agreement or to declare Ambassador Gillon *personae non grata* under diplomatic law.[79] The case is far from unique and confirms that States still cling to the old values of international law.[80]

JACQUES HARTMANN*

II. CONVENTIONAL WEAPONS: A CLUSTER OF DEVELOPMENTS

A. Outline

The adoption of Protocol V to the UN Convention on Certain Conventional Weapons represents a shift in focus for weapons law towards the long-term after-effects of weapons. This note considers this development.

B. Background

The seemingly endless ingenuity of man's inhumanity to man has long been lamented. As weapons of greater military utility have been developed, so moral and legal arguments have been evolved and deployed against their possession and use. This uneasy relationship has, until relatively recently, been characterized by an inequality between the rapid advance of science and its capabilities and the comparative glacial development of legal constraints.

International humanitarian law has traditionally approached the regulation and control of conventional weapons from two different but complementary directions:[1]

1. *The prohibition of particular weapons:* This approach provides some certainty in that there is little ambiguity as to whether a specific type of weapon is prohibited or not. However, the effects of the prohibitions have been circumvented with the development of weapons which are different in type but possess similar capabilities. One example is the prohibition in the 1899 Hague Declaration 2 Concerning Asphyxiating Gases[2] on the use of '*projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases'*. The adoption of the Geneva Gas Protocol 1925[3] avoided any emphasis on the method of delivery of the gas in order to address this perceived gap.

[79] Vienna Convention on Diplomatic Relations (1961) Art 4(2) and 9.

[80] See C Warbrick 'Immunity and International Crimes Under English Law' (2004) 53 ICLQ 769–74, and the incident involving Major T. R. A. Kohatsu quoted in Cassese, above n 55 at 273.

* Doctoral Candidate and Tutor at University of Durham. I am extremely grateful to Professor Colin Warbrick for his invaluable comments and support. I would also like to acknowledge the help received from Dapo Akande and Annalisa Savaresi.

[1] See Y Sandoz *Prohibitions or Restrictions on the Use of Certain Conventional Weapons* Extract from International Review of the Red Cross Jan–Feb 1981, which analyses the two approaches and characterizes them as disarmament law and international humanitarian law.

[2] 1899 Hague Declaration 2 Concerning Asphyxiating Gases reproduced in Adam Roberts and Richard Guelff *Documents of the Laws of War* (3rd ed OUP Oxford 2000) 59 et seq. The Declaration focused on the method of delivery of the gas and therefore provided an opportunity for the use of other types of gas-producing weapons in the First World War such as cylinders which circumvented the prohibition (see HMSO British Army *Manual of Military Law Part III*, 1958, at 41, para 111, n 1).

[3] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare signed 17 June 1925, entered into force 8 Feb 1928.

justin.mcclelland@slaughterandmay.com doi:10.1093/iclq/lei027

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2. *The restriction of the use of weapons by reference to their wounding effects:* A basic tenet of international humanitarian law is the principle prohibiting the employment of weapons of a nature to cause superfluous injury or unnecessary suffering.[4] However, the determination of what constitutes superfluous injury or unnecessary suffering can be the subject of considerable debate[5] and can result in states employing weapons which they deem not to have breached the principle but which others view as having 'stepped over the line'.[6]

Whilst the two approaches are linked,[7] they have evolved separately in an effort to compensate for the respective flaws that each possesses. Their evolution has been unwieldy and reactive, however. The 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to Excessively Injurious or to Have Indiscriminate Effects (CCW) offered some hope of a mechanism to provide some structure to the previously ad hoc approach to weapons law.

C. UN Convention on Certain Conventional Weapons 1980

In the early 1970s the International Committee of the Red Cross organised a number of conferences regarding the development of international humanitarian law which were to lead to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH) and subsequently to the 1977 Protocols Additional to the Geneva Conventions 1949. During these discussions concerns were raised regarding certain types of conventional weapons.[8] Consideration on how best to address these concerns took place within the

Reproduced in Roberts and Guelff above n 2 155 et seq. The manner in which the use of 'gas' or 'smoke' has been viewed and re-viewed by States is commented upon by Roberts and Guelff at 156.

[4] The principle was enunciated in treaty text in Art 23(e)Hague Convention IV Regulations Respecting the Laws and Customs of War on Land, adopted 18 Oct 1907 where it stated that it was forbidden to 'employ arms, projectiles, or material *calculated to cause* unnecessary suffering' (emphasis added). The authentic French text used the term 'propres à causer des maux superflus', terminology which has been translated more closely in subsequent treaties as 'of a nature to cause superfluous injury' (see 1977 Protocol I Additional to the Geneva Conventions 1949, Art 35).

[5] Notable discussions in the recent past have been centred upon an International Committee of the Red Cross initiative called the 'SIrUS Project' (see R Coupland *The SIrUS Project: Towards a Determination of Which Weapons Cause 'Superfluous Injury or Unnecessary Suffering'* ICRC Pamphlet 1997).

[6] See R Coupland *Humanity: What is it and How Does it Influence International Law?* International Review of the Red Cross, vol 83 Dec 2001, 969–89 and in respect of arms control and the influence of IHL principles see RJ Mathews and TLH McCormack 'The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties' in *The International Review of the Red Cross,* vol 81, June 1999 331–52.

[7] The 1899 Hague Declaration 2 (op cit) regarding gases had the principle of superfluous injury or unnecessary suffering as its basis.

[8] In particular the aftermath of the Vietnam War focused attention on the use of napalm, fuel air explosives, and small-calibre weapons. These were the subject of proposals by several States at the conferences leading up to the adoption of the CCW (eg Small-calibre weapon systems (Mexico, Sweden, and Zaire), Fuel-Air Explosives (Mexico, Sweden, and Switzerland)) see UN GA A/AC.206/10 dated 16 June 1981, entitled 'A Comparative Study of the Scope Originally Proposed or Aimed at in Draft Multilateral Disarmament Treaties of a Universal Character Concluded under UN Auspices and the Scope Finally Fixed in Those Treaties, Including the Contemplated Measures for Expanding That Scope' ('UN GA Comparative Study').

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Ad Hoc Committee of the CDDH which was created to explore the area of weapons law. Its work was supplemented by two meetings in Lugano (1974) and Lucerne (1976) which were organised by the ICRC.

The Additional Protocols of 1977 incorporated some positive developments regarding the regulation of weapons but they were not considered to have gone far enough. Accordingly, a resolution of the CDDH[9] was passed which allowed for a series of negotiations[10] that led to the adoption 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 (CCW).[11]

The structure of the CCW provides a framework to which Protocols can be attached addressing particular types of conventional weapons. From the earliest stages of negotiations the CCW was envisaged as being dynamic and flexible.[12] However, this flexibility would depend on the mechanism of review that CCW adopted. Upon it becoming apparent that the initial achievements of the CCW in 1980 would be modest, the manner in which the CCW would operate and evolve (and therefore the mechanism of review adopted) gained added importance. Efforts to bring the CCW within the control of the Conference on Disarmament were successfully resisted on account of the fear that this would unduly burden progress and undermine the responsiveness of the CCW. It remained independent of the Conference on Disarmament, therefore[13] and, as a result, was expected to yield much in the way of development in the area of weapons law.

The purpose of CCW is to prohibit or place restrictions on weapons that form the subject of the Protocols as well as on their use. It therefore combines the 'two-pronged' approach of the past. The Preamble:

> recalls the general principle of the protection of the civilian population against the effects of hostilities.[14]

However, it recalls this principle in the context of the prohibition against the employment of weapons of a nature to cause unnecessary suffering or superfluous injury.[15] When adopted, therefore, it was concerned with the nature of injuries caused and avoidance of the use of weapons that are likely directly to affect civilians in the conduct of combat.

[9] The CDDH states had adopted Resolution 22(IV) dated 7 June 1977 which recommended follow-up discussions to discuss prohibitions or restrictions on the use of specific conventional weapons. By a UN General Assembly resolution (32/152 dated 19 Dec 1977) it was decided that a UN Conference would be held.

[10] Preparatory Conferences were held in Geneva (28 Aug to 15 Sept 1978 and 19 Mar to 12 Apr 1979) followed by two full conferences (10–28 Sept 1979 and 15 Sept–10 Oct 1980) resulting in the adoption of the CCW on 10 Oct 1980.

[11] See F Kalshoven 'Conventional Weaponry: The Law From St Petersburg to Lucerne and Beyond' in M Meyer *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (British Institute of International and Comparative Law 1989) and Paul Szasz 'The Conference on Excessively Injurious or Indiscriminate Weapons' in the (1980) 74 American Journal of International Law 212–15 for an analysis of several of the legal issues during the negotiations.

[12] Mexico first raised the proposal of having a general convention to which protocols on specific conventional weapons would be attached. UN GA Comparative Study, para 64.

[13] Mention of the CD being used for further prohibitions or restrictions on weapons is however mentioned in the Preamble to the CCW, Preambular para 12.

[14] UN CCW, Preambular para 2.

[15] ibid Preambular para 3.

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The nature of the Protocols attached underlines this focus. At initial adoption of CCW, three Protocols were attached. This represented a disappointment to some who had wanted more extensive prohibitions and restrictions. However, agreement was only possible in the limited time available on three Protocols. Understandably, the subjects of the Protocols were influenced by the use of weapons in recent conflicts, most notably Vietnam.

Protocol I prohibited those weapons 'the primary effect of which is to injure by fragments which in the human body escape detection by X-rays'. The proposal of this Protocol, sponsored by 32 States, attracted immediate widespread support. This represented a notable success in that it prohibited weapons which were not in use in the arsenals of States.[16] The prohibition clearly has a foundation in the principle prohibiting weapons of a nature to cause unnecessary suffering and superfluous injury.

Protocol II addressed the contentious issue of landmines, booby traps and other devices. Discussion of this Protocol dominated the UN Conferences leading up to the adoption of the CCW. Several issues protracted negotiations. The disclosure of information regarding the location of mines by a State to an adverse party in occupation of land mined by that State proved the most difficult. Seemingly in an effort to provide some level of progress on this issue, a proposal was accepted which inserted a Technical Annex covering the manner in which the locations of mines were to be recorded. The Annex was short[17] and centred entirely on technical aspects of mine location recording. Importantly, it was non-binding, requiring that States 'shall take into account' its provisions.

Protocol III addresses the use of incendiary weapons. The focus is on the prohibition on the use of such air-delivered weapons against civilians or military objectives located within concentrations of civilians where the unintended effects of fire-storm could affect civilians.

At the time that the CCW was adopted, therefore, the aim was to prohibit or restrict weapons on account of their immediate effects on the civilian population arising from their use. The Protocols were binding in nature save for a Technical Annex that was introduced in an effort to achieve progress in an intractable area of negotiations.

[16] US Senate Treaty Doc 103-25 (103d Congress, 2d Session) Message from the President of the US dated 12 May 1994, states in respect of Protocol I 'We are not aware of any significant current attempt to develop or produce such a weapon, but the prohibition is in principle desirable from a humanitarian viewpoint and in no way constrains U.S. military operations' p VI.

[17] It stated: 'Whenever an obligation for the recording of the location of the minefields, mines and booby traps arises under the Protocol, the following guidelines shall be taken into account. With regard to pre-planned minefields and large-scale and pre-planned use of booby traps: maps, diagrams or other records should be made in such a way as to indicate the extent of the minefield or booby-trapped area; and the location of the minefield or booby-trapped area should be specified by relation to the coordinates of a single reference point and by the estimated dimensions of the area containing the mines and booby traps in relation to that single reference point. With regard to other minefields , mines and booby taps laid or placed in position; In so far as possible, the relevant information specified in paragraph 1 above should be recorded so as to enable the areas containing minefields, mines and booby traps to be identified.' UN CCW, Protocol II Technical Annex, Guidelines on Recording UN DOC A/CONF.95/15, Annex I, 15 dated 27 Oct 1980.

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D. Updating the UN CCW

Having spent so much time ensuring that the CCW had an ad hoc review mechanism divorced from the Conference on Disarmament in order to ensure its continued use, it was perhaps surprising that it was not until 25 September 1995[18] that the States Parties met again to discuss updating the Convention. Indeed, the CCW did not enjoy any form of prominence in the 1980s. A number of reasons have been given for the lack of success that it enjoyed: its modest achievements in 1980, the lack of a compliance mechanism and the limitation of its scope to international armed conflict.[19]

Influencing the decision to revisit the CCW in the mid-1990s was the debate 'bubbling' at that time regarding the issue of anti-personnel landmines.[20] Whilst Protocol II addressed mines that were 'designed to explode upon the presence, proximity or contact of a person or vehicle', the restrictions were not viewed as effective. Protocol II was having little impact upon the numbers of injuries and deaths to civilians from mines, most notably in non-international armed conflicts. The scope of the Amended Protocol II extended the application of the Protocol to non-international armed conflict, the provisions tightened the restrictions on the use of mines, and a limited compliance Article was introduced. In an effort to further the international guidance on the use of mines the Technical Annex was expanded to cover recording of minefields, specifications on detectability and deactivation, and standard signs for minefields.

Whilst Amended Protocol II received the lion's share of the attention, the first new Protocol to receive international attention in the Review Conferences was that concerning Blinding Laser Weapons. Despite the prior adoption of Protocol I there have been claims that the adoption of Protocol IV was unique in the area of 'arms-control' treaties in that it prohibited a weapon before its deployment on the battlefield.[21] It should be noted here that the focus of the Protocol was on the battlefield use of blinding lasers.

Amended Protocol II was adopted on 3 May 1996 in Geneva. The introduction of more precise definitions and enhanced restrictions on the use of mines was intended to reduce the impact of such weapons on civilians during conflict and in the immediate post-conflict period.

Within 18 months the Ottawa Convention,[22] or the 'Mine-Ban Treaty' as it is also known, was adopted which banned the possession and use of anti-personnel landmines.

[18] The Review Conference sat over three sessions in Vienna (25 Sept–13 Oct 95) and Geneva (15–19 Jan 96 and 22 Apr–3 May 96).

[19] Robert J Mathews *The 1980 Convention on Certain Conventional Weapons: A Useful Framework Despite Earlier Disappointments*, paper presented at the Australian Defence Force Conference held at Melbourne University ('Pushing the Envelope: The ADF Contribution to International & Operations Law' held from 20–22 Feb 2002).

[20] Following pressure from the French NGO Handicap International, the French Government submitted a request to the UN Secretary-General on 9 Feb 1993 to convene the first Review Conference. An analysis of some of the issues facing the 1st Review Conference is provided by the ICRC in its Report dated 1994 (International Review of the Red Cross March–April 1994 at 123–93.

[21] Protocol IV was adopted on 13 Oct 1995. See Louise Doswald-Beck 'New Protocol on Blinding Laser Weapons' in The International Review of the Red Cross, May-June 1996, P 272–81. See also The International Review of the Red Cross Nov–Dec 1995 at 672–7.

[22] Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction adopted 18 Sept 1997.

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Riding on the success in amending Protocol II and relying upon the increased profile that the landmine cause enjoyed, a Conference took place in Ottawa in October 1996. The coordination of the non-governmental organizations was achieved by way of the International Campaign to Ban Landmines (ICBL)[23] which assisted in galvanising international opinion in favour of a ban. The NGO involvement in shaping the debate was a notable feature of the process. With remarkable speed, the process moved forward, culminating in a Conference in Oslo in Sept 1997 at the conclusion of which the Convention was adopted.

E. Recent developments

Following the adoption of Amended Protocol II and Protocol IV, the focus of the CCW began to shift. In the intervening period between the first Review Conference and the Preparatory Commissions in preparation for the second Review Conference (2001), the concerns which the CCW began to address changed from the wounding characteristics of weapons and their immediate impact on the civilian population to the unintended after-effects of weapons and the long-term impact on civilian populations.
Three aspects fall for consideration in respect of this change:

- The reasons for the shift in focus;
- The manner in which the shift has manifested itself, and;
- The impact upon CCW for the future.

a. THE REASONS FOR THE SHIFT IN FOCUS

The Ottawa Convention heralded a change in the international legal dynamic within which the CCW had operated. The focus of the ICBL had been the long-term after effects of the anti-personnel landmines (APLs). The effectiveness of the campaign did not rely on legal arguments as much as on the images of children in Africa and elsewhere maimed as a result of mines that littered the agricultural land that their communities relied upon for survival. Banning the use of APLs therefore provided a way of minimising future problems. At the same time the obligations upon a State Party to clear existing APLs from land under its control or jurisdiction[24] ensured that attention was drawn from the mid-conflict effects of landmines or their immediate post-conflict effects on the civilian populations to their long-term impact.

The use of so-called 'cluster-bombs'[25] in the Kosovo Campaign in 1999 generated much discussion over the problems of clearance of unexploded ordnance (UXO). Whilst the problem of UXO had been well-known to the mine clearance organizations operating in Africa, Laos, Cambodia and Afghanistan for a number of years, the

[23] ICBL arose out of an NGO Conference in London in 1993 at which the Vietnam Veterans of America Foundation, Medico International, Handicap International, Human Rights Watch, Mines Advisory Group and Physicians for Human Rights agreed to co-ordinate efforts to call for a ban on the use, production, stockpiling, and sale, transfer or export of anti-personnel mines.

[24] The Ottawa Convention, Arts 2 and 5.

[25] 'Cluster bombs' is the term used to describe air or artillery-delivered munitions that contain tens of sub-munitions which disperse above the ground, providing a larger footprint of effect than is available from a unitary conventional warhead which simply explodes upon impact at its intended target.

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Kosovo Campaign highlighted the problems to the 'Western world'. This assisted in raising the profile of post-conflict reconstruction and the potentially retarding effect that UXO could have on it.

Coinciding with this raised awareness was the increase in the number of Peace Support Operations[26] conducted by military forces around the world in the 1990s. High profile operations in the Balkans, Kosovo, East Timor, Somalia and Sierra Leone served to underline to the 'military mind' the impact that UXO has on reconstruction.

It was the combination of these matters that shifted political, media and military discussion from the immediate effects of weapons to their longer-term effects. With this background it was perhaps inevitable that the legal discussion would move accordingly.

b. THE MANNER IN WHICH THE SHIFT HAS MANIFESTED ITSELF

Kosovo ensured that, with anti-personnel landmines addressed by the Ottawa Convention, cluster-bombs would be the next weapon to be subjected to scrutiny. The *perceived* problem with cluster-bombs was two-fold essentially:[27]

As the 'footprint' (area of coverage of the sub-munitions) is large (up to the area of a football pitch) then, it was alleged, they cannot be used in a manner that discriminates between military and civilian objects;

As the failure rates of cluster-bombs were alleged to be comparatively high in relation to unitary warheads and as the numbers of them per warhead are greater then, it was alleged, they create considerably larger numbers of UXO than unitary warheads. This latter issue was exacerbated by the perceived attractiveness of the small and often brightly-coloured bomblets to handling by children.

The issue of cluster-bombs provided much scope for discussion within the CCW on the military utility of such weapons and their humanitarian impact. The extent of their use in the Gulf Conflict (1991) and Kosovo (1999) demonstrated the fact that the military were committed to their continued use within the constraints of the laws of war. This clearly settled position contributed to the debate evolving beyond simply dealing with the issue of cluster bombs.[28] It became apparent during conferences in the run-up to the second Review Conference[29] that the issue of concern upon which States Parties were concentrating was the explosive detritus of conflict in general and not specific weapons causing it. A Group of Governmental Experts was mandated by the States Parties,[30]

[26] Peace Support Operations are defined in the UK military doctrine as 'multifunctional operations involving military forces and diplomatic and humanitarian agencies. They are designed to achieve humanitarian goals or a long-term political settlement, and are conducted impartially in support of a UN or OSCE mandate. These include peacekeeping, peace enforcement, conflict prevention, peacemaking, peace building and humanitarian operations'. British Military; Peace Support Operations; Joint Warfare Publications 3-50, para 101a.

[27] See Virgil Wiebe 'Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law' (Fall 2000) 22 Michigan Journal of International Law 1.

[28] In the evolution of the concern the ICRC was instrumental with a meeting organized in Nyon in Sept 2000 at which initial proposals were considered. For an analysis of the background to the negotiations see Herby and Nuiten 'Explosive remnants of war: Protecting civilians through an additional protocol to the 1980 Convention on Certain Conventional Weapons' The International Review of the Red Cross, No 841, Mar 2001, 195–205.

[29] The Second Review Conference took place in Dec 2001.

[30] At the same meeting at which the mandate in respect of ERW was agreed (Meeting of States

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to negotiate an instrument on post-conflict remedial measures of a generic nature which would reduce the risks of ERW.[31]

The mandate was significant in several respects. Firstly, unequivocally it focused attention on the post-conflict effects of weapons. The term Explosive Remnants of War (ERW) was coined to describe the nature of the UXO and abandoned ordnance which would be addressed. Areas listed for consideration within the mandate included, 'responsibility for clearance,[32] existing ERW,[33] the provision of information to facilitate clearance and risk education, [and] assistance and co-operation',[34] all aspects clearly rooted in the post-conflict arena.

Secondly, the breadth of the mandate carried with it additional challenges. The range of areas for discussion exposed the difficulties in shifting the focus of the CCW to post-conflict issues. By confining the restrictions within existing Protocols to the manner in which weapons are used in conflict, it was possible to bound their application by reference to military and legal considerations. Protocol III for instance deals with the protection of civilians and civilian objects from the use of air-delivered incendiary weapons. The restrictions require consideration of factors reasonably expected to be known to commanders in battle, namely the location of hostile forces and civilians. It is therefore pragmatic and capable of application on the battlefield.

It was suggested by some during negotiations[35] that a commander, in navigating the targeting process, should take account of the impact of post-conflict UXO, arising from weapons that he is deploying, on a transient and unpredictable population. Further, it was argued, such considerations should be borne in mind by the commander who deploys such weapons in anticipation of their functioning as designed. Such a requirement introduces a variety of variables and factors that cannot possibly be within the commander's knowledge at the time that an attack is planned. It simply would not be realistic for such an assessment to be conducted. Such a proposal would mark a departure from a hitherto pragmatic approach to the development of weapons law, which would be unwelcome and prove impossible to translate into practice.

Such suggestions expose the problem that such binding obligations could present to commanders in battle. There are other considerations of wider import that the shift in focus of the CCW results in. When discussions begin to focus on the extent of 'responsibility for clearance' of UXO and the nature of 'assistance and cooperation' then considerations become not so much military as financial. It is inevitable that States will be reluctant to take on open-ended obligations for such assistance and, therefore, it is likely that they will become more conservative in the extent to which they are content to be bound by such obligations. This aspect links with the second issue.

Parties to UN CCW Geneva 12–13 Dec 2002) a Working Group on Mines Other Than Anti-Personnel Mines received a mandate to consider restrictions on such mines in addition to those in Amended Protocol II. It is not proposed to deal with this aspect in any detail in this article.

[31] CCW/GGE/VI/2 dated 27 Nov 03, para 1

[32] This was an issue which caused considerable discussion as the market found it difficult to bear the idea of user responsibility. Instead States preferred the idea of generic preventive measures.

[33] The extent of existing ERW in certain regions of the world (eg Northern Africa) concentrated the minds of States with regard to the level of obligation that they were willing to bear.

[34] ibid.

[35] Sweden (UN Document CCW/GGE/I/WP.9/Corr 1) and Norway (UN Doc CCW/GGE/VI/WG.1/WP.3). The UK response was provided in UN Document CCW/GGE/I/WP.10.

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The mandate introduced the notion of the CCW incorporating 'voluntary best practice'. The CCW had always followed, where possible, a binding approach to its provisions. This was consistent with the evolution of weapons law. It is true to say that the Technical Annex introduced for Protocol II had included '*guidelines that shall be taken into account*'. However, this guidance became obligatory in the wording adopted for the Technical Annex in Amended Protocol II[36] reflecting the dissatisfaction that some States had felt with the achievements of 1980. By introducing the concept of voluntary best practice there was the danger that the CCW would be diluted in its effect.

Thirdly, the term ERW did not relate to any particular weapon. From the earliest negotiations in respect of CCW specific types of weapons have been proposed for consideration. Small-calibre weapons, for instance, have been raised for consideration at each stage in the history of the CCW. Even when a category of weapons may have been proposed eg blinding laser weapons, it was sufficiently identifiable (ie consisting of a laser weapon, the intention of which is permanently to blind) to allow for consideration of the characteristics of the weapons with a view to legal prohibition or restriction.

ERW possessed no such readily identifiable characteristics. The final definition accepted in respect of Protocol V[37] speaks, inter alia, of explosive ordnance which should have exploded but failed to do so. The basis of the negotiations would therefore concentrate on the unintended characteristics of weapons. Further, the weapons in question would be widely and problematically defined.

Finally, it mandated discussions on how best to improve methods of manufacture, handling, quality control and storage of weapons so as to minimise the incidence of ERW. Such matters were beyond the scope of anything that CCW had dealt with before, being more in the nature of 'industry standards' than international humanitarian law.

The breadth of the mandate therefore prompted States to contemplate voluntary measures that could be incorporated into the envisaged Protocol. A number of Annexes developed as the mechanism to achieve this, thereby reversing the move to mandatory language in the Technical Annex in Amended Protocol II. Technical Annexes also offered clear advantages in providing levels of detail that would be inappropriate in the main body of the Protocol but would also allow for flexibility such that it could be applied in myriad situations thereby enhancing its ultimate utility.

[36] The words 'Whenever an obligation for the recording of the location of minefields, mines and booby traps arises under the Protocol, the following guidelines shall be taken into account' (Protocol II, Tech Annex) became 'Recording of the location of mines other than remotely-delivered mines, minefields, mined areas, booby-traps and other devices shall be carried out in accordance with the following provisions' (Amended Protocol II, Tech Annex, para 1(a))

[37] Protocol V adopts a cumulative definition in Art 2, as follows:
Explosive ordnance means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996;
Unexploded Ordnance means explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so;
Abandoned explosive ordnance means explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use;
Explosive remnants of war means unexploded ordnance and abandoned explosive ordnance.'

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Why was the CCW chosen?

In all the discussions within CCW there was general agreement that ERW posed problems to the safety of those living in or returning to an area of conflict and to the regeneration of that area. The changes in the popular attitude towards UXO in post-conflict situations which reflected this agreed view can explain why the initiative towards minimizing and clearing up ERW was pursued: they do not, however, explain why CCW was chosen as the vehicle for this development.

CCW was described by one diplomat at the CCW negotiations in the period 2001–3 as 'the only weapons show in town'. This was certainly the case as regards conventional weapons. Further, the Conference on Disarmament, which had been considered at the outset of the CCW as being a vehicle for reviewing CCW, had shown little sign of progress for some time. On one view, therefore, CCW offered the only real existing mechanism to address many of the issues being debated.

Ottawa also potentially plays a role in the choice of CCW. The manner in which the Ottawa debate followed an NGO-led agenda could be seen as a defining moment in that States were less inclined to countenance a repetition of that experience. The manner in which the Ottawa process evolved did not lend itself to measured control by States. The remarkable number of initiatives from NGOs and States in the period following the adoption of Amended Protocol II testifies to this.[38] In contrast to the Ottawa experience, CCW offered a structure for negotiations that provided more control to States Parties than an ad hoc process.

However, it would be wrong to overlook the dynamic nature of the CCW as a reason for its being chosen. Following a slow start, CCW (re-invigorated by the mines debate) has become an effective legal mechanism to address weaponry issues. The inherent flexibility that its framework structure provides means that it is susceptible to 'shaping' to the issue of the moment. The danger is that it becomes misshapen beyond its original purpose or intention such that this flexibility whilst previously its strength becomes its weakness.

Outcome of CCW Negotiations

The 'instrument' that States Parties had been mandated to negotiate was agreed on 24 Nov 2003 and adopted as Protocol V to the CCW, entitled Protocol on Explosive Remnants of War. Those Articles of most relevance to the current discussion are:

Art 3: Clearance, removal or destruction of explosive remnants of war
Art 4: Recording, retaining and transmission of information
Art 5: Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war
Art 6: Provisions for the protection of humanitarian missions and organizations from the effects of explosive remnants of war

[38] Amended Protocol II was adopted on 3 May 1996. Thereafter, a number of conferences and meetings took place in quick succession: International Strategy Conference: Towards a Global Ban on Anti-Personnel Mines (Ottawa 3–5 Oct 96); UN GA Res 51/45S (Dec 96); Expert Meeting on the Text of a Convention to Ban Anti-Personnel Mines (Vienna Feb 97); International Expert Meeting on Possible Verification Measures to ban Anti-Personnel Landmines (Germany Apr 97); International Conference for a Global Ban on Anti-Personnel Mines (Belgium Jun 97). See *A Guide to Mine Action* Geneva International Centre for Humanitarian Demining, July 2003 and L Maresca and S Maslen *The Banning of Anti-Personnel Landmines* (CUP Cambridge 2000).

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Art 7: Assistance with respect to existing explosive remnants of war
Art 8: Co-operation and assistance
Art 9: Generic preventive measures

Technical Annex
—Recording, storage and release of information for Unexploded Ordnance (UXO) and Abandoned Explosive Ordnance (AXO) (linked with Art 4)
—Warnings, risk education, marking, fencing and monitoring (linked with Art 5)
Generic preventive measures (linked with Art 9)

The Protocol therefore covers those aspects of the clearance of ERW that would be expected: information regarding the types and numbers of munitions used is recorded; surveys of the threat posed by ERW are conducted; ERW is marked and cleared; and warnings are provided to the civilian population regarding the dangers. Such activities undoubtedly contribute to the clearance of ERW. However, obligations of this nature would be potentially manpower intensive and financially burdensome if mandatory. Further, as has been seen in the post-conflict aftermath of Kosovo, Afghanistan and, most recently, Iraq, the nature and extent of the problem is unpredictable.

With this unpredictability comes wariness of taking on responsibilities. Accordingly, the obligations have been caveated. This is nothing new in CCW, or indeed other treaties. However, the fear of not knowing just how big an obligation the CCW may create has resulted in the enhancing of the caveats by combining them. The obligation to release information on areas targeted is to be complied with 'as far as practicable, subject to . . . legitimate security interests'.[39] Surveying, marking and clearing of ERW in territory under a State's control is to take place 'after the cessation of hostilities and as soon as feasible'.[40] Whilst caveats in respect of obligations appear in other Protocols[41] under CCW they are not as wide as those in Protocol V.

The scale of the Technical Annex (a third of the whole Protocol),[42] which is voluntary in nature, further underlines the impact that the shift in the focus of CCW has had. For example, States were understandably unwilling to subject themselves to binding obligations regarding the release of information recorded in respect of targets attacked on account of operational security concerns.

There has been another development with respect to the Technical Annexes which relates to the detail contained within them. With respect to warnings and risk education in part 2, the level of granularity that the guidance provides resembles the sort of guidance that one would expect in field manuals rather than in treaties.[43] Whilst the education of those people involved in protecting civilians from the effects of ERW clearly needs to encompass those precautions contained within the Technical Annex, it is questionable what substantive benefits derive from such detail being included in CCW, particularly as they are noted as being the type of precautions that 'may' be taken.[44]

[39] Protocol V, Art 4.2 [40] ibid Art 3.3

[41] eg Amended Protocol II, Art 10 regarding Removal of Minefields etc. Art 10.1 states 'Without delay after the cessation of active hostilities' which contrasts with 'after the cessation of hostilities and as soon as feasible' in Protocol V, Art 3.3 which deals with the removal of ERW.

[42] Some $4^1/_2$ pages of the $11^1/_2$ page Protocol.

[43] "[Warning] signs and other hazardous boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the explosive remnants of war affected area and which side is considered to be safe" Protocol V, Tech Annex, Part 2, para (i).

[44] Protocol V, Art 5.1.

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c. HOW WILL THE SHIFT IN FOCUS AFFECT THE FUTURE OF THE CCW?

Protocol V has therefore heralded a shift in focus for the CCW. It has concentrated on the longer-term after-effects of weapons used in conflict rather than their use in conflict itself or their immediate impact on the civilian population. Additionally, it focused its efforts away from a particular type of weapon, instead dealing with a number of unspecified categories of weapons that may become ERW.

Dealing with this latter aspect first, the framework for the CCW lays down the circumstances in which additional Protocols may be added. Article 8(2)(a) states:

> At any time after the entry into force of this Convention any High Contracting party may propose additional Protocols relating to *other categories of conventional weapons not covered* by the existing annexed Protocols. (emphasis added)

The danger with adopting a Protocol of such wide ambit (all unexploded and abandoned ordnance less mines, booby traps and other devices) is that it runs the risk of overlapping with existing Protocols. Incendiary weapons, for example, would potentially be covered by both Protocols III and V.[45] Whilst views over the acceptability of this (vis-à-vis Article 8) differ,[46] there can be no doubt that it has the potential to cause confusion regarding application. The advantage of the principle underlying Article 8 of the Framework Convention is that it provides clarity. Any confusion generated by the overlap of Protocols will serve to undermine the effectiveness of the CCW. As regards the future of the CCW, adopting such a wide Protocol potentially prevents more specific Protocols being adopted at a later date.

Fuel-Air Explosives, which were suggested for consideration at the Conference in 1980,[47] provide a convenient example. Should they fall for consideration in the future any such weapons which were dropped but failed to explode would fall within the scope of Protocol V. Adopting a strict interpretation of Article 8 of the Framework Convention, it would not be possible to adopt a Protocol as they are already covered. Even adopting a more flexible interpretation, care would have to be taken to avoid obligations arising which were inconsistent as between the Protocols.

Such comments are structural or formulaic in nature. There are more substantive issues here, however, which relate to the 'temporal element' of the CCW. The new Protocol is almost exclusively concerned with issues arising outside of the actual fighting within the conflict. There are provisions regarding clearance etc in Amended Protocol II but they flow from provisions regarding the use of mines, booby traps and other devices during conflict. Explosive *Remnants* of War by their nature arise after use (or non-use in the case of abandoned explosive ordnance). Further, the language talks of 'without delay after the cessation of active hostilities'.

[45] As Protocol III addresses the *use* of incendiary weapons and Protocol V covers the after-effects of ERW, the two Protocols are not inconsistent but they do overlap. Care has been taken to exclude mines, booby traps and other devices from the scope of Protocol V as the clearance of these weapons was already provided for in Amended Protocol II. Such deconfliction will not be as easy for future weapons systems considered for attention by CCW.

[46] Debates have been ongoing for some time regarding how any further amendments to Amended Protocol II will be termed. Confusing the issue further is the description of mines formerly known as anti-vehicle mines as Mines Other Than Anti-Personnel Mines (MOTAPMs). Discussion of these weapons is ongoing (CCW/GGE/VI/2 dated 27 Nov 2003 contains a recommendation that the Working Group on MOTAPMs continue its work in 2004).

[47] See UN GA a/Conf.95/15 dated 27 Oct 1980 Final Report of the Conference to the General Assembly 7, para 23

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It is therefore a shift away from the characteristics of weapons and their effects to one that concentrates on their after-effects. If this is to be a trend that endures States may be equally unwilling in the future to take on binding obligations in the form of treaty language. The development of further Technical Annexes as a mechanism to reduce the mandatory nature of unpredictable and potentially open-ended obligations may therefore become a common feature of Protocols.

Ultimately, however, if the law continues to move in this direction then the obligations will bite, not so much on those engaged in the conduct of warfare and their use of weapons, but on those who make the weapons in the first place and those who have responsibility for clearing up after conflict.

F. Conclusion

Whilst the move to concentrate on post-conflict aspects can be considered to be true to the Preamble to the framework when it 'recalls the general principle of the protection of the civilian population against the effects of hostilities', it is difficult to imagine that the after-effects were the effects that the drafters had in mind.

Over the course of the life of the CCW many types of weapons have been suggested for its attention (fuel-air explosives, directed energy weapons, napalm, flechettes). Whilst these would more neatly fit the framework and intention behind CCW, they have not, however, captured the NGO and therefore the public imagination sufficiently to provide the international impetus needed to register on the CCW scale.

We may find that with the advent of our strengthened focus on the post-conflict arena we have evolved our two-pronged approach to the regulation and control of conventional weapons into a three-pronged approach, namely:

- The prohibition of particular weapons
- The restriction of the use of weapons by reference to their wounding effects; and, for those weapons that fail to function as intended;
- The clearance of explosive remnants of war afterwards.

J McClelland MBE*

III. ATTORNEY GENERAL'S ADVICE ON THE IRAQ WAR

IRAQ: RESOLUTION 1441

IRAQ: RESOLUTION 1441

1. You have asked me for advice on the legality of military action against Iraq without a further resolution of the Security-Council, This is, of course, a matter we have discussed before. Since then I have had the benefit of discussions with the Foreign Secretary and Sir Jeremy Greenstock, who have given me valuable background information on the negotiating history of resolution 1441. In addition, I have also had the opportunity to hear the views of the US Administration from their perspective as co-

* Solicitor Advocate and serving officer in the British Army Legal Services. He was a member of the UK delegation to the UN Convention on Certain Conventional Weapons in the period 2000–3. The views expressed are those of the author alone. They do not necessarily reflect the views of the UK Government or Armed Forces.

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