

AN IMPETUS OF HUMAN WRECKAGE?: THE 1996 AMENDED LANDMINE PROTOCOL

INTRODUCTION

[In] a field hospital in Honduras, . . . I met a young boy who had lost his leg from a landmine. When I asked him which side in the war had put it there, he did not know. What difference did it make? Both sides used landmines. But he was crippled for life, and he was living in the hospital because he had no place else to go.¹

Landmines² are the weapon of choice for many government and insurgent groups.³ They are cheap, easy to manufacture and use, difficult to detect, and expensive and dangerous to remove.⁴ After an armed conflict, the deploying party seldom deplants their explosives; they are left for the indigenous populations or, more recently, peacekeepers to deal with.⁵

Landmines cause devastation that has terrorized the world for decades.⁶ Each day, landmines hidden beneath the Earth's surface haunt boys and girls at play, farmers tending their fields, and ordinary travelers.⁷ Each week, landmines kill or maim 500 people.⁸ Each year, millions of new mines are added to the chilling number of landmines already buried in Asia, Africa,

1. 139 CONG. REC. S9290 (July 22, 1993) (statement of Sen. Patrick Leahy). Sen. Leahy recalls that he started the War Victims Fund and sponsored legislation for a landmine moratorium for people like the Honduran boy. Sen. Leahy notes the psychological pressure of living with such a threat as follows: "Think of the horror of living day to day in a country where at any moment you could lose a leg, your life, or your child's life, because of these hidden weapons [landmines]. Where any open field, or patch of trees, or roadside ditch is a potential death trap. That is a way of life for tens of millions of people around the world." *Id.*

2. For the purposes of this Comment, "landmines" and "mines" refer to antipersonnel landmines, booby-traps, or similar explosive devices, rather than to antiantitank landmines or water mines. Antipersonnel mines are weapons designed specifically to kill or incapacitate human beings, as distinguished from other weapons whose function is to destroy or render vehicles, equipment, or materials ineffective. THE ARMS PROJECT AND PHYSICIANS FOR HUMAN RIGHTS, *LANDMINES: A DEADLY LEGACY* 18 (1993) [hereinafter *DEADLY LEGACY*].

3. Some insurgent groups are organized in that they exercise governmental authority for a time over part of the territory of a state. Some insurgent authorities in control of a specific territory have also entered into agreements with governments and have therefore been considered to have treaty making capacity.

4. U.S. Dep't of State, *Fact Sheet: U.S. Initiatives For Demining and Landmine Control*, DEP'T OF STATE DISPATCH, Feb. 6, 1995 [hereinafter *Landmine Fact Sheet*]. It costs between \$150 to \$1000 to remove one landmine. *Id.*

5. *Id.*

6. President Clinton, Remarks on Admiral Boorda, Landmines (May 17, 1996) (transcript available from White House Press Office).

7. *Id.*

8. Senator Patrick Leahy, *Statement on the Administration's New Landmine Policy*, CONGRESSIONAL PRESS RELEASE, May 16, 1996. It is estimated that over 28,000 people are maimed or killed by mines each year. *Id.*

Central America, Europe, and the Middle East.⁹ The current landmine crisis results not only from the destructive power of landmines, but from the sheer number of mines accumulated throughout the world.¹⁰

The Landmine Protocol,¹¹ annexed to the 1980 U.N. Convention on Conventional Weapons,¹² was the first attempt to cope with the growing landmine crisis. It was designed to protect civilians from landmine warfare. The Landmine Protocol proved futile for three reasons: it neglected to address the fundamental problem of temporal indiscriminateness inherent in mine warfare, it lacked enforcement mechanisms, and it failed to regulate either landmine production or transfers.¹³

Landmines are temporally indiscriminate because they lie dormant in the ground and wait for their victims to trigger their firing mechanisms.¹⁴ They are blind weapons that cannot distinguish the "footfall of a soldier and that of an old aging woman."¹⁵ Landmines are unaware of cease fire and, long after the fighting has stopped, they can maim or kill the children and grandchildren of the soldiers who laid them.¹⁶ Although the Landmine Protocol prohibits the indiscriminate use of landmines, use is not the heart of the crisis. The problem is that landmines produce indiscriminate effects regardless of how they are placed. Since mines are delayed-action weapons, they are not meant for immediate harm. Because of the time-lag between when mines are laid and when they explode, mines frequently strike civilians.¹⁷

The Landmine Protocol is silent with regard to these indiscriminate effects. Mines deployed within the boundaries of the Landmine Protocol will outlast their military purpose and will cause future harm to civilians. The humanitarian tragedy of suffering and casualties will be their only lasting effect.

9. There are over 100 million mines buried in these regions. *Id.* "It is estimated that Angola has between 10 million and 20 million landmines scattered in the countryside after two decades of civil war between the Angolan government and UNITA." *Two U.N. Peacekeepers, Angolan Hurt in Mine Accident*, REUTERS N. AM. WIRE, June 17, 1996. Approximately two million landmines were buried during a 16 year civil war in Mozambique. *See 30,000 Landmines Removed in Mozambique*, XINHUA NEWS AGENCY, June 12, 1996.

10. DEADLY LEGACY, *supra* note 2, at 3.

11. *Final Act*, U.N. Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons, at Appendix C (Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices), U.N. Doc. A/Conf.95/15/Annex I (1980) [hereinafter *Landmine Protocol*].

12. *Final Act*, U.N. Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons, Appendix A (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects), U.N. Doc. A/CONF.95/15/Annex I (1980) [hereinafter *Weapons Convention*].

13. DEADLY LEGACY, *supra* note 2, at 8.

14. *Id.* at 3.

15. *Id.* at 3.

16. *Id.* at 3.

17. *Id.* at 5.

Secondly, neither the Weapons Convention nor the Landmine Protocol contain enforcement mechanisms.¹⁸ Absent provisions of liability for breaches of the Protocol, blatant violations go unpunished.¹⁹ For example, approximately 65 million of the 100 million uncleared landmines around the world have been laid since the Landmine Protocol has been in force.²⁰

Finally, the 1980 Landmine Protocol is silent on issues of landmine production and transfer. As a result, several states have themselves employed moratoriums on antipersonnel landmines. In October 1992, the United States adopted such a unilateral export moratorium. This led to U.S. resolutions calling for moratoria on exports of landmines that pose grave risks to civilians.²¹ A 1994 resolution called for the eventual elimination of antipersonnel landmines.²²

The instrument's silence regarding indiscriminate effects, enforcement mechanisms, and landmine production and transfer resulted in an international plea for a global ban on landmines.²³ In response to this plea, the French government requested an international conference to review the Weapons Convention and its annexed Landmine Protocol.²⁴ On December 22, 1993, States Parties to the Weapons Convention submitted the same request to the Secretary-General of the United Nations.²⁵

The Secretary-General subsequently established the Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects. At the first plenary meeting, from September 25-October 13, 1995, the Conference resulted in failed negotiations regarding the Landmine Protocol and concluded that more time was needed.²⁶ On May 3, 1996, when the second Review Conference ended, disappointment was felt around the world. The amended Landmine Protocol failed to reflect the international public opinion to ban landmines

18. *Landmine Protocol*, *supra* note 11, art. 3, para. 3.

19. Janet E. Lord, *Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis*, 25 CAL. W. INT'L L.J. 311, 345 (Spring, 1995).

20. *Landmine Fact Sheet*, *supra* note 4.

21. *Landmine Fact Sheet*, *supra* note 4. Senator Patrick J. Leahy sponsored legislation to impose a one year moratorium on the sale, transfer and export abroad by the U.S. of antipersonnel landmines, and to provide funds for demining efforts. He led the General Assembly to extend the moratorium for three years. He was also the mastermind behind *Landmines: A Deadly Legacy* put out by The Arms Project. *DEADLY LEGACY*, *supra* note 2, at xi.

22. *Id.*

23. *Id.* at 5.

24. *Landmine Protocol*, *supra* note 11, art. 8. Pursuant to Article 8, the Weapons Convention permits the contracting parties to review the scope and operation and make changes, if necessary, to the Weapons Convention and any of its Protocols.

25. *Final Report*, Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious Or to Have Indiscriminate Effects, at 4, U.N. Doc. CCW/CONF.I/16 1 (Part I)(1996) [hereinafter *Review Conference*].

26. *Review Conference*, *supra* note 25, at 6.

altogether.

Historically, the initial 1980 Landmine Protocol was then positive step towards the codification and development of the law of landmine warfare. While it filled a major gap that existed in humanitarian law,²⁷ it proved futile over time. The participants of the Review Conference were presented with a historic opportunity to ban landmine use altogether. The Conference's result, however, was merely a more detailed and restrictive version of the 1980 Landmine Protocol.

Part I of this Comment briefly discusses the tactical and strategic value of landmines and discusses the humanitarian consequences in terms of medical, social, environmental, and economic costs throughout the world. Part II examines international law governing landmine use prior to the Review Conference with an emphasis on the original Landmine Protocol. Part III discusses the events leading to the Review Conference as well as the final amendments regulating not only landmine use, but also production and transfer. Part IV analyzes the effectiveness of the amended Landmine Protocol as applied to the growing landmine crisis. This comment concludes that, although tighter restrictions have been placed on the use, production, and transfer of landmines, the Landmine Protocol will yet fail to safeguard the civilians of the world.

I. A "SLOW MOTION" WEAPON OF MASS DESTRUCTION

Landmines are viably characterized as a slow motion weapon of mass destruction.²⁸ These devices work in slow motion because it is the gradual accumulation of mines that creates the potential for mass destruction.²⁹ Mines may not initially evoke the nightmarish visions of warfare like biological, chemical, or nuclear weapons, but their effect is the same: they are all indiscriminate weapons that cause excessive deaths and insufferable injuries. They have as well the potential for massive long-term devastation.³⁰

A. *The Evolution of Landmine Use: From Tactics to Strategies*

Landmines may be the most ancient weapons on the United States' our arms control agenda.³¹ During both World War I and World War II, they

27. Lieutenant Colonel Burris M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73, 94 (1984)[hereinafter Carnahan].

28. DEADLY LEGACY, *supra* note 2, at 3. The Arms Project, a division of the Human Rights Watch, commonly refers to the accumulation of landmines as a "slow motion weapon of mass destruction." This coined phrase has been adopted universally by the international community.

29. *Id.* at 11.

30. *Id.* at 12.

31. U.S. Dep't of State, *Hidden Killers: U.S. Policy on Anti-personnel Landmines*, DEP'T OF STATE DISPATCH, Feb. 6, 1995 [hereinafter *Hidden Killers*].

were primarily used as obstacles to enemy movement.³² For example, troops would seed their antitank³³ minefields with antipersonnel landmines to hinder the enemy from clearance attempts, thereby causing delay.³⁴ But today, the role of landmines has become two-fold. Because we live in a time when war is waged increasingly against civilians,³⁵ a once purely defensive tactical battlefield weapon has expanded to an offensive strategic theaterwide weapon.³⁶ This section explains both the defensive and offensive uses of landmines and concludes that modern conventional military operations and technological developments have caused a dramatic and fundamental expansion of landmine use.³⁷

1. The Traditional Approach: Defensive Tactics

Landmines are deployed defensively in several ways. First, they are used to impede enemy access to certain areas of land by requiring mine clearance before those areas may be traveled or occupied.³⁸ Minefields are also commonly laid to protect areas from expected enemy attack. Such areas might include the perimeters of key economic installations, villages, towns, and countries.³⁹

2. The Modern Approach: Offensive Strategies

While originally invented as a defensive device to impede advancing armies, mines are increasingly being deployed as offensive weapons.⁴⁰ Placement around the perimeters of villages and towns can serve an

32. Carnahan, *supra* note 27, at 75-76.

33. An antitank mine refers to mines whose function is to destroy or render vehicles, equipment, or materials ineffective. *DEADLY LEGACY*, *supra* note 2, at 17.

34. *Id.* at 21.

35. *Hidden Killers*, *supra* note 31.

36. *DEADLY LEGACY*, *supra* note 2, at 23.

37. *See id.* at 33.

38. Carnahan, *supra* note 27, at 75.

39. HUMAN RIGHTS WATCH, *LANDMINES IN MOZAMBIQUE 28-31 (1994)* [hereinafter *MOZAMBIQUE*]. During the continuous war in Mozambique from the 1960 until 1992, combatants on all sides used landmines. The Mozambican government used antipersonnel mines to protect hospitals, clinics, bridges, dams, factories, and water pipelines. The government also laid protective and nuisance minefields around the perimeters of towns and municipal centers where attacks were expected. *Id.* at 31. In 1990, an extensive minefield was laid to act as a barrier to an expected coalition attack from Turkey during the Gulf War. MIDDLE EAST WATCH, A DIVISION OF HUMAN RIGHTS WATCH, *HIDDEN DEATH: LANDMINES AND CIVILIAN CASUALTIES IN IRAQI KURDISTAN 32 (1992)* [hereinafter *HIDDEN DEATH*]. Presently, the United States is laying almost a million mines necessary to delay and disrupt a mass infantry attack on Seoul by North Korean troops long enough for U.S. airpower to get into Seoul and be fully effective. President Clinton, Secretary of State Warren Christopher, and Secretary of Defense Bill Perry, Remarks at News Conference on the Policy on Landmine Use by the Military (May 16, 1996) (transcript available from Federal News Service).

40. *DEADLY LEGACY*, *supra* note 2, at 22. Mines are now used mainly in civil wars, by developing countries. *Landmines. Treading Gingerly*, *ECONOMIST*, Apr. 27, 1996, at 46.

offensive, as well as defensive, measure. For example, during the recent Cambodian conflict, government troops placed mines around the perimeters of enemy villages, then bombarded the villages with artillery fire so that the "enemy"—mainly noncombatant civilians—were forced to flee into the minefields.⁴¹ The use of landmines as an offensive weapon alters their role from that of a limited utility, tactical weapon used on a particular battlefield in support of other weapons systems (especially antitank mines) to that of a strategic weapon.⁴²

The intentional targeting of civilians is perhaps the most horrifying offensive use of mines.⁴³ Mines have been used deliberately to terrorize and control civilians. For instance, in Thailand, mines planted around a refugee camp are used to prevent refugees from leaving at night.⁴⁴ Mines strewn in farmlands and paddyfields, in schoolyards, and on country roads make entire villages uninhabitable.⁴⁵ The mere threat of mines can also be used as a kind of psychological warfare against civilians.⁴⁶

Route denial and ambush mining are other forms of offensive deployment.⁴⁷ Route denial consists of planting mines on major supply roads and rural tracks in an attempt to deny such routes to opposing forces.⁴⁸ Roads and tracks strewn with mines also facilitate ambushes. Interlinking mines, so that the point man passes several devices before triggering a mine, ensures that the remaining members of the patrol are within the killing zone of the mine pattern.⁴⁹ Other types of ambushes consist of blocking tracks to channel pedestrians and vehicles into mined areas.⁵⁰ Mines are also used to attack people trying to escape or take cover at ambush sites.⁵¹

3. Technological Advancement

In addition to the expanded tactical use of landmines, the technological advances in landmine design has also increased their destructive capabilities.⁵² Technological advances include remotely delivered systems,⁵³ low

41. *Id.* at 22-23.

42. *Id.* at 22.

43. *Id.* Mines deployed against civilians are also a flagrant violation of international law. *Id.* at 23.

44. *Thailand: Army to Show Renegades No Mercy*, BANGKOK POST, Feb. 9, 1996.

45. *Hidden Killers*, *supra* note 31.

46. MOZAMBIQUE, *supra* note 39, at 28. For example, in the Gorongosa region of Mozambique, civilians were told that areas were heavily mined, when in fact they were not. *Id.* at 29.

47. *Id.* at 29.

48. *Id.* Antipersonnel mines surround antitank mines in order to hinder clearance attempts.

49. *Id.* at 30. This technique is called a "patrol trap."

50. *Id.*

51. *Id.*

52. DEADLY LEGACY, *supra* note 2, at 33.

metal content,⁵⁴ sophisticated electronic sensors,⁵⁵ self-destructing,⁵⁶ and self-neutralizing mechanisms.⁵⁷ These advances render mines even more destructive to civilian populations.⁵⁸

B. Military Benefits vs. Humanitarian Costs

Given the ease of defensive and offensive strategies, there are a number of military benefits. Such benefits include hindering, delaying, and directing troop movement while denying access to large tracts of land, military bases, and key installations.⁵⁹ Mines are designed deliberately to maim without killing in order to burden an enemy's medical organization and undermine troop morale.⁶⁰

A few military disadvantages, however, do detract from the military benefits of landmines. Often, troops find themselves victims of their own minefields. For example, U.S. deployed mines killed approximately one third of the U.S. forces in Vietnam while they killed relatively few of the enemy in exchange.⁶¹ Studies of mine use in the last decade show that, in the aggregate, the military value of landmines is short-lived and quite inconsequential when compared with the ongoing wreckage they cause.⁶²

But aside from such military detriments, senseless humanitarian costs are the real scourge of landmines. Individual, communal, and overall socio-economical costs are exorbitant prices to pay in contrast with the

53. "Remotely delivered mines" are landmines delivered via machinery to a remote location in a very short period of time. This may be done through the use of rockets, artillery, or aerial drops which serve to place landmines in a distant area of an enemy's territory. Peter J. Eckberg, Note, *Remotely Delivered Landmines and International Law*, 33 COLUM. J. TRANSNAT'L L. 149, 150 (1995)[hereinafter Eckberg]. See also DEADLY LEGACY, *supra* note 2, at 26.

54. Mines with a low metal content are often extremely difficult to detect and deactivate or destroy. Apparently, some truly all-plastic mines are now being produced. DEADLY LEGACY, *supra* note 2, at 27.

55. Mine fuzing sensors and their associated microprocessors can be used to discriminate between the movement of animals and humans or to count the number of passers-by before a mine will detonate. *Id.* at 28.

56. A mine with a self-destructing mechanism will automatically explode after a pre-set period of time. *Id.*

57. A mine with a self-neutralizing mechanism is designed to turn itself off after a set period of time. *Id.* at 29.

58. *Id.* at 26.

59. *Id.* at 21. Modern conventional military tactics depend largely upon speed of movement and maneuver, coupled with firepower, to defeat an enemy. A defender will therefore see any time delay or physical hindrance that can be imposed upon an enemy as an advantage. In this regard, landmines hinder the movement of an enemy and its access to large tracts of land, military bases, and key installations. Landmines are also used to direct enemy troops toward an area where the defender is best able to defeat them.

60. *Id.* at 22. An injured soldier in a minefield crying for help can demoralize his comrades. Moreover, his commander will often be obliged to deploy other troops to rescue him and possibly slow down military operations. *Id.*

61. *Id.* at 21-22. Even with this data, the Army continued to ask for more mines.

62. *Id.* at 272.

military value of landmines. Individual costs include medical, physical, mental, and labor disabilities.

The medical consequences of mine blasts are traumatic. If not killed immediately by explosives, victims will often die in the fields from loss of blood or lack of medical transport.⁶³ If death does not ensue, surgical amputation⁶⁴ typically results from ravaging wounds.⁶⁵ If victims are fortunate enough to receive medical treatment, they require antibiotics, large amounts of blood, and extended hospital stays.⁶⁶ The survivor amputees require mental therapy, physical therapy, and prosthetic devices to lead normal and productive lives.⁶⁷ Most mine blasts, however, occur in developing countries where scarce resources make even ordinary medical treatment difficult to supply. Most mine victims will therefore never receive these services.⁶⁸

Aside from physical disabilities, victims suffer severe social hardship, particularly during their social reintegration process.⁶⁹ The societies in which the majority of landmine victims live are agrarian or pastoral, where survival means muscle power.⁷⁰ An amputee is often viewed as unproductive and simply another mouth to feed.⁷¹ They must learn to cope with social rejection and discrimination from their families and society as a whole.⁷²

Victims may feel like a burden on their families⁷³—a valid feeling, considering that the relatives of a mine victim often must assume the total burden of care.⁷⁴ Spouses of amputees may eventually abandon them to seek more productive, able-bodied partners.⁷⁵ Unmarried young men and women fear that they will not find a partner because of their disability.⁷⁶

Amputees not only suffer from severe social hardships but are also

63. *Id.* at 118.

64. *Id.* at 117. Surgery can be extremely problematic due to the severity and degree of contamination. The surgeon's task is to cut away all of the dead and severely damaged tissue and remove debris and dirt, a process called debridement. *Id.* at 121.

65. Mines damage the body either by blast or by driving dirt, bacteria, clothing, and metal and plastic fragments into the tissue and bone, often causing severe secondary infections. Damage is rarely confined to one leg. Damage can be found to the second leg, other limbs, the genitals, chest, and face. *Id.* at 121.

66. *Id.* at 117.

67. *Id.*

68. *Id.*

69. MOZAMBIQUE, *supra* note 39, at 72.

70. DEADLY LEGACY, *supra* note 2, at 117.

71. *Id.* at 131.

72. MOZAMBIQUE, *supra* note 39, at 72-75.

73. *Id.* at 75.

74. DEADLY LEGACY, *supra* note 2, at 131.

75. MOZAMBIQUE, *supra* note 39, at 74; DEADLY LEGACY, *supra* note 2, at 132.

76. MOZAMBIQUE, *supra* note 39, at 74-75.

discriminated against in the workplace.⁷⁷ They are often fired after falling victim to a landmine.⁷⁸ Some are fortunate enough to receive final compensation before being fired.⁷⁹

Because of the lack of support from families and communities, landmine victims must try to survive in any way they can.⁸⁰ Despite their disabilities, amputees may try to continue to produce crops. Others with basic educations may try to find secretarial work, but office jobs are scarce.⁸¹ Amputees may drift into the larger towns where they become beggars or petty criminals.⁸² Consequently, many die of malnutrition because they are ill-equipped to make a living.⁸³

The effects on community life can be equally devastating.⁸⁴ Mines serve to impede enemy movement in war, but in times of peace, uncleared landmines are obstacles to post war and economic development. In some cases, mines render land completely uninhabitable. They inhibit refugee repatriation.⁸⁵ Conversely, communities will often disintegrate as villagers fearful of encountering mines abandon their farms to live in other villages.⁸⁶ With peace, communities already shattered by war must rebuild their homes and villages, find new pastures and farmland, and seek out new markets for their goods—all with the continuing threat of landmines.⁸⁷

The damage to the economic infrastructure of a country is quite significant. During civil strife or regional conflict, it is common to lay mines around railways, electric plants and powerlines, key road nets, water treatment plants, and government buildings.⁸⁸ These are key installations required to support a rebuilding economy.⁸⁹ As a result, economic reconstruction is delayed until the mines can be cleared.⁹⁰

Most postwar countries in the developing world, however, have neither

77. *Id.* at 74.

78. *Id.* at 74. Case Study: S.A. was fired in 1992, after he had been maimed by a landmine and the company paid no compensation. S.A. wrote a complaint to the provincial department of employment, but has received no answer.

79. *Id.* at 74. Case Study: R.S. was a tractor driver at the Empresa di Citrinos de Chmoio. In 1980, while driving a tractor in an orange tree plantation, the vehicle hit an antitank mine. He lost his left leg. After his accident, the Empresa de Citrinos paid him a substantial amount of money, and fired him.

80. *Id.* at 73.

81. *Id.* at 75.

82. DEADLY LEGACY, *supra* note 2, at 132. A beggar in Maputo describes why he spends all day begging, "I have to survive so I spend the day outside here asking [for] money." MOZAMBIQUE, *supra* note 39, at 74.

83. DEADLY LEGACY, *supra* note 2, at 288.

84. *Id.* at 132.

85. *Id.* at 134.

86. *Id.* at 133.

87. *Id.* at 132-33.

88. *Hidden Killers*, *supra* note 31.

89. *Id.*

90. *Id.*

the economic nor organizational infrastructure to support a large scale mine clearance operation.⁹¹ This leaves their fate in the hands of the international community.⁹² As the Kurdish author, Hussain Arif, once wrote, "we have come so close but so many things conspire against us, and now these mines, this blight in our fields—they will surely kill our dream, even if we are successful in all our other efforts." The obvious humanitarian wreckage thus exceeds not only the military benefits of landmines but also their military intent. Given the weight of the humanitarian costs, the military benefits of landmine use justifiably deserve the international plea for the global ban of landmines and the universal demand for action by the United Nations.

II. INTERNATIONAL LAW GOVERNING LANDMINES PRIOR TO THE REVIEW CONFERENCE

The Landmine Protocol devolves from international humanitarian law, also called the law of war. The law of war traditionally governed the unnecessary harshness of armed conflict between states. Although this humanitarian law has roots in customary international law,⁹³ much of it has been codified in a variety of treaties.⁹⁴ This section first addresses customary international laws applicable to landmine use. It then sets forth the various treaties that govern the weapon.

A. Customary International Law

Customary international law limits the means by which parties to a conflict wage war.⁹⁵ It prohibits states from using weapons which cause unnecessary suffering and superfluous injury⁹⁶ and it prohibits indiscriminate and direct attacks against noncombatants.⁹⁷ Customary law also requires that the military value derived from the use of a weapon outweigh

91. DEADLY LEGACY, *supra* note 2, at 134. The United Nations has estimated the costs of clearance, including support and logistics costs, at somewhere between \$300 and \$1000 a mine. Most antipersonnel mines, however, cost less than \$25, and some less than \$3. *Id.*

92. As the Kurdish author, Hussain Arif wrote, "we have always had our dream, freedom, self determination, a voice in our future—this is the Kurdish dream." HIDDEN DEATH, *supra* note 39, introductory quotation.

93. General practices of states that gradually obtain universal recognition as law evolve into customary international law. Norman B. Smith, *A Plea For the Total Ban of Land Mines By International Treaty*, 17 LOY. L.A. INT'L & COMP. L.J. 507, 513 (Apr. 1995) [hereinafter Smith].

94. States may choose to codify customary law in international treaties. It is important to note, however, that it is not the treaty that gives the legal status to custom. Customary law governs all. In addition to codifying customary law in treaties, states may also expressly agree to bind themselves to specific rights and duties. See Smith, *supra* note 93.

95. DEADLY LEGACY, *supra* note 2, at 306; JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 163 (1985) [hereinafter PRINCIPLES]; HIDDEN DEATH, *supra* note 39, at 56.

96. DEADLY LEGACY, *supra* note 2, at 306.

97. PRINCIPLES, *supra* note 95, at 76.

its humanitarian costs.⁹⁸ In addition to the above principles, customary law requires that in cases not covered by treaties, principles of humanity, and public conscience will serve as protection to civilians and combatants.⁹⁹ The above variant was first codified by the 1899 Hague Convention and is embodied in most subsequent humanitarian law instruments.¹⁰⁰

B. Treaty Law Prior to the Weapons Convention

The St. Petersburg Declaration of 1868¹⁰¹ was the first treaty to prohibit the use of specific weapons. The drafters noted that the employment of arms which uselessly aggravate human suffering is contrary to the laws of humanity.¹⁰² In anticipation of the inevitable effect of modern weapon technology, they specifically acknowledged the possibility of drawing up new agreements in order to maintain the principles established in the Declaration.¹⁰³

The customary principle of eliminating weapons which cause unnecessary suffering and superfluous injury is also the premise of the First Hague Peace Conference of 1899, as well as the Second Hague Peace Conference of 1907.¹⁰⁴ Furthermore, the Hague Agreements were the first international treaties to codify the customary rule regarding the employment of warfare: the right of belligerents to adopt means of injuring the enemy is not unlimited.¹⁰⁵ The Law of the Hague was an early attempt to develop laws

98. PRINCIPLES, *supra* note 95, at 76; See also FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 15 (1987) [hereinafter CONSTRAINTS]; MOZAMBIQUE, *supra* note 39, at 109.

99. CONSTRAINTS, *supra* note 98, at 14; PRINCIPLES, *supra* note 95, at 60. See also HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 112 (Astrid J.M. Delissen & Gerard J. Tanja, eds., 1991) [hereinafter CHALLENGES AHEAD]. ("One could also mention the famous finding by the Nuremberg International Military Tribunal that, by 1939, the Hague Regulations had passed (the Martens Clause) into custom and thus becoming binding on parties and non-parties alike.") The Martens Clause reads in its entirety:

In cases not covered by the Conventions, civilians and combatants remain under the protection and the authority of the principles of the law of nations, as they result from established usages, from the principles of humanity, and the dictates of public conscience.

Id.

100. CHALLENGES AHEAD, *supra* note 99, at 116. The Weapons Convention embodies the Martens Clause into its preamble. *Weapons Convention, supra* note 12.

101. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Dec. 11, 1868, 1 A.J.I.L. Supp. 95 (1907), reprinted in BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 128(1990) [hereinafter St. Petersburg Declaration].

102. DEADLY LEGACY, *supra* note 2, at 312.

103. *Id.* at 313. The Declaration banned the use in war of projectiles weighing less than 400 grams which are either explosive or inflammable.

104. *Id.* at 313; CONSTRAINTS, *supra* note 98, at 29 [hereinafter Law of the Hague or Hague Agreements].

105. CONSTRAINTS, *supra* note 98, at 29.

which civilized countries would agree to follow in times of war.¹⁰⁶

The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare¹⁰⁷ is analogous to the above international agreements because it also prohibits weapons that cause unnecessary suffering.¹⁰⁸ The 1925 Geneva Protocol, however, goes one step further from the previous agreements in that it prohibits warfare that is inherently indiscriminate in its effect.¹⁰⁹ In 1972, the Biological Weapons Convention¹¹⁰ supplemented the 1925 Geneva Protocol. The Biological Weapons Convention was the first international agreement to ban not just use, but the production, stockpiling, and transfer of a specific weapon type.¹¹¹

The four Geneva Conventions of 1949 redefined and redeveloped the Law of the Hague.¹¹² Thus far, the Law of the Hague, as well as the other conventions regarding wars, were literally applicable to just that—wars between States.¹¹³ The Geneva Conventions serve as the first treaties expressly to provide protection for all those who, as a consequence of armed conflict, have fallen into the hands of the adversary.¹¹⁴ Inhabitants of

106. Lord, *supra* note 19, at 326 n.113.

107. 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, *reprinted in* BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 136 (1990) [hereinafter 1925 Geneva Protocol].

108. *Id.*

109. CONSTRAINTS, *supra* note 98, at 30; DEADLY LEGACY, *supra* note 2, at 314.

110. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, *reprinted in* BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 211 (1990).

111. *Id.*

112. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 74 U.N.T.S. 31; Convention for Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; these four conventions are *reprinted in* BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 147-80 (1990) [hereinafter Geneva Conventions]; CONSTRAINTS, *supra* note 98, at 10.

113. See also St. Petersburg Declaration, *supra* note 101; 1925 Geneva Protocol, *supra* note 107.

114. CONSTRAINTS, *supra* note 98, at 40; Geneva Conventions, *supra* note 112, art. 3; Article 3 reads in its entirety:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place

occupied territory as well as enemy civilians in the territory of a belligerent party are protected.¹¹⁵

In time, the four Geneva Conventions of 1949 began to manifest shortcomings.¹¹⁶ The simple treaty provisions of the Laws of the Hague and the Geneva Conventions were outdated by sophisticated developments in the techniques of warfare (such as the innovations in the sphere of landmines). The provisions became blatantly incapable of providing the civilian population with adequate protection against the dangers arising from military operations.¹¹⁷

The Geneva Diplomatic Conference on Humanitarian Law, which met from 1974-1977, proved successful because it clarified the precise prohibitions and restrictions that States were prepared to accept.¹¹⁸ The Diplomatic Conference produced two Additional Protocols to the 1949 Geneva Conventions.¹¹⁹ Protocol I is the predecessor to the Landmine Protocol. Notably, many provisions of Protocol I simply codified pre-existing rules of customary international law relating to the methods and means of warfare.¹²⁰ Such provisions limited the scope of warfare,¹²¹ forbade weapons that cause superfluous injury and unnecessary suffering,¹²² prohibited direct¹²³ and indiscriminate attacks¹²⁴ against civilians, and prohibited

whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

Id.

115. CONSTRAINTS, *supra* note 98, at 10-11.

116. *Id.* at 11.

117. *Id.* at 35.

118. *Id.* at 36.

119. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1977 U.N. Jurid. Y.B. 95, reprinted in BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 230-246 (1990) [hereinafter *Protocol I*]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 1977 U.N. Jurid. Y.B. 135, reprinted in BURNS H. WESTON ET AL., BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 247-252 (1990) [hereinafter *Protocol II*]; CONSTRAINTS, *supra* note 98, at 71.

120. CONSTRAINTS, *supra* note 98, at 71; Eckberg, *supra* note 53, at 161-162. "The protections provided for in Protocol I marked great strides by codifying several of the customary principles of international law dealing with rules of war; however, the effectiveness of the agreement is limited because only a small number of nations are parties to the agreement." *Id.* at 162.

121. *Protocol I*, *supra* note 119, art. 35, para. 1.

122. *Id.* art. 35, para. 2.

123. *Id.* art. 51, para. 2.

methods of warfare which may cause widespread, long-term severe damage to the natural environment.¹²⁵

Other provisions clarified previously vague principles regarding the protection of the civilian population against the effects of hostilities.¹²⁶ Protocol I required that parties to a conflict distinguish between civilians and combatants, as well as civilian objects and military objects.¹²⁷ It further mandated that the parties operations be directed only against military operations.¹²⁸ Protocol I also took the ambiguity out of the word "civilian," requiring that in case of doubt, the presumption must be that the person is a civilian.¹²⁹

Protocol I additionally obligated the High Contracting Parties to determine whether a new method of warfare would be prohibited by the Protocol or by any other rule of international law.¹³⁰ Finally, Protocol I illustrated the importance of the protection of civilians failing to release legal obligations with respect to civilians when another party to the conflict violates Protocol I.¹³¹

The general principles of the law of war as set forth in Protocol I were clear. But in relation to landmines in particular, Protocol I was flawed. Its provisions were too general and broadly drafted to suitably address the concerns raised by the widespread use of the weapon.¹³²

C. The Weapons Convention

The Diplomatic Conference, in addition to drafting the 1977 Additional Protocols, formed an Ad Hoc committee on weapons to confront the issue of specific limitations on landmines and booby-traps.¹³³ Although new limitations were politically and technologically necessary, the Conference was unable to come to an agreement.¹³⁴ The subject was passed to the United Nations General Assembly. The General Assembly convened the Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons

124. *Id.* art. 51, para. 4(5).

125. *Id.* art. 35, para. 3.

126. CONSTRAINTS, *supra* note 98, at 71; *Protocol I*, *supra* note 119, Part IV.

127. *Protocol I*, *supra* note 119, art. 48.

128. *Id.* art. 48.

129. *Id.* art. 50, para. 1.

130. *Id.* art. 36.

131. *Id.* art. 51, para. 8.

132. Lord, *supra* note 19, at 329; DEADLY LEGACY, *supra* note 2, at 285.

133. Carnahan, *supra* note 27, at 75. The sudden interest in restricting landmines and other "delayed action weapons" arose for both political and technical reasons. Politically, the rise of international terrorism in the 1960s and 1970s stimulated efforts to curb some of the terrorists' favorite weapons, booby-traps, and time bombs. On the technical side, the development of remotely delivered mines caused new concern that "offensive" mines might be used indiscriminately. *Id.*

134. *Id.*

Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.¹³⁵ After two sessions, the participants reached an agreement commonly referred to as the Weapons Convention.¹³⁶ The Weapons Convention applied to "dubious weapons,"¹³⁷ dubious because either the weapons themselves or the manner in which they are used are not in accordance with the principles of humanitarian law of armed conflict.¹³⁸

The participants' views at the Conference varied widely.¹³⁹ As a result, the Weapons Convention itself was an extremely general agreement.¹⁴⁰ It contained eleven articles that dealt with matters such as scope of application, entry into force and revisions.¹⁴¹ Its three annexed Protocols (Protocol I on "Non-Detectable Fragments,"¹⁴² Protocol II on "Prohibitions or Restrictions of the Use of Mines, Booby-Traps and Other Devices,"¹⁴³ and Protocol III on "Prohibitions or Restrictions on the Use of Incendiary Weapons"¹⁴⁴) contained the substantive aspects of the possible

135. *Id.*

136. *Weapons Convention, supra* note 12.

137. The term is coined by the distinguished Dutch Professor, Bert Roling. CONSTRAINTS, *supra* note 98, at 147.

138. *Id.* As mentioned above, these principles include prohibitions against using weapons that cause unnecessary suffering and superfluous injury and indiscriminate and direct attacks against noncombatants. The principles also require the military value derived from the use of a weapon outweigh its humanitarian costs. PRINCIPLES, *supra* note 95, at 76.

139. CONSTRAINTS, *supra* note 98, at 147. "To give just one example: while some delegations favoured a categorical ban on all possible uses of incendiary weapons, other delegations saw no reason to protect combatants from the impact of such weapons, and they were not even convinced of the need to add the rules already laid down in Protocol I of 1977 on protection of the civilian population, any specific rules protecting civilians against the use of incendiary weapons." *Id.*

140. The Weapons Convention was drafted in general terms because the participants were uncertain as to whether the individual States would be prepared to accept all the prohibitions and restrictions they would be able to agree upon. CONSTRAINTS, *supra* note 98, at 147.

141. *Weapons Convention, supra* note 12. Art. 8 reads in its entirety:

(a) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all the High Contracting Parties and shall seek their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. States not parties to this Convention shall be invited to the conference as observers.

(b) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and that amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties are bound by that Protocol.

142. *Final Act*, U.N. Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons, at Appendix B (Protocol On Non-Detectable Fragments), U.N. Doc. A/CONF.95/15/Annex I (1980).

143. *Landmine Protocol, supra* note 11.

144. *Final Act*, U.N. Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons, at Appendix D (Protocol On Prohibitions or Restrictions of the Use of Incendiary Weapons), U.N. Doc. A/CONF.95/15/Annex I (1980)[hereinafter *Protocol III*].

uses of certain conventional weapons.¹⁴⁵

The Weapons Convention, as evidenced in the preamble, was narrowly tailored to principles of humanitarian law of armed conflict.¹⁴⁶ In reaffirming the need to continue the codification of customary international law, the Weapons Convention recalled “the general principles of the protection of the civilian population against the effects of hostilities” as well as principles of unnecessary suffering and protection of the environment which derive directly from Protocol I of 1977.¹⁴⁷

The Conference, however, failed to agree on several subjects. This led to the absence of specific rules (such as the use of incendiary weapons against combatants).¹⁴⁸ To ensure protection against the absence of rules,¹⁴⁹ the High Contracting Parties, embodied the customary law requiring that in cases not governed by the convention, civilians and combatants remain under the protection of the principles of humanity.¹⁵⁰

D. 1980 Landmine Protocol

The purpose of the 1980 Landmine Protocol was to adapt customary humanitarian principles, particularly those expressed in 1977 Additional Protocol I, to the peculiar vagaries of landmine use.¹⁵¹ While a salutary attempt towards the regulation of mine warfare, the Landmine Protocol contained numerous flaws. An amalgamation of balancing tests, exceptions, limitations, and loopholes rendered it ineffective.

1. Scope

The material scope related to the use of mines, booby-traps, and other devices on land.¹⁵² As part of the Weapons Convention, the Landmine Protocol applied in the same situations as the Geneva Convention Common

145. CONSTRAINTS, *supra* note 98, at 148.

146. *Weapons Convention*, *supra* note 12, preamble.

147. *Id.*

148. CONSTRAINTS, *supra* note 98, at 148.

149. *Weapons Convention*, *supra* note 12, preamble.

150. Martens Clause defined. See CHALLENGES AHEAD, *supra* note 99 at 116.

151. MOZAMBIQUE, *supra* note 39, at 110; DEADLY LEGACY, *supra* note 2, at 304. The Landmine Protocol additionally deals with booby-traps and other similar devices. For purposes of this Comment, article 6, which deals exclusively with booby-traps will not be discussed. *Landmine Protocol*, *supra* note 11, art. 6.

152. Article 1 provides: “This Protocol relates to the use on land of the mines, booby-traps and other devices defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways.” *Landmine Protocol*, *supra* note 11, art. 1. Article 2 defines: “‘Mine’ means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and ‘remotely delivered mine’ means any mine so defined delivered by artillery, rocket, mortar, or similar means or dropped from an aircraft.” *Id.* art. 2, para. 1.

Article 2 and the Additional Protocol I, which included international conflicts and fighting against colonial domination, alien occupation, and racist regimes.¹⁵³ Because of this limited scope, the Landmine Protocol was effectively irrelevant to the internal armed conflicts in which landmines are chiefly used.¹⁵⁴

2. General Restrictions

At the heart of the Landmine Protocol were general restrictions of mine use set forth to protect civilians and non-combatants.¹⁵⁵ The Landmine Protocol not only prohibited the direct use of mines against civilians,¹⁵⁶ but it also purported to prohibit their indiscriminate use.¹⁵⁷ However, the instrument ignored the basic problem of temporal indiscriminateness inherent in landmine use: the effect of mines that outlast their military purpose cause future risks to civilians.¹⁵⁸ The Arms Project appropriately concluded:

The Landmines Protocol thus fails on its own terms to provide adequate protection from this indiscriminate quality. This reflects the failure of its authors to make the analytical distinction between indiscriminate weapon *use* (which can be minimized if combatants take care to distinguish military targets from civilians) and the indiscriminate *effects* that naturally result

153. Geneva Conventions, *supra* note 112, art. 2. *Protocol I*, *supra* note 119, art. 1, para. 4.

154. DEADLY LEGACY, *supra* note 2, at 286. The treaty does not govern the use of landmines in civil wars or other internal conflicts. *Id.*

155. Article 3 provides:

1. This Article applies to:
 - (a) Mines;
 - (b) Booby-traps; and
 - (c) Other devices.
2. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offense, defense or by way of reprisals, against the civilian population as such or against individual civilians.
3. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
 - (a) Which is not on, or directed against, a military objective; or
 - (b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or
 - (c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
4. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are tractable or practically possible taking into account all circumstances ruling the time, including humanitarian and military considerations.

Landmine Protocol, *supra* note 11, art. 3.

156. *Id.* art. 3, para. 2.

157. *Id.* art. 3, para. 3.

158. DEADLY LEGACY, *supra* note 2, at 286.

from a mine's delayed-action operation. . . . The inadequacy of this narrow formulation is evident. Technically, mines can be directed at a legitimate military target as required by Article 3(3)(a) and (b). The problem is temporality; because of their delayed-action quality, mines essentially become indiscriminate weapons, or, at least, indiscriminate in their effects. Article 3(3) ignores this fundamental problem.¹⁵⁹

A balancing test was set forth that actually allows indiscriminate use of the weapon if the expected damage is not excessive when weighed against the direct military advantage.¹⁶⁰ However, this test "[d]oes not offer guidance on how to compare the potential for long-term and essentially unknowable devastation presented by landmine use with a relatively short-term military advantage."¹⁶¹

Combatants were required to take "all feasible precautions" to minimize probable harm to civilians.¹⁶² Even this generally protective language contained an enormous loophole. Military commanders could justify taking no measures at all to protect civilians by finding that none were "feasible" under the circumstances.¹⁶³ The vagueness could have been cleared up if the authors had required "effective" measures instead of "feasible" measures,¹⁶⁴ rather, the authors chose a precaution that failed to place sufficient emphasis on future humanitarian considerations.¹⁶⁵

3. Restrictions of Non-remotely Delivered Mines

Non-remotely delivered mines¹⁶⁶ were prohibited in populated areas, except when combat between ground forces is taking place or imminent, when they are placed on or in the close vicinity of a military objective, or when measures are taken to protect civilians.¹⁶⁷ With so many exceptions, the prohibition undercut the Protocol's mandate to avoid attacks on civilians.¹⁶⁸

159. *Id.*

160. *Landmine Protocol*, *supra* note 11, art. 3, para. 3(c).

161. *DEADLY LEGACY*, *supra* note 2, at 287.

162. *Landmine Protocol*, *supra* note 11, art. 3, para. 4.

163. Carnahan, *supra* note 27, at 81.

164. *DEADLY LEGACY*, *supra* note 2, at 291.

165. *Id.* at 292.

166. *Landmine Protocol*, *supra* note 11, art. 4, para. 1.

167. *Id.* art. 4, para. 2. Specific measures are not enumerated. Article 4 gives a short list of examples: the posting of warning signs, the posing of sentries, the issue of warnings or the provision of fences. *Id.* art. 4, para. 2(b).

168. *DEADLY LEGACY*, *supra* note 2, at 296.

4. Regulations of Remotely Delivered Mines

Remotely delivered mines¹⁶⁹ could be deployed only within an area which is itself a military objective or which contains military objectives.¹⁷⁰ Combatants, additionally, must comply with one of the following: they must accurately record the location of the mines or the mines must have an “effective neutralizing mechanism.”¹⁷¹ Although this provision attempted to safeguard civilians from harm, it failed to take into account that even remotely delivered mines directed at a military objective can become indiscriminate.¹⁷² These mines, as with all mines, may survive their military objective.¹⁷³ Remotely delivered mines, distinctively, may miss their mark due to the large quantities of mines dispersed and the virtual impossibility of accurate targeting during remote delivery.¹⁷⁴ Finally, the above regulations actually gave greater deference to military interest. It mandated that the use of remotely delivered mines required “effective advance warning” unless “circumstances do not permit.”¹⁷⁵ The requirements, therefore, allowed combatants to neglect advance warnings by reason of unfavorable circumstances.¹⁷⁶

5. Recording and Publication

More narrow rules consumed the Landmine Protocol’s recording and publication procedures. Its provisions required that parties must record “all preplanned minefields”¹⁷⁷ and should “endeavour to ensure” the recording of all other minefields.¹⁷⁸ While this appeared to be a positive attempt to alert civilians of minefields, practically, it is another useless requirement.

169. *Landmine Protocol*, *supra* note 11, art. 5.

170. *Id.* art. 5, para. 1.

171. *Id.* art. 5, para. 1(a), (b).

Employing self-neutralizing or self-destructing mechanisms is not necessarily a more effective alternative. . . . The failure rate of these mechanisms is often as high as ten percent. . . . Self-neutralizing mines cannot confidently be handled as long as there is any question about the effectiveness of the neutralizing feature. . . . Additionally, no method exists to prevent civilian casualties before and at the moment of self-destruction. These shortcomings of self-neutralizing or self-destructing mechanisms further demonstrate the inadequacy of Article 5.

Smith, *supra* note 93, at 527-8.

172. *DEADLY LEGACY*, *supra* note 2, at 300.

173. *Id.* at 300.

174. *Id.*

175. *Landmine Protocol*, *supra* note 11, art. 5, para. 2. Article 5 also fails to set forth how to warn civilians.

176. Smith, *supra* note 93, at 527.

177. *Landmine Protocol*, *supra* note 11, art. 7, para. 1(a). Lieutenant Colonel Burris M. Carnahan pointed out that the term “preplanned” was intended to refer to a degree of advance preparation beyond that covered by the word “planned.” Carnahan, *supra* note 27, at 84.

178. *Landmine Protocol*, *supra* note 11, art. 7, para. 2.

A preplanned minefield is . . . one for which a detailed military plan exists considerably in advance of the proposed date of execution [S]uch a detailed military plan could not exist for the vast majority of minefields emplaced during wartime.¹⁷⁹ In the heat of combat many minefields will be created to meet immediate battlefield contingencies with little ‘planning’ or ‘pre-planning.’¹⁸⁰

Aside from the fact that there is rarely ever a “pre-planned” minefield, the few attempts that have been made to record minefields have proven mostly inaccurate.¹⁸¹ The passage of time and weather conditions change the locations of mines.¹⁸² Precise and detailed records will only prove successful if coupled with timely mine clearance.¹⁸³

6. Mine Clearance

The Landmine Protocol¹⁸⁴ did not mandate mine clearance or even make it a priority.¹⁸⁵ It vaguely stated that “the parties shall endeavour to reach agreement . . . necessary to remove or otherwise render ineffective minefields [and] mines . . . placed in position during the conflict.”¹⁸⁶ This provision has been accurately referred to as “the most questionable variant of the rules of warfare, whose true purpose is not to ‘safeguard the minimum standard of civilization’ but rather to ‘cover up the inability or unwillingness to achieve this object.’”¹⁸⁷

7. Publication

Publishing the minefield’s location was another conclusory attempt by the authors to safeguard civilians. The Landmine Protocol stated that “after the cessation of active hostilities,” the parties shall “take all necessary and appropriate measures” to “make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of . . . mines . . . in the territory of the adverse

179. Carnahan, *supra* note 27, at 84; see also DEADLY LEGACY, *supra* note 2, at 292-3 (quoting Lieutenant Colonel Burris M. Carnahan).

180. Carnahan, *supra* note 27, at 84.

181. During the Falkland/Malvinas War, even though the British attempted to keep precise and detailed maps to the mines they laid, the records proved inaccurate. DEADLY LEGACY, *supra* note 2, at 292.

182. *Id.* at 293.

183. *Id.* at 293.

184. *Landmine Protocol*, *supra* note 11, art. 9.

185. DEADLY LEGACY, *supra* note 2, at 294.

186. *Landmine Protocol*, *supra* note 11, art. 9.

187. Carnahan, *supra* note 27, at 82-83 (quoting 2 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 11 (1968)).

party.”¹⁸⁸ A publication requirement could have been useful but allowing parties to wait until “after the cessation of activities” rendered it ineffective because such a time span ignored the temporal problem of landmine use.¹⁸⁹ This requirement put civilians in grave danger because combatants were not required to publish mines that outlive their military objective while the conflict still persisted.¹⁹⁰ The disclosure of mine placement *after* cessation of hostilities was ineffective because many serious conflicts last over a decade.¹⁹¹

8. Protection from the Effects of Mines

The Landmine Protocol additionally provided for a certain level of protection for United Nations forces and missions from the effects of mines.¹⁹² A party was required, if requested by the head of the United Nations force or mission to “remove or render harmless” all mines in the area designated for peacekeeping, observation or similar functions and to take such measures necessary to protect the forces or missions.¹⁹³ Fact-finding missions received a slightly lesser level of protection. For example, if the size of the mission was too large for the party to provide adequate protection, the party would be relieved of all duties except for the disclosure of the locations of mines.¹⁹⁴

9. Production, Stockpiling, and Transfer

While the 1980 Landmine Protocol attempted to regulate landmine use, the text did not regulate their production, stockpiling, or transfer. Manufacturers were permitted to produce mines in any fashion they desired; mines that contained an anti-handling device, plastic mines that could not be detected, or mines that looked like toys. Manufacturers were permitted to transfer mines to whomever they chose, from a High-Contracting Party¹⁹⁵ who continuously violates the Protocol to a guerrilla warfare group not bound by it.

10. Enforcement

Neither the Weapons Convention nor the Landmine Protocol contained enforcement mechanisms. The instrument was silent regarding who was

188. *Landmine Protocol*, *supra* note 11, art. 7, para. 3.

189. DEADLY LEGACY, *supra* note 2, at 295.

190. *Id.* at 296.

191. *Id.*

192. *Landmine Protocol*, *supra* note 11, art. 8.

193. *Id.* art. 8, para. 1(a), (b).

194. *Id.* art. 8, para. 8.

195. A High Contracting Party is a State which has ratified a treaty.

responsible for violations of the Protocol. Any step taken to ensure compliance would only enhance the effectiveness of the obligations pertaining to landmine use.¹⁹⁶

E. Conclusion

The authors of the Landmine Protocol believed that with appropriate restrictions on landmine use in place, the necessary balance between humanitarian and military considerations could be achieved.¹⁹⁷ The Landmine Protocol, however, failed to deal effectively with the problems of temporal indiscriminateness inherent in landmine use. The instrument failed for the following reasons: it only regulated landmine *use*, it failed to confront the indiscriminate *effects* mines cause, it required only recording pre-planned minefields, it is only applied to international conflicts, and it lacked any enforcement measures to guarantee compliance with the obligations it sets out. Taken together, these numerous flaws rendered the 1980 Landmine Protocol, in theory and in practice, completely ineffective to promote any customary humanitarian principles to protect civilians and non-combatants from the intricacies of landmines.

III. REVIEW CONFERENCE

Because of the ineffectiveness of the Landmine Protocol, a comprehensive review conference was established to reconsider the instrument. Its governing sentiment was to adopt a treaty that would totally ban the production, possession, and use of landmines.¹⁹⁸ After two years of negotiations, the Review Conference failed to secure such a global ban. It did, however, adopt stricter restrictions regulating landmine use, production, and transfer.

A. Events That Led To The Final Report

Coupled with the ineffective Landmine Protocol, the human wreckage resulting from the accumulation of mines world wide was too great to be ignored. In 1991, non-governmental organizations, such as the International Committee of the Red Cross, the Arms Project of Human Rights Watch, and Physicians for Human Rights, became the leaders of the international campaign for a global ban on landmines.¹⁹⁹ They insisted that even the

196. Lord, *supra* note 19, at 345.

197. *Id.*; DEADLY LEGACY, *supra* note 2, at 297.

198. A number of High-Contracting Parties, non-parties, and organizations such as the International Committee of the Red Cross banded together to request a Review Conference pursuant to the Weapons Convention Article 8. *Review Conference*, *supra* note 25, at 4.

199. DEADLY LEGACY, *supra* note 2, at xi; Gerd-Eckhard Zehm, "Perverse" Weapons: Regulation on Mines Face Review, DEUTSCHE PRESS-AGENTUR, Sept. 22, 1995.

most stringent possible regulations would not solve the growing crisis. The Review Conference resulted from their continued persistence.

In 1993, States parties to the Weapons Convention formally requested the Secretary-General of the United Nations to convene a Conference of the High Contracting Parties to review the provisions of the Weapons Convention, in particular, the Landmine Protocol.²⁰⁰ As a result of this request, the United Nations scheduled the first phase of the Review Conference in the Fall of 1995.²⁰¹ The U.N. General Assembly called upon the maximum number of states and invited interested non-governmental organizations, in particular the International Committee for the Red Cross, to attend the conference.²⁰²

Non-governmental organizations (NGO's), however, were not the only advocates for a global ban. The Review Conference and its preparatory process played an "indispensable role in focusing government attention on the need for action to stop the killing and maiming caused by landmines."²⁰³ Just prior to the Review Conference, U.N. Secretary-General, Boutros Boutros-Ghali, called for a total ban on the production and use of landmines even though it was unlikely to get full backing from the states parties to the Convention.²⁰⁴ Belgium became the first country to pass a law banning the production, export, and use of landmines.²⁰⁵ Eight States had suspended or renounced landmine use by their own armed forces.²⁰⁶ Australia and Germany completely banned their armed forces from using mines.²⁰⁷ Additionally, more than 30 nations endorsed the view that the only way to solve the catastrophic problems caused by landmines is to ban them totally.²⁰⁸

Upon commencement of the Review Conference, the participants exchanged their general views. "When the floor was opened for the press and the world, country after country decried the use of landmines and called

200. *Review Conference*, *supra* note 25, at 4.

201. *Id.*

202. *Id.*

203. *Summary Record of the 11th Meeting*, Review Conference of the States Parties to the Convention of Prohibitions or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, at 3, U.N. Doc. CCW/CONF.I/SR.11 3 (Part 2) (1996) [hereinafter *Summary Record 11*].

204. Steve Pagani, *U.N. Vienna Conference Set to Curb Use of Landmines*, REUTERS N. AM. WIRE, Sept. 24, 1995 [hereinafter *U.N. Vienna*].

205. *Id.*

206. *Summary Record 11*, *supra* note 203, at 3.

207. *U.S. Expects Accord on Limiting Landmine Use*, REUTERS N. AM. WIRE, Apr. 16, 1996 [hereinafter *U.S. Expects*].

208. Robert Evans, "Don't Miss Your Chance," *Conference on Landmines is Told*, DEUTSCHE PRESS-AGENTUR, Apr. 23, 1996; As of January 16, 1996, the States that backed an immediate ban included NATO alliance members Belgium, Denmark, Iceland, and Norway, as well as Austria, Cambodia, Colombia, Estonia, Ireland, Laos, Malaysia, Mexico, Mozambique, New Zealand, Nicaragua, Philippines, Peru, Slovenia, Sweden and Uruguay. *Campaigners Demand Global Landmine Ban*, REUTERS N. AM. WIRE, Jan. 16, 1996 [hereinafter *Campaigners*].

for a rigid regime.”²⁰⁹ NGO activists report that once the doors were closed to the world, however, country after country began renegeing on earlier stances.²¹⁰ The Review Conference was dominated by three issues regarding landmines: expanding the scope to include internal conflicts,²¹¹ the inclusion of verification and compliance mechanisms, and coming up with restrictions on the use and production of mines.²¹² While there was a general agreement prior to the conference to expand the scope to include internal conflicts, views clashed as to what kind of internal conflicts should be included.²¹³ Because countries such as China, India, and Mexico define some armed conflicts as terrorism, they opposed the expansion of the scope to include all conflicts.²¹⁴

Disagreement also arose as well regarding verification and compliance mechanisms. Proponents argued a verification commission should be established to document violations.²¹⁵ Opponents argued a commission would hinder broader adherence to the Weapons Convention and possibly make it counter-productive. They also claimed non-signatories would be discouraged from ratifying the Weapons Convention.²¹⁶ A small group of nations opposed extensive verification and compliance mechanisms.²¹⁷ Further, while Western governments favored a tougher mechanism, developing countries feared such mechanisms would infringe on national sovereignty.²¹⁸

Disputes arose regarding restrictions on the use, export, and production of landmines. The parties expressed many views on whether to impose a total ban.²¹⁹ Because such differences precluded even the possibility of a total ban, the main focus became a quest for more limited restrictions.²²⁰ This too became the subject of much debate. Agreement could not be reached.²²¹

The participants held different views on issues such as making mines detectable, self-destructive, self-activating, and how such requirements might

209. Senthil Ratnasabapathy, *Disarmament: Two Days to Go at Landmine Meeting, Still No Accord*, INTER PRESS SERVICE, Oct. 11, 1995 [hereinafter *Two Days*].

210. *Two Days*, *supra* note 209.

211. *Id.*

212. Senthil Ratnasabapathy, *Disarmament: UN Meet To Ponder Ban On Landmines*, INTER PRESS SERVICE, Sept. 25, 1995 [hereinafter *U.N. Meet*].

213. *Two Days*, *supra* note 209.

214. *Id.*

215. *U.N. Meet*, *supra* note 212..

216. Senthil Ratnasabapathy, *Disarmament: Delegates Hassle, Critics Complain Over Landmine Ban*, INTER PRESS SERVICE, Oct. 9, 1995 [hereinafter *Delegates*]. More than two-thirds of the countries have not signed the convention. *Id.*

217. *Id.*

218. *Id.*

219. *Summary Record 11*, *supra* note 203, at 2-11.

220. *Id.*

221. *Two Days*, *supra* note 209.

affect the huge stockpiles of mines held by many countries.²²² For example, during the negotiations, there was a general agreement that all antipersonnel landmines should be detectable, but disagreement as to the requisite grams of metal required for detection arose.²²³ Once eight grams was agreed upon, the question of what to do with existing mines not in compliance became an issue.²²⁴ Although a complete ban seemed hopeless, additional tension arose when some countries expressed a desire to ban certain types of mines. India, for example, who had originally called for a total ban on remotely delivered mines, was forced to call instead for a restriction because there was no support for ban.²²⁵

The Review Conference's continued disagreement stemmed from a number of factors. The underlying problem was the difference in views on the legal status of the weapon. While the NGO's viewed landmines as illegitimate weapons in violation of humanitarian law, the governments viewed landmines as legitimate weapons for military use.²²⁶ Some of the largest mine producers and mine users were not willing to consider the possibility of the total elimination of mines.²²⁷ Although most Western nations supported their elimination, they did not believe that the time was ripe to push for a complete ban.

Additionally, humanitarian concerns were not the only focus of the negotiations. Financial, military, and political concerns were said to have taken priority over human wreckage.²²⁸ For example, NGO activists claimed some states seemed determined to draft language that would place their own weapon programs out of danger. Developing nations contended that the Western nations efforts to destroy dumb mines were backed by a commercial incentive to render their expensive high-tech mines more marketable.²²⁹

When the Review Conference came to an end, the participants found themselves far apart on the key issues and in need for additional time to complete its work on the Landmine Protocol.²³⁰ The Conference decided that it would continue in resumed sessions to be held in the first half of 1996. Its goal was to conclude the review and the amendment process of the Landmine Protocol.²³¹

Discussion for an outright ban on landmines was not even on the agenda

222. *Campaigners*, *supra* note 208. *U.S. Expects*, *supra* note 207.

223. *Delegates*, *supra* note 217.

224. Senthil Ratnasabapathy, *Disarmament: Good Guys, Bad Guys and the Business of Landmines*, INTER PRESS SERVICE, Oct. 16, 1995 [hereinafter *Good Guys*].

225. *Campaigners*, *supra* note 208.

226. *Delegates*, *supra* note 216.

227. *Campaigners*, *supra* note 208.

228. *Two Days*, *supra* note 209.

229. *Good Guys*, *supra* note 224.

230. *Review Conference*, *supra* note 25, at 6.

231. The resumed sessions were held from January 15, 1996 through the 19th and from April 22, 1996 through May 3. *Id.*

when the conference reconvened.²³² The international lobbying effort, however, finally began to produce positive results. The participants agreed upon stricter restrictions regarding the use, export, and production. Measures included eliminating mines that are nondetectable, limiting exports, technical assistance for mine clearance, and prohibiting mine use during internal conflicts.

B. *The Final Report of the Review Conference: The Amended Landmine Protocol*

On May 3, 1996, the Review Conference adopted by consensus the Amended Landmine Protocol.²³³ U.N. Secretary-General, Boutros-Ghali remarked the progress achieved fell "far short of what [he] had hoped."²³⁴ During the concluding statements of the conference, a delegate from the International Campaign to Ban Landmines stated that he thought that "the work of the United Nations was to forge unity between countries, not weapons to divide them."²³⁵ The Final Report does little to prohibit landmine use, export, and production. It consists, alternatively, of a plethora of restrictions.

1. Scope and Application

The participants to the Review Conference expanded the scope of application to include internal conflicts. However, the amended protocol does not apply to situations of internal disturbances and tensions that are not considered armed conflict.²³⁶ Such situations include riots, isolated and sporadic acts of violence, and other acts of similar nature.²³⁷ Additionally, non-parties are bound by the protocol if the armed conflict occurs in the territory of a High Contracting Party.²³⁸ Developing countries' feared that the expansion to internal conflict would lead to infringement on their national sovereignty. In order to curb this fear, the amended Landmine Protocol prohibits any part of the protocol to be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government to maintain law and order or to defend the national unity and territorial integrity.²³⁹

232. *U.S. Expects*, *supra* note 207.

233. *Review Conference*, *supra* note 25, at 11.

234. *Summary Record of the 14th Meeting*, Review Conference of the States Parties to the Convention of Prohibitions or Restriction on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, at 7, U.N. Doc. CCW/CONF.I/SR14 29 (Part 2)(1996) [hereinafter *Summary Record 14*].

235. *Id.*

236. *Review Conference*, *supra* note 25, at 14, Annex B, art. 1, para. 2.

237. *Id.*

238. *Id.* at 16, Annex B, art. 3.

239. *Id.* at 15, Annex B, art. 1, para. 4.

2. Restrictions on the Use of Mines

a. *General Restrictions*. While allowing the old restrictions to remain virtually unchanged, the participants of the Review Conference added provisions concerning parties responsibilities, effective advanced warnings, and technological prohibitions.²⁴⁰ Each party to a conflict is responsible for all mines employed by it and must undertake to clear, remove, destroy, or maintain them under the terms specified in the amended protocol.²⁴¹ Effective advanced warning of emplacement of mines is required, unless circumstances do not permit.²⁴² The 1980 Landmine Protocol contained the same provision regarding remotely delivered mines. The provision was said to give greater deference to military interest because it actually allows combatants to neglect advance warnings by reason of unfavorable circumstances.²⁴³ The implementation of this provision illustrates that the participants military interests still dominate.

The general restrictions were further expanded to prohibit the use of certain mines. For example, it prohibits self-deactivating mines equipped with an anti-handling device designed to make the mine capable of exploding after the mine has ceased to function.²⁴⁴ Mines which employ a mechanism specifically designed to detonate the munition in the presence of commonly

240. *Id.* at 16-17, Annex B, art. 3.

241. *Id.* art. 3, para. 2. The terms are set forth in Article 10. Article 10 reads in its entirety:

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.
2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.
3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in area over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfill such responsibility.
4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

Review Conference, *supra* note 25, at art. 10.

242. *Id.* at 18, Annex B, art. 3(11).

243. Smith, *supra* note 93, at 526.

244. *Review Conference*, *supra* note 25, at 17, Annex B, art. 3, para. 6.

available mine detectors are prohibited as well.²⁴⁵

b. *Restriction on the Use of Antipersonnel Mines other than Remotely Delivered Mines.* Restrictions on the use of antipersonnel mines other than remotely delivered mines are undercut by exceptions.²⁴⁶ These provisions prohibit the use of mines that do not have self-destruction or self-deactivation mechanisms *unless* mines are placed within a perimeter-marked area, the area is monitored by military personnel and protected by fencing,²⁴⁷ and the mines are cleared before the area is abandoned.²⁴⁸ The party is relieved of the duty to clear the area if it is turned over to the forces of another state and that state accepts the responsibility for maintaining the mines.²⁴⁹ A party will also be relieved of the above duties if such compliance is “not feasible due to forcible loss of control of the area as a result of enemy military action.”²⁵⁰ While the parties who laid the mines are required to monitor and protect the area, the party who gains control of the area is only required to the “maximum extent feasible” to maintain and if necessary, establish protections.²⁵¹

c. *Restrictions on the Use of Remotely Delivered Mines.* On its face, the amended protocol prohibits the use of remotely delivered mines.²⁵² These mines can be used, however, if they contain self-destruction or self-neutralization mechanisms and have a back up self-deactivation feature,

245. *Id.* art. 3, para. 5. Similarly, non-detectable mines are prohibited unless their use is in compliance with the Technical Annex (2). *Id.* at 18, art. 4. The Technical Annex (2) reads in its entirety:

(a) With respect to anti-personnel mines produced after 1 January 1997, such mines shall incorporate in their construction a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(b) With respect to anti-personnel mines produced before 1 January 1997, such mines shall either incorporate in their construction, or have attached prior to their emplacement, in a manner not easily removable, a material or device that enables the mine to be detected by commonly-available technical mine detection equipment and provides a response signal equivalent to a signal from 8 grammes or more of iron in a single coherent mass.

(c) In the event that a High Contracting Party determines that it cannot immediately comply with sub-paragraph (b) it may declare at the time of its notification of consent to be bound by the Protocol that it will defer compliance with sub-paragraph (b) for a period not to exceed 9 years from the entry into force of this Protocol. In the meantime it shall, to the extent feasible, minimize the use of anti-personnel mines that do not so comply.

246. *Id.* at 18, art. 5.

247. *Id.* at 18, art. 5, para. 2(a).

248. *Id.* at 18, art. 5, para. 2(b).

249. *Id.* at 18, art. 5, para. 3.

250. *Id.*

251. *Id.* at 18, art. 5, para. 4.

252. *Id.* at 19, art. 6, para. 1.

which is designed so that the mine will not function as a mine when the the military purpose for which it was placed does not exist.²⁵³ Consistent with the old instrument, “effective advanced warning” must be given if delivered or dropped mines may affect the civilian population, unless circumstances do not permit.²⁵⁴ This amendment gives greater deference to the parties’ military interest than it does to civilian tragedy.

d. *Restrictions Regarding the Transfer of Mines.* Each High Contracting Party agrees not to transfer any mine in which the use is prohibited by the protocol.²⁵⁵ The parties also agree not to transfer mines to any recipient other than a State or a State agency authorized to receive such transfers.²⁵⁶ The parties additionally agree not to transfer any antipersonnel mines to States which are not bound by the protocol, unless the recipient State agrees to follow it.²⁵⁷ The amended protocol also includes a provision dealing with immediate transfers by requiring parties to refrain from any actions which would be inconsistent with transferring the prohibited mines.²⁵⁸

3. Recording, Use of Information, and Removal of Minefields and Mines Areas

The participants of the Review Conference agreed to a considerable change in the recording and publication requirements for landmines. The Amended Landmine Protocol expanded the recording requirement from “pre-planned minefields” to all minefields, mined areas, and mines. Parties are required to record the location of mines on maps, diagrams, or other records accurately by relation to two coordinates and the estimated dimensions of the area containing these weapons in relation to those reference points.²⁵⁹ The records, additionally, must contain complete information such as the mine type, number, emplacing method, type of fuse and life time, date and time of laying, anti-handling devices, and other relevant information on all weapons laid.²⁶⁰ For mines produced after the amended protocol’s entry into force, the originating country’s name, the month and year of production, and the serial or lot number must be marked in English or in the respective national language.²⁶¹

The mine removal requirements of the old Landmine Protocol which did not make mine clearance mandatory or even a priority were changed. The

253. *Id.* at 19, art. 6, para. 2(3).

254. *Id.* at 19, art. 6, para. 4.

255. *Id.* at 20, art. 8, para. 1(a).

256. *Id.* at 20, art. 8, para. 1(b).

257. *Id.* at 21-22, art. 8, para. 1(c).

258. *Id.* at 21, art. 8, para. 3.

259. *Id.* at 28, Tech. Annex 1.

260. *Id.*

261. *Id.*

amended protocol now requires parties to clear, remove, destroy, or maintain all minefields, mined areas, and mines.²⁶² The parties to a conflict are responsible for the areas under their control and shall endeavor to reach agreements regarding their responsibilities.²⁶³

4. Technical Cooperation and Assistance

The High Contracting Parties to the amended Landmine Protocol set forth duties regarding technical cooperation and assistance.²⁶⁴ The Amended Protocol provides that, without prejudice to constitutional and other legal provisions, "each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material, scientific, and technological information concerning the implementation of this protocol and means of mine clearance."²⁶⁵ The parties agree to provide information and assistance, and have the right to seek and receive technical assistance, other than weapons technology.²⁶⁶ Although the participants did not mandate to cooperation and assistance regarding technological information, they have made it a priority.

5. Protection from Effects of Minefields, Mined Areas, and Mines

The High Contracting Parties or parties to a conflict must, so far as they are able, take such measures as are necessary to protect all forces or missions from the effects of mines in any area under its control.²⁶⁷ Other duties, however, vary depending on who controls the forces or missions. With the exception of the United Nations peace-keeping forces or missions, protection is afforded only to forces or missions which are performing functions in an area with the consent of the party whose territory the functions are performed.²⁶⁸ Similar to the old Landmine Protocol, the United Nations forces and missions receive a greater level of protection such as the disclosure of all information regarding the location of minefields.²⁶⁹ Parties who consent to the presence of other forces or missions, at the very least, must take measures so far as it is able to provide protection and they may have to remove or render harmless any mines in the area.²⁷⁰

All information provided in confidence to the recipient must be kept in strict confidence and must not be released outside the force or mission

262. *Id.* at 22, art. 10, para. 1.

263. *Id.* at 22, art. 10, para. 4.

264. *Id.* at 22, art. 11.

265. *Id.* at 22, art. 11, para. 1.

266. *Id.* at 23, art. 11, para. 7.

267. *Id.* at 24, art. 12, para. 2(b)(i).

268. *Id.* at 23, art. 12, para. 1(a).

269. *Id.* at 24, art. 12, para. 2(b)(iii).

270. *Id.* at 24, art. 12, para. 2(b)(i).

without express authorization of the provider of the information.²⁷¹ Forces and missions must, additionally, respect the laws and regulations of the host State and refrain from any action or activity incompatible with the impartial and international nature of their duties.²⁷² The mine infested countries, such as Cambodia, welcomed the inclusion of the greater protection for humanitarian mine clearance operations.²⁷³

6. Compliance and Consultations

The participants of the Review Conference introduced compliance procedures to the Landmine Protocol. The amended protocol now requires parties to take appropriate steps, including legislative and other measures, to prevent and suppress violations on their territory.²⁷⁴ These measures include the imposition of penal sanctions against persons who, in the context of armed conflict and contrary to the amended provisions, willfully kill or cause serious injury to civilians.²⁷⁵ It further requires parties to train their armed forces commensurately with the provisions of the amended protocol.²⁷⁶

The instrument also requires parties to consult each other to resolve problems that may arise with regard to interpretation and application of the amended protocol.²⁷⁷ It mandates that for the purpose of consultation and cooperation, a conference of the High Contracting Parties be held annually.²⁷⁸ The provisions set forth a list of work that should be done at this conference.²⁷⁹ Finally, the amended Landmine Protocol states that the costs of the conference will be borne by any states, non-parties alike, participating in the work of the conference.²⁸⁰

IV. AN ANALYSIS OF THE FINAL REPORT: DOES THE FINAL REPORT OVERCOME THE FLAWS OF THE 1980 LANDMINE PROTOCOL?

Because the Landmine Protocol failed to deal effectively with the

271. *Id.* at 25, art. 12, para. 6.

272. *Id.* at 25-26, art. 12, para. 7(a), (b).

273. *Summary Record 14*, *supra* note 236, at 4.

274. *Review Conference*, *supra* note 25, at 27, Annex B, art. 14, para. 1.

275. *Id.* at 27, art. 14, para. 2.

276. *Id.* at 27, art. 14, para. 3.

277. *Id.* at 27, art. 14, para. 4.

278. *Id.* at 26, art. 13, para. 1.

279. *Id.* at 26., art. 13, para. 3. The work includes the following: a review of the protocol's operation and status, preparation for review conferences, consideration of the development of technology that will protect civilians against the indiscriminate effects of mines, and the preparation of annual reports to the U.N. which will circulate them to all High Contracting Parties. The annual reports should include matters such as mine clearance and rehabilitation programs, legislation related to the protocol, and dissemination of information on the protocol to the parties armed forces and civilian populations.

280. *Id.* at 26, art. 13, para. 5.

problems of temporal indiscriminateness inherent in landmine use, the Review Conference was established. Campaigners for a global ban had hoped that the conference would deal effectively with the Landmine Protocol's numerous flaws as set forth above. The final report represents a compromise, but "many of its provisions [will] remain a subject of legal speculations."²⁸¹

The most significant change in the Landmine Protocol is the expansion of its scope to include internal armed conflicts. One of the 1980 Landmine Protocol's major flaws was that it applied only to interstate wars and wars of national liberation. This change is significant because mines are chiefly used in civil wars and wars are increasingly civil (as opposed to international). Presently, forty countries are engaged in civil strife.²⁸² The number is expected to rise to sixty by the turn of the century (which would mean that every third country in the world would be affected by a civil war).²⁸³

All internal conflicts, however, are not governed by the amended protocol. Civilians can therefore be terrorized with mines in situations that are not considered armed conflict. Because parties are given the discretion to define conflicts as mere "internal disturbances," the article is subject to interpretation. The provision allows mines to be used in situations such as riots, sporadic acts of violence, and other incidents of similar nature.²⁸⁴ Nevertheless, because it applies to warfare in the context of non-international armed conflicts, the amended Landmine Protocol has a more effective scope of application.²⁸⁵

Another significant change in the Landmine Protocol is that it has been amended to not only regulate mine use but also mine transfers and production. It is debatable, however, how effective these new regulations will be. While the instrument is not silent on the issue of mines transfers, it merely imposes an obligation to refrain from any transfer of mines whose use is prohibited. The Article does not legally bind the parties from transferring mines to non-parties who may not comply with the protocol. Some parties stress a commitment to observe all restrictions to the fullest extent possible and to refrain from any transfer inconsistent with the purpose of the amended Landmine Protocol. Not all parties, however, accept this political commitment. Until the transfer of mines whose use violates the amended Landmine Protocol is completely prohibited, agreeing to "undertake" not to transfer mines inconsistent with the protocol will not effectively promote the purpose of the Review Conference.

The international community demonstrated its willingness to regulate the

281. *Summary Record 14*, *supra* note 234, at 21.

282. *U.N. Meet*, *supra* note 212.

283. *Id.*

284. For example, in India, a police officer was killed and six other people were wounded in a landmine blast as voters went to the polls in the state of Bihar. Such election-related violence is not prohibited by the Final Report. *Police Officer Killed in Landmine Blast in Bihar*, AGENCE FRANCE PRESSE, May 7, 1996.

285. Lord, *supra* note 19, at 344.

production of landmines by requiring mines to be manufactured with self-destruction and self-deactivation mechanisms. The Technical Annex, however, sets forth complicated and tedious specifications on these mechanisms. It allows one out of ten mines to be designed to fail in the self-destruction process with a goal that the back-up self-deactivation feature will work so that no more than one in one thousand activated mines will function. With more than 2.5 million mines laid each year, the number of mines whose mechanisms fail are quite substantial considering the number of human lives at stake.

The amended Landmine Protocol further prohibits the use of mines which are not in compliance with the provisions on self-destruction and self-deactivation. This prohibition, however, is engulfed by exceptions. It actually condones the use of prohibited mines so long as they are monitored and cleared before the area is abandoned. It further relieves the party who laid them of any duty if compliance becomes "not feasible." Like the original protocol, this word choice allows combatants to justify non-compliance with any reason. The use and production of mines with additional mechanisms, although mandated, can easily be avoided through exceptions.

Additionally, the amended Landmine Protocol does not effectively deal with the major flaw of the previous instrument: the indiscriminate effect of landmines. The protocol condones the use, transfer, and production of more technologically advanced mines but does not prohibit the use or transfer of existing mines other than, arguably, non-detectable mines. Non-detectable mines will be allowed for another nine years if a party determines that it cannot immediately comply with the requirement to incorporate a detectable mechanism in mines already produced or produced before January 1, 1997.²⁸⁶ These parties are required, to the extent "feasible," to minimize the use of these mines.²⁸⁷ Instead of entirely prohibiting the use of an indiscriminate weapon, the revised protocol allows the continued use of non-detectable mines and condones the use of new models which have virtually the same indiscriminate effects, even if the effects are short term.²⁸⁸

Recording procedures and mine removal, conversely, have been dealt with effectively, although concern arises regarding whether they are actually viable. The revised protocol contains an optimistic list of recording and removal requirements. During a heated conflict, it is doubtful that any of these requirements will be followed.²⁸⁹ As evidenced by previous actions,

286. *Review Conference*, *supra* note 25, at 29, Tech. Annex 2(b)-2(c).

287. *Id.* at 29, Tech. Annex 2(c).

288. *Summary Record 14*, *supra* note 236, at 6.

289. To demonstrate this vagrancy, despite a cease fire and peace talks between the Angolan government and UNITA rebels, fighting still persisted and new landmines continued to be laid. *Angolan Fighting, Mine Planting Continue U.N.*, REUTERS N. AM. WIRE, Aug. 17, 1995 [hereinafter *Angolan Fighting*].

it is equally doubtful whether the international community will be able to implement these requirements successfully.

Finally, another major flaw of the 1980 Landmine Protocol was that it lacked enforcement mechanisms. While many advocated for a verification commission, the final report, in reality, only consists of vague measures of enforcement. Compliance has been left in the hands of the High Contracting Parties. Because the revised protocol is laced with exceptions and loopholes, a compliance investigation mechanism was essential. A body should have been established within the United Nations that could ensure compliance with the provisions and take appropriate measures against any party who violated them. Whether states will comply with their obligation to take appropriate steps to prevent and suppress violations is questionable.²⁹⁰

In sum, the revised protocol does not effectively deal with the problem of temporal indiscriminateness inherent in mine warfare. It fails to regulate effectively the use, production, and transfer of landmines. It requires methods of recording and removal which are too complicated to comply with. Finally, it fails to provide adequate enforcement mechanisms. The Final Report of the Review Conference therefore fails to overcome the major flaws of the 1980 Landmine Protocol that it was primarily intended to remedy.

CONCLUSION

The governing problem of the 1980 Landmine Protocol and the Final Report is that neither effectively address the problem at hand: the growing landmine crisis and its effect on civilians. The same strategy is perennially adopted to deal with this crisis. Instead of placing landmines outside the law, governments and the military work long and hard to continue to make room for them within the law.²⁹¹ Landmines are not the first weapons to be placed within the law. For centuries, governments and militaries have prioritized methods of warfare over humanitarian concerns. They have implemented laws governing which weapons not to use and how not to use them. However, modern military technology has continuously side stepped this strategy by creating new weaponry to which the law does not apply.

A Western perspective clearly dominates this comment's moral posture. Such posture may result from the abundance of weapons choices afforded to the Western world. When placed in the greater context of Western weaponry, landmines are easily disposable. It is important to note that in developing countries, landmines may be the only weapon choice available.

If this perspective can permeate the remainder of the Westerners who use landmines, then perhaps the Western community as a whole will be able to

290. *Id.* The delegate from Afghanistan expressed his concern regarding the Soviet Union's irresponsible actions in lacing Afghanistan with mines. He doubted whether anyone would dare turn them in. *Summary Record 14, supra* note 234, at 5.

291. *Summary Record 14, supra* note 234, at 7.

understand and prevent the circumstances under which developing countries are deploying these weapons of massive long-term devastation.

In reality, the Final Report is only part of the process that will bring about the total ban on landmines. The Landmine Review Conference has given rise to an increased global awareness. Landmines are not only being stigmatized around the world by the public but also by many governments. With international cooperation and unilateral actions by governments, the scourge of landmines and the human wreckage they cause can be put to rest.

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