Backgrounder
No. 2550
April 28, 2011
Published by The Heritage Foundation

The United States Should Not Join the Convention on Cluster Munitions

Steven Groves and Ted R. Bromund, Ph.D.

Abstract: *The Convention on Cluster Munitions is a misbegotten treaty that neither advances the laws of war nor enhances security. It is an unverifiable, unenforceable, all-or-nothing exercise in moral suasion, not a serious diplomatic instrument. It creates perverse incentives for insurgents to use civilian populations as human shields, undermines effective arms control efforts, inhibits nation-states' ability to defend themselves, and denigrates the sovereignty of the United States and other democratic states. The U.S. should emphatically reject both the convention and the undemocratic Oslo Process that produced it and should instead continue to negotiate a realistic and enforceable protocol on cluster munitions that balances U.S. military requirements with the humanitarian concerns posed by unexploded ordnance.*

The Obama Administration is under pressure to join the Convention on Cluster Munitions (CCM), a flawed treaty that would ban all cluster munitions in the U.S. arsenal, including some of its most advanced weapons. The process that created the convention poses dangers to American sovereignty and effective diplomacy, and joining the convention would reduce the effectiveness of the U.S. armed forces.

The U.S. should not join the Convention on Cluster Munitions under any circumstances. The Obama Administration should instead continue to work toward adoption of a new protocol to the Convention on Certain Conventional Weapons (CCW) that would balance U.S. military requirements with the need

Talking Points

- Cluster munitions provide essential capabilities to U.S. armed forces.
- U.S. policy is to procure and use cluster munitions responsibly, in a manner consistent with the laws of war and its existing treaty obligations.
- The international campaign to ban cluster munitions is based on unsupported assertions, is rooted in a rejection of state sovereignty and the laws of war, and incentivizes combatants to use civilians as human shields.
- If the U.S. joined the Convention on Cluster Munitions, it would be obliged to stop using cluster munitions, including some of its most advanced weapons. The U.S. should therefore not join the convention.
- Instead, the U.S. should continue to work toward the adoption of a new protocol to the Convention on Certain Conventional Weapons that balances U.S. military requirements with the need to lessen the humanitarian threat of unexploded ordnance associated with cluster munitions.

This paper, in its entirety, can be found at:
http://report.heritage.org/bg2550

Produced by The Margaret Thatcher Center for Freedom

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

to lessen the humanitarian impact of unexploded ordnance, which is often associated with cluster munitions.

The Cluster Munitions Controversy

There is no universally accepted definition of "cluster munition." While traditional bombs and artillery shells have a single warhead that is intended to detonate on impact, cluster munitions are designed to split apart during descent, scattering multiple, smaller explosive submunitions across a wide area and striking multiple targets on the ground, such as armored columns, massed infantry, and aircraft parked in the open. Cluster munitions are thus categorized as an "area weapon" as opposed to a single warhead, which is a "unitary weapon."

In some cases, the submunitions do not detonate upon impact with the target or the ground. If not removed, this unexploded ordnance (UXO) can impair the movement of friendly forces through the area by damaging equipment and injuring or killing military personnel. Civilians returning to an area where cluster munitions have been used have fallen victim to UXO because they either did not know that UXO is dangerous, accidentally came into contact with the UXO, or attempted to clear the UXO themselves. However, the UXO problem is not unique to cluster munitions. No weapon—area or unitary—detonates perfectly every time. The danger from UXO is inherent in the use of explosives in war.

To address the humanitarian effects of UXO, in 2001 the United States and other nations that are party to the CCW began to negotiate a protocol to minimize the dangers to civilians from explosive remnants of war, including UXO from cluster munitions.[1] These negotiations led to the completion of CCW Protocol V on Explosive Remnants of War in November 2003.[2] But some nations were not satisfied with Protocol V and called for a separate protocol specific to the dangers that they associated with cluster munitions. The CCW process therefore kept the issue of cluster munitions on its agenda.

Because negotiations in the CCW process are based on consensus, meaning that all nations present must accept a proposed protocol before it can be adopted, the CCW process does not move rapidly. Several countries and nongovernmental organizations (NGOs), such as the Cluster Munition Coalition (CMC) and Human Rights Watch, wanted more immediate action on cluster munitions. These nations and NGOs broke away from the CCW process in November 2006 and began their own negotiations, the "Oslo Process," to ban all cluster munitions.

Given the continuing military utility of cluster munitions, the fact that their responsible use complies with the laws of war, and the faults inherent in both the CCM and the Oslo Process, the U.S. should neither seek accession to the CCM nor change U.S. policy to comply with it.

Two years later, in December 2008 in Oslo, Norway, 94 nations signed the Convention on Cluster Munitions, the treaty created by this breakaway group. Nations party to the CCM agree to ban the use, transfer, acquisition, and stockpiling of cluster munitions. To date, 108 countries have signed the CCM, and 56 have become full parties to the convention by submitting their instruments of ratification.[3]

Under the auspices of the CCW, the United States continued negotiations on a new protocol that would restrict the types of cluster munitions that may be used during an armed conflict. These negotiations will continue in 2011, but the mandate for them will expire at the end of the year. If no agreement is reached before the CCW review conference in November, the nations party to the CCW

1. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as Amended on 21 December 2001, at *http://www.unog.ch/80256EDD006B8954/(httpAssets)/40BDE99D98467348C12571DE0060141E/$file/CCW+text.pdf* (April 11, 2011).
2. Protocol on Explosive Remnants of War, November 28, 2003, Art. 3(2), at *http://www.icrc.org/ihl.nsf/FULL/610* (April 11, 2011).
3. Cluster Munition Coalition, "The Problem," at *http://www.stopclustermunitions.org/the-problem/* (April 20, 2011).

may conclude that renewing the mandate serves no purpose and allow the negotiations to lapse.[4] That would leave the CCM as the only treaty and international process specifically concerned with the production, use, and transfer of cluster munitions.

Given the continuing military utility of cluster munitions, the fact that their responsible use complies with the laws of war, and the faults inherent in both the CCM and the Oslo Process, the U.S. should neither seek accession to the CCM nor change U.S. policy to comply with it. Rather, the U.S. should continue its efforts to negotiate an agreement within the CCW process that recognizes that the traditional obligations of combatants apply to their use of cluster munitions and that these munitions should be designed to reduce the unintended harm that they, like all weapons of war, can cause to civilians.

U.S. Policy on Cluster Munitions

The United States, like many other nations that are major users and producers of cluster munitions, has not joined the CCM. The U.S. has concluded that the CCM's immediate and total ban on cluster munitions is not in its national interest. Harold Koh, Legal Adviser to the Department of State, stated in 2009 that U.S. national security interests "cannot be fully ensured consistent with the terms of the CCM."[5] Former State Department official Richard Kidd summarized the deleterious effect of a total ban:

> The most vocal proponents of a ban on cluster munitions fail to mention the very real costs and trade-offs that will be incurred in other areas if such a total ban were to come into effect, costs which will include a decrease in military effectiveness, strains within alliance structures, impediments to the formation of peacekeeping operations, the diversion of humanitarian assistance streams and the very real likelihood that the weapons used in lieu of cluster munitions could also have significant adverse humanitarian consequences.[6]

The United States has played a leading role in the humanitarian efforts to clear UXO worldwide, most of which is not associated with cluster munitions and was not generated by the United States.[7] In the narrower context of cluster munitions, the U.S. was one of the first countries to recognize the humanitarian concerns that are associated with submunitions that fail to detonate. On January 10, 2001, Secretary of Defense William Cohen issued a memorandum stating that the use of submunitions in Kosovo and other operations "[has] revealed a significant unexploded ordnance (UXO) concern."

To address that concern, Secretary Cohen announced, "It is the policy of the [Department of Defense] to reduce overall UXO through a process of improvement in submunition system reliability—the desire [of the U.S.] is to field future submunitions with a 99% or higher functioning rate."[8] To that end, the memorandum mandated that any submunitions approved for production in fiscal year (FY) 2005 and beyond must have a 99 percent or greater functioning rate. Secretary Cohen did not ban the production or use of cluster munitions by U.S. forces. Rather, he set a goal to procure more reliable submunitions in the future while permitting U.S. forces to retain and use "legacy" submunitions until they are replaced by more advanced models.

The Bush Administration refined U.S. policy on cluster munitions and placed a deadline on the phaseout of less reliable submunitions. On June 19,

4. Jeff Abramson, "Cluster Negotiations Extended Again," *Arms Control Today*, January/February 2011, at *http://www.armscontrol.org/act/2011_01-02/Cluster* (February 24, 2011).
5. Harold Hongju Koh, "Opening Statement for the United States Delegation," Third Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War, November 9, 2009, at *http://geneva.usmission.gov/2009/11/09/erw/* (April 11, 2011).
6. Richard Kidd, remarks at "Connect US Fund" Roundtable Dialogue, Aspen Institute, Washington, D.C., at *http://www.america.gov/st/texttrans-english/2008/April/20080530150219eaifas0.8029596.html* (April 11, 2011).
7. U.S. Department of State, Bureau of Political-Military Affairs, "The United States' Leadership in Conventional Weapons Destruction," February 14, 2011, at *http://www.state.gov/r/pa/plrmo/156534.htm* (February 24, 2011).
8. William S. Cohen, "DoD Policy on Submunition Reliability," Memorandum for the Secretaries of the Military Departments, U.S. Department of Defense, January 10, 2001.

2008, Secretary of Defense Robert Gates stated that after 2018, the U.S. will use only submunitions that have a functioning rate of 99 percent or higher:

> After 2018, the Military Departments and Combatant Commands will only employ cluster munitions containing submunitions that, after arming, do not result in more than 1% unexploded ordnance (UXO) across the range of intended operational environments. The 1% UXO limit will not be waived.[9]

However, Secretary Gates also warned that an immediate ban on cluster munitions would undermine U.S. interests because "[t]he loss of the ability to employ cluster munitions, in a manner consistent with the law of armed conflict, would create a credibility gap for indirect fire of area targets and require an increase in other resources."[10] Therefore, Secretary Gates defined 2008 to 2018 as the transition period. During this transition period, U.S. forces may use cluster munitions that exceed the 1 percent UXO rate, but only with the approval of a combatant commander.[11]

The actions of Secretaries Cohen and Gates have been complemented by Congress's passage of legislation to ensure that legacy U.S. cluster munitions are not supplied to foreign nations and to urge that U.S.-supplied munitions not be used in a manner inconsistent with the law of armed conflict. In 2009, Congress restricted the foreign sale or transfer of cluster munitions to those with a 99 percent or higher functioning rate and required that the sale or transfer agreement specify that the cluster munitions "will only be used against clearly defined military targets and will not be used where civilians are known to be present."[12]

The United States has played a leading role in the humanitarian efforts to clear UXO worldwide, most of which is not associated with cluster munitions and was not generated by the United States.

Some Members of Congress have sought to go further. For instance, only a month after President Barack Obama's election, Senators Patrick Leahy (D–VT) and Dianne Feinstein (D–CA) explicitly called for the incoming Administration to "put our nation on a path" to accede to the CCM.[13] On September 29, 2009, Senator Leahy, Senator Feinstein, and 14 other Senators wrote to President Obama urging him to conduct a thorough review of U.S. policy on cluster munitions.[14] On March 10, 2011, Senator Feinstein introduced legislation that would require the President to submit a plan to Congress for "cleaning up" any unexploded cluster munitions if such weapons are used by U.S. forces.[15]

The final aspect of U.S. policy on cluster munitions and, more broadly, on the explosive remnants of war is compliance with U.S. obligations under Protocol V to the CCW, which it ratified in January 2009. Even before ratification, the U.S. was spending tens of millions of dollars every year to clear landmines and other UXO left behind, mostly by other combatants.[16]

9. Robert M. Gates, "DoD Policy on Cluster Munitions and Unintended Harm to Civilians," Memorandum for the Secretaries of the Military Departments, U.S. Department of Defense, June 19, 2008.
10. *Ibid.*, p. 1.
11. The 2008 policy placed additional restrictions on cluster munitions, including the removal and demilitarization of munitions that exceed operational planning requirements, and restrictions on the transfer of cluster munitions that do not meet the 1 percent UXO rate to foreign countries.
12. Omnibus Appropriations Act, 2009, Public Law 111–8, 123 Stat. 895, Sec. 7056(b), March 11, 2009.
13. Patrick Leahy and Dianne Feinstein, "New Treaty Should Prompt New Administration to Review U.S. Policy on Cluster Munitions," December 3, 2008, at *http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.OpEds&ContentRecord_id=FED5D84D-C45A-DF9B-B2FF-77A3396943E2* (March 3, 2011).
14. Landmine and Cluster Munition Monitor, "United States Cluster Munition Ban Policy," updated October 22, 2010, at *http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/313* (March 3, 2011).
15. Cluster Munitions Civilian Protection Act of 2011, S. 558, 112th Cong., 1st Sess., March 10, 2011.
16. The removal of landmines and removal of the UXO related to cluster munitions and unitary munitions are often combined, both in description and practice, even though landmines and other types of UXO are not technically identical.

From 1993 through 2010, U.S. funding for humanitarian mine action programs totaled $1.792 billion, averaging almost $100 million per year.[17] According to the International Campaign to Ban Landmines, total international support for 1992–2008 was $4.27 billion, which means that the U.S. provided one-third of worldwide funding.[18] In FY 2010 alone, the U.S. contributed $161.5 million through the State Department's Office of Weapons Removal and Abatement toward the destruction of conventional weapons in 43 countries.[19]

In FY 2009, U.S. funding from the State Department and other agencies for UXO clearance in Afghanistan totaled $30.77 million, making Afghanistan the largest recipient of such U.S. assistance.

In Afghanistan, for example, clearance operations are coordinated through the U.N. Mine Action Coordination Centre of Afghanistan (MACCA), which noted more than 6,000 known hazards affecting 641 square kilometers of the country as of the end of 2010. UXO (excluding landmines) in Afghanistan causes 74 percent of the over 600 annual deaths and injuries resulting from explosive remnants. Landmines are responsible for the remaining 26 percent.[20]

In the year ending March 2010, MACCA received $78.44 million in funding, almost all of it from Western donors, although Oman donated a token $100,000. The United States provided more than $18 million (23 percent) of MACCA's funding on a bilateral basis. Canada gave $13.39 million. No other country donated more than $6 million.[21] In FY 2009, U.S. funding from the State Department and other agencies for UXO clearance in Afghanistan totaled $30.77 million, making Afghanistan the largest recipient of such U.S. assistance.[22]

The International Campaign to Ban Landmines notes that, while the U.S. employed cluster munitions in Afghanistan, "clearance operations followed in 2002–2003 guided by US cluster strike data"—which the U.S. provided as required by Protocol V—have been so successful that "demining operators say they now encounter few cluster munition remnants."[23] Engineers serving with the U.S. 112th Engineer Battalion in Afghanistan note that cleared land must be 99.6 percent free of all mines and UXO: "The only way to guarantee this land is safe is to remove just about every single piece of metal scrap."

Progress is understandably slow because many clearance operations must shift tons of dirt and, if lucky, rely on maps of Soviet minefields left behind when Soviet forces departed Afghanistan in 1989.[24] Taliban attacks on and abductions of clearance personnel further slow clearance operations. In 2009–2010, 21 abductions or armed attacks against clearance personnel were reported.[25]

In working to overcome these obstacles, the U.S. has shown leadership on this issue in Afghanistan, as it has around the world. The U.S has thus ful-

17. U.S. Department of State, Bureau of Political-Military Affairs, *To Walk the Earth in Safety: The United States' Commitment to Conventional Weapons Destruction*, 9th Edition, July 2010, at *http://www.state.gov/documents/organization/145116.pdf* (October 1, 2010).
18. International Campaign to Ban Landmines, *Landmine Monitor Report 2009: Toward a Mine-Free World*, October 2009, p. 1, at *http://www.the-monitor.org/lm/2009/res/Landmines_Report_2009.pdf* (October 1, 2010).
19. U.S. Department of State, "The United States' Leadership in Conventional Weapons Destruction."
20. Mine Action Coordination Centre of Afghanistan, "Mine Action Programme of Afghanistan (MAPA) Fast Facts," 2011, at *http://www.macca.org.af/file.php?id=243* (February 24, 2011).
21. Mine Action Coordination Centre of Afghanistan, *1388 MAPA Annual Report*, 2010, p. 52, at *http://www.macca.org.af/file.php?id=191* (February 24, 2011).
22. Iraq received $19.54 million in FY 2009. U.S. Department of State, *To Walk the Earth in Safety*, pp. 46 and 49.
23. International Campaign to Ban Landmines, *Landmine Monitor Report 2009*, p. 102.
24. Alexandra I. Colarik, "Mine/UXO Clearance," Task Force Predator Post, November 7, 2010, at *http://tfpredatorpost.com/?page_id=164* (February 24, 2011).
25. Mine Action Coordination Centre of Afghanistan, *1388 MAPA Annual Report*, p. 50.

filled its obligation under CCW Protocol V to provide, where feasible, "technical, financial, material or human resources assistance, bilaterally or through a mutually agreed third party, including *inter alia* through the United Nations system or other relevant organizations, to facilitate the marking and clearance, removal or destruction of such explosive remnants of war."[26] The record demonstrates that the U.S. has sought to retain cluster munitions that provide essential military capabilities, to replace these weapons with newer and more reliable variants as soon as is practical, to fulfill its responsibilities related to cluster munitions and other UXO under Protocol V in Afghanistan, and to provide humanitarian assistance to many other countries to help them cope with serious UXO threats that the United States did not create.

International Efforts to Ban or Regulate Cluster Munitions

CCW Protocol V, like U.S. policy, recognizes the necessity of allowing armed forces to pursue legitimate military objectives while emphasizing that armed forces have an obligation to take "all feasible precautions" to protect the civilian population. In this context, "feasible" does not mean "humanly possible." It means "precautions which are practical or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations."[27]

Thus, Protocol V does not impose all-or-nothing requirements. It recognizes that combatants have an obligation to remove or assist in removing explosive remnants of war, but it also recognizes that combatants have other obligations, including protecting the personnel in their armed forces. Because none of these obligations can be shirked and all of them are in tension, they must be balanced with each other. Privileging one obligation will necessarily detract from the others. By recognizing this need for balance, Protocol V continued the long Western tradition in the development and elaboration of the laws of war.

While the breakaway nations were angered by the slow pace of the CCW process, their departure was precipitated by Israel's use of cluster munitions during the July–August 2006 conflict between Israel and Hezbollah in southern Lebanon.

The CCW process that produced Protocol V and the four preceding protocols operates on the basis of consensus, meaning that all nations that are party to the CCW must agree to a text before it can be adopted. Consensus is not a magic solution for the problems inherent in negotiating a treaty among a large number of states. Some states will agree to the letter of the consensus while failing to fulfill it in practice, while others will seek to mobilize an emerging consensus against the United States.[28] However, when the object of a treaty is limited, especially when developing the laws of war, consensus is important for the simple reason that if all parties do not agree to it, the new codification of the laws of war is simply an expression of opinion, not an obligation that all nations have accepted.

As adopted in 2003, Protocol V does not specifically address cluster munitions, but it certainly applies to the removal of unexploded cluster submunitions, which are simply one of the many types of explosive remnants of war that pose dangers. However, some nations party to the CCW and some nongovernmental organizations believed that Protocol V did not go far enough in restricting the use of cluster munitions.[29]

Therefore, the U.S. and other countries agreed to continue negotiations under the CCW process in

26. U.N. Office at Geneva, "Disarmament," at *http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30* (February 24, 2011).
27. Protocol on Explosive Remnants of War, Art. 3(2).
28. Ted R. Bromund, "The Obama Administration Makes the Wrong Call on the U.N.'s Arms Trade Treaty," Heritage Foundation *WebMemo* No. 2653, October 15, 2009, at *http://www.heritage.org/Research/InternationalOrganizations/wm2653.cfm.*
29. See Nout van Woudenberg, "The Long and Winding Road Towards an Instrument on Cluster Munitions," *Journal of Conflict and Security Law*, Vol. 12, No. 3 (Winter 2007), pp. 447–483.

2005 and 2006 to address cluster munitions specifically. During the Bush Administration, these negotiations sought agreement on reasonable restrictions on the design and use of cluster munitions "with a view to minimizing the humanitarian risk of these munitions becoming explosive remnants of war."[30]

Due in part to Russian resistance, the negotiations did not progress swiftly enough for the nations and NGOs that regarded Protocol V as inadequate.[31] Their frustration boiled over during a November 2006 meeting of the CCW states parties when delegates from Sweden submitted a declaration calling for an international agreement not only on the removal of cluster munitions UXO, but also "prohibit[ing] the development, production, stockpiling, transfer and use of cluster munitions that pose serious humanitarian hazards because they are for example unreliable and/or inaccurate."[32] Concurrent with Sweden's declaration, delegates from Norway announced that they would organize and host an international conference in Oslo separate from the CCW "to start a process towards an international ban on cluster munitions that have unacceptable humanitarian consequences."[33]

While the breakaway nations were angered by the slow pace of the CCW process, their departure was precipitated by Israel's use of cluster munitions during the July–August 2006 conflict between Israel and Hezbollah in southern Lebanon.[34] Thus, instead of continuing to work through the CCW process, 49 countries gathered in Oslo in February 2007 and declared their intention to "[c]onclude by 2008 a legally binding instrument that will…prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians."[35]

Fifteen months later, on May 30, 2008, in Dublin, 107 countries adopted the final draft of the Convention on Cluster Munitions.[36] Parties to the CCM agree—with some significant and revealing exceptions—to ban the use, transfer, acquisition, and stockpiling of all cluster munitions. The CCM currently has 108 signatories, but only 56 have become full parties by depositing their instruments of ratification.[37] For their part, the United States and many other nations continue to negotiate a Protocol VI to the CCW that would restrict the use, transfer, and stockpiling of cluster munitions but, unlike the CCM, would not ban these weapons outright.

Creating a Capability Gap for U.S. Forces

Current U.S. policy on cluster munitions strikes the proper balance between maintaining military capabilities and addressing humanitarian concerns. In contrast, the Convention on Cluster Munitions requires a total and immediate ban on cluster munitions as defined by the CCM without regard for the consequences on future battlefields. The CCM allows no transition period that would permit countries that rely on cluster munitions to develop and field alternative weapons to engage area targets.

30. *Ibid.*
31. Abramson, "Cluster Negotiations Extended Again."
32. Convention on Certain Conventional Weapons, Third Review Conference, "Declaration on Cluster Munitions," November 17, 2006, at *http://www.unog.ch/80256EDD006B8954/(httpAssets)/E4AC282AA43501A6C125723000605378/$file/Sweden+(CM).pdf* (April 11, 2011).
33. Steffen Kongstad, "Statement by Norway at the Third Review Conference of the CCW," Geneva, November 17, 2006, at *http://www.unog.ch/80256EDD006B8954/(httpAssets)/0CAFAE63ED7030A0C125723000607A10/$file/Norway.pdf* (April 11, 2011), and Cluster Munition Coalition, "Report, Oslo Conference on Cluster Munitions, 22–23 February 2007," at *http://www.stopclustermunitions.org/calendar/?id=1108* (April 11, 2011).
34. Abramson, "Cluster Negotiations Extended Again."
35. Oslo Conference on Cluster Munitions, "Declaration," February 23, 2007, at *http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20%28final%29%2023%20February%202007.pdf* (April 11, 2011).
36. Convention on Cluster Munitions, May 30, 2008, at *http://www.clusterconvention.org/documents/full-text-enfres/the-convention* (April 14, 2011).
37. Cluster Munition Coalition, "Who's Joined the Convention on Cluster Munitions?" February 3, 2011, at *http://www.stopclustermunitions.org/wp/wp-content/uploads/2011/02/english-who-has-joined-the-ccm-100111.pdf* (April 11, 2011).

The CCM's proponents maintain that these weapons no longer have any military utility, if they ever had any utility. One proponent claims that the changing nature of warfare has rendered cluster munitions obsolete because "today's urban insurgents" do not employ tanks or armored vehicles and because UXO poses too great a threat to counterinsurgency and peacekeeping operations.[38] Human Rights Watch maintains:

> The military utility of cluster munitions is limited in modern warfare. The weapons were designed for Cold War-era operations with large formations of tanks or troops. Today's combat often takes place in urban environments, where the humanitarian harm of cluster munitions is magnified.[39]

The opponents of cluster munitions also assert that unitary munitions are sufficient and that cluster munitions will not be missed.

The argument that the nature of war has changed forever simply lacks any foundation in fact. In Iraq and Afghanistan, the U.S. has attacked troop and tank formations. In the ongoing operations in Libya, NATO is targeting tanks and other vehicles. Furthermore, as a statement about the future, this claim is no more than a guess. Wars of the future may prove to be counterinsurgency campaigns in cities. They may also be wars fought between well-armed and technologically advanced adversaries on traditional battlefields. Most likely, the character of future wars, like wars in the past, will vary, depending on who is fighting, where they are fighting, and over what they are fighting.

It would be extremely dangerous for the U.S. to assume that war has changed forever and that some combat scenarios will never reoccur. Such an assumption would inevitably become public knowledge and would incentivize enemies to fight in just those ways for which the U.S. has not prepared.

If armed forces are deprived of the ability to attack legitimate targets with cluster munitions, they either will not attack them or will attack them with a large number of more powerful unitary munitions.

In the past, states banned or regulated weapons based on their effects on combatants. The CCM's proponents argue that the incidental effects of weapons on civilians must also be taken into consideration or even receive first consideration. Yet this assumes that civilians will be on the battlefield in the first place. This assumption goes beyond an argument about the future nature of war: It creates incentives to ensure that its prediction will come true. If combatants assume that civilians will be on the battlefield, they have no incentive to try to keep them off. Indeed, it will incentivize combatants to make military use of civilian populations.[40] That will not be good for civilians, armed forces, or the regulation and control of war.

Similarly, the assertion that unitary munitions represent the wave of the future is not supported by the facts. Unitary munitions are a very old kind of weapon. It would be more plausible to claim, as evidenced by their rapid development over the past 20 years, that smart weapons are the wave of the future. Smart weapons can be deployed as unitary munitions or as cluster munitions. Both kinds of munition engage targets more accurately and effectively, thus reducing harm to civilians and requiring fewer missions by U.S. and allied forces. It is the opponents of cluster munitions, with their fixation on the number of submunitions and failure to account for smart weapons, who are living in the past.

Finally, the claim that unitary munitions are sufficient from a military perspective and better from a humanitarian one is equally flawed. Unitary muni-

38. Bonnie Docherty, "The Time Is Now: A Historical Argument for a Cluster Munitions Convention," *Harvard Human Rights Journal*, Vol. 20 (2007), pp. 68–69, at *http://www.law.harvard.edu/students/orgs/hrj/iss20/docherty.pdf* (April 11, 2011).

39. Human Rights Watch, "Twelve Facts and Fallacies About the Convention on Cluster Munitions," April 14, 2009, at *http://www.hrw.org/node/82346* (April 11, 2011).

40. Scholars of the laws of war tend to ignore this "incentive effect." For example, see Charli Carpenter, "Fighting the Laws of War: Protecting Civilians in Asymmetric Conflict," *Foreign Affairs*, March/April 2011, pp. 146–152.

tions are larger than cluster submunitions. They contain more explosives, cause more collateral damage, and—if they fail to detonate—leave behind even more dangerous UXO. If armed forces are deprived of the ability to attack legitimate targets with cluster munitions, they either will not attack them or will attack them with a large number of more powerful unitary munitions. Neither of these choices is militarily satisfactory or more humane. The argument that unitary munitions are simply and obviously preferable to cluster munitions reflects nothing more than the desire of the coalition that produced the CCM to demonize cluster munitions.

"The loss of the ability to employ cluster munitions, in a manner consistent with the law of armed conflict, would create a capability gap for indirect fire of area targets and require an increase in other resources."

Recent U.S. military actions directly refute the assertions made by the proponents of a ban. The United States has used cluster munitions in every major U.S. combat operation since Vietnam, including Grenada in 1983, Iraq in 1991, Kosovo in 1999, Afghanistan in 2001, and Iraq in 2003.[41] Despite proponents' contentions, U.S. forces engaged tanks, armored vehicles, troop concentrations, and other targets in Iraq and Afghanistan with cluster munitions in situations in which using a small number of area weapons was preferable to using numerous unitary weapons.

The U.S. military continues to support the retention of a cluster munitions capability. In an October 2004 report to Congress, the U.S. Department of Defense described the important role that cluster munitions play in U.S. combat operations and explained why they are preferable to unitary munitions in time-sensitive battlefield conditions:

> Cluster munitions perform a vital role on the battlefield through the rapid delivery of lethal fire on target. The unique capability of these munitions provides commanders a versatile weapon ideally suited to attack time-sensitive area targets in a fluid battlefield environment. To obtain the same target effects that are attained with cluster munitions, many times more unitary munitions (projectiles, missiles or bombs) would have to be expended. Restricting U.S. Forces to firing only unitary munitions would severely hinder our capabilities (including logistical support systems) and would limit the number of available munitions options for the operational commander. Furthermore, it would make the successful attack of time-sensitive targets less certain and undoubtedly increase risk to U.S. soldiers.[42]

In 2008, Secretary Gates reaffirmed the importance of maintaining a cluster munitions capability to engage area targets:

> There remains a military requirement to engage area targets that include massed formations of enemy forces, individual targets dispersed over a defined area, targets whose precise locations are not known, and time-sensitive or moving targets. Cluster munitions can be the most effective and efficient weapons for engaging these types of targets. Unitary munitions do not provide the same capability and effects in the same amount of time as cluster munitions in addressing these requirements. Cluster munitions are an integral part of U.S. forces capabilities. The loss of the ability to employ cluster munitions, in a manner consistent with the law of armed conflict, would create a capability gap for indirect fire of area targets and require an increase in other resources.[43]

According to the U.S. Air Force, its ability to attack multiple targets with a single cluster munition instead of multiple unitary munitions "reduces the risks to aircrews and equipment by reducing the

41. Landmine and Cluster Munition Monitor, "United States Cluster Munition Ban Policy."
42. U.S. Department of Defense, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), Defense Systems/Land Warfare and Munitions, "Cluster Munitions," October 2004, p. ii.
43. Gates, "DoD Policy on Cluster Munitions and Unintended Harm to Civilians," p. 1.

number of sorties required to effectively attack" area targets.[44]

As with all munitions, cluster munitions sometimes leave behind dangerous unexploded ordnance. The United States has therefore sought, in its domestic policy and through international negotiations, to limit the humanitarian impact caused by submunition UXO. Thus, by 2018, the U.S. plans to phase out cluster munitions that do not have a 99 percent or higher functioning rate. The U.S. is also negotiating regulations on the design and use of cluster munitions through a protocol to the Convention on Certain Conventional Weapons.

The near-total ban mandated by the CCM would impose an unwarranted limit on the ability of the U.S. to defend itself and its allies.

The CCM's Blanket Ban on Cluster Munitions Is Unwarranted

The stated purpose of the Convention on Cluster Munitions—to ban all cluster munitions—is undesirable or unwarranted for six reasons:

- While all weapons of war have the potential to cause humanitarian harm, cluster munitions cause very few civilian casualties and, when properly deployed, do not inherently violate international humanitarian law.
- The CCM's definition of "cluster munition" is internally inconsistent and explicitly reflects the self-interested military and financial motives of some of the convention's key members.
- While the CCM protects the advanced cluster munitions of its members, it would ban similar U.S. weapons.
- The stigma that the CCM attaches to cluster munitions and the humanitarian concerns that it evokes incentivize insurgents to use civilian populations as human shields.
- The CCM seeks to erase the boundary between arms control treaties, which apply in times of peace, and international humanitarian law, which regulates how arms are used during wartime.
- The CCM contains no serious compliance mechanism but, if seriously implemented, would impose intrusive and burdensome requirements on the United States.

Cluster Munitions' Compliance with the Law of Armed Conflict. The CCM treats cluster munitions as if they were the equivalent of poisonous gas or biological weapons and therefore deserving of banishment because they are inherently inhumane or indiscriminate. However, unlike these weapons, which have been banned by treaty, cluster munitions do not cause excessive, unnecessary, or inhumane harm to combatants.[45] Thus, cluster munitions do not inherently violate the law of armed conflict, also known as international humanitarian law.

It is revealing that even the CCM does not claim that cluster munitions are inhumane to combatants. Rather, it asserts that the signatories are concerned about *civilian* casualties caused by cluster munitions "when they fail to function as intended or when they are abandoned."[46] This argument could be used against any type of explosive munition, all of which sometimes fail to function and can be dangerous if abandoned. The CCM ignores efforts to improve the design of cluster munitions and rejects as insufficient any efforts to simply limit or regulate their use. Proponents of a ban apparently believe that there is no way to use cluster munitions that would uphold international humanitarian law by "distinguish[ing] between the civilian population and combatants."[47]

44. U.S. Air Force, Judge Advocate General's Corps, *Air Force Operations and the Law*, 1st ed. (2002), p. 296, cited in William Boothby, "Cluster Bombs: Is There a Case for New Law?" Harvard University *Occasional Paper Series*, No. 5 (Fall 2005), p. 4, at *http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper5.pdf* (April 12, 2011).
45. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, September 3, 1992, and Additional Protocol IV on Blinding Laser Weapons to the Convention on Certain Conventional Weapons, October 13, 1995.
46. Convention on Cluster Munitions, May 30, 2008, at *http://www.stopclustermunitions.org/wp/wp-content/uploads/2008/06/englishfinaltext.pdf* (April 12, 2011).
47. *Ibid.*

This belief is incorrect. Cluster munitions can be directed against military objectives in ways that uphold this distinction. For example, cluster munitions can be used legitimately—and have been used legitimately—to target a column of tanks and armored personnel vehicles in a desert setting. Similarly, cluster munitions can be dropped legitimately on a military airfield or hangars.

The CCM ignores efforts to improve the design of cluster munitions and rejects as insufficient any efforts to simply limit or regulate their use.

More broadly, it is important to recognize that armed forces are allowed to attack legitimate military targets. They are obliged to seek to minimize civilian casualties but are not obliged to ensure that civilian populations are entirely unaffected by all armed conflict. Such a requirement would render almost any military action illegal and deprive nations of their inherent right to self-defense. Thus, while distinguishing between the civilian population and combatants is certainly vital, it is entirely wrong to regard unintended civilian casualties caused by attacks on legitimate military targets as a problem that requires the banning of the weapon concerned.

Certainly, as new weapons emerge, international humanitarian law may be obliged to recognize that fact. International humanitarian law responds to new weapons not by overthrowing its own fundamental principles, but by applying them to the new weapons. The problems posed by the invention of cluster munitions are not new. The concerns surrounding their use on the modern battlefield find a close parallel in the regulation of sea mines after the 1905 Russo–Japanese War. During that war, both sides laid sea mines to great military effect, but those same mines also destroyed a number of fishing boats and other civilian vessels during and after the hostilities. At a 1907 international conference in The Hague, the Convention Relative to the Laying of Automatic Submarine Contact Mines was adopted. The convention did not ban the use of sea mines, but rather "required notices to ship owners, mechanisms to limit a mine's life, and post-conflict mine clearance."[48]

Sea mines, like cluster munitions, target legitimate military objectives and do not cause excessive or unnecessary injuries to combatants. On the other hand, requiring measures to reduce the impact of sea mines and cluster munitions on the civilian population is reasonable, especially in a post-conflict setting. In both cases, however, an outright ban is unnecessary and not required under the laws of war.

The International Criminal Court (ICC) has also recognized the legitimacy of cluster munitions. In the wake of NATO's 1999 bombing campaign against the Federal Republic of Yugoslavia, a committee convened by the ICC Office of the Prosecutor conducted a legal review of NATO's use of cluster munitions. The committee concluded that "no specific treaty provision…prohibits or restricts the use of cluster bombs" and that no evidence indicates that NATO forces used cluster munitions inappropriately.

By contrast, the same committee report condemned the Serb use of inaccurate Okran rockets with cluster munition warheads against civilian targets in Zagreb. The report found "no indication [that] cluster bombs were used in such a fashion by NATO" and concluded that the Office of the Prosecutor should not commence an investigation into NATO's use of cluster munitions.[49] The report recognized that cluster munitions, like many other munitions, are legitimate weapons that can be used illegitimately.

In addition to being legal, UXO from cluster munitions cause very few civilian casualties. The Cluster Munition Coalition acknowledges that there were only 100 confirmed civilian casualties worldwide from cluster munition UXO in 2009.[50] Even

48. Docherty, "The Time Is Now," p. 57.
49. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, § IV.1(3), June 13, 2000.
50. Cluster Munition Coalition, *Cluster Munition Monitor 2010*, October 2010, p. 2, at *http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/* (March 16, 2011).

if the actual total is higher, cluster munitions cause only a tiny fraction of civilian deaths resulting from military conflicts. In Afghanistan, for example, casualties from all UXO, including landmines, totaled 508 individuals in 2009–2010. Thus, in Afghanistan alone, where there are few cluster munition remnants, UXO killed five times as many people in 2009 as unexploded cluster munitions killed in the entire world.[51]

The International Criminal Court (ICC) has also recognized the legitimacy of cluster munitions.

The CMC concedes that "the effort to ban cluster munitions, with some notable exceptions, has been largely *preventive* in nature."[52] Of course, this statement presumes that cluster munitions are inherently incapable of being designed or used responsibly.

The CCM's Specious Definition of Cluster Munition. The CCM exempts certain artillery shells manufactured in Germany, France, and Sweden from its definition of cluster munition. Thus, claiming that the CCM bans all cluster munitions is inaccurate. Rather, it bans all cluster munitions *except* those that key European nations manufacture, seek to sell outside Europe, and rely upon for their own forces.

In May 2008, negotiations in Dublin were foundering on the definition of cluster munition. This definition would determine which weapons the convention would ban and which would not be affected. A "breakthrough" in the negotiations was seemingly achieved when United Kingdom Prime Minister Gordon Brown announced that in order to "break the log jam" in the negotiations and "to secure as strong a Convention as possible in the last hours of negotiation we have issued instructions that we should support a ban on all cluster bombs, including those currently in service by the UK."[53]

The CCM that resulted from this breakthrough defined "cluster munition" as a munition that contains 10 or more explosive submunitions.[54] The definition excludes munitions that contain nine or fewer submunitions as long as each submunition weighs no more than four kilograms (8.8 pounds), is designed to detect and engage a single target, and is equipped with electronic self-destruct and self-deactivation mechanisms.[55]

This definition ensured that the CCM would not ban the SMArt 155 artillery round (manufactured by GIWS, a joint venture of Rheinmetall AG and the Diehl Group, Germany's largest two ammunition makers) and the 155 BONUS artillery round (a joint manufacturing project of France's Nexter Munitions and Sweden's Bofors AB).[56] If these weapons had not been exempted in the final negotiations, key European nations would likely have refused to adopt the CCM.

This exclusion was motivated by both military and financial concerns. News reports indicate that in November 2007 (six months before the Dublin negotiations), Britain contracted with GIWS to purchase approximately $133 million worth of SMArt 155 artillery rounds. Accordingly, Britain, France, Germany, and Sweden pushed through amendments to specifically exclude these munitions.[57]

51. Mine Action Coordination Centre of Afghanistan, *1388 MAPA Annual Report*, p. 5.
52. Cluster Munition Coalition, *Cluster Munition Monitor 2010*, p. iii (emphasis in original).
53. Michael Smith, "Brown's Loophole Means Cluster Bombs Stay on in UK's Arsenal," *The Sunday Times* (London), June 1, 2008, and Agence France-Presse, "Observers Laud Landmark Cluster Bomb Ban," Google News, May 28, 2008, at *http://afp.google.com/article/ALeqM5ivXrxXgalv00M8IhEYe7fdUxTMDw* (April 12, 2011).
54. Convention on Cluster Munitions, Art. 2(2)(c)(i).
55. *Ibid.*, Art. 2(2)(c)(ii)–(v).
56. Press release, "Germany's SMArt 155 Sensor-Fused Artillery Ammunition Stops Tanks in Their Tracks," Rheinmetall Defence, February 15, 2010, at *http://www.rheinmetall-defence.com/index.php?fid=5291&lang=3* (April 12, 2011), and BAE Systems Bofors AB, "155 BONUS: Strike and Destroy up to 35 km," 2006, at *http://www.bofors.se/bae/products/Bonus.pdf* (April 12, 2011). The United Kingdom's BAE Systems is also a partner in the production and sale of the 155 BONUS round.
57. Smith, "Brown's Loophole Means Cluster Bombs Stay on in UK's Arsenal."

Other nations were similarly self-serving. For example, Australia had made an initial purchase of over $12 million of SMArt 155 artillery shells in October 2007. In Dublin, its diplomats also pushed to exclude the SMArt 155 from the ban.[58] The manufacturers of these munitions have also sought to sell them outside Europe. Reportedly, GIWS representatives demonstrated the SMArt 155 to representatives of the United Arab Emirates in 2005.[59]

The CCM exempts certain artillery shells manufactured in Germany, France, and Sweden from its definition of cluster munition.

There is no logical reason to classify an aerial bomb or artillery shell containing nine submunitions as a permissible "regular munition" under the CCM while classifying a munition containing 10 submunitions as a "cluster munition," which is therefore banned. The SMArt 155 and 155 BONUS rounds serve the same purpose—attacking vehicles from above with smart submunitions—and use the same kind of guidance systems and deactivation features that are used in the most advanced cluster munitions in the U.S. arsenal. The CCM's proponents claim that munitions with nine or fewer submunitions are not cluster munitions because they "avoid indiscriminate area effects and the risks posed by unexploded submunitions," as stated in the CCM.[60] But as neither the SMArt 155 nor the 155 BONUS has been used in combat, there is no evidence from the field that they do not pose similar risks.

The exemption of these artillery rounds from the CCM owes everything to the desire of a few European nations to protect their own manufacturers and to ensure that they retain essential military capabilities. These are understandable desires, but they demonstrate that the CCM was crafted specifically to accommodate these European concerns while ignoring U.S. concerns. The CCM's attempt to delegitimize U.S. cluster munitions while allowing the Europeans to retain their cluster munitions and sell them abroad makes joining the CCM even less appealing to the U.S.

The CCM's unequal treatment of U.S. and European munitions is not a coincidence. It is an excellent way to stigmatize the U.S. possession and sale of cluster munitions while declaring that European sales meet all humanitarian concerns. In other words, it is an attempt to protect foreign (including European) markets from U.S. competition. This is an understandable desire, but one that is unrelated to humanitarianism, and it offers the U.S. no incentive to join the CCM.

Americans and indeed the NGO community may not be used to imagining that treaties supposedly intended to stop the transfer and production of arms can actually be used to legitimate them, but it is naïve to believe that self-interested states conduct their diplomacy solely to achieve humanitarian aims.[61] They look out for their interests just as the United States should look out for its interests.

Attempts to Ban Next-Generation U.S. Weapons. While the CCM excludes selected cluster munitions that are important to manufacturers and

58. Media release, "Defence Purchases New Anti-Tank Artillery Round," Australian Department of Defence, October 3, 2007, at *http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=7131* (April 12, 2011); Associated Press and Australian Associated Press, "Deadlock Broken on Cluster Bomb Ban," *The Australian*, May 30, 2008, at *http://www.theaustralian.com.au/news/deadlock-broken-on-cluster-bomb-ban/story-e6frg6to-1111116482639* (April 12, 2011); and "Fitzgibbon Wants to Keep SMArt Cluster Shells," Australian Broadcasting Corporation News, May 29, 2008, at *http://www.abc.net.au/news/stories/2008/05/29/2259009.htm* (April 12, 2011).
59. GlobalSecurity.org, "ATK/GIWS SMArt 155 Sensor Fuzed Munition Succeeds in UAE Desert Tests," January 10, 2005, at *http://www.globalsecurity.org/military/library/news/2005/01/mil-050110-atk01.htm* (February 25, 2011).
60. Convention on Cluster Munitions, Art. 2(2)(c), and Cluster Munition Coalition, "CMC Briefing Paper on the Convention on Cluster Munitions," at *http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/02/cmc-briefing-paper-on-ccm.pdf* (April 12, 2011).
61. For another example, see Ted R. Bromund and Steven Groves, "The U.N.'s Arms Trade Treaty: A Dangerous Multilateral Mistake in the Making," Heritage Foundation *WebMemo* No. 2309, August 21, 2009, at *http://www.heritage.org/Research/InternationalOrganizations/bg2309.cfm*.

purchasers in Germany, Britain, Australia, France, Sweden, and other countries, the CCM would arguably ban the Sensor Fuzed Weapon (SFW), a highly advanced munition developed in the United States.

The SFW does not resemble any legacy cluster munition in the U.S. arsenal, except that it is also usually dropped from an aircraft. It is a 1,000-pound weapon that contains 10 BLU-108 cylindrical submunitions, each of which contains four "skeet" copper warheads.

Unlike traditional cluster submunitions that are unguided and generally land wherever gravity takes them, the 10 BLU-108 submunitions are ejected from the main munition canister at a certain altitude and then brought to a vertical position by a parachute. After descending to a preset altitude, each submunition begins to spin rapidly and climb in altitude using its rocket motor. Each submunition then ejects four skeet warheads over the target area. Using infrared and laser sensors, the 40 skeets then detect armored vehicles on the ground. When a target is located, the skeet fires an explosively formed copper warhead at the heat source that can penetrate six inches of armor plating, destroying or disabling the vehicle.[62]

The SFW's explosive skeet submunitions are designed to leave behind a "clean" battlefield by using redundant self-destruct and self-deactivation mechanisms. The manufacturer describes these features as follows:

> If a Skeet warhead does not detect a valid target over its lofted trajectory, one of its three safety modes will activate. The first 2 modes enable the Skeet to self destruct after 8 seconds from launch or within a 50ft altitude above the ground. The Skeet's third feature is a time out device that will yield the warhead inert minutes after hitting the ground. The built in redundant self-destruct logic and time out features are key elements that distinguish SFW from traditional [cluster bomb units] and ensure a clean battlefield.[63]

Despite these features, the NGOs at the center of the cluster munitions campaign maintain that the SFW would qualify as a cluster munition under the CCM definition and would therefore be banned.[64] The CCM permits two-submunition artillery shells but would potentially ban the SFW because it contains 10 BLU-108 submunitions and 40 "skeet" sub-submunitions. They ignore the SFW's use of targeting, self-destruct, and sensor fuse technology similar to the submunitions in the SMArt 155 and 155 BONUS artillery shells.

According to the manufacturer, after more than 625 tests, the SFW "has been verified by the U.S. government at greater than or equal to 99 percent reliability" in terms of unexploded ordnance.[65] Further, the SFW has been battle tested successfully, while the artillery shells have never been deployed in combat.

The SFW was first used in combat during Operation Iraqi Freedom. On April 2, 2003, during the initial stages of the war, a detachment of Marines was conducting reconnaissance just north of Al Hillah when it detected a battalion-sized column of Iraqi armor being offloaded from a train. The Iraqis meant to set up an ambush at a crucial chokepoint on the route north to Baghdad.

The Marines, who were not equipped to engage an armored column, requested an airstrike, and a B-52 dropped two SFWs on the leading edge of the Iraqi column, destroying about two dozen tanks and armored vehicles, approximately one-third of the Iraqi force. The Iraqi personnel in the remaining two-thirds of the column abandoned their vehicles

62. For an animated description and live fire demonstration of an SFW, see Discovery Networks, "Future Weapons: Sensor Fuzed Weapon," video, July 23, 2008, at *http://www.youtube.com/watch?v=p-216-Y6Cac* (April 12, 2011).
63. Textron Defense Systems, "BLU-108 Submunition," 2008, at *http://www.textrondefense.com/pdfs/datasheets/blu108_datasheet.pdf* (April 12, 2011).
64. For example, see Cluster Munition Coalition, "Sensor-Fuzed Submunitions and Clean Battlefields: Examining the Facts," August 14, 2008, at *http://www.stopclustermunitions.org/calendar/?id=576* (April 12, 2011).
65. Textron Defense Systems, "Sensor Fuzed Weapon," 2010, at *http://www.textrondefense.com/pdfs/datasheets/sfw_datasheet.pdf* (April 12, 2011).

and surrendered to the Marines. No duds or live warheads were reported at the site.[66]

Incentivizing Use of Civilian Populations as Human Shields

The CCM represents only the most recent effort in a long-running campaign to bend and distort the traditional laws of war to the advantage of insurgent forces and to the detriment of responsible armed forces and civilian populations.

The CCM advocates' fundamental argument is that cluster munitions pose a danger to civilian populations when used in areas where they are present or to which they will return after a conflict. While cluster munitions do pose this danger, it is equally true that armed forces are supposed to make all efforts to separate themselves from civilian populations during combat. If they are allowed to use their own—or foreign—civilian populations as cover, they present their opponents the irresolvable dilemma of choosing either not to attack legitimate military objectives (and thus losing the war) or to attack them, risking civilian casualties and condemnation as war criminals. The fault in this case lies not with the attacking forces, but with the force that used a civilian population as human shields.

U.S. policymakers were concerned about this dilemma during the negotiation of Additional Protocol I to the Geneva Conventions. Protocol I, concluded in 1977, has a number of flaws, but one fundamental fault is that it grants combatant status to irregular forces even if they do not clearly distinguish themselves from the civilian population.[67] The protocol was shaped by the influence of the so-called national liberation movements of the 1970s, such as the Palestinian Liberation Organization, some of which were even present during its negotiation. Therefore, it is not surprising that the protocol privileges terrorists by elevating them to the status of legitimate states.

The CCM represents only the most recent effort in a long-running campaign to bend and distort the traditional laws of war to the advantage of insurgent forces and to the detriment of responsible armed forces and civilian populations.

For this reason and others, the U.S has not ratified Additional Protocol I. In a message to the Senate on January 29, 1987, President Ronald Reagan explained that Protocol I would "undermine humanitarian law and endanger civilians in war" because "terrorists and other irregulars [would] attempt to conceal themselves" among civilians to take advantage of its protections and so pose the irresolvable dilemma to U.S. forces.[68] As Reagan stated:

> [W]e cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.[69]

This judgment received the official support of *The New York Times*, which described Protocol I as "a shield for terrorists."[70]

66. For a reenactment of the events of April 2, 2003, see Textron Defense Systems, "Textron's Sensor Fuzed Weapon (SFW) in OIF B-52 Attack," video, February 2, 2007, at *http://www.youtube.com/watch?v=THZvZ6S4C14* (April 12, 2011). For a description by B-52 pilot Lieutenant Colonel Richard Stockton, see Textron Defense Systems, "Combat Proven Sensor Fuzed Weapon," August 25, 2008, at *http://www.youtube.com/watch?v=oSxQXs9m9Wk* (April 12, 2011). In addition to the engagement at Al Hillah, four SFWs were dropped on a Baghdad missile engagement zone, destroying an entire brigade of Iraqi armor that was parked in the open.
67. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 44 (3), at *http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument* (March 1, 2011).
68. Ronald Reagan, "Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions," January 29, 1987, at *http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM* (March 1, 2011).
69. *Ibid.*

The recent enthusiasm for the CCM owes something to the inherently slow nature of the CCW process, which is based on consensus. However, the "Oslo Process" that created the CCM was spurred by the 2006 conflict between Israel and Hezbollah in southern Lebanon and Israel's use of cluster munitions during that conflict.

Israel faced an irresolvable dilemma: Because Hezbollah deliberately intermingled itself with the civilian population, Israel could either strike and risk civilian casualties or do nothing and allow Hezbollah to win. In the end, it attacked after making assiduous efforts to warn Lebanese civilians in the affected areas. A review by Israel's military advocate general found that the "majority of the cluster munitions were fired at open and uninhabited areas," tacitly conceding that some strikes were fired at inhabited areas.[71] This was regrettable but unavoidable, given Hezbollah's tactics.

After the war, Israel provided maps, coordinates, and training to help locate and clear any unexploded cluster submunitions. However, these efforts and the irresolvable dilemma posed by Hezbollah's use of civilian communities as cover did not assuage the sensibilities of the so-called international community, and even the United States raised objections. A State Department spokesman announced, "There may—likely could have been some violations" by Israel of limits on the use of U.S.-made cluster munitions.[72] Congressional discontent about this issue led in 2009 to adoption of the legislation that limits the export of cluster munitions. Congress had rejected similar legislation just three years earlier.[73] Thus, the 2006 Israel–Hezbollah conflict heavily influenced both the creation of the CCM and the U.S.'s policy to sell its cluster munitions only to those who certify that they "will not be used where civilians are known to be present."

This is deeply problematic. The 2009 law has already moved a step toward the position that President Reagan rejected in 1987. The U.S. should certainly not target civilians, but it cannot afford to reward its enemies for using civilian populations as shields. If recipients of U.S. weapons—and, tacitly, the U.S. itself—cannot use these weapons where civilians are present, the message to terrorists and other enemy combatants is clear: Conceal yourself among civilians, and you will be safe. That was the tendency, if not the clear intent, of Additional Protocol I. The CCM, with the stigma it attaches to cluster munitions and the broader humanitarian concerns that it evokes, only reinforces this tendency.

Israel faced an irresolvable dilemma: Because Hezbollah deliberately intermingled itself with the civilian population, Israel could either strike and risk civilian casualties or do nothing and allow Hezbollah to win.

The U.S. is well aware of this problem. For example, in a statement on the 2009 conflict between Hamas and Israel in the Gaza Strip, Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, condemned a U.N. fact-finding mission for "its failure to deal adequately with the asymmetrical nature of the Gaza conflict, and its failure to assign appropriate responsibility to Hamas for deliberately targeting civilians and basing itself and its operations in heavily civilian-populated urban areas."[74]

70. Editorial, "Denied: A Shield for Terrorists," *The New York Times*, February 17, 1987, at *http://www.nytimes.com/1987/02/17/opinion/denied-a-shield-for-terrorists.html* (April 12, 2011).
71. CNN, "Israel: Cluster Bomb Use Was Legal," December 25, 2007, at *http://articles.cnn.com/2007-12-25/world/israel.cluster.bombs_1_cluster-bombs-cluster-munitions-hezbollah-in-southern-lebanon* (March 1, 2011).
72. Sean McCormack, quoted in *ibid.*
73. Wade Boese, "Israeli Cluster Munitions Use Examined," *Arms Control Today*, March 2007, at *http://www.armscontrol.org/act/2007_03/IsraelCluster* (March 1, 2011).
74. "Statement by Ambassador Alejandro D. Wolff, U.S. Deputy Permanent Representative to the United Nations, on a UN General Assembly Resolution on the UN Fact-Finding Mission on the Gaza Conflict, in a Special Session of the General Assembly," U.S. Mission to the United Nations, February 26, 2010, at *http://usun.state.gov/briefing/statements/2010/137331.htm* (March 1, 2011).

The text of the CCM recognizes this problem. The treaty's preamble states that "armed forces distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention."[75] This at least implies a recognition that terrorists and other illegal combatants should not be allowed to force legitimate armed forces into committing violations of the laws of war by hiding themselves among civilians.

Yet the statement is completely divorced from reality. It presumes equality between terrorists and regular armed forces, but the CCM cannot be enforced against terrorists, and in practice, states face far greater opprobrium for any breach of humanitarian law than terrorists do.

In short, international humanitarian law from Additional Protocol I onward has tended to legitimize illegitimate combatants and encourage them to use civilians as human shields to the detriment of the rights, legitimacy, and power of legitimate combatants; the protection of civilians; and the traditional laws of war.[76] While it should always seek to avoid civilian casualties, the U.S., like all legitimate belligerents, has the right to attack militarily legitimate targets. If the mere presence of civilians must bring all operations to a halt, terrorists and even uniformed combatants acting in violation of the laws of war will have an enormous, enduring military advantage. The U.S. should not accede to any convention that does not maintain the balance between humanitarian concerns and the military rights of legitimate combatants that are inherent in the traditional laws of war. By seeking to ban a weapon that can be used responsibly, the CCM demonstrates that it does not maintain this balance.

Conflating International Humanitarian Law, Arms Control, and Human Rights. The CCM is part of a related undesirable development: the tendency to conflate the principles of human rights law, arms control, and the laws of war. Traditionally, human rights law applied in peacetime within the boundaries of a nation-state. Arms control treaties limited or banned arms, and the laws of war regulated the behavior of belligerents during wartime, including how arms were used. Arms control treaties fell away or were disregarded during wartime because war was a special, separate reality, and it was unrealistic to expect belligerents to keep or be bound by arms control commitments made to their opponents during peacetime.

International humanitarian law from Additional Protocol I onward has tended to legitimize illegitimate combatants and encourage them to use civilians as human shields.

Modern interpretations of the laws of war by the international legal community have already blurred human rights law and the laws of war. The CCM continues this trend by simultaneously posing as all three of these separate conceptual areas. Like a human rights convention, it emphasizes the social, medical, gender, and age-related rights of cluster munitions victims in peacetime. Like an arms control treaty, it bans an entire class of weapons, and it regulates (by banning) the use of these weapons in time of war. Unlike traditional arms control treaties, it applies in all circumstances, including during wartime. Like the Ottawa Convention, which bans anti-personnel landmines, it is an arms control treaty that, because it applies in time of war, leaves signatories open to charges of war crimes.[77] In short, the CCM and the Ottawa Convention assert that the way to control wartime activities is to ban them before war starts.

75. Convention on Cluster Munitions, Preamble.
76. For a discussion of the ways in which modern-day pirates have benefited from this trend, see James Jay Carafano and Jon Rodeback, "Taking the Fight to the Pirates: Applying Counterterrorist Methods to the Threat of Piracy," Heritage Foundation *Backgrounder* No. 2524, March 4, 2011, at *http://www.heritage.org/Research/Reports/2011/03/Taking-the-Fight-to-the-Pirates-Applying-Counterterrorist-Methods-to-the-Threat-of-Piracy*.
77. Steven Groves and Ted R. Bromund, "The Ottawa Mine Ban Convention: Unacceptable on Substance and Process," Heritage Foundation *Backgrounder* No. 2496, December 13, 2010, at *http://www.heritage.org/Research/Reports/2010/12/The-Ottawa-Mine-Ban-Convention-Unacceptable-on-Substance-and-Process.*

This is undesirable in part because it is unrealistic. If the survival of the United States depended on the use of cluster munitions, the U.S. would use cluster munitions, regardless of any treaties it had signed. Only today's relatively peaceful and prosperous times—at least in the American and European portions of the world—allow the CCM's advocates to indulge in the fantasy on which the treaty is based.

The collapse of the distinction between war and peace leads to the negotiation of unrealistic treaties, such as the CCM and the Ottawa Convention, and damages the protections that the laws of war offer to civilians and combatants alike.

However, the CCM has a deeper flaw. By trying to apply during both peacetime and wartime, it seeks to erase a fundamental distinction on which the laws of war depend: the idea that there is something special about the state of war.

This distinction is important and valuable. If war is separate and distinct from peace, then it is possible to create special rules that define and limit conduct during wartime. On the other hand, if war is not separate and distinct from peace, then the way to limit it is to apply the standards of peacetime, when law rules, to the conduct of war. However, war is not peace, and force is inherently inimical to the peacetime standards that rightly apply the rule of law. The collapse of the distinction between war and peace leads to the negotiation of unrealistic treaties, such as the CCM and the Ottawa Convention, and damages the protections that the laws of war offer to civilians and combatants alike.

For example, if war has a status different from peace, and if belligerent powers have particular and carefully limited and balanced rights, combatants cannot legitimately use the civilian population as human shields. However, if war is not special, then the hostage-takers will win because the peacetime standard of allowing the guilty to go free rather than cause the innocent to suffer will still apply. This approach thus exposes civilians to greater dangers and privileges combatants who have no reliable chain of command over armed forces that do. It also encourages the negotiation of treaties that further erode the distinction between war and peace.

Like all other civilized states, the United States has an enormous stake in protecting the laws of war. This stake implies the need to reject the CCM and similar treaties that are based on a vision that is inherently inimical to those laws.

An Unserious and Burdensome Convention. Finally, like many multilateral treaties, the CCM is flawed because it contains no serious compliance mechanism. However if seriously implemented, it would impose intrusive and burdensome requirements on the United States.

As with the Ottawa Convention, the CCM's compliance process relies on self-reporting, a procedure dominated by the U.N. Secretary-General and annual meetings of states parties to the CCM. The U.N. has little incentive to take alleged violations seriously. If it did, it might be called on to condemn a member state, which would start a crisis that could lead to sanctions or even armed conflict. The U.N.'s reluctance to confront Iran seriously over its covert nuclear program implies that, when dealing with the much less pressing subject of cluster munitions, the CCM compliance process will never produce results in cases in which a signatory does not comply freely. The convention will weigh heavily on the United States if the U.S. accedes to it but will have virtually no effect on less responsible states.

The CCM is ultimately an exercise in moral suasion, not an enforceable diplomatic instrument. The Cluster Munition Campaign concedes this by stating that the *Cluster Munition Monitor*, its own annual report, is "the de facto monitoring regime" for the convention.[78] Serious treaties are monitored by their signatories, not by an NGO.

On the other hand, if the U.S. acceded to the CCM, it would actually be obliged to uphold the obligations of the convention, unlike many signatories of such multilateral treaties. First, under the CCM, the U.S. would be responsible for paying 22 percent of the associated costs, including annual meetings, fact-finding missions, and all other activi-

78. Cluster Munition Coalition, *Cluster Munition Monitor 2010*, p. iv.

ties mandated by the convention.[79] It would also be obligated to share without "undue restrictions" equipment and scientific and technological information relevant to the CCM's obligations, a requirement that could be interpreted as obliging it to assist in building up the technical capacity of a dictatorial regime.[80]

The convention will weigh heavily on the United States if the U.S. accedes to it but will have virtually no effect on less responsible states.

The U.S. would also be subject to a lengthy list of social requirements mandated by Article 5, "Victim Assistance":

> Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

It is not possible to assess how this obligation might affect, for example, U.S. operations in Afghanistan. In a society that does not treat women as equals, the obligation to "provide for [the] social and economic inclusion" of female victims of cluster munitions could be impossible to satisfy. Moreover, the CCM does not distinguish between civilian victims of cluster munitions and combatants that have been killed or wounded during combat operations.[81] That discrepancy would place the U.S. in a position of fighting the Taliban in one moment and providing social and economic assistance to them in the next. Finally, the requirement to assist victims of cluster munitions might lead both states and NGOs to prioritize them, in spite of the CCM's prohibition of this, thereby diverting humanitarian assistance funding away from other cases that are less visible but more critical.

In short, even leaving aside as legally nonbinding the CCM's preamble, which refers to the desire of the signatories to "ensure the full realization of the rights of all cluster munitions victims and [to] recogni[ze] their inherent dignity," the CCM is yet another in a line of expansive multilateral conventions that are very heavy on potentially restrictive verbiage but very light on serious compliance mechanisms or actual achievements.

The Rushed, Flawed, and Undemocratic "Oslo Process"

While the military reasons for the United States to refuse to ratify the CCM are compelling, the convention is also dangerous to American interests for another reason: The Oslo Process that created the convention was rushed and flawed, and it threatens both the practice of serious arms control diplomacy and the sovereignty of the United States and other nation-states.

The CCM was not the result of traditional diplomatic processes, but the result of a short, sharp crusade by a large number of NGOs and a few states, led by Austria, the Holy See, Ireland, Mexico, New Zealand, Norway, and Peru.[82] All of these states are small, and none of them are major players in international security. Like the "Ottawa Process" that produced the Ottawa Convention on anti-personnel landmines more than a decade earlier, the Oslo Process was "a humanitarian initiative by a group of predominantly small and medium-sized states in partnership with civil society organizations."[83]

The NGOs, all of which had been active in the Ottawa campaign, did not want to regulate cluster

79. Convention on Cluster Munitions, Art. 14(1).
80. *Ibid.*, Art. 6(3).
81. *Ibid.*, Art. 2(1), 5.
82. John Borrie, "How the Cluster Munition Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin," *Disarmament Diplomacy*, No. 88 (Summer 2008), at *http://www.acronym.org.uk/dd/dd88/88jb.htm* (April 12, 2011).
83. *Ibid.*

munitions, which was the preferred route of the CCW process. They wanted a complete, rapid ban.

To achieve this, they sought to usurp the role of nation-states in the diplomatic process. They worked by applying relentless public pressure and by claiming to speak for the people of the world and thereby asserting an independent and higher claim to moral authority than any national government could claim. Instead of treating cluster munitions as weapons that could be controlled through a treaty process, the NGOs defined them as an offense against humanity and therefore a subject on which no compromise was possible. Instead of supporting serious negotiations through the CCW process that would carefully consider the advantages and disadvantages of an agreement, they took less than two years to complete the CCM.

While many states signed these conventions, many fewer actually altered their behavior or believed that the treaties would ever apply to them.

The U.S. was not completely isolated from this process. It did seek to ensure that CCM signatories could engage in joint operations with U.S. military forces. Yet like the Ottawa Convention, the CCM crusade proceeded in a spirit of hostility to the U.S., a spirit predicated on the (correct) belief that the U.S. was willing to regulate cluster munitions but not to ban them entirely. As a result, the negotiation process was limited to the true believers.

In the broader picture, the CCM, like the Ottawa Convention, is a child of the liberal belief in the "end of history" that prevailed in the 1990s. After the end of the Cold War and before 9/11, there was a widespread, if profoundly mistaken, view that arms control and indeed diplomacy, security, and the entire international state system needed to be and could be transformed. This mindset produced the concept of NGO-led negotiations; institutions that are based on the rejection of state sovereignty, such as the International Criminal Court; and the belief that arms control is fundamentally about fulfilling human rights.[84] Many states were basically uninterested in these beliefs, but in each case, a few were willing to go along, in part to claim the credit for leading the advance into this brave new world.

In the 1990s, more and more institutions and treaties were created on a narrow base of states. Yet even judged by the low bar set by comparably broad and contemporaneous treaties, the CCM required very few ratifications before entering into force. The Kyoto Protocol (1997) required 55 ratifications. The Ottawa Convention (1997) entered into force after only 40 ratifications, only one-fifth of the world's states. The Rome Statute (1998), which created the International Criminal Court, required 60 ratifications. The CCM required 30 ratifications, roughly 15 percent of the nations of the world, to enter into force.

Each time, advocates claimed that the new institution or treaty constituted a step forward for the world, a new source of moral suasion, and a new source of customary international law that ultimately would bind even non-signatories—a profoundly political argument that is based on their contempt for sovereign states.

While many states signed these conventions, many fewer actually altered their behavior or believed that the treaties would ever apply to them. The CCM illustrates the decay, not the growth, of international institutions because the new institutions are not created by responsible democratic nation-states through serious, verifiable, treaty commitments. This decay derives ultimately from the transnational attack on sovereignty, the refusal of transnational activists to accept that signing a treaty is not the same as solving a problem, and their desire to use the treaty process to circumvent domestic political processes to achieve their political objectives.

The Oslo Process was all but identical to the Ottawa Process. These new "processes" are far

84. Brett D. Schaefer and Steven Groves, "The ICC Review Conference: A Threat to U.S. Interests," Heritage Foundation *Backgrounder* No. 2416, May 28, 2010, at *http://www.heritage.org/research/reports/2010/05/the-icc-review-conference-a-threat-to-us-interests*, and Bromund and Groves, "The U.N.'s Arms Trade Treaty: A Dangerous Multilateral Mistake in the Making."

outside the mainstream, and their progeny—the Ottawa Convention and the CCM—have thus far proven unacceptable to successive U.S. Administrations under Presidents Bill Clinton, George W. Bush, and Barack Obama. In the mid-1990s, the Clinton Administration found the Ottawa Process and the resulting convention unacceptable. The Bush Administration also rejected the Ottawa Convention, refusing to sign it or submit it to the U.S. Senate for accession. In 2009, the Obama Administration refused to join the negotiating process for a new "arms trade treaty" unless that process was based on consensus. In short, the Oslo Process embodies practices that even the Obama Administration, with its avowed multilateralist bent, found unacceptable.[85]

If the United States joined the CCM, it would not only accede to the convention's onerous and unreasonable obligations, but also sanction and endorse the process that created it. That process is objectionable in part because it is inherently flawed. By substituting moral fervor for careful diplomacy, it creates broad, rushed, and unsatisfactory treaties.

In practice, the Oslo Process legitimized unelected and self-nominated NGOs at the expense of elected governments.

This is clearly bad for arms control and international humanitarian law because it mistakes a signature on a treaty for the realities of arms control and war. It therefore gives bad actors an institution behind which they can hide and discourages good actors with legitimate concerns from negotiating treaties that impose genuine controls that are compatible with their legitimate military concerns. Such a process also harms U.S. security because it creates an illusion of effective arms control and increases pressure to abandon weapons that the U.S. uses responsibly to secure its vital interests and those of its allies.

The CCM's attack on state sovereignty is even more objectionable. The United States was founded on the belief that the people create government and that the state's sovereignty derives ultimately from the sovereignty of the people. In the realm of diplomacy, the state acts on behalf of the people while remaining subject to their democratic control. By contrast, advocates of the CCM and the process that created it believe that state representation of individuals through diplomacy is inadequate at best or even undesirable because it gives primacy to the state instead of the individual. Therefore, the wants and needs of the people—and the NGOs presume to define these wants and needs very broadly—must be represented directly in the realm of international politics, with national governments participating as only one of the many players responsible for the conduct of diplomacy.[86]

In fact, all of the world's people cannot represent themselves directly. Thus, in practice, the Oslo Process legitimized unelected and self-nominated NGOs at the expense of elected governments. The NGOs' preference for this approach, which enhances their influence, is understandable. It is also a compelling reason for the United States to reject treaties that result from it. The Oslo Process denigrates the democratic, sovereign, limited state and replaces it with a transnational network of unaccountable NGOs that claim moral superiority precisely because they are not checked by a democratic political process.

Practical Repercussions of the Oslo Process

The flaws of the Oslo Process are not theoretical. They directly influenced the convention that it pro-

85. Ted R. Bromund and David B. Kopel, "As the U.N. Arm's Trade Treaty Process Begins, U.N.'s 'Programme of Action' on Small Arms Shows Dangers," Heritage Foundation *WebMemo* No. 2969, July 20, 2010, at *http://www.heritage.org/Research/Reports/2010/07/As-the-UNs-Arms-Trade-Treaty-Process-Begins-UNs-Programme-of-Action-on-Small-Arms-Shows-Its-Dangers*.

86. James Jay Carafano and Janice A. Smith, "The Muddled Notion of 'Human Security' at the U.N.," chapter 4 in Margaret Thatcher Center for Freedom, "Reclaiming the Language of Freedom at the United Nations: A Guide for U.S. Policymakers," Heritage Foundation *Special Report* No. 8, September 6, 2006, at *http://www.heritage.org/research/reports/2006/09/reclaiming-the-language-of-freedom-at-the-united-nations*.

duced and therefore contributed to the convention's weaknesses.

The Rush to a Convention. The first flaw of the Oslo Process was the speed with which it was conducted. The rush to conclude the CCM was driven by the news cycle, particularly by reaction to the 2006 Israel–Hezbollah war. This is at best a superficial reason to engage in what was supposedly a serious international negotiation. In practice, it reflected not so much a rejection of cluster munitions as it did the widespread hostility toward Israel in the international system. Among other considerations, this hostility is based on the refusal by much of Europe to understand that Israel, surrounded by hostile states and terrorist organizations, has security needs and challenges that do not apply to the comfortable states of Western Europe that shelter under the American security umbrella. With the narrative of presumed Israeli perfidy already well-established, Israel's use of cluster munitions in 2006 was guaranteed to outrage tender European consciences, which are unmoved by far more egregious violations of basic human rights around the world.

Because its advocates wanted the CCM to be concluded rapidly, it necessarily rejected the traditional reliance on consensus and resorted to majority rule.[87] It was therefore not a negotiation, but an agreement driven by those who already agreed to agree.

A Convention of Lilliputians. The very limited success that the CCM has enjoyed in practice reflects the second weakness of the Oslo Process. The Cluster Munition Coalition likes to tout the number of states that have ratified the CCM and the number of states formerly in possession of or otherwise associated with cluster munitions that have signed the CCM. However, according to the coalition itself, only 18 governments have actually used cluster munitions since 1945. Of those, one (Yugoslavia) no longer exists; two (Iraq and South Africa) have experienced fundamental changes of regime; and two (France and Britain) successfully excluded some of their cluster munitions from the CCM. Of the other former users of cluster munitions, only three—Colombia, the Netherlands (which used cluster munitions during the NATO campaign in Kosovo), and Nigeria—have signed the CCM, and only the Netherlands has actually ratified it.[88]

The rush to conclude the CCM was driven by the news cycle, particularly by reaction to the 2006 Israel–Hezbollah war.

In short, 105 of the CCM's 108 signatories have no record of using cluster munitions, are unlikely to use them, or drafted the CCM to allow the continued use of the cluster munition weapons in their arsenals. To put it another way, of the CCM's 108 signatories, only the Netherlands has ratified the CCM and actually abandoned cluster munitions altogether.

The CCM is the definition of low-hanging fruit. The list of non-signatories—which includes the U.S., Russia, China, India, Pakistan, South Korea, Israel, and Brazil—is not as long as the list of signatories, but they collectively represent an overwhelming share of the world's population, economic activity, military power, and cluster munitions.[89]

Failure to Balance Humanitarian and Military Concerns. The Oslo Process's third weakness is that, because it did not include most major powers, it had "a predominantly humanitarian focus." As such, "it differed from the CCW, in which military concerns were much more to the forefront." As Norway observed in its closing statement to the Dublin Conference, "In essence, this process and the new Convention on Cluster Munitions, is disarmament

87. The CMC notes that the rules of procedure at the 2008 Dublin conference required that "any state wishing to change the draft text had to have the support of a two-thirds majority of governments participating in the negotiations for the proposed amendment to be accepted." Cluster Munition Coalition, *Banning Cluster Munitions: Government Policy and Practice*, May 2009, p. 6, at *http://www.the-monitor.org/index.php/publications/display?url=cm/2009/* (April 14, 2011).
88. Cluster Munition Coalition, *Cluster Munition Monitor 2010*, p. 12.
89. U.S. negotiators point out that the states that have not signed the CCM control approximately 85 percent of the world's cluster munitions. Melanie Khanna, e-mail to *Arms Control Today*, December 23, 2010, quoted in Abramson, "Cluster Negotiations Extended Again."

as humanitarian action," emphasizing an "instrumental partnership with civil society."[90]

The failure to address the concerns of armed forces in a serious manner resulted in a convention that did not reflect the law of war's traditional balancing of the rights of belligerents and the need to protect civilians. It produced a convention that does not take verification seriously, a problem that is inevitable when all-or-nothing arms control becomes multilateral. Too many actors means that no one can be held accountable for anything.

The fundamental logic of the convention, like too much arms control diplomacy, was to focus on the evils of the weapons, not the evils of those using the weapons. It reflected the belief that, because some states are irresponsible, the responsible ones must limit themselves to induce irresponsible states to behave better. None of this makes for a serious arms control process or the creation of new international humanitarian law.

The failure to address the concerns of armed forces in a serious manner resulted in a convention that did not reflect the law of war's traditional balancing of the rights of belligerents and the need to protect civilians.

The United States will find it very difficult to accommodate the advance of this vision of NGO-driven diplomacy. The U.S. tried to shape the CCM with limited success. U.S. diplomats meeting with British counterparts in June 2008 "underscored the importance of NATO interoperability not being affected" by the CCM. However, the British diplomat responded:

> [T]he Norwegian official in charge of the [cluster munition] initiative was from the human rights department, vice the political-military side. She had been clear to the Norwegians that NATO interoperability was a redline for HMG [Her Majesty's Government]…[but she also] explained that HMG was experiencing much of the same public and political pressure to ban [cluster munitions] that the Norwegians felt. She noted [that British Foreign Secretary] Miliband had been targeted personally with posters saying "Cluster Munitions should be Milibanned!" HMG, therefore, needed to be seen cooperating with the process.[91]

In other words, issues such as the CCM are already straining U.S. alliances and will cause more strains, particularly if—as seems likely—the U.S. and its allies cannot rely on the secrecy of bilateral communications to share concerns.

The logical alternative for the U.S. would seem to be to stop relying on allies to fix these broken negotiations and to engage in them directly, but this would be the wrong solution because the negotiations cannot be fixed. The negotiations will always come down to a Hobson's choice of intrusive controls that in practice would affect only the U.S. or the illusion of arms control with the U.S.'s blessing but without any verification. In this scenario, there is no good choice. The only way to win a rigged game is to refuse to play.

This is especially important because crusades like the one against cluster munitions show no sign of ending. Just as the activists moved on from anti-personnel landmines to cluster munitions, they will soon move on to another new cause.

The next target may be U.S. use of unmanned aerial vehicles in Pakistan and elsewhere, a practice that has already come under predictable criticism from the U.N. and some Europeans.[92] Indeed,

90. Borrie, "How the Cluster Munition Ban Was Won."

91. U.S. Embassy in London, "International Security Discussions with HMG," June 3, 2008, in *The Telegraph*, February 4, 2011, at *http://www.telegraph.co.uk/news/wikileaks-files/london-wikileaks/8305077/INTERNATIONAL-SECURITY-DISCUSSIONS-WITH-HMG.html* (March 2, 2011).

92. Eli Lake, "U.S. Drone Strikes Come Under U.N. Fire," *The Washington Times*, June 2, 2010, at *http://www.washingtontimes.com/news/2010/jun/2/us-drone-strikes-come-under-un-fire* (April 14, 2011), and "U.S. Drone Attack Raises Uncomfortable Questions for Germany," *Spiegel Online*, December 3, 2010, at *http://www.spiegel.de/international/world/0,1518,732684,00.html* (March 2, 2011).

the U.S. Administration has deemed the threat so serious that its State Department Legal Adviser has already made a formal statement defending the legality of U.S. actions.[93] While necessary, this will not stem the criticism. Simply supporting U.S. policies on a case-by-case basis is insufficient. The U.S. needs to state clearly that any future multilateral negotiations regarding restrictions on conventional weapons must take place within the CCW process.

Diplomatic "Unilateralism." The fourth fundamental weakness of the Oslo Process was that, while multilateral in name, it was unilateral in spirit. The states and NGOs that launched the Ottawa Process at least had the decency to wait until the CCW had concluded its negotiations on Amended Protocol II regarding landmines before drafting their own alternative treaty. This time, the cluster munitions activists abandoned the process without even waiting for negotiations under the CCW to be completed.

If the U.S. had engaged in this kind of diplomatic "unilateralism" and promoted its own "coalition of the willing" on this or any other matter, it would have been roundly condemned by the same nations and NGOs that founded the Oslo Process. By contrast, the group that broke away from the CCW process has been lauded for its leadership. One supportive author explains:

> [The Oslo Process is] a free-standing international process—a coalition of the willing including a wide range of states, international organizations and diverse civil society actors—[that] developed a robust international legal norm to ban a weapon system of humanitarian concern…something the traditional forum of the CCW had proved unable to do.[94]

Their actions were thus a rebuke of the CCW process. Joining the CCM would weaken the CCW and its proceedings, which, whatever their faults, offer the only forum for all concerned parties to negotiate serious agreements that advance the elaboration of the laws of war and have a chance of being widely ratified.

The Dangerous Effort to Undermine the CCW Process

The debate between the proponents of banning cluster munitions under the CCM and the proponents of a protocol "regulating" cluster munitions under the CCW is strikingly similar to the debate over anti-personnel landmines. In both situations, a group of like-minded nations and nongovernmental organizations became dissatisfied with the pace or results of the CCW process and initiated their own separate process to draft a competing convention. In both cases, the breakaway coalitions completed treaties that placed a blanket ban on anti-personnel landmines and cluster munitions, respectively. The only difference is that, in the case of cluster munitions, the breakaway coalition did not even wait for the CCW process to complete its work.

The Ottawa Process that stemmed from the breakaway group's dissatisfaction with the CCW process produced a treaty that placed a total ban on all anti-personnel landmines under all conditions.[95] On the other hand, the CCW process produced Amended Protocol II, a treaty that, among other restrictions, requires that all anti-personnel landmines be designed so that 90 percent of them will self-destruct within 30 days of placement. In addition, each mine must be equipped with a "back-up self-deactivation feature" so that "no more than one in one thousand activated mines will function as a mine 120 days after emplacement."[96]

Similarly, when the breakaway group was outraged by Israeli use of cluster munitions, they launched the Oslo Process that produced the CCM, which bans the use of cluster munitions under all

93. Harold Hongju Koh, "The Obama Administration and International Law," speech at Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, at *http://www.state.gov/s/l/releases/remarks/139119.htm* (March 2, 2011).

94. Borrie, "How the Cluster Munition Ban Was Won."

95. Groves and Bromund, "The Ottawa Mine Ban Convention."

96. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Amended Protocol II), Technical Annex, § 3(a), at *http://www.unog.ch/80256EDD006B8954/(httpAssets)/8B3DCD52D33DCC59C12571DE005D8A28/$file/AMENDED+PROTOCOL+II.pdf*.

circumstances. The NGOs that drove much of the agitation for the CCM now argue that the mere existence of the CCM legally precludes negotiating a protocol through the CCW process that would regulate but not ban cluster munitions. For example, Laura Cheeseman, the campaign manager of the Cluster Munition Coalition, argues that states that have signed the CCM "have a legal obligation to promote the norms established by the Convention on Cluster Munitions" and that no treaty deriving from the CCW process is likely to uphold these norms.[97]

In practice, the CCM encourages the outsourcing of the development and use of cluster munitions to non-signatories and encourages the signatories to free-ride on the non-signatories.

This is a classic instance of the absolutist pursuit of perfection being used as the enemy of the good. The CCM came into force after only 30 ratifications, after which its supporters claim it became "binding international law."[98] That is incorrect because it was and is simply a multilateral treaty that has been ratified by a small minority of states. Even today, barely a quarter of the world's states have ratified the CCM. Most of these states are not serious players in international security, and many are also under the *de facto* protection of the United States. These states certainly have the right to renounce cluster munitions themselves, but such renunciations are cost-free and, as such, carry little weight.

The structure of the United Nations, led by the Security Council with five permanent members, testifies to the reality that, while all states are equal in name, the large powers have outsized security responsibilities. The U.S. and a few other nations provide security, while almost all other nations consume it. It is therefore not sensible for the United States to adopt treaties like the CCM, which by simply banning weapons refuses to recognize that the U.S. has security obligations that Luxembourg, Burkina Faso, and other CCM parties lack.

Some important states, such as the United Kingdom and France, have ratified the CCM, but it is important to remember that they did so only because the CCM exempted some of their cluster munitions from its ban. Most powers, including India, China, and Russia, have not signed the CCM.[99] If the CCW process fails to produce a protocol this year, the U.S. will likely continue to use upgraded cluster munitions sparingly and in accordance with its other obligations—and be blamed for it—while states like Russia and China will be ignored, although they will be under no obligations whatsoever. There is no reason to believe that this state of affairs advances the cause of humanity.

Ms. Cheeseman's assertion that signatories to the CCM have a legal obligation to promote its norms and thus cannot participate in any further CCW negotiations is based on her interpretation of Article 21 of the CCM, which states:

> Each State Party shall notify the governments of all States not party to this Convention…of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.[100]

Yet the convention also allows its signatories to engage in military operations with countries, such as the United States, that are not party to the CCM.[101] The Cluster Munition Coalition clearly resents this and maintains that "most states that have expressed a view have indicated that, even during joint operations, any intentional or deliberate assistance is prohibited."[102] The CCM's defenders are thus placed

97. Laura Cheeseman, "Cluster Munition Coalition Opening Statement to the CCW Group of Governmental Experts," February 21, 2011, at *http://www.stopclustermunitions.org/news/?id=2906* (March 1, 2011).
98. Cluster Munition Coalition, *Cluster Munition Monitor 2010*, p. 1.
99. Cluster Munition Coalition, "108 States on Board the Convention on Cluster Munitions," at *http://www.stopclustermunitions.org/treatystatus/* (March 2, 2011).
100. Convention on Cluster Munitions, Art. 21(2).
101. *Ibid.*, Art. 21(4).
102. Cluster Munition Coalition, *Cluster Munition Monitor 2010*, p. 2.

in the awkward position of acknowledging that a CCM party can fight side by side with a nation that is using cluster munitions but stating that a CCM party cannot participate in negotiations to limit its ally's use of cluster munitions.

In practice, therefore, the CCM encourages the outsourcing of the development and use of cluster munitions to non-signatories and encourages the signatories to free-ride on the non-signatories. That is certainly not the CCM's declared intent, but it is the CCM's practical effect. The CCM's supporters believe that a ban on cluster munitions that is accepted by many small states is legally superior and practically better than an agreement reached through the CCW that regulates but does not ban cluster munitions and is accepted by everyone, including all the world's major powers. This position is at best counterintuitive.

Finally, both the CCM and Ms. Cheeseman's statements rely heavily on the vague and dangerous concept of "norms." This is language and a concept that the U.S. should shun completely because it commits signatories to obligations that are irresponsibly vague. Neither the norms of the CCM nor whatever it means to "promote" them can be defined with any precision. In the United States, treaties must receive the advice and consent of the Senate. If the Senate does not know what a treaty contains—if it cannot ascertain exactly what these norms are—it should not ratify the treaty because it does not know what obligations it is committing the United States to carry out.

The concept of norms as a diplomatic instrument inherently infringes on American sovereignty. The CCM's reliance on norms, contrary to the Cluster Munition Coalition's contention, is not an advantage. It is another reason why the U.S. should not join the CCM.

What the United States Should Do

Throughout 2011, officials in the Obama Administration will be engaged in negotiations in Geneva with the CCW Group of Governmental Experts (GGE) on cluster munitions. The GGE met in February and March and will meet in August, and the states parties to the CCW will meet in November with the aim of finalizing a protocol to the CCW. These negotiations will build on the Draft Protocol on Cluster Munitions that was circulated in September 2010.[103]

The United States should join a new CCW protocol on cluster munitions only if the protocol advances U.S. national security interests. In addition to judging the protocol on its merits when a full and final text is available, the United States should join the new protocol only if it meets the following tests:

- **The protocol should not conflict with current U.S. policy on cluster munitions.** Until 2018, U.S. policy permits the use of cluster munitions that result in more than 1 percent unexploded ordnance (UXO). After 2018, only cluster munitions that result in less than 1 percent UXO may be used. This transition period will allow the U.S. military the necessary operational flexibility to draw from its existing cluster munition stockpiles if needed while providing a deadline for the acquisition of munitions that meet the 1 percent UXO requirement. The United States should not join any protocol that does not allow U.S. forces such a transition period to phase out its legacy weapons while acquiring advanced munitions to replace them.
- **The protocol should not ban the U.S.'s next generation of advanced weapons, such as the Sensor Fuzed Weapon (SFW).** To ensure that SFW and similar weapons yet to be developed are not banned, the protocol should not limit the number of submunitions that a cluster munition may deploy. The crucial factor in limiting the humanitarian impact of cluster munitions is not the total number of submunitions, but rather the performance of those submunitions once they are deployed during combat. Cluster munitions that have a functioning rate of greater than 99 percent should not be banned.

103. U.N. Office at Geneva, "Draft Protocol on Cluster Munitions," August 31, 2010, at *http://www.unog.ch/80256EDD006B8954/(httpAssets)/A38E76AF000060D6C12577900048C885/$file/Draft+text_100831_final+clean.pdf* (April 14, 2011).

- **The protocol should not create any supranational authority, either in the U.N. or elsewhere.** Clearance obligations should duplicate those laid out in CCW Protocol V and should include the understanding that clearance is not required during combat or if it poses unacceptable risks. The identification and removal of explosive remnants of cluster munitions should be carried out in a way that is consistent with Protocol V and current U.S. practice. As in Protocol V, the U.S. can accept a generalized obligation to support clearance operations, but it should retain the right to allocate funding on any basis it chooses, including bilaterally. The U.S. should also oppose any effort to link the design, use, or clearance of cluster munitions to any obligation to provide benefits to a defined class of "cluster munitions victims." Such a provision would invariably spread to other weapons and become a generalized obligation.
- **The protocol should not undermine international humanitarian law or traditional principles of arms control.** It should continue the long-standing tradition of recognizing that these areas are separate and complementary, not overlapping and duplicative. In particular, it should not give rights to illegitimate combatants or incentivize them to behave in ways that would force legitimate militaries to choose between attacking legitimate military targets and respecting the requirement that they seek to avoid harming civilians.
- **The protocol should not define cluster munitions as a special class of weapon.** The protocol's goal should be to lead, through the phased-in integration of self-destruct and self-deactivate mechanisms, to the creation of cluster munitions that reduce the potential harm to civilians returning to an area where such munitions have been used. More broadly, the protocol should make it clear that it is applying the traditional concepts that undergird the laws of war to a new weapon, not stigmatizing cluster munitions as a reprehensible weapon requiring a unique convention.
- **The United States should only join a protocol that permits the Senate to attach reservations, understandings, and declarations (RUDs) to the instrument of ratification.** RUDs allow the Senate to do its duty to uphold the U.S. Constitution by giving advice on the treaty and rejecting or placing conditions on its acceptance of portions of the treaty. In similar contexts, the Senate attached RUDs to both Amended Protocol II and Protocol V to the CCW.[104]

  Reservations in particular are a well-known part of the diplomatic process and are accepted as such in the 1969 Vienna Convention on the Law of Treaties.[105] The Vienna Convention states that treaties can ban particular reservations or specify acceptable reservations. It also states that reservations that are fundamentally incompatible with the treaty in question are not acceptable. However, it does not state that a treaty can ban all reservations.[106]

  Yet Article 19 of the CCM flatly prohibits all reservations to any part of the convention.[107] It is therefore an all-or-nothing instrument, which is exactly what it was designed to be.[108] Its sup-

104. The U.S. resolution of ratification regarding Amended Protocol II contained one reservation and nine understandings. The resolution regarding Protocol V contained one understanding. See U.N. Treaty Collection, Chap. 26, "Disarmament," at *http://treaties.un.org/pages/Treaties.aspx?id=26&subid=A&lang=en* (April 14, 2011).
105. U.S. Department of State, "Vienna Convention on the Law of Treaties," at *http://www.state.gov/s/l/treaty/faqs/70139.htm* (October 1, 2010). The U.S. is not a party to the Vienna Convention but considers many of its provisions to constitute customary international law.
106. Vienna Convention on the Law of Treaties, Art. 19, May 23, 1969, at *http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf* (October 1, 2010).
107. Convention on Cluster Munitions, Art. 19.
108. As Brett Schaefer notes, the rise of the take-it-or-leave-it treaty has been a distinct and unwelcome feature of the post–Cold War era. Brett D. Schaefer, "The Role and Relevance of Multilateral Diplomacy in U.S. Foreign Policy," Heritage Foundation *Lecture* No. 1178, February 14, 2011, at *http://www.heritage.org/Research/Lecture/2011/02/The-Role-and-Relevance-of-Multilateral-Diplomacy-in-US-Foreign-Policy*.

porters argue that cluster munitions are such an egregious violation of human rights that the convention cannot allow any exceptions to a complete ban or any reservations to any part of the treaty.[109] The result is that the convention attempts to exempt itself from a crucial component of the Senate's advice and consent responsibilities.

The U.S. Should Reject the Convention on Cluster Munitions

The Convention on Cluster Munitions and the process that created it are seriously flawed. The Oslo Process was based on the denigration of state sovereignty and the elevation of unelected and unaccountable NGOs to a central role in international diplomacy. No U.S. Administration has endorsed such a process.

The convention that resulted from the Oslo Process is an unverifiable, unenforceable, all-or-nothing exercise in moral suasion, not a serious diplomatic instrument. It is based on the incorrect belief that cluster munitions cannot be designed or used responsibly and the dangerous belief that the protection of civilians requires abandoning the balance between humanitarian concerns and the rights of belligerents that traditionally has characterized international humanitarian law.

U.S. policy on the use and clearance of cluster munitions and, more broadly, on the clearance of UXO is responsible and deserves the continued support of the Obama Administration and the Senate. If possible, the U.S. should seek to embody this policy in a protocol to the Convention on Certain Conventional Weapons. Such a protocol, like all treaties that come before the Senate, would need to be considered carefully on its merits.

If the U.S. should succeed in negotiating a protocol that does not replicate the flaws of the CCM, it would be a sensible complement to the existing laws of war and serve to emphasize that the U.S. supports the responsible, negotiated elaboration of those laws.

*—**Steven Groves** is Bernard and Barbara Lomas Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation and a contributor to* ConUNdrum: The Limits of the United Nations and the Search for Alternatives *(Rowman & Littlefield Publishers, 2009). **Ted R. Bromund, Ph.D.,** is Senior Research Fellow in the Thatcher Center.*

109. International Campaign to Ban Landmines, "Making the Landmine Treaty Universal," at *http://www.icbl.org/index.php/icbl/Universal/MBT/Making-the-MBT-Universal* (October 1, 2010).