Examples of existing CCW Protocols

I. Introduction

1. This background paper was prepared by the Implementation Support Unit of the Convention on Certain Conventional Weapons (CCW) at the request of the Chair of the Group of Governmental Experts (GGE) on emerging technologies in the area of lethal autonomous weapons systems (LAWS), to facilitate discussions of the Group. The paper aims to provide an overview of the example of existing Protocols within the Convention and the ways in which they address the weapons under their scope.

2. The topic of this paper is derived from the current mandate of the Group which states, inter alia, that the “Group is to further consider and formulate, by consensus, a set of elements of an instrument, without prejudging its nature, and other possible measures to address emerging technologies in the area of lethal autonomous weapon systems, taking into account the example of existing Protocols within the Convention, proposals presented by High Contracting Parties and other options related to the normative and operational framework on emerging technologies in the area of lethal autonomous weapon systems, building upon the recommendations and conclusions of the Group, and bringing in expertise on legal, military, and technological aspects.”1 It also aims to respond to the requests from delegations made during the 2024 first session, whereby delegations indicated that taking into account the example of existing Protocols could be useful for making further progress in the discussions to address LAWS. The elaboration of this paper is without prejudice to the

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further exploration of other options related to the normative and operational framework in the area of LAWS.

3. The paper first provides a concise overview of the examples of the existing CCW Protocols, highlighting how the instruments prohibit and/or restrict the weapons they address; the basis under international humanitarian law (IHL) for the prohibitions; whether definitions or descriptions are contained in the instruments; what other obligations may be included; any further guidance, risk mitigation and/or preventive measures; and what reporting obligations and measures to ensure compliance with the Convention and Protocols exist.

4. The paper additionally offers an overview of the key aims, purpose and scope of the framework Convention, as well as focused information on each of the existing CCW Protocols, touching upon the same categories mentioned above and others. For brevity, not all provisions or aspects of the Protocols are examined, but rather the aspects that the GGE may find particularly relevant to its discussions on elements of an instrument and possible measures to address LAWS are highlighted.

II. Concise overview of the examples of existing Protocols

5. The CCW Protocols adopt tailored approaches to addressing the weapons within their scope, but some commonalities can be observed.

6. As regards prohibitions, these are based on either the prohibition under IHL against using means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering, or the prohibition on the use of weapons which are by nature indiscriminate (Amended Protocol II could be said to encompass both prohibitions). All Protocols are based on the IHL principles of humanity, distinction, proportionality and military necessity. Additionally, some Protocols reaffirm, clarify and/or expand certain rules of IHL, such as Amended Protocol II in relation to specifically protected persons, or Protocol III in relation to impacts on the natural environment.

7. All prohibitions are based on the use of a weapon with certain effects, which are deemed to be excessively injurious or to be indiscriminate. Some Protocols specify that a weapon must have been designed to have a certain effect (Protocols III and IV, Amended Protocol II) and/or refer to the specific purpose of the weapon (e.g., Protocols III and IV). Furthermore, certain Protocols also contain prohibitions on the transfer and/or production of a weapon (Amended Protocol II, Protocol IV).

8. Some Protocols focus on prohibiting the use of a weapon without including further information on the circumstances of such use (Protocols I, IV), while others specify that the weapon cannot be used against certain targets (i.e., civilians or civilian objects – Amended Protocol II, Protocol III), and/or in certain conditions or geographical scope (e.g., military objects within a concentration of civilians – Protocol III, or clearly marked areas – Amended Protocol II), or through certain means (e.g., air-delivered – Protocol III).

9. Certain Protocols include both prohibitions and restrictions (Amended Protocol II, Protocol III). Regarding the restrictions, the Protocols often phrase these as exceptions to the prohibitions, detailing the specific permitted circumstances of their use. To do this, some Protocols rely on specific IHL rules (without stating these explicitly), such as those on precautions in attack (Amended Protocol II, Protocol III), advance warning (Amended Protocol II), or target selection (Protocol III).

10. Protocol IV only prohibits the weapons under its Article 1, but additionally clarifies how other comparable technologies (i.e., laser systems) should be used to avoid any incidental effects similar to those described in Article 1.

11. The definitions put forward by the Protocols clarify the scope of the weapons being addressed (Amended Protocol II, Protocols III and V). Other Protocols do not provide definitions, but rather descriptions of the weapons, their effects, design and/or functions (Protocols I and IV). Certain Protocols also include examples of weapons falling within and outside of their scope, to further clarify the latter (Protocols III and IV).
12. Some existing Protocols also include other obligations that are not prohibitions or restrictions on the use, and these include matters such as cooperation among High Contracting Parties (HCPs), obligations toward protected persons, recording and sharing information, as well as clearance and destruction, among others (Amended Protocol II and Protocol V).

13. The Protocols may also contain further guidance, risk mitigation and/or preventive measures that may be either of an obligatory nature (e.g., the Technical Annex of Amended Protocol II) or voluntary (e.g., the Technical Annex of Protocol V). Several provisions seek to provide more detailed and specific guidance on already-existing IHL obligations (e.g., Amended Protocol II, Protocol III).

14. As regards reporting obligations and measures to ensure compliance, only Amended Protocol II and Protocol V include in their texts such mechanisms, which may include specifying that an HCP must take measures to prevent and suppress violations of the instrument within the realm of its jurisdiction (Amended Protocol II); the CCW Compliance Mechanism, adopted at a date subsequent to the adoption of the Convention, applies to the framework Convention and all Protocols.

III. Overview of the framework Convention

Key aims and purpose of the CCW

15. The CCW aims to protect civilians against the effects of hostilities and to protect combatants from superfluous injury and unnecessary suffering. It does this through prohibiting or restricting, through its Protocols, the use of specific types of weapons that may either cause unnecessary suffering to combatants or have indiscriminate effects.

16. This aim is reflected in the title of the Convention itself, as well as in its preamble, in which the HCPs recall the general principle of the protection of the civilian population against the effects of hostilities (preambular paragraph 2), and base themselves on the principle of international law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited (preambular paragraph 3), as well as on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (preambular paragraph 3).

17. In addition to the protection of civilians and combatants, HCPs also recalled in the preamble to the CCW the prohibition of employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (preambular paragraph 4).

18. Though the CCW is primarily an instrument of international humanitarian law, some of its existing Protocols also contain disarmament or arms control provisions. As contained in preambular paragraph 7 of the Convention, HCPs recognize the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control. Further, in preambular paragraph 8, the HCPs express their wish to prohibit or restrict further the use of certain conventional weapons and the belief that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of

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such weapons. Some of the existing CCW Protocols include provisions on the production and transfer of weapons.\(^3\)

19. The CCW seeks to adopt new prohibitions or restrictions on weapons or to amend existing ones in response to changes in warfare and weapons development.\(^4\) This is recognized by the HCPs in preambular paragraph 8 of the Convention, which specifies that there is a need to continue the codification and progressive development of the rules of international law applicable in armed conflict. It is also contained in Article 8(1)(a), which states that, at any time after the entry into force of the Convention, any HCP may propose amendments to it or to any annexed Protocol by which it is bound. In addition, Article 8(2)(a) of the Convention states that, at any time after the entry into force of the Convention, any HCP may propose additional protocols relating to other categories of conventional weapons not covered by the existing Protocols.\(^5\) New protocols or amendments are “motivated by a humanitarian desire to prevent developments in technology which are foreseen as posing unacceptable risks against which legal provision is seen by the international community of states to be appropriate.”\(^6\)

### Scope of the CCW

20. The Convention applies to certain conventional weapons, which can be taken to mean weapons other than those of mass destruction.\(^7\) Article 8(2)(a) of the Convention stipulates that, at any time after the entry into force of the Convention, any HCP may propose additional protocols relating to other categories of conventional weapons not covered by the existing Protocols.\(^8\) This scope is also referenced in preambular paragraphs 9 and 12. It has been observed that this scope “should also be interpreted sensibly and non-restrictively” as it will not only refer to particular weapons technologies, as shown by the various types of weapons covered by Protocol V.\(^9\)

21. As per amended Article 1, paragraphs 1 and 2 of the CCW, the Convention and its Protocols apply to both international and non-international armed conflicts, as referred to in common Articles 2 and 3 to the Geneva Conventions of 1949, respectively. CCW Article 1(2) also specifies that the Convention and its Protocols do 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.

22. Article 1, paragraph 7 of the CCW states that the provisions of paragraphs 2-6 of Article 1 shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to that article and thus “future negotiators are free to determine the scope of application of protocols in preparation”.\(^10\) It is also worth noting that Protocol V applies to post-conflict situations and Amended Protocol II contains provisions that apply after the cessation of hostilities.

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\(^3\) Amended Protocol II and Protocols IV and V. Although Amended Protocol II and Protocol IV “apply primarily in situations of armed conflict, it is understood that the prohibitions on transfer also apply in peacetime.” (Casey-Maslen, 31. No. 2 supra.)


\(^5\) See also Article 8 (3)(a) which states that consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols at a review conference.


\(^8\) Emphasis added. See also Article 8(3)(a) which states that consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols at a review conference.

\(^9\) Boothby, 114. No. 6 supra.

\(^10\) Ibid., 111.
IV. Protocol I

Prohibitions:

23. Protocol I prohibits the use of “any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.” (Article 1).

24. The essence of the text is “the ‘primary effect’ of the weapon, as distinct from any subsidiary effect.”11 Additionally, weapons that have the primary effect of injuring by fragments that can be detected by X-rays, such as metal fragments, are not prohibited under the protocol.12

Definitions:

25. Protocol I does not define a weapon as such, but rather describes its effects.

26. The title of Protocol I also reflects this approach, as it focuses on “Non-detectable fragments” rather than on the specific weapon type. It can be said that Protocol I relates to “weapons that injure by non-detectable fragments,” which is a description of the weapons covered based on their effects.

Basis in IHL for the prohibitions:

27. The effects of the weapons referred to in Article 1 are deemed to be excessively injurious and to cause unnecessary suffering.13 The prohibition on the use of such weapons is based on the rule under international humanitarian law that the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.14

V. Amended Protocol II

Prohibitions and restrictions:

On use

28. Amended Protocol II prohibits and restricts certain specific uses of mines, booby-traps and other devices. It “developed the law and gave significantly greater precision to the restrictions and prohibitions applicable to these weapons”15 and codified and therefore clarified a body of law about which there was substantial disagreement.16

29. Regarding the prohibitions, under Article 3(3), the protocol prohibits “in all circumstances to use any mine, booby trap, or other device that is designed or of a nature to cause superfluous injury or unnecessary suffering.” This is a reiteration of the prohibition against the use of such weapons, tailored to the weapons covered by the Protocol.

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12 Ibid.
14 Additional Protocol I to the Geneva Conventions (1977), Article 35(2) and International Committee of the Red Cross, Customary IHL, “Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering”, inter alia.
15 Boothby, 166.
30. Paragraphs 5 and 6 of Article 3 prohibit the use of specific types of mines, booby traps or other devices that have indiscriminate effects, specifically as related to detection and clearance.

31. Under Article 3(7), it is prohibited to direct mines, booby-traps and other devices against civilians or civilian objects either in offence, defence or by way of reprisal. This prohibition is related to the general one under IHL prohibiting making civilians or civilian objects the target of attacks but has an additional specification that the weapons cannot be used by way of reprisal.

32. Article 3(8) prohibits the indiscriminate use of the weapons to which Article 3 applies; it further defines what is meant by “indiscriminate use” as determined by the way in which the weapons are emplaced. It specifies that this means placement (a) that is not on or directed against a military objective; (b) employing a method or means of delivery that cannot be directed at a specific military objective; or (c) which could be expected to cause incidental harm to civilians and civilian objects that would be excessive in relation to the anticipated military advantage.

33. Regarding the restrictions, under Article 4, the protocol prohibits the use of a specific type of anti-personnel mine, namely those that are not detectable. As such, it does not prohibit the use of other types of anti-personnel mines.

34. Article 5 places restrictions on the use of anti-personnel mines that are not remotely delivered. Paragraph 2 indicates that the use of such weapons is prohibited unless they comply with certain provisions on self-destruction and self-deactivation as specified in the Technical Annex. It then provides for exceptions to this prohibition on use, creating obligations on marking, fencing and clearance. Paragraph 3 provides for exceptions to those obligations; paragraph 4 obliges States to attempt to comply with the obligations under certain circumstances; and paragraph 5 obliges States to take all feasible precautions to safeguard the marking of areas. Paragraph 6 provides for further exceptions on the use of anti-personnel mines other than remotely-delivered mines that function in a certain manner, within a specified time period and with geographical limitations and monitoring.

35. Article 6 relates to remotely-delivered mines and prohibits their use unless they meet recording requirements (para. 1) and comply with self-destruction and self-deactivation provisions contained in the Technical Annex. Paragraph 3 restricts the remote delivery of mines other than anti-personnel mines to those that comply with certain technical specifications.

36. Article 7 creates prohibitions on the use of booby-traps and other devices, by specifying that these can never be used in any way as attached to or associated with several categories of objects and persons or in specific manners, among others (paragraphs 1 and 2). Article 7(3) creates exceptions to the prohibitions depending on the targets, geographical considerations, and provides for risk mitigation measures to protect civilians.

On transfer

37. Article 8 prohibits the transfer by HCPs of all mines the use of which is prohibited by the Protocol, as well as of transfers to non-State actors.

On production

38. The use of mines produced after the entry into force of Amended Protocol II is prohibited unless they have a visible, legible and durable marking containing specific information such as the name of the country of origin, the date of production and the serial number (Technical Annex, paragraph 1 (d)).

39. Moreover, all anti-personnel mines produced after 1 January 1997 must include “a material or device that enables the mine to be detected by commonly-available technical mine detection equipment” (Technical Annex, paragraph 2 (a)). Anti-personnel mines produced before this date can still be used, only if such material or device was incorporated in their
construction or if it was attached prior to their emplacement, in a manner not easily removable (paragraph 2 (b)).

Definitions:

40. Amended Protocol II provides definitions for all the weapons for which it prohibits or regulates the use of, including by specifying the manner of its placement, the purpose for which it is designed, and/or the method of delivery (Article 2(1) to (5)).

41. To ensure consistent interpretation and application of Amended Protocol II, Article 2(6) to (9) provide definitions for key terms such as “military objective” and “civilian objects”. These definitions align with existing international humanitarian law as provided for under Additional Protocol I to the Geneva Conventions and customary law. Additionally, Article 2(10) to (14) focus on providing technical specifications including “self-destruction mechanism”, “self-deactivating” and “anti-handling device”. It further explains what is meant by “transfer” for the purposes of the protocol (Article 2(15)).

Scope of application:

42. Article 1 of Amended Protocol II defines its scope of application and specifies, among others, that the instrument applies to both international and non-international armed conflicts (paragraph 2). Moreover, and complementary to the definitions provided under Article 2, Article 1(1) specifies the geographical scope of the use of the weapons covered by the Protocol, stating that the Protocol relates to use on land, but not to anti-ship mines at sea or in inland waterways.

Basis in IHL for the prohibitions:

43. The prohibitions and restrictions on the use of mines, booby-traps and other devices are based on the prohibition of indiscriminate attacks under the principle of distinction in international humanitarian law, as well as on the general principle of protection of the civilian population “against dangers arising from military operations”. Additionally, the effects of the weapons referred to in Article 3(3) are deemed to be excessively injurious. The prohibition on the use of such weapons is based on the rule under international humanitarian law that the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.

45. The obligations specified in Article 12 are based on the obligation to respect and protect humanitarian relief personnel, as provided for under Additional Protocol I to the Geneva Conventions and customary law.

Other obligations:

46. Under Article 9, Amended Protocol II creates obligations related to recording and the use of information on minefields, mined areas, mines, booby-traps and other devices. Article

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17 Additional Protocol I to the Geneva Conventions (1977), Articles 52(2) and 52(1).
20 Additional Protocol I to the Geneva Conventions (1977), Article 51.
21 Though it has also been argued that the CCW protocols actually do not conclude that the weapons under their scope cause superfluous injury. (Parks, 522, No. 2 supra.)
22 Additional Protocol I to the Geneva Conventions (1977), Article 71 (2).
23 International Committee of the Red Cross, Customary IHL. “Rule 31. Humanitarian Relief Personnel”.

10 contains obligations for HCPs related to the removal of minefields, mined areas, mines, booby-traps and other devices after the cessation of hostilities, as well as on international cooperation for such purposes, both among HCPs and with international organizations.

47. Article 11 specifies how HCPs should cooperate and assist each other for the purposes of mine clearance (paragraphs 1-5) and the transfer of technology to facilitate the implementation of relevant prohibitions and restrictions contained in the Protocol (paragraph 6) and of the period of deferral of compliance with the specifications on self-destruction and self-deactivation (paragraph 7).

**Further guidance, risk mitigation and/or preventive measures:**

48. Amended Protocol II contains a number of provisions that provide further guidance to improve compliance with prohibitions and restrictions and/or with already existing provisions of IHL. For example, Article 3(9) specifies that “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 are not to be treated as a single military objective”, which provides further guidance for determining an area or target of an attack. Additionally, under Article 3(10), HCPs must take all feasible precautions to protect civilians from the effects of weapons to which that article applies. Other such articles that provide further guidance and/or are intended to mitigate risks or harm for civilians include Articles 5(4) and (5); 6(4) and 7(3)(b).

49. Article 12 provides guidance additional and without prejudice to “existing international humanitarian law, or other international instruments as applicable” for an HCP to protect specified forces or missions from the effects of mines, booby-traps and other devices in any area under its control by, among other things, removing such weapons, informing the forces or missions of the location of the weapons and providing safe passage (paras. 1-5). It also contains an expectation that the information provided to forces or missions will be treated in strict confidence (para. 6).

50. Amended Protocol II also contains a Technical Annex that sets out in detail the manner in which the recording of the location of mines other than remotely-delivered mines, minefields, mined areas, booby-traps and other devices must be carried out (para. 1). Under paragraph 2, the Technical Annex stipulates the specifications on detectability that anti-personnel mines must comply with and provides the possibility for HCPs to defer their compliance with certain specifications for specific time period. Similarly, paragraph 3 contains the specifications on self-destruction and self-deactivation, while paragraph 4 sets out the manner in which minefields and mined areas should be marked, with an accompanying illustrative diagram. The Technical Annex “has the same legal status as the rest of the Protocol, so states party are bound to adhere to its requirements.”

**Consultations and reporting:**

51. Under Article 13, the Protocol establishes a conference of HCPs that will meet annually, to consult and cooperate with each other on all issues related to the Protocol’s operation (para. 1). Under paragraph 4 of the same article, HCPs are under an obligation to provide annual reports on, in general terms, their implementation of the Protocol; the reports shall be circulated by the Secretary-General to all HCPs ahead of the annual Conference.

**Compliance:**

52. Amended Protocol II contains provisions on compliance, under Article 14. Paragraphs 1 and 2 indicate that HCPs must take measures at the national level to prevent and suppress violations of the Protocol by persons or on territory under its jurisdiction or control. Such measures include those of a legislative nature, as well as those that ensure the imposition of
penal sanctions against individuals wilfully killing or causing serious injury to civilians, contrary to the provisions of the Protocol, and to bring them to justice.

53. Under paragraph 3, Article 14 obliges HCPs to require their armed forces to issue relevant military instructions and operating procedures and to provide training to armed forces personnel to comply with the Protocol.

54. Moreover, under Article 14(4), HCPs undertake to consult and cooperate with each other to resolve any problems relating to the interpretation and application of the Protocol, through various means.

VI. Protocol III

Prohibitions and restrictions:

55. Article 2 of Protocol III imposes prohibitions and restrictions on the use of incendiary weapons against civilians and civilian objects.

56. Regarding the prohibitions, Article 2(1) prohibits “in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.” The specification that such use is prohibited “in all circumstances” makes clear that there can be no exceptions to this prohibition. The inclusion of the words “as such” indicates that the specific targeting of the civilian population, individual civilians or civilian objects and using incendiary weapons against them is always prohibited.

57. Article 2(2) prohibits “in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons”. This provision creates a prohibition without exceptions on air-delivered incendiary weapons against a military objective when it is located within a concentration of civilians, to protect civilians from the indiscriminate effects of incendiary weapons delivered in this manner.

58. Under Article 2(3), it is prohibited “to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”25 This provision creates an exception to the prohibition on the use incendiary weapons against a military objective within a concentration of civilians under three cumulative conditions, as emphasized: incendiary weapons used in this context are not air-delivered; the military objective is clearly separated from the concentration of civilians; and all feasible precautions have been taken to limit or minimize harm to civilians and civilian objects. Article 2(3) therefore creates restrictions on the use of incendiary weapons within specific circumstances.

59. The protocol also prohibits attacks on “forests or other kinds of plant cover” with incendiary weapons, except when “such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives” (Article 2(4)). The first part of this article contains a prohibition, and the second creates an exception to that prohibition within specific circumstances.

Definitions:

60. To clarify the scope of Protocol III, Article 1(1) defines incendiary weapons as weapons or munitions that are meant to set fire to objects or to cause burn injury “through the action of flame, heat, or combination thereof, produced by a chemical reaction of a

25 Emphasis added.
substance delivered on the target.” The definition contains the purpose for which the weapon is designed, its effects, and the process through which it achieves those effects.

61. The protocol further provides examples of incendiary weapons it regulates, such as “flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances” (Article 1(1)(a)), thus clearly indicating that such weapons come under its scope. The specification that these are examples indicates that the list is not exhaustive.

62. Moreover, under Article 1(1)(b), the protocol explicitly excludes other weapons that do not fall within its scope. These include munitions that may have incidental incendiary effects; munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect; and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons. It further provides non-exhaustive examples of each of these types of weapons and at the same time clearly excludes these weapon types.

63. To ensure consistent interpretation and application, Article 1, paragraphs 2 to 5 provide definitions for key terms, namely “concentration of civilians”, “military objective”, “civilian objects” and “feasible precautions.” These definitions align with existing international humanitarian law as provided for under Additional Protocol I to the Geneva Conventions26 and customary law.27

Basis in IHL for the prohibitions:

64. The prohibition on the use of incendiary weapons against civilians or civilian objects as specified in Article 2 is based on the principle of distinction in international humanitarian law,28 including the prohibition of indiscriminate attacks.29

65. Additionally, Article 2(4) prohibiting the use of incendiary weapons on forests or other kinds of plant cover, in addition to being based on the principle of distinction, can also be linked to the prohibition of employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.30

Other observations:

66. Article 2(1) reaffirms the already existing prohibition under international humanitarian law against making civilians or civilian objects the objects of attack and the principle of distinction,31 while Article 2(2) “undoubtedly represented a progressive development of the law at the time of its conclusion”32 and contributed towards enhancing

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26 Additional Protocol I to the Geneva Conventions (1977), Articles 51(5)(a), 52(2), 52(1) and 57.
29 Further, as noted by W.H. Parks, the drafters “were not prepared to conclude that incendiary weapons cause superfluous injury or agree to restrictions on their employment against combatants or their equipment.” (Parks, 521.)
31 Dinstein, p. 100, para. 276. No. 11 supra. and International Committee of the Red Cross, Customary IHL. “Rule 84. The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons”.
the protection of civilians. In addition, it has been argued that “an invaluable clarification of fact and law was agreement as to what is and is not an incendiary weapon.”

67. Under Article 2(3), what constitutes a “clear separation” from a concentration of civilians is not specified, and thus this is left to the judgement of commanders.

68. Protocol III may offer indirect protection to combatants when they are in proximity to a concentration of civilians but in general does not protect combatants from the effects of incendiary weapons.

VII. Protocol IV

Prohibitions:

69. Protocol IV prohibits the use of “laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices” (Article 1).

70. Protocol IV does not prohibit all laser weapons, only those that are meant to cause deliberate permanent blinding by lasers during armed conflict. This is reflected in Article 2, which foresees the employment of “laser systems” by the High Contracting Parties but specifies that all feasible precautions must be taken to avoid the incidence of permanent blindness to unenhanced vision. Therefore, the Protocol does not, “and was not intended to, prohibit the use of laser systems for range-finding, jamming, dazzling, communications, weapons guidance, or attack or destruction of material.”

71. Moreover, Article 3 specifies that blinding “as an incidental or collateral effect of the legitimate military employment of laser systems” is not covered by the prohibition of the protocol.

72. Protocol IV also prohibits the transfer by HCPs of the weapons described in Article 1 to any State or non-State entity (Article 1).

Definitions:

73. Protocol IV does not explicitly define a weapon, but rather describes the purpose for which it is designed and its effects.

74. The title of the instrument is “Protocol on Blinding Laser Weapons” and thus it could be said that blinding laser weapons are a specific type of weapon as described by its purpose and effects in Article 1, and as differentiated from other laser weapons (as per Articles 2 and 3).

75. Protocol IV contains a definition of "permanent blindness" under Article 4, meant to clarify the scope of the weapons referred to in Article 1.

76. The specification that the weapons must cause permanent blindness to “unenhanced vision” may be considered to exclude the intentional blinding of any combatant (or civilian) “using binoculars, night vision goggles, or a telescopic gunsight by an anti-optic laser”.

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33 Parks, 521.
34 Boothby, 204.
35 Dinstein, p. 100, paras. 276 and 278.
Basis in IHL for the prohibitions:

77. The effects of the weapons referred to in Article 1 are deemed to be excessively injurious and based on the prohibition on the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.

Further guidance, risk mitigation and/or preventive measures:

78. Under Article 2, HCPs must take all feasible precautions to avoid the incidence of permanent blindness, and this includes training of their armed forces and other practical measures. The latter may include a range of measures at the national level, such as eye-safe laser rangefinders or weighing the military necessity of using laser systems that may cause permanent blindness over less harmful alternatives.

Other observations:

79. Article 1 states that the weapon must be “specifically designed” in the indicated manner to be prohibited, and thus “relates to the objective nature or capacity of the weapon, regardless of the subjective intent of the user.”

80. The adoption of Protocol IV in 1995 was viewed as an important innovation in international humanitarian law, particularly as it prohibited in advance the use of a new weapon, prior to its production and proliferation and represented “the first time since 1868 […] that a weapon of military interest has been banned before its use on the battlefield and before a stream of victims gave proof of its tragic effects.”

81. The drafters of Protocol IV agreed that restrictions on lasers would not restrict legitimate uses such as in target-marking and range-finding lasers nor further developments in laser weapon technologies.

82. Protocol IV only prohibits the use and transfer of a narrow category of laser weapons. It has been observed that this narrow precision is intentional, as during negotiations some HCPs were concerned that a protocol on this topic “might be abused to form the basis of war crimes charges against soldiers legitimately using a laser in combat. […] The new Protocol thus focuses on laser design, which places responsibility on a government to prove or disprove the legitimacy of laser production specifications and intended use.”

VIII. Protocol V

Prohibitions and restrictions:

83. Protocol V does not establish prohibitions and/or restrictions on the use of certain weapons during armed conflict, but rather relates to remedial measures of a generic nature in

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39 Boothby, 111.

40 McCall, 35. No. 37 supra.


44 Ibid., Carnahan and Robertson, p. 489.
order to minimize the risks and effects of explosive remnants of war (ERW) (preambular paragraph 2 and Article 1). It also aims to address generic preventive measures, through voluntary best practices specified in a Technical Annex for improving the reliability of munitions, and therefore minimizing the occurrence of ERW (preambular paragraph 3).

84. Protocol V has been described as largely “prospective rather than retroactive. It emphasizes ‘best practices’ vis-à-vis rules per se. Nonetheless, it constitutes an advance in the law of war and protection for the civilian population, and an improvement over the pre-existing situation.”

Definitions:

85. Protocol V contains definitions, under Article 2, for the types of munitions and ordnance that it covers.

Scope of application:

86. Article 1, among other things, specifies that the Protocol applies to ERW on the land territory of HCPs, including its internal waters.

Basis in IHL for measures:

87. Given their indiscriminate effects, ERW present a significant threat for civilians, peacekeepers and humanitarian workers engaged in post-conflict reconstruction efforts. Recognizing this concern and following a call from the ICRC, HCPs sought to strengthen the legal framework in this area. Protocol V is therefore the first multilateral agreement designed to address the wide range of unexploded and abandoned ordnance, aiming to minimize civilian casualties and foster a safer post-conflict environment.

Further guidance, risk mitigation and/or preventive measures:

88. As noted, Protocol V focuses on remedial measures of a generic nature in order to minimize the risks and effects of ERW and aims to address generic preventive measures, through voluntary best practices specified in a Technical Annex.

89. As regards the remedial measures, Article 3 specifies obligations relating to clearance, removal or destruction of ERW, while Article 4 contains obligations relating to the recording, retaining and transmission of information.

90. Article 5 obliges HCPs and parties to the conflict to take all feasible precautions to protect the civilian population, individual civilians and civilian objects from the risks and effects of ERW, defines what such feasible precautions are and provides examples of what such precautions may include.

91. Article 6 obliges HCPs and parties to a conflict to protect humanitarian missions and organizations from the effects of ERW.

92. Under Article 9, HCPs are encouraged to take generic preventive measures aimed at minimizing the occurrence of ERW, including those referred to in the Technical Annex. Paragraph 2 of the same article specifies that HCPs may undertake the voluntary exchange of information on efforts to promote and establish best practices in respect of paragraph 1 of the article.

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45 Parks, 534.
47 Ibid.
93. Regarding the Technical Annex itself, as noted above, it is meant to be implemented by HCPs on a voluntary basis. It accordingly contains suggested best practices relating to recording, storage and release of information for unexploded ordnance and abandoned explosive ordnance (para. 1); warnings, risk education, marking, fencing and monitoring (para. 2); and on generic preventive measures (para. 3), including on munitions manufacturing management, munitions management, training, transfer and future production.

Other obligations:

94. Article 7(1) of the Protocol creates the right of HCPs to seek and receive assistance, where appropriate, from other HCPs and other relevant actors to deal with the problems caused by ERW. Pursuant to Article 7(2), HCPs that are in a position to do so must provide assistance in dealing with the problems relating to ERW, as necessary and feasible.

95. Article 8 includes a number of provisions on cooperation and assistance among HCPs relating to marking, clearing, removing or destroying ERW, care, rehabilitation and reintegration of ERW victims, provision of funds for assistance, and requests for assistance, among others. On a voluntary basis, HCPs may also share technical information on relevant types of explosive ordnance (para. 5).

Consultations and reporting:

96. Under Article 10, the Protocol establishes a conference of HCPs to consult and cooperate with each other on all issues related to the Protocol’s operation (para. 1). Under paragraph 2 of the same article, the conference of HCPs shall consider matters relating to the national implementation of the Protocol, including through annual national reporting.

Compliance:

97. Protocol V contains provisions on compliance, under Article 11. Paragraph 1 indicates that HCPs must require their armed forces and relevant agencies or departments to issue appropriate instructions and operating procedures and to provide their personnel with adequate training consistent with the Protocol.

98. Under Article 11(2), HCPs undertake to consult and cooperate with each other to resolve any problems relating to the interpretation and application of the Protocol, through various means.

IX. Other considerations

99. At the Third Review Conference, in 2006, the HCPs decided to establish a compliance mechanism applicable to the Convention, undertaking to consult each other and to cooperate bilaterally, through the Secretary-General, or through other voluntary international procedures, regarding any concerns which relate to the fulfilment of their legal obligations or to resolve any issue that may arise with regard to the interpretation and application of the provisions of the Convention, among the main.

100. The CCW and its three original protocols did not contain provisions on compliance. As noted above, Amended Protocol II, adopted in 1995, and Protocol V, in 2006, included their own compliance provisions, but it was not until 2006 that the HCPs decided to adopt such a mechanism for the Convention. As stated in paragraph 18 of the Decision on the

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48 For more information on the CCW Compliance Mechanism, please see https://disarmament.unoda.org/the-convention-on-certain-conventional-weapons/compliance/.
Compliance Mechanism,\textsuperscript{49} the decision applies to all HCPs to the Convention and its annexed Protocols, and it is intended to complement, but not to substitute, the existing relevant provisions on compliance contained in Protocols annexed to the Convention.

101. Within the framework of the CCW, decisions have also been taken by Review Conferences that are not exclusively of a procedural nature, including a Plan of Action to Promote Universality of the Convention\textsuperscript{50} and the Decision on the CCW Compliance Mechanism referred to above,\textsuperscript{51} among others.

\textsuperscript{49} Third Review Conference of the High Contracting Parties of the CCW. Decision on a Compliance Mechanism Applicable 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. (as adopted on 17 November 2006). Available at: https://front.un-arm.org/wp-content/uploads/2020/12/Compliance.pdf


\textsuperscript{51} Third Review Conference of the High Contracting Parties of the CCW. Decision on a Compliance Mechanism. No 49 supra.