



The Law of War Since 1949

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Introduction

During the two decades that followed the Diplomatic Conference which drafted the four 1949 *Geneva Conventions for the Protection of War Victims*¹ there was comparatively little activity directed towards the codification or extension of the reach of the law of war.² The only such activity in the 1950's was the drafting of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*.³ This Convention was undoubtedly a response to the rapacious actions of agents of Hitler and Goering in German-occupied territories during World War II.⁴ Among other things, it specifically prohibits the pillage of objects of arts and the use of cultural objects for purposes exposing them to the dangers of damage or destruction. The United States has not ratified this Convention but there are indications that it is tending towards such action in the foreseeable future.

In 1967 the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies* was opened for signature.⁵ Article IV(1) of that Treaty prohibits the placing in orbit around the Earth of any nuclear weapons or other weapons of mass destruction or their installation on any celestial body. The second paragraph of that article, in effect, demilitarizes the moon and other celestial bodies.

The only other activity in this field in the 1960's was the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*.⁶ This Convention was approved by the General Assembly of the United Nations at a time when it was feared that the criminal statute of limitations of the Federal Republic of Germany would soon preclude that nation of continuing its program of prosecutions for war crimes committed by German nationals during the course of World War II.⁷ It is of interest to note that in that Convention the definition of "crimes against humanity" was extended with the specific additions of apartheid and genocide.⁸ Once again, the United States has not ratified this Convention and it would appear that it has no intention of so doing.

During the decade of the 1970's four conventions were drafted which resulted in major additions to the law of war.

There were:

1. *1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof* (better known as the *Seabed Convention*);⁹
2. *1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* (better known as the *Bacteriological Convention*);¹⁰
3. *1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (better known as the *ENMOD Convention*);¹¹ and
4. *1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (better known as the *1977 Additional Protocol I*).¹²

And while the decade of the 1980's, and the 1990's to date, have not been so prolific, the importance of the few decisions reached during those two periods cannot be overstated. In 1980 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 (with three Protocols)* (better known as the *Conventional Weapons Convention*)¹³ was drafted; and in 1993 agreement was finally reached on a *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*.¹⁴ It is with these latter six Conventions that we will now concern ourselves. It is, perhaps, appropriate to point out at this time that several of these Conventions were drafted by the Conference on Disarmament which meets in Geneva on a more or less permanent basis and under a variety of titles. However, that does not lessen their impact on the law of war. The various *1907 Hague Conventions*¹⁵ which contain much of the basic codified law of war were drafted by a so-called "Peace Conference"; and many law-of-war conventions, such as the *1925 Geneva Protocol*,¹⁶ the *1936 London Submarine Protocol*,¹⁷ etc. were drafted by disarmament conferences—but this did not lessen their impact on the law of war.

Seabed Treaty

Article I of the *1971 Seabed Treaty* Provides that States Parties thereto

undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil (thereof beyond the outer limit of a seabed zone) . . . any nuclear weapons or any other types of weapons of mass destruction¹⁸

This prohibition does not apply to the territorial waters of coastal States, but under Article II it does apply to the “seabed zone” which includes all places beyond the twelve-mile limit as measured in accordance with the provisions of the *1958 Convention on the Territorial Sea and Contiguous Zone*.¹⁹ In effect, the *Seabed Treaty* prohibits the laying of nuclear mines or other nuclear weapons under the waters of the high seas.

Article III of this Convention contains the verification provisions. Every State Party to the Treaty has “the right to verify through observation” the activities on the seabed and the ocean floor and in the subsoil thereof of every other State Party “provided that observation does not interfere with such activities”; and a State Party may, if it deems it necessary, refer the matter to the Security Council of the United Nations. Inasmuch as such activities will necessarily be taking place on the seabed and ocean floor and in the subsoil thereof beyond the territorial waters of any coastal State, this means that it will be taking place under the waters of the high seas. The “right” thus granted appears to be more or less meaningless as it would exist even without the treaty grant. In fact, in view of the provision that the observation may not interfere with a State’s activities on the seabed, it may even be argued that the provision, rather than assisting in verifying compliance, protects the State engaged in illegal activities from observation as it may label any such observation as “interference”. Similarly, every State Party to the Treaty would have the right to have recourse to the Security Council of the United Nations if it had evidence that another State Party was violating the provisions of the Treaty even without a specific provision granting that right. It can be seen that in drafting this article the draftsmen were more concerned with ensuring that it could be said that the Treaty included a verification provision than with drafting a meaningful provision on the subject.

The United States is a Party to this Treaty. It will be necessary at some point to reach a decision as to whether it prohibits the use of nuclear warheads on such weapons as the CAPTOR of the United States Navy, a weapon which lies on the seabed and discharges a torpedo only when activated by the passage of a submarine, a torpedo which is capable of carrying a nuclear warhead.

Bacteriological Convention

While we usually refer to the *1925 Geneva Protocol* as the instrument prohibiting the use of asphyxiating gases, actually it prohibited the use not only of asphyxiating gases but also of “bacteriological methods of warfare”. In 1972, being unable at that time to reach agreement on a more comprehensive

combined chemical-bacteriological weapons convention, a convention was signed by which the States Parties to it agreed to prohibit the “development, production and stockpiling” of bacteriological (biological) and toxin weapons, and further agreed to destroy all such weapons then in their arsenals.²⁰ With “use” already prohibited, this means that the States Parties have, in effect, agreed that no such weapons could be or would be available in any future war.

Once again, Article VI of this Convention, dealing with verification, leaves much to be desired. It provides for the lodging of a complaint with the Security Council of the United Nations with respect to any alleged violation of the provisions of the Convention and includes an undertaking by any State Party to the Convention to cooperate in any investigation thereafter initiated by the Security Council. Unfortunately, such an investigation can, of course, be prevented by a veto in the Security Council; and a number of States have heretofore found it expedient to disregard mandates of the Security Council and undoubtedly will do so in the future when they believe that such action is in their national interest—which, of course, it will be when they are the actual violators of the Convention and are being investigated.

The United States is a Party to this Convention. Strange to relate, all of the “non-law-abiding States”, with the exception of Syria, have found it appropriate to become Parties to this Convention. To what extent they can be expected to comply with its provisions is debatable.²¹

ENMOD Convention

By Article I of the 1976 *ENMOD Convention* a State Party thereto has undertaken

not to engage in military or any other hostile use of environmental modification techniques having widespread long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

Article II defines environmental modification techniques as “any technique for changing—through the deliberate manipulation of natural processes—the dynamics, composition or structure of the Earth.” Although Article III of the Convention specifically provides that it does not apply to environmental modifications techniques for peaceful purposes, a number of States have apparently failed to ratify this Convention for fear that, despite that specific provision, they will be accused of a violation of the Convention and of a hostile act, if, for example, they seed a cloud in order to cause rain to fall over an arid area of their territory, when, had that action not been taken, the cloud might have provided much-needed rain on the territory of a neighboring State.

Problems with respect to the objectives and application of the Convention and with respect to charges of violations thereof are covered in Article V which provides for the establishment of a Consultative Committee of Experts to solve the former and for resort to the Security Council of the United Nations to pass on the latter. An Annex to the Convention sets out the functions and rules of procedure of the Consultative Committee. The provisions with respect to the Security Council are, with a few unimportant exceptions, identical with those contained in the *1971 Bacteriological Convention*, discussed above.

Because of the technical nature of this Convention, the draftsmen deemed it appropriate to reach a number of “understandings” which are not a part of the Convention itself.²² These understandings include definitions of the terms “widespread”, “long-lasting”, and “severe” used in Article I; and an illustrative list of examples of the phenomena referred to in Article II.

The United States is a Party to this Convention.²³

1977 Additional Protocol I

After negotiations conducted during 1974, 1975, 1976, and 1977, a Diplomatic Conference convened by the Swiss Government was finally successful in completing the drafting of the *1977 Additional Protocol I*, the primary purpose of which was to provide protection from the hazards of war to the persons not protected by the *1949 Geneva Conventions*: the civilian populations in the unoccupied territory of the belligerent States.²⁴ Unfortunately, primarily because of a certain group of provisions of that Protocol, many States, including France, Great Britain, and the United States, have not ratified it.

The Preamble to this Protocol contains a statement to which the United States fully subscribes. After referring to the international agreements containing the rules of the law of war, it states that these rules

must be applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

This is a complete rejection of the doctrine of the “just war”, espoused by some nations, under which the law of war is binding upon their enemy, always the aggressor, while it is not binding upon the victim of aggression, always oneself.

Article 1 of the Protocol is concerned with when it is applicable. Paragraph 4 of that Article states:

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4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes. . . .

Prior to this provision the conflicts therein referred to had been considered to be internal conflicts, civil wars to which the international law of war did not apply. This provision, with its corollary provisions in Articles 43 and 44, is one of the main objections of the United States, and other States, to this Protocol.

Ever since the unratified *1874 Declaration of Brussels*²⁵ four requirements for a person to be a legal combatant have been repeated in convention after convention. He must:

1. be commanded by a person responsible for his subordinates;
2. wear a fixed distinctive emblem recognizable at a distance;
3. carry his arms openly;
4. conduct military operations in accordance with the laws and customs of war.²⁶

Article 43(1) of the *1977 Additional Protocol I* only partially follows the historical precedent in that it requires the armed forces of a belligerent to have a responsible commander (Item 1 above) and to enforce the law of war (Item 4 above). Then Article 44(3), after stating that there are occasions when an armed combatant cannot distinguish himself from the non-combatant civilian population, permits him to retain his status as a legal combatant with the sole requirement that he carry his arms openly

1. during each military engagement; and
2. during such time as he is visible to his adversary while engaged in a military deployment preceding an attack. (This is a very limited application of Item 3 above).

There is no requirement that combatants wear “a fixed distinctive emblem recognizable at a distance”—or any other kind of distinctive marking (Item 2 above). Obviously, these provisions of the Protocol put the civilian population at risk in order to give additional protection to members of national liberation movements. And Article 44(4) provides that if a combatant (read that as “a member of a national liberation movement”) fails to comply with the modest requirements of the provision concerning the carrying of arms openly, while he will not be entitled to the status of a prisoner of war, he will be entitled to all the protection to which a prisoner of war is entitled.²⁷ There is no explanation of the difference between 1. having the status of a prisoner of war; and 2. not having that status but, nevertheless, having all of the protection to which a prisoner of war is entitled. In their demand for the protection of members of

national liberation movements the Third World States gave these individuals, even when illegal combatants, more protection than the legal, uniformed combatant receives.²⁸

Once again, problems arose when the Conference attempted to draft a verification provision. It ended with a very lengthy Article 90 entitled "International Fact-Finding Commission, the Commission being tasked with the chore of investigating complaints of grave breaches or other serious violations of the four 1949 *Geneva Conventions* and of the 1977 *Protocol I*. The main objection here is that it is applicable only to those States which have filed a statement accepting the jurisdiction of the commission.²⁹

There are a number of provisions of this Protocol which are either a codification of the customary international law of war or are much-needed additions to that law. For example, Articles 35 and 55 are attempts to protect the natural environment from the effect of war.³⁰ Article 51 prohibits attacks on the civilian population; prohibits attacks which have as their primary purpose the spreading of terror among the civilian population; prohibits target-area bombing; and prohibits reprisal attacks against the civilian population. Article 52 prohibits attacks on civilian objects which are not military objectives, as well as reprisals against such objects which are not military objectives, as well as reprisals against such objects. Article 53 prohibits attacks on historic monuments, works of art, and places of worship, as well as reprisals against such places. Article 54 provides that "Starvation of civilians as a method of warfare is prohibited" and then lists specific sources of food and water supplies indispensable to civilian life which are not to be attacked, even by way of reprisal.

On a number of occasions officials of the United States Government at the policy-making level have indicated that this country accepts many of the provisions of the Protocol as binding law.³¹ However, neither the Reagan nor the Bush Administrations sent the Protocol to the Senate for that body's advice and consent to ratification by the President.³² Whether the Clinton Administration will do so remains to be seen—so far it has not done so but there are rumors that it is engaged in another review of the Protocol in order to determine whether it should be sent to the Senate for the latter's advice and consent to ratification and, if so, what understandings or reservations should be included.

Conventional Weapons Convention

During the early 1970's a conference of government experts convened by the International Committee of the Red Cross (ICRC) drafted a list of conventional weapons which were believed to require consideration because they appeared to cause unnecessary suffering or to be indiscriminate in their effect. There were:

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1. Small calibre projectiles;
2. Blast and fragmentation weapons;
3. Time-delay weapons (land mines and booby traps);
4. Incendiary weapons; and
5. Potential weapons development.³³

In 1977, near the conclusion of the Diplomatic Conference which ultimately drafted the *1977 Additional Protocol I*, that Conference adopted a resolution recommending that another conference be held to draft “prohibitions and restrictions on the use of specific conventional weapons”.³⁴ The General Assembly of the United Nations thereafter convened such a Conference. It met in 1979 and 1980 and drafted 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*, to which three Protocols were attached.

The Convention itself is merely an “umbrella” convention containing administrative provisions applicable to all three of the substantive Protocols. Article 1 makes the Convention and the Protocols applicable in “any situation described in paragraph 4 of Article 1 of Additional Protocol I”; and Article 7(4) elaborates on that provision by providing how a State Party to this Convention may become bound by it *vis-à-vis* a national liberation “authority”. Paragraph 4 of Article 1 of the *1977 Additional Protocol I* is as we have already seen, one of the major reasons why the United States has not ratified that Protocol. However, with respect to the *1977 Additional Protocol I* a major objection was that it served as the basis for Article 44(3) of that instrument which removed from members of national liberation movements the historic requirements for legal combatants and it was argued that this gave protection to terrorists. That problem does not arise with respect to this Convention or its Protocols. When the United States ratified this Convention, it made a reservation with respect to Article 7(4)(b). (France made reservations to several of these provisions, including Article 7(4)(b)).³⁵

Article 4 of this Convention, dealing with ratifications, is rather unique. It requires that in ratifying the Convention a State must also ratify at least two of the three attached Protocols. And, finally, Article 8 of the Convention provides for the calling of a review conference by the Parties thereto ten years after the effective date of the Convention if none has been called prior to that date. That ten-year period has now expired and it is expected that the review conference will meet in September 1995.

It is in the Protocols themselves that important provisions of the law of war are contained. Protocol I is entitled *Prohibitions or Restrictions on the Use of Non-Detectable Fragments*. It prohibits the use of any weapon “the primary effect of which is to injure by fragments which in the human body escape detection by X-ray”. It was directed primarily against weapons made of such materials as

glass and plastic. It was completely non-controversial, probably because, as one of the United States Delegates has said, “no one seems to have had any serious military interest in such weapon”.³⁶ A Canadian Delegate has stated that this Protocol “bans a weapon which does not exist”.³⁷ It was the fear that States would only ratify the Convention and its Protocol I that caused the adoption of the provision in Article 4 of the Convention requiring the ratification of two or more of the Protocols. Actually, that fear does not appear to have been justified. As of 31 December 1992, thirty-five States had become Parties to the *Conventional Weapons Convention* and all but Benin and France had ratified all three Protocols. Benin approved Protocols I and III and France ratified Protocols I and II.³⁸

Protocol II is concerned with *Prohibitions and Restrictions on the Use of Mines, Booby Traps and Other Devices*. It is to be noted that Article 1 makes it clear that its subject matter is limited to land mines only. That article specifies that its coverage includes “mines laid to interdict beaches, waterway crossings or river crossings” but that it “does not apply to the use of anti-ship mines at sea or in inland waterways”.

Article 2 of this Protocol contains two very important definitions, among others:

“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; “remotely delivered mine” means any mine delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.

Of course, the foregoing provision with respect to “remotely delivered mines” would also apply to the weapons of warships.

The second definition of interest is that relating to booby traps. It states:

“Booby-traps” means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.

Of particular interest is the fact that there is a list of ten categories of articles the booby-trapping of which is prohibited. These categories include objects specially designed for children, including toys, a type of booby trap widely used, with grim results, in Afghanistan.

Another category worthy of note is

kitchen utensils, or appliances except in military establishments, military locations or military supply depots.

The unit cook is an important person. He must be warned of the possibility of legal booby traps so that he will take care in adding enemy kitchen utensils to his collection!

Other important provisions concerning mines are those requiring the recording of information with respect to the location of minefields. Not only is this subject covered in several articles of Protocol II, but there is a Technical Annex containing guidelines for such recording.

There are special provisions in Article 8 of Protocol II for the protection of United Nations forces and missions from minefields, mines, and booby traps. When one reads of the relief trucks which have been the victims of buried mines on much-traveled roads both in Somalia and in Bosnia, the need for such provisions becomes obvious—but that they will be complied with appears to be questionable.

One final provision which is of major importance is contained in Article 9. It provides for various procedures, both national and international, to be followed upon the cessation of hostilities in order to “remove or otherwise render ineffective, minefields, mines and booby traps placed in position during the conflict”. After World War II there was an “*International Agreement for the Clearance of Mines in European Waters*”,³⁹ but there was no equivalent agreement with respect to land mines. After those hostilities had ended the French kept well over one hundred thousand German prisoners of war engaged in the task of mine removal on French territory, with many casualties, as a result of which the *1949 Geneva Third Convention* specifically prohibits such action.⁴⁰ For many years after the end of World War II there were civilian mine casualties in North Africa. And even at this late date there are almost daily casualties caused by land mines in Afghanistan.⁴¹

It is clear that land mines have become one of the major problems of the world as we approach the Twenty-First century. It is also clear that this Protocol is entirely inadequate for the protection of mankind from a weapon that has assumed the role of the major hazard to the civilian population.⁴² There is pressure for an international agreement for the complete prohibition of the use of land mines and at least some strong limitations on their use appears to be just over the horizon.

Let us now turn to Protocol III—*Protocol on Prohibitions and Restrictions on the Use of Incendiary Weapons*. This was undoubtedly the most controversial of the three Protocols. It contains only two articles, the first dealing with definitions and the second with the protection of civilians and civilian objects. (It should be emphasized that the primary objective of both Protocols II and III is protection of civilians.) Incendiary weapons are defined as

any weapons or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combinations thereof, produced by chemical reaction of a substance delivered on the target.

The definition goes on to specifically exclude from its coverage weapons which have incidental incendiary effects and combined effects munitions (CEMs). Although the word “napalm” was heard frequently during the discussions, that word will not be found in the Protocol itself.

Article 2(1) states that

it is prohibited in all circumstances to make the civilian population as such, individual civilians, or civilian objects the object of attack by incendiary weapons.

There can be no objection to this provision. Civilians, and civilian objects not being used for military purposes, should not be the objects of any type of attack, incendiary or non-incendiary.

Article 2(2) prohibits air-delivered incendiary attacks on military objectives located within a concentration of civilians. This provision is, perhaps, overly broad, as many important military objectives, such as national command and communication centers, are frequently located within a concentration of civilians; and many types of major military objectives, even when originally built away from concentrations of civilians, are soon to be found surrounded by concentrations of civilians. Decisions in this regard should be based on the principle of proportionality.⁴³ Of course, if, as a matter of military tactics, another type of air-delivered weapon can be just as effective in destroying such a military objective, for example, the so-called “smart-bomb”, it should be the weapon selected.

Article 2(3) prohibits attacks on military objectives within a concentration of civilians by incendiary weapons, other than those which are air-delivered, “except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken.”⁴⁴ As only a small number of military installations are “clearly separated” from concentrations of civilians, once again the doctrine of proportionality should be applied.

Article 2(4) is undoubtedly a throwback to Vietnam and the defoliation program employed there by the United States. It provides:

It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

There does not appear to be anything contained in this Protocol which would be so restrictive on military operations as to justify the refusal of the United States to ratify it; and if there is any such provision, surely it could be taken care of by an understanding or, if deemed necessary, by a reservation.⁴⁵ Nevertheless, the President transmitted only the Convention and Protocols I and II to the Senate for its advice and consent to ratification, accompanied by a statement to the effect that action on Protocol III was being deferred pending further examination.⁴⁶

Chemical Weapons Convention

It will be recalled that in 1925 the Geneva Protocol was drafted and that it was subsequently widely accepted by States.⁴⁷ It is important to emphasize that this Protocol prohibited “use” only. As a result many States ratified it with what was known as the “First-Use Reservation”. What this meant was that most nations engaged in the development, production, and stockpiling of chemical and bacteriological weapons in order to be prepared to retaliate in kind should a future enemy make first use of such weapons.

While, as we have seen, in 1972 it was found possible to draft a convention prohibiting the development, production and stockpiling of bacteriological weapons, the problem of chemical weapons long continued unsolved, primarily because of the difficult question of verification. It was not until September 1992 that a *Draft Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* was finally submitted to the General Assembly of the United Nations. In February 1993 that organization approved the Convention and submitted it to the States for ratification or accession. It is far lengthier and more complex than its bacteriological brother. In fact, it is probably the most complex law-of-war convention ever drafted. Let us study a few of its highlights.

Article I is the heart of the Convention. By it each State party undertakes that it will never under any circumstances:

1. Develop, produce, or otherwise acquire or stockpile chemical weapons, or transfer such weapons to “anyone”;
2. Use chemical weapons; or
3. Engage in any military preparations to use chemical weapons.

That article contains these further undertakings by each Party:

1. To destroy any chemical weapons that it owns or possesses or that are located within its jurisdiction;

2. To destroy any chemical weapons that it has abandoned on the territory of another State Party; and
3. To destroy any chemical weapons production facilities that it owns or possesses or that are located within its jurisdiction.

Finally, that Article provides that “Each State Party undertakes not to use riot control agents as a method of warfare”—and therein lies the problem as far as the United States is concerned. When the United States finally ratified the *1925 Geneva Protocol in 1975* there was an agreement between the President and the Senate that an Executive Order would be issued covering the subject of riot control agents. The Executive Order which was issued provides that the United States renounced the first use of herbicides except for certain limited purposes; and then lists four situations in which it will use riot control agents in war:

1. In riot conditions in areas under US military control including for the control of rioting prisoners of war;
2. In situations in which civilians are used to mask or screen attacks;
3. In rescue missions in remotely isolated areas of downed airmen and escaping prisoners of war; and
4. In rear echelon areas to protect convoys from civil disturbances, terrorists, and paramilitary organizations.⁴⁸

It is to be assumed that in ratifying the Convention the United States will continue to insist on the legality of the use of riot control agents in those four situations despite the very adverse reception that such claim encountered during the drafting process.

Article II contains a large number of lengthy definitions. Of particular interest is the fact that research and development of methods of protection against toxic chemicals and chemical weapons is not prohibited. Article III is a rather unusual provision. Within thirty days of ratification or accession a State Party must make a number of declarations concerning its ownership of chemical weapons, their location, its program of destruction, etc. Articles IV and V are concerned with the destruction of chemical weapons and the closing and destruction of chemical weapons production facilities, respectively. Article VII establishes an elaborate permanent organization to oversee and verify compliance with the Convention. Article IX establishes the methods by which verification by an organ of the Organization may be obtained. These methods include what is termed “Challenge Inspections”—an on-site inspection by members of the Technical Secretariat of the Organization requested by any State Party which believes that there is non-compliance by another State Party. (There is also a 100-page “Verification Annex” which fleshes out various parts of the Convention proper).

Article XII is entitled “Measures to Redress a Situation and to Ensure Compliance, Including Sanctions”.

Apparently, while the United States is not enamored with all of the provisions of the Convention or of the Verification Annex, and particularly with the wording of some of them, it will accept the entire document as written with a reservation with respect to riot control agents mentioned above. What action, if any, with respect to this Convention will be taken by the “non-law-abiding States” mentioned above remains to be seen—but it would probably be unwise to expect them to become Parties to it, or to comply with it if they do become Parties.⁴⁹

Conclusion

It may safely be said that while law-of-war activity during the first half of the Twentieth Century was notable for the numerous *1907 Hague Conventions*, the *1925 Geneva Protocol*, and the four *1949 Geneva Conventions*, the second half of that century was characterized by a melange of much-needed international legislation relating to a variety of unrelated aspects of this field.⁵⁰ It is perhaps being overly optimistic to look forward during the balance of this century to the widespread adoption of a *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Nuclear Weapons and Other Weapons of Mass Destruction and on Their Destruction*. However, such an event is not as unlikely as it once was. On 3 September 1993 the World Health Organization (WHO) requested an advisory opinion from the International Court of Justice on the following question:

In view of the health and environmental effects, would the use of nuclear weapons by a States in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?⁵¹

Then on 15 December 1994 the General Assembly of the United Nations adopted Resolution 49/75 entitled “Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”. The question posed by the General Assembly asks:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?⁵²

Both of those matters are presently pending before the Court. Should the Court decide the former affirmatively, and the latter negatively, the possibility of an international convention implementing those decisions and totally prohibiting not only the threat or use of nuclear weapons, but their very

existence, would be greatly enhanced and the law-of-war activities of the latter half of the Twentieth Century would truly have a major place in history. Unfortunately, it can be assumed with more than a reasonable degree of certainty that were such a fortuitous event to occur, a number of present-day, or potential, possessors of nuclear weapons would fail to become Parties to such a convention—or would become Parties with the preconceived idea of violating their agreement and thereafter being in a position to hold the non-nuclear world hostage.

Notes

This article is a revision and updating of an article entitled "Some Recent Developments in the Law of War" which appeared in 25 *German Yearbook of International Law (Jahrbuch für Internationales Recht)* 252-272 (1982).

1. 6 U.S.T. 3114-3695; T.I.A.S. 3362-3365; 75 U.N.T.S. 31-468; 157 B.F.S.P. 234-423; *The Laws of Armed Conflicts* 373-594 (D. Schindler and J. Toman, eds., 3d ed., 1988) (hereinafter cited as Schindler and Toman).

2. Apparently in the belief that the words "war" and "law of war" have a pejorative connotation, many authors, led by the International Committee of the Red Cross (ICRC), now use the term "armed conflict", instead of the word "war" and the term "humanitarian law", instead of the term "law of war". At the XIIIth Congress of the International Society of Military Law and the Law of War a representative of the ICRC, said: "We use the term 'humanitarian law' to avoid using the word 'war'". The present author does not believe that it is possible to change the nature of things by the "gimmick" of word usage. (Fortunately, to date we have not been plagued with "PAC" or "POAC" in lieu of "POW").

3. *Records of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict* (Government of the Netherlands, The Hague, 1961); 249 U.N.T.S. 240; Schindler and Toman, *supra* note 1, at 745.

4. See 1 Trial of the Major War Criminals 241-243 (1947); *Nazi Conspiracy and Aggression: Opinion and Judgment* 71-72 (1947).

5. 18 U.S.T. 2419; T.I.A.S. 6347; 610 U.N.T.S. 205; 6 I.L.M. 386 (1967).

6. 754 U.N.T.S.; 8 I.L.M. 68 (1969).

7. Many of these prosecutions were not true war crimes cases as both the alleged culprit and the victim were German nationals. The Federal Republic elected to extend its appropriate statute of limitations by domestic statute and did not ratify this Convention.

8. The definition of crimes against humanity had originally been drafted in the Charter of the International Military Tribunal attached to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1554, 82 U.N.T.S. 280, 3 *Treaties and Other International Agreements of the United States of America, 1776-1949*, at 1238 (C. Bevens, ed., 13 vols., 1968-1976) (hereinafter cited as Bevens); Schindler and Toman, *supra* note 1, at 911. It was thereafter copied *verbatim*, or practically *verbatim*, in a number of other charters or laws.

9. 23 U.S.T. 701; T.I.A.S. 7337; 955 U.N.T.S. 115; 10 I.L.M. 146 (1971).

10. 26 U.S.T. 583; 1015 U.N.T.S. 164; 11 I.L.M. 309 (1972); Schindler and Toman, *supra* note 1, at 137.

11. 31 U.S.T. 333; 1108 U.N.T.S. 151; 16 I.L.M. 88 (1977); Schindler and Toman, *supra* note 1, at 163.

12. 1 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict*, Part 1, at 115 (Swiss Federal Political Department, Bern, 1978) (hereinafter cited as *Official Records*); U.N. Doc. A/32/144, Annex I; 72 A.J.I.L. 457 (1977); 16 I.L.M. 1391 (1977); Schindler and Toman, *supra* note 1, at 621.

13. *Final Report of the Conference to the General Assembly, A/CONF. 95/15* and Corr. 1-5, 27 October 1980, Appendix A, 1342 U.N.T.S. 137; 19 I.L.M. 1524 (1980); Schindler and Toman, *supra* note 1, at 179. On 11 December 1989 the General Assembly adopted A/RES/44/34 to which was attached an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (29 I.L.M. 90 (1990)). It appears doubtful that this latter Convention will obtain wide acceptance apart from the African nations. (In effect, Article 47 of the 1977 Additional Protocol I, *supra* note 12, outlaws mercenaries by denying them status as combatants and as prisoners of war).

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14. 32 I.L.M. 800, 804 (May, 1993). As of May 1993 there were 144 States signatory to this Convention. "Non-law-abiding" States believed to have chemical weapons potentially, such as Iraq, Libya, North Korea, and Syria, are not among the signers. Dalder, "Arms Control and Disarmament", in *A Global Agenda: Issues Before the 48th General Assembly of the United Nations* 140 (1993). As yet there are, of course, few ratifications or accessions.

15. 36 Stat. 2259-2441; T.I.A.S. 538-546; 1 Bevens, *supra* note 8, at 619-741; Schindler and Toman, *supra* note 1, at 57, 63, 201, 791, 797, 803, 811, 819, 825, 941, and 951.

16. 26 U.S.T. 571; 8061; 94 L.N.T.S. 65; 25 A.J.I.L. (Supp.) 94 (1931); Schindler and Toman, *supra* note 1, at 1154.

17. 173 L.N.T.S. 353; 3 Bevens, *supra* note 8, at 298; 31 A.J.I.L. (Supp.) 137 (1937); Schindler and Toman, *supra* note 1, at 883.

18. It is worthy of note that the parallel provision of Article IV (1) of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *supra* note 5, provides:

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies or station such weapons in outer space in any other manner.

19. 15 U.S.T. 1606; 516 U.N.T.S. 205; 52 A.J.I.L. 834 (1958).

20. Article IX of this Convention contains a rather unusual provision by which each State Party recognizes the need for a similar convention with respect to chemical weapons and undertakes to continue to negotiate on the subject in good faith. As will be seen, they did so for more than two decades before achieving success.

21. Even Syria may now be a Party to the Convention as the data contained in the latest edition of *Multilateral Treaties Deposited with the Secretary-General* is only through 31 December 1992. There are frequent reports that Iraq continues to engage in bacteriological-weapons research and that it has attained considerable success in this field.

22. See US Arms Control and Disarmament Agency, *1976 Documents on Disarmament* 582; Schindler and Toman, *supra* note 1, at 168.

23. The importance which the United States attaches to problems involving the effect of war on the environment is demonstrated by the fact that in September 1995 an international conference on The Protection of the Environment During Armed Conflict and Other Military Operations will take place at the United States Naval War College in Newport, Rhode Island.

24. While Part III, Section I, of the 1949 Civilians Convention, *supra* note 1, bears the title "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories", the provisions thereunder really apply only to persons who are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals", enemy aliens in the territory of a belligerent, internees, and the civilian populations of occupied territories.

25. Schindler and Toman, *supra* note 1, at 25; *General Collection of the Laws and Customs of War* 575 (M. Deltenre, ed., 1943; French, Dutch, German, English).

26. See Article 1, Regulations Attached to the 1899 Convention (No. II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803; 1 Bevens, *supra* note 8, at 247; 1 A.J.I.L. (Supp.) 129 (1907), Schindler and Toman, *supra* note 1, at 75; Article 1, Regulation Attached to the 1907 Hague Convention (No. IV) with respect to the Laws and Customs of War on Land, *supra* note 15; Article 1, 1929 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021; 2 Bevens, *supra* note 8, at 932; 27 A.J.I.L. (Supp.) 929 (1933); Schindler and Toman, *supra* note 1, at 339; Article 4, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021; 2 Bevens, *supra* note 8, at 932; 27 A.J.I.L. (Supp.) 929 (1933); Schindler and Toman, *supra* note 1, at 339; Article 4, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 1. For a detailed discussion of the four conditions, see Howard S. Levie, *Prisoners of War in International Armed Conflict* 44-59 (1979).

27. The United States takes the rather peculiar position that these provisions will protect terrorists. It is exceedingly difficult to find any justification for the arguments advanced in support of this position. Terrorists do not engage in pitched battles. Inasmuch as there are legitimate objections to these provisions, it is to be regretted that the United States choose to emphasize an insubstantial one.

28. Lest uniformed members of national armies find it appropriate to doff their uniforms and fight like members of national liberation movements, and, if captured, to demand the same treatment as that accorded to members of national liberation movements, Article 44(7) specifies that it was not the intention to change the practice of wearing uniforms by members of the regular forces. Apparently, should they remove their uniforms and dress in civilian clothes, they will be illegal combatants even if they comply with the provisions of Articles 43(1) and 44(3) and they will not be entitled to the protection accorded by Article 44(4).

29. As of 30 September 1994 there were 135 States Parties to the 1977 Protocol I, only 41 of whom had filed statements accepting the competence of the International Fact-Finding Commission. None of the "non-law abiding" States has done so. Hans-Peter Gasser, "Universal acceptance of international humanitarian law", *International Review of the Red Cross*, No. 302, at 450 (September-October 1994). For an in-depth discussion of the Commission, written by one of its members, see Erich Kussbach, "The International Humanitarian Fact-Finding Commission", 43 *Int'l and Comp. L. Q.* 174 (1994).

30. It is interesting to note that while the 1976 ENMOD Convention and the 1977 Additional Protocol I were being drafted in Geneva at the same time period, but by different bodies, Article 1 of the former uses the phrase "widespread, long-lasting or severe", while Article 35 and 55 of the latter use the phrase "widespread, long-term and severe". The use of the conjunctive makes the provisions of the Protocol much more restrictive in their coverage.

31. See, in particular, Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocol Additional to the 1949 Geneva Convention", 2 *Am. U.J. Int'l L. and Pol'y* 419 (1987). Mr. Matheson is the Senior Deputy Legal Adviser of the Department of State and was a member of the United States Delegation at the Diplomatic Conference which drafted the 1977 Additional Protocol I.

32. President Reagan sent the 1977 Additional Protocol II, dealing with non-international wars, to the Senate for its advice and consent to ratification of that Protocol. In his letter transmitting Protocol II, to the President, the Secretary of State explained at some length his reasons for not also transmitting the 1977 Additional Protocol I. *President's Message to the Senate Transmitting Protocol II*, 23 *Weekly Comp. Pres. Doc.* 91 (Jan. 29, 1987); Sen. Treaty Doc. 100-2, 100th Cong., 1st Sess., January 29, 1987.

33. International Committee of the Red Cross, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects: Report of the Work of Experts*, Chapters III-VII (1973).

34. Resolution 22(IV), Follow-up Regarding Prohibitions or Restrictions of the Use of Certain Conventional Weapons, 1 *Official Records*, *supra* note 12, Part One, at 215 and Part Two, at 252.

35. *Multilateral Treaties Deposited with the Secretary-General* 813, 814 (1992); 20 *I.L.M.* 1287 (1981); Schindler and Toman, *supra* note 1, at 193.

36. Michael J. Matheson, "Remarks", 1979 *Proc. A.S.I.L.* 156, 157.

37. William Fenrick, "The law of Armed Conflict: the CUSHIE Weapons Treaty", 11 *Can. Def. Q.* 25, 27 (Summer 1981). ("CUSHIE" is the Canadian acronym for Causing Unnecessary Suffering of Having Indiscriminate Effects").

38. *Multilateral Treaties Deposited with the Secretary-General*, 31 December 1992, at 813. The United States has now followed the French precedent.

39. 3 *Bevans*, *supra* note 8, at 1322.

40. Article 52 of that Convention, *supra* note 1, provides:

Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature.

.....

The removal of mines or similar devices shall be considered as dangerous labour.

41. See, for example, Arms Project of Human Rights Watch/Physicians for Human Rights, *Landmines: A Deadly Legacy* 145 (1993). It is estimated that worldwide there are close to 10,000,000 mines buried in the earth, many of which are still subject to being detonated by the application of the appropriate amount of pressure.

42. *Id.*, *passim*.

43. This provision is probably one of the main reasons why France and the United States ratified only Protocols I and II.

44. The term "feasible precautions" had been used in several articles of the 1977 Additional Protocol I, *supra* note 12, causing the United Kingdom to state, when signing, what it believed the words to mean. Schindler and Toman, *supra* note 1, at 717. With slight variations Article 1(5) of this Protocol adopts the British interpretation.

45. For a much more detailed analysis of this Convention and its Protocols, see Howard S. Levie, "Prohibitions and Restrictions on the Use of Conventional Weapons", 68 *St. John's Law Review* 643 (1995).

46. S. Treaty Doc No. 103-25, 103d Cong., 2d. Sess. (1994); 88 *Am. J. Int'l L.* 748 (1994). The United States ratified the Convention and Protocols I and II on 24 March 1995.

47. Many commentators take the position that it now represents part of the customary international law of war.

48. Executive Order 11850, 8 April 1975, 40 *Fed. Reg.* 16187 (1975); 14 *I.L.M.* 794.

49. According to a recently-published article nine countries which already possess chemical weapons are not signatories to the Chemical Weapons Convention: Egypt, Iraq, Libya, Syria, Taiwan, North Korea,

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Somalia, Serbia, and Sudan. Sherman McCall, "A Higher Form of Killing", *Naval Inst. Proc.*, February 1995, at 40-44.

50. It is appropriate to record here the fact that on 25 May 1993 the Security Council of the United Nations adopted S/RES 827, establishing an International Tribunal, and approving a Statute for that Tribunal, to try persons who might be accused of a wide variety of violations of the law of war (war crimes) alleged to have been committed by the government and armed forces of the former Yugoslavia (Serbia and Montenegro) against the people of Bosnia-Herzegovina. See 32 I.L.M. 1203 and 1192 (1993). Then, on 8 November 1994 the Security Council adopted S/RES 955, establishing a similar Tribunal for the trial of persons accused of serious violations of international humanitarian law in Rwanda or in neighboring States by citizens of Rwanda. These actions constitute major steps forward in the enforcement of the law of war.

51. International Court of Justice, Communique 93/30, 13 September 1993.

52. *Id.*, Communique 94/24, 23 December 1994.