

# *Fordham International Law Journal*

---

*Volume 18, Issue 4*

1994

*Article 14*

---

## The Landmine Review Conference: Will the Revised Landmine Protocol Protect Civilians?

Paul J. Lightfoot\*

\*

Copyright ©1994 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# The Landmine Review Conference: Will the Revised Landmine Protocol Protect Civilians?

Paul J. Lightfoot

## **Abstract**

This Comment analyzes the impact of landmine use on civilians, the effect of international law on landmine warfare, and the proposed changes to international law in response to the harm inflicted upon civilians. The Comment concludes that the United Nations Review Conference will not adopt a total ban on the production, use, transfer, and stockpiling of landmines, and therefore will fail in its efforts to protect civilians.

# THE LANDMINE REVIEW CONFERENCE: WILL THE REVISED LANDMINE PROTOCOL PROTECT CIVILIANS?

*Paul J. Lightfoot\**

## INTRODUCTION

Protocol II<sup>1</sup> ("Landmine Protocol") of the 1980 Convention on Conventional Weapons<sup>2</sup> ("CCW") was designed to protect civilians from the devastating effects of landmines.<sup>3</sup> Fifteen years later, the daily lives of civilians in more than sixty countries throughout Africa, Asia, Europe, and Latin America continue to be threatened and impeded by the existence of over 100 million emplaced landmines.<sup>4</sup> The Landmine Protocol has failed to protect civilians, and as a result, the civilian injury and death tolls have mounted.<sup>5</sup>

---

\* J.D. Candidate, 1996, Fordham University. The Author gratefully acknowledges the assistance provided by Kenneth Anderson, General Counsel, The Soros Foundations.

1. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 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, Apr. 10, 1981, 1342 U.N.T.S. 137, 168, 19 I.L.M. 1523, 1529 [hereinafter CCW].

2. *Id.* There are three Protocols attached to the CCW. *Id.* Protocol I prohibits the use of weapons that cause injury by fragments that cannot be detected in the human body by X-rays. Protocol on Non-Detectable Fragments (Protocol I), CCW, *supra* note 1, 1342 U.N.T.S. at 168, 19 I.L.M. at 1529. Protocol III is concerned with the use of incendiary weapons. Protocol on Prohibitions or Restrictions on the use of Incendiary Weapons (Protocol III), CCW, *supra* note 1, 1342 U.N.T.S. 171, 19 I.L.M. at 1534.

3. CCW, *supra* note 1, Protocol II, art. 3(2)-(3), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530. The Landmine Protocol forbids the use of landmines that are directed at civilians, either directly, or in a way that does not or cannot be directed at a military objective. *Id.* Landmines kill and maim about 26,000 people a year, mostly civilians. U.S. DEP'T STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, HIDDEN KILLERS: THE GLOBAL LANDMINE CRISIS 1 (1994) [hereinafter HIDDEN KILLERS]. The presence of large quantities of landmines affects entire ways of life, especially the economies and infrastructure, of persons living in mined territories. Paul Jefferson, *Technical Aspects of Anti-Personnel Mines*, in SYMPOSIUM ON ANTI-PERSONNEL MINES 103, 105 (International Committee of the Red Cross ed., 1993) [hereinafter MONTREUX SYMPOSIUM] (ICRC symposium of landmine experts regarding anti-personnel mines).

4. HIDDEN KILLERS, *supra* note 3, at 56.

5. *State Department Special Briefing*, Federal News Service, Jan. 27, 1995, available in LEXIS, News Library, CURNWS File (recounting briefing by Assistant Secretary of State Thomas McNamara stating that landmine problem is getting worse); see Jack H. McCall, Jr., *Infernal Machines and Hidden Death: International Law and Limits on the Indiscriminate*

A movement toward a ban on the use, production, stockpiling, and transfer of mines ("total ban") has been gaining momentum for several years.<sup>6</sup> The proponents of a total ban believe that partial bans and restrictions on the use of landmines cannot effectively control what has been called a "global landmine crisis."<sup>7</sup> Many countries, however, whose military leaders believe that landmines are essential for their combat needs, oppose the movement toward a total ban.<sup>8</sup>

From September 25 to October 13, 1995, the United Nations will host a conference in Vienna to review the CCW ("Review Conference").<sup>9</sup> The countries participating in the Review Conference will examine the CCW, including the Landmine Protocol, and decide how this document should be altered, if at all, to respond to the crisis.<sup>10</sup> In preparation for the Review Con-

---

*Use of Land Mine Warfare*, 24 GA. J. INT'L & COMP. L. 229 (1994) (describing magnitude of problem and failure of Landmine Protocol).

6. Richard Falk, *Walking the Tightrope of International Humanitarian Law: Meeting the Challenge of Land Mines*, in CLEARING THE FIELDS 69 (Kevin M. Cahill ed., 1995); *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(10), at 5 (making total ban ultimate goal of amended Landmine Protocol).

7. *Testimony May 13, 1994, Kenneth Anderson Director Arms Project of Human Rights Watch, Senate Appropriations/Foreign Operations FY95 Foreign Operations Appropriations - Global Landmine Crisis*, 103d Cong., 2d Sess. (May 13, 1994), available in LEXIS, News Library, CURNWS File [hereinafter *Anderson Testimony*] (explaining that total ban is necessary for monitoring and enforcing landmine restrictions).

8. *Report of the International Committee of the Red Cross for the Review Conference of the 1980 United Nations 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*, 299 INT'L REV. RED CROSS 123, 178 (Mar.-Apr. 1994) [hereinafter *ICRC Report*]. A symposium of military experts concluded that no alternative meets the military requirements of landmines. *Id.*

9. *Progress Report of the Group of Governmental Experts to Prepare the Review Conference of the States Parties 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*, 3d Sess., ¶ 14, at 7, U.N. Doc. CCW/Conf.I/GE/21 (1994) [hereinafter *Report of the Third Experts Meeting*].

10. HIDDEN KILLERS, *supra* note 3, at 2; CCW, *supra* note 1, art. 8(3)(a), 1342 U.N.T.S. at 167, 19 I.L.M. at 1528. Article 8 of the CCW authorizes a Review Conference after ten years of the Convention being in force. *Id.* All states parties are invited to the Review Conference. *Group of Governmental Experts to Prepare the Review Conference of the States Parties 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*, Fourth Sess., annex III, rule 1, at 1, U.N. Doc. CCW/Conf.I/GE/23 (1995) [hereinafter *Report of the Final Experts Meeting*]. States which are not parties are invited as observers. *Id.* As of the January 1995 meeting, the states parties were: Australia, Austria, Bulgaria, Canada, China, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, India, Japan, Latvia, Mexico, the Nether-

ference, Governmental Experts Meetings, held by the United Nations, have produced reports containing proposals that will control the subject matter to be considered by the delegates participating in the Review Conference.<sup>11</sup>

This Comment analyzes the impact of landmine use on civilians, the effect of international law on landmine warfare, and the proposed changes to international law in response to the harm inflicted upon civilians. Part I describes the impact of landmine warfare on civilians, and examines the regulation of landmines by international law. Part II describes the response of the international community by presenting the resulting proposals of the Governmental Experts Meetings. Part III argues that the proposals of the Governmental Experts Meetings fail to adequately address the global landmine crisis, and that while partial bans may save lives and help maintain the momentum toward tighter controls, these proposals can be dangerous and counter-productive if seen as solutions rather than steps toward a total ban. This Comment concludes that the Review Conference will not adopt a total ban on the production, use, transfer, and stockpiling of landmines, and therefore will fail in its efforts to protect civilians.

### I. *THE GLOBAL LANDMINE CRISIS*

Landmines affect the daily lives of civilians around the globe.<sup>12</sup> Historically, conventional armies used landmines defensively, which minimized the damage done to civilians.<sup>13</sup> In the last twenty-five years, however, the nature of landmine warfare has changed.<sup>14</sup> Today, guerilla forces,<sup>15</sup> less concerned

---

lands, New Zealand, Norway, Pakistan, Poland, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, and Ukraine. *Id.* ¶ 2, at 1. The states non-parties who participated in the January meeting as observers were: Afghanistan, Algeria, Angola, Argentina, Belgium, Brazil, Cambodia, Chile, Colombia, Ethiopia, Iran, Ireland, Israel, Italy, Kenya, Kuwait, Nicaragua, Peru, Portugal, the Republic of Korea, Romania, South Africa, Syria, Turkey, Great Britain, and the United States. *Id.*

11. *Report of the Final Experts Meeting*, *supra* note 10, annex III, rule 29, at 6. Rule 29 of the Draft Rules of Procedure to be followed by the Review Conference establishes that the draft proposals submitted to the Conference by the Group of Governmental Experts will be the proposals to be considered by the Conference. *Id.*

12. *HIDDEN KILLERS*, *supra* note 3, at 1.

13. Cyrus Vance & Herbert S. Okun, *Eliminating the Threat of Land Mines: A New U.S. Policy*, in *CLEARING THE FIELDS* 198, 199 (Kevin M. Cahill ed., 1995).

14. *Id.*

15. Rae McGrath, *The Reality of the Present Use of Mines by Military Force*, in *MON-*

about the consequences to civilians, use landmines more extensively and less responsibly, increasing the damage to civilians.<sup>16</sup> The Landmine Protocol was designed to protect civilians from landmine warfare.<sup>17</sup>

### A. *The Magnitude of the Landmine Crisis*

The U.S. Department of State estimates that 500 people are maimed or killed by landmines every week.<sup>18</sup> Eighty percent of landmine victims are civilians,<sup>19</sup> and many are children.<sup>20</sup> Cambodia is an example of a country particularly devastated by landmines, where one out of every 236 persons is missing an arm or a leg.<sup>21</sup> In Africa, where nearly half of the countries have landmine problems, over 12,000 people die each year.<sup>22</sup>

In addition to the humanitarian costs, the economic costs of landmines are also enormous.<sup>23</sup> The total cost of clearing all of the mines laid throughout the world is estimated to be US\$33 billion.<sup>24</sup> After the Gulf War fighting ceased in Kuwait, the Kuwaiti government spent \$US700 million to clear mines, and more than eighty deminers died in the effort.<sup>25</sup> Most countries infested with landmines lack the resources to embark on such a costly demining effort.<sup>26</sup> While mines may cost as little as US\$3

---

TREUX SYMPOSIUM, *supra* note 3, at 7, 9. Insurgents, guerrillas, or terrorists are all terms that have been used to describe forces that use landmines in ways considered less acceptable, or more illegal, than the conventional armies involved in conflicts. *Id.* Some conventional armies have, as in the Soviet invasion of Afghanistan, used mines in the same manner as the insurgents. *Id.* Military experts, gathered at a symposium to study the military use of landmines, "felt that there was a need to distinguish between conventional warfare, which is generally carried out in international armed conflicts where classical contemporary military doctrine prevails and where trained and disciplined soldiers are engaged, and civil war and counter-insurgency operations, where these conditions are seldom met." *ICRC Report, supra* note 8, at 171.

16. *ICRC Report, supra* note 8, at 173.

17. See *supra* note 3 and accompanying text (describing purpose of Landmine Protocol).

18. HIDDEN KILLERS, *supra* note 3, at 2.

19. Vance & Okun, *supra* note 13, at 199.

20. *ICRC Report, supra* note 8, at 159.

21. Jody Williams, *Social Consequences of Widespread Use of Landmines*, in MONTREUX SYMPOSIUM, *supra* note 3, at 69, 75.

22. HIDDEN KILLERS, *supra* note 3, at 1.

23. *Id.* at 13-14.

24. Patrick Worsnip, *U.S. Sees No Hope of Banning Mines Soon*, Reuters, Jan. 27, 1995, available in LEXIS, News Library, CURNWS File.

25. HIDDEN KILLERS, *supra* note 3, at 21.

26. *Id.* at 1.

each, they can cost up to US\$1000 each to clear.<sup>27</sup>

The characteristics of landmines present unique humanitarian concerns.<sup>28</sup> Because landmines do not explode until their victims approach,<sup>29</sup> a mine cannot be aimed at a specific target, and the dangers posed by landmines do not diminish rapidly.<sup>30</sup> Mines remaining from World War II kill or injure about twelve people a year in the Netherlands.<sup>31</sup> According to the International Committee for the Red Cross ("ICRC"), it would take 4000 years to clear the mines already laid in Cambodia.<sup>32</sup> The majority of the mines throughout the world were emplaced during the last fifteen years,<sup>33</sup> and presently, mines are being laid much faster than they are being cleared.<sup>34</sup> In the former Yugoslavia alone, an estimated three million mines were laid between 1991 and 1994.<sup>35</sup>

### B. *How Landmines Are Used*

Because of their time-delayed characteristics, landmines are weapons with indiscriminate effects.<sup>36</sup> When landmines were

27. *Id.*

28. Lieutenant Colonel Burris M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73, 82 (1984).

29. *Id.* at 75.

30. Brigadier A.P.V. Rogers, *The Mines Protocol: Negotiating History*, in MONTREUX SYMPOSIUM, *supra* note 3, at 227; *Anderson Testimony*, *supra* note 7.

31. David A. Bloom, *Land Mines Keep Wars From Ever Coming to an End*, CHRISTIAN SCI. MONITOR, Feb. 16, 1995, at 19; Vance & Okun, *supra* note 13, at 202.

32. John Young, *Red Cross Urges Ban to Stop Landmine Carnage*, Times, Dec. 29, 1994, available in LEXIS, News Library, CURNWS File.

33. HIDDEN KILLERS, *supra* note 3, at v.

34. STATEMENT BY THE DIRECTOR OF INTERNATIONAL PROTECTION, UNHCR, TO THE REVIEW CONFERENCE OF THE STATE PARTIES 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, May 20, 1994) (available from United Nations High Commissioner for Refugees). Each year 80,000 mines are removed by coordinated efforts, while two million are laid by warring factions. *Id.* at 4.

35. *Testimony May 13, 1994*, Patrick Leahy Senator, Senate Appropriations/Foreign Operations FY 95 Foreign Operations Appropriations - Global Landmine Crisis, 103d Cong., 2d Sess. (May 13, 1994), available in LEXIS, News Library, CURNWS File.

36. *Anderson Testimony*, *supra* note 7. The Landmine Protocol definition of "indiscriminate use" is the use of a landmine:

- (a) which is not on, or directed against, a military objective; or
- (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
- (c) which may be expected to cause incidental loss of civilian life, injury to

primarily used by conventional armies, the impact of landmine warfare on civilians was less severe.<sup>37</sup> Armed forces during conventional wars such as World War II and the Korean War used landmines in a limited and specific manner.<sup>38</sup> But the nature of warfare has changed during the past quarter of a century.<sup>39</sup> Today, landmine use is pervasive, and the parties using them are less "responsible" than ever before.<sup>40</sup>

### 1. The Nature of Modern Landmine Warfare

Military leaders regard landmines as an integral part of a battlefield plan.<sup>41</sup> A symposium of military leaders concluded that other methods of warfare are unable to accomplish the same objectives in as cost-effective and efficient a manner.<sup>42</sup> The main purposes of landmines for conventional armies are to deny access to areas, to channel enemy forces so that they are more

---

civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

CCW, *supra* note 1, Protocol II, art. 3, 1342 U.N.T.S. at 169, 19 I.L.M. at 1530-31.

37. THE ARMS PROJECT & PHYSICIANS FOR HUMAN RIGHTS, *LANDMINES: A DEADLY LEGACY* 270 (1993). The threshold of the traditional balancing test of humanitarian and military concerns is much more easily passed in favor of the military when the mines were being used primarily by conventional armies for defensive purposes. *Id.* For a book review of *Landmines: A Deadly Legacy*, see Morris Panner, *Book Review: Landmines: A Deadly Legacy*, 17 *FORDHAM INT'L L.J.* 1202 (1994).

38. *Prepared Statement of Cyrus R. Vance and Herbert A. Okun Before the Foreign Operations Subcommittee of the Senate Appropriations Committee*, 103d Cong., 2d Sess. (May 13, 1994), available in LEXIS, News Library, CURNWS File [hereinafter *Vance & Okun Testimony*].

39. Vance & Okun, *supra* note 13, at 199.

40. *Fact Sheet: U.S. Initiatives for Demining and Landmine Control*, 5 DEP'T ST. DISPATCH 362 (May 30, 1994).

41. *Id.*

42. *ICRC Report*, *supra* note 8, at 171. There is some evidence that landmines do not serve the important military purpose that military leaders believe. Steven Askin & Stephen Goose, *The Market for Anti-Personnel Landmines - A Global Survey*, 6 *JANE'S INTELLIGENCE REVIEW* 425 (1994). At an industry symposium last year, retired U.S. Marine Corps Commandant General Gray said that he was "not aware of any operational advantage from the broad deployment of mines," and that he "knows of no situation in the Korean War, nor in the five years [he] served in Southeast Asia, nor in Panama, nor Desert Shield/Desert Storm, where [U.S.] use of mine warfare truly channeled the enemy into a destructive pattern." *Id.* The Arms Project & Physicians for Human Rights cite a quote in a biography of former U.S. Secretary of State Robert McNamara that a pentagon study discloses the fact that "although the army kept asking for more mines, one fifth to one third of all U.S. deaths were caused by these devices, while they killed relatively few enemy in exchange." *LANDMINES: A DEADLY LEGACY*, *supra* note 37, at 338 (citation omitted).



vulnerable to attack, and to restrict the mobility of the enemy while under attack.<sup>43</sup>

Because of their low cost, ease of use, and terrorizing effects,<sup>44</sup> landmines have become the weapon of choice among military forces with few resources.<sup>45</sup> These forces use mines offensively, often targeting civilian objectives,<sup>46</sup> in violation of international law.<sup>47</sup> Insurgent forces in internal guerilla armed conflicts recognize the value of landmines not only for their military utility, but also because they weaken the opposition's economic, social, and political infrastructures.<sup>48</sup> These forces, akin to terrorists, have directed landmines in random and wide-scale practice at civilian objectives as anti-morale or terror weapons.<sup>49</sup> Guerrilla and other irregular forces lay the majority of mines, and tend to rely on the least expensive types,<sup>50</sup> which are often the most injurious to civilians.<sup>51</sup>

43. *ICRC Report*, *supra* note 8, at 171.

44. *HIDDEN KILLERS*, *supra* note 3, at 7.

45. Vance & Okun, *supra* note 13, at 199. The U.S. Department of State notes that landmines are the weapon of choice for many government and insurgent forces. *Fact Sheet: U.S. Initiatives for Demining and Landmine Control*, *supra* note 40, at 362. The forces using landmines in less developed countries often are not the militaries of the state. McGrath, *supra* note 15, at 9.

46. *Fact Sheet: U.S. Initiatives for Demining and Landmine Control*, *supra* note 40, at 362. The Landmine Protocol defines a "civilian objective" as any object that is not a military objective. CCW, *supra* note 1, Protocol II, art. 2(5), 1342 U.N.T.S. at 168, 19 I.L.M. at 1530. A "military objective" is defined as an object that "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." *Id.* art. 2(4), 1324 U.N.T.S. at 168, 19 I.L.M. at 1530.

47. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 51(4)(a), 1125 U.N.T.S. 3, 26, 16 I.L.M. 1391, 1413 [hereinafter Additional Protocol I] (prohibiting attacks not directed at military objectives); CCW, *supra* note 1, Protocol II, art. 3(2), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530 (prohibiting direction of landmines against civilians).

48. *ICRC Report*, *supra* note 8, at 173.

49. See McGrath, *supra* note 15, at 9-10 (describing insurgent, or guerrilla parties to armed conflicts); see *supra* note 15 and accompanying text (discussing use of landmines by insurgents, guerrillas, and terrorists).

50. *Prepared Statement of Cyrus R. Vance and Herbert A. Okun Before the Foreign Operations Subcommittee of the Senate Appropriations Committee*, *supra* note 38.

51. *State Department Special Briefing*, *supra* note 5. These forces primarily use mines that are not equipped with self-destructing or self-neutralizing mechanisms, and tend to use minimal metal mines, which are difficult for deminers to detect. *Id.*

## 2. The Effects of Modern Technology on Landmine Warfare

Mines can now be remotely delivered<sup>52</sup> ("scatterables"), either by artillery, helicopter, or fixed-wing aircraft.<sup>53</sup> This enables forces to place mines deep into enemy territory and behind enemy lines, changing the role of mines from battlefield weapons to theater-wide weapons of mass destruction.<sup>54</sup> Accurately recording the location of scatterables is impossible because they are deployed rapidly and remotely.<sup>55</sup> The capability to lay vast quantities of mines, the greater geographic range at which remotely delivered mines can be directed,<sup>56</sup> and the difficulty in recording their location make scatterables more offensive to humanitarian concerns than hand-emplaced landmines.<sup>57</sup> The delegates who drafted the CCW considered banning the use of scatterables altogether.<sup>58</sup>

Technological advances have increased the longevity of landmines and decreased the ability of deminers to detect them as well. In the late 1970's, mine manufacturers began using more plastic and less metal in the manufacturing of mines,<sup>59</sup> which provided mines with better protection from the natural elements and made mines less likely to become inoperative over time.<sup>60</sup> Metal-detectors are nearly useless in the effort to clear landmines with minimal metal contents, which increases the costs, both monetarily and in terms of human lives, of dealing with landmines.<sup>61</sup> A low metallic content adds little, if any, mili-

---

52. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 2(2), at 2. A remotely delivered mine is not emplaced by hand, but delivered from a remote launching system or aircraft. *Id.*

53. Lt. Col. N. Hamish Rollo, *The Military Use of Anti-Personnel Mines*, in MONTREUX SYMPOSIUM, *supra* note 3, at 211, 216.

54. *See Anderson Testimony*, *supra* note 7 (discussing larger range at which remotely delivered mines can be emplaced). Military forces with sophisticated remote delivering systems can lay mines well beyond areas they could safely reach with troops. *Id.* Tactical and geographic obstacles can no longer stop the laying of mines beyond enemy lines and deep into enemy territory. *Id.*

55. HIDDEN KILLERS, *supra* note 3, at 54; Terry Gander, *Anti-Personnel Mine Warfare - An Outline*, in MONTREUX SYMPOSIUM, *supra* note 3, at 204.

56. *Anderson Testimony*, *supra* note 7.

57. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 27, 343.

58. *Id.* at 27, 300 (discussing possibility of ban on remotely delivered mines); Carnahan, *supra* note 28, at 79-80 (mentioning that several delegates wanted to ban use of remotely delivered mines altogether).

59. *State Department Special Briefing*, *supra* note 5.

60. *See id.* (describing effects of manufacturing mines with high plastic content).

61. U.S. DEFENSE INTELLIGENCE AGENCY AND U.S. ARMY FOREIGN SCIENCE AND TECH.

tary advantage.<sup>62</sup> Military experts at an ICRC symposium agreed that imposing a requirement of detectability<sup>63</sup> would have few negative consequences, as far as military utility is concerned.<sup>64</sup>

Another modern landmine option is to have mines fitted with devices that either render them inert ("self-neutralizing") or cause them to detonate ("self-destructing") after a fixed period of time.<sup>65</sup> Deminers would prefer self-destructing to self-neutralizing mines.<sup>66</sup> Self-neutralizing mines still deny access to the land,<sup>67</sup> can be dug-up and reused, and may become more dangerous as they decompose.<sup>68</sup> Self-neutralizing and self-destructing devices have failure rates that some feel are unacceptable.<sup>69</sup> Many also feel that any restrictions concerning self-neutralizing or self-destructing mines would not be productive without specifications on the delay time between the deployment and the activation of mines equipped with these devices.<sup>70</sup>

### C. *Legal History of the Restrictions on Landmine Warfare*

The use of landmines is regulated by principles of custom-

NOLOGY CENTER, LANDMINES WARFARE - TRENDS & PROJECTIONS 4-1 (1992); *NATO Lacks Technology To Detect Plastic Landmine*, Agence France Presse, Nov. 9, 1994, available in LEXIS, News Library, CURNWS File. Mechanical mine clearing systems are not yet capable of achieving a clearance rate acceptable to humanitarian needs. Patrick M. Blagden, *Summary of United Nations Demining*, in MONTREUX SYMPOSIUM, *supra* note 3, at 117. Most mine clearance is therefore accomplished by hand. *Id.*

62. Jefferson, *supra* note 3, at 109-10; J. Alistair Craib, *Mine Detection: The Military Necessity to Render Anti-Personnel Mines Non Detectable*, in MONTREUX SYMPOSIUM, *supra* note 3, at 207, 209; *see also* Rollo, *supra* note 53, at 211 (describing how minimum metal mines contribute little military utility).

63. *Group of Governmental Experts to Prepare the Review Conference of the States Parties 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*, 2d Sess., art. 6, at 9, U.N. Doc. CCW/Conf.I/GE/CRP.2 (1994) [hereinafter *Report of the Second Experts Meeting*]. A detectable mine is one that has a sufficiently high metal content to be located using widely available detection equipment. *Id.*

64. *ICRC Report*, *supra* note 8, at 181.

65. Jeab-Pierre Golay, *Self-Neutralizing and Self-Destruct Mechanisms for Anti-Personnel Mines*, in MONTREUX SYMPOSIUM, *supra* note 3, at 111, 113-15. Mines without self-neutralizing or self-destructing devices are "long-lived" mines.

66. Jefferson, *supra* note 3, at 107-08.

67. *See* LANDMINES: A DEADLY LEGACY, *supra* note 37, at 29. The combination of the possibility of failure of self-neutralizing devices and the necessary high rate of clearance demands that deminers approach every mine that is supposed to self-neutralize as if the mine were active. *Id.*; *ICRC Report*, *supra* note 8, annex II.

68. *ICRC Report*, *supra* note 8, at 139.

69. Jefferson, *supra* note 3, at 106-08.

70. *Id.*

ary international law that have been expressly codified in several multilateral treaties.<sup>71</sup> These treaties were premised on unwritten but widely accepted principles of customary international law that state that the right to adopt methods of warfare is not unlimited, that the use of weapons that cannot be effectively directed at military objectives is prohibited, and that weapons that cause unnecessary suffering are prohibited.<sup>72</sup> These principles require a balancing test between military utility and humanitarian concerns.<sup>73</sup> Despite the extensive codification in treaties that has taken place over the past century, the fundamental principles of customary international law continue to act as limitations on warfare.<sup>74</sup> The Martens Clause, which first appeared in the Hague Peace Conferences, establishes that in cases not expressly provided for, the laws of humanity and public conscience will continue to regulate methods of warfare employed by parties to armed conflicts.<sup>75</sup>

### 1. St. Petersburg Declaration

The 1868 St. Petersburg Declaration<sup>76</sup> was the first international treaty prohibiting the use of a specific type of weapon.<sup>77</sup>

---

71. Falk, *supra* note 6, at 74; HIDDEN KILLERS, *supra* note 3, at 55-56.

72. Louise Doswald-Beck & Gerald C. Cauderay, *The Development of New Anti-Personnel Weapons*, 279 INT'L REV. RED CROSS 565, 565-66 (1990).

73. ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAWS OF WAR 4-5 (1989). This balancing test is known as proportionality. *Id.*

74. *Id.* at 4.

75. Doswald-Beck & Cauderay, *supra* note 72, at 565. The preamble of the 1907 Hague Convention reads:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience.

1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1910 Gr. Brit. T.S. No. 9 (Cmd. 5030), 2 A.J.I.L. 90-117. The Martens Clause also appears in an article common to all of the Geneva Conventions, in Additional Protocol I, and the CCW. DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 4, n.8. The concept of customary international law also implies that all parties in every conflict are bound by such principles. *Id.* at 6.

76. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 1 A.J.I.L. Supp. 96, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration].

77. Doswald-Beck & Cauderay, *supra* note 72 at 566; LANDMINES: A DEADLY LEGACY, *supra* note 37, at 312.

The treaty recognized that the laws of humanity placed a limitation on the methods that armed parties may employ in a conflict, and that the use of arms that uselessly aggravate human suffering is contrary to the laws of humanity.<sup>78</sup> The drafters of the St. Petersburg Declaration concluded that a bullet designed to explode upon contact with skin violated these principles, and therefore banned its use.<sup>79</sup>

## 2. The Hague Peace Conferences

While the Hague Peace Conferences<sup>80</sup> did not ban any weapons for which a major power had a need,<sup>81</sup> they reaffirmed the principle that parties may not use methods of warfare that cause unnecessary suffering.<sup>82</sup> The 1899 Hague Declaration 3,<sup>83</sup> in the spirit of the St. Petersburg Declaration, prohibited the use of certain types of bullets that cause superfluous injury.<sup>84</sup> This declaration also prohibited the use of projectiles whose sole object was to diffuse asphyxiating gases.<sup>85</sup> The 1899 Conference was the first successful attempt to codify a comprehensive regime governing the laws of land warfare.<sup>86</sup>

## 3. 1925 Geneva Protocol

The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacterio-

78. St. Petersburg Declaration, *supra* note 76, 1 A.J.I.L. Supp. at 96, 138 Consol. T.S. at 297.

79. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 312; Doswald-Beck and Cauderay, *supra* note 72, at 566; DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 30.

80. 1899 Hague Declaration 2 Concerning Asphyxiating Gases, July 29, 1899, 1907 Gr. Brit. T.S. No. 32 (Cmd. 3751), 1 A.J.I.L. Supp. 157; 1899 Hague Declaration 3 Concerning Expanding Bullets, July 29, 1899, 1907 Gr. Brit. T.S. No. 32 (Cmd. 3751), 1 A.J.I.L. Supp. 155 [hereinafter 1899 Hague Declaration 3]; 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 1910 Gr. Brit. T.S. No. 9 (Cmd. 5030), 2 A.J.I.L. Supp. 90; 1907 Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 2 A.J.I.L. Supp. 117.

81. Geoffrey Best, *The Restraint of War in Historical and Philosophical Perspective*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 3, 20 (T.M.C. Asser Instituut ed., 1991)

82. Doswald-Beck & Cauderay, *supra* note 72, at 565-66.

83. 1899 Hague Declaration 3, *supra* note 80, 1907 Gr. Brit. T.S. No. 32 (Cmd. 3751), 1 A.J.I.L. Supp. at 155.

84. WILLIAM I. HULL, THE TWO HAGUE CONFERENCES 468 (1908).

85. DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 35.

86. *Id.* at 43.

logical Methods of Warfare<sup>87</sup> ("1925 Geneva Protocol") derives its authority from customary international law prohibiting weapons that cause unnecessary suffering.<sup>88</sup> The 1925 Geneva Protocol prohibits not only means of warfare that cause unnecessary suffering, but also means of warfare that have indiscriminate effects.<sup>89</sup> Like the Hague Peace Conferences, the 1925 Geneva Protocol banned the use of asphyxiating gases.<sup>90</sup> This Protocol was supplemented by the 1972 Biological Weapons Convention,<sup>91</sup> which was the first international agreement to ban not just use, but the production, stockpiling, and transfer of a specific weapon type.<sup>92</sup>

#### 4. Additional Protocol I to the Geneva Conventions<sup>93</sup>

The 1949 Geneva Conventions,<sup>94</sup> which are mainly concerned with protecting the victims of war,<sup>95</sup> are adhered to by more states than any other laws of war agreement.<sup>96</sup> The 1977 Additional Protocols were intended to supplement rather than replace the 1949 Geneva Conventions.<sup>97</sup> Additional Protocol I

87. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].

88. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 314.

89. *Id.*

90. 1925 Geneva Protocol, *supra* note 87, 26 U.S.T. at 571-72, 94 L.N.T.S. at 69.

91. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1976 Gr. Brit. T.S. 11 (Cmd. 6397).

92. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 315.

93. Additional Protocol I, *supra* note 47. Additional Protocol II is concerned with the protection of victims of non-international armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442.

94. Geneva Conventions For The Protection of War Victims Concerning: I Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, II Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, III Treatment of Prisoners of War, IV Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

95. Additional Protocol I, *supra* note 47, pmbl., ¶ 3, 1125 U.N.T.S. at 7, 16 I.L.M. at 1396.

96. DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 169. There are 165 states listed as parties to the Geneva Conventions. *Id.* at 326-31. Some view the basic principles of the Geneva Conventions as being declaratory of customary international law. *Id.* at 169-70.

97. DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 388.

was designed to protect the victims of international conflicts.<sup>98</sup> While the Geneva Conventions applied only to international conflicts,<sup>99</sup> Additional Protocol I was extended to include wars of national liberation and conflicts directed against racist regimes.<sup>100</sup> Additional Protocol I prohibits certain methods of warfare, but does not contain formal prohibitions concerning specific weapons.<sup>101</sup>

#### a. Article 35

Article 35 of Additional Protocol I codifies the established principle of the laws of war that parties to an armed conflict are not free to use any method of warfare.<sup>102</sup> Paragraph 1 reminds the parties to an armed conflict that the right to choose methods or means of warfare is not unlimited,<sup>103</sup> codifying a principle but not enumerating any affirmative rights or duties.<sup>104</sup> Paragraph 2 prohibits the use of weapons or methods that are of a nature to cause superfluous injury or unnecessary suffering.<sup>105</sup> Paragraph 3 prohibits methods or means of warfare that inflict widespread, long-term, and severe damage to the natural environment.<sup>106</sup> Paragraphs 2 and 3 both place an affirmative duty on military leaders to refrain from acts that have a particular effect.<sup>107</sup>

---

98. Additional Protocol I, *supra* note 47, pmb., ¶ 3, 1125 U.N.T.S. at 7, 16 I.L.M. at 1396.

99. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 3115, 75 U.N.T.S. 31, 32. Article 2 of the Geneva Conventions makes the Convention applicable to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." *Id.*

100. Additional Protocol I, *supra* note 47, art. 1(4), 1125 U.N.T.S. at 7, 16 I.L.M. at 1397. The Additional Protocol I is still precluded from applying to many internal conflicts that the U.S. Department of State claims exhibit the most egregious misuses of landmines. *HIDDEN KILLERS*, *supra* note 3, at 56.

101. ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 394 (1987); DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 471.

102. Additional Protocol I, *supra* note 47, art. 35, 1125 U.N.T.S. at 21, 16 I.L.M. at 1408-09.

103. *Id.*

104. *Id.* art. 35(1), 1125 U.N.T.S. at 21, 16 I.L.M. at 1408.

105. *Id.* art. 35(2), 1125 U.N.T.S. at 21, 16 I.L.M. at 1409.

106. *Id.* art. 35(3), 1125 U.N.T.S. at 21, 16 I.L.M. at 1409. The U.S. Department of State calls landmines the "most toxic and widespread pollution facing mankind." U.S. DEP'T STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, *HIDDEN KILLERS: THE GLOBAL LANDMINE CRISIS 2* (1993).

107. *Id.* art. 35(2)-(3), 1125 U.N.T.S. at 21, 16 I.L.M. at 1409.

## b. Article 51

Article 51 of Additional Protocol I prohibits attacks against civilians and indiscriminate attacks.<sup>108</sup> Article 51(4) defines an indiscriminate attack as one that is not directed at a military objective, or that uses a means of warfare that cannot be directed at a military objective.<sup>109</sup> Due to the time-delayed characteristics of landmines, commentators have argued that no deployed landmines are capable of being directed at a military objective in compliance with Article 51.<sup>110</sup>

D. *The Landmine Protocol*

The purpose of the Landmine Protocol of the CCW<sup>111</sup> was to apply the concrete expression of principles of customary international law to the use of landmines.<sup>112</sup> The principles that form the foundations for the Landmine Protocol date to the St. Petersburg Declaration, the Hague Conventions, and the 1925 Geneva Protocol.<sup>113</sup> The Landmine Protocol is distinguished from earlier agreements by being more concerned with protecting civilians than soldiers.<sup>114</sup>

## 1. Scope and Definitions

Article 1 states the scope of the Landmine Protocol.<sup>115</sup> As a part of the CCW, the Landmine Protocol applies in the same situations as the Additional Protocol I, which include international conflicts, wars of national liberation, and wars against ra-

---

108. *Id.* art. 51(4), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

109. *Id.* art. 51(4)(a)-(b), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413. The flush language of Article 51(4) states that indiscriminate attacks are those that are "of a nature to strike military objectives and civilians or civilian objects without distinction." *Id.* art. 51(4), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

110. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 289. The Arms Project and Physicians for Human Rights concluded that, in reference to Article 51(4), "the use of landmines is completely forbidden under this provision." *Id.*; see Falk, *supra* note 6, at 76 (declaring that objective reasoning concludes that Article 51 is violated by modern use of landmines); Vance & Okun, *supra* note 13, at 207.

111. CCW, *supra* note 1, 1342 U.N.T.S. 137, 19 I.L.M. 1523.

112. ICRC Report, *supra* note 8, at 127; Carnahan, *supra* note 28, at 95; see *supra* notes 71-75 and accompanying text (explaining customary international law).

113. DOCUMENTS ON THE LAWS OF WAR, *supra* note 73, at 472.

114. *Id.* Civilians are the majority of the victims of landmines. See *supra* note 19 and accompanying text (noting that 80% of landmine victims are civilians).

115. CCW, *supra* note 1, Protocol II, art. 1, 1342 U.N.T.S. at 168, 19 I.L.M. at 1529.



cist regimes.<sup>116</sup> The Landmine Protocol applies to the use of mines, booby-traps, and other devices.<sup>117</sup> Article 2 defines terms to be used in the Landmine Protocol, including mine, booby-trap, other devices, military objective, civilian objects, and recording.<sup>118</sup>

## 2. General Restrictions on the Use of Mines

Article 3 adapts the principles of Article 51 of the Additional Protocol I to the use of landmines.<sup>119</sup> The direction of mines against civilians<sup>120</sup> and the indiscriminate use of landmines are prohibited.<sup>121</sup> Both the Landmine Protocol and the Additional Protocol I preclude, as indiscriminate, the use of mines that are not directed at a military objective, or that cannot be directed at a military objective.<sup>122</sup> The Landmine Protocol, however, adds a balancing test to the determination of what constitutes "indiscriminate,"<sup>123</sup> allowing the use that would otherwise be considered indiscriminate if the expected ensuing damage is not excessive when compared to the anticipated military advantage.<sup>124</sup>

## 3. Restrictions on Mines That Are Not Remotely Delivered

Article 4 is concerned with restricting the use of landmines

116. Additional Protocol I, *supra* note 47, art. 1(3)-(4), 1125 U.N.T.S. at 7, 16 I.L.M. at 1397.

117. CCW, *supra* note 1, Protocol II, art. 1, 1342 U.N.T.S. at 168, 19 I.L.M. at 1529. The Landmine Protocol applies to "mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways." *Id.* This Comment focuses on the application of the Landmine Protocol to mines, but not booby-traps or other devices.

118. CCW, *supra* note 1, Protocol II, art. 2, 1342 U.N.T.S. at 168, 19 I.L.M. at 1530.

119. Carnahan, *supra* note 28, at 78.

120. CCW, *supra* note 1, Protocol II, art. 3(2), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530.

121. *Id.* art. 3(3), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530.

122. *Id.*; Additional Protocol I, *supra* note 47, art. 51, 1125 U.N.T.S. at 26, 16 I.L.M. at 1413.

123. CCW, *supra* note 1, Protocol II, art. 3(3)(c), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530. "Indiscriminate use is any placement of such weapons . . . (c) 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.*

124. *Id.* Commentators have noted that this test has the effect of providing less protection to civilians than Article 51 of the Additional Protocol I, upon which the Landmine Protocol was based. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 262, 271-73; Falk, *supra* note 6, n.15.

that are not remotely delivered.<sup>125</sup> Article 4(2) prohibits the use of landmines in populated areas where there is no ground combat.<sup>126</sup> Such use is excepted from that prohibition, however, if the mines are either placed in close proximity to a military objective, or if measures are taken to protect the civilians from the effects of the mines.<sup>127</sup>

#### 4. Restrictions on Remotely Delivered Mines

Article 5 imposes additional restrictions on the use of remotely delivered mines.<sup>128</sup> The first paragraph prohibits their use unless the mines are directed at a military objective and 1) their location is accurately recorded; or 2) the mines are equipped with an effective self-neutralizing or self-destructing device.<sup>129</sup> The second paragraph requires that effective advance warning be given of any delivery of scatterables that might affect the civilian population, if practicable.<sup>130</sup>

#### 5. Recording the Location of Mines

Paragraph 1 of Article 7 requires that parties record<sup>131</sup> the location of all pre-planned minefields.<sup>132</sup> Paragraph 2 imposes a duty on parties to attempt to record the locations of all other minefields.<sup>133</sup> Paragraph 3 requires parties to keep all such

---

125. CCW, *supra* note 1, Protocol II, art. 4, 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

126. *Id.* art. 4(2), 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

127. *Id.*

128. *Id.* art. 5, 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

129. *Id.* art. 5(1), 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

130. *Id.* art. 5(2), 1342 U.N.T.S. at 169, 19 I.L.M. at 1531. Commentators have expressed concerns that Article 5 fails to consider that it does not seem possible to ever accurately record scatterables, and that experience has shown that any field commander would find that every circumstance does not permit effective advance warning, due to the nature of deploying remotely delivered mines. Gerald Cauderay, *Anti-Personnel Mines*, 295 INT'L REV. RED CROSS 273, 281 (1993); HIDDEN KILLERS, *supra* note 3, at 54.

131. See CCW, *supra* note 1, Protocol II, art. 2(6), 1342 U.N.T.S. at 168, 19 I.L.M. at 1530. 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. *Id.*

132. CCW, *supra* note 1, Protocol II, art. 7(1)(a), 1342 U.N.T.S. at 170, 19 I.L.M. at 1532. The word "pre-planned" is not defined, but suggests a degree of planning more than "planned." Carnahan, *supra* note 28, at 84.

133. CCW, *supra* note 1, Protocol II, art. 7(2), 1342 U.N.T.S. at 168, 19 I.L.M. at 1530. "The parties shall endeavor to ensure the recording of the location of all other minefields, mines and booby-traps which they have laid or placed in position." *Id.*

records, and to provide these records to certain parties in certain circumstances in order to protect civilians and U.N. missions and to help in the process of clearing minefields after the cessation of hostilities.<sup>134</sup>

#### 6. Protecting U.N. Forces and Missions, and International Cooperation in the Removal of Mines

Article 8 is concerned with the protection of U.N. forces and missions.<sup>135</sup> When the head of a U.N. force or mission requests, parties to an armed conflict are required, when practicable, to remove or neutralize mines in the area, take measures to protect the force or mission, and make available all information concerning mines in the area.<sup>136</sup> Paragraph 2 imposes a duty on parties to a conflict to provide protection, when possible, to any U.N. fact-finding mission.<sup>137</sup> If providing protection is not possible, the party must provide all available information concerning mines to the head of the mission.<sup>138</sup> Article 9 requires parties, after the cessation of active hostilities, to assist each other in removing mines or rendering minefields ineffective.<sup>139</sup>

### E. *Individual Countries and Organizations*

#### 1. United States

While formerly a large exporter of landmines,<sup>140</sup> and still a producer, the United States has recently taken a leadership role in the effort to curb the global landmine crisis.<sup>141</sup> The United States stopped exporting mines in 1992, and has publicly played a role in attempting to get other countries to halt exports.<sup>142</sup>

---

134. *Id.* art. 7, 1342 U.N.T.S. at 170, 19 I.L.M. at 1532.

135. *Id.* art. 8, 1342 U.N.T.S. at 171, 19 I.L.M. at 1533.

136. *Id.* art. 8(1), 1342 U.N.T.S. at 171, 19 I.L.M. at 1533.

137. *Id.* art. 8(2), 1342 U.N.T.S. at 171, 19 I.L.M. at 1533.

138. *Id.*

139. *Id.* art. 9, 1342 U.N.T.S. at 171, 19 I.L.M. at 1534.

140. Askin & Goose, *supra* note 42. The United States shipped at least 4.4 million mines since 1969 (until the export moratorium went into effect in 1992). *Id.*

141. *Anderson Testimony*, *supra* note 7. The United States is also a leader in the area of demining. See generally HIDDEN KILLERS, *supra* note 3 (describing efforts of United States to help clear mines from infested countries).

142. Pub. L. No. 102-484, § 1365, 106 Stat. 2561 (1992) (to be codified at 22 U.S.C. 2778). The United States adopted a unilateral export moratorium on anti-personnel landmines in October 1992. *Id.* The moratorium was extended by three years in 1993. HIDDEN KILLERS, *supra* note 3, at 56. In November 1993, Senator Leahy [D-Vt.], who sponsored the legislation, introduced a non-binding resolution that passed before the

Recently, the United States became a state party to the CCW,<sup>143</sup> and U.S. President Bill Clinton, in a speech to the U.N. General Assembly, called for the eventual elimination of the use of landmines.<sup>144</sup> For now, however, the United States supports the tightening of restrictions at the Review Conference, but not a total ban.<sup>145</sup>

a. Ratification of the Conventional Weapons Convention

Neither President Ronald Reagan nor President George Bush submitted the CCW to the U.S. Senate for ratification.<sup>146</sup> In May of 1994, President Clinton submitted the CCW, including the Landmine Protocol, to the Senate.<sup>147</sup> The Senate ratified the CCW on March 24, 1995, which will allow the United States to participate as a full member at the Review Conference.<sup>148</sup> As a state party, the United States will play a larger role and have full voting rights.<sup>149</sup>

The Clinton Administration has acknowledged the inadequacy of the current Landmine Protocol.<sup>150</sup> At the Review Conference, the U.S. delegation will push for several amendments to

---

United Nations General Assembly, deploring the consequences of landmines and calling on member states to enact their own export moratoria. *Id.* The State Department reported, in January 1995, that 18 countries have proclaimed moratoria of their own, and 3 or 4 others have export controls in place that are analogous to moratoria. *State Department Special Briefing, supra* note 5. A September 1994 article listed the United States, Argentina, Belgium, France, Germany, Greece, the Netherlands, Poland, Slovakia, Spain, South Africa, and Switzerland as having banned exportation, with Italy having banned production and exportation, and Great Britain having banned mines without self-neutralizing devices. Askin & Goose, *supra* note 42.

143. *Washington News*, U.P.I., Mar. 24, 1995, available in LEXIS, News Library, CURNWS File.

144. President Clinton, *Building a Secure Future On the Foundation of Democracy*, 5 DEP'T ST. DISPATCH 633 (Sept. 26, 1994).

145. *Fact Sheet: U.S. Initiatives for Demining and Landmine Control, supra* note 40, at 362.

146. Vance & Okun, *supra* note 13, at 201.

147. *Testimony March 7, 1995 Michael J. Matheson, Principal Deputy Legal Advisor, Department of State, Senate Foreign Relations, Convention on Conventional Weapons*, Federal Document Clearing House Congressional Testimony, Mar. 7, 1995, available in LEXIS, News Library, CURNWS File [hereinafter *Matheson Testimony*].

148. *Washington News, supra* note 143; CCW, *supra* note 1, art. 5(2), 1342 U.N.T.S. at 165, 19 I.L.M. at 1526. States that are not parties will still be invited to participate as observers. *Id.* art. 8, 1342 U.N.T.S. at 166, 19 I.L.M. at 1527.

149. *Washington News, supra* note 143.

150. *Matheson Testimony, supra* note 147.

the Landmine Protocol.<sup>151</sup> These proposals include: 1) extending the scope of the Landmine Protocol to include internal conflicts; 2) requiring that all remotely delivered mines be equipped with self-destructing devices; 3) requiring that all mines without self-destruct and self-deactivation<sup>152</sup> devices only be used within controlled, marked, and monitored minefields; 4) requiring that all mines be made detectable; 5) requiring that the party that lays the mines be responsible for their ultimate disposal; and 6) adding an effective verification mechanism.<sup>153</sup>

#### b. Policy of the United States Regarding a Total Ban

The U.S. policy regarding a total ban of landmines has changed. On December 16, 1993, the United States was one of only three countries to abstain from the U.N. Resolution to hold a Review Conference of the CCW.<sup>154</sup> The United States abstained because it objected to an amendment asking the Conference to discuss all aspects of the landmine crisis, including a total ban.<sup>155</sup> On September 26, 1994, President Clinton unveiled a plan for a landmine control regime that poses as an ultimate goal the complete elimination of anti-personnel mines.<sup>156</sup> According to the U.S. Department of State, however, complete elimination is a long term goal.<sup>157</sup> The U.S. military feels that landmines are essential, so the complete elimination would not occur until alternatives acceptable to the military were available.<sup>158</sup>

Clinton's control regime, by urging restrictions on the ex-

151. *Id.*

152. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 2(12), at 3. Self-deactivating means "automatically rendering a munition inoperable by means of the irreversible exhaustion of a component that is essential to the operation of the munition." *Id.*

153. *Matheson Testimony*, *supra* note 147.

154. Patrick J. Leahy, *U.S. Can Help Stop the Land-Mine Slaughter*, N.Y. TIMES, Jan. 13, 1994, at A20.

155. *Anderson Testimony*, *supra* note 7. President Clinton stated in a letter to Senator Leahy in February 1994 that "[w]hile we fully supported the overall thrust of the resolution, we could not vote for it because the U.S. Armed Forces continue to require landmines to accomplish certain military missions." Vance & Okun, *supra* note 13, at 204 (citation omitted).

156. President Clinton, *supra* note 144, at 633-36.

157. Worsnip, *supra* note 24.

158. Telephone interview with Valerie Belon, U.S. Department of State (Jan. 12, 1995).

port, production, and stockpiling of landmines, hopes to reduce the availability of mines, reduce the reliance on the most dangerous types of mines, and reinforce the Landmine Protocol restrictions.<sup>159</sup> The proposed regime will work independently of the Landmine Protocol.<sup>160</sup> The Clinton administration has stated that it will continue to urge countries to enact moratoria until the proposed regime is in place.<sup>161</sup> The regime would replace the standard moratorium with restrictions that would only allow the export of "safe" mines to countries that were not on a "no-arms" list.<sup>162</sup>

## 2. Europe

Italy does not manufacture landmines, ratified the CCW in December of 1994, and has expressed support of Sweden's motion to amend the Landmine Protocol so that it constitutes a total ban.<sup>163</sup> Belgium has outlawed the production and use of anti-personnel mines<sup>164</sup> and has pledged to destroy the mines it has in stock.<sup>165</sup> Estonia supports a total ban and has proposed that the Landmine Protocol be amended accordingly.<sup>166</sup>

In December 1992 the European Parliament passed a resolution demanding that all Member States declare a five year moratorium on the export of landmines, ratify the CCW, and make the CCW applicable to internal warfare.<sup>167</sup> On October 8, 1993,

---

159. President Clinton, *supra* note 144, at 633-36.

160. Interview with David Gowdey, Department of Humanitarian Affairs, United Nations, in New York (Jan. 30, 1995).

161. *Fact Sheet: U.S. Policy on a Landmine Control Regime*, 5 DEP'T ST. DISPATCH 637 (Sept. 26, 1994).

162. *Id.* At least one Non-Governmental Organization has claimed that the administration's loosening of export restrictions is due in part to pressure from U.S. corporations that have not been able to sell their mines abroad since 1992. Telephone interview with Scott Nathanson, Peace Action Education Fund, (Feb. 24, 1995).

163. Jorge Pina, *Italy: Parliament Approves Convention Against Anti-Personnel Mines*, Inter Press Service, Dec. 6, 1994, available in LEXIS, News Library, CURNWS File. It has been reported that, after Italy banned the exportation and production of anti-personnel mines, a company in Singapore purchased parts and components for the local assembly of at least 7 million Italian mines. Askin & Goose, *supra* note 42.

164. Michael Dynes, *Pressure Grows on Britain to Outlaw Mines*, TIMES, Mar. 3, 1995, available in LEXIS, News Library, CURNWS File.

165. *Belgium Bans All Trade in Anti-Personnel Mines*, Reuters, Mar. 2, 1995, available in LEXIS, News Library, CURNWS File.

166. *Report of the Third Experts Meeting*, *supra* note 9, annex, app. II, at 27 (proposing that Landmine Protocol prohibit use, development, manufacture, stockpiling, and transfer of anti-personnel mines).

167. European Parliament Motion for a Resolution, Dec. 14, 1992, *reprinted in*

the European Community Member States, together with Austria, Finland, Norway, and Sweden, introduced a resolution before the U.N. General Assembly urging states and organizations to do more to solve the global landmines crisis.<sup>168</sup> Ireland,<sup>169</sup> Sweden, and Austria have been reported as supporting a total ban.<sup>170</sup> France, the country that requested the Review Conference,<sup>171</sup> does not export anti-personnel mines.<sup>172</sup> France has been reported, however, like Germany, as promoting only those restrictions that it believes are likely to succeed, such as allowing the use of mines which self-destruct.<sup>173</sup>

Great Britain does not support a total ban on landmines. Like the United States, Great Britain believes that landmines can play a legitimate defensive role if used in accordance with the rules.<sup>174</sup> Great Britain is willing, however, to amend the Landmine Protocol so that all mines must be equipped with an effective self-destruct mechanism.<sup>175</sup> According to the Foreign Office, Great Britain widened its export moratorium in March 1995 to prohibit the export of non-detectable mines, and to forbid the export of mines to countries that have not ratified the CCW.<sup>176</sup>

---

LANDMINES: A DEADLY LEGACY, *supra* note 37, at 450; *EP Calls for Five-Year Export Moratorium on Anti-Personnel Mines*, Reuter European Community Report, Dec. 18, 1992, available in LEXIS, News Library, CURNWS File.

168. *Draft Resolution before the General Assembly*, 48th Sess., Agenda Item 155, A/48/1.5, Oct. 8, 1993, re "Assistance in Mine Clearance."

169. Andy Pollak, *UN Convention on Landmine Use Ratified by Ireland*, IRISH TIMES, Mar. 24, 1995, at 5. Ireland ratified the CCW in March of 1995. *Id.* Joan Burton, Minister of State for Foreign Affairs of Ireland, says that "Ireland was calling for a total ban on the manufacture, stockpiling, export and use of landmines." *Id.*

170. *EU: NGOs Call for Coherent Strategy Regarding Anti-Personnel Mines*, Reuter Textline Agency Europe, Nov. 24, 1994, available in LEXIS, News Library, CURNWS File; *Chemical Weapons are now Banned: Landmines Must be Next*, Times, Mar. 3, 1995, available in LEXIS, News Library, CURNWS File.

171. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 324.

172. *Id.*

173. *Id.*

174. Michael Sheridan, *UK: Britain Helps to Block A Global Ban on Mines*, INDEPENDENT, Oct. 28, 1994, available in LEXIS, News File, CURNWS File.

175. *Id.*

176. *Landmine Export Ban is Extended*, DAILY TELEGRAPH, Mar. 16, 1995, at 4. Prohibiting the export of non-detectable mines is consistent with Article 6 of the proposals that the Review Conference will use to amend the Landmine Protocol. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 6, at 6. Forbidding the export to states non-parties is consistent with the proposed Article 6 ter(1). *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 6 ter(1), at 8. Great Britain did not ratify the CCW until February of 1995. Dynes, *supra* note 164.

### 3. Africa

One-third of the world's landmines are in Africa, but only three of its countries are parties to the CCW.<sup>177</sup> An ICRC delegate stated that the low participation rate is due to a lack of awareness on the part of African states.<sup>178</sup> Ethiopia's Foreign Ministry, however, recently announced that it supports a total ban, and is willing to work with international organizations to address the crisis.<sup>179</sup>

### 4. United Nations

In December 1993, noting the extent of the damage that landmines have done to unarmed civilians, the U.N. General Assembly passed a resolution calling on states to enact their own landmine export moratorium.<sup>180</sup> The United Nations passed a similar resolution, without opposition, in December of 1994.<sup>181</sup> The 1994 resolution seeks the eventual elimination of the use of landmines.<sup>182</sup>

The U.N. Secretary-General, Boutros Boutros-Ghali, advocates a total ban.<sup>183</sup> Secretary General Boutros-Ghali also proposes adding landmines to the U.N. Register of Conventional Weapons<sup>184</sup> to help inform the global community of who is mak-

---

177. *Experts to Tackle Landmines Problems on African Continent*, Agence France Presse, Feb. 27, 1995, available in LEXIS, News Library, CURNWS File. The countries are Benin, Niger, and Tunisia. *Id.*

178. *Id.* The ICRC held a conference in early March 1995 to promote international treaties to regulate the use of landmines. *Id.*

179. *Ethiopia Supports Ban on Anti-Personnel Mines*, Xinhua News Agency, Feb. 23, 1995, available in LEXIS, News Library, CURNWS File.

180. *General and Complete Disarmament*, U.N. GAOR 1st Comm., 48th sess., 81st plen. mtg. at 14, U.N. Doc. ARES/48/75 (1994).

181. *United Nations Approves Leahy's Landmine Export Ban*, Gannet News Service, Dec. 16, 1994, available in LEXIS, News Library, CURNWS File.

182. *Id.*

183. Boutros Boutros-Ghali, *The Land Mine Crisis: A Humanitarian Disaster*, FOREIGN AFF., Sept./Oct. 1994, at 8.

184. Thalif Deen, *Disarmament: U.N. Chief Wants World Body to Curb Small Arms*, Inter Press Service, Jan. 9, 1995, available in LEXIS, News Library, CURNWS File. The U.N. Register is a program where countries are requested to voluntarily provide data every year on the number of certain types of weapons to the United Nations. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 113-14. This information is made available to the public. *Id.* Presently small arms, such as landmines, are not included in the category of weapons reported in the register. *Id.*



ing, buying, and selling landmines.<sup>185</sup> The Secretary-General advocates placing landmines in the same legal and ethical category as chemical weapons, and calls for the international community to ban production, stockpiling, trade, and use of mines and their components.<sup>186</sup>

## 5. Non-Governmental Organizations

Non-Governmental Organizations ("NGOs"), while not formally part of the Review Conference, have played a substantial role in the movement toward a total ban on landmines. The ICRC, having seen the devastation wrought by landmines during its humanitarian efforts,<sup>187</sup> has been pressuring the international community for a total ban on landmines.<sup>188</sup> Similarly, NGOs in numerous countries are lobbying the people and governments on a local level about the horrific consequences of the use of landmines.<sup>189</sup>

Despite efforts to allow NGOs full participation in the Review Conference and its preparatory meetings,<sup>190</sup> NGOs will only be allowed, with a few exceptions, to speak at plenary sessions.<sup>191</sup> This has led some commentators to state that military considerations will be weighed disproportionately to humanitarian concerns.<sup>192</sup> Some NGOs, frustrated by this indifference to humanitarian concerns, have abstained from the effort to amend the

185. See *LANDMINES: A DEADLY LEGACY*, *supra* note 37, ch. 4, at 107-16 (explaining importance of transparency in landmine transactions).

186. Boutros-Ghali, *supra* note 183, at 8. The Secretary-General discusses the shortcomings of the Landmine Protocol and the extent of the damage done by landmines. *Id.*

187. Sheridan, *supra* note 174.

188. *Id.*

189. Stephanie Nebehay, *Coalition Calls for Total Ban on Landmines*, Reuters, May 11, 1995, available in LEXIS, News Library, CURNWS File.

190. *Id.* NGOs urged governments to allow them representation at the Governmental Experts Meetings. *Id.* The United States pushed to grant the NGOs representation at the Governmental Experts Meetings. *Vance & Okun Testimony*, *supra* note 38.

191. *Report of the Final Experts Meeting*, *supra* note 10, at 1, ¶ 2. The ICRC, at the invitation of the Secretary-General, who is the Depositary of the Convention, was allowed to take part in the Group of Governmental Experts. *Id.* The U.N. Department of Humanitarian Affairs, the Office of the U.N. High Commissioner for Refugees and the U.N. Children's Fund were allowed to participate as observers. *Id.* The Draft Rules of Procedure for the Review Conference allow that NGOs may designate a representative to attend public meetings (plenary sessions) and may make available written contributions. *Id.* annex III, rule 49.

192. *Anderson Testimony*, *supra* note 7.

Landmine Protocol altogether.<sup>193</sup>

## II. PROPOSALS TO AMEND THE LANDMINE PROTOCOL AT THE REVIEW CONFERENCE

The United Nations has held four experts meetings in Geneva in preparation for the Review Conference.<sup>194</sup> The first meeting began in February 1994, and the last meeting ended in January 1995.<sup>195</sup> Shortly after the Second, Third, and Final meetings, the United Nations released a report detailing the proposed additions and deletions for the CCW that each meeting agreed upon.<sup>196</sup> The proposed additions and deletions from the Final Experts Meeting are the proposals to amend the Landmine Protocol upon which the participants of the Review Conference will decide.<sup>197</sup> The Experts Meetings were not public, and information about which countries proposed particular provisions has not been disseminated.<sup>198</sup>

### A. Proposals Regarding the Scope of the Landmine Protocol

The Review Conference is likely to extend the jurisdiction of the Landmine Protocol to include internal conflicts.<sup>199</sup> The

---

193. Interview with David Gowdey, Department of Humanitarian Affairs, United Nations, in New York (Jan. 30, 1995).

194. *Report of the Final Experts Meeting*, *supra* note 10, annex V.

195. *Id.* The first session was held between February 28 and March 9, 1994. *Id.* The second session was between May 16 and 27, 1994. *Id.* The third session was between August 8 and 19, 1994. *Id.* The final session was between January 9 and 20, 1995. *Id.*

196. *Report of the Second Experts Meeting*, *supra* note 63; *Report of the Third Experts Meeting*, *supra* note 9; *Report of the Final Experts Meeting*, *supra* note 10. The Experts Meetings Reports contain more than one version of a provision when the participants of the meeting were able to agree that a provision should be altered, but were not able to agree on a specific new provision. See, e.g., *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 1, at 1 (displaying alternative proposals of Article 1 of the Landmine Protocol).

197. *Report of the Final Experts Meeting*, *supra* note 10, annex III, rule 29, at 6.

198. Interview with David Gowdey, Department of Humanitarian Affairs, United Nations, in New York (Jan. 30, 1995).

199. Frances Williams & Bruce Clark, *UN agrees ban on landmine use*, FIN. TIMES, Jan. 20, 1995, at 4; *Experts Make "Remarkable Progress" on Mines Ban*, Agence France Presse, Jan. 20, 1995, available in LEXIS, News Library, CURNWS File. The Reports from the Experts Meetings of the Second, Third, and Final Meetings all include proposals that extend the scope to include internal conflicts. *Report of the Second Experts Meeting*, *supra* note 63, art. 1, at 1. It was also proposed that the extension of jurisdiction be included in an article of the Convention, not the Protocol. *Id.* n.1, at 1. This sentiment was mentioned in the Report of the Third Experts Meeting. *Report of the Third Experts Meet-*

Final Experts Meeting has proposed two alternatives concerning how far the new Landmine Protocol would extend.<sup>200</sup> The first alternative extends the jurisdiction of the Landmine Protocol to apply in all circumstances during war and peace.<sup>201</sup> The second alternative extends the Landmine Protocol to apply to all parties in conflicts within the territory of states parties, including dissident armed groups.<sup>202</sup> The second alternative would not, however, include internal disturbances that do not rise to the level of armed conflicts.<sup>203</sup>

### B. Definition Proposals

Article 2 of the Landmine Protocol contains definitions to which subsequent articles refer.<sup>204</sup> The participants of the Experts Meetings allow for separate definitions of "remotely delivered mines" and "anti-personnel mines."<sup>205</sup> The terms "self-destructing mechanism," "self-neutralizing mechanism," "self-deactivation," and "remote control" are also defined.<sup>206</sup> The Review Conference will choose between two alternative definitions for "anti-handling device."<sup>207</sup>

---

ing, *supra* note 9, annex, art. 1, at 8. The proposal did not progress past the final experts meeting in January. *Report of the Final Experts Meeting, supra* note 10, annex I.

200. *Report of the Final Experts Meeting, supra* note 10, annex I, art. 1, at 1.

201. *Id.* art. 1, alt. A(2).

202. *Id.* art. 1, alt. B(2)-(3).

203. *Id.* art. 1, alt. B(2). Paragraph two provides that "[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." *Id.*

204. CCW, *supra* note 1, Protocol II, art. 2, 1342 U.N.T.S. at 168, 19 I.L.M. at 1530.

205. *Report of Final Experts Meeting, supra* note 10, annex I, art. 2(2)-(3), at 2. The current Landmine Protocol defines "mine," and "remotely delivered mine" in the same paragraph. CCW, *supra* note 1, Protocol II, art. 2(1), 1342 U.N.T.S. at 168, 19 I.L.M. at 1530.

206. *Report of the Final Experts Meeting, supra* note 10, annex I, art. 2, at 2. " 'Self destructing mechanism' means an incorporated automatically functioning mechanism which secures the destruction of a munition." *Id.* art. 2(10), at 3. " 'Self neutralizing mechanism' means an incorporated automatically functioning mechanism which secures the destruction of a munition." *Id.* art. 2(11), at 3. " 'Self deactivating' means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component that is essential to the operation of the munition." *Id.* art. 2(12), at 3. " 'Remote Control' means a control by commands from a distance." *Id.* art. 2(13), at 3.

207. *Report of the Final Experts Meeting, supra* note 10, annex I, art. 2(14), at 3. An anti-handling device is "a device by which a mine will explode when an attempt is made to remove, neutralize or destroy the mine," or, in the alternative, "a device to protect a munition against removal." *Id.*

C. *Proposals Regarding General Mine Restrictions*

The Experts Meetings Reports and the current Landmine Protocol forbid the direction of mines at civilians<sup>208</sup> and the indiscriminate use of mines.<sup>209</sup> The proposed Article 3 promulgates the same balancing test as is currently applied in the Landmine Protocol governing what constitutes "indiscriminate."<sup>210</sup> Parties are allowed to use mines in a way that would otherwise be precluded if the expected damage to civilians is not excessive when compared to the anticipated military advantage.<sup>211</sup>

The proposals to Article 3 include a provision that would incorporate language analogous to Article 51(5)(a) of the Additional Protocol I prohibiting the bombardment of a number of individual military objectives within a town as a single military objective.<sup>212</sup> The proposed Article 3 would require advance warning, where feasible, before any mines are laid that would

---

208. See *supra* notes 119-24 and accompanying text (describing Article 3); *Report of the Second Experts Meeting*, *supra* note 63, art. 3(2), at 4; *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 3(3), at 10; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(5), at 4. "It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisal, against the civilian population as such or against individual civilians." *Id.*

209. CCW, *supra* note 1, Protocol II, art. 3(3), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530; *Report of the Second Experts Meeting*, *supra* note 63, art. 3(3), at 4; *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 3(4), at 11; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(6), at 4.

Indiscriminate use is any placement of such weapons:

- (a) which is not on, or directed against, a military objective; or
- (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
- (c) which may be expected to cause incidental loss of civilian life, injury to civilian, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Id.*

210. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(6), at 4.

211. *Id.* art. 3(6)(c), at 4. The proposal does contain a list of circumstances that the party would take into account during the balancing test of humanitarian and military concerns. *Id.* art. 8(a)-(d), at 4. The current Landmine Protocol does not. CCW, *supra* note 1, Protocol II, art. 3(4), 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

212. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(7), at 4. "Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects cannot be treated as a single military objective." *Id.*; Additional Protocol I, *supra* note 47, art. 51(5)(a), 1125 U.N.T.S. at 26, 16 I.L.M. at 1413 (displaying original language of provision).

affect civilians.<sup>213</sup> States parties would also be responsible for clearing any mines that they lay.<sup>214</sup> Another Article 3 proposal codifies customary international law dating back to the St. Petersburg Declaration by prohibiting the use of mines that are designed to cause superfluous injury or unnecessary suffering.<sup>215</sup> The proposed Paragraph 10 of Article 3 declares that the ultimate goal of the restrictions and prohibitions of the Landmine Protocol is a total ban on use, trade, production, and stockpiling of anti-personnel landmines.<sup>216</sup>

*D. Proposals Regarding Restrictions on Mines That Are Not Remotely Delivered*

Article 4 concerns restrictions on mines that are not remotely delivered.<sup>217</sup> In an effort to address the problem of long-lived mines, the proposed Article 4 prohibits the use of mines that are not self-destructing.<sup>218</sup> An exception would exist, however, for mines placed in a perimeter-marked<sup>219</sup> area that is fenced, marked, and monitored, and either cleared or turned over to a responsible party before being abandoned.<sup>220</sup> If a party gains control of a mined area, that party would be required to provide the protection of Article 4 until the mines have been cleared.<sup>221</sup> States parties would also be required to take all feasible measures to prevent tampering with perimeter-marking materials, and to ensure that all mines comply with the Technical Annex's provisions on detectability.<sup>222</sup>

213. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(9), at 4.

214. *Id.* art. 3(2), at 3.

215. *Id.* art. 3(3), at 3.

216. *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 3(8), at 11; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(10), at 5.

217. *See supra* notes 125-27 and accompanying text (describing Article 4).

218. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 4(2), at 5.

219. *ICRC Report*, *supra* note 8, at 174. Military experts concluded that insurgent forces almost never mark minefields, as they consider it a loss of effect against the opposing force. *Id.*

220. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 4(2), at 5. Like the Third Meeting, Paragraph 3 of the Final Experts Meeting absolves the party to the conflict of Paragraph 2 responsibility if "such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action." *Id.* art. 4(3), at 5.

221. *Id.* art. 4(4), at 5.

222. *Id.* art. 4, at 5. The Technical Annex to the proposals gives specifications to aid parties in complying with the provisions of the Landmine Protocol. *Id.* Technical Annex.

### E. Remotely Delivered Mine Proposals

Article 5 concerns remotely delivered mines.<sup>223</sup> The Review Conference will be considering two proposals. The first prohibits the use of remotely delivered mines that are not self-destructing.<sup>224</sup> The second prohibits the use of mines that do not comply with the Technical Annex provisions on detectability.<sup>225</sup> Both effectively prohibit the use of remotely delivered mines that are not detectable.<sup>226</sup>

### F. Proposed Article 6

Three proposals for Article 6 will be considered by the Review Conference.<sup>227</sup> The first, like the current Landmine Protocol, would prohibit the use of certain types of booby-traps.<sup>228</sup> The second proposal would prohibit the use, development, manufacture, stockpiling and transfer of certain weapons,<sup>229</sup> applying to either: 1) all anti-personnel mines; 2) mines without self-destructing or self-neutralizing devices; or 3) booby-traps.<sup>230</sup> A footnote to the second proposed Article 6 of the Final Experts Meeting Report acknowledges that not all delegations accept the second proposed Article 6.<sup>231</sup> The third alternative for Article 6, designed to prevent the use of mines in ways contrary to the purposes of the Landmine Protocol, concerns transfers<sup>232</sup> and would prohibit the transfer of any weapons defined in Article 2 to any entities that are not states, or to any states that are not bound by the Landmine Protocol.<sup>233</sup> States parties would under-

---

223. See *supra* notes 128-30 and accompanying text (describing Article 5).

224. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 5, at 6.

225. *Id.* art. 5 bis, at 6. The participants recognized that including the detectability provision in this article would require the omission of the provision elsewhere in the Protocol. *Id.* art. 5 bis, n.2, at 6.

226. *Id.*

227. *Id.* art. 6, at 6-7.

228. *Id.*

229. *Id.* art. 6 bis, at 7-8.

230. *Id.* This proposal requires states parties to destroy any such mines in their ownership or possession. *Id.* It would also prohibit either the use, manufacture, stockpiling, or transferring of mines that are not in compliance with the provisions on detectability. *Id.* States would also be required to report to the Depositary any information about any stockpiles of landmines in their possession. *Id.*

231. *Id.* art. 6 bis, n.3, at 7.

232. *Id.* art. 6 ter, n.5, at 8. Transfers involve the physical movement of mines into or from national territory, and the transfer of title to and control over the mines. *Id.*

233. *Id.* art. 6 ter(1)-(2), at 8. One commentator expressed the belief that the

take not to transfer mines that are prohibited in all circumstances to any states parties,<sup>234</sup> and states parties would be allowed to receive mines that are restricted only if they agree to comply with humanitarian law.<sup>235</sup>

### G. *Proposals Regarding the Recording of Mines*

The proposals regarding Article 7 seek to strengthen the criteria that require parties to record the location of mines.<sup>236</sup> The proposals from the Final Experts Meeting would require parties to comply with specifications for recording that are found in the Technical Annex,<sup>237</sup> and to keep the records for use after the cessation of hostilities.<sup>238</sup> Such records would be used to protect civilians and would be made available to the U.N. Secretary-General.<sup>239</sup>

### H. *Proposals Regarding the Protection of U.N. Forces and Missions*

Article 8 of the Landmine Protocol concerns the protection of U.N. forces and missions, whether for peacekeeping, observation, or fact-finding purposes.<sup>240</sup> Proposed Paragraph 1 would require parties, upon request, to provide all mine information to the head of the U.N. operation.<sup>241</sup> Parties would also be required to remove or neutralize all mines in the area<sup>242</sup> and to take necessary measures to protect the personnel of the U.N. forces.<sup>243</sup>

The Final Experts Meeting Report contains three proposed versions of Paragraph 2. In the first, if an authorized U.N. mis-

---

transfer clause is essential for successful compliance with the Landmine Protocol of states that would otherwise be loathe to sign on. Interview with David Gowdey, Department of Humanitarian Affairs, United Nations, in New York (Jan. 30, 1995).

234. *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 6 ter(3), at 15; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 6 ter(3), at 8.

235. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 6 ter(4), at 8.

236. *Id.* art. 7, at 9.

237. *Id.*

238. *Id.*

239. *Id.*

240. *See supra* notes 135-38 and accompanying text (describing Article 8).

241. *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 8(1)(c), at 17; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 8(1), at 9.

242. *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 8(1)(a), at 17; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 8(1)(a), at 9.

243. *Report of the Third Experts Meeting*, *supra* note 9, annex, art. 8(1)(b), at 17; *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 8(1)(b), at 10.

sion is performing functions in an area with the consent of the parties to an armed conflict, the parties must provide, upon request, all mine information to the head of the mission as well as protection where possible.<sup>244</sup> The second version of Paragraph 2 proposed would require that when an ICRC mission is performing authorized functions with the consent of the parties, the parties must, upon request, provide protection, to the extent feasible, as well as mine information.<sup>245</sup> The third version would require the parties to provide the same safeguards, when requested, to the head of an impartial humanitarian organization that performs consensual functions in the area.<sup>246</sup> The proposed Paragraph 3 provides that when a United Nations or other fact-finding mission performs functions in any area with the consent of the parties, each party must provide feasible protection.<sup>247</sup> If unable to provide protection, the parties must make available landmine information in its possession.<sup>248</sup>

### I. *Proposals Regarding Mine Removal*

Article 9 concerns the removal of mines.<sup>249</sup> The current version requires parties, after the cessation of active hostilities, to assist one another in removing or rendering ineffective minefields.<sup>250</sup> The Final Experts Meeting Report contains two proposed versions of Article 9. Paragraph 1 of the first proposed Article 9 would require that parties either remove, destroy, or maintain all mines, without delay, in areas under their control after fighting has ceased.<sup>251</sup> If the party no longer has control over an area where it has laid mines, the party shall provide the controlling party technical and material assistance so that the controlling party can fulfill its demining obligations.<sup>252</sup> Paragraph 2 would impose a duty on parties to reach agreement with other states parties and international organizations, where appropriate, including joint operations and technical and material

---

244. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 8(2)(a), at 10.

245. *Id.* art. 2(b), at 10.

246. *Id.* art. 2(c), at 11.

247. *Id.* art. 8(3), at 11.

248. *Id.*

249. *See supra* note 139 and accompanying text (describing Article 9).

250. *See supra* note 139 and accompanying text (describing Article 9).

251. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 9(1), at 11.

252. *Id.* art. 9(1)(b), at 11.



assistance, to fulfill demining obligations.<sup>253</sup>

In the alternative version of Article 9 proposed, dealing with technological cooperation, mine clearance, and the implementation of the Landmine Protocol,<sup>254</sup> Paragraphs 1 and 2 would obligate parties to partake in the exchange of equipment, material, and information concerning mine clearance and the implementation of the Landmine Protocol<sup>255</sup> either through the United Nations, international bodies, or bilaterally.<sup>256</sup> The mine clearance section of Article 9, as proposed in the alternative, calls for states parties to provide mine clearance information to the U.N. data bank, and for the United Nations to provide expert advice and to assist states parties in their own mine clearance programs.<sup>257</sup> This proposal would impose assistance duties on states parties and mechanisms for requests for assistance.<sup>258</sup> Two implementation paragraphs would impose a duty on parties to provide information to the United Nations concerning implementation, including the technical requirements for features like self-destructing mines, and would provide the means to transfer such information to countries in need of the information.<sup>259</sup>

### *J. Verification and Compliance Proposals*

The current CCW contains no provisions for verification of compliance by states parties. Some states, including China and Cuba, oppose any provision for verification at all, and propose a non-binding transparency resolution.<sup>260</sup> Other nations, mainly Western powers including France and Germany, call for precise verification measures.<sup>261</sup> France submitted a working paper for the Second Experts Meeting with proposals for an Article 10 regarding "verification of compliance with the provisions," and an Article 11 regarding "measures to guarantee compliance with

---

253. *Id.* art. 9(2), at 12.

254. *Id.* art. 9 bis, at 12.

255. *Id.* art. 9 bis(1)-(2), at 12.

256. *Id.*

257. *Id.* art. 9 bis(3)-(4), at 12.

258. See *supra* notes 249-59 and accompanying text (outlining proposals to Article 9).

259. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 9 bis(7)-(8), at 13.

260. *Experts Make "Remarkable Progress" on Mines Ban*, *supra* note 199.

261. *Id.*

the Protocol and responsibility for removal of mines."<sup>262</sup>

The Final Experts Meeting contains three alternative proposals relating to verification and compliance. Alternative A promotes transparency and cooperation but does not specifically provide means for verification or enforcement.<sup>263</sup> Alternative B requires parties to protect civilians from landmines, and to voluntarily take certain measures toward that end.<sup>264</sup> Each state party would also have to provide the Depositary with an annual report documenting the efforts of that state to protect civilians from the indiscriminate effects of landmines.<sup>265</sup> The report would be distributed upon request to any other state party by the Depositary.<sup>266</sup> Alternative C is more comprehensive and detailed.<sup>267</sup> The proposed Article 10 would establish a Verification Commission,<sup>268</sup> and Article 11 would provide mechanisms for fact-finding missions.<sup>269</sup> Article 12 would outline procedures for the Commission to deal with violations, including obligating the party in violation to remedy the wrong, collective measures in conformity with international law, and the referral of matters to the U.N. Security Council.<sup>270</sup>

### III. THE AMENDED LANDMINE PROTOCOL WILL FAIL TO PROTECT CIVILIANS UNLESS IT CONSIDERS HUMANITARIAN CONCERNS AND THE REALITY OF MODERN LANDMINE WARFARE

Despite the international law that regulates landmine warfare,<sup>271</sup> civilians are not adequately protected from the use of

---

262. *Report of the Second Experts Meeting*, *supra* note 63, app. I, arts. 10-11, at 16-17.

263. *Report of the Final Experts Meeting*, *supra* note 10, annex I, app. 1, alt. A.

264. *Id.* alt. B(1).

265. *Id.* alt. B(2)-(3).

266. *Id.*

267. *Id.* alt. C.

268. *Id.* alt. C, art. 10. Article 10 does not contain a proposal by which the Secretary-General, in certain circumstances, would be authorized to request a convening of the Verification Commission. *Id.* The Third Experts Meeting Report did contain such a provision. *Report of the Third Experts Meeting*, *supra* note 9, n.1, at 21.

269. *Report of the Final Experts Meeting*, *supra* note 10, annex I, app. 1, alt. C, arts. 10-11.

270. *Id.* art. 12.

271. See *supra* notes 71-139 and accompanying text (describing international law regulating landmines).

landmines.<sup>272</sup> The international community has made great strides in recognizing the global landmine crisis and in recognizing the failure of international law to control the problem. The Review Conference, however, is in danger of repeating the mistakes made by the original convention. The Reports of the Experts Meetings indicate that, once again, humanitarian concerns will be given insufficient weight in proportion to military considerations.<sup>273</sup> The proposals aimed at satisfying humanitarian concerns ignore the reality of modern landmine warfare and will fail to protect civilians from the use of landmines.

### A. *The Failure of the Landmine Protocol*

The Landmine Protocol has been ineffective because it placed greater emphasis on military considerations than humanitarian concerns. The failure of the drafters of the Landmine Protocol to adequately consider humanitarian considerations is evidenced throughout the document. For example, Article 7 requires the recording of mines that are preplanned.<sup>274</sup> The type of planning this provision refers to rarely occurs in the battlefield.<sup>275</sup> By allowing field officers to circumvent the recording requirement any time they lay mines that are not preplanned, the Landmine Protocol allows parties to an armed conflict to avoid the requirement in its entirety.

In addition, Article 4 of the Landmine Protocol allows landmines to be deployed in populated areas if the mines are placed in close proximity to a military objective.<sup>276</sup> A military

---

272. See *supra* notes 18-35 and accompanying text (describing magnitude of landmine crisis).

273. *Report of the Final Experts Meeting*, *supra* note 10, annex III, rule 1. Only states parties to the CCW may be represented at the Review Conference. *Id.* Representatives of the ICRC may participate as observers. *Id.* rule 48. NGOs may only attend certain public meetings and may make available written contributions concerning matters on which they have a special competence. *Id.* rule 49. The United States, recognizing the valuable expertise that NGOs would contribute to the process of amending the Landmine Protocol, has argued in favor of granting observer status to NGOs. Vance & Okun, *supra* note 13, at 204.

274. CCW, *supra* note 1, Protocol II, art. 7(1)(a), 1342 U.N.T.S. at 170, 19 I.L.M. at 1532.

275. Carnahan, *supra* note 28, at 84. "Preplanned" implies a degree more than "planned," which is arguably a degree more than the planning with which many battlefield operations are undertaken, especially considering the types of forces committing the majority of the more egregious uses of landmines. *Id.*

276. CCW, *supra* note 1, Protocol II, art. 4(2), 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

objective is an object that makes an effective contribution to military action and the capture or destruction of which offers a definite military advantage.<sup>277</sup> Therefore, when an object in the vicinity offers a military advantage, armed forces may place landmines in populated areas without violating the Landmine Protocol. The relatively broad definition of "military objective" allows parties to an armed conflict to place landmines in populated areas, giving preference to military needs rather than humanitarian costs.

Finally, Article 5(1) allows the use of long-lived remotely delivered mines as long as they are accurately recorded.<sup>278</sup> The wording of Paragraph 1 ignores the fact that remotely delivered mines, by their nature, cannot be accurately recorded.<sup>279</sup> Forces are permitted to produce and deploy long-lived scatterables, despite the fact that such mines are not being accurately recorded.

The recording requirements of Article 7 and Article 5(1), as well as the military objective requirement of Article 4, all fail to affirmatively place a functional duty on military officers. These provisions reflect the disposition of the drafters of the Landmine Protocol, who wrote the Landmine Protocol primarily with military considerations in mind. In fact, in some instances, the Landmine Protocol places less restrictions on the use of landmines than if military forces complied with previously existing agreements.<sup>280</sup>

While some provisions of the Landmine Protocol were actually directed at humanitarian concerns, their effectiveness has been undermined by the reality of modern landmine warfare. The prohibition on the use of landmines that are not directed at a military objective was an attempt to protect civilians.<sup>281</sup> Similarly, the provision expressly prohibiting the directing of landmines against the civilian population was aimed at humanitarian concerns.<sup>282</sup> Like the rest of the Landmine Protocol, how-

---

277. *Id.* art. 2(4), 1342 U.N.T.S. at 168, 19 I.L.M. at 1530.

278. *Id.* art. 5(1)(a)-(b), 1342 U.N.T.S. at 169, 19 I.L.M. at 1531.

279. *See supra* note 130 (describing difficulties of recording remotely delivered mines).

280. *See supra* note 124 (comparing protections of Article 3 of the Landmine Protocol to Article 51 of the Additional Protocol I).

281. CCW, *supra* note 1, Protocol II, art. 3(3)(a), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530.

282. CCW, *supra* note 1, Protocol II, art. 3(2), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530.

ever, neither of those provisions has curbed the proliferation of landmine warfare, nor protected civilians from the effects of landmines.<sup>283</sup> The parties using the majority of landmines simply ignore these restrictions. By allowing landmines to be produced, transferred, and deployed, the Landmine Protocol has allowed parties to armed conflicts to continue to use landmines as they see fit.

### B. *The Impending Failure of the Review Conference*

The results of the Reports of the Experts Meetings suggest that the participants of the Review Conference will make many of the same mistakes that were made by the drafters of the CCW. The Review Conference will once again emphasize military considerations.<sup>284</sup> Humanitarian concerns are not being weighed commensurate with military considerations as mandated by customary international law.<sup>285</sup>

The participants of the Experts Meetings have recognized the failure of the Landmine Protocol. The provisions that have been proposed in response to that failure, however, demonstrate a lack of regard for both humanitarian concerns and the reality of modern landmine warfare. For example, proposed Article 4 will attempt to prevent the use of long-lived mines. Parties will be forced to use mines that self-destruct, or else comply with expensive and difficult restrictions.<sup>286</sup> In theory, this provision will prevent the widespread use of long-lived mines. In reality,<sup>287</sup> however, parties will be allowed to make, stockpile, and use long-lived mines. Parties who now show little regard for the current

283. See *supra* notes 18-35 and accompanying text (describing how landmine use has proliferated and caused great damage to civilians).

284. See *supra* note 273 (outlining lack of humanitarian representation at Review Conference).

285. See *supra* notes 71-75 and accompanying text (explaining how customary international law and fundamental principle of proportionality limit permissible methods of warfare). The Author believes that allowing NGOs greater participation and responsibility in the process of regulating landmine warfare would help satisfy the principle of proportionality.

286. *Report of the Final Experts Meeting, supra* note 10, annex I, art. 4, at 5. The restrictions require parties using mines that are not self-destructing to fence, monitor, and mark such minefields. *Id.*

287. The idea that parties to armed conflicts will fence, monitor, and mark their minefields is optimistic. See Jefferson, *supra* note 3, at 105. "[T]he defined minefield is a comparatively rare and ideal situation." *Id.* The forces that engage in the bulk of landmine warfare deploy landmines "haphazardly and without marking." *Id.*

Landmine Protocol will show the same disregard for the amended Landmine Protocol and will have the option of using long-lived landmines.

In addition, the proposed Article 3, like Article 3 of the current Landmine Protocol,<sup>288</sup> allows the use of landmines that may be expected to cause incidental injury to civilians if the expected damage is not excessive to the anticipated military advantage.<sup>289</sup> Such language symbolizes the international community's manifest lack of consideration for humanitarian concerns. Besides permitting the use of landmines expected to harm civilians,<sup>290</sup> the proposed Article 3 lets military leaders use a balancing test to determine the legality of landmine use. By including this provision in the proposals for the amended Landmine Protocol, the drafters have undermined the effectiveness of a regulation designed to prevent the indiscriminate use of landmines.

Controlling the global landmine crisis by tightening restrictions on the use of mines failed in the original Landmine Protocol. Military leaders do not consider these international agreements when making decisions in the field of combat. The mere tightening of restrictions in the amended Landmine Protocol will again fail to protect civilians from the practical reality of military forces abusing loopholes, ignoring restrictions, and continuing to use landmines in a manner that adversely affects civilians.

### C. A Total Ban Is the Only Solution

Rather than placing restrictions on the choices made by military forces, the problem must be addressed at its root. In order to prevent the damage inflicted upon civilians by landmines, efforts must be made to eliminate the availability of landmines for military use. To do so would require the imposition of a ban on the use, production, stockpiling, and transfer of landmines, combined with an effective verification and compliance mechanism.

Even if made completely illegal, some countries may produce and use landmines. There are two distinctions, however,

---

288. CCW, *supra* note 1, Protocol II, art. 3(3)(c), 1342 U.N.T.S. at 169, 19 I.L.M. at 1530.

289. *Report of the Final Experts Meeting*, *supra* note 10, annex I, art. 3(6)(c), at 4.

290. See *supra* note 124 and accompanying text (explaining how balancing test allows landmine warfare violating Article 51(4) of Additional Protocol I).

that set a total ban apart from measures that merely tighten restrictions. The first is that a total ban would be more easily and effectively enforced than a partial one.<sup>291</sup> A breach of a total ban would be evident<sup>292</sup> and would subject parties having, using, making, or selling landmines to sanctions and international pressure to comply.<sup>293</sup> For such a stigma to be effective, it must be attached to the weapon itself. The stigma would lose its effectiveness if certain types of landmine use were permitted, while others were prohibited.<sup>294</sup>

The second distinction is that there would be no room for judgment in interpreting a total ban. As the failure of the Landmine Protocol has shown,<sup>295</sup> restrictions are often ignored on the battlefield. Experience has demonstrated that when parties have access to landmines, they use them in abundance, ignoring the complex restrictions on use.<sup>296</sup>

A total ban will not make landmines impossible to make, buy, or use. Such a ban would, however, increase the costs of using landmines, both monetarily, and politically, in terms of dealing with the international stigma associated with violating a treaty aimed at humanitarian objectives. These increased costs would result in decreased deployment of landmines. Fewer landmines deployed would harm fewer civilians.

#### D. *The Military Utility of Landmines Does Not Preclude a Total Ban*

Military leaders believe that landmines are essential to their strategies and objectives.<sup>297</sup> Commentators have expressed reservations about the viability of a control measure that would conflict directly with the express convictions of the military community.<sup>298</sup> The lack of interest by military leaders in curbing

---

291. *Anderson Testimony*, *supra* note 7.

292. Vance & Okun, *supra* note 13, at 207.

293. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 12. Attaching a stigma to the use of chemical and biological weapons, which are considered repugnant by the international community, has reduced the use of such weapons. *Id.*; see *supra* note 270 and accompanying text (giving example of sanctions and international pressure to comply).

294. *Id.*

295. See *supra* notes 18-35 and accompanying text (establishing that civilians have not been protected).

296. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 12.

297. *ICRC Report*, *supra* note 10, annex II. This conclusion may be debatable, but it must be accepted as the military view. See *supra* note 42 (questioning military utility of landmines).

298. Falk, *supra* note 6, at 82.

landmine use helps to explain why partial bans have failed in the past and will continue to fail in the future, but does not mean that a total ban cannot succeed. By precluding countries from having, making, using, or selling landmines, a total ban would take the power to violate such a treaty out of the hands of the military leaders who are prone to violating its provisions. If they cannot obtain landmines, military leaders will not be able to use the devices.

Military utility alone does not satisfy the inquiry into the legality of a weapon. Dum-dum bullets<sup>299</sup> and chemical and biological warfare were both systems of warfare with military utility that were banned.<sup>300</sup> Customary international law necessitates a balancing test between military utility and humanitarian costs.<sup>301</sup> With landmines, the issue of military utility may be debatable, but the issue of humanitarian costs is not. The loss has been quantifiably measured in terms of human lives and economics.<sup>302</sup> Military leaders oppose a total ban because they want to have the option of using landmines. The cost of that option is that landmines are available for use throughout the world, killing and maiming civilians.

#### E. A Total Ban Is Viable

Cornelio Sommagura, president of the ICRC, was told that the idea of a total ban was a utopian ideal.<sup>303</sup> Indeed, many of the opponents of a total ban believe that it is not a viable option because the influential people do not consider a total ban a realistic option. While this may have been the case until recently, the momentum toward a total ban on landmines has increased substantially in the past few years, and includes a number of highly respected persons and organizations. Secretary-General Boutros Boutros-Ghali has written several articles, which advo-

---

299. See *supra* note 78 and accompanying text (describing prohibition of bullets that expand upon contact with soft surface).

300. LANDMINES: A DEADLY LEGACY, *supra* note 37, at 314. The relative success of international law in controlling chemical and biological weapons may be due to the fact that it was accomplished via a total ban. *Id.*

301. See *supra* notes 71-75 and accompanying text (explaining how customary international law and fundamental principal of proportionality limit methods of warfare).

302. See *supra* notes 18-27 and accompanying text (describing humanitarian and economic costs of use of landmines).

303. Sheridan, *supra* note 174.



cate a total ban.<sup>304</sup> South African Archbishop Desmond Tutu has stated that a total ban is the only sure way to save lives from landmines<sup>305</sup> and has called on the countries of Africa to support such a measure.<sup>306</sup> Senator Patrick Leahy [D-Vt.], former Chairman of the Senate Foreign Security Council, has been a vocal proponent of a total ban.<sup>307</sup> Senator Leahy's efforts have been instrumental in pushing the United States to its current position on landmines.<sup>308</sup> Representative Lane Evans [D-Il.] has also played a large role in the U.S. efforts.<sup>309</sup> Former U.S. President Jimmy Carter has officially endorsed the efforts of the NGO campaign to totally ban landmines,<sup>310</sup> and former U.S. Secretary of State Cyrus Vance has testified before Congress about the need for the United States to lead the way in obtaining a global ban on the use of landmines.<sup>311</sup>

The popular cry for the total ban of landmines cannot be ignored. Twenty years ago, few people were aware of the damage resulting from landmines. Today, journalists' coverage of landmine damage around the globe have heightened the public's awareness. As one Australian arms control diplomat stated, while the 1980's was the decade to control chemical weapons globally, the 1990's is the decade for landmines.<sup>312</sup> The principles of customary international law have successfully banned weapons in the past when their harm to civilians outweighed their military utility.<sup>313</sup> Landmines are such a weapon,<sup>314</sup> and thus the international community should implement a total ban.

304. See *supra* notes 183-86 and accompanying text (describing role of Secretary-General Boutros Boutros-Ghali in fight to ban landmines).

305. *Zimbabwe; South African Bishop Calls for ban on Land Mines*, BBC Summary of World Broadcasts, Mar. 4, 1995, available in LEXIS, News Library, CURNWS File.

306. *Id.*

307. See *supra* note 154 (citing letter to editor of New York Times by Senator Leahy concerning need to ban landmines).

308. *Anderson testimony*, *supra* note 7.

309. *Id.*

310. LANDMINES: A DEADLY LEGACY, *supra* note 37, app. 16, at 460.

311. *Prepared Statement of Cyrus R. Vance and Herbert A. Okun Before the Foreign Operations Subcommittee of the Senate Appropriations Committee*, *supra* note 38.

312. Warren Osmond, *Australia Pushes for Landmine Controls*, Sydney Morning Herald, Feb. 26, 1994, available in LEXIS, News Library, CURNWS File.

313. See St. Petersburg Declaration, *supra* note 76 (banning type of bullet); see 1925 Geneva Protocol, *supra* note 87 (banning chemical weapons).

314. See *supra* note 110 and accompanying text (discussing how international law prohibits modern use of landmines).

### CONCLUSION

The current Landmine Protocol tightened restrictions on the use of landmines, but nonetheless failed to control the global landmine crisis. In response to the global landmine crisis, the Governmental Experts Meetings have proposed amendments to the Landmine Protocol that will tighten restrictions on the use of landmines. Based on the Reports of these Meetings, the U.N. Review Conference will not adopt a total ban on the production, use, transfer, and stockpiling of landmines. Mere restrictions on the use of landmines, however, fail to safeguard civilians. In order to protect civilians, the international community must impose a ban on the manufacture, use, transfer, and stockpiling of landmines, coupled with an effective verification and compliance scheme.