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U.N. Convention on Certain Conventional Weapons: What the U.S. Should Do

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On November 25, after four years of intensive negotiations, the Convention on Certain Conventional Weapons (CCW), a U.N.-based process through which participating nations adopt protocols to regulate or limit the use of conventional weapons, failed to reach an agreement on a new protocol to regulate cluster munitions. The U.S. had backed the new protocol but was defeated by a group of nations that have joined the Convention on Cluster Munitions (CCM).

The U.S. should recognize that the time is not ripe for any further negotiation. It should not attempt to restart the CCW process, nor should it sign the CCM. Rather, it should stay the course on its existing policy of phasing out less reliable munitions.

Existing U.S. Policy Balances Humanitarian Concerns and Military Necessity. There is no universally accepted definition of “cluster munition,” but, broadly, they are munitions designed to split apart after deployment, scattering multiple, smaller explosive submunitions across a wide area and striking multiple targets on the ground. Advocates of the CCM argue that, since not all submunitions invariably explode, the unexploded ordinance (UXO) from these weapons pose a particular danger to civilians and should therefore be banned.

But both the Clinton and George W. Bush Administrations recognized that cluster munitions serve a crucial military purpose and acted to ensure that the U.S. would employ them in a manner consistent with the traditional law of armed conflict. The standard of this law is not that combatants must guar-

antee that no harm will befall civilians but that they must avoid targeting civilians and seek to minimize harm to them.

In 2001 and 2008, the U.S. adopted and refined policies that commit the U.S., after 2018, to using only the most reliable submunitions, and, since 2005, to procuring only those submunitions. The U.S. is also fielding a new generation of advanced weapons, such as the Sensor Fuzed Weapon, that combine computerized guidance and control systems with multiple submunitions. They have already proven to be more accurate and reliable than traditional cluster munitions but would nonetheless be banned under the CCM.¹

CCW Process Could Have Produced a Protocol Satisfactory to the U.S. To address the humanitarian effects of UXO, in 2001 the U.S. 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. These negotiations led to the completion of CCW Protocol V on Explosive Remnants of War in November 2003. But some nations called for a separate protocol specific to cluster munitions. The CCW therefore kept clus-

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ter munitions on its agenda, but this mandate will expire at the end of 2011. As no agreement was reached at the CCW review conference in November, the nations party to the CCW are likely to allow the negotiations to lapse.

The U.S. made strenuous efforts to negotiate a cluster munitions protocol through the CCW process. It argued that, since most of the nations that maintain major stockpiles of cluster munitions have made it clear that they will not sign the CCM, which bans most of these weapons, a CCW protocol would do more, in practice, to reduce the humanitarian effects of UXO associated with cluster munitions. For example, a CCW protocol that required nations to stockpile and use only the most reliable munitions would have banned more cluster munitions in the U.S. alone—munitions that the U.S. no longer plans to use—than the CCM prohibited in the rest of the world combined.

Arms Control Absolutists Destroyed Hope for Agreement. Unfortunately, the U.S.-led effort to seek consensus through the CCW was torpedoed by a group of nations—led by Norway, Austria, and Mexico and backed by U.N. officials and non-governmental organizations (NGOs)—that refused to adopt any protocol that was less broad than the CCM.

The position of the absolutists was that the U.S.-backed protocol would “set a disturbing precedent in international humanitarian law” by creating “a new international treaty that is actually weaker than existing international humanitarian law.”² This is untrue. There is no “existing international humanitarian law” on cluster munitions; there is simply a convention—signed and ratified almost exclusively by nations that have never manufactured, stockpiled, or used cluster munitions—that pretends to have

the status of international law. Nor is there a long-standing pattern of national renunciation of cluster munitions. In 2011 alone, Thailand used these munitions in a border clash with Cambodia, and Libya used cluster munitions supplied by Spain—a CCM signatory—against its own civilians.³

The idea that a new treaty signed primarily by nations with no relevance to the issue at hand, not representing the enduring practice of nations, and rejected by the U.S. and most of the world’s other major powers can suddenly become settled international humanitarian law is a direct assault on U.S. sovereignty. If this claim is true for cluster munitions, it must be true for many other areas of policy. This would profoundly limit American diplomacy and, ultimately, the ability of the U.S. to govern itself. Moreover, the CCM advocates imply that military actions that harm civilians are, *ipso facto*, forbidden. This claim destroys the balance inherent in the traditional laws of war and is a revolutionary assault on them.

The CCW debacle is a victory for no one, though the CCM’s advocates believe they have won. In reality, the credibility of the CCW process has been dented, and there will be no controls at all on the vast majority of the world’s cluster munitions. Neither of these outcomes is in the interest of the U.S. or the victims of UXO.

But the CCW’s failure has three silver linings. First, the CCM’s backers have been exposed for what they always were: arms control absolutists who eagerly ruined a promising effort at multilateral arms control because it did not give them everything they wanted. Second, the U.S. played a responsible role, demonstrating yet again its commitment to serious negotiations that would regulate particular weapons and reduce the dangers posed by UXO. Third,

1. See Ted R. Bromund and Steven Groves, “The United States Should Not Join the Convention on Cluster Munitions,” Heritage Foundation *Backgrounders* No. 2550, April 28, 2011, at <http://www.heritage.org/Research/Reports/2011/04/The-United-States-Should-Not-Join-the-Convention-on-Cluster-Munitions>.
2. Tom Miles, “U.S. Defeated in Bid on Cluster Bomb Accord,” Reuters, November 25, 2011, at <http://www.reuters.com/article/2011/11/25/us-weapons-clusterbombs-idUSTRE7AO1LF20111125> (December 13, 2011).
3. C. J. Chivers, “Following Up, Part 2. Down the Rabbit Hole: Arms Exports and Qaddafi’s Cluster Bombs,” *The New York Times*, June 22, 2011, at <http://atwar.blogs.nytimes.com/2011/06/22/following-up-part-ii-down-the-rabbit-hole-arms-exports-and-qaddafis-cluster-bombs/> (December 13, 2011).

the U.S. is free to continue to pursue its previously announced policies on cluster munitions without further reference to the CCW process.

What the U.S. Should Do. The U.S. should not seek to restart the CCW process by offering concessions of any sort, and it should under no circumstances join the CCM, which, military considerations aside, would only reward the nations and NGOs that conspired to scuttle the CCW process. Instead, it should calmly stay the course, and demonstrate by its actions that the advocates of the

CCM have made a serious error by rejecting the U.S. initiative and that, if they do not adopt a more serious attitude, they will end up with treaties that are good for moral posturing but achieve little or nothing in practice.

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