acquisition, or retaining of biological agents or toxins.¹⁰⁴ Spain’s Penal Code likewise fails to criminalize the provision of assistance with biological weapons.¹⁰⁵ Like the United States, these states have deliberately shied away from defining the scope of the BWC assistance provision.

⁹⁶ S. REP. NO. 101-210, at 1 (1989).

⁹⁷ *Id.* at 6.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing the testimony of Rep. Bruce Morrison).

¹⁰⁰ Biological Weapons Convention, *supra* note 7.

¹⁰¹ *Id.* art. 4.

¹⁰² Final Declaration of the Sixth Review Conference, *supra* note 86, at 10.

¹⁰³ *Crimes (Biological Weapons) Act 1976* s 8 (Austl.), http://www.austlii.edu.au/au/legis/cth/consol_act/cwa1976243/s8.html.

¹⁰⁴ *Biological Weapons Act, 1974*, c.6 (Eng.), http://www.opbw.org/nat_imp/leg_reg/uk/BIOLOGICAL%20WEAPONS%20ACT%201974.pdf.

¹⁰⁵ *Crimes Against the Collective Security*, title XVII, s 3 (C.P.), http://www.opbw.org/nat_imp/leg_reg/spain/Penal_Code.pdf.

C. The Chemical Weapons Convention

Article I of the Chemical Weapons Convention provides that “[e]ach State Party to this Convention undertakes never under any circumstances . . . to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”¹⁰⁶ This assistance provision departs from previous provisions in two major ways. First, it expands the scope of prohibited activity. The NPT and the BWC prohibit a state from providing or receiving assistance with the “manufactur[ing]” or “acqui[sition]” of a prohibited weapon,¹⁰⁷ whereas the CWC provides more broadly that state parties must not “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”¹⁰⁸

Second, like the BWC, the CWC abandons the state-driven framework of the NPT, broadening the reach of the provision to apply to any individual engaged in prohibited activity. The effect of this modification is that the CWC assistance provision has the potential to reach a much broader range of state action.¹⁰⁹ Nonetheless, although the CWC assistance provision modifies the language of the NPT—and created a new blueprint for weapons ban treaties to follow—the text of the treaty still fails to significantly clarify the meaning of “assist, encourage, or induce.”¹¹⁰

Secondary sources, on the other hand, do offer substantial insight into the drafters’ vision for the provision. The CWC *travaux préparatoires* suggest that the CWC drafters intended the provision to reach only direct assistance, rather than indirect acts. The domestic legislative history serves as an instructive illustration of the political advantages of maintaining a flexible understanding of the provision. And examples of state practice highlight the lack of incentive to clarify preemptively the assistance provision’s terms.

1. *Travaux Préparatoires*

Following the conclusion of NPT negotiations in 1968, the Eighteen Nation Disarmament Committee turned its attention to the question of biological and chemical weapons. Plans to fuse prohibitions on both weapons into one treaty were tabled when it became clear, “in part” or “among other reasons,” that chemical weapons would be far more difficult to eliminate as a tool of warfare than biological weapons.¹¹¹ Biological weapons had

¹⁰⁶ Chemical Weapons Convention, *supra* note 8, at art. 1.

¹⁰⁷ Non-Proliferation Treaty, *supra* note 6, at art. 1; Biological Weapons Convention, *supra* note 7, at art. 3.

¹⁰⁸ *Id.*

¹⁰⁹ For example, the NPT does not explicitly ban assistance with maintaining or securing an existing nuclear weapons stockpile, Non-Proliferation Treaty, *supra* note 6, while the CWC prohibits assistance with any prohibited activity, including with maintaining or securing an existing chemical weapons cache, Chemical Weapons Convention, *supra* note 8, at art. 1.

¹¹⁰ A widely-cited commentary to the CWC clarifies that assistance in the context of the treaty “can be given by material or intellectual support, e.g., supply of chemicals or technology needed for the production of chemical weapons, but also financial resources, technological-scientific know-how or provision of specialized personnel, military instructors, etc. to anybody who is resolved to commit such prohibited activity or by support in the concealment of such activities.” It also defines encouragement or inducement as “contributing to the emergence of the resolve of anybody to commit a prohibited activity by instigating, promising assistance *etc.*” However, the authors of the commentary do not indicate the sources on which they relied to reach this conclusion. WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION 15-16 (1994).

¹¹¹ BERNAUER, *supra* note 30, at 24.

been rarely deployed in warfare on a significant scale.¹¹² Chemical weapons, on the other hand, had been employed in both World War I and World War II, and the United States and the Soviet Union had both amassed extensive chemical weapons caches during the Cold War.¹¹³ As a result, the Biological Weapons Convention entered into force in March 1975.¹¹⁴ But the Chemical Weapons Convention would not enter into force for another twenty-two years.¹¹⁵

Efforts to obtain international consensus on the chemical weapons question proceeded slowly, and draft conventions were submitted over the course of many years.¹¹⁶ On March 28, 1972, a group of communist nations submitted a draft that prohibited assistance to “any State, group of States or international organizations to manufacture or otherwise acquire” chemical agents or weapons.¹¹⁷ This language echoed the text of the BWC assistance provision. Ten years later, a draft version submitted by the U.S.S.R. reflected a broadened view of the scope of the assistance provision. This 1982 draft is aligned more closely with the final version of the treaty, requiring that “[e]ach State Party to the Convention undertakes . . . [n]ot to assist anyone, or to encourage or induce anyone, directly or indirectly, to engage in activities prohibited by the Convention.”¹¹⁸ This draft marks an early—possibly the first—appearance of the use of “anyone” instead of any state or group of states.

But it is also significant that the treaty draft included the word “indirectly.” The final incarnation of the CWC in 1993 converts “indirectly” to “in any way,” so that the assistance provision enshrined in the treaty provides a member state must not “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”¹¹⁹ This deliberate erasure of the word “indirectly” may have contemporary implications. Weapons-ban signatory states are currently engaged in a contentious debate over the scope of the provision. Following the ratification of the Mine Ban Treaty, for example, some states declared that the assistance provision applied only to “direct” assistance, not indirect assistance. Australia issued a declaration that explicitly stated it would interpret the word “assist” to mean “the actual and direct physical participation in any activity prohibited by the

¹¹² *Id.*

¹¹³ *Basic Facts on Chemical Disarmament*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, <http://www.opcw.org/news-publications/publications/history-of-the-chemical-weapons-convention/#c4127> (last visited Nov. 10, 2012). Iraq also employed chemical weapons against its Kurdish citizens in 1988. *Id.*

¹¹⁴ BERNAUER, *supra* note 30, at 25.

¹¹⁵ *Status of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/cwc> (last visited Nov. 10, 2012).

¹¹⁶ In 1969, the drafting process was delegated to a multilateral negotiating body known variously as the Committee on Disarmament and the Conference on Disarmament. BERNAUER, *supra* note 30, at 25. Membership in the Conference has shifted over time, but by 1993 the Committee consisted of the five nuclear states and 34 additional countries. *Id.* In 1980, the task was further relegated to a special working group for chemical weapons disarmament, the Ad Hoc Committee on Chemical Weapons. *Id.* at 26.

¹¹⁷ *Id.*

¹¹⁷ Communist Draft Convention on the Prohibition of the Development, Production, and Stockpiling of Chemical Weapons and on Their Destruction, Mar. 28, 1972, CCD/361, *reprinted in* U.S. CONTROL AND DISARMAMENT AGENCY, DOCUMENTS ON DISARMAMENT 1972, at 121 (1974).

¹¹⁸ Basic Provisions of a Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on Their Destruction, CD/294, July 21, 1982 (U.S.S.R. version).

¹¹⁹ Chemical Weapons Convention, *supra* note 8, art. I.

Convention but does not include permissible indirect support.”¹²⁰ Others have criticized this interpretation.¹²¹

The Mine Ban Treaty *travaux* do not specifically address the question of direct versus indirect assistance. But the CWC provision served as the model for subsequent assistance provisions.¹²² And there is precedent for looking to earlier treaties for clarification if the language is clearly inherited from that agreement.¹²³ In this case, the meaning of the CWC assistance provision may have bearing on the meaning of subsequent provisions. Eliminating the word “indirect” from the provision was a calculated decision on the part of the CWC drafters. And it may weigh on the side of those who argue that the provision extends only to acts of direct assistance.

By 1984, the committee had drawn up its own draft convention, one that served as the basis for a “rolling text,” or a draft version of the treaty that would be periodically amended and expanded over time.¹²⁴ After various obstacles and setbacks—including the United States’ decision to produce binary chemical weapons after an eighteen-year moratorium¹²⁵—the United States and the Soviet Union agreed to a bilateral chemical weapons treaty in 1990.¹²⁶ This may have helped pave the way for a multilateral version to be introduced.¹²⁷

2. *United States Ratification and Implementation*

The scope of the CWC assistance provision was discussed in length during Senate deliberations on the treaty.¹²⁸ Resolving the lingering ambiguity in the assistance provision was

¹²⁰ UNITED NATIONS TREATY COLLECTION, CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvi-5&chapter=26&lang=en (last visited Nov. 10, 2012) (declaration of Australia).

¹²¹ STUART MASLEN, 1 COMMENTARIES ON ARMS CONTROL TREATIES: THE CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION, AND TRANSFER OF ANTI-PERSONNEL MINE BANS AND ON THEIR DESTRUCTION 92-93 (2004) (“Given the clarity of the language contained in Article 1(1)(c)—to ‘assist, encourage, or induce *in any way*’—it is not clear how [Australia’s Declaration] can be legally sustained. Reservations are prohibited by Article 19 of the Anti-Personnel Mine Ban Convention.”).

¹²² The language of the CWC assistance provision is significantly different from the BWC assistance provision. Compare Chemical Weapons Convention, *supra* note 8, art. 1, with Biological Weapons Convention, *supra* note 7, art. 3. Moreover the CWC assistance provision is nearly identical to both the Mine Ban Treaty assistance provision, Mine Ban Treaty, *supra* note 9, art. 1, and the Cluster Munitions Convention assistance provision, *see* Cluster Munitions Convention, *supra* note 10, art. 1.

¹²³ *See, e.g.*, Southern Bluefin Tuna Case (N.Z. & Austl. v. Japan), ¶ 58, Award on Jurisdiction and Admissibility, 39 I.L.M. 382 (UNCLOS Arb. Trib. 2000) (“It is plain that the wording of Article 16(1) and (2) has its essential origins in the terms of Article XI of the Antarctic Treaty; the provisions are virtually identical. In view of the States that concluded the Antarctic Treaty – divided as they were between some States that adhered to international adjudication and arbitration and a Great Power that then ideologically opposed it—it is obvious that these provisions are meant to exclude compulsory jurisdiction.”).

¹²⁴ J.P. Perry Robinson, *Origins of the Chemical Weapons Convention*, in SHADOWS AND SUBSTANCE 50 (Benoit Morel & Kyle Olson eds., 1993).

¹²⁵ BERNAUER, *supra* note 30, at 27.

¹²⁶ *Id.*

¹²⁷ *Id.* at 28.

¹²⁸ Surprisingly, the assistance provision received little attention while the treaty was in committee. The Committee on Foreign Relations held intermittent hearings throughout March, April, May, and June of 1994. *See THOMAS: Treaties*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/thomas.php> (entry for Treaty No. 103-21) (last visited Oct. 28, 2012). There was virtually no discussion in these hearings of the scope of this assistance provision

not the primary goal of this discussion. Rather, the scope of the assistance provision was raised in the context of the obligations imposed by Article X. But the proceedings nonetheless highlight the Senate's fluid conception of the assistance provision.

Article X of the CWC requires that states parties facilitate the "fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons."¹²⁹ During the ratification process, some senators expressed concern that this obligation would compel the United States to relinquish sensitive scientific knowledge to rogue states.¹³⁰ An amendment was introduced that would have prohibited the United States from joining the CWC unless the parties of the Convention agreed to strike this article.¹³¹ Such an amendment was, in the words of one member, "an outright killer" that would "prevent the United States from joining the Convention."¹³²

In an effort to salvage the treaty, its proponents countered these national security concerns by casting the assistance provision as a powerful check on the Article X obligations. Such Article X concerns were unfounded, explained one national security advisor, because "countries contemplating any exchanges under Article X are legally bound by the fundamental obligation in Article I of the treaty never 'to assist, encourage or induce in any way anyone to engage in any activity prohibited' under the Convention."¹³³ As a result, "all relevant transfers must be subject to very close scrutiny, especially with countries whose compliance may be in doubt."¹³⁴

Senator Dianne Feinstein espoused an even more expansive view of the reach of the assistance provision, testifying that:

Within the CWC, the countries who make exchanges allowed in Article X are legally bound by the treaty's overriding principle, stated in Article I, that they can do nothing to "assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." Any country's failure to uphold this obligation would enable the full force of over 160 nations to coalesce in support of sanctions, and possibly military action It must be remembered that Article I supersedes all subsequent articles of the Convention. It

throughout the course of these hearings. *Chemical Weapons Convention (Treaty Doc. 103-21): Hearings Before the S. Comm. on Foreign Relations*, 103d Cong. (1994). The committee report likewise fails to clarify the definition of the provision. S. REP. NO. 104-33 (1996).

¹²⁹ Chemical Weapons Convention, *supra* note 8, art. X(3).

¹³⁰ *See, e.g.*, 143 CONG. REC. S3592 (daily ed. Apr. 24, 1997) (statement of Sen. Hutchinson) ("Even worse, this treaty as written actually encourages the spread of chemical weapons technology among the countries that are parties to it because articles X and XI require treaty participants to share their chemical weapons defense technologies and prohibits countries from placing restrictions on commerce in chemicals that can be used for weapons purposes.").

¹³¹ 143 CONG. REC. S3572 (daily ed. Apr. 24, 1997) (statement by Sen. Wellstone) ("CWC condition No. 32 . . . prohibits the United States from joining the CWC until the President certifies that the parties to the convention have agreed to strike article X and amend article XI.").

¹³² *Id.*

¹³³ 143 CONG. REC. S3583 (daily ed. Apr. 24, 1997) (letter from Samuel Berger, Asst. to the President for National Security Affairs to Sen. Diane Feinstein (Apr. 22, 1997)).

¹³⁴ *Id.* (letter from Samuel Berger, Asst. to the President for National Security Affairs to Sen. Diane Feinstein (Apr. 22, 1997)).

is disingenuous to suggest that the treaty would undercut its central prohibition so blatantly.¹³⁵

Other senators expressed a similarly broad interpretation of the scope of the assistance provision. Senator Joe Biden stated: “[L]ook, you cannot avoid the central purpose of the treaty and that is: Never, under any circumstances, can any party assist, encourage, induce in any way anyone to engage in any prohibited activity.”¹³⁶ And, perhaps most colorfully, Senator Glenn argued that in light of the obligations imposed by Article I, the Article X national security objection was “hogwash.”¹³⁷

Those advocating for an amendment to strike Article X argued that this alleged primacy of the Article I assistance provision was mere conjecture. “There is also the idea—and this is really not a proper legal argument, but some have said that article I supersedes the specific articles of the convention,” argued Senator Jon Kyl. “Now, for those who are lawyers, they recognize this is not true. The specific always governs over the general. Article I is a general prohibition. The very specific articles such as articles X and XI will control. They are the specific implementation of the treaty.”¹³⁸

The amendment to strike Article X came up for Senate vote on April 24, 1999.¹³⁹ The vote was expected to be so close that the Vice-President was called to the Capitol to be on hand in the event of a tie.¹⁴⁰ Ultimately, the proposed amendment was struck down by a healthy margin—the final vote was 66-34.¹⁴¹ But had the amendment passed, it would have killed the treaty outright.¹⁴² In this case, the decision to eliminate this provision should not be read as a straightforward endorsement by the Senate of a strong assistance provision. Some senators may have remained unpersuaded by the argument that Article I was sufficiently robust to counter Article X concerns, but chose to vote against the amendment in order to preserve the treaty as a whole.

Though the Article I argument ultimately prevailed, it was not a commanding victory. A full hour of debate was reserved solely for this amendment,¹⁴³ followed by a vote expected to be so close it threatened to come out a tie.¹⁴⁴ In April 1997, nearly thirty years after the ratification of the NPT, the Senate was still debating the most fundamental questions concerning the meaning of the weapons ban assistance provision.¹⁴⁵ Moreover, the understanding of the

¹³⁵ *Id.* at S3626 (statement of Sen. Diane Feinstein).

¹³⁶ *Id.* at S3632 (statement of Sen. Joe Biden).

¹³⁷ 143 CONG. REC. S3514 (daily ed. Apr. 23, 1997) (statement of Sen. John Glenn).

¹³⁸ 143 CONG. REC. S3628 (daily ed. Apr. 24, 1997) (statement of Sen. Jon Kyl).

¹³⁹ *U.S. Senate Roll Call Votes 105th Cong. 1st Sess.*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=105&session=1&vote=00050 (last visited Nov. 12, 2012).

¹⁴⁰ JONATHAN B. TUCKER, CTR. FOR THE STUDY OF WEAPONS OF MASS DESTRUCTION, NAT’L DEF. UNIV., U.S. RATIFICATION OF THE CHEMICAL WEAPONS CONVENTION 22 (2011), http://www.ndu.edu/press/lib/pdf/CSWMD-CaseStudy/CSWMD_CaseStudy-4.pdf.

¹⁴¹ *U.S. Senate Roll Call Votes*, *supra* note 139.

¹⁴² TUCKER, *supra* note 140, at 22 (“[T]he fifth amendment—to delay U.S. ratification until Articles X and XI of the CWC had been renegotiated—would effectively doom the treaty.”).

¹⁴³ The Article X amendment, along with four other contentious amendments, were debated for ten hours over the course of two days. *Id.* at 18.

¹⁴⁴ *Id.* at 22.

¹⁴⁵ The text of the Act implementing the CWC offers little additional guidance as to the meaning of the assistance provision. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Div.1, Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-867. The

assistance provision articulated during the debates over ratification only remotely resembles the weak assistance provision depicted a decade later in the discussions surrounding the U.S.-India nuclear fuel agreement. Preserving the provision's vagueness has permitted members of Congress to shape the provision to conform to shifting political demands.

3. *State Practice*

Nearly every nation in the world has ratified the CWC, and has committed to dismantling any remaining chemical weapons caches.¹⁴⁶ States have found little opportunity to define the meaning of the CWC assistance provision. Assistance provisions are not usually clarified domestically until the danger of violating the assistance provision arises—for example, when a signatory state engages in a joint military operation with a non-signatory state. These situations can only arise when a party to the treaty interacts with a state that continues to rely on the prohibited weapon. Nearly universal ratification of the CWC has made this increasingly rare. As a result, the implementing statutes of other state parties offer little clarification of the meaning of the provision.

These states have made minor revisions to the assistance provision's language. South Korea's implementing legislation has eliminated "encourage" from the language of its domestic act.¹⁴⁷ Ireland's implementing legislation, on the other hand, prohibits only "assist[ance],"¹⁴⁸ whereas both Australia¹⁴⁹ and Canada's implementing legislation preserves the original language of the CWC assistance provision.¹⁵⁰ Canada's act further provides that "[i]n the event of any inconsistency between the provisions set out in the schedule and the provisions of the Convention, the provisions of the Convention prevail."¹⁵¹ This sample represents only a fraction of the nations that have ratified the treaty. But this cross-section of domestic statutes suggests that domestic legislating implementing the CWC offers little additional guidance as to the meaning of "assist, encourage, or induce."

implementing act prohibits efforts to "to assist or induce" the development, production, and acquisition of chemical weapons, eliminating the "encourage" provision. But this alteration is not explained, nor does the act define "assist" or "induce." *Id.*

¹⁴⁶ *Status of Participation in the Chemical Weapons Convention as of 21 May 2009*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, http://www.opcw.org/index.php?eID=dam_frontend_push&docID=13069.

¹⁴⁷ Act on the Control of the Production, Export, Import, etc. of Specific Chemicals for the Prohibition of Chemical Weapons, Act no. 5162, art. 3, Aug. 16, 1996 (S. Kor.), http://www.opcw.org/fileadmin/OPCW/LAO/article_VII/legislation_database/KR.pdf.

¹⁴⁸ Chemical Weapons Act, 1997, Part II(3)(1)(b) (Act. No. 28/1997) (Ir.), <http://www.irishstatutebook.ie/1997/en/act/pub/0028/print.html#partii>.

¹⁴⁹ Faiza Patel King, *Implementing the Chemical Weapons Convention: A Comparative Case Study of the Legislation of Australia and France*, in *THE CHEMICAL WEAPONS CONVENTION: IMPLEMENTATION, CHALLENGES, AND OPPORTUNITIES* 104 (Ramesh Thakur & Ere Haru eds., 2006).

¹⁵⁰ Chemical Weapons Convention Implementation Act, S.C. 1995, c. 25, art. 6 (Can.), <http://laws-lois.justice.gc.ca/eng/acts/C-27.6/FullText.html>.

¹⁵¹ *Id.* art. 2(3).

D. The Mine Ban Treaty

The Mine Ban Treaty assistance provision repeats nearly verbatim the language of the CWC. Under Article I of the Mine Ban Treaty, “[e]ach State Party undertakes never under any circumstances . . . to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”¹⁵² The treaty itself does not further define the meaning of “assist, encourage, or induce.” And the *travaux* do not significantly clarify its terms.

The examples of state practice, however, provide valuable insight into the international community’s evolving understanding of this provision. Due to the failure of many powerful states to ratify the treaty, the signatories to the Convention were forced to define the assistance provision’s impact upon joint operations between signatory and non-signatory states. They were also forced to confront the new question of whether investment in a company that manufactures the prohibited weapon qualifies as “assistance” under the terms of the treaty.

1. *Travaux Préparatoires*

The Mine Ban Treaty advanced through an accelerated negotiations process. States attending the First Review Conference of the Convention on Conventional Weapons in May 1996 expressed widespread support for an international effort to curtail the use of landmines.¹⁵³ The Mine Ban Treaty signing ceremony took place just nineteen months later.¹⁵⁴ Perhaps due in part to this compressed schedule, the text of Article I was adopted nearly verbatim from the CWC. Even early drafts include this unaltered assistance provision language.¹⁵⁵

Moreover, the *travaux* collectively show that the assistance provision was rarely, if ever, invoked during the Mine Ban negotiating process. One survey of the Mine Ban Treaty drafting process concluded that there was no discussion of the scope of the assistance provision prior to the treaty’s adoption.¹⁵⁶ Given the scarcity of relevant preparatory material, examples of state practice take on heightened salience in the effort to untangle the scope of the Mine Ban Treaty assistance provision.

¹⁵² Mine Ban Treaty, *supra* note 9, art. 1.

¹⁵³ Stuart Maslen & Peter Herby, *An International Ban on Anti-personnel Mines: History and Negotiation of the “Ottawa Treaty,”* in THE BANNING OF ANTI-PERSONNEL MINES: THE LEGAL CONTRIBUTION OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 606 (Louis Maresca & Stuart Maslen eds., 2000).

¹⁵⁴ *Id.* at 607. This compressed timeframe was due largely to the mine ban proponents’ desire to capitalize on the momentum built at the First Review Conference. But the process may have been further accelerated by the death of Princess Diana in August of 1997. Proponents viewed the treaty as a fitting tribute to Princess Diana’s lifetime work of anti-landmine advocacy. As public pressure mounted, the treaty took on increased urgency, particularly in the United Kingdom. ALAN BRYDEN, INTERNATIONAL LAW, POLITICS AND INHUMANE WEAPONS: THE EFFECTIVENESS OF GLOBAL LANDMINE REGIMES 11 (2013).

¹⁵⁵ *See, e.g.*, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Austrian Draft, May 13, 1997, *reprinted in* THE BANNING OF ANTI-PERSONNEL LANDMINES, *supra* note 153, at 554.

¹⁵⁶ STUART MASLEN, ANTI-PERSONNEL MINES UNDER INTERNATIONAL HUMANITARIAN LAW: A VIEW FROM THE VANISHING POINT 115 (2001) (“To the best knowledge of the author, there was no open discussion of the issue during or prior to the Oslo Diplomatic Conference, yet since the adoption of the Convention, the precise meaning of the undertaking contained in Article I(1)(c) has been widely debated.”).

2. *United States Ratification and Implementation*

The United States has not ratified the Mine Ban Treaty.

3. *State Practice*

The Mine Ban Treaty negotiations proceeded fairly smoothly. The ratification process, however, marked a departure in the evolution of the assistance provision across weapons ban treaties. The Mine Ban Treaty represented the first global treaty containing an assistance provision that the United States failed to ratify.¹⁵⁷ And the United States' abstention, along with its continued reliance on the prohibited weapons, gave a sudden urgency to the project of defining the assistance provision.

Most of the United States' primary military allies, including England, France, and Germany, had ratified the treaty. The United States failure to ratify the treaty forced these states to consider the impact of the assistance provision on military efforts engaged in jointly with the United States. Anticipating this problem, Canada issued a declaration of understanding at the time of ratification. It stated:

It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1 (c).¹⁵⁸

Various countries followed suit. Australia and the United Kingdom issued similar declarations of understanding upon ratification of the treaty,¹⁵⁹ with Australia adding that it would interpret the word "assist" to mean "the actual and direct physical participation in any activity prohibited by the Convention but does not include permissible indirect support"¹⁶⁰

¹⁵⁷ The United Nations lists twelve multilateral treaties containing an assistance provision in its disarmament treaty database. Four of those treaties are regional. The United States is a member of six of those remaining treaties. The only two non-regional disarmament treaties the United States has not joined are the Mine Ban Treaty and the Cluster Munitions Convention. See DISARMAMENT TREATIES DATABASE, *supra* note 2.

¹⁵⁸ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvi-5&chapter=26&lang=en (last visited Nov. 10, 2012) (declaration of Canada).

¹⁵⁹ *Id.* (declaration of Australia and declaration of the United Kingdom).

¹⁶⁰ *Id.* (declaration of Australia). Some scholars have argued that the Australian declaration is functionally equivalent to a treaty reservation restricting the effect of the Convention, which is prohibited by Article 19 of the treaty. MASLEN, *supra* note 121, at 92-93. In the course of a report compiled by a coalition of NGOs, the Australian government submitted the following statement in response to these concerns: "The Australian Defense Forces Activities in military coalitions conducted with non-Ottawa States are governed by rules of engagement which comply, without exception, with the terms of the Convention (including the declaration made by Australia when depositing its instrument of ratification) as incorporated into domestic legislation by the Anti-Personnel Mines

And the effort to pass implementing legislation in the United Kingdom was delayed due to concerns that British soldiers would be at risk of prosecution for engaging in joint military operations.¹⁶¹ Clause 5 of this domestic legislation responds to these concerns by providing a defense against prosecution if certain conditions regarding a joint operation are met.¹⁶²

When the treaty's member states convened for the First Review Conference to the Convention in December 2004, the final report of the conference testified to the member states' ongoing struggle to define the assistance provision in light of the United States' continuing reliance on the prohibited weapon. Paragraph 115 of the final report states:

With respect to Article 1, States Parties have discussed paragraph 1, subparagraph c of the Article (i.e., that each State Party undertakes never to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention), - and how they understand its application when engaged in military operations with States not party to the Convention. In addition, States Parties have discussed whether the transit of antipersonnel mines by a State not party to the Convention relates to this provision.¹⁶³

But interoperability was not the only area of concern. The sudden confusion regarding joint military engagements was accompanied by another fresh problem: whether investment in companies that manufacture the prohibited weapon violates the assistance provision. States have long held that domestic companies engaging directly in the manufacturing or transportation of the prohibited weapon violate the terms of a disarmament treaty.¹⁶⁴ But given the large number of states that had failed to ratify this particular treaty—including the United States, Russia, and China, India, and South Korea¹⁶⁵—signatory states were newly confronted with the prospect of widespread and unconcealed manufacturing of the prohibited weapon.

Norway's Advisory Council on International Law addressed this question in 2001. The Council determined that, although the provision's text does not contain explicit guidance, the Norwegian government should refrain from investing in a Singaporean company that continued to manufacture mines because such an investment would veer perilously close to the provision's bounds. "The provision in article 1(1)(c) says nothing about which forms of assistance, etc. are meant to be covered," the Council wrote, but it is also "widely formulated and must be presumed to be intended to cover all forms of assistance."¹⁶⁶ The investment of the Norwegian fund "could contribute to other states and investors following suit."¹⁶⁷ And even if an investment were too small to

Convention Act of 1998." INT'L CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 2004: TOWARD A MINE-FREE WORLD 20 (2004).

¹⁶¹ MASLEN, *supra* note 156, at 134.

¹⁶² *Id.*

¹⁶³ First Review Conference on the State Parties to the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, Nairobi, Kenya, Nov. 29-Dec. 3, 2004, *Final Report*, ¶ 115, APLC/CONF/2004/5 (Feb. 9, 2005).

¹⁶⁴ *See infra* Section I(B)(2).

¹⁶⁵ *States Parties and Signatories*, APLC, U.N. OFFICE AT GENEVA, <http://www.unog.ch/80256EE600585943/%28httpPages%29/6E65F97C9D695724C12571C0003D09EF?OpenDocument> (last visited Nov. 12, 2012).

¹⁶⁶ THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY 134 (Gro Nystuen & Stuart Casey-Maslen eds., 2010) (citations omitted).

¹⁶⁷ *Id.*

transgress the assistance prong of the provision, “this would probably nonetheless be covered by the alternatives ‘induce or encourage’ in any way.”¹⁶⁸ Other countries, however, have yet to address this question directly.

E. The Cluster Munitions Convention

The Cluster Munitions Convention assistance provision nearly replicates the CWC assistance provision. It prohibits all state parties from “[a]ssist[ing], encourag[ing] or induc[ing] anyone to engage in any activity prohibited to a State Party under this Convention.”¹⁶⁹ The Convention distinguishes itself from previous agreements, however, by embedding clarifying statements within its text.

Article 21 of the Cluster Munitions Convention governs “[r]elations with States not party to this Convention.”¹⁷⁰ It represents the first weapons ban treaty provision to address explicitly the issue of joint military engagement with a non-signatory state. And it provides that member states, as well as their military personnel and their citizens, “may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.”¹⁷¹

This concession to the national security demands of member states, however, does not defeat the assistance provision altogether. “Nothing in paragraph 3 of this Article,” the Convention continues in Article 21(4), authorizes a state party to the Convention “(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.”¹⁷² The interaction between this paragraph and the Article 1 assistance provision suggests that a member state is firmly prohibited from engaging in any of the activities described in Article 21(4), but that the vast range of activity not governed by this provision is left to the state to define.¹⁷³

The *travaux* reveal little about the drafters’ understanding of the way in which Article 21 affected the Article 1 assistance provision. But a survey of emerging state views reveals significant differences in state practice on crucial questions regarding the provision’s scope. Preserving the provision’s ambiguity permits each country to tailor its understanding of the provision to various domestic pressures and concerns.

¹⁶⁸ *Id.*

¹⁶⁹ Cluster Munitions Convention, *supra* note 10, art. 1.

¹⁷⁰ *Id.* art. 21.

¹⁷¹ *Id.* art. 21(3).

¹⁷² *Id.* art. 21(4).

¹⁷³ One widely cited commentary on the Convention on Cluster Munitions directly addresses the extent to which Article 21 derogates from the obligations imposed by Article 1. “The word ‘notwithstanding’ supports the interpretation that paragraph 3 [of the Convention] indeed formulates an exception to the more general rules laid down in Article 1 or that it deviates from the legal situation that would otherwise have prevailed.” THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY, *supra* note 166, at 573.

I. *Travaux Préparatoires*

The Cluster Munitions Convention has only seventy-two states parties.¹⁷⁴ As a point of comparison, 160 states are party to the Mine Ban Treaty.¹⁷⁵ The drafting process reflects this muted international consensus for the treaty. It also reflects the lingering impact of the failure of the many powerful states to ratify the previous multilateral weapons ban treaty. The United States had indicated at the outset that it would not join the Convention. As a result, the question of the assistance provision's impact on joint military engagement colored the entire negotiation process.¹⁷⁶ The impact of Article 1 on interoperability "proved to be a major point of contention in the final negotiations of Article 1 from the beginning of the Diplomatic Conference until the final day of negotiations."¹⁷⁷

At a draft conference held in Wellington, a group of delegations presented a discussion paper summarizing the interoperability concerns generated by the assistance provision as written.¹⁷⁸ The Mine Ban Treaty had contained no provision explicitly addressing interoperability. But the group argued that, although cluster munitions were more likely to actually be deployed in combat than mines, and therefore posed a greater danger for a state to violate the assistance provision.¹⁷⁹ Various proposals were offered in response.¹⁸⁰ But as late as January 21, 2008, the Draft Cluster Munitions Convention still did not contain a provision addressing the question of interoperability.¹⁸¹

By the time of the May 2008 Diplomatic Conference in Dublin, it had become clear that the question of interoperability would pose one of the most significant challenges for the drafting process.¹⁸² During consultations with interested delegations, a consensus emerged that including the interoperability caveat as a separate article, rather than as an amendment to Article

¹⁷⁴ DISARMAMENT TREATIES DATABASE, *supra* note 2.

¹⁷⁵ As a point of comparison, 160 states are party to the Mine Ban Treaty. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, DISARMAMENT TREATIES DATABASE, http://disarmament.un.org/treaties/t/mine_ban (last visited Nov. 14, 2012). One hundred ninety nations are party to the NPT. *Treaty on the Non-Proliferation of Nuclear Weapons*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, DISARMAMENT TREATIES DATABASE, <http://disarmament.un.org/treaties/t/npt> (last visited Nov. 14, 2012). One hundred and sixty three states are party to the BWC. *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, DISARMAMENT TREATIES DATABASE, <http://disarmament.un.org/treaties/t/bwc> (last visited Nov. 14, 2012) And 188 states are party to the CWC. *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, DISARMAMENT TREATIES DATABASE, <http://disarmament.un.org/treaties/t/cwc> (last visited Nov. 14, 2012).

¹⁷⁶ THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY, *supra* note 166, at 550 n.32. ("According to a report by Human Rights Watch and Landmine Action, a State Department official said the US had communicated its views on the process and the draft convention to more than 100 nations. Foremost among the concerns it raised with other States about the possible impact of a future Convention that prohibits cluster munitions was the issue of 'interoperability' (joint military engagement operations involving the US and States Parties to the Convention), with the US seeking to ensure that a new Convention would not impede its ability to employ cluster munitions in NATO and other coalition military operations.")

¹⁷⁷ *Id.* at 106.

¹⁷⁸ *Id.* at 553.

¹⁷⁹ *Id.* at 554.

¹⁸⁰ *Id.* at 554.

¹⁸¹ THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY, *supra* note 166, at 653-66.

¹⁸² *Id.* at 556.

I, offered the best path forward.¹⁸³ This new article was drafted, and the delegates conveyed informally that they would accept this draft text as a basis for consensus for the final language of the treaty.¹⁸⁴

2. *United States Ratification and Implementation*

The United States has not ratified the Cluster Munitions Convention.

3. *State Practice*

The Cluster Munitions Convention entered into force just over two years ago. As a result, there are few examples of implementing legislation to examine. However, at least one state has already been criticized for using Article 21 to abrogate the Convention's core prohibitions. Australia's proposed legislation criminalizes assistance with obtaining or using cluster munitions, but also provides broad exceptions to this rule for those individuals engaged in joint military operations with non-signatory states.¹⁸⁵ Human Rights Watch chastised Australia for ceding too much ground on the issue, urging the country to "issue clear policy statements that it will not knowingly assist with the use of cluster munitions, and will not grant permission for foreign forces to stockpile cluster munitions on, or transit cluster munitions through, Australian territory."¹⁸⁶

Informal reports also suggest that significant confusion and discord remain among states parties as to the scope of the assistance provision. During the course of their research for a 2009 report on the Cluster Munitions Convention, Human Rights Watch and Landmine Action obtained letters from various government officials clarifying their country's position on the scope of the assistance provision.¹⁸⁷ While not legally binding, these responses provide some indication as to state's current understanding of the provision.

Responding to the question of whether the assistance provision prohibits the transit of cluster munitions through the territory of a member state, the Dutch Minister of Foreign Affairs wrote that "the transit across Dutch territory of cluster munitions that remain the property of the third party in question is not prohibited under the Convention."¹⁸⁸ The United Kingdom had also previously stated that the assistance provision imposes no legal requirement to ban the storage or transit of foreign cluster munitions on its territory.¹⁸⁹ However, in keeping with the spirit of the treaty, the United Kingdom would seek to remove all caches from its territory "within the eight year period allowed for stockpile destruction."¹⁹⁰ Mexico, on the other hand, indicated in a letter to HRW and Landmine Action that "the transit . . . of cluster munitions is

¹⁸³ *Id.* at 558.

¹⁸⁴ *Id.* at 565.

¹⁸⁵ Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (Cth) paras. 72.41-72.43 (Austl.), <http://www.comlaw.gov.au/Details/C2010B00251>.

¹⁸⁶ *Australia: Cluster Munitions Law Seriously Flawed*, HUMAN RIGHTS WATCH, Aug. 22, 2012, <http://www.hrw.org/news/2012/08/22/australia-cluster-munitions-law-seriously-flawed>.

¹⁸⁷ HUMAN RIGHTS WATCH ET AL., BANNING CLUSTER MUNITIONS: GOVERNMENT POLICY AND PRACTICE 35 (2009) [hereinafter HRW Report].

¹⁸⁸ *Id.* at 25 (quoting Letter from Henk Swarttouw, Dutch Ministry of Foreign Affairs, to Human Rights Watch and Landmine Action (Feb. 26, 2009)).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

prohibited” unless such action is taken for the purpose of destroying the prohibited weapon or for providing training in the detection, clearance, and destruction of cluster munitions.¹⁹¹ Bulgaria, Burkina Faso, Ecuador, Lebanon, Malta, and Zambia have all assumed similar positions.¹⁹²

The HRW report also probed member states for their understanding of how the assistance provision interacts with the interoperability provision. Fewer countries indicated their position on this question. But Ecuador indicated that states may never use Article 21 to derogate from any of the core prohibitions, presumably meaning those articulated in Article I.¹⁹³ The Netherlands stated that “the consequences of this provision for NATO operations are still being clarified.”¹⁹⁴

The question of whether investment in a company that manufactures cluster munitions qualifies as “assistance” has also taken on increased salience in recent years. Following the close of negotiations at the Dublin Conference, the Cluster Munitions Coalition, an international civil society campaign heavily involved in the effort to establish a treaty to ban cluster munitions, called for states to expressly indicate that the assistance provision extends to prohibit investment in cluster munitions producers.¹⁹⁵ No state party issued such a statement at the time.¹⁹⁶

A number of the domestic statutes implementing the Convention, however, do govern investment in companies that manufacture cluster munitions weapons. Ireland’s implementing legislation prohibits the investment of any public funds in a company that manufactures cluster munitions.¹⁹⁷ It further provides that “[a]n investor shall endeavour to avoid the direct investment of public moneys in equity or debt securities issued by a munitions company.”¹⁹⁸ New Zealand also prohibits “intentional or knowing investment in the development or production of cluster munitions.”¹⁹⁹ Luxembourg’s implementing legislation contains a similar provision.²⁰⁰

This Part has surveyed a vast amount of material produced over the course of decades. Out of this broad array of sources, a few patterns emerge. First, the original assistance provision was only vaguely defined at the time of drafting, and the provision has remained ambiguous for the four decades since. The drafters have rarely addressed the scope of the assistance provision directly, and various states’ implementing legislation has seldom attempted to clarify its meaning. Collectively, these sources suggest that the weapons ban assistance provision has been left deliberately vague.

Second, states have taken advantage of this vagueness to adapt the provision to changing circumstances. For example, the assistance provision was cast as exceedingly powerful by the

¹⁹¹ *Id.* (quoting Letter from Amb. Juan Manuel Gómez Robledo, Secretariat of Foreign Relations of Mex., to Human Rights Watch and Landmine Action (Mar. 4, 2009)).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 26 (quoting Letter from Henk Swarttouw, Dutch Ministry of Foreign Affairs, to Human Rights Watch and Landmine Action (Feb. 26, 2009)).

¹⁹⁵ THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY, *supra* note 166, at 130-31.

¹⁹⁶ *Id.*

¹⁹⁷ Cluster Munitions and Anti-personnel Mines Act 2008 (Act No. 20/2008) pt. 4 (Ir.), http://www.stopexplosiveinvestments.org/uploads/pdf/ireland_legislation.pdf.

¹⁹⁸ *Id.*

¹⁹⁹ THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY, *supra* note 166, at 132.

²⁰⁰ *Id.*

Senate in order to ratify an important and controversial weapons ban treaty. But when the U.S. government decided that present circumstances called for enhanced nuclear trade with India—despite the consequences such a move may have for the NPT—the provision was contracted to allow the United States to maneuver around it.

And finally, this flexibility has reduced the cost of becoming a party to weapons ban treaties. It has allowed signatory states to continue engaging in joint military operations with non-signatory states. Member states are given wide latitude to determine which acts violate the provision. This reduces the risk of a domestic political backlash over an unpopular position. It also permits states to avoid antagonizing a crucial military ally.

II. ENFORCEMENT MECHANISMS

Defining the scope of a weapons-ban assistance provision permits the international community to recognize the violation of a treaty obligation. But this is only a first step toward ensuring compliance. In order to be effective, assistance provisions must also contain some mechanism for remedying violations. And yet the five weapons ban treaties surveyed here contain only weak provisions for enforcement. Even the most clearly defined assistance provision becomes meaningless if it repeatedly ignored.

Just as case law clarifies the meaning of a statute, enforcement of the terms of a treaty help to clarify its scope. This section demonstrates that violations of the assistance provision have rarely been punished. As a result, the assistance provision has retained its ambiguity. Throughout the 1970s and 1980s, for example, nuclear states repeatedly provided non-nuclear states with sensitive nuclear assistance.²⁰¹ And yet it was unclear which forms of assistance violated the terms of the treaty. If any of these transfers of sensitive nuclear material had triggered allegations of an Article I violation, the terms of this provision's scope may have been clarified. But a history of non-enforcement has contributed to the assistance provision's continued ambiguity.

A. Treaty Language

The Nuclear Non-Proliferation Treaty does not explicitly empower state parties to punish its members for failing to comply with the terms of the treaty. However, it does offer incentives for states to ratify and adhere to their treaty obligations. Under Article V of the NPT, nuclear states agree to provide nuclear technology and explosive devices to non-nuclear states parties to the treaty for the purpose of “peaceful application.”²⁰² Such assistance should be offered at a price that is “as low as possible and exclude[s] any charge for research and development.”²⁰³ The NPT compensates states for refraining from obtaining nuclear weapons by providing them with a steady and inexpensive supply of nuclear energy.

At the time of drafting, the benefit of NPT ratification for nuclear-weapons states was obvious: containing the spread of nuclear weapons would help preserve the nuclear states' national security advantage. But for non-nuclear states, the promise of cheap and easy access to nuclear power, combined with the many obstacles to obtaining a nuclear weapon or achieving

²⁰¹ See *supra* Subsection I(A)(3).

²⁰² Non-Proliferation Treaty, *supra* note 6, art. 5.

²⁰³ *Id.*

nuclear capabilities, also counseled strongly in favor of compliance with the terms of the treaty. In theory, the interaction between the Article I assistance provision and the Article V enforcement regime would create substantial incentives for states to comply with the requirements of the treaty.²⁰⁴

The negotiation process for the next major disarmament treaty, the Biological Weapons Convention, proceeded smoothly.²⁰⁵ But the price of this smooth passage was the absence of any effective enforcement mechanisms.²⁰⁶ There are no specific provisions for verifying a state's compliance with the treaty. The treaty provides only that a state party may lodge a complaint with the Security Council against another for a breach of its obligations, and that the targeted state must "co-operate" with any subsequent investigation the Security Council may initiate.²⁰⁷

By the time the Chemical Weapons Convention was opened for signature in 1993, the collapse of the Soviet Union had radically altered the global world order, and had opened up new opportunities for international legal cooperation. In the context of this new geo-political reality—and perhaps with an eye toward the ways in which the NPT had failed to contain the spread of nuclear weapons—the drafters of the CWC crafted an alternative method of enforcement. The first prong of the CWC enforcement regime resembles that of the NPT. It provides for the suspension of certain rights and privileges under the treaty in the event of non-compliance.²⁰⁸ Such rights and privileges include, for example, "the right to participate in[] the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention."²⁰⁹

Yet in the event that the withholding of these rights and privileges granted by the treaty fails to curb the state's behavior, the CWC provides additional mechanisms for enforcement. When a state party has committed "serious damage" to the purpose of the Convention, the Conference "may recommend collective measures to States Parties in conformity with international law."²¹⁰ And in the case of a violation of "particular gravity," the Conference shall "bring the issue . . . to the attention of the United Nations General Assembly and the United Nations Security Council."²¹¹ An added incentive for compliance is that states parties must monitor and regulate their trade in chemicals with non-states parties. For a certain category of chemicals, states parties are prohibited from engaging in trade with a non-state party altogether.²¹² Many of these chemicals are necessary for the manufacture of legitimate products.

²⁰⁴ In reality, numerous non-nuclear states launched nuclear weapons programs. *See supra* Subsection I.A.3. But the counter-factual is also hard to prove. The NPT may have been successful in deterring scores more states from pursuing their own nuclear programs.

²⁰⁵ BOWMAN, *supra* note 76, at 15.

²⁰⁶ *Id.*

²⁰⁷ Biological Weapons Convention, *supra* note 7, art. 5.

²⁰⁸ Under Article XII, the Convention Conference, comprised of one representative of each state party, may, "upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention." Chemical Weapons Convention, *supra* note 8, arts. 8(9), 12(2).

²⁰⁹ *Id.* art. 11(2)(b).

²¹⁰ *Id.* art. 12(3).

²¹¹ *Id.* art. 12(4).

²¹² *Chemical Weapons Convention (Treaty Doc. 103-21): Hearings Before the S. Comm. on Foreign Relations, 103d Cong. 28-29 (1994)* (statement of Hon. Stephen J. Ledogar, U.S. Rep., Conf. on Disarmament, U.S. Dep't of State).

States are therefore incentivized to avoid expulsion from the treaty in order to protect domestic production.²¹³

In sum, the enforcement language goes beyond that of the NPT. But the CWC still fails to provide more explicit instructions for ensuring compliance. Moreover, the United States may have further weakened the enforcement capabilities of the CWC by passing implementing legislation that reserves the right to refuse chemical weapons inspections in the interests of national security²¹⁴ and to refuse the removal of chemical samples from U.S. territory.²¹⁵ In the aftermath of the legislation's adoption, "[s]everal foreign governments [took] note of the provisions and some, such as India and Russia . . . initiated steps to duplicate them."²¹⁶

Despite these weaknesses, the next major weapons-ban treaty to contain an assistance provision offered even fewer options for ensuring compliance. The Mine Ban Treaty provides only vague and blunted enforcement mechanisms. A member state agrees to submit to a series of intricate and well-orchestrated steps to ensure compliance. The process is initiated when one member state suspects non-compliance by another state and submits a request for "clarification."²¹⁷ The request may eventually be routed through the United Nations, culminating in a "fact-finding mission" and a meeting of member states.²¹⁸ But these softened provisions represent the totality of enforcement provided for by the text of the treaty itself.

The Cluster Munitions Convention offers little more in the way of enforcement. This recent treaty echoes the language of the Mine Ban Treaty, providing that "the Meeting of States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law."²¹⁹

B. Unilateral Withdrawal

The limited enforcement mechanisms set forth in the text of the treaty itself are further weakened by the ease with which a state party may unilaterally withdraw from its treaty obligations. All five treaties contain a relatively costless means of exit for member states. Even if a state party were to face stiff penalties for violating the assistance provision, it could simply cast off its treaty obligations altogether.

The NPT permits a state to withdraw from the treaty following a three-month waiting period, provided that the state also provides the other states parties and the U.N. Security Council notice of withdrawal, including a "statement of the extraordinary events it regards as having jeopardized its supreme interests."²²⁰ The BWC and the CWC also provide for unilateral withdrawal under the same terms as laid out in the NPT: a member state may withdraw from each convention with three months (in the case of the BWC) or 90 days' (in the case of the

²¹³ *Id.*

²¹⁴ Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, tit. III, § 307, 112 Stat. 2681-856, 2681-878 to 2681-879 (codified as amended at 22 U.S.C. § 6701-71 (2006)).

²¹⁵ *Id.* at 2681-875 ("No sample collected in the United States pursuant to an inspection permitted by this Act may be transferred for analysis to any laboratory outside the territory of the United States.")

²¹⁶ Jonathan B. Tucker, *The Chemical Weapons Convention: Has it Enhanced U.S. Security?*, ARMS CONTROL TODAY, Apr. 2001, at 10, http://www.armscontrol.org/act/2001_04/tucker.

²¹⁷ Mine Ban Treaty, *supra* note 9, art. 8.

²¹⁸ *Id.* arts. 8(8)-(20).

²¹⁹ Cluster Munitions Convention, *supra* note 10, art. 8(5).

²²⁰ Non-Proliferation Treaty, *supra* note 6, art. X.

CWC) notice and assurance that such withdrawal is required because “the supreme interests of its country” would otherwise be jeopardized.²²¹ The Mine Ban Treaty imposes both a longer waiting period and safeguards against withdrawal in wartime. Under Article 20, a state may unilaterally withdraw from the treaty following a six-month waiting period, unless the state is engaged in an armed conflict. In this case, “the withdrawal shall not take effect before the end of the armed conflict.”²²² The Cluster Munitions Convention contains similar terms.²²³

None of the weapons-ban treaties imposes penalties upon withdrawing states that have consequences beyond those that any other non-signatory state faces. In the case of the NPT, for example, withdrawal includes a loss of access to nuclear technologies for “peaceful” purposes—i.e., the loss of a benefit that membership confers, rather than a penalty for withdrawal.²²⁴ Under the four remaining treaties, the adverse consequences of withdrawal are perhaps less immediately obvious. The benefits of membership include the exchange of “equipment and scientific and technical information” relating to the prohibited weapon; withdrawal from these treaties may thus impose indirect costs.

There are few examples of state withdrawal from the weapons-ban treaties. Nonetheless, North Korea’s unilateral withdrawal from the NPT in 2003 demonstrates that there are circumstances under which a state will not merely flout a treaty’s obligations, but will instead bow out from the agreement altogether. International reaction to this withdrawal from the NPT obligations is therefore instructive. On January 10, 2003, North Korea announced that it was withdrawing from the NPT and would no longer submit to inspections by the International Atomic Energy Agency.²²⁵ Article X of the NPT states that any member has the right to withdraw “if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.”²²⁶ It does not impose a good faith requirement on the party exiting the treaty. Thus, while there was some debate over whether North Korea was bound to fulfill the three-month waiting period,²²⁷ the international consensus appears to be that North Korea is no longer a party to the treaty.²²⁸

The same day North Korea announced its withdrawal, Kofi Annan issued a statement urging North Korea to reconsider.²²⁹ A series of six-party talks were initiated soon after North

²²¹ Chemical Weapons Convention, *supra* note 8, art. 16; Biological Weapons Convention, *supra* note 7, art. 13(2).

²²² Mine Ban Treaty, *supra* note 9, art. 20.

²²³ Cluster Munitions Convention, *supra* note 10, art. 20.

²²⁴ Non-Proliferation Treaty, *supra* note 6.

²²⁵ See Frederic L. Kirgis, *North Korea’s Withdrawal from the Nuclear Non-Proliferation Treaty*, AM. SOC’Y OF INT’L LAW (Jan. 2003), <http://www.asil.org/insigh96.cfm>.

²²⁶ Non-Proliferation Treaty, *supra* note 6, art. 10.

²²⁷ North Korea announced its withdrawal from the NPT in 1993. After intense negotiations, the government announced it would “unilaterally . . . suspend, as long as it consider[ed] necessary, the effectuation of its withdrawal from the NPT.” Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT’L L. 405, 431 (2003). North Korea argued that the 2003 withdrawal took effect immediately because it was only one day short of the three-month waiting period when it suspended its withdrawal in 1993. *Id.* at 432 n.143.

²²⁸ The U.N. website acknowledges that North Korea “announced its withdrawal from the treaty,” but it notes that States Parties “continue to express divergent views” regarding North Korea’s status. *Democratic People’s Republic of Korea: Accession to Treaty on the Non-Proliferation of Nuclear Weapons*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/a/npt/democraticpeoplesrepublicofkorea/acc/moscow> (last visited Nov. 11, 2012).

²²⁹ Press Release, U.N. Secretary-General, Secretary General Urges Democratic People’s Republic of Korea to Reconsider Withdrawal From Nuclear Non-Proliferation Treaty, U.N. Press Release SG/SM/8578 (Oct. 1, 2003), <http://www.un.org/News/Press/docs/2003/sgsm8578.doc.htm>.

Korea's announcement and lasted until February 10, 2005.²³⁰ But it was not until after North Korea announced that it had successfully executed a nuclear test on October 9, 2006 that the international community mounted a more serious response to North Korea's nuclear activities. Five days after the test, the Security Council passed Resolution 1718. That resolution stated that nuclear proliferation "constitutes a threat to international peace and security."²³¹ According to one scholar, this language had the effect of "polishing the trigger to act under Chapter VII of the UN Charter."²³² The resolution also "[d]emand[ed] that the DPRK immediately retract its announcement of withdrawal from the [NPT]"²³³ and imposed limited sanctions.²³⁴

In July 2006, the Security Council issued Resolution 1695. Though working outside of the NPT framework, the resolution indirectly addressed some central elements of the assistance provision. It mandated that all member states "prevent missile and missile-related items, materials, goods and technology being transferred" to North Korea's missile or WMD programs, and that they further "prevent the procurement of missiles or missile related-items, materials, goods and technology" from North Korea, and "the transfer of any financial resources in relation to" North Korea's missile or WMD program.²³⁵

Following North Korea's launch of a second nuclear test in May of 2009, the Security Council issued further sanctions.²³⁶ But there was never any military response to North Korea's violation of the NPT. And there is no indication that there are serious checks in place to deter nations from exercising a right to abandon a treaty. The North Korean example indicates that mere withdrawal is not sufficient to elicit a strong international response. In this case, it was the violation of the prevailing norm against the detonation of nuclear weapons that provoked the international community to punish a transgressing state.²³⁷ This example suggests that unilateral withdrawal offers a relatively cost-free option for a state that chooses to abdicate its treaty obligations.

C. External Methods of Enforcement

International responses to violations of weapons ban treaty assistance provisions have varied enormously. But any ramification or punishment for disarmament treaty violations has generally targeted states that violated the treaty directly. There are far fewer examples of a state being punished for merely providing assistance with the production or acquisition of a prohibited weapon. Moreover, the response from the United Nations to these violations of these assistance provisions has been fairly muted. The United Nations has been hesitant to impose sanctions for the violation of any provisions of these disarmament treaties, and has been even more reluctant to punish those states that have assisted others in their pursuit of a prohibited weapon. The response from the United Nations following India and Pakistan's 1998 nuclear detonations is illustrative of this pattern. In the weeks following the explosion, the Security

²³⁰ Geoffrey S. Carlson, *An Offer They Can't Refuse? The Security Council Tells North Korea to Re-Sign the Nuclear Non-Proliferation Treaty*, 46 COLUM. J. TRANSNAT'L L. 420, 435 (2008).

²³¹ S.C. Res. 1718, U.N. Doc S/RES/1718 (Oct. 14, 2006).

²³² Carlson, *supra* note 230, at 438.

²³³ S.C. Res. 1718, *supra* note 231, ¶ 3.

²³⁴ *Id.* ¶ 8.

²³⁵ S.C. Res. 1695, ¶¶ 3-4, U.N. Doc. S/RES/1695 (Jul. 15, 2006).

²³⁶ S.C. Res. 1874, ¶¶ 9-12, U.N. Doc. S/RES/1874 (June 12, 2009).

²³⁷ For a description of entrenchment of the norm of non-use of nuclear weapons, see Nina Tannenwald, *The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use*, 53 INT'L ORG. 433 (1993).

Council issued a non-binding resolution “[e]ncourag[ing] all States to prevent the export of equipment, materials or technology that could in any way assist programmes in India or Pakistan for nuclear weapons or for ballistic missiles capable of delivering such weapons.”²³⁸ The Security Council did not even take the step of banning exports of nuclear equipment and technology to India.²³⁹

This survey of enforcement mechanisms reveals underscores the difficulties of ensuring compliance with any of these treaties’ requirements. The assistance provision, which governs acts one step removed from the actual reliance on a prohibited weapon, is even more challenging to enforce. The primary result of this weak enforcement regime is that a provision will be rendered entirely meaningless if it is universally ignored. The secondary consequence of this history of non-enforcement is that the provision has not been further defined by the process of prosecuting its violation.

III. THE BENEFITS AND DRAWBACKS TO AMBIGUITY

The deliberate vagueness of the assistance provision offers member states the benefit of flexibility. It permits each state to tailor the assistance provision to their specific needs. The advantage of this approach is that it helps national security concerns, allowing states to determine when and how the assistance provision may affect a joint military operation with a non-signatory state. It allows states to create military “workarounds” that permit them to comply with their treaty obligations while still maintaining strong ties with its crucial allies.

This flexibility has proved crucial to American military operations. The United States relies on these “workarounds” in its own efforts to engage the military aid of countries that are signatories to disarmament treaties like the Cluster Munitions Convention.²⁴⁰ For example, Canadian soldiers operating as part of the allied forces in Afghanistan in 2001 were ordered by their American commander to lay anti-personnel mines. Because Canada is a signatory to the Ottawa Convention, the soldiers refused. American forces were eventually brought in to lay the mines for them.²⁴¹ While this solution could potentially have some limited adverse military effects—for example, delaying a military operation while waiting for American forces to arrive—such a workaround permits Canada to continue engaging in joint operations with the United States. To deem third-party states providing military assistance to other countries as having violated their treaty obligations may weaken the United States’ ability to enlist the military support of many of its most important allies.

In addition, a more aggressive interpretation of the assistance provision may have a dampening effect on future weapons ban treaties. If the space for interpretation of the assistance provision is constricted, states may begin to decide that the global benefits of prohibiting noxious weapons are outweighed by the national security costs imposed by ratifying these

²³⁸ S.C. Res. 1172, ¶ 8, U.N. Doc. S/RES/1172 (June 6, 1998).

²³⁹ Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty Is Losing Its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT’L L. 337, 395 (2007).

²⁴⁰ HUMAN RIGHTS WATCH & HARVARD LAW SCH. INT’L HUMAN RIGHTS CLINIC, INTEROPERABILITY AND THE PROHIBITION ON ASSISTANCE: MEMORANDUM TO DELEGATES OF THE DUBLIN DIPLOMATIC CONFERENCE ON CLUSTER MUNITIONS 10-11 (2008), http://www.hrw.org/pub/2008/arms/HRW_HLS_Interoperability_0508.pdf.

²⁴¹ Michael Byers, *Book Review*, 23 EUR. J. INT’L L. 586, 586-87 (2012) (reviewing HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY*, (2011)).

treaties. If such treaties become overly burdensome on joint military efforts, they may become politically unpalatable. Finally, preserving this flexible approach to the assistance provision permits the United States more latitude in pursuing its own foreign policy goals. The obvious example of this is the notably constricted view of the NPT assistance provision articulated by the government in its effort to provide India with nuclear fuel and nuclear technology.

The downside of this vagueness, however, is that states are less firmly bound by these treaties. The line between a flexible assistance provision and a weak one is thin. There are few examples of a state violator of any disarmament assistance provision suffering any consequences for this violation. For this reason, many states and NGOs have criticized the United States' decision to provide India with nuclear fuel assistance. Critics of the deal feared that "global nonproliferation norms would be undermined by the extension of nuclear trade to India, a state that has tested nuclear weapons and never signed the nuclear Nonproliferation Treaty (NPT)."²⁴² And describing the fallout from the U.S.-India Nuclear Assistance Bill, a Center for Strategic and International Studies fellow noted that "[s]tates have pushed the boundary between legally binding and voluntary commitments . . . China and Russia have exploited the political disarray for their own national benefit."²⁴³

The new Cluster Munitions Convention interoperability provision has also been criticized for shrinking the assistance provision down to the point of non-existence. While proponents paint Article 21 of the Cluster Munitions Convention as a necessary accommodation of the demands of the current global order, critics argue that the new article may render the assistance provision meaningless. During the Cluster Munitions Convention negotiations, the Cluster Munitions Coalition "strongly criticized the article for being politically motivated and for leaving a degree of ambiguity about how to apply the ban on assistance with prohibited acts in joint military operations."²⁴⁴ And the ICRC has expressed concern that the article permits state to introduce alarmingly broad loopholes into their domestic implementing legislation. Such exceptions in domestic implementing legislation, it explained, may "permit members of the armed forces to be directly involved in the use, possession, stockpiling and transport of cluster munitions."²⁴⁵

²⁴² Sharon Squassoni, *The U.S.-India Deal and its Impact*, ARMS CONTROL TODAY, Jul./Aug. 2010, http://www.armscontrol.org/act/2010_07-08/squassoni.

²⁴³ *Id.*

²⁴⁴ HUMAN RIGHTS WATCH, MEETING THE CHALLENGE: PROTECTING CIVILIANS THROUGH THE CONVENTION ON CLUSTER MUNITIONS 136 (2010), <http://www.hrw.org/sites/default/files/reports/armsclusters1110webwcover.pdf>.

²⁴⁵ *Convention on Cluster Munitions: Interoperability and National Legislation—The View of the ICRC*, INT'L COMM. OF THE RED CROSS 2 (Sept. 12, 2012), <http://www.icrc.org/eng/assets/files/2012/cluster-munitions-interoperability-icrc-2012-09-12.pdf>.