



# **From Good to Bad: The Threat Posed to International Law by the Draft CCW Protocol on Cluster Munitions**

## **Memorandum to Delegates to the Fourth Review Conference of the 1980 Convention on Conventional Weapons**

**Human Rights Watch and the  
Harvard Law School International Human Rights Clinic**

**November 2011**

### **Introduction**

In September 2011, representatives of 131 states met in Beirut for the Second Meeting of States Parties to the 2008 Convention on Cluster Munitions. Strong support for the convention was evident from the large number of participants, including from 40 observer states, from the strong language of the Beirut Declaration condemning the use of cluster munitions by any actor,<sup>1</sup> and from official statements by governments demonstrating their commitment to eliminating cluster munitions and the harm they cause. As the head of the United Kingdom delegation appealed to the meeting, “The fact that countries are still using cluster munitions that cause unacceptable harm to civilians should enrage us. We should not have to have this conversation again. The Beirut declaration must be the moment where we say: let this end, enough is enough.”<sup>2</sup>

Despite the solid and growing support for the Convention on Cluster Munitions, an alternative instrument that would threaten its underlying purpose and comprehensive obligations is set to be discussed and possibly adopted by the Fourth Review Conference of the Convention on Conventional Weapons (CCW). The proposed CCW protocol (“the draft protocol”) circulated on August 26, 2011 would allow continued use of cluster munitions and would offer weaker

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<sup>1</sup> First Meeting of States Parties to the Convention on Cluster Munitions, “Revised Draft 2011 Beirut Declaration,” September 5, 2011, <http://www.clusterconvention.org/files/2011/05/Draft-Beirut-Declaration-2011.pdf> (accessed November 10, 2011).

<sup>2</sup> Statement by the United Kingdom, to the Second Meeting of States Parties to the Convention on Cluster Munitions, Beirut, September 13, 2011, <http://www.clusterconvention.org/msp/2msp/day-1-general-exchange-of-views/> (accessed November 10, 2011), p. 3. 4 1-56432-841-4

protections to civilians in armed conflict than the Convention on Cluster Munitions. It could thus decrease the stigma surrounding the weapons and hinder universalization of the absolute ban on cluster munitions. Recognizing the danger of the proposed protocol, a representative from Austria urged states parties to the Convention on Cluster Munitions to “speak out strongly against any action contrary to the core principles of the convention” and ensure that “universalization of the convention remains high on our agenda” because “the norm and stigma against cluster munitions is by no means secured. In our view, there is even a potential challenge to the very fundamentals of the Convention on Cluster Munitions that is taking place in the context of the negotiations of the CCW in Geneva.”<sup>3</sup>

In addition to competing with the standards set by the Convention on Cluster Munitions, the possible adoption of a weaker instrument on cluster munitions following a strong one raises concerns in the context of international law. The adoption would be inconsistent with established legal principles and practices and could in fact have adverse effects on the development of international humanitarian law and international law more generally.

This memorandum provides background on the already lengthy CCW negotiations and the existing legal regime governing cluster munitions. It then examines the draft protocol through the lens of international humanitarian law. The draft protocol is contrary to the humanitarian purpose of that field of law, and it would represent an unprecedented weakening, which would set an unfortunate example for future treaties. Finally, the memorandum explores the general trend that international treaty law becomes progressively stronger over time, illustrates how the draft protocol runs against this trend, and discusses how the draft protocol would create an undesirable conflict with the Convention on Cluster Munitions.

We call on all states at the Review Conference, especially those that have joined the Convention on Cluster Munitions, to express their concerns with the draft protocol and demonstrate that there is no consensus on the adoption of the draft protocol. CCW states parties should bring their decade of discussions on cluster munitions within the CCW forum to an end at the Fourth Review Conference. The Convention on Cluster Munitions is the appropriate legal means to address cluster munitions and the harm they cause, and states should devote their energies to implementing and universalizing that instrument.

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<sup>3</sup> Statement by Austria, to the Second Meeting of States Parties to the Convention on Cluster Munitions, Beirut, September 13, 2011, <http://www.clusterconvention.org/msp/2msp/day-1-general-exchange-of-views/> (accessed November 10, 2011), p. 2.

## Background

The long history of the draft protocol suggests that CCW states parties' efforts are motivated more by politics than by humanitarian concerns and demonstrates why the CCW is a forum that can produce only weaker regulations than the Convention on Cluster Munitions. States parties to the CCW began to address cluster munitions through the CCW process in 2001 at the urging of nongovernmental organizations including Human Rights Watch. Initial state interest in the issue was neither widespread nor established enough to overcome the military powers' reluctance to tackle cluster munitions head-on.<sup>4</sup> Instead, during the CCW's Second Review Conference in 2001, states parties agreed to approach these weapons indirectly by approving a mandate to discuss the issue of "explosive remnants of war" (ERW). Unexploded submunitions are a form of ERW. The following year, states parties approved a new mandate to negotiate an ERW instrument.<sup>5</sup> These negotiations yielded Protocol V in 2003.<sup>6</sup>

Protocol V created some obligations on user and affected states parties to facilitate clearance of ERW, but it did not go far enough. It repeatedly qualifies states' responsibilities with phrases such as "where feasible" and "to the maximum extent possible." Furthermore, Protocol V does not address the problems cluster munitions cause at the time of attack except for a list of voluntary "generic preventive measures" in the Technical Annex.<sup>7</sup> CCW states parties dealt with cluster munitions explicitly only through a weak mandate to study "possible preventive measures aimed at improving the design of certain specific types of munitions, *including sub-munitions*, with a view to minimize the humanitarian risk of these munitions becoming [explosive remnants of war]."<sup>8</sup> The mandate, first adopted in 2002, was given neither urgency nor priority, and it remained almost identical from 2003 to 2006.<sup>9</sup>

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<sup>4</sup> Switzerland attempted to introduce technical controls in restrictions applicable to submunitions specifically. This motion was supported by other states including Austria, Belgium, Canada, Denmark, France, Ireland, Mexico, the Netherlands, New Zealand, Norway, and Sweden. However, major users, producers, and stockpilers of cluster munitions blocked it. Human Rights Watch, *Meeting the Challenge: Protecting Civilians through the Convention on Cluster Munitions*, November 2010, <http://www.hrw.org/reports/2010/11/22/meeting-challenge-o>, p. 106.

<sup>5</sup> *Ibid.*, pp. 104-105.

<sup>6</sup> Protocol on Explosive Remnants of War to the 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 (Protocol V), adopted November 28, 2003, 2399 U.N.T.S. 100, entered into force November 12, 2006.

<sup>7</sup> Article 9 encourages states parties "to take generic preventative measures aimed at minimising the occurrence of explosive remnants of war." *Ibid.*, art. 9.

<sup>8</sup> Meeting of States Parties to the CCW, "Report of the Meeting of States Parties," CCW/MSP/2004/2, December 13, 2004, p. 4 [emphasis added].

<sup>9</sup> Human Rights Watch, *Meeting the Challenge*, pp. 108-109.

In 2006, the movement to tackle cluster munitions directly gathered strength. Israel's widespread use of cluster munitions in south Lebanon brought renewed attention to their dangers, while national legislation laid the groundwork for states to deal with the weapons outside of the CCW framework. At the Third Review Conference of the CCW in 2006, a group of 30 countries proposed a mandate to negotiate a cluster munition protocol, but several major military powers prevented its adoption.<sup>10</sup> These events led Norway to initiate the Oslo Process, outside of the CCW forum, which culminated in adoption of the Convention on Cluster Munitions in May 2008. As of November 12, 2011, a total of 111 states had joined the Convention, either as states parties or signatories.

The decision to continue discussions on cluster munitions within the CCW process appears to have been more a reaction to the Oslo Process than a response to the harm caused by cluster munitions. After six years of stalemate, states parties to the CCW agreed in 2007 to "negotiate a proposal" to address cluster munitions and designated a Group of Governmental Experts (GGE) to continue discussions.<sup>11</sup> Just weeks before the signing of the Convention on Cluster Munitions in December 2008, CCW states parties once again revised the mandate to make "every effort to conclude negotiations [within the CCW process] as rapidly as possible"<sup>12</sup>

Two new draft texts—strongly influenced and supported by the United States—were circulated by the GGE chair in 2010 and subsequently combined by the chair into one draft text. A revised version of this text, the draft protocol, was circulated at the end of the GGE session in August 2011.

If adopted, the August 26, 2011 version of the draft protocol would result in dramatically weaker protections for civilians than the strong protections established in the Convention on Cluster Munitions. The convention absolutely bans the use, production, stockpiling, and transfer of cluster munitions and contains strong clearance and victim assistance obligations.<sup>13</sup> The draft protocol, by contrast, prohibits only pre-1980 cluster munitions and merely regulates the use of most later models.<sup>14</sup> In addition, it allows states parties to

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<sup>10</sup> Ibid., pp. 110, 112.

<sup>11</sup> Meeting of States Parties to the CCW, "Report," CCW/MSP/2007/5, December 3, 2007, [http://www.mineaction.org/downloads/1/Report%20CCW%20MSP%202007%20\(7-13Nov2007\).pdf](http://www.mineaction.org/downloads/1/Report%20CCW%20MSP%202007%20(7-13Nov2007).pdf) (accessed November 10, 2011), p. 9.

<sup>12</sup> Meeting of States Parties to the CCW, "Report," CCW/MSP/2008/4, January 23, 2009, <http://www.mineaction.org/downloads/1/MSP%202009%20Final%20Report.pdf> (accessed November 10, 2011), p. 7.

<sup>13</sup> Human Rights Watch and Landmine Action, *Banning Cluster Munitions: Government Policy and Practice* (Ottawa: Mines Action Canada, 2009), [http://www.the-monitor.org/cm/2009/banning\\_cluster\\_munitions\\_2009.pdf](http://www.the-monitor.org/cm/2009/banning_cluster_munitions_2009.pdf) (accessed November 11, 2011), p. 8.

<sup>14</sup> "Draft Protocol on Cluster Munitions," August 26, 2011, art. 4. Technical Annex A excludes cluster munitions that have a one percent failure rate or less from the entirety of the draft protocol's obligations. Ibid., Technical Annex A. Technical Annex B lists subsets of cluster munitions not subject to the prohibitions, including those with specified fail-safe mechanisms as well as those designed as anti-ship, direct fire, and anti-runway weapons. Ibid., Technical Annex B.

defer implementation of the regulations for up to 12 years, even allowing use of the weapons during the transition period.<sup>15</sup> Finally, the positive obligations of the proposed protocol are also less detailed and comprehensive than those of the Convention on Cluster Munitions.<sup>16</sup> Three years after states parties expressed the need for urgency, the Fourth Review Conference of the CCW plans to take up this problematic draft protocol and seek to determine whether consensus exists on its adoption.<sup>17</sup>

## The Draft Protocol and International Humanitarian Law

In addition to potentially weakening the stigma against cluster munitions, the draft protocol is problematic under international humanitarian law as it runs contrary to its primary purpose, which is to minimize suffering in war. The draft protocol would contravene the humanitarian objectives of this body of law because it would follow the Convention on Cluster Munitions, which absolutely bans the weapons, with permissive provisions that would allow the use of cluster munitions. Furthermore, there is no precedent in international humanitarian law for the adoption of a treaty providing weaker protections for civilians than an existing treaty. Indeed, the draft protocol would counter the law's general development in the opposite, increasingly protective direction. The adoption of the draft protocol would thus not only challenge existing principles of international humanitarian law but also set an unfortunate precedent for future treaties.

### *A Challenge to the Humanitarian Purpose of International Humanitarian Law*

The fundamental purpose of international humanitarian law, or the law of armed conflict, is humanitarian. The International Court of Justice has spoken of “the intrinsically humanitarian character ... which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”<sup>18</sup> The Geneva Conventions of 1949 and their additional protocols, which form the core of international humanitarian law, aim to protect victims of armed conflict, whether combatants or civilians.<sup>19</sup> The goal of minimizing the suffering of civilians,

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<sup>15</sup> The draft protocol would allow use of cluster munitions during the deferral period “after approval by [the user’s] highest-ranking operational commander in the area of operations or by the appropriate politically mandated operational authority.” *Ibid.*, art. 5(4).

<sup>16</sup> For example, there is no deadline for completion of stockpile destruction or clearance. *Ibid.*, art. 6. Furthermore, the definition of cluster munition victim is in the preamble and not the text and thus is not binding. *Ibid.*, preamble, para. 5.

<sup>17</sup> United Nations Office at Geneva, Disarmament, “Fourth Review Conference of the Convention on Prohibitions or Restrictions on the Use of Certain Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects,” undated, <http://www.unog.ch/80256EE600585943/%28httpPages%29/43FD798E7707CE5AC12578B20032B630?OpenDocument> (accessed November 10, 2011).

<sup>18</sup> “Legality of the Threat or Use of Nuclear Weapons,” Advisory Opinion, International Court of Justice, July 8, 1996, para. 86.

<sup>19</sup> International Committee of the Red Cross (ICRC), “The Geneva Conventions of 1949 and their Additional Protocols,” October 29, 2010 Overview, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (accessed November 10, 2011).

one of the most important principles of international humanitarian law, is articulated in numerous treaties and customary rules within this body of law.<sup>20</sup>

The Convention on Cluster Munitions embodies the humanitarian purpose of international humanitarian law throughout its text. In its preamble, states parties declare that the convention aims “to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned.”<sup>21</sup> In other words, the purpose of the Convention on Cluster Munitions is to eliminate cluster munitions and the harm they cause. The preamble also places the convention in the context of “the principles and rules of international humanitarian law.”<sup>22</sup> With regard to the humanitarian obligations it establishes, the convention emphasizes victim assistance not only with five preambular paragraphs, but also with groundbreaking obligations in Article 5.<sup>23</sup>

The goals of the CCW are also rooted in the humanitarian character of international humanitarian law. In the preamble of the CCW framework convention, states parties recall “the general principle of the protection of the civilian population against the effects of hostilities.” They further note that in adopting the CCW, states parties have “bas[ed] themselves” on two related principles of international humanitarian law: “the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited” and the prohibition on the use of weapons “of a nature to cause superfluous injury or unnecessary suffering.”<sup>24</sup> The very title of the CCW further reflects the imperative to minimize suffering from weapons that “may be deemed to be excessively injurious or to have indiscriminate effects.”<sup>25</sup>

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<sup>20</sup> For example, early attempts to codify the laws of war at the 1899 Hague Conference resulted in the famous “Martens clause,” which makes clear that if no specific rules appears to govern a situation in an armed conflict, civilians and combatants remain protected by “the principles of international law, as they result from the usages established between civilized nations, *from the laws of humanity*, and the requirements of the public conscience.” Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Convention of 1899), adopted July 29, 1899, 32 Stat. 1803, 1 Bevans 247, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429, entered into force September 4, 1900, preamble [emphasis added].

<sup>21</sup> Convention on Cluster Munitions, adopted May 30, 2008, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, entered into force August 1, 2010, preamble, para. 2.

<sup>22</sup> *Ibid.*, preamble, para. 20.

<sup>23</sup> The convention requires states parties to recognize the “inherent dignity” of the victims of cluster munitions by providing assistance including “medical care, rehabilitation, and psychological support, as well as providing for their social and economic inclusion.” *Ibid.*, preamble, paras. 6 and 7; see also *ibid.*, art. 5.

<sup>24</sup> 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 (CCW), adopted October 10, 1980, 1342 U.N.T.S. 137, entered into force December 2, 1983, preamble, para. 3.

<sup>25</sup> CCW, title.

The CCW draft protocol runs contrary to the underlying purpose of international humanitarian law, however, because it has the potential to water down the strong humanitarian provisions of the Convention on Cluster Munitions. The categorical ban contained in the Convention on Cluster Munitions works to stigmatize the use of cluster munitions in armed conflict. States parties to the Convention on Cluster Munitions also assume an obligation to promote the universalization of the convention, which will help ensure an end to the use of cluster munitions. The draft protocol, by contrast, explicitly permits the use of certain cluster munitions and allows for a significant transition period before specified categories become unlawful.<sup>26</sup> If the draft protocol were to be adopted, it could provide a specific legal framework for ongoing and even increased use of cluster munitions, reduce the stigma building around the weapons, and hinder the objective of universalization of the ban convention. Such a step back from the humanitarian position of the Convention on Cluster Munitions would not accord with the purpose of international humanitarian law.

### *An Unprecedented Weakening*

The adoption of the draft protocol would be unprecedented in international humanitarian law because it would see a strong convention followed with a weak one on the same subject. An assessment of all treaties governing the means and methods of warfare in the database of the International Committee of the Red Cross (ICRC) demonstrates that this draft protocol would mark a notable departure from established practice. According to the ICRC, there has never been a legally binding instrument in international humanitarian law that contains weaker protections for civilians than a treaty already in force.<sup>27</sup> With this in mind, the ICRC urged states parties to the Convention on Cluster Munitions to consider their responsibilities carefully, noting that “in the field of international humanitarian law we would consider it regrettable if new norms were adopted that would contradict rather than complement the Convention on Cluster Munitions and would allow the development and use of specific types of cluster munitions that are likely to perpetuate the humanitarian problem.”<sup>28</sup>

Not only is it unprecedented for a treaty with weaker protections for civilians to follow one with strong protections, but international humanitarian law has traditionally moved in the opposite direction, providing greater regulation or prohibitions of particular types of weapons. The draft protocol counters this trend. The CCW and developments under it form part of the evolution of international humanitarian law toward increasingly more restrictive

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<sup>26</sup> See above section “Background.”

<sup>27</sup> Statement by the ICRC, at the General Debate on All Disarmament and International Security Agenda Items, UN General Assembly, 66th session, First Committee, items 87 & 106 of the agenda, New York, October 11, 2011.

<sup>28</sup> Ibid.

regulation of weapons that cause harm to civilians.<sup>29</sup> The preamble to the CCW reaffirms “the need to continue the codification and progressive development of the rules of international law applicable in armed conflict.”<sup>30</sup> “Progressive development” as a concept in international law means concluding treaties on “subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states.”<sup>31</sup> In this spirit, for example, the CCW was amended in 2001 to extend its application from international armed conflicts to all armed conflicts.<sup>32</sup> The draft protocol is unnecessary and would go against this spirit because rules surrounding cluster munitions have already been progressively developed through the Convention on Cluster Munitions.

The rules surrounding antipersonnel landmines further illustrate the progression of international humanitarian law.<sup>33</sup> These weapons were subject to no specific regulation until 1980, when states adopted Protocol II to the CCW, which restricted the use of landmines and booby traps in certain situations and placed obligations on parties to an armed conflict to record the location of minefields.<sup>34</sup> Following the establishment of the International Campaign to Ban Landmines and greater concern about the civilian suffering caused by landmines, Protocol II was amended in 1996, notably to ban the use of non-detectable antipersonnel mines and to restrict the use of mines without self-destructing

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<sup>29</sup> CCW was not the first regulation of conventional weapons. Inspired by the humanitarian sentiments of the 1868 St. Petersburg Declaration, which banned explosive projectiles of under 400 grams, the famous 1899 and 1907 Hague Conferences restricted the use of a range of weapons, banning, for example, the use of “bullets which expand or flatten easily in the human body.” See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, adopted November 29, 1869, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297, entered into force December 11, 1868; Declaration (IV,3) concerning Expanding Bullets, adopted July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002, 187 Consol. T.S. 459, entered into force September 4, 1900; Hague Convention of 1899, art. 25; Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, adopted October 18, 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, entered into force January 26, 1910, art. 25.

<sup>30</sup> CCW, preamble, para. 8.

<sup>31</sup> Statute of the International Law Commission, adopted by the UN General Assembly in Resolution 174 (II) of November 21, 1947, as amended by Resolutions 485 (V) of December 12, 1950, 984 (X) of December 3, 1955, 985 (X) of December 3, 1955 and 36/39 of November 18, 1981, art. 15; see also Sir Arthur Watts QC, “Codification and Progressive Development of International Law” in R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2006, online edition, [http://www.mpepil.com.eresources.law.harvard.edu:2048/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690e1380&recno=1&searchType=Quick&query=progressive+development](http://www.mpepil.com.eresources.law.harvard.edu:2048/subscriber_article?script=yes&id=/epil/entries/law-9780199231690e1380&recno=1&searchType=Quick&query=progressive+development) (accessed November 10, 2011); see also UN Charter, signed June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force October 24, 1945, art. 13.

<sup>32</sup> CCW Amendment to Article 1, adopted December 21, 2001, CCW/CONF.II/2, entered into force May 18, 2004.

<sup>33</sup> Robert J. Mathews, “The 1980 Convention on Certain Conventional Weapons: A Useful Framework despite Earlier Disappointments,” *International Review of the Red Cross*, vol. 83, no. 844, December 2001, <http://www.icrc.org/Web/eng/siteengo.nsf/html/57JRLI> (accessed November 10, 2011).

<sup>34</sup> CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), adopted October 10, 1980, 1342 U.N.T.S. 168, entered into force December 2, 1983.

and self-deactivating features.<sup>35</sup> The amended protocol, however, failed to address the inherently indiscriminate nature of antipersonnel landmines. Consequently, at the initiative of Canada, states instead undertook an alternative process outside the CCW and produced the 1997 Mine Ban Treaty, which absolutely bans the use, production, stockpiling, and transfer of antipersonnel mines.<sup>36</sup> This treaty had 158 states parties as of November 12, 2011.

The same progression toward stronger obligations over time is also evident in international humanitarian law's rules regarding chemical weapons. In the 1925 Geneva Protocol, states parties agreed that the prohibition on the use of gas "shall be universally accepted as a part of International Law" and in addition, agreed "to extend this prohibition to the use of bacteriological methods of warfare."<sup>37</sup> The UN General Assembly clarified in 1969 that the 1925 Geneva Protocol applied to the use of chemical and biological agents of warfare.<sup>38</sup> The Convention on Biological Weapons in 1972 moved beyond banning use to banning the development, production, stockpiling, acquisition, and retention of such weapons.<sup>39</sup> States adopted the Chemical Weapons Convention in 1993, strengthening the ban on chemical weapons significantly.<sup>40</sup> Many states had interpreted the 1925 Geneva Protocol to prohibit only "first use" of chemical weapons,<sup>41</sup> and it did not explicitly preclude their development.<sup>42</sup> Under the Chemical Weapons Convention, states agreed to a comprehensive ban on the use, production, stockpiling, and transfer of chemical weapons as well as specific destruction deadlines and a strict verification regime to ensure compliance. Reservation is not permitted from any of its provisions.<sup>43</sup> As of November 12, 2011, 188 states were party to the convention.

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<sup>35</sup> CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II), adopted May 3, 1996, 1125 U.N.T.S. 609, entered into force December 3, 1998.

<sup>36</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Treaty), adopted September 18, 1997, 2056 U.N.T.S. 211, entered into force March 1, 1999.

<sup>37</sup> Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, adopted June 17, 1925, 94 L.N.T.S. 65, entered into force February 8, 1928.

<sup>38</sup> UN General Assembly Resolution 2603 A (XXIV) of December 16, 1969.

<sup>39</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), opened for signature April 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, entered into force March 26, 1975. States also agreed to "[undertake] to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition [of chemical weapons'] development, production and stockpiling and for their destruction...." *Ibid.*, art. 9.

<sup>40</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), opened for signature January 13, 1993, 32 I.L.M. 800, entered into force April 29, 1997.

<sup>41</sup> That is, a state could use chemical weapons against an enemy that had attacked it with chemical weapons.

<sup>42</sup> See R. R. Baxter and Thomas Buergenthal, "Legal Aspects of the Geneva Protocol of 1925," *The American Journal of International Law*, vol. 64, No. 5, October 1970, pp. 853-879.

<sup>43</sup> Chemical Weapons Convention, art. 22.

Establishing unprecedented, regressive obligations for cluster munitions would not only cause difficulties for the legal regime governing cluster munitions, but also open the door for a lessening of protections for civilians in future international humanitarian law treaties. The Convention on Cluster Munitions creates prohibitions for cluster munitions comparable to the absolute bans in the Chemical Weapons Convention and Mine Ban Treaty. Adopting the CCW draft protocol would be akin to concluding an instrument that merely *regulates* the use, production, stockpiling, and transfer of most chemical weapons and prohibits only limited categories, despite the existence of the Chemical Weapons Convention, which already *absolutely bans* chemical weapons. Given the unprecedented and regressive nature of the CCW draft protocol on cluster munitions, states should carefully consider its broader implications for the development of international humanitarian law.

## The Draft Protocol and International Law

The proposal contained in the draft protocol on cluster munitions is problematic not only in terms of international humanitarian law, but also in terms of international law more generally. International law, too, develops progressively and, as exemplified by international human rights law, systems of treaties regulating specific areas of law tend to become stronger over time. The draft protocol runs counter to this trend. While it is true that sometimes regional standards have been stronger in certain respects than later international standards, that is to be expected given regional differences, and it is not normally the case between international treaties that are intended for universal accession and adherence. Furthermore, adoption of the draft protocol would generate a conflict of treaties with the Convention on Cluster Munitions because it frustrates the convention's purpose. Such conflicts should be avoided as they create incoherence in international law.

### *Reversing the Trend*

Systems of international treaties tend over time to place increasingly stronger obligations on states, particularly when they involve humanitarian interests aimed at protecting civilians. The evolution of international human rights law exemplifies this trend. The foundational international treaties in this field, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), have been supplemented by a variety of human rights treaties relating to specific subjects.<sup>44</sup> These later treaties build on the obligations contained within the ICCPR

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<sup>44</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976.

and ICESCR. For example, Article 9 of the ICCPR outlines the general principle that people should not be subject to arbitrary arrest or detention,<sup>45</sup> and this provision is supplemented by specific provisions in subsequent treaties. The Convention on the Rights of the Child (CRC) applies the earlier rule to a certain group, i.e., children, adds that it should be a “measure of last resort,” and establishes that detention should take place in a “manner which takes into account the needs of persons of his or her age.”<sup>46</sup> The 2006 Convention on the Rights of Persons with Disabilities similarly applies the rule to another group, saying that “the existence of a disability shall in no case justify a deprivation of liberty,” while also adding a non-discrimination clause for those individuals who are detained.<sup>47</sup> This trend toward increasingly more protective obligations reflects the concept of progressive development of international law. The draft protocol on cluster munitions, by contrast, would take a step backward.

Some CCW delegates have argued to Human Rights Watch that this trend is subject to exceptions, in particular pointing to regional instruments that have been followed by weaker international ones. Analogies between those instruments and the cluster munition situation are flawed and can be distinguished on at least three grounds.

First, international and regional instruments have different aims. International treaties aim to set a universal standard. The Convention on Cluster Munitions, in particular, makes universalization an explicit goal. In the preamble, states parties emphasize “the desirability of attracting the adherence of all States,” and Article 21 obliges states parties to encourage all states not party to adhere to the convention.<sup>48</sup> Nearly three years after it opened for signature, significant progress has been made toward this goal.<sup>49</sup> Regional instruments are never intended to have a global scope but instead are designed to fit the desires of a discrete set of states. As is the case with the CCW draft protocol and the

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<sup>45</sup> Article 9 states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” ICCPR, art. 9.

<sup>46</sup> Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 37(b) and (c).

<sup>47</sup> International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, opened for signature March 30, 2007, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (December 13, 2006), entered into force May 3, 2008, art. 14(1)(b).

<sup>48</sup> This principle is enshrined in the preamble of the Convention on Cluster Munitions, which emphasizes “the desirability of attracting the adherence of all states to this Convention,” and underscores the determination of states to “work strenuously towards the promotion of its universalization and full implementation.” Convention on Cluster Munitions, preamble, para. 19. See also *ibid.*, art. 21.

<sup>49</sup> While several major military powers have not joined, the convention has attained widespread acceptance. As of November 11, 2011, it had 111 states parties and signatories representing all regions of the world. This list of states includes both affected and former user states as well as former producers and stockpilers of cluster munitions.

Convention on Cluster Munitions, a weak international treaty that competes with a strong international one would threaten the universalization goals of the latter. A weak international instrument following a strong regional one might indicate a failure to bring the world up to a region's standards, but it would not diminish the fact that a specific region had adopted those strong standards.

Second, some international treaties adopt weaker standards than exist in regional instruments in certain areas yet establish higher standards in others. A CCW delegate argued to Human Rights Watch that the move from regional instruments regulating corruption to the UN Convention against Corruption (UNCAC) represented a parallel situation to the cluster munitions one.<sup>50</sup> In the corruption example, however, there is no consistent trend of stronger to weaker.<sup>51</sup> The draft protocol on cluster munitions is distinguishable from UNCAC because it would establish uniformly weaker standards than the Convention on Cluster Munitions.

Finally, both the Convention on Cluster Munitions and the draft protocol fall into the category of binding international instruments. Their relationship thus differs from one where a non-binding regional instrument is followed by a binding international instrument. A comparison has been made between the proposed Arms Trade Treaty (ATT), an international treaty regulating the transfer of a wide range of arms, and the proposed draft protocol on cluster munitions; both are said to be weaker than their predecessors. Some states have expressed concern that "an ATT would undermine strong existing standards,"<sup>52</sup> referring to regional arrangements on arms trade, but the regional instruments' political commitments are not comparable to the legal obligations of the Convention on Cluster Munitions. The stronger-to-weaker progression from the Convention on Cluster Munitions to the draft protocol is therefore distinguishable from examples raised regarding regional instruments. The draft protocol would work against a general trend of international law by creating a weaker regulatory regime after a strong regime.

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<sup>50</sup> UN Convention Against Corruption (UNCAC), UN General Assembly Resolution of October 31, 2003, A/58/422, entered into force December 14, 2005.

<sup>51</sup> For instance, the treaties established by the Organization of American States, Organisation for Economic Co-operation and Development (OECD), and the Council of Europe respectively deal with corruption as bribery, whereas the UNCAC adopts a much broader understanding of corruption that goes beyond the giving or receiving of bribes. Conversely, the UNCAC monitoring mechanisms are considered to be weaker than those in the respective OECD and Council of Europe treaties. See Philippa Webb, "The United Nations Convention against Corruption: Global Achievement or Missed Opportunity?" *Journal of International Economic Law*, 8(1), pp. 221-222.

<sup>52</sup> Sarah Parker, "Implications of States' Views on an Arms Trade Treaty," *United Nations Institute for Disarmament Research*, January 2008, p. 11.

## *Conflicts between Treaties*

Following a strong international treaty with a weaker international one can create a conflict between treaties, and if the draft protocol on cluster munitions were adopted, it would generate a conflict with the Convention on Cluster Munitions. States should strive to avoid this conflict as it contributes to incoherence in the principles and rules of international law.

The concept of treaty conflict has not been explicitly defined.<sup>53</sup> Some have interpreted the term narrowly to mean incompatibility: “a strict notion of conflicts between treaties implies that both cannot be applied simultaneously.”<sup>54</sup> Others have interpreted it more broadly, including the International Law Commission, a body created by the United Nations to promote the progressive development and codification of international law. According to the International Law Commission, “there are other, looser understandings of conflict as well. A treaty may sometimes frustrate the goals of another treaty without there being any strict incompatibility between their provisions. Two treaties or sets of rules may possess different background justifications or emerge from different legislative policies or aim at divergent ends.”<sup>55</sup>

A conflict in goals exists between the Convention on Cluster Munitions and the draft protocol. While the convention’s goal is to eliminate cluster munitions,<sup>56</sup> the draft protocol permits the weapons’ use.<sup>57</sup> This explicit permission to use cluster munitions in the draft protocol would frustrate the purpose expressed by the Convention on Cluster Munitions, satisfying the broader test for conflict.

Conflicts between international treaties are undesirable and have systemic implications for international law. The international legal scholar C. Wilfred Jenks, in an article referenced repeatedly in the International Law Commission’s 2006 report *Fragmentation of*

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<sup>53</sup> Nele Matz Luck, “Treaties, Conflicts Between,” in R. Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2006, online edition, [http://www.mpepil.com.eresources.law.harvard.edu:2048/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690e1485&recno=1&searchType=Quick&query=treaties%2C+conflicts+between](http://www.mpepil.com.eresources.law.harvard.edu:2048/subscriber_article?script=yes&id=/epil/entries/law-9780199231690e1485&recno=1&searchType=Quick&query=treaties%2C+conflicts+between) (accessed November 10, 2011).

<sup>54</sup> *Ibid.*

<sup>55</sup> UN General Assembly, “Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,” finalized by Martti Koskeniemi, A/CN.4/L.682, April 13, 2006, para. 24.

<sup>56</sup> See above section “A Challenge to the Humanitarian Purpose of International Humanitarian Law.” Malgosia Fitzmaurice has clarified that a treaty’s object and purpose is determined, individually and cumulatively, by the following criteria: “the title of the treaty; its preamble; an article of the treaty with apparent relevance for the treaty’s object and purpose; and the *travaux préparatoires*; etc.” Malgosia Fitzmaurice, “Treaties,” in R. Wolfrum, ed., *The Max Planck Encyclopedia of International Law*, Oxford University Press, 2010, online edition, [http://www.mpepil.com.eresources.law.harvard.edu:2048/subscriber\\_article?script=yes&id=/epil/entries/lw-9780199231690-e1481&recno=3&searchType=Quick&query=treaties+](http://www.mpepil.com.eresources.law.harvard.edu:2048/subscriber_article?script=yes&id=/epil/entries/lw-9780199231690-e1481&recno=3&searchType=Quick&query=treaties+) (accessed November 10, 2011).

<sup>57</sup> See above section “A Challenge to the Humanitarian Purpose of International Humanitarian Law.”

*International Law*, characterized conflict between treaties as “an anomaly which every possible precaution should be taken to avoid.”<sup>58</sup> Indeed, “prevention or solution of conflicts between treaties is crucial for establishing at least elementary coherence of norms in international law.”<sup>59</sup> Conflicts such as the one between the Convention on Cluster Munitions and the draft protocol create incoherency and confusion, ultimately eroding the utility of international law. States should avoid that situation by rejecting the draft protocol.

## Conclusion

The adoption of CCW’s draft protocol on cluster munitions would run counter to established legal principles and would open the door to future regression of international law. In particular, adoption would contravene the humanitarian purpose of international humanitarian law and constitute an unprecedented step in the wrong direction, introducing lesser protections for civilians in armed conflict than already exist under the Convention on Cluster Munitions. A new protocol would also run counter to international law’s trend toward progressively stronger instruments and present a conflict between treaties that should, and can be, avoided.

States parties have the opportunity at the Fourth Review Conference to show that there is not consensus on the problematic draft protocol. In determining and articulating their positions, they should consider the threats the instrument poses to the cluster munition regime. As Germany stated during the Second Meeting of States Parties to the Convention on Cluster Munitions, “We need to strengthen our efforts to effectively discourage *any* use of cluster munitions by *any* actor.”<sup>60</sup> The draft protocol is not the mechanism to achieve this goal. States parties should further take into account the adverse impact the proposed instrument could have on international law. Promoting universal adherence to the Convention on Cluster Munitions is the best path for states that wish not only to eliminate cluster munitions and the harm they cause but also to uphold key principles of international law.

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<sup>58</sup> C. Wilfred Jenks, “The Conflict of Law-Making Treaties,” *The British Yearbook of International Law*, vol. 30 (1953), p. 405.

<sup>59</sup> Nele Matz-Luck, “Treaties, Conflicts Between.”

<sup>60</sup> Statement by Germany, to the Second Meeting of States Parties to the Convention on Cluster Munitions, Beirut, September 13, 2011, <http://www.clusterconvention.org/msp/2msp/day-1-general-exchange-of-views/> (accessed November 10, 2011) [emphasis added].