

**CONVENTION OF 10 OCTOBER 1980 ON PROHIBITIONS OR RESTRICTIONS
ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE
DEEMED TO BE EXCESSIVELY INJURIOUS
OR TO HAVE INDISCRIMINATE EFFECTS
(CONVENTION ON CERTAIN CONVENTIONAL WEAPONS)**

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1. Historical context

Since its origins, which can be traced to the mid-nineteenth century,¹ modern international humanitarian law has been divided into two branches: one for the protection of persons at the mercy of or in the hands of their enemy, and the other intended to put certain humanitarian limits on the conduct of hostilities, especially regarding the use of certain methods and means of combat. The first branch is generally called “Geneva law”, because its development had its beginnings in the conventions adopted in Geneva, the very first in 1864; the second is known as “Hague law”, because of its rapid development after the diplomatic conferences that took place there in 1899 and 1907. The two branches are complementary and today are brought together in positive law in the form of the Additional Protocols to the Geneva Conventions, adopted in 1977, reaffirming and also developing the principles concerning the conduct of hostilities.

The first multilateral treaty that was part of “Hague law” is the Declaration of St. Petersburg of 1868 (Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, of 11 December 1868). This treaty is of major historical importance for more than its operative provisions; that is, because of the principles set forth in its preamble: that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. The two major humanitarian principles which govern prohibitions and restrictions on the use of weapons were already present in that weapons must only target combatants and that they must not cause superfluous injury.

After the First World War and the use of chemical weapons during that war, those cruel weapons, which are incapable of respecting the principle of the distinction between civilians and combatants were studied and since that time there has been movement towards a ban on chemical and biological weapons (or bacteriological as they were known at the time).

During the Second World War, called the “failure of civilization” by some, all principles of international humanitarian law were flouted. But with the adoption of the Charter of the United Nations, the maintenance of universal peace was stressed first and foremost. International humanitarian law, whose intention is to preserve some humanity in the midst of war, was de-emphasized because of the hopes that there would no longer be reason to use it.

The inability of States to reach an agreement on the establishment of a joint armed force and the beginnings of the Cold War brought armed conflicts and, as a result, international humanitarian law, to the fore. A diplomatic conference was held in Geneva from 21 April to 12 August 1949 to revisit that law as a whole in the light of the lessons learned from the Second World War.

The Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War adopted the four Geneva Conventions of 12 August 1949, which remain in force today and which have been universally ratified. It did not, however, succeed in including within these conventions most of the rules concerning the conduct of hostilities, “Hague law”, essentially due to different views on the question of nuclear weapons. The United States, the only Power to have them at the time, would not accept the possibility of their use being banned, fearing that such a prohibition would undermine their effect as a deterrent; whereas several other States did not wish to discuss questions concerning the restriction of certain weapons without also examining the question of nuclear weapons. That impasse lasted for many years, its end prevented by the appearance of new nuclear Powers, most of which also emphasized the importance of nuclear deterrence, or the “balance of terror”, as it has sometimes been called.

The solution finally found to break this impasse involved separating the question of weapons of mass destruction — biological, chemical and nuclear weapons — from the other questions, sending the former to be dealt with in the forum of disarmament. The main argument for doing so was that, given the strategic importance of those weapons, the prohibition of their use could not be disassociated from questions linked to their manufacture, possession, transfer and destruction. And, indeed, it was within the framework of disarmament that the conventions on those weapons were adopted; namely, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, of 13 January 1993.

The treatment of the problem of weapons of mass destruction in the disarmament forum allowed for movement on the subject of the conduct of hostilities, and the rules on this matter were reaffirmed and developed in Protocol I of June 1977 Additional to the Geneva Conventions of 1949. At the time of the diplomatic conference which adopted the two Protocols, which took place over four sessions from 1974 to 1977, a special commission, whose work was facilitated by intersessional meetings of experts organized by the International Committee of the Red Cross (ICRC), examined certain conventional weapons whose use, it seemed, should be prohibited or restricted. A major amount of documentation was thus brought together. The diplomatic conference, however, finally decided to limit itself, in Additional Protocol I of 1977, to reaffirming and developing the general principles and rules, without including within those instruments prohibitions or restrictions on the use of specific weapons. Do those principles nevertheless allow final conclusions to be drawn regarding whether or not the use of certain weapons is legal?

In the field of weapons of mass destruction, that question arises only for nuclear weapons. The prohibition on the use of chemical and biological weapons, each of which is the subject of a specific convention, as mentioned above has in effect become part of customary international humanitarian law.² With regard to nuclear weapons, whose use has not been prohibited by a specific convention, the International Court of Justice has

concluded that such use would generally be contrary to the general principles and rules of international humanitarian law, but left a question mark regarding the legality of their possible use in certain extraordinary circumstances.³

With regard to conventional weapons, a group of doctors has tried to establish objective criteria for the notion of “superfluous injury”.⁴ Without going into detail, the most important of these include permanent disability, disease other than the traumas normally caused by explosions or projectiles, virtually inevitable death in the field, a very high degree of mortality in hospital settings or particularly severe injuries. The idea was that these criteria would be used by States at the national level and in international forums to assess the legality of a new weapon. It has the great merit of proposing objective criteria for States, who are under an obligation to determine the legality of the weapons that they produce or acquire (article 36 of Protocol I of 1977). However, those criteria have not been validated internationally and therefore it may not be concluded, in the current state of law, that a new conventional weapon could be considered prohibited solely because it does not meet those criteria, especially as there is no recognized authority to decide thereon.

That is why a diplomatic conference, the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, was held from 10 to 28 September 1979, to draft a convention on the prohibition or restriction of the use of certain specific conventional weapons which, applying the principles adopted in Protocol I of 1977, could be added to existing prohibitions, notably that on explosive projectiles under 400 grammes weight,⁵ poison and poisoned weapons,⁶ and certain bullets.⁷ Based on the material gathered during the diplomatic conference held from 1974 to 1977, the conference adopted such a convention on 10 October 1980 (Convention on Certain Conventional Weapons).

2. Content

The structure put in place by the Convention on Certain Conventional Weapons is intelligent because it takes into account the ever-present need to adapt constantly to technical developments that give rise to new weapons.

2.1 Convention on Certain Conventional Weapons

The Convention provides technical support for its Protocols above all. It does not provide for the prohibition or restriction of the use of specific weapons itself. In its preamble it recalls the principles on which the prohibitions or restrictions provided for in the various protocols are founded, as reaffirmed and developed in Protocol I of 1977, notably the protection of civilians from the effects of hostilities and the prohibition of weapons causing superfluous injury or widespread, long-term and severe damage to the environment. It also reaffirms the “Martens Clause”, that is, the respect, beyond express contractual requirements, for “usages established by ... the laws of humanity, and the requirements of the public conscience”. It also makes a link to disarmament, recalling that it remains an overall objective of the United Nations and emphasizing that prohibitions or restrictions on the use of certain weapons can open the way to agreements aimed at ending the production, stockpiling and proliferation of such weapons.

The Convention sets its entry into force as six months after ratification, approval, acceptance or accession of 20 States; it came into force on 2 December 1983. Being only a

support, it obviously cannot be accepted independently of its Protocols: the lower limit was set at two Protocols (to be chosen by the party) by which States must declare themselves bound at the same time as the Convention. Of course, they may later sign other Protocols.

The Convention provides for a flexible review procedure. A State party may request either to review the Convention itself or one or more Protocols, or to add a new Protocol. A diplomatic conference would be then convened if the majority of the other States parties agree to take part. This system works well, the Convention and one of its Protocols having been reviewed and two Protocols having been added.

The amendment to the Convention itself, adopted 21 December 2001, covered an essential point: the scope of application. Regrettably, in 1980 on the basis of arguments related to national sovereignty which were unconvincing, States had limited the Convention's scope of application to international armed conflicts. After having extended the scope of application of the Protocol on anti-personnel mines to armed conflicts not of an international character (see section 2.3 below) during its review, States logically decided also to extend the Convention's scope of application to those conflicts, with the result for the States parties that all the Protocols are applicable to all armed conflicts. This development has considerable significance because most armed conflicts are not international. It confirms a general trend where the differences between the rules applicable in the conduct of hostilities to these two types of conflict have become considerably less pronounced.

2.2 Protocol on Non-Detectable Fragments, 10 October 1980 (Protocol I)

This Protocol is of minor importance since the projectiles concerned are not widely used. It nevertheless identifies a means of warfare that is clearly contrary to the principle prohibiting superfluous injury or unnecessary suffering, as it involves the deliberate use of projectiles that are not detectable by X-ray. Although such projectiles achieve the legitimate objective of ensuring soldiers are no longer able to engage in combat, they also hinder considerably the healing of the wounds they cause.

2.3 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, 10 October 1980 (Protocol II), amended on 3 May 1996

Although it also applies to other devices, this Protocol is important primarily because of the restrictions it places on the use of anti-personnel mines, which continue to afflict untold numbers of people, the majority of whom are civilians, and many children, who have been killed or seriously injured, often to the point of requiring amputation. Furthermore, anti-personnel mines cause major environmental damage by making vast areas difficult to access or unsuitable for agriculture owing to the danger posed by mines, sometimes even decades after armed hostilities have ended.

The Protocol lays down general rules for all anti-personnel mines and specific rules for remotely delivered mines, especially those dropped from the air. Such mines must not be delivered indiscriminately and all precautions must be taken to prevent harm to civilians. Remotely delivered mines must either contain a mechanism that destroys or renders them harmless when they no longer serve a military purpose, or must be delivered with the utmost precision and their location recorded. The Protocol does not, however, provide for a verification mechanism and in fact makes verification difficult: because some

uses are authorized, the production and sale of anti-personnel mines continues to be permitted and it is very difficult to verify subsequently whether they are being used legally.

The States therefore decided to reinforce the Protocol's prohibitions and amended it in 1996. In the amendments, they, *inter alia*, provided a more specific definition of anti-personnel mines and the other devices covered under the Protocol; reinforced the prohibitions, specifically by imposing a total prohibition on non-detectable mines; introduced the obligation by States parties to clear all mined areas in their territory without delay once conflict has ceased, and by other States to cooperate with them and provide the technical assistance necessary to fulfil such responsibility; underlined the obligation by States parties to take all appropriate steps to enforce and suppress violations of the Protocol; and, most importantly, extended the scope of application of the Protocol to include armed conflicts not of an international character, thereby paving the way for a similar extension of the application of the Convention itself (see section 2.1 above).

The amended Protocol still falls short in that it fails to place a total ban on the use of anti-personnel mines and, for the aforementioned reasons, makes any verification arbitrary. As public opinion then lobbied for a complete prohibition on the use of anti-personnel mines, numerous States took another route in order to achieve a more ambitious convention on anti-personnel mines (see section 3 below).

2.4 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980 (Protocol III)

At the Conference in 1980, incendiary weapons were of contemporary concern, particularly given the use of napalm in the Viet Nam war. Discussions relating to this Protocol therefore took on a special importance that has since somewhat faded, for the fortunate reason that these weapons are hardly ever used, if at all. Protocol III does not prohibit completely the use of incendiary weapons but imposes limitations by excluding their use against military objectives located within a concentration of civilians, owing to the danger to the population if the fire were to spread.

2.5 Protocol on Blinding Laser Weapons, 13 October 1995 (Protocol IV)

This Protocol provides a rare, and perhaps unique, example of a weapon that is prohibited before ever having been used in warfare. The development of laser technology, especially for the purpose of measuring, has created the technical possibility of producing weapons specifically designed to blind. In light of the concerns raised by this possibility, the ICRC held interdisciplinary expert meetings, the reports of which were transmitted to States for their consideration. The States were convinced of the importance of immediately proscribing the use of such weapons, without totally excluding laser technology, owing to its military usefulness, for instance, as previously mentioned, for the purpose of measuring. It is therefore specifically the use of blinding laser weapons that is prohibited by Protocol IV. To our knowledge, such weapons have never been used.

2.6 Protocol on Explosive Remnants of War, 28 November 2003 (Protocol V)

The discussions that led to the adoption of this Protocol were prompted mainly by the appearance of cluster bombs, weapons systems consisting of a single main bomb that releases a large number of small explosive devices. Used in various types of operations,

these weapons are known to leave many small devices unexploded, especially if they fall on soft terrain. They then remain dangerous, in a way similar to anti-personnel mines, resulting in the death and serious injury of civilians, with children often becoming victims.

Because they consider them useful for military purposes, States are nevertheless reluctant to adopt a total ban on these weapons. Instead, they prefer to introduce restrictions and technical guidelines to reduce collateral damage among civilians, for instance, limiting the number of unexploded devices through the designing of more reliable weapons or the neutralization of such devices after a specified period of time. While discussions on banning this type of weapon did not result in a consensus, States nevertheless agreed on measures to clear all areas of unexploded devices and, more generally, of explosive remnants of war that are dangerous to the civilian population; these measures were incorporated into a new protocol.

States seeking further limitations, however, were not satisfied with this Protocol and, just as with anti-personnel mines, met separately to adopt a Convention on Cluster Munitions (see section 3 below).

3. Parallel developments

States turned to alternative channels owing to their frustration, in some cases, with what they considered to be meagre results achieved within the framework of the revision system under the Convention on Certain Conventional Weapons.

The consistent efforts to adopt the texts by consensus within that framework stemmed from the understandable desire to achieve the widest possible adherence, if not immediately, then in the medium term, since States who joined the consensus would later display, in theory, a greater readiness to formally adopt the texts. This was all the more important in the area of prohibitions and restrictions on the use of weapons, as the effectiveness of such measures largely depends on their wide, if not universal, acceptance.

Nonetheless, it was noted that some States demanded major concessions, which weakened the scope of the negotiated texts, in order to participate in the consensus and then, in spite of the concessions granted, failed to ratify the texts adopted by consensus. On this basis, and in a desire to go beyond the adopted texts, some States decided to explore other channels.

Frustrated by the outcome of the discussions held in 1996 on amendments to Protocol II on anti-personnel mines, which they saw as inadequate, and with the active support of civil society, around one hundred States held a diplomatic conference on anti-personnel mines. They were determined to achieve a total ban on the use of such mines, without necessarily achieving consensus by all States at any cost. The participants in the conference, which was held in Ottawa, adopted the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction in Oslo on 18 September 1997. Although some major Powers did not attend the conference and in fact distanced themselves from it, the sheer number of States parties to the Convention gives it indisputable authority, and allows it to be used to leverage international efforts towards a total and universal ban on the use of anti-personnel mines.

In the same spirit as the preamble to the Convention on Certain Conventional Weapons, the Ottawa Convention on Landmines is not limited to banning the use of these weapons, but goes further in imposing measures of disarmament: States parties must undertake never to produce or sell these weapons and must destroy any existing stock. To that end, the Convention stipulates the need for cooperation among States.

A similar process occurred following the adoption of the aforementioned Protocol on Explosive Remnants of War (Protocol V). A number of States that considered Protocol V as inadequate and concluded that the consensus-based negotiations on cluster munitions would, at best, result in a restriction on the use of these weapons or technical limitations decided to hold an *ad hoc* diplomatic conference; this conference led to the adoption, on 30 May 2008, of the Convention on Cluster Munitions. As with the Ottawa Convention on Landmines, this Convention proscribes under any circumstances the use, acquisition, stockpiling or transfer of cluster munitions and requires the destruction of stocks, while stressing the importance of international cooperation and victim assistance.

4. Outlook for the future

The Ottawa Convention on Landmines has had an undeniable impact and the same is likely to be true for the Convention on Cluster Munitions, even if States have shown more reluctance in that area.

However, these two Conventions should not be seen as a death sentence for the Convention on Certain Conventional Weapons. The system established by the latter has proven to be intelligent and works well. It is therefore important to maintain the dialogue it makes possible among all the States of the world on new developments in conventional arms, which has led to the adoption of texts prohibiting or restricting the use of new weapons and undoubtedly will continue to do so. It will continue to be an opportunity for dialogue thanks to the diligence of certain States, first and foremost, but also to the dedication of independent experts, the ICRC in its role as guardian of international humanitarian law, and civil society, in monitoring the development of new military techniques and questioning their compatibility with the principles of international humanitarian law. A case in point is the contemporary issue of so-called “non-lethal” weapons. The information and materials thus gathered contributes to the discussions between States, first at an expert level, and then at a diplomatic level, in the case of amendments to the Convention and its Protocols or the adoption of a new protocol.

The parallel system used by States on two occasions must therefore be considered a complement to rather than as a substitute for the system established by the Convention on Certain Conventional Weapons. It provides an impetus for States that would like to abuse the consensus-based system in order to hamper any developments aimed at prohibiting or restricting the use of conventional weapons. However, it can play an important role only if the prohibitions in question are supported by a large number of States, including the major military Powers, and are defended widely by civil society, as representative of the public conscience referred to in the well-known Martens Clause.

Lastly, it is crucial that the steps taken to prohibit or restrict the use of certain conventional weapons be supplemented by similar efforts with regard to weapons of mass destruction, as well as the arms trade, including trade in light weapons, the use of which is legal in warfare.

References

A. Legal instruments

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Declaration of St. Petersburg to the effect of prohibiting the use of certain projectiles in wartime, Saint Petersburg, 11 December 1868.

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B. Jurisprudence

International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Report 1996*, p. 226.

C. Doctrine

J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I: Rules (Cambridge, International Committee of the Red Cross/ Cambridge University Press, 2005), Rules 73 and 74.

P. Herby and R. Coupland, “Review of the Legality of Weapons: A New Approach”, *International Review of the Red Cross*, No. 835 (1999), pp. 583-592.

¹ It was at this time that multilateral treaties began to be adopted that were open and universal in scope, meaning that it was hoped that they would be adopted by all States.

² In this regard see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I, Rules, Cambridge University Press, Rules 73 and 74.

³ Although the Court stated that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict”, it did add that “in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”: Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, para. 105, E.

⁴ In the framework of the “SIrUS” (Superfluous Injury or Unnecessary Suffering) project, described in the article by Peter Herby and Robin Coupland, “*Review of the legality of weapons: a new approach*”, *International Review of the Red Cross*, No. 835, pp. 583-592.

⁵ Prohibited in the Declaration of St. Petersburg of 1868, mentioned above, note 2.

⁶ Contained in article 23 (a) of the Regulations concerning the Laws and Customs of War on Land, annex to the convention on the same subject, of 29 July 1899 and 18 October 1907.

⁷ More precisely those contained in the declaration on the agreement to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, of 29 July 1899.