



**Strengthening the Humanitarian Protections of
Protocol III on Incendiary Weapons**
**Memorandum to
Convention on Conventional Weapons (CCW) Delegates**
**Human Rights Watch and the Harvard Law School
International Human Rights Clinic**
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Introduction

Protocol III to the Convention on Conventional Weapons (CCW) has failed adequately to address the serious and ongoing harm of incendiary weapons.¹ Although 109 states have joined the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, incendiary weapons have continued to be used at great human cost in conflicts from Africa to Asia, Latin America, and the Middle East. Incendiary weapons cause particularly cruel injuries to human beings—civilians and combatants alike. Furthermore, incendiary weapons are prone to being indiscriminate, starting fires and causing casualties over a large area without distinguishing between soldiers and civilians.²

Human Rights Watch and the Harvard Law School International Human Rights Clinic call upon states parties to Protocol III to revisit the text of the protocol and to amend its 30-year-old provisions to address more comprehensively the problems of incendiary weapons. At the CCW Review Conference in November 2011, states parties should agree upon a mandate to review and amend Protocol III, with a view to adopting amendments by the end of 2012.

At the close of the diplomatic conference that produced the CCW in 1980, states expressed hope that the new protocol would be a step toward reducing the harm of incendiary

¹ See generally Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Need to Re-Visit Protocol III on Incendiary Weapons*, November 22, 2010, <http://www.hrw.org/news/2010/11/22/memorandum-ccw-delegates>.

² See generally Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*, March 31, 2011, <http://www.hrw.org/news/2011/03/31/human-suffering-caused-incendiary-munitions>.

weapons.³ Many states also voiced disappointment with the weakness of Protocol III, however, especially its failure to prohibit all use of incendiary weapons⁴ and its lack of adequate protections for combatants.⁵ A number of states recommended turning to the CCW review mechanism to improve the protocol,⁶ but that did not occur. The First Review Conference was not held for 15 years, and when it did take place, discussions centered on antipersonnel mines. The next review conferences in 2001 and 2006 focused on explosive remnants of war, anti-vehicle mines, and cluster munitions. With the Fourth Review Conference approaching in November 2011, states parties should seize the opportunity to reopen Protocol III in order to address the deficiencies that have hindered its effectiveness over the past three decades.

After describing the need for stronger restrictions, this memorandum lays out a series of possible amendments that would increase Protocol III's effectiveness. First, states parties should amend the overly narrow, design-based definition of "incendiary weapon" in order to ensure that the protocol covers the most problematic modern incendiary munitions, such as those using white phosphorus. Second, states parties should bolster the protocol's restrictions on the use of incendiary weapons. A complete ban would have the most humanitarian benefits. Alternatively, states could amend the protocol to prohibit all use of incendiary weapons in civilian areas and to require additional precautions in cases where they are used elsewhere. A prohibition on the use of incendiary weapons as antipersonnel weapons, even if they are targeted at military personnel, should also be considered.

II. The Need for Stronger Restrictions on Incendiary Weapons

Both the hazards of this type of munition and the objectives of existing law call for strengthening Protocol III. Incendiary munitions, which this paper uses as a more encompassing term than the protocol's narrow "incendiary weapon," cause unacceptable

³ See, for example, Statement of France, United Nations Conference on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Committee of the Whole, Summary Record of the 15th Meeting, Geneva, October 8, 1980, U.N. Doc. A/CONF.95/CW/SR.15 (October 21, 1980), para. 27; Statement of Yugoslavia, *ibid.*, para. 6.

⁴ See, for example, Statement of Mexico, *ibid.*, paras. 8–9; Statement of Romania, United Nations Conference on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Committee of the Whole, Summary Record of the 14th Meeting, Geneva, October 3, 1980, U.N. Doc. A/CONF.95/CW/SR.14 (October 10, 1980), para. 2.

⁵ See, for example, Statement of the Syrian Arab Republic, United Nations Conference on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Committee of the Whole, Summary Record of the 15th Meeting, Geneva, October 8, 1980, U.N. Doc. A/CONF.95/CW/SR.15 (October 21, 1980), para. 5; Statement of Yugoslavia, *ibid.*, paras. 6–7; Statement of Austria, *ibid.*, paras. 12–13.

⁶ See, for example, Statement of the Syrian Arab Republic, *ibid.*, para. 5; Statement of Mexico, *ibid.*, paras. 8–9; Statement of Finland, *ibid.*, para. 15; Statement of Egypt, *ibid.*, para. 11.

suffering through cruel injuries and indiscriminate effects. At the same time, the CCW seeks to prevent exactly those types of harm. The existence of Protocol III shows that states parties recognized that the two-pronged harm of incendiary munitions was inconsistent with the objectives of the CCW. The protocol itself, however, provides inadequate protections, and the time has come to remedy its shortcomings.

Incendiary munitions containing chemicals such as napalm and white phosphorus cause conscience-shocking injuries.⁷ Initial injuries include thermal and chemical burns, respiratory damage, circulatory shock, asphyxiation, and carbon monoxide poisoning, often leading to a slow and painful death. Victims who survive may suffer long term from intense pain, severe infections, organ failure, lowered resistance to disease, lifelong deformity and disability, psychological trauma, and an inability to reintegrate into society.

Many types of incendiary munitions cannot be used in a way that allows the combatant to distinguish effectively between soldiers and civilians, military targets and civilian objects. For example, a single typical 155mm artillery round spreads 116 white phosphorus wedges over an area with a radius of up to 125 meters (410 feet). Each wedge burns at about 815° C (1500° F) and produces a thick chemical smoke. These wedges ignite whatever they touch in their broad footprint, burning civilians and setting fire to buildings. As a result, use of incendiary munitions in populated areas severely endangers civilians.

The CCW seeks to protect humans from the two types of harm that incendiary munitions cause. As its full title makes clear, the CCW is concerned with weapons that may be “excessively injurious” or have “indiscriminate effects.”⁸ More generally, the CCW’s preamble recalls the “principle of the protection of the civilian population against the effects of hostilities.” The preamble also highlights the international humanitarian law principle, which underlies all of the convention’s restrictions, that the right to “choose methods or means of warfare is not unlimited.”⁹

The rest of this paper will explain how Protocol III is inadequate and lay out possible ways to strengthen its restrictions. Each option is designed with an eye to both decreasing the ongoing humanitarian harm of incendiary munitions and meeting the goals of the CCW.

⁷ For more information on the injuries caused by incendiary munitions, see generally Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*.

⁸ The full title of the CCW is 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.

⁹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), adopted October 10, 1980, 1342 U.N.T.S. 137, entered into force December 2, 1983, preamble.

III. A Broader Definition

The positive humanitarian impact of Protocol III would be increased greatly by broadening its definition to cover all incendiary munitions. The current narrow definition fails to cover certain munitions that cause cruel injuries and indiscriminate harm to civilians.

As written, Protocol III defines an incendiary weapon as a munition “primarily designed” to set fire to objects or to cause burn injuries to persons.¹⁰ This primary design test is too restrictive and allows certain munitions that produce incendiary effects, such as artillery shells containing white phosphorus, to escape regulation. States parties should therefore amend Protocol III to define an incendiary weapon in terms of its *effects*, rather than in terms of the purpose for which the munition was *primarily designed*.¹¹

Protocol III uses the concept of effects to delineate exclusions to its definition, but states parties should amend that provision as well because it excludes too much. Protocol III does not consider “munitions which have incidental incendiary effects, such as illuminants, tracers, smoke or signaling systems” to be incendiary weapons.¹² This clause could be read to exclude such munitions even if their incidental incendiary effects are substantial. It could also be understood to allow for the intentional use of such munitions as incendiary weapons, so long as they are not primarily designed for that purpose. In an amended protocol, states parties should make clear that smoke-screening, illuminating, and other similar munitions may escape regulation only when their incendiary effects are both minimal and incidental. In addition, states parties should clarify that munitions that fall under the new exclusion cannot be used intentionally as incendiary weapons. The proposed amendments would allow military commanders to retain the ability to use certain illuminants, tracers, and smoke systems as long as the munitions had limited incendiary effects on people and property and were not used deliberately as incendiary weapons.¹³

¹⁰ CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), adopted October 10, 1980, 1342 U.N.T.S. 171, entered into force December 2, 1983, art. 1(1) (“‘Incendiary weapon’ means any weapon 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 combination thereof, produced by a chemical reaction of a substance delivered on the target.”).

¹¹ Interestingly, while Australia’s 1994 Commanders’ Guide restates Protocol III’s design-based definition, it also states that “incendiaries include weapons such as ... white phosphorus.” International Committee of the Red Cross (ICRC) Customary International Humanitarian Law Database, “Practice Relating to Rule 84: The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons,” http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter30_rule84 (accessed August 4, 2011).

¹² CCW Protocol III, art. 1(b)(i).

¹³ For instance, 155mm smoke projectiles have much less intense incendiary effects than their white phosphorus counterparts. Human Rights Watch, *Rain of Fire: Israel’s Unlawful Use of White Phosphorus in Gaza*, March 2009, <http://www.hrw.org/reports/2009/03/25/rain-fire>, p. 13.

Rationale

The proposed amendments would expand the range of munitions covered by Protocol III to include those that may not be primarily designed as incendiary weapons, but that have a strong tendency to create incendiary effects. For instance, M825E1 white phosphorus artillery shells are ostensibly primarily designed as smoke-screening munitions,¹⁴ but they have the effect of starting fires and burning people within a wide radius. The Israeli use of these white phosphorus shells in Gaza in 2009 caused serious bodily harm to civilians, killing at least 12 and injuring dozens more. As well as producing severe burns, the shells indiscriminately set flame to civilian structures over a wide area, including classrooms in a UN compound.¹⁵ US forces used white phosphorus munitions against combatants in Fallujah, Iraq in 2004 expressly for “the combined effects of the fire and smoke” and reportedly also caused civilian casualties.¹⁶ Because these shells were primarily designed to be smoke-screening devices with incidental incendiary effects, however, some have argued Protocol III would not have covered their use, even if Israel and the United States were states parties at the time.¹⁷

The purpose of CCW is to protect human beings from weapons that are excessively injurious or that have indiscriminate effects. Accordingly, the language of Protocol III should focus on how incendiary weapons actually affect people—the cruel nature of the injuries they cause and their tendency to injure soldiers and civilians without distinction—regardless of the purpose for which weapons are primarily designed. It should not matter if a white phosphorus munition is labeled as a smoke-screen shell. Such a munition should clearly fall under a new definition of incendiary weapon because when a weapon causes substantial incendiary effects, its use should be restricted.

¹⁴ Global Security, “M825 155mm Projectile,” <http://www.globalsecurity.org/military/systems/munitions/m825.htm> (accessed August 4, 2011).

¹⁵ Human Rights Watch, *Rain of Fire*, pp. 2–4, 45–47.

¹⁶ “US Used White Phosphorous in Iraq,” *BBC News*, November 16, 2005, http://news.bbc.co.uk/2/hi/uk_news/politics/4441822.stm (accessed March 11, 2011).

¹⁷ Israel, which is not party to Protocol III, has stated that it does not consider white phosphorus used as a smokescreen to be covered by the protocol. Israel Ministry of Foreign Affairs, “The Operation in Gaza: Factual and Legal Aspects,” July 2009, <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2Do-017675DAFEF7/o/GazaOperationwLinks.pdf> (accessed March 11, 2011), p. 147. The United States has since become a state party to Protocol III (albeit with a reservation), but US Department of Defense has stated, because white phosphorus is “primarily designed and used for illumination and screening purposes, it is not an ‘incendiary weapon’ as defined in Protocol III.” US Department of Defense, “Answers to Questions from Senator Leahy,” enclosure 2, p. 5 (facsimile to Human Rights Watch, June 12, 2009).

Precedent

Restrictions based on the effects of a weapon are well established in international humanitarian law.¹⁸ Additional Protocol I to the Geneva Conventions prohibits the use of weapons “*of a nature to cause* superfluous injury or unnecessary suffering.”¹⁹ The protocol additionally forbids attacks using “means of combat *the effects of which* cannot be limited as required by this Protocol.”²⁰ Both of these provisions are part of customary international law.²¹ An effects-based test would also be consistent with international jurisprudence. In its *Nuclear Weapons* advisory opinion, the International Court of Justice discussed whether nuclear weapons could be considered poison or asphyxiating weapons. The Court noted that whether a weapon violates the prohibitions on these weapons depends on whether its “prime, or even exclusive, effect is to poison or asphyxiate,” not on whether it was *designed* to have those characteristics.²²

IV. Increased Restrictions on Use

States parties to Protocol III have a further opportunity to advance humanitarian protections by strengthening restrictions on the use of incendiary weapons, which this paper will now define broadly as recommended above. As written, Article 2 of Protocol III bans only use of air-dropped incendiary weapons in “a concentration of civilians.”²³ It

¹⁸ The 2008 Convention on Cluster Munitions demonstrates how even a convention with a design-based definition can take effects into account. The convention defines cluster munition as being “*designed* to disperse or release explosive submunitions....” The convention then looks to the humanitarian effects of weapons to determine which are safe to exclude. It states that its definition of cluster munition does not include munitions with certain specific technical characteristics because they “avoid indiscriminate area effects and the risks posed by unexploded submunitions.” Convention on Cluster Munitions, adopted May 30, 2008, Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, CCM/77, entered into force August 1, 2010, art. 2(2)(c) (emphasis added).

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, art. 35(2) (emphasis added).

²⁰ *Ibid.*, art. 51(4)(c) (emphasis added).

²¹ ICRC Customary International Humanitarian Law Database, “Rule 12: Definition of Indiscriminate Attacks,” http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule12 (accessed August 4, 2011); *ibid.*, “Rule 70: Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering,” http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 (accessed August 4, 2011).

²² Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, International Court of Justice (ICJ) Reports 226, July 8, 1996, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95> (accessed August 4, 2011), para. 55 (emphasis added). The Court has also used effects-based analysis in a variety of other contexts, including in the *Wall*, *Oil Platforms*, and *Nicaragua* cases. Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 136, July 9, 2004, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4> (accessed August 4, 2011), paras. 121–122 (considering the de facto effects of the wall on Palestinian self-determination); *Islamic Republic of Iran v. United States of America*, ICJ Reports 161, November 6, 2003, paras. 87–99 (considering the effects on commerce of attacks on oil platforms, rather than the intent of the attacks); *Nicaragua v. United States of America*, ICJ Reports 14, June 37, 1986, para. 195 (adopting the “scale and effects” test for armed attacks under international law).

²³ CCW Protocol III, art. 2(2) (“It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.”).

imposes weaker regulations on the use of surface-launched incendiary weapons. In a complicated provision regarding surface-launched weapons, it prohibits an attack on a military objective within a concentration of civilians except when the objective is separated from the concentration of civilians and all feasible precautions are taken to minimize effects on civilians.²⁴

These rules have proved inadequate to prevent the cruel injuries and indiscriminate harm of incendiary weapons. An outright prohibition on the use of incendiary weapons will give civilians and combatants the strongest protection under international law. If it is impossible to achieve consensus on a blanket ban, however, there are other options that could have important humanitarian benefits.

A Blanket Prohibition

Fully protecting human beings from the cruel and often indiscriminate effects of incendiary weapons requires a total prohibition on the use of these weapons.

Rationale

An absolute prohibition offers major humanitarian advantages over the existing Article 2 restrictions on the use of incendiary weapons. A blanket ban would protect civilian bystanders from the horrible injuries caused by incendiary weapons, would be easier to apply, would protect military personnel from unnecessary suffering, could reduce stockpiles, and would reinforce the stigma against use.

First, a complete ban would most effectively prevent future injuries to civilians caused by the use of incendiary weapons. Incendiary weapons—whether air or surface delivered—are so prone to being indiscriminate that their use in any context can pose unacceptable risks to civilian bystanders. Any harm that results is exacerbated by the cruel nature of the injuries caused by incendiary weapons, especially their tendency to inflict extreme pain, permanent disfigurement, and death.²⁵ The best way to achieve complete protection of civilians from this suffering is to prohibit the use of all incendiary weapons.

²⁴ CCW Protocol III, art. 2(3) (“It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”).

²⁵ See generally Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*.

Second, the clarity of an outright ban on the use of incendiary weapons would make Protocol III easier to apply.²⁶ A ban would remove the potential for abuse by eliminating debate about what does and does not constitute a concentration of civilians. After the attacks with white phosphorus munitions by US forces in Fallujah, Iraq, some analysts argued that the targeted areas were not concentrations of civilians because much of the city's civilian population had fled.²⁷ The question of this interpretation of Protocol III was moot because the United States was not a state party at the time and does not consider white phosphorus to be an incendiary weapon. Nevertheless, it shows that the meaning of concentration of civilians has been open to discussion. An outright prohibition on the use of incendiary weapons would also avoid the need to make difficult judgments about whether all feasible precautions were taken to avoid civilian casualties, as required by Article 2(3). A blanket ban would clarify that all use is impermissible.

Third, a complete ban would protect soldiers from the extreme pain and suffering caused by incendiary burns. Incendiary weapons are an exceptionally cruel way of rendering combatants *hors de combat*.²⁸ Beyond their immediate lethality, such weapons often impose long-term physical and psychological disabilities on victims, soldiers and civilians alike. Just as the international community has prohibited the use of blinding lasers, dum-dum bullets, and poison gas to protect soldiers,²⁹ states parties should prohibit the use of incendiary weapons, in part, to protect military personnel and other combatants.

Fourth, forbidding all use of incendiary weapons would eliminate the primary motivation for states parties to produce, procure, and stockpile these weapons. Reducing the availability of incendiary weapons would in turn lessen the chance that they are misused. In 1984, for example, the Ministry of Defense of El Salvador admitted the country possessed napalm bombs but denied awareness of their actual use.³⁰ Whether or not the

²⁶ The lack of clarity in the current text was an obstacle to obtaining state adherence. France, Ministry of Foreign Affairs, Statement of December 2, 1987, excerpt reprinted in *Annuaire Français de Droit International*, vol. 34 (1988), p. 900 (France initially declined to ratify Protocol III because it judged the protocol “trop imprécis, donc irréaliste.”).

²⁷ See David P. Fidler, “The Use of White Phosphorus Munitions by U.S. Military Forces in Iraq,” ASIL Insights, December 6, 2005, <http://www.asil.org/insights051206.cfm> (accessed August 15, 2011).

²⁸ See generally Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*.

²⁹ CCW Protocol on Blinding Lasers (Protocol IV), adopted October 13, 1995, 35 I.L.M. 1218, entered into force July 30, 1998, art. 1; Hague Declaration (IV, 3) Concerning the Prohibition of the Use of Expanding Bullets, adopted July 29, 1999, Martens Nouveau Recueil (ser. 2) 998, 187 Consol. T.S. 459, entered into force September 4, 1900; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, adopted June 17, 1925, 95 L.N.T.S. 65, entered into force February 8, 1928.

³⁰ “Salvador Affirms It Has Napalm,” *New York Times*, October 8, 1984, <http://www.nytimes.com/1984/10/08/world/salvador-affirms-it-has-napalm-san-salvador-oct-7-reuters-high-salvadoran.html> (accessed March 26, 2011).

ministry's claims were true, human rights groups reported frequent use of napalm resulting in serious harm to civilians.³¹ Had El Salvador never acquired napalm in the first place, there would have been no opportunity for the bombs to be used, allegedly without the ministry's approval.

A reduction in stockpiles could further advance antiproliferation efforts by decreasing the opportunities for weapons transfers to non-state armed groups or states not party. By curbing the spread of incendiary weapons, states parties would help to protect both civilians and their own soldiers from the suffering these weapons inflict.³²

Finally, a key consideration is that a prohibition on all use of incendiary weapons would reinforce the stigma against using the weapons. A clear reaffirmation that incendiary weapons are excessively injurious and have indiscriminate effects would send a message to individual combatants and non-state armed groups, as well as to states party and states not party to CCW, that the use of these weapons is unacceptable in the eyes of the international community.

A blanket prohibition on use could be accompanied by other humanitarian provisions. For example, an amended protocol could prohibit production, transfer, and stockpiling, require stockpile destruction, and oblige states parties to provide assistance for victims. Such provisions have precedent in CCW Amended Protocol II on antipersonnel mines³³ and Protocol V on explosive remnants of war.³⁴ The Mine Ban Treaty and Convention on Cluster Munitions have even stronger versions of these obligations.³⁵ If states are willing to pursue a more extensive reworking of Protocol III, these provisions would be a positive addition to an instrument on incendiary weapons.

³¹ Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*, pp. 7–8.

³² The Taliban, for example, reportedly used white phosphorus in improvised explosive devices (IEDs) employed against NATO forces in Afghanistan. Michael Evans, "Taliban Using White Phosphorus, Some of It Made in Britain," *The Times Online*, May 12, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article6269646.ece> (accessed April 9, 2011). See also "Declassified Data Reveals Insurgent Use of White Phosphorus," Combined Joint Task Force–101 Operation Enduring Freedom press release, May 11, 2009, <http://www.cjtf82.com/en/press-releases-mainmenu-326/1680-newly-declassified-data-reveals-insurgent-use-of-white-phosphorus.html> (accessed April 16, 2011).

³³ Amended Protocol II includes regulations on transfer and production of antipersonnel mines. CCW Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), adopted May 3, 1996, 1125 U.N.T.S. 609, entered into force December 3, 1998, art. 8 and technical annex, parts 2 and 3.

³⁴ Protocol V obliges states parties "in a position to do so" to provide assistance to victims. CCW Protocol V on Explosive Remnants of War, adopted November 28, 2003, U.N. Doc. CCW/MSP/2003/2, entered into force November 12, 2006, art. 8(2).

³⁵ See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty), adopted September 18, 1997, 2056 U.N.T.S. 211, entered into force March 1, 1999, arts. 1(b), 4, and 6(3); Convention on Cluster Munitions, arts. 1(1)(b), 3, 5, and 6(7).

Precedent

Prohibitions on particular classes of weapons have a long history.³⁶ Weapon bans have been motivated by a range of concerns including infliction of superfluous injury or unnecessary suffering on combatants and indiscriminate effects on civilians. As early as 1869, the St. Petersburg Declaration categorically prohibited explosive projectiles weighing less than 400 grammes.³⁷ Since then, treaties have outlawed poison gas,³⁸ chemical³⁹ and biological⁴⁰ weapons, antipersonnel landmines,⁴¹ and cluster munitions.⁴² Existing CCW protocols already prohibit all use of blinding laser weapons⁴³ and weapons that injure people with undetectable fragments.⁴⁴

There has been support for a blanket ban on incendiary weapons in particular for decades. During the League of Nations Conference for the Reduction and Limitation of Armaments (Geneva 1932–1934), the Special Committee on chemical, bacteriological and other weapons proposed prohibiting incendiary bombs.⁴⁵ At the CCW preparatory conference in 1979, Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sudan, Sweden, Switzerland, Togo, Venezuela, Yugoslavia, and Zaire put forward a proposal prohibiting all use of incendiary weapons.⁴⁶ During the CCW diplomatic conference in 1979, a delegate from Mexico expressed the view that a majority of states supported a total ban.⁴⁷

³⁶ See generally Stefan Oeter, “Methods and Means of Combat,” in *The Handbook of International Humanitarian Law*, ed. Dieter Fleck (Oxford: Oxford University Press, 2008).

³⁷ Such munitions were usually used as antipersonnel infantry weapons. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, adopted November 29/December 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Conol. T.S. 297, entered into force December 11, 1868.

³⁸ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, adopted October 18, 1907, 36 Stat. 2277, 1 Bevans 631, entered into force January 26, 1910, art. 23(a); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare.

³⁹ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), adopted January 13, 1993, 23 I.L.M. 800, entered into force April 29, 1997.

⁴⁰ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), opened for signature April 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, entered into force March 26, 1975.

⁴¹ Mine Ban Treaty, art. 1 (“Each State Party undertakes never under any circumstances: (a) To use anti-personnel mines...”).

⁴² Convention on Cluster Munitions, art. 1(1) (“Each State Party undertakes never under any circumstances to: (a) Use cluster munitions...”).

⁴³ CCW Protocol IV, art. 1.

⁴⁴ CCW Protocol on Non-Detectable Fragments (Protocol I), adopted October 10, 1980, 1342 U.N.T.S. 137, entered into force December 12, 1983.

⁴⁵ Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (Leiden, The Netherlands: Koninklijke Brill NV, 2007), pp. 342–345.

⁴⁶ Proposal by Austria et al., Preparatory Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, U.N. Doc. No. A/CONF.95/PREP.CONF./L.1/Rev.1, Rev.1/Add.1, Add.2 (1979)

⁴⁷ Statement of Mexico, 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, Committee of the Whole, Summary

More recently, in its 1991 international humanitarian law manual, Sweden said, “There is a need to supplement the present Protocol III so that the agreement constitutes a *complete prohibition of incendiary weapons*. In this way, protection of civilians could be further enhanced, and this should be extended to cover combatants.”⁴⁸ In addition, at least three states, Andorra, Hungary and the Former Republic of Yugoslavia, have banned use of incendiary weapons in national laws, and at least one, Colombia, has prohibited it in a military manual.⁴⁹ While these proposals and policies have not led to an absolute prohibition at the international level, the time is ripe to negotiate one now. Recent conflicts have shown how incendiary weapons, broadly defined, produce ongoing harm, and humanitarian concerns are increasingly important to weapons treaties.

Alternative Provisions

If it is not possible to secure an outright prohibition on the use of incendiary weapons in the CCW forum, states parties should at the very least change the definition and prohibit use of all models of these weapons in civilian areas. States parties could also impose strict standards for when incendiary weapons may be used even outside of civilian areas and prohibit antipersonnel use of incendiary weapons.

Prohibition on Use of All Incendiary Weapons in Civilian Concentrations

Article 2(2) of the protocol already prohibits the use of air-delivered incendiary weapons against targets within a concentration of civilians. States should at least amend this provision to apply the same restriction to all incendiary weapons, including surface-launched models.

Although Article 2(3) imposes some restrictions on the use of non-air-delivered incendiary weapons against military targets within concentrations of civilians,⁵⁰ its complicated rules, described above, fail to protect civilians adequately from surface-launched incendiary weapons.⁵¹ While air-dropped napalm was the central concern

Record of the Fifth Meeting, Geneva, September 21, 1979, U.N. Doc. No. A/CONF.95/CW/SR.5 (September 24, 1979), para. 17. But see W. Hays Parks, “The Protocol on Incendiary Weapons,” *International Review of the Red Cross*, vol. 279 (November-December, 1990), pp. 535, 538 (“there appeared to be little support for a total prohibition on incendiary weapons” at the preparatory conference).

⁴⁸ ICRC Customary International Humanitarian Law Database, “Practice Relating to Rule 85: The Use of Incendiary Weapons against Combatants,” http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter30_rule85 (accessed August 15, 2011) (emphasis in original).

⁴⁹ Ibid.

⁵⁰ CCW Protocol III, art. 2(3).

⁵¹ See Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*, pp. 10–14.

during the initial CCW negotiations,⁵² recent reports concerning the use of munitions with incendiary effects have mainly involved surface-launched munitions such as artillery projectiles.⁵³ The mechanism by which incendiary weapons are delivered, be it plane, artillery, ground rocket, mortar, or any other, is irrelevant from a humanitarian standpoint. A prohibition on all use of incendiary weapons against targets within concentrations of civilians would further the CCW's overarching purpose of "protect[ing] the civilian population against the effects of hostilities."⁵⁴

Some states, such as Germany⁵⁵ and France,⁵⁶ already prohibit the use of all incendiary weapons in civilian areas regardless of the weapons' delivery mechanism. Such an option was also considered for Protocol III at the negotiating stage. An Indonesian proposal circulated at the CCW Preparatory Conference in 1979 would have forbidden the use of all incendiary weapons (both air-dropped and surface-launched) against military objectives "within civilian population centres."⁵⁷ It is an opportune moment to revive this proposal and strengthen the restrictions on incendiary weapons.

Presumption of Illegality

Under the proportionality test, international humanitarian law prohibits "any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁵⁸ As described above, attacks

⁵² See Parks, "The Protocol on Incendiary Weapons," p. 539.

⁵³ Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*, pp. 10–15. These surface-launched attacks have fallen through Protocol III's loopholes in two ways. First, many involve white phosphorus shells, which are arguably not covered under the existing definition of incendiary weapon. Second, even if the shells were munitions that fit clearly under the existing definition, they would have escaped regulation because they were not air dropped.

⁵⁴ CCW, preamble.

⁵⁵ See ICRC Customary International Humanitarian Law Database, "Practice Relating to Rule 84: The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons," http://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter30_rule84 (accessed August 15, 2011) (quoting German military manual indicating that "[i]t is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by incendiary weapons.").

⁵⁶ *Ibid.* (quoting France's Law of Armed Conflict Manual indicating, "It is forbidden to launch an attack with incendiary weapons against military objectives located near or within a concentration of civilians.").

⁵⁷ Indonesia, Draft Proposal on Incendiary Weapons Submitted to the Preparatory Conference of the Convention on Certain Conventional Weapons, U.N. Doc. A/CONF.95/PREP.CONF./L.13, March 22, 1979. The proposal would have allowed use of incendiary weapons against combatants in field fortifications. It is not clear whether fortifications within civilian areas could have been targeted.

⁵⁸ Additional Protocol I, arts. 51(5)(b) and 57(2)(a)(iii). This requirement is part of customary international law. ICRC Customary International Humanitarian Law Database, "Rule 14: Proportionality in Attack," http://www.icrc.org/customary-ihl/eng/docs/v1_ru_rule14 (accessed August 15, 2011); Yoram Dinstein, *Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), p. 120.

involving incendiary weapons, especially in concentrations of civilians, are highly likely to impose excessive harm to civilians.

Even outside of civilian concentrations, the indiscriminate nature of incendiary weapons makes them prone to injuring civilians and damaging civilian property. In order better to protect civilians, states could adopt a presumption that the use of incendiary weapons outside of civilian concentrations is disproportionate and thus illegal except where states can show that expected military advantage substantially outweighs risk to civilians.

Such a presumption of illegality would compel commanders to investigate the civilian consequences of striking possible targets thoroughly before authorizing the use of incendiary weapons. Because the humanitarian harm resulting from the use of incendiary weapons is foreseeable and severe, commanders should have to present extraordinarily strong military reasons for using them, if they are allowed to use them at all. Narrowing the range of permissible attacks would decrease the number of cases in which incendiary weapons are actually used, reducing the associated human suffering.

Prohibition of Antipersonnel Use

In light of the terrible effects of incendiary weapons on human beings, states could also amend Protocol III to prohibit the targeting of military personnel and other combatants. Protocol III already prohibits states from targeting civilians.⁵⁹ It does not address use on combatants, however, and the humanity of soldiers is deserving of respect even in times of armed conflict.

A new provision on antipersonnel use would help reduce the risk of soldiers being hit and harmed by these excessively injurious weapons. The International Committee of the Red Cross's Commentary to Additional Protocol I to the Geneva Conventions indicates that, under existing international law, incendiary weapons must "not be used in such a way that they will cause unnecessary suffering."⁶⁰ Because such weapons are prone to causing extreme pain, disability, and disfigurement, states parties should consider codifying that principle in Protocol III and adopting a clear prohibition on using such weapons against military personnel as well as civilians.

⁵⁹ CCW Protocol III, art. 2(1) ("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.").

⁶⁰ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), para. 1424. See also Additional Protocol I, art. 35(2).

Prohibiting the targeting of combatants will also reinforce the general norm against the use of incendiary weapons, making all kinds of use less likely. Narrowing the range of circumstances under which states could permissibly use incendiary weapons would reduce the reasons to stockpile such weapons in the first place. Sending the message that incendiary weapons are so cruel that they cannot be used even on soldiers could further reinforce the stigma associated with the weapons.

There is international precedent for prohibiting the antipersonnel use of particular weapons. For example, the 1868 St. Petersburg Declaration was adopted to prevent individual soldiers from being targeted with certain explosive projectiles,⁶¹ and the 1869 Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body, banning dum-dum bullets, had similar motivations.⁶²

There have also been a number of proposals and policies to prohibit the use of incendiary weapons against combatants. During the 1979 CCW Preparatory Conference, the working group on incendiary weapons circulated, in brackets, a clause declaring that “[i]t is prohibited to use incendiary weapons against combatants as such.”⁶³ Indonesia,⁶⁴ Nigeria,⁶⁵ and the USSR⁶⁶ proposed similar provisions although with exceptions. More recently, Belgium has prohibited antipersonnel use of incendiary weapons in its national military manual.⁶⁷ The United Kingdom has similarly stated in its military manual, “[W]eapons such as napalm and flame-throwers are governed by the unnecessary suffering principle so that they should not be used directly against personnel.”⁶⁸ In

⁶¹ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight.

⁶² Hague Declaration (IV, 3) Concerning the Prohibition of the Use of Expanding Bullets.

⁶³ “Draft Protocol on Prohibitions or Restrictions of the Use of Incendiary Weapons: Submitted by the Working Group on Incendiary Weapons,” United Nations Conference on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, First Session, Working Group on Incendiary Weapons, Geneva, U.N. Doc. No. A/CONF.95/CW/2 (September 27, 1979).

⁶⁴ Proposal of Indonesia, United Nations Preparatory Conference on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, First Session, Working Group on Incendiary Weapons, Geneva (1979) (“It is prohibited to use incendiary weapons against combatants except when they (a) are in or in the vicinity of armoured vehicles [or] (b) are in field fortifications such as bunkers and pill-boxes and in caves.”).

⁶⁵ Proposal of Nigeria, *ibid.* (“It is prohibited to use incendiary weapons against combatants except when in defended localities.”).

⁶⁶ Proposal of the USSR, *ibid.* (“It is prohibited to use incendiary weapons against combatants as such except when they are removed less than 50 to 80 kms from the enemy lines.”).

⁶⁷ ICRC Customary International Humanitarian Law Database, “Practice Relating to Rule 85: The Use of Incendiary Weapons against Combatants” (quoting Belgian military manual stating, “The use of [incendiary] weapons against persons is prohibited because they cause unnecessary suffering.”).

⁶⁸ UK Ministry of Defence, “The Joint Service Manual of the Law of Armed Conflict,” 2004, p. 112.

addition, according to the UK minister of state, while the UK government does not consider white phosphorus unlawful, it is “very clear that it should not be used as an anti-personnel weapon and certainly not in a civilian environment.”⁶⁹ An amendment to Protocol III would make such positions binding at the international level.

V. Conclusion

In 1980, states came together to take steps to mitigate the terrible effects that incendiary weapons inflict on human beings. Even then, many states were concerned that Protocol III’s provisions would not be enough to address the horrors of incendiary warfare.⁷⁰ Their concerns proved well founded: incendiary weapons have continued to impose unacceptable suffering around the world.⁷¹ States parties now have the opportunity to revisit the protocol to put in place measures to fulfill the humanitarian objectives of the CCW.

By adopting a more comprehensive definition of incendiary weapons, states can ensure that Protocol III covers all such weapons that are likely to cause excessively injurious or indiscriminate incendiary effects. Expanding the definition is key to bringing de facto incendiary weapons, such as white phosphorus shells, within the ambit of the CCW.

States should also reduce the harm incendiary weapons cause by imposing stronger restrictions on their use. A total prohibition on the use of these weapons would maximize the protection of civilians. If such a prohibition is not possible within the CCW forum at this point, states should, at the very least, adopt measures to prohibit use of all incendiary weapons in civilian areas. They should also seriously consider a presumption that the use of incendiary weapons is unlawful, even outside of civilian concentrations, and a prohibition on antipersonnel incendiary attacks. Only by amending the text of Protocol III to address its weaknesses can real progress be made in preventing future suffering from incendiary weapons.

⁶⁹ Bill Rammell, statement, January 13, 2009, *Parliamentary Debates*, Commons, vol. 486 (2008-2009), col. 115, <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090113/debtext/90113-0001.htm#0901135000012> (accessed August 15, 2011).

⁷⁰ See notes 4–6, above.

⁷¹ See generally Human Rights Watch & the Harvard Law School International Human Rights Clinic, *Memorandum to CCW Delegates: The Human Suffering Caused by Incendiary Munitions*.