

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Trump Administration Authorizes U.S. Military Use of Non-persistent Landmines

doi:10.1017/ajil.2020.44

The Trump administration released an updated policy on landmine use on January 31, 2020, significantly changing the prior U.S. policy. Whereas previously the United States supported landmine use only on the Korean peninsula, the revised policy now allows for the universal use of “non-persistent” landmines, i.e., those that have self-destruction mechanisms and self-deactivation features. This policy significantly diverges from provisions of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention), a treaty to which the United States is not a party but which has widespread international support.

The Ottawa Convention, which was finalized in 1997 and currently has 164 states parties, requires the discontinuance of all landmine use, the cessation of the development and acquisition of landmines, the destruction of all landmines in a state party’s possession or control, and abstention from aiding other actors’ development or use of landmines.¹ Although the United States was an early leader in advancing the notion of a universal ban on landmine use, it did not sign the Ottawa Convention and has not acceded to it.² The Obama administration nonetheless sought to increase the alignment between U.S. practice and the provisions in the Ottawa Convention.³ In particular, in 2014, the administration declared that it would generally discard its stockpiles of landmines and refrain from using landmines that are in its control.⁴ Yet, due to what it described as a “unique situation” on the Korean peninsula, the administration created an exception to this policy as it refused to destroy landmines “required for the defense of the Republic of Korea.”⁵

On January 31, 2020, the Trump administration released an updated landmine policy, retreating from the Obama administration’s disapproval of landmines and moving the United States further away from alignment with the Ottawa Convention.⁶ In contrast to

¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Art. I, Sept. 18, 1997, 2056 UNTS 35597 (2002) [hereinafter Ottawa Convention] (setting these restrictions with respect to anti-personnel landmines); Depositary Status for the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, UNITED NATIONS TREATY COLLECTION, at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en [<https://perma.cc/N7Z4-29H4>] [hereinafter Depositary Status for the Ottawa Convention].

² See generally Depositary Status for the Ottawa Convention, *supra* note 1; Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 835, 836 (2014).

³ Daugirdas & Mortenson, *supra* note 2.

⁴ *Id.*

⁵ *Id.* at 837 (quoting a 2014 U.S. Department of State press statement). This policy was formally documented in Presidential Policy Directive-37, which was issued in January 2016. CONG. RESEARCH SERV., IF11440, NEW U.S. ANTIPERSONNEL LANDMINE USE POLICY 1 (2020), at <https://crsreports.congress.gov/product/pdf/IF/IF11440>. The exception with respect to the Korean peninsula hindered the U.S. ability to fully comply in practice with the Ottawa Convention, as Article 1(c) commits states parties to undertake to never “assist, encourage or induce, in any way,” another state in the use or development of landmines. Ottawa Convention, *supra* note 1, Art. 1(c).

⁶ White House Press Release, Statement from the Press Secretary (Jan. 31, 2020), at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-107> [<https://perma.cc/PR6U-VS7Z>]; see also U.S. Dep’t of

the previous U.S. policy, the “ability to employ non-persistent landmines will [now] not have any expressed geographic limitations.”⁷ The Department of Defense defined non-persistent landmines as those that “possess self-destruction mechanisms and self-deactivation features.”⁸ Use of these landmines is now approved “when necessary for mission success in major contingencies or other exceptional circumstances” as determined by combatant commanders.⁹ When asked to specify what constitutes an exceptional circumstance, however, a Department of Defense official responded, “war is exceptional” and “an exceptional circumstance[] is when you have to put troops in harm’s way.”¹⁰ Although this new policy greatly expands the military’s opportunity to use landmines, the policy expressly provides that the Department of Defense “will continue to adhere to all applicable international legal obligations concerning landmines.”¹¹ This includes the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices joined by the United States in 1999, which is more commonly known as the Amended Mines Protocol.¹² As stated by Secretary of Defense Mark Esper: “Consistent with the Amended Mines Protocol, the Military Departments and Combatant Commands will take feasible precautions to protect civilians from the use of landmines, record all necessary information concerning mined areas, and address such mines without delay after the cessation of active hostilities.”¹³

Defense Press Release, Landmine Policy: Statement Attributable to Vic Mercado, Performing the Duties of Assistant Secretary of Defense for Strategy, Plans and Capacities (Jan. 31, 2020), at <https://www.defense.gov/Newsroom/Releases/Release/Article/2071692/landmine-policy> [<https://perma.cc/YRE6-5V6E>] [hereinafter Dep’t of Defense Landmine Policy Press Release].

⁷ Memorandum from Mark T. Esper, Secretary of Defense, on the Department of Defense’s Policy on Landmines to the Secretaries of the Military Departments et al., at 2 (Jan. 31, 2020), available at <https://media.defense.gov/2020/Jan/31/2002242359/-1/-1/1/DOD-POLICY-ON-LANDMINES.PDF> [<https://perma.cc/JF2G-6MPK>] [hereinafter Landmine Policy Memorandum].

⁸ *Id.* In accordance with the prior U.S. policy, the new policy prohibits the use of persistent landmines “that do not incorporate self-destruction mechanisms and self-deactivation features.” *Id.*

⁹ *Id.* at 3. There are eleven combatant commanders, each in charge of a combatant command “which provides command and control of military forces in peace and war.” U.S. Dep’t of Defense, *Combatant Commands*, at <https://www.defense.gov/Our-Story/Combatant-Commands> [<https://perma.cc/X5BQ-G7CL>].

¹⁰ U.S. Dep’t of Defense Press Release, Performing the Duties of Assistant Secretary of Defense for Strategy, Plans and Capabilities Victorino Mercado Media Engagement on Landmine Policy (Jan. 31, 2020), at <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2072121/performing-the-duties-of-assistant-secretary-of-defense-for-strategy-plans-and> [<https://perma.cc/BZ3P-YMRZ>] [hereinafter Mercado Press Conference].

¹¹ Landmine Policy Memorandum, *supra* note 7, at 1.

¹² *Id.* at 1–2; see also Depositary Status for the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed 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, UNITED NATIONS TREATY COLLECTION, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2-b&chapter=26&clang=_en [<https://perma.cc/SJ3F-87V5>].

¹³ Landmine Policy Memorandum, *supra* note 7, at 2; see also 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, Amended Protocol II, Art. 3(8)(c), May 3, 1996, 35 ILM 1206 (prohibiting use of landmines “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”); *id.* Art. 9 (requiring the recording of “[a]ll information concerning . . . mines”); *id.* Art. 10 (mandating that landmines “be cleared, removed, destroyed or maintained [pursuant to other specified articles]” following “the cessation of active hostilities”).

A Department of Defense official described this policy change as stemming from a shift in the “strategic environment . . . that requires our military to become more lethal, resilient, and ready for future contingencies.”¹⁴ The official further stated:

Landmines . . . remain a vital tool in conventional warfare that the United States military cannot responsibly forgo, particularly when faced with substantial and potentially overwhelming enemy forces in the early stages of combat. Withholding a capability that would give our ground forces the ability to deny terrain temporarily and therefore shape an enemy’s movement to our benefit irresponsibly risks American lives.¹⁵

The Trump administration previously used parallel reasoning in 2017 when, in reversing a 2008 policy established by the George W. Bush administration, it decided to allow the “employ[ment] [of] cluster munitions”—weapons that, once detonated, explode and fire dozens to hundreds of small submunitions towards a target—including those with a detonation failure rate of more than 1 percent.¹⁶ Similar to the new landmine policy, the administration justified its support of the use of such weaponry as being necessary for a “qualitative and quantitative competitive advantage against potential adversaries” in light of “important changes in the global security environment.”¹⁷

The Obama administration, in comparison, promulgated the previous U.S. policy limiting the use of landmines because it concluded that any military advantage that landmines would generate was outweighed by the harm to civilians that these instruments of war have the potential to cause.¹⁸ Many international actors, including leaders of the Ottawa Convention, have expressed concern about the danger to civilians that may result from the new U.S. landmine policy. Osman Abufatima Adam Mohammed, the president of the Eighteenth Meeting of States Parties to the Ottawa Convention, described this new policy as “a step in the wrong direction” and explained that it will “only drift the US further apart from 80% of the world’s States who have committed to protect civilians from these

¹⁴ Dep’t of Defense Landmine Policy Press Release, *supra* note 6. Asked in a press conference if he could “point to any specific example in the past four years” where landmines would have prevented U.S. troops from feeling “at a severe disadvantage,” the official answered: “No, I think it’s a matter of risk.” Mercado Press Conference, *supra* note 10.

¹⁵ *Id.*

¹⁶ Memorandum from Patrick M. Shanahan, Deputy Secretary of Defense, on the Department of Defense’s Policy on Cluster Munitions to the Secretaries of the Military Departments et al. 2 (Nov. 30, 2017), available at <https://dod.defense.gov/Portals/1/Documents/pubs/DOD-POLICY-ON-CLUSTER-MUNITIONS-OSD071415-17.pdf> [<https://perma.cc/S4EG-ZWVF>] [hereinafter Cluster Munition Policy Memorandum]; CONG. RESEARCH SERV., RS22907, CLUSTER MUNITIONS: BACKGROUND AND ISSUES FOR CONGRESS 1 (2019), available at <https://fas.org/sgp/crs/weapons/RS22907.pdf>. Due to their failure rates combined with their lack of self-destructive capabilities, these weapons “can remain explosive hazards for decades.” *Id.* at 2. For a summary of the 2008 U.S. policy, see John R. Crook, Contemporary Practice of the United States, 102 AJIL 889 (2008).

¹⁷ Cluster Munition Policy Memorandum, *supra* note 16, at 1.

¹⁸ White House Press Release, FACT SHEET: Changes to U.S. Anti-Personnel Landmine Policy (Sept. 23, 2014), at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/fact-sheet-changes-us-anti-personnel-landmine-policy> [<https://perma.cc/4RA7-YABW>] (“The measures announced today represent a further step to advance the humanitarian aims of the Ottawa Convention and to bring U.S. practice in closer alignment with a global humanitarian movement that has had a demonstrated positive impact in reducing civilian casualties”). A report compiled by a global landmine monitoring organization found that at least 6,897 people were killed or injured from landmines in 2018. International Campaign to Ban Landmines, *Landmine Monitor 2019*, at 53 (2019), available at <http://the-monitor.org/media/3074086/Landmine-Monitor-2019-Report-Final.pdf> [hereinafter Landmine Monitor Report]. Of the casualties, 71% were civilians and 40% were children. *Id.* at 58.

treacherous weapons.”¹⁹ The treaty’s Secretariat Director Juan Carlos Ruan also responded to the new landmine policy by explaining that “[t]here is no such thing as responsible use of anti-personnel mines” because “any perceived or limited military utility of anti-personnel mines is grossly outweighed by the humanitarian consequences of their use.”²⁰ The European Union, comprised of member states who are all parties to the Ottawa Convention, released a statement similarly disapproving the United States’ new policy and describing the use of landmines “anywhere, anytime, and by any actor” as “completely unacceptable to the European Union.”²¹ Further, a collection of U.S. and international nongovernmental organizations signed a joint letter “strongly condemn[ing]” the policy and requesting that Congress “take immediate measures” to prevent any further military action in accordance with the policy.²² Presumably anticipating these responses to its policy change, the Department of Defense in its initial press release denied that the new policy would “exacerbate the problems associated with unexploded munitions” and stated that its policy authorizing the use of landmines does not lessen the U.S. commitment to “international humanitarian demining efforts.”²³

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

United States Signs Agreement with the Taliban, but Prospects for Its Full Implementation Remain Uncertain

doi:10.1017/ajil.2020.45

On February 29, 2020, the United States signed an “Agreement for Bringing Peace to Afghanistan” with the Taliban. The agreement provides that the United States and its allies will withdraw all forces from Afghanistan in stages over a fourteen-month period and that the Taliban will not allow actors within its controlled territory to attack the United States and its allies. The agreement contains additional provisions with respect to prisoner exchanges, sanctions relief, and future negotiations regarding a permanent ceasefire and broader political settlement that the Taliban will pursue with the government of Afghanistan. On the same day, the United States and Afghanistan issued a Joint Declaration reflecting some, though not all, of the terms of the U.S. agreement with the Taliban. Over the three months following the

¹⁹ Anti-Personnel Mine Ban Convention Implementation Support Unit Press Release, *US Landmine Policy Change, a Dangerous Step Forward* (Feb. 3, 2020), available at https://www.apminebanconvention.org/fileadmin/APMBC/press-releases/2020-02-03-Mine_Ban_Convention_on_US_landmine_policy.pdf [hereinafter *Ottawa Convention Press Release*]. According to the Landmine Monitor Report, there are only eleven states, not including the United States, that have not committed to ceasing future production of landmines—China, Cuba, India, Iran, Myanmar, North Korea, Pakistan, Russia, Singapore, South Korea, and Vietnam. Landmine Monitor Report, *supra* note 18, at 5.

²⁰ Ottawa Convention Press Release, *supra* note 19.

²¹ Anti-Personnel Mines: Statement by the Spokesperson on the United States’ Decision to Re-introduce Their Use, EUR. COMM’N, at https://eeas.europa.eu/headquarters/headquarters-homepage/73966/anti-personnel-mines-statement-spokesperson-united-states%E2%80%99-decision-re-introduce-their-use_en.

²² Members of the United States Campaign to Ban Landmines, *Joint Statement on the Trump Administration’s New Landmine Policy* (Feb. 28, 2020), available at <https://www.fcni.org/documents/1265>.

²³ Dep’t of Defense Landmine Policy Press Release, *supra* note 6.