

Office of the Judge Advocate General
International and Operational Law Division

International and Operational Law Practice Note

Law of War Treaties Pass the Senate

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At the end of September, the Senate provided its advice and consent for five law of war treaties, many of which have been languishing in the Senate for years. The 1954 Hague Cultural Property Convention,¹ which had been recommended by President Clinton for ratification,² was approved with four understandings and a declaration.³ Four protocols of the Certain Conventional Weapons (CCW) Convention,⁴ including an extension of the CCW to all non-international armed conflicts,⁵ Protocol III (Incendiaries),⁶ Protocol IV (Blinding Lasers),⁷ and Protocol V (Explosive Remnants of War (ERW)),⁸ were also approved with a reservation and several declarations and understandings.⁹ These treaties were significant in number (the most at any one time since the Hague Conventions were ratified in 1907¹⁰), but also because they represent a renewed effort to assert U.S. leadership in the international community on law of war matters. They are also an example of the U.S. Government's public diplomacy efforts to portray the U.S. military as a law-abiding member of the international community.¹¹ When the President prepares instruments of ratification, the treaties will be filed with the UN Educational Scientific and Cultural Organization (UNESCO),¹² in Paris, and the UN Office at Geneva (UNOG) for Disarmament.¹³

All of the Senate actions emphasize that the treaties are self-executing, with the exception of the requirement in the 1954 Hague Convention on penal sanctions¹⁴ and the ERW Protocol, which requires appropriations for assistance to nations

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¹ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAW OF WAR 374 (2001) [hereinafter 1954 Hague Convention].

² Letter of Transmittal from President Clinton to the Senate Committee on Foreign Relations, Treaty Doc. 106-1 (Jan. 6, 1999), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:td001.106.pdf.

³ 154 CONG. REC. S9439, 9555 (daily ed. Sept. 25, 2008).

⁴ 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, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW], *reprinted in* ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAW OF WAR 515 (2001).

⁵ *Id.* art. 1, *reprinted in* ROBERTS & GUELF, at 521.

⁶ *Id.* Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), *reprinted in* ROBERTS & GUELF, at 533.

⁷ *Id.* Protocol on Blinding Laser Weapons (Protocol IV), *reprinted in* ROBERTS & GUELF, at 535.

⁸ *Id.* Protocol on Explosive Remnants of War (Protocol V), *reprinted in* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 428 (2008) [hereinafter LOW DOCUMENTARY SUPP.].

⁹ *See* 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008); 154 CONG. REC. S9439, 9555 (daily ed. Sept. 25, 2008); 154 CONG. REC. S.9559, 9850 (daily ed. Sept. 26, 2008).

¹⁰ *See* ROBERTS & GUELF, *supra* note 4, at 67.

¹¹ *See, e.g.,* John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Remarks at the Hague, Netherlands: The United States and International Law (June 6, 2007) (transcript available at <http://www.state.gov/s/rls/86123.htm>).

¹² *See* United Nations Educational Scientific and Cultural Organization, Protection of Cultural Property in the Event of Armed Conflict http://portal.unesco.org/culture/en/ev.php-URL_ID=35261&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited Jan. 13, 2009).

¹³ *See* United Nations Office at Geneva, The Convention on Certain Conventional Weapons, [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument) (last visited Jan 13, 2009).

¹⁴ 1954 Hague Convention, *supra* note 1, art. 28; 154 CONG. REC. S9439, 9555 (Sept. 25, 2008). Penal sanction for serious crimes covered by the convention has already been provided for in the War Crimes Act, 18 U.S.C. § 2441 (2000) (wanton destruction of property) and the Uniform Code of Military Justice, Article 109 (2008) (willful or reckless destruction of property).

removing ERW.¹⁵ They also emphasize the long-standing U.S. position that law of war treaties do not create a private right of action.¹⁶ Several of the resolutions included the understanding that the application of the law of war standards will be based on the information “reasonably available . . . at the [relevant] time.”¹⁷ This understanding is similar to those asserted by U.S. allies during their ratification processes for targeting provisions of Additional Protocol I, which require similar proportionality analyses, conducted in situations where commanders may have “imperfect information.”¹⁸

The Senate action on the 1954 Hague Convention reiterated the U.S. and allied position that the convention does not apply to nuclear weapons, nor does it change the customary international law standard to protect cultural property from harm, unless it is used by the opposing military or unless military necessity demands it be attacked.¹⁹ The Senate understanding interprets the “special protection” of Chapter II of the Convention as codifying “customary international law in that it, first, prohibits the use of any cultural property to shield any legitimate military targets from attack and, second, allows all property to be attacked using any lawful and proportionate means, if required by military necessity and notwithstanding possible collateral damage to such property.”²⁰ In addition, the Senate included an understanding that the burden of establishing cultural property protections lies on the State that controls the property, to “ensure that it is properly identified and that it is not used for an unlawful purpose.”²¹ These points emphasize the reciprocal obligations of attacking and defending forces that were codified in Additional Protocol I to the Geneva Conventions.²² These understandings all comport with U.S. practice and are consistent with allied nations’ understandings and practice.²³

The Amendment of Article 1 to the CCW extends the provisions of the convention and its protocols to non-international armed conflicts, covered by Common Article 3 to the Geneva Conventions.²⁴ The extension of the CCW to non-international armed conflicts was originally a U.S. proposal²⁵ and is consistent with the U.S. approach of applying the LOW for all armed conflicts and military operations across the conflict spectrum, no matter how the military operations are characterized.²⁶ It is also consistent with other recent changes to the CCW, including the extension of Amended Mine Protocol II and the ERW Protocol V to non-international armed conflicts, to protect victims of all conflicts from the ravages of war and the effects of military weaponry left on the battlefield.²⁷

The Senate action on Protocol III (Incendiaries) included a reservation to use incendiaries in populated areas only when their use would result in fewer civilian casualties (e.g., against a chemical plant) and it could be done with all feasible precautions.²⁸ This reservation is consistent with the intent of Article 2 of Protocol III, which allows attack against military objectives located within “concentrations of civilians,” with “other than air-delivered incendiary weapons” if the objective is clearly separated from the civilians and all feasible precautions have been taken to limit civilian casualties and collateral

¹⁵ Protocol on Explosive Remnants of War (Protocol V), art. 7, *reprinted in* LOW DOCUMENTARY SUPP., *supra* note 8, at 430; 154 CONG. REC. S9559, 9850 (daily ed. Sept. 26, 2008).

¹⁶ 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008). *Compare id.*, with Military Commissions Act § 5 (2000) (clarifying that the Geneva Conventions do not provide a private right of action for alien unlawful enemy combatants).

¹⁷ 154 Cong. Rec. S9223, 9333 (daily ed. Sept. 23, 2008).

¹⁸ Declarations and Understandings by Various Governments, *reprinted in* ROBERTS & GUELF, *supra* note 4, at 499–512.

¹⁹ 154 CONG. REC. S.9439, 9555 (daily ed. Sept. 25, 2008).

²⁰ *Id.*

²¹ *Id.*

²² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), arts. 57, 58, June 8, 1977, 1125 U.N.T.S. 608, 26 I.L.M. 1391 (1977), *reprinted in* ROBERTS & GUELF, *supra* note 4, at 423.

²³ *See, e.g.*, Declarations and Understandings by Various Governments, *reprinted in* ROBERTS & GUELF, *supra* note 4, at 499–512.

²⁴ CCW, *supra* note 4, amend art. 1, *available at* [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/B20A03F9D7163A5BC12571DC0064F843/\\$file/AMENDED+ARTICLE+1.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/B20A03F9D7163A5BC12571DC0064F843/$file/AMENDED+ARTICLE+1.pdf). The terms of the amendment emphasize that non-international armed conflicts do not include “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.” *Id.* para. 2.

²⁵ *See* U.S. CCW Declaration, *reprinted in* LAW OF WAR DOCUMENTARY SUPPLEMENT, *supra* note 8, at 412 (2008).

²⁶ U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (May 9, 2006).

²⁷ *See, e.g.*, CCW, *supra* note 4, Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1996 Amended Protocol II), art. 1.2, *reprinted in* ROBERTS & GUELF, at 536.

²⁸ 154 CONG. REC. S9223, 9333 (daily ed. Sept. 23, 2008).

damage.²⁹ In an article published in the International Review of the Red Cross that has served as the *travaux preparatoire* for the Incendiaries Protocol, Hays Parks noted that there was significant controversy regarding the prohibition on use of air-delivered incendiaries in populated areas and some delegations were concerned that commanders may be “forced to employ artillery fire or an air-delivered high explosive munition that would be less accurate or more destructive than an air-delivered incendiary weapon, resulting in greater collateral civilian casualties or damage to civilian objects.”³⁰ The reservation, though partly in contravention of the ban on air-delivered incendiaries in concentrations of civilians, reflects the concern expressed by some nations that air-delivered incendiaries may be delivered more accurately, with less collateral damage, than artillery in certain circumstances.³¹

The United States has followed these treaties, as a matter of practice, since they were signed.³² This approach is consistent with the Vienna Convention on the Law of Treaties, which urges nations to “refrain from acts which would defeat the object and purpose of a treaty” when the nation has signed a treaty, subject to ratification.³³ So why ratify these treaties now? Other than being consistent with current practice, John Bellinger, the Legal Advisor to Department of State has noted that “ratification would promote U.S. international security interests in vigorously supporting, along with our friends and allies, both the rule of law and the appropriate development of international humanitarian law.”³⁴ Even though the U.S. military has followed these treaty provisions, as a matter of policy, since the U.S. signed each treaty, their ratification is a symbol of U.S. application of the rule of law in armed conflict and helps restore U.S. leadership in the law of war.

²⁹ CCW *supra* note 4, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), art. 2, *reprinted in* ROBERTS & GUELF, at 534.

³⁰ W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT’L REV. OF THE RED CROSS 535, 548 (Nov.–Dec. 1900).

³¹ *See, e.g.*, UK Understanding of Protocol III, *reprinted in* ROBERTS & GUELF, *supra* note 4, at 559.

³² *Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. 2 (Apr. 15, 2008) (statement of John Bellinger, Legal Advisor for Dep’t of State), *available at* <http://foreign.senate.gov/testimony/2008/BellingerTestimony080415p.pdf> [hereinafter Bellinger Statement].

³³ Vienna Convention on the Law of Treaties, art. 18, 8 I.L.M. 679 (1969).

³⁴ Bellinger Statement, *supra* note 32, at 2–3.