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Research Report

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SWP Comments, No. 6/2009

Provided in Cooperation with:

Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs,
Berlin

Suggested Citation: Justen, Detlev (2009) : A twenty-first century without cluster munitions? Options for the Geneva negotiations on the UN Weapons Convention, SWP Comments, No. 6/2009, Stiftung Wissenschaft und Politik (SWP), Berlin

This Version is available at:

<https://hdl.handle.net/10419/256081>

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A Twenty-First Century without Cluster Munitions?

Options for the Geneva Negotiations on the UN Weapons Convention

Detlev Justen

In December 2008, the Oslo Process, an initiative of the Norwegian government to ban cluster munitions, was concluded with the signing of the “Convention on Cluster Munitions.” The Convention, with its extensive prohibitions, will enter into force six months after the 30th Instrument of Ratification has been submitted to the UN Secretary-General. However, the negotiations on cluster munitions under the UN-based Convention on Certain Conventional Weapons (CCW) in Geneva have not yet reached an end. In contrast to the Oslo Process, the latter process involves representatives of the major stockpilers of cluster munitions, the US, Russia, and China, who reject most of the prohibitions agreed upon in Oslo. The precondition for ratification of a new protocol on cluster munitions would be consensus among the 109 CCW signatory states. It remains completely unclear, however, whether the proposed protocol could be designed to complement the Oslo Convention and thus to strengthen the existing weapons prohibition regime, or whether it would create a source of conflict between agreements of differing scope and quality. These two possibilities will be discussed in the following, and the potential failure of the Geneva negotiations will be addressed as well.

Accompanied by widespread public interest, the Convention on Cluster Munitions was signed in Oslo on December 3–4, 2008, by 94 nations, including Germany, as well as a total of 19 EU and 18 (now 20) NATO countries. The convention prohibits the signatories from all use, stockpiling, production, and transfer of cluster munitions. It also offers participating states a framework for cooperation in a number of areas: in victim assistance, in the clearance of

areas contaminated by cluster munitions remnants, and in the destruction of these munitions. The Oslo process was initiated in response to the extreme risks posed by cluster munitions as criticized by the signatory states of the Oslo Declaration, numerous NGOs, and the International Committee of the Red Cross (ICRC). Unexploded shells of such munitions, which can detonate on contact or when moved, pose a daily threat in 27 countries and 5

unrecognized territories and are the cause of innumerable deaths and injuries. The negative social and economic impacts of cluster munitions thus closely resemble those of landmines. According to data from *Handicap International*, more than 13,300 people have fallen victim to cluster munitions to date—98 percent of whom were civilians.

Yet the Oslo signatory states possess only an estimated 10 percent of all cluster munitions worldwide. The rest are stockpiled by the world's major users and producers: the US, Russia, and China. Since the latter view cluster munitions as a legitimate military weapon and consider them indispensable for defense and national security, they reject the convention.

But the Oslo convention is not the only forum in which negotiations are underway to reduce the dangers arising from cluster munitions. A successful outcome of the convention would eclipse the still open-ended negotiations surrounding the UN Convention on Certain Conventional Weapons (CCW). This agreement, which entered into force on December 2, 1983, governs prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects.

Negotiations on Cluster Munitions under the UN Convention on Certain Conventional Weapons

The first talks on cluster munitions among the signatory states to the CCW took place in November 2003 surrounding the ratification of Protocol V on Explosive Remnants of War. By the time of the Third Review Conference on the CCW three years later, substantial progress was being made on the issue of cluster munitions: having just witnessed the bombardment of residential areas in Lebanon and Israel in Summer 2006, the Conference appointed a Group of Government Experts (GGE), who convened in June 2007 to discuss the problem of

cluster munitions. During the Conference of the Parties to the Convention in November 2007, the GGE reached an initial agreement, although on a very narrowly defined mandate: that of submitting a “proposal” at the Conference of the Parties to the Convention the following year designed to “urgently address the humanitarian impact of cluster munitions.” The efforts of several countries including Germany to go beyond this “proposal” and conclude a new Protocol VI on the issue of cluster munitions as early as 2008 failed due to the conflict between participants in the Oslo process and its opponents, the US, China, Russia, India, Pakistan, Israel, and Brazil. The latter were only willing to agree to significantly reduced restrictions. Nevertheless, the contracting parties were able to agree on continuing negotiations in 2009.

Current Status of Negotiations

At the meeting of the Group of Government Experts in early 2009, consensus on a protocol had not yet emerged. The positions of the participants in the Oslo treaty and the main users and producers of cluster munitions remained too far apart. Still in dispute are in particular the scope of the ban (comprehensive ban vs. partial ban/limitations on use) and temporal aspects (immediate ban vs. transitional periods). While the Oslo participants want to achieve a fast, total ban, the main users and producers of cluster munitions continue to reject this idea, and some of them see little need for a new convention. The existing draft protocol (“consolidated text”) contains mainly the elements of the definition of cluster munitions from the Oslo Convention; but it would allow the use of certain models with a proven high rate of unexploded shells, which were still used in 2006 in Lebanon and in 2008 in the Caucasus (e.g., M85, CBU-97). The proposal is therefore being criticized especially by the Oslo states, the NGO Cluster Munitions Coalition and the ICRC.

Relationship between the Oslo Convention and the UN Weapons Convention

Three options currently exist for the relationship between the already signed Oslo Convention and a possible protocol on cluster munitions under the framework of the CCW. The present analysis concentrates on the two points of contention that will probably determine the outcome of the negotiations in Geneva: the scope of the ban on cluster munitions, and their definition. With regard to the provisions of a ban, the spectrum of interests represented by the signatory states range from a total ban on cluster munitions to mere partial bans or limitations on use. While the Oslo Convention prohibits all models of cluster munitions in use to date, the proposal submitted to the CCW signatories approves the use of certain makes of cluster munitions with a high rate of unexploded shells. Provisions concerning victim assistance, support for rehabilitation, or mutual support among contracting parties are not the focal point in Geneva, despite their importance for the reduction of the humanitarian problems (see above).

Option 1

Geneva fails – but Oslo remains

If the negotiations in Geneva fail, this would leave the Oslo Convention as the only international convention dealing explicitly with cluster munitions. The major cluster munitions users would thus not be bound by international law, since they reject this treaty. But by stigmatizing the use of cluster munitions, the Oslo Convention would still have a tangible impact on the non-signatory states, probably leading to an overall reduction in the use, development, production and transfer of cluster munitions, as was the case with anti-personnel mines. This would, however, also weaken the CCW. And as a result, the future and long-term value of this universal arms control forum, in which the world's leading military powers are represented,

could be called into question. After all, by failing to ratify a cluster munitions protocol, the signatory states would demonstrate for the second time since the failure of the Protocol on Anti-Vehicle Mines at the end of 2006 that they are incapable of reaching consensus.

Option 2

Complementarity – but with long transitional periods

Another possible scenario would be that a protocol is ratified containing the same scope of prohibitions (comprehensive ban) and the same definition of cluster munitions as the Oslo Convention. But in order to gain the agreement of the major military powers and main stockpilers of these munitions, transitional periods of at least 25 years will be essential. The US, for instance, apparently initiated a procurement program for cluster and precision-guided munitions in mid-2008 and is now tied to this commitment. Russia and China will also need this period of time to adapt or replace their extensive and mostly older weapons stocks. A similar situation came about during the negotiations on Protocol II of the CCW (the Mine Protocol), which was amended in 1996. There as well, a compromise was reached on transitional periods (although of only nine years). Granted, a 25-year transitional period would mean “legalizing” cluster munitions for a limited period of time. However, the possibility of gaining the agreement of the main stockpilers as well as the concrete prospect of achieving a comprehensive ban on the munitions would outweigh this disadvantage. Additionally, provisions would have to be included in the protocol declaring that the use of cluster munitions during this transitional period is permissible only in “exceptional cases” for which high preconditions will be imposed, and preferably also implying an immediate ban on trade or transfer of these weapons. With this solution, the stigmatization arising from the Oslo Convention would create at

least an obstacle to potential deployments during the transitional period. Establishing an identical definition of cluster munitions would provide military forces and politicians a firm legal foundation as well as a sound basis for action. This would also prevent countries that are signatories of both conventions from using whichever definition seems most opportune to them at the time.

Option 3 Minimal solution in Geneva – but undermining the Oslo Convention

It is also conceivable that Protocol VI will be ratified containing a more limited scope of prohibitions (individual bans, limitations) and possibly a (narrower) definition of cluster munitions than the Oslo treaty. This would create a precedent-setting international legal case, for here—in contrast to the conventions on land mines—a “weaker” convention would follow a “stronger” one on the same issue. The consequence would be a sustained legalization of the use of certain models of cluster munitions, including those with a potentially high rate of unexploded shells. Governments that reject the Oslo treaty might then use the protocol to justify their use of cluster munitions. This, in turn, could lead to an erosion of the comprehensive ban regulations contained in the Oslo Convention and a reduction in the stigmatization effect arising from it. Furthermore, differing definitions of the same type of munitions create legal uncertainties and a shaky basis for action.

Prospects and Recommendations

How should Germany and the other Oslo signatories behave in view of the upcoming negotiations in Geneva? Efforts should be made to achieve Option 2, that is, to reach agreement on a Protocol VI that stipulates a comprehensive ban on cluster munitions and contains the same definition of cluster munitions as the Oslo Convention (com-

patibility). The prospect of the main users and producers of these munitions agreeing to a total ban—even if only in the distant future—should justify the price of long transitional periods. In this scenario, all models of cluster munitions would be slated for complete abolition. The aim would be a “ban on cluster munitions before the end of the twenty-first century.”

If Protocol VI takes shape as a more limited ban than the Oslo Treaty, containing only limitations on use, lower technical standards, and a narrower definition of cluster munitions (incompatibility), it would be better to reject it. In this case, it appears more expedient to deliberately accept the failure of the Geneva negotiations (Option 1), since the Oslo Treaty would still remain in effect. Although this would mean a weakening of CCW, as already mentioned, it would be advisable to avoid the coexistence of incompatible treaties since this would mean a long-term legitimization of cluster munitions and would create a significant degree of legal uncertainty. Furthermore, under Option 1, the stigmatizing effect of the Oslo Treaty would remain and might even be strengthened.

Finally, this option would also still allow the signatory states to the CCW the possibility to reopen negotiations on a (compatible) Protocol VI at a later point in time, and thus to work towards achieving a breakthrough for Option 2 (compatibility).

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ISSN 1861-1761

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(English version of
SWP-Aktuell 23/2009)