

St. John's Law Review

Volume 68
Number 3 *Volume 68, Summer 1994, Number 3*

Article 2

April 2012

Prohibitions and Restrictions on the Use of Conventional Weapons

Howard S. Levie

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Levie, Howard S. (1994) "Prohibitions and Restrictions on the Use of Conventional Weapons," *St. John's Law Review*. Vol. 68 : No. 3 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol68/iss3/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

PROHIBITIONS AND RESTRICTIONS ON THE USE OF CONVENTIONAL WEAPONS

HOWARD S. LEVIE*

In 1980, a Diplomatic Conference convened by the General Assembly of the United Nations in Geneva was successful in drafting a Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects¹ ("Conventional Weapons Convention"). Three Protocols, each relating to a specific weapon or group of weapons, were attached. The Conventional Weapons Convention was opened for signature at the United Nations Headquarters in New York on April 10, 1981.² The United States did not sign it until April 8, 1982, and since then has ratified only the Convention and two of the Protocols.³ The Conventional Weapons Convention and its Protocols received the necessary twenty ratifications and accessions by June 2, 1983,⁴ and entered into force six months later on December 2, 1983.⁵

The purposes of this Article are (1) to determine why these instruments were considered necessary; (2) to analyze the provi-

* A.B., Cornell University, 1928; J.D., Cornell Law School, 1930; LL.M., George Washington University Law School, 1957; Colonel, JAGC, USA (Ret); Professor Emeritus of Law, Saint Louis University Law School; Charles H. Stockton Chair of International Law, U.S. Naval War College, 1971-1972; Adjunct Professor of International Law, U.S. Naval War College, 1991-present. The opinions expressed herein are solely those of the author and do not necessarily represent the opinions of any of the institutions or organizations mentioned above.

¹ Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, app. A, 19 I.L.M. 1523, 1524 [hereinafter "1980 Final Act"], reprinted in *THE LAWS OF ARMED CONFLICTS* 179 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter Schindler & Toman].

² See 1980 Final Act, *supra* note 1, app. A, art. 3, 19 I.L.M. at 1525, reprinted in Schindler & Toman, *supra* note 1, at 180.

³ See Schindler & Toman, *supra* note 1, at 192; S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995).

⁴ Ratification is "[t]he affirmance . . . of a prior act which did not bind . . . whereby the act, as to some or all persons, is given effect as if originally authorized . . ." BLACK'S LAW DICTIONARY 1261 (6th ed. 1990). Accession is "[t]he absolute or conditional acceptance by one or several nations of a treaty already concluded between other sovereignties . . . so that such nation becomes a party to it . . ." *Id.* at 14.

⁵ See Schindler & Toman, *supra* note 1, at 179.

sions of the Convention and of the three Protocols; and (3) to ascertain in what manner ratification will be in the best interests of the United States.⁶

INTRODUCTION

As long ago as 1868, the Preamble of the Declaration of St. Petersburg set forth a number of "limits at which the necessities of war ought to yield to the requirements of humanity."⁷ These limits included the following:

- That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
- That the only legitimate objects which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
- That for this purpose it is sufficient to disable the greatest possible number of men;
- That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their deaths inevitable; [and]
- That the employment of such arms would, therefore, be contrary to the laws of humanity.⁸

Articles 22 and 23(e) of the Regulations Attached to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,⁹ and the same articles of the Regulations Attached

⁶ Items (2) and (3) will be discussed together.

⁷ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Nov. 29-Dec. 11, 1868, St. Petersburg, *reprinted in* 1 AM. J. INT'L L. SUPP. 95 (1907), *and in* Schindler & Toman, *supra* note 1, at 102.

⁸ *Id.*

⁹ 32 Stat. 1803, 1817 (1903), T.S. No. 403, *reprinted in* 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 247 (C. Bevans, ed., 13 vols., 1968-1976) [hereinafter Bevans], *and in* Schindler & Toman, *supra* note 1, at 63.

Secretary of State Warren Christopher has described the Hague Conventions of 1899 and 1907 as

significant treaties attempt[ing] to reduce the suffering caused by armed conflicts and to provide protection to the victims of war, including the civilian population and members of the armed forces who have been wounded or captured. They are an attempt to reduce the inevitable suffering and damage present during any war in a manner consistent with legitimate military requirements.

88 AM. J. INT'L L. 748, 749 (1994). The first Conference in 1899 reduced a number of existing customs on the rules and laws of war to written form. Basically, the second Conference in 1907 made few changes in the 1899 Regulations. Today, these rules are collectively known as the Law of The Hague.

to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land,¹⁰ include the following humanitarian rules:

Article 22: The right of belligerents to adopt means of injuring the enemy is not unlimited.¹¹

Article 23 (e): In addition to the prohibitions provided by special Conventions, it is especially prohibited¹² [or forbidden]: To employ arms, projectiles, or material of a nature [calculated] to cause unnecessary suffering.¹³

Unfortunately, despite the vast increase in the nature and lethality of weapons which occurred during the course of the subsequent seven decades, the only international agreement prohibiting or restricting specific conventional weapons which became effective during that period was the 1925 Geneva Gas Protocol,¹⁴ prohibiting the use of asphyxiating gases and bacteriological weapons.¹⁵

Prior to the Diplomatic Conference that took place in Geneva between 1974 and 1977,¹⁶ the work of which culminated in two additions to the four 1949 Geneva Conventions¹⁷ (only one of

¹⁰ 36 Stat. 2277, 2301-02 (1911), T.S. No. 539; 2 AM. J. INT'L L. SUPP. 190 (1908); reprinted in 1 Bevens, *supra* note 9, at 631, and in Schindler & Toman, *supra* note 1, at 63.

¹¹ *Id.*

¹² See Schindler & Toman, *supra* note 1, at 82.

¹³ To the same effect, see 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, art. 35(1)-(2) [hereinafter 1977 Additional Protocol I], in 1 Swiss Federal Political Department, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Part 1, at 115 (1978) [hereinafter Official Records], 1125 U.N.T.S. 3, 16 I.L.M. 1391, reprinted in Schindler & Toman, *supra* note 1, at 621.

¹⁴ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, reprinted in Schindler & Toman, *supra* note 1, at 115; see also 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 26 U.S.T. 583, 1015 U.N.T.S. 164, reprinted in Schindler & Toman, *supra* note 1, at 137 (using these weapons was not prohibited or restricted by 1972 Convention—this was accomplished by the 1925 Geneva Gas Protocol).

¹⁵ Contrary to the beliefs of some, neither the four 1949 Geneva Conventions for the Protection of the Victims of War, see *infra* note 17, nor the 1977 Additional Protocol I has provisions containing prohibitions or restrictions on the use of specific conventional weapons.

¹⁶ The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts [hereinafter Diplomatic Conference] met from 1974 to 1977.

¹⁷ There are four 1949 Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug.

which will concern this Article¹⁸), the International Committee of the Red Cross ("ICRC") had sponsored a number of preliminary conferences, the last of which was a Conference of Government Experts that met in 1972. Although those conferences were concerned with the reaffirmation and development of international humanitarian law applicable in armed conflicts, and not with prohibitions or restrictions on the use of specific conventional weapons, at the conclusion of the 1972 conference a group of the government experts suggested that the ICRC should arrange a special meeting to consult with legal, military, and medical experts on the question of express prohibitions or limitations of the use of such conventional weapons as may cause unnecessary suffering or be indiscriminate in their effect.¹⁹

Complying with this suggestion, the ICRC convened meetings of a selected group of experts in March and June 1973. These meetings of experts did not attempt to formulate concrete proposals, but sought merely to document the weapons which required consideration.²⁰ Five categories of weapons were classified as causing unnecessary suffering or being indiscriminate in their effects: 1) small-calibre projectiles; 2) blast and fragmentation weapons; 3) time-delay weapons (land mines and booby traps); 4) incendiary weapons; and 5) potential weapons development.²¹ It will be found that these experts chose well and that the weapons in these five categories continued to constitute the subject of dis-

12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31, *reprinted in* Schindler & Toman, *supra* note 1, at 373 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* Schindler & Toman, *supra* note 1, at 401 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135, *reprinted in* Schindler & Toman, *supra* note 1, at 423 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3517, 75 U.N.T.S. 287, *reprinted in* Schindler & Toman, *supra* note 1, at 495 [hereinafter Fourth Geneva Convention].

¹⁸ See 1977 Additional Protocol I, *supra* note 13.

¹⁹ International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: 2 Report on the Work of the Conference, Annexes 115, 116 (July 1972).

²⁰ International Committee of the Red Cross, Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects: Report on the Work of Experts, paras. 11 and 12 (1973). It must be borne in mind that, despite the occasional efforts of a few individuals, nuclear, chemical, or biological weapons were never considered to be areas open for discussion in any of the conferences to which this Article refers.

²¹ *Id.* at chs. III-VII.

cussions in the various subsequent conferences on this matter, up to and including the conference that drafted the Conventional Weapons Convention and Protocols which were the ultimate result of these labors.²²

The Diplomatic Conference that met in Geneva for the first time on February 20, 1974 (and did not complete its work until June 10, 1977), established an Ad Hoc Committee on Conventional Weapons, whose terms of reference called for it to "discuss weapons without making any substantive or drafting decisions."²³ This Committee functioned throughout the four sessions of the Diplomatic Conference.²⁴ While the Ad Hoc Committee made no substantive recommendations, during the final Plenary Meetings the Diplomatic Conference adopted a resolution recommending that a conference be held not later than 1979 to reach "agreements on prohibitions or restrictions on the use of specific weapons."²⁵

²² "Small-calibre projectiles" was the only weapons category to fall by the way-side. A working paper on the subject (A/CONF.95/CW/5) was submitted at the Conventional Weapons Conference by Sweden. This was followed by a "Summary of the technical consultations in the Informal Working Group on Small-calibre Weapons Systems" (A/CONF.95/CW/8); then this subject disappeared except for a resolution adopted near the end of the 1979 session of the Conventional Weapons Conference. See 1979 Report of the Conference to the General Assembly, (A/CONF.95/8), Oct. 8, 1979, at 51 [hereinafter 1979 Conference Report]; and Final Report of the Conference to the General Assembly, (A/CONF.95/15), and Corr. 1-5, Oct. 27, 1980, at 10 [hereinafter 1980 Final Report]. It is understood that actual field tests conducted by the experts failed to substantiate the Swedish thesis that small-calibre weapons tumble and tear more than larger calibre weapons, and therefore, cause more suffering than the larger projectiles. Thus, further study was considered necessary before any action could be recommended with respect to these weapons. Of course, the category "potential weapons development" constituted an academic discussion of weapons not yet in the arsenal of any nation. Perhaps the weapons which fall within the ambit of the 1980 Protocol I to the Conventional Weapons Convention are in this category.

²³ 16 Official Records, *supra* note 13, at 5. It will be found that these limitations on the activities of the Ad Hoc Committee were eventually disregarded. See *id.* at 551-627.

²⁴ Concurrently, the ICRC sponsored two Conferences on the subject. See Report of the Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 1974 (1974) [hereinafter Lucerne Conference]; Report of the Conference of Government Experts on the Use of Certain Conventional Weapons, Lugano, 1975 (1976).

²⁵ Resolution 22(IV), Follow-up Regarding Prohibitions or Restrictions of Use of Certain Conventional Weapons, 1 Official Records, *supra* note 13, at Part One, 215-216 and Part Two, 52-53. Committee I of the Diplomatic Conference had adopted a provision on the subject for inclusion in the 1977 Additional Protocol I, CDDH/I/SR. 77, 9 Official Records, *supra* note 13, at 481-88, but that provision had been rejected by the Plenary Meeting, 7 Official Records, *supra* note 13, at 33.

The General Assembly of the United Nations took note of that resolution and adopted its own resolution, convening in 1979 a United Nations conference on prohibitions or restrictions on the use of specific conventional weapons.²⁶ Preparatory conferences met in 1978 and 1979, and the Conventional Weapons Conference met for the first time in Geneva from September 10, 1979, to September 28, 1979. The Conference met again from September 15, 1980, to October 10, 1980. At this latter session it completed the drafting of a Conventional Weapons Convention and three Protocols annexed to that Convention.²⁷ This Article will focus on the meaning and intent of the Conventional Weapons Convention and its Protocols in order to determine whether there are valid reasons that the United States and other major military nations to ratify such instruments which advance the humanitarian law of war— instruments that, moreover, such nations played a major role in drafting.

I. THE CONVENTIONAL WEAPONS CONVENTION

The Conventional Weapons Convention itself may truly be termed an "umbrella" convention. It contains no substantive humanitarian provisions, those being the subject matter of the three Protocols which are annexed to it. It has several provisions, however, that are either controversial or unusual.

Article 1 makes the Conventional Weapons Convention and its annexed Protocols applicable in accordance with the provisions of Article 2 of the 1949 Geneva Conventions.²⁸ This is certainly not a controversial provision, although it would have been preferable to restate the article itself in full, a practice followed elsewhere in the Conventional Weapons Convention and its Protocols.²⁹ It then proceeds to make them applicable in "any situation described in paragraph 4 of Article 1 of Additional Protocol I to

²⁶ G.A. Res. 32/152, U.N. GAOR, 32d Sess., Supp. No. 45, at 57, U.N. Doc. A/32/45 (1977), reprinted in [1977] 31 Y.U.N. 43, U.N. Sales No. E.79.I.1, and in 16 UNITED NATIONS RESOLUTIONS 529 (Dusan J. Djonovich, ed. 1984) [hereinafter Djonovich]. For some reason, despite the more specific title that the General Assembly gave to its agenda item, the resolution bears the title "Incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons."

²⁷ See generally 1980 Final Act, *supra* note 1.

²⁸ 1949 Geneva Conventions, *supra* note 17, art. 2.

²⁹ For example, Article 7(1) of the Conventional Weapons Convention is a restatement of the first sentence of Article 96(2) of the 1977 Protocol I.

these Conventions.”³⁰ This provision of the 1977 Additional Protocol I, making an international law-of-war convention applicable in conflicts involving national liberation movements (theretofore considered to be internal in nature), is one of the major reasons why the United States has not ratified this latter instrument. Although the present author agrees with the objection of the United States to this provision in the 1977 Additional Protocol I, primarily because it was the basis for Article 44(3) of that Protocol which removed the historic requirements for legal combatants from members of national liberation movements, the latter provision has no effect on the Conventional Weapons Convention or its Protocols. There is no question here of hiding one’s personal weapons from view, concealing oneself among civilians preparatory to an attack, or wearing no visible distinguishing insignia. Anyone whose State or “authority” has agreed to be bound by any of these Protocols who thereafter violates the humanitarian provisions thereof will be guilty of a war crime, whether he be a uniformed soldier in an international or civil war, a rebel in a civil war, or a member of a national liberation movement in hostilities against the colonial power.³¹ While ratifying the Conventional Weapons Convention, the United States could easily express its

³⁰ Article 1(4) of the 1977 Additional Protocol I, *supra* note 13, states that “[t]he situations referred to in the preceding paragraph include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .” Once again, it would have been preferable to include the entire provision—but any attempt to do this would probably have increased the non-palatability of the provision tenfold!

³¹ It is possible that the claim will be made, as it has sometimes been made with respect to Common Article 3 of the 1949 Geneva Conventions, *supra* note 17, that if the State involved in a civil war, or a war of national liberation, is a Party to the Conventional Weapons Convention and some or all of its Protocols, the provisions of those instruments are automatically binding upon its adversary, whether or not an “authority” has taken any action with respect thereto. This is based on the theory that all of the nationals of a State Party to an international agreement are bound by the provisions thereof. On the other hand, rebels have generally denied that they are bound by the acts of a government that they are seeking to overthrow.

displeasure with this provision by way of an understanding³² or, as France has done, by making a specific reservation.³³

Article 2 is concerned with the relation of the Conventional Weapons Convention and its Protocols to other international agreements, affirming that they do not detract "from other obligations imposed upon the High Contracting Parties by international humanitarian law applicable in armed conflict." This provision appears to be superfluous inasmuch as there is nothing in these instruments which could possibly have that effect. If anything, they "add to," they do not "detract from" other obligations.³⁴

Article 3 (Signature) is a part of the standard boilerplate of international agreements, as are Articles 5 (Entry into force), 6 (Dissemination), 9 (Denunciation), 10 (Depositary), and 11 (Authentic texts).³⁵ Naturally, some of these articles contain variations from the standard to meet the particular circumstances of the Conventional Weapons Convention.

³² See S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995) (declaring that "the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949"). The United States may contend, as it does with respect to the provision in the 1977 Additional Protocol I, that this provision will protect terrorists. Such a contention has no validity with respect to the 1977 Additional Protocol I—and it has even less validity here.

³³ The French reservation (made upon signature) states, "with reference to the scope of application defined in article 1 of the [Conventional Weapons Convention], that it will apply the provisions of that Convention and its three Protocols to all the armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949." MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 833, 834 (1991), 20 I.L.M. 1287 (1981) [hereinafter MULTILATERAL TREATIES] (noting reservations, declarations, and statements of signatory nations), reprinted in Schindler & Toman, *supra* note 1, at 193-94. No Party to the Conventional Weapons Convention is known to have taken exception to the French reservation, though it excludes the reference to the 1977 Additional Protocol I and national liberation movements.

³⁴ Nevertheless, one commentator has found it necessary to allocate three pages of discussion to this subject. Elmar Rauch, *The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines*, 24 GERMAN Y.B. INT'L L. 262, 264-66 (1981). The present author does concur with Rauch's finding that the Conventional Weapons Convention is *not* a supplement to the 1977 Additional Protocol I. *Id.* at 265. Another commentator states that "[t]he purpose of this Article is to exclude the *a contrario* line of argument whose adherents might claim that anything not specifically prohibited in the Convention is allowed." A.P.V. Rogers, *A Commentary on the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, 26 MIL. L. & L. WAR REV. 185, 188 (1987).

³⁵ 1980 Final Act, *supra* note 1, app. A, arts. 3, 5, 6, 9-11.

Article 4 (Ratification, acceptance, approval or accession) begins in the standard fashion, but paragraph 3 requires discussion. It provides:

Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance, or approval of this Convention or of accession thereto, that State shall notify the depositary of its consent to be bound by any two or more of these Protocols.³⁶

Apparently, the United States construes this provision as authorizing reservations and understandings. At the time of signing, the United States said:

In addition, the United States of course reserves the right, at the time of ratification, to exercise the option provided by Article 4(3) of the Convention, and to make statements of understanding and/or reservations, to the extent that it may deem necessary to ensure that the Convention and its Protocols conform to humanitarian and military requirements.³⁷

Inasmuch as the Convention contains no prohibition against reservations or understandings, it is somewhat difficult to understand why the United States considered it necessary to announce its construction of Article 4(3) as specifically granting that right.³⁸

Furthermore, paragraph 3 contains a rather unusual provision in that when a State becomes a Party to the Conventional Weapons Convention "that State shall notify the depositary of its consent to be bound by *any two or more of these Protocols*."³⁹ There was thought to be good reason for this provision. As shall be noted, the 1980 Protocol I, concerned with nondetectable fragments, was completely noncontroversial, and it could be expected that many States might ratify the Conventional Weapons Convention and Protocol I only. Article 4 compels States to give more consideration to the other two Protocols, and thus, it prevents States from ratifying only the Conventional Weapons Convention

³⁶ 1980 Final Act, *supra* note 1, app. A, art. 4.

³⁷ MULTILATERAL TREATIES, *supra* note 33, at 832, 835, reprinted in Schindler & Toman, *supra* note 1, at 192, 196.

³⁸ Perhaps the United States was making two separate statements: one setting forth its intent to exercise the option of not ratifying all three protocols, and another reserving the right to make statements of understandings and/or reservations. Indeed, if this were so, the U.S. could have made its intent much clearer—e.g., by the use of a semi-colon instead of a comma after the words "article 4(3) of the Convention".

³⁹ 1980 Final Act, *supra* note 1, app. A art. 4 (emphasis added).

and Protocol I and thereafter claiming the status of Parties to the Convention.⁴⁰

In addition to a provision rejecting the general participation (*si omnes*) doctrine contained in Article 7(1),⁴¹ Article 7 contains a number of other provisions with respect to treaty relations between the Parties. Unfortunately, not content with the provision addressing national liberation movements (termed an "authority") contained in Article 1, the Conference found it necessary to include further lengthy special provisions on this subject in Article 7(4), in an attempt to link the Conventional Weapons Convention with the four 1949 Geneva Conventions and the 1977 Additional Protocol I.⁴² The 1949 Geneva Conventions and the 1977 Additional Protocol I are completely irrelevant to the Conventional Weapons Convention and its Protocols.⁴³ Those instruments do not contain prohibitions or restrictions on the use of specific con-

⁴⁰ The United States had suggested mandatory acceptance of all three Protocols. 1980 Report of the United States Delegation to the Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 13 [hereinafter 1980 Report of the United States Delegation]. The actions of States in ratifying or acceding to the 1980 Conventional Weapons Convention would seem to indicate that the fear which engendered this provision was unwarranted. As of January 1, 1992, thirty-one States had ratified or acceded to the Convention. MULTILATERAL TREATIES, *supra* note 33, at 832-33. Every State had also ratified or acceded to all three Protocols, with the exception of Bonin, which did not approve 1980 Protocol II, and France, which did not ratify 1980 Protocol III. *Id.*

⁴¹ This provision, contained in Article 7, is similar to the provisions of Common Article 2(3) of the 1949 Geneva Conventions. See *supra* note 17. It continues the practice of reversing the procedure contained in the 1907 Hague Conventions which were not effective if *any single* belligerent was not a Party to a particular Convention—a provision erroneously applied by Justice Pal in his dissent in the trial before the International Military Tribunal for the Far East. See HOWARD S. LEVIE, *TERRORISM IN WAR: THE LAW OF WAR CRIMES* 152 (1993).

⁴² The provisions adopted were actually mild compared to those sought by the African group of nations. Interestingly, the United States did not object to these provisions at the Conventional Weapons Conference. Instead, the United States insisted that the Convention only apply to internal conflicts if the "authority" of the liberation movement "had accepted and applied the rules of warfare which already apply to States as a result of various international agreements." 1980 Report of The United States Delegation, *supra* note 40, at 14. This meant that an "authority" could not "take advantage of the Convention unless it had accepted and applied certain rules of warfare concerning, among other things, the treatment of prisoners and the protection of noncombatants." *Id.*

⁴³ It is suggested that it would have been more appropriate merely to make the Conventional Weapons Convention and the Protocols, which were previously approved by the State involved in the conflict, applicable when the "authority" had agreed to accept and apply them.

ventional weapons.⁴⁴ Clearly, these special provisions were another attempt to secure for national liberation movements the benefits of all of the humanitarian law of war upon an undertaking by an "authority" that is rarely able to control the activities of the members of its movement and that uses the civilian population as a military objective rather than as something to be protected. France, like the United States, is not a Party to the 1977 Additional Protocol I and had no difficulty in making a reservation to Article 7(4)(b) of the 1980 Convention.⁴⁵ There is no reason why the United States should not make a similar reservation, if it is so minded.⁴⁶ Moreover, it is of interest that, while Common Article 3(4) of the 1949 Geneva Conventions (with respect to armed conflicts not of an international character) and Article 4 of the 1977 Additional Protocol I both provide that the application of those instruments does not affect the legal status of the Parties, no such provision was included in the Conventional Weapons Convention.⁴⁷

⁴⁴ The Assistant Director of the ICRC's Department of Principles of Law, Yves Sandoz, has stated that the Conventional Weapons Convention and its Protocols "are valuable, or rather indispensable, supplements to the 1977 Protocols." Yves Sandoz, *A New Step Forward in International Law: Prohibitions or Restrictions on the Use of Certain Conventional Weapons*, 21 INT'L REV. RED CROSS 3, 16 (Jan.-Feb. 1981). Absent in the Conventional Weapons Convention is a provision similar to Article 1(3) of the 1977 Additional Protocol I, specifically stating that it supplements the 1949 Geneva Conventions. While the Convention and its Protocols supplement the 1977 Additional Protocol I in the sense that they contain law-of-war provisions not contained in that Protocol, they are completely independent and have no other relationship thereto. States can be Parties to the Conventional Weapons Convention and some or all of its Protocols without being Parties to the 1977 Additional Protocol I. States cannot be Parties to the 1977 Additional Protocol I without being Parties to the 1949 Geneva Conventions. See 1977 Additional Protocol I, *supra* note 13, art. 92.

⁴⁵ Upon signing the Conventional Weapons Convention, France made a reservation stating:

[A]s regards the Geneva Conventions of 12 August 1949, the declaration of acceptance and application provided for in article 7, paragraph 4(b), of the Convention on Prohibitions or Restrictions . . . will have no effects other than those provided for in article 3 common to the Geneva Conventions, in so far as that article is applicable.

MULTILATERAL TREATIES, *supra* note 33, at 833-34, 20 I.L.M. at 1287 (1981), reprinted in Schindler & Toman, *supra* note 1, at 193-94. Once again, no Party is known to have taken exception to France's reservation. Article 3 common to the Geneva Conventions sets forth rules applicable in wars "not of an international character"—i.e. civil wars.

⁴⁶ Indeed, the Senate made such a reservation when it ratified the Convention. S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995).

⁴⁷ Upon signing the Convention, France made an interpretive statement that the application of the Convention would have no effect on the legal status of the parties to

Notably, one subject that is missing from the Conventional Weapons Convention that is probably more important in a humanitarian law-of-war treaty than in most types of treaties (other than a disarmament treaty) is the question of verification. Efforts to include such a provision were strongly and successfully resisted.⁴⁸

II. 1980 PROTOCOL I

The 1980 Protocol on Non-Detectable Fragments ("Protocol I")⁴⁹ is a single sentence which provides that "[i]t is prohibited to use any weapon the primary effects of which is to injure by fragments which in the human body escape detection by X-rays."⁵⁰ This Protocol was directed primarily against weapons made of such materials as glass and plastic. The United States had become a cosponsor of the proposal for this Protocol, which was adopted unanimously.⁵¹ One of the U.S. Delegates attributed the unanimity "in part to the fact that no one seems to have had any serious military interest in such a weapon."⁵² Accordingly, the United States is justified in ratifying this Protocol.

the conflict. MULTILATERAL TREATIES, *supra* note 33, at 833, 20 I.L.M. at 1287 (1981), reprinted in Schindler & Toman, *supra* note 1, at 193.

⁴⁸ France, Italy, the United States, and the People's Republic of China made statements deprecating this omission upon signing the Conventional Weapons Convention. MULTILATERAL TREATIES, *supra* note 33, at 833-35, reprinted in Schindler & Toman, *supra* note 1, at 192-96.

⁴⁹ Protocol I 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, 1980 Final Act, *supra* note 1, app. B, 19 I.L.M. 1523, 1529 (1980), reprinted in Schindler & Toman, *supra* note 1, at 185 [hereinafter "Protocol I"].

⁵⁰ *Id.*

⁵¹ 1979 Report of the United States Delegation to the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects 5 [hereinafter 1979 Report of the United States Delegation]. The 1980 Report of the United States Delegation, *supra* note 40, at 5, states: "The proposal does not, however, preclude non-metallic casing materials or other parts or components which are not designed as the primary wounding mechanism."

⁵² Matheson, *Remarks*, 1979 PROC. A.S.I.L. 156, 157. See also W.J. Fenrick, *The Law of Armed Conflict: The CUSHIE Weapons Treaty*, 11 CAN. DEF. Q. 25 (Summer 1981). The then Major Fenrick states flatly that this Protocol "bans a weapon which does not exist." *Id.* at 27. He also explains that "CUSHIE is an unofficial Canadian acronym derived from the words 'Causing Unnecessary Suffering or Having Indiscriminate Effects.'" *Id.* at 30 n.2.

III. 1980 PROTOCOL II

The 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices ("Protocol II")⁵³ is concerned with the "time-delay" weapons referred to by the 1973 Conference of Government Experts.⁵⁴ Such weapons include: 1) anti-vehicle and antipersonnel land mines, hand-buried or delivered by aircraft, artillery, or naval guns;⁵⁵ 2) booby traps; and 3) other devices. While the 1980 Protocol II was more controversial than Protocol I, it was without question of greater importance.

Article 1 of the 1980 Protocol II, entitled Material Scope of Application, makes clear that its subject matter is limited to the use of the aforementioned weapons on land only ("including mines laid to interdict beaches, waterway crossings or river crossings") and that it "does not apply to the use of anti-ship mines at sea or in inland waterways."⁵⁶ Although there appears to have been little controversy involved in the drafting of this article, its importance cannot be overestimated.⁵⁷

⁵³ Protocol II 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, 1980 Final Act, *supra* note 1, app. C, 19 I.L.M. 1523, 1529 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 177, 185 [hereinafter "Protocol II"].

⁵⁴ See *supra* note 19 and accompanying text. The 1956 Draft Rules are the source of many of the provisions of both Protocol II and Protocol III. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (2d Ed. 1958) *reprinted in* Schindler & Toman, *supra* note 1, at 251.

⁵⁵ It is important to note that while land mines are primarily a defensive mechanism intended to impede enemy movement, the infliction of casualties being an incidental result, such mines are now also used offensively. Burrus M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 22 MIL. L. & L. WAR REV. 117, 120-22 (1983) (citing Lucerne Conference, *supra* note 24, at 229).

⁵⁶ Protocol II, 1980 Final Act, *supra* note 1, app. C, 19 I.L.M. at 1529, *reprinted in* Schindler & Toman, *supra* note 1, at 185. It is unfortunate, that advantage was not taken of the opportunity to draft international legislation restricting the use of sea mines, particularly on the high seas, restrictions which are long overdue. See HOWARD S. LEVIE, *MINE WARFARE AT SEA* 52-53 (1992).

⁵⁷ Despite the fact that Article 49(3) of the 1977 Additional Protocol I, *supra* note 13, specifically states that the provisions of that Section apply "to all attacks from the sea . . . against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea," (emphasis added), one author has found that the provisions of the Section "apply to all acts of naval warfare which may affect the civilian population." RAUCH, *THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS: REPERCUSSIONS ON THE LAW OF NAVAL WARFARE* 57-60 (1984). The quoted provisions should preclude any such contention with respect to the 1980 Protocol II.

Article 2, entitled Definitions, defines "mine," "booby-traps," and "other devices." It provides:

1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle,⁵⁸ and "remotely delivered mine" means any mine . . . delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.⁵⁹
2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.⁶⁰
3. "Other device" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.⁶¹

Inasmuch as this definition of "other devices" contains no examples and, unlike the procedure followed with respect to the other weapons covered by this Protocol, no additional article deals exclusively with "other devices," it is likely that there will be controversy regarding exactly which weapons were the intended target of this provision.

Article 2(4), defining "military objective," appears to have engendered no controversy. It reads:

"Military objective" means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁶²

⁵⁸ 1980 Final Act, *supra* note 1, 19 I.L.M. at 1530, *reprinted in* Schindler & Toman, *supra* note 1, at 180.

⁵⁹ *Id.* One commentator hazards the opinion that in the future most land mines will be laid by aircraft, rockets, or artillery. Carnahan, *supra* note 55, at 123.

⁶⁰ 1980 Final Act, *supra* note 1, 19 I.L.M. at 1530, *reprinted in* Schindler & Toman, *supra* note 1, at 180.

⁶¹ *Id.* This provision appears to consider as being inhumane manually-emplaced "other devices" which include exactly the mechanisms which are required in remotely-delivered mines. *See supra* text accompanying note 59. The logic of the distinction is difficult to understand.

⁶² 1980 Final Act, *supra* note 1, 19 I.L.M. at 1530, *reprinted in* Schindler & Toman, *supra* note 1, at 185. This provision obviously had as its basic source paragraph 2 of the Resolution adopted by the Institute of International Law in 1969, entitled *The Distinction Between Military Objectives and Non-Military Objects In General and Particularly the Problems Associated With Weapons of Mass Destruction*, 66 AM.J. INT'L L. 470, 470-71 (1972), *reprinted in* Schindler & Toman, *supra* note 1, at 265. Its immediate source was Article 52(2) of the 1977 Additional Protocol I, *supra* note 13.

Article 2(5) was essentially unnecessary, as its content follows from Article 2(4). It defines "civilian objects" as "all objects which are not military objectives as defined in paragraph 4."⁶³

Finally, Article 2(6) defines "recording" as "a physical, administrative and technical operation designed to obtain, for the purpose of registration in the official records, all available information facilitating the location of minefields, mines and booby-traps."

Articles 3, 4, and 5 of the 1980 Protocol II set forth general restrictions on the use of all of the weapons covered by the Protocol: mines, booby-traps, and other devices. The main objective of their provisions is to protect both the civilian population and individual civilians from the effects of these weapons.⁶⁴ There appears to be very little in their provisions that could be considered controversial. The provision of Article 4 requiring "the posting of warning signs" and "the issue of warnings" of the location of mine fields, however, is somewhat unrealistic.⁶⁵ To a large degree, the value of mines is that the progress of an attacking force is slowed up by the need to search for, locate, and neutralize minefields and individual mines. This advantage is lost if the minelayer is obliged to make public to all, which necessarily includes the enemy, the location of mines that have been laid.⁶⁶ Moreover, the provisions of Article 5 presume an accuracy for remotely-delivered mines which may be incorrect. While the requirement for a self-actuating or remotely-controlled mechanism which renders a mine harmless (mechanisms which have long been employed on sea mines) would, in general, be a protection for the civilian population, one might wonder whether the safety of civilians is jeopardized when that mechanism is one which causes the mine to destroy itself by exploding without warning.⁶⁷

⁶³ 1977 Additional Protocol I, *supra* note 13, art. 52(1).

⁶⁴ See Rogers, *supra* note 34, at 187. One commentator, a member of the United Kingdom Delegation at the Conventional Weapons Conference states: "The Conference was concerned, therefore, with finding ways of protecting the innocent from the dangers of mines and booby traps while at the same time preserving this important means of self-defence." *Id.*

⁶⁵ 1980 Final Act, *supra* note 1, 19 I.L.M. at 1531 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 186.

⁶⁶ Rogers, *supra* note 34, at 193 (labeling provision as "merely hortatory").

⁶⁷ These various mechanisms are frequently used when the armed force which delivers the mines from a remote source anticipates that its troops will need to traverse the mined area in the near future.

Article 6 of the 1980 Protocol II, establishing prohibitions on the use of booby-traps,⁶⁸ is a very important provision for the protection of civilians, particularly children. It provides:

1. Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use:

(a) any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached,⁶⁹ or

(b) booby-traps which are in any way attached to or associated with: (i) internationally recognized protective emblems, signs or signals; (ii) sick, wounded or dead persons; (iii) burial or cremation sites or graves; (iv) medical facilities, medical equipment, medical supplies or medical transportation; (v) children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing or education of children;⁷⁰ (vi) food or drink; (vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots; (viii) objects clearly of a religious nature; (ix) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (x) animals or their carcasses.

2. It is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering.⁷¹

Introducing Article 6(1) with the phrase "Without prejudice to the rules of international law . . . relating to treachery and perfidy" was an unfortunate decision.⁷² Despicable as many booby-

⁶⁸ 1980 Final Act, *supra* note 1, app. C, art. 6(1)(b)(v), 19 I.L.M. at 1532 (1980), reprinted in Schindler & Toman, *supra* note 1, at 187.

⁶⁹ See Rogers, *supra* note 34, at 199. With respect to this provision: "There is no reason why booby-traps should not be prefabricated so long as they are not in the shape of a harmless, portable object. What the Conference had in mind to prohibit were booby-traps made to look like watches, cameras, pens or other attractive items. It did not prohibit the booby-trapping of existing attractive items." *Id.* In other words, a belligerent may booby-trap a camera, but it may not manufacture booby-traps which appear to be cameras.

⁷⁰ The Working Group proposal referred solely to "children's toys." A/CONF.95/3, Annex II, at 9; 1979 Report of the United States Delegation, *supra* note 51, app. D. The Committee of the Whole added the rest of item 1(b)(v), probably having in mind events in Afghanistan where the booby-trapping of objects intended for children's care caused countless children to be killed or maimed.

⁷¹ 1980 Final Act, *supra* note 1, app. C, art. 6, 19 I.L.M. at 1532 (1980), reprinted in Schindler & Toman, *supra* note 1, at 187.

⁷² *Id.*

traps have been, they have not generally heretofore been considered to be either treacherous or perfidious.⁷³ Obviously, it was not intended that this Protocol would declare *all* booby-traps treacherous and perfidious. Had that been the intention, the lengthy enumeration would have been unnecessary.⁷⁴ Notwithstanding, the quoted phrase will unquestionably be used, on occasion, as the basis for an argument that *any* particular booby-trap is both treacherous and perfidious and, therefore, a violation of the law of war.⁷⁵

Article 7 of the 1980 Protocol II amplifies the definition of "recording" contained in Article 2.⁷⁶ It includes some of the provisions which were exceedingly difficult to draft, primarily because of the technical problems involved.⁷⁷ In addition, there was strong support for a provision requiring the exchange of full information between belligerents concerning the location of minefields immediately upon the cessation of hostilities. Nevertheless, paragraph (3)(a)(i) of Article 7, requiring the belligerents "to take all necessary and appropriate measures" to protect civilians immediately after the cessation of hostilities,⁷⁸ represents a compromise reached because a number of nations were unwilling to require a belligerent, some of whose territory might still be occupied at the time of the cessation of hostilities, to make available to the occupier the location of minefields which might become valuable in the event that there was a resumption of hostilities. However, under

⁷³ During World War II the Germans were particularly adept at preparing booby-traps; but no German was tried on the charge that such an act was treacherous or perfidious and a violation of the law of war.

⁷⁴ An example of a booby-trap that would be legal, even under the 1980 Protocol II, is one made as part of a land mine which would cause the mine to explode if attempts were made to move it or to deactivate it before its own internal mechanism causes it to deactivate or self-destruct. These would not fall within the definition of "other devices." 1980 Final Act, *supra* note 1, app. C, art. 3(1)(C), 19 I.L.M. at 1530 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 185. The Germans used such booby-traps in their sea mines and in various types of aerial bombs dropped on Great Britain during World War II, and no charge was ever made that such action had been treacherous or perfidious.

⁷⁵ Article 37 of the 1977 Additional Protocol I states "[a]cts inviting the confidence of an adversary . . . shall constitute perfidy." 1977 Additional Protocol I, *supra* note 13, art. 37, 16 I.L.M. at 1409 (1977), *reprinted in* Schindler & Toman, *supra* note 1. The rare cases in which a booby-trap might be used in connection with such an invitation are certainly covered in Article 6(1) of Protocol II.

⁷⁶ 1980 Final Act, *supra* note 1, app. C, art. 7, 19 I.L.M. at 1532-33 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 187-88.

⁷⁷ 1980 Report of The United States Delegation, *supra* note 40, at 6-7.

⁷⁸ *Id.*

sub-paragraphs (3)(a)(ii) and (iii) of that article, where there is no occupied territory, or where troops occupying enemy territory have withdrawn therefrom, there is no discretion involved—records of minefields and booby-trapped areas must be made available to the other Party and to the Secretary-General of the United Nations.⁷⁹ It is appropriate to point out here that, based on a proposal made by Morocco, there is a Technical Annex to Protocol II containing guidelines on recording which are to be “taken into account.”⁸⁰ With regard to the Technical Annex the United States has said:

(1) its provisions are not mandatory or uniformly applicable in all circumstances, but only “guidelines” which are to be “taken into account”; (2) the items of information listed in the Annex are of a sufficiently general character so as to be operationally practicable and to provide sufficient flexibility; (3) the Annex relates solely to information needed to establish the location of minefields and does not require disclosure of technical characteristics of the mines used; and (4) the addition of the Annex provides the assurance that the recording obligations of the Protocol would in any event be satisfied if the items of information listed in the Annex are recorded.⁸¹

In view of the many, many casualties caused by mines after the cessation of hostilities, particularly among civilians, there should be no relaxation of the rules governing the maintenance of complete records with respect to mines laid during the course of hostilities and the availability of those records to all concerned at the earliest possible date.⁸²

Article 8 of Protocol II deals with the protection of United Nations forces and missions from the minefields, mines, and areas of

⁷⁹ *Id.* During the 1982 conflict in the Falklands (Malvinas) the Argentines sowed plastic mines indiscriminately and without recording their locations. This resulted in many casualties occurring after the cessation of hostilities. V. ADAMS, *THE FALKLANDS CONFLICT* 50 (1988).

⁸⁰ 1979 Conference Report, *supra* note 22, at 22-23. Morocco was plagued with explosions of World War II mines and booby-traps for many years after the termination of that conflict, as were other North African countries. *Cf.* G.A. Res. 35/71, U.N. GAOR 2d Comm., 35th Sess., 83rd plen. mtg., U.N. Doc. A/35/592/Add.4 (1980), reprinted in 19 Djonovich, *supra* note 26, at 311 (recognizing that most developing countries exposed to wars waged by colonial powers suffer loss of life and property as a result of mines).

⁸¹ 1980 Report of the United States Delegation, *supra* note 40, at 7-8.

⁸² See, e.g., Cauderay, *Anti-Personnel Mines*, 33 INT'L REV. RED CROSS 273 (July-August 1993). See also ARMS PROJECT OF HUMAN RIGHTS WATCH, *LANDMINES: A DEADLY LEGACY*, *passim* (1993).

booby-traps established by the belligerent parties prior to the arrival of a United Nations peacekeeping, observation, or other similar mission.⁸³ Its provisions appear to be completely reasonable and noncontroversial. When United Nations peacekeeping or observation forces are involved, extensive protection from minefields and booby-traps (removal, other measures, and providing the necessary information) is required; when a United Nations mission is involved, the belligerent party must provide it with protection from those weapons.⁸⁴

Finally, Article 9 deals with the very important subject of international cooperation in the removal of minefields, mines, and booby-traps.⁸⁵ At the end of World War II an international organization was established for the removal of sea mines,⁸⁶ but the failure to take any concerted international action with respect to land mines and booby-traps resulted in accidental deaths and injuries to innocent civilians for many years thereafter.⁸⁷

⁸³ 1980 Final Act, *supra* note 1, app. C, art. 8, 19 I.L.M. at 1533 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 188.

⁸⁴ See L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 133 (1993). Following the Gulf War, military personnel, under the auspices of the Security Council resolutions, sustained severe casualties during cleaning operations as Iraq failed to keep proper records of the locations of minefields. *Id.* Negligence in keeping such records also resulted in numerous injuries to civilians after the cessation of hostilities in Cambodia and the Falklands. *Id.*

⁸⁵ 1980 Final Act, *supra* note 1, app. C, art. 9, 19 I.L.M. at 1534 (1980), *reprinted in* Schindler & Toman, *supra* note 1, at 188.

⁸⁶ International Agreement for the Clearance of Mines in European Waters, Nov. 22, 1945, *reprinted in* 3 Bevens, *supra* note 9, at 1322. Following World War II, German prisoners of war were used to remove land mines laid by the Germans in France. This resulted in a number of casualties. Because of that experience, Article 52(1) of the 1949 Third Geneva Convention provides that prisoners of war may not be compelled to undertake dangerous labor and specifically states that the removal of mines falls within this category. See Third Geneva Convention, *supra* note 17, at art. 52(1)(3). During the Falklands (Malvinas) War it was alleged that the British were violating this provision. Howard S. Levie, *The Falklands Crisis and the Laws of War*, in *THE FALKLANDS WAR: LESSONS FOR STRATEGY, DIPLOMACY AND INTERNATIONAL LAW* 64, 73 (Alberto R. Coll & Anthony C. Arend, eds., 1985). Investigation revealed that Argentine prisoners of war had volunteered to mark a stock of Argentine mines which had been stored at a location close to their prisoner-of-war camp.

⁸⁷ Carnahan, *supra* note 55, at 126, cites three post-World War II treaties containing provisions with respect to the removal of land mines: Agreement Between the Commander-in-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, Panmunjom, Korea, July 27, 1953, art. II(13)(a), 4 U.S.T. 235, T.I.A.S. No. 2782, *reprinted in* 4 MAJOR PEACE TREATIES OF MODERN HISTORY 2657 (Fred L. Israel, ed., 1967-1980) [hereinafter Israel] (calling for removal of all minefields by commander of side whose forces emplaced them); Agreement on Ending the War and Restoring

To summarize, while the 1980 Protocol II is not a perfectly drafted international agreement, there is nothing objectionable in its contents that, if deemed necessary, cannot be taken care of with simple statements of understanding.⁸⁸ There does not appear to be any reason why the United States should not accept it.⁸⁹

IV. 1980 PROTOCOL III

The 1980 Protocol on Prohibitions and Restrictions on the Use of Incendiary Weapons ("Protocol III")⁹⁰ is unquestionably the most controversial of the three Protocols. The early opposition of the United States to prohibitions or restrictions on the battlefield use of incendiary weapons was used by the Soviet delegation "to foster the impression in most quarters that this was the basic obstacle to a successful conclusion of the Conference."⁹¹ Undoubtedly, it is the implications of this Protocol, rather than its content, that make the United States reluctant to ratify the Conventional Weapons Convention.⁹² Despite the fact that Protocol III contains

Peace in Viet-Nam: Protocol Concerning the Cease-fire in South Viet-Nam and the Joint Military Commission, Paris, Jan. 27, 1973, art. 5, 24 U.S.T. 38, pt.1., 39; T.I.A.S. No. 7542, reprinted in 5 Israel 92, 93 (requiring each party to do its utmost to complete removal or deactivation of all mine-fields and traps within fifteen days after cease fire); Appendix to Annex I of the Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Washington, March 26, 1979, art. VI(4), 18 I.L.M. 362, 382-83, reprinted in 5 Israel 331, 349 (agreeing that Israel will make efforts to destroy or remove minefields in areas from which it withdraws).

⁸⁸ See S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995) (ratifying Protocol II with understanding concerning Article 6(1)). *But see* Rauch, *supra* note 34, at 286-287 (stating that provisions of 1977 Additional Protocol I and of 1980 Protocol II relating to mines are incompatible). It is submitted that Rauch's conclusion is based on an overly critical analysis. Nevertheless, this would not present a problem to a country such as the United States which has not ratified, and apparently does not intend to ratify, the 1977 Additional Protocol I.

⁸⁹ See 1980 Report of the United States Delegation, *supra* note 40, at 8 ("The U.S. Delegation supported the adoption of this Protocol in the belief that it would substantially reduce collateral injury and damage to civilian populations, and would require other armed forces to observe the kind of prudent and orderly practices in the employment of mines which U.S. forces already observe.").

⁹⁰ Protocol III 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, Geneva, Oct. 10, 1980, 1980 Final Act, *supra* note 1, app. D, 19 I.L.M. 1534, reprinted in Schindler & Toman, *supra* note 1, at 190 [hereinafter "Protocol III"].

⁹¹ 1980 Report of the United States Delegation, *supra* note 40, at 9.

⁹² Of course, the United States could do as France has already done: ratify the Convention, but accept only Protocols I and II. However, this is certainly not a procedure to be recommended.

no prohibition or restriction on the use of napalm (other than the general prohibitions and restrictions on the use of incendiary weapons) or on the use of any incendiary weapons against combatants,⁹³ and despite the fact that the negotiating history is to the contrary, it may be considered inevitable that, when the occasion arises, the claim will be advanced that both of these are banned by Protocol III.

Article 1 of Protocol III sets forth a series of definitions. It is particularly notable that while the definition of incendiary weapons includes the enumeration "flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances," it also enumerates what are *not* such weapons: "illuminants, tracers, smoke or signalling systems . . . munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect . . . and similar combined effects munitions."⁹⁴

Protocol III has only one other article. Drafting it was probably one of the most difficult tasks that the Conference and its organs encountered.⁹⁵ One major issue had been resolved by excluding combined-effects munitions ("CEMs") from the ambit of the term "incendiary weapons."⁹⁶ Although the word "napalm" was heard again and again during the discussions conducted with respect to this Protocol and was included in a number of proposals,⁹⁷ nowhere in Protocol III will one find that word used. This issue was resolved by eliminating all mention of napalm, thus permitting its use against combatants but not against civilians or civilian objects, which are protected against all incendiary attacks.⁹⁸

⁹³ See Sandoz, *supra* note 44, at 13 (supporting notion that emphasis was placed on danger that incendiary weapons present to civilians).

⁹⁴ 1980 Final Act, *supra* note 1, app. D, art. 1., 19 I.L.M. at 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190.

⁹⁵ It is interesting to note that the Draft Protocol prepared by the 1979 Conference Working Group on Incendiary Weapons included an alternative proposal which read simply: "It is prohibited to use incendiary weapons." 1979 Conference Report, *supra* note 22, at 29.

⁹⁶ See 1980 Final Act, *supra* note 1, app. D, 19 I.L.M. at 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190.

⁹⁷ See, e.g., Working Group's Draft Protocol, 1979 Conference Report, *supra* note 22, at 28; see also the proposal by Australia and the Netherlands, *supra* note 22, at 33.

⁹⁸ 1980 Final Act, *supra* note 1, app. D, art. 2, 19 I.L.M. at 1534, *reprinted in* Schindler & Toman, *supra* note 1, at 190. It has also been strongly urged that the use of incendiaries against combatants be prohibited. See, e.g., the proposals by the Soviet Union, Indonesia, Nigeria, and Jordan, 1979 Conference Report, *supra* note 22, at 31.

Article 2 is of such importance that it warrants complete quotation:

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.⁹⁹
2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.¹⁰⁰

The prohibition contained in the second paragraph perhaps encompasses too much. It encourages the establishment of military objectives which are valid military targets within cities, towns, and villages, (all concentrations of civilians) thus immunizing the military objective from attack by air-delivered incendiary weapons, perhaps the only appropriate means of attack.¹⁰¹ The drafters would have been better advised to use the provisions of Article 57(2)(a) of the 1977 Additional Protocol I as the basis for the provisions of this paragraph.¹⁰² However, this is a problem

⁹⁹ This will mean that there will be no more fire-bombing of cities such as Tokyo, Dresden, etc., in some of which more civilian lives were lost than at Hiroshima or Nagasaki.

¹⁰⁰ Beginning with the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Techniques, Geneva, May 18, 1977, 31 U.S.T. 333, 167 I.L.M. 88, reprinted in Schindler & Toman, *supra* note 1, at 163; continuing with the 1977 Additional Protocol I, *supra* note 13, at arts. 35(3) and 55; and now with the Protocol III, *supra* note 90, the draftsmen of law-of-war conventions have taken a few small steps towards the protection of the natural environment from the havoc of war.

¹⁰¹ During the Vietnamese conflict, when the North Vietnamese became aware of the fact that a large area around Hanoi was "off-limits" for attacks by American aircraft, that area became the major collection area for military supplies.

¹⁰² That provision of the 1977 Additional Protocol I sets forth the precautions which must be taken when a military objective is to be attacked and includes the

which could be readily corrected by a reservation, or even by an understanding.

The insertion of the phrase "other than air-delivered incendiary weapons" in paragraph 3 of this article was unnecessary and renders the provision ambiguous. It was probably meant to indicate that this paragraph was intended to cover all the possibilities not covered by paragraph 2 of the same article. However, this phrase could validly be construed to mean that under the stated circumstances (a military objective within a concentration of civilians) attacks by all types of incendiary weapons, except by ("other than" by) air-delivered incendiary weapons are prohibited—even though (or perhaps because) that procedure had been specifically prohibited by the previous paragraph. Was it intended thereby to exempt from the prohibition contained in the previous paragraph air-delivered incendiaries under the circumstances set forth in the "except" clause? Or was it intended thereby to exclude air-delivered incendiaries from the "except" clause itself? These are but a few of the interpretations to which that phrase lends itself. Any acceptance of Protocol III should include an understanding that clearly sets forth what the use of that phrase is believed to have been intended to accomplish.

To summarize, as far as it goes, the 1980 Protocol III is an extremely humanitarian agreement which contains nothing irreparable of either a political or a military nature that warrants the refusal of the United States and other major military powers to accept it.

EPILOGUE

When the United States signed the 1980 Conventional Weapons Convention in 1982 it stated:

The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession. We believe that the Convention represents a positive step forward in efforts to minimize injury or damage to the civilian population in time of armed conflict. Our signature of this Convention reflects the general willingness of the United States to adopt practical and reason-

taking of all feasible precautions to minimize civilian casualties. See 1977 Additional Protocol, *supra* note 13, at art. 57(2).

able provisions concerning the conduct of military operations, for the purpose of protecting noncombatants.¹⁰³

More than a decade later, on March 21, 1994, the Secretary of State transmitted that Convention and Protocols I and II to the President with a recommendation for ratification by the United States with the four following conditions:

1. The United States considers that the fourth paragraph of the Preamble to the present Convention, which reproduces the subject of provisions of Article 35, Paragraph 3 and Article 55, Paragraph 1 of Additional Protocol I [to the 1949 Geneva Conventions], applies only to [s]tates which have accepted those provisions;
2. The United States declares, with reference to the scope of application defined in Article 1 of the present Convention, that it will apply the provisions of the present Convention to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions of 12 August 1949;
3. The United States declares that Article 7, Paragraph 4(b) of the present Convention will have no effect; and
4. The United States understands that Article 6, Paragraph 1(a) of Protocol II to the present Convention does not prohibit the adaptation of other objects for use as booby-traps.¹⁰⁴

The President transmitted the 1980 Conventional Weapons Convention and its Protocols I and II to the Senate on May 12, 1994, recommending that the Senate give its advice and consent to their ratification subject to the above stated conditions.¹⁰⁵ He deferred action on Protocol III pending further examination concerning its acceptability from a military point of view.¹⁰⁶ On March 24, 1995, the Senate gave its advice and consent to the ratification of the Convention, Protocol I, and Protocol II.¹⁰⁷

¹⁰³ MULTILATERAL TREATIES, *supra* note 33, at 833, 835, reprinted in Schindler & Toman, *supra* note 1, at 196.

¹⁰⁴ S. TREATY DOC. NO. 25, 103d Cong., 2d Sess. (1994) reprinted in 88 AM. J. INT'L L. 748, 751 (1994).

¹⁰⁵ 88 AM. J. INT'L L. 749 (1994).

¹⁰⁶ *Id.* at 748. "Further examination" when 14 years have elapsed since that Protocol was drafted!

¹⁰⁷ S. Res. 4568, 104th Cong., 1st Sess., 141 CONG. REC. 4568 (1995).