

**THIRTY YEARS SINCE THE ADOPTION  
OF THE CONVENTION ON PROHIBITIONS  
OR RESTRICTIONS ON THE USE OF CERTAIN  
CONVENTIONAL WEAPONS ESPECIALLY  
THE PROTOCOL ON PROHIBITIONS OR  
RESTRICTIONS ON THE USE OF MINES,  
BOOBY-TRAPS AND OTHER DEVICES**

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**Abstract:** Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and Protocol II to it restricts, but does not forbid completely the use of mines. Although this Convention is a treaty in the sphere of the Law of Armed Conflicts (International Humanitarian Law) it contains certain elements of Law of Disarmament. The provisions which are more typical for treaties in the sphere of disarmament and restriction of armament are contained in Article 8, Paragraph 1, Subparagraph a) of The Amendment of 1996 which requires that the State-Parties not to transfer any mines the use of which is prohibited by this Protocol.

**Resumé:** Úmluva o zákazu nebo omezení použití určitých konvenčních zbraní a Protokol II k Úmluvě omezuje, ale nezakazují úplně použití min. Ačkoli je tato Úmluva smlouvou v oblasti práva ozbrojených konfliktů (mezinárodního humanitárního práva) obsahuje určité prvky práva odzbrojení. Ustanovení, která jsou typičtější v oblasti odzbrojení a omezení zbrojení jsou obsaženy v čl. 8 odst. 1 dodatku Protokolu II z roku 1996, který požaduje, aby smluvní strany nepřeváděly jakékoli miny jejichž použití je zakázáno.

**Key words:** Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, mines, un-necessary suffering, excessive injurie, indiscriminate usage.

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Various conventional weapons are used in armed conflicts that have both an international and non-international character. Ban on certain conventional weapons such as expanding or flattening ammunition and the use of poisons was introduced as early as in the 19<sup>th</sup> century, and the ban on placing automatic underwater mines, etc. at the beginning of the 20<sup>th</sup> century. Efforts to ban other conventional weapons were made between the World Wars.

After World War II, some other conventional weapons were expressly prohibited or their use banned. The relevant *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects* was adopted (signed) in 1981.<sup>1</sup>

The Convention refers to *some of the most dangerous* conventional weapons most frequently used in the second half of the 20<sup>th</sup> century. Its title reflects the fact that the weapons covered can be “excessively injurious” or have “indiscriminate effects”. The Convention stipulates the general principles directly applicable to prohibiting weapons that have indiscriminate effects or may cause excessive injuries.

The Convention itself is one of a general nature. In 1981 three additional Protocols were adopted including *Protocol on the Prohibition of Weapons with Non-Detectable Fragments* (Protocol I), *Protocol on Prohibitions or Restrictions of the Use of Mines, Booby-Traps and Other Devices* (Protocol II), and *Protocol on Prohibitions or Restrictions of the Use of Incendiary Weapons* (Protocol III). Under paragraph 3 of Article 4 of the Convention, every State may notify of its consent to be bound by any of the Protocols annexed to this Convention provided that, at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or accession thereto, the State shall notify the Depository of its consent to be bound by at least two Protocols<sup>2</sup>. Within the meaning of paragraph 4 of Article 4, however, a State may at any time after the deposit of its instrument of ratification notify the Depository of its consent with any of the annexed Protocols by which it is not already bound. Any Protocol by which a State is bound forms an integral part of the Convention in respect of that party.

Article 8 of the Convention also permits to propose and *negotiate amendments* to the Convention and the Protocols. In accordance with the foregoing, Protocol II was changed by Amendment of May 3, 1996 at the UN Conference on Prohibitions and Restrictions of Use of Certain Conventional Weapons held from September 25 to October 13, 1995 and from April 22 to May 3, 1996.

Article 8(2) of the Convention further provides for the right of any party to the Convention to propose *new additional protocols* which refer to other categories of conventional weapons that are not covered by the existing Protocols. These new additional protocols are ratified by the conference of the States which are parties to

<sup>1</sup> Cf. the Czech wording of the Convention in: Potočný, M., Ondřej, J.: *Selected Documents for the Study of International Public Law*. Fifth Volume. Prague, Charles University, 1992, at p. 80 *et seq.*

<sup>2</sup> For example, the United States accepted Protocols I and II on depositing the accession instruments on 24<sup>th</sup> March 1995; Czechoslovakia accepted all three Protocols.

the Convention. On October 13, 1995 the above mentioned Conference adopted a new *Protocol on Blinding Laser Weapons* (Protocol IV) and, on November 28, 2003 a new *Protocol on Explosive Remnants of War* (Protocol V). The Protocol came into force on November 12, 2006.

From the perspective of the completion of the Convention, of much importance was *The Second Review Conference of The States Parties to the Convention* held in Geneva on December 11 to 21, 2001 which extended the scope of application of the Convention and its annexed Protocols. As originally adopted, the Convention applied only to situations of international armed conflict. At the Second Review Conference, the States Parties agreed to amend the Convention in accordance with Article 8(1)(b) so as to also apply to *situations of non-international armed conflict*. The amended Article 1 facilitated the application of the Convention and its annexed Protocols to situations described in Common Article 3 of the Geneva Conventions of August 12, 1949. However, the Convention and its annexed Protocols *do not apply* to internal conflict or disturbance such as *riots*, isolated and sporadic *acts of violence* and other acts of similar nature, for not being armed conflicts. The Convention and its annexed Protocols therefore cover situations<sup>3</sup> *expressed in Common Article 3 to the 1949 Geneva Conventions* on protection of victims of war.

The Third Review Conference of The States Parties to the Convention took place in November 2006. As the States parties did not manage to reach consensus on the *Protocol on Mines Other Than Anti-Personnel Mines, or Anti-Vehicle Mines*, some States adopted a *Declaration on this issue*. The Declaration forbids the use of any anti-vehicle mines *outside of marked and recorded areas*, unless the mines are detectable or contain *a self-destruction and-or self-neutralization mechanism*, and refers also to cases of prevention of transfer of anti-vehicle mines.<sup>4</sup> However, the Declaration is not legally binding.<sup>5</sup> The conference also adopted *a decision* concerning a compliance control mechanism.

### **1. Protocol on Prohibitions or Restrictions of the Use of Mines, Booby-Traps and Other Devices**

From a practical point of view, *landmines* are considered as one of *the most dangerous and most frequently used* conventional weapons that cause *unnecessary suffering*. These mines are designed to destroy tanks and vehicles (anti-tank mines) or persons. A particularly dangerous type of mines are *anti-personnel mines* that can be activated with weight of five to fifty kilograms. G. Best *comments*<sup>6</sup> that, in the 70s and 80s, mines came to be what napalm had been in the 50s and 60s. As regards the consequences of the use of mines, records from Cambodia show, for example, that

<sup>3</sup> Cf Boothby, W. H.: *Weapons and the Law of Armed Conflict*. Oxford : Oxford University Press, 2009, at p. 110.

<sup>4</sup> Ibid, at p. 194.

<sup>5</sup> Ibid, at p. 193.

<sup>6</sup> Cf Best, G. *War and Law since 1945*. Oxford: Clarendon Press, 1994, at p. 299.

a total of four million mines were laid in 1991 with catastrophic results: a total of approximately 35 thousand amputees with around 250-300 injuries caused by mines each month.<sup>7</sup>

Ban limiting the use of landmines is anchored in Protocol II on Prohibitions or Restrictions of the Use of Mines, Booby-Traps and Other Devices. The Protocol is considered the most *important result of the negotiations* which led to the adoption of the Convention on Conventional Weapons of 1980 and the protocols annexed to it. According to I. Detter,<sup>8</sup> the interest in landmines increased during the 60s and 70s of the 20th century, when booby-traps were used as a favourite weapon by terrorists. In her opinion, this terrorist activity explains why Protocol II was added to the Convention.

D. Fleck (ed.)<sup>9</sup> states that – unlike Protocol I – Protocol II *does not forbid the use of weapons* because of *prevention of unnecessary suffering and excessive injuries*, but it rather *forbids their indiscriminate use* and *is aimed against indiscriminate effects...* Protocol II *does not forbid the possession* or even the *use of mines and booby-traps* as such. It only forbids the *use of mines and booby-traps* in certain situations, where the danger of *indiscriminate effects is especially high*.<sup>10</sup> In spite of a broad support for *the complete prohibition of landmines*, the States parties did not succeed during their debates in 1996 on the amendment to Protocol II in reaching consensus on the general prohibition of landmines to be incorporated in the Protocol. As mentioned above, Protocol II was modified by an amendment in 1996 (the “1996 Amendment”). The importance of the Amendment consists in its Article 1 extending the scope of application of Protocol II so as to also apply to *situations of non-international armed conflict*. As also mentioned above, the application of all Protocols was extended to cover conflicts of non-international character. The 1996 Amendment also supplements and refines Protocol II in certain other respects.

In accordance with Article 1, Protocol II refers to the use of *mines on land*, the use of *booby-traps* and other devices including mines laid to interdict beaches, waterway crossings and river crossings but, on the other hand, it does not apply to the use of anti-ship mines at sea or *in inland waterways*. Article 2 of the Protocol defines the weapons to which it applies – *mines*,<sup>11</sup> *booby-traps*,<sup>12</sup> and *other devices*.<sup>13</sup>

<sup>7</sup> Ibid.

<sup>8</sup> Cf Detter, I. *The Law of War*. Second edition. Cambridge.: Cambridge University Press, 2000, at p. 218.

<sup>9</sup> Cf Fleck, D. (ed.) *The Handbook of International Humanitarian Law*. Second edition. Oxford : Oxford University Press, 2008, at p. 142.

<sup>10</sup> Ibid.

<sup>11</sup> “Mine” means ammunition placed under, on or near the ground or other surface area and designed to be exploded or detonated by the presence, proximity or contact of a person or vehicle.

<sup>12</sup> “Booby-trap” 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 perform an apparently safe act.

<sup>13</sup> “Other devices” means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.

As expressly stated therein, the Protocol is primarily intended to protect *the civilian population*. Under Article 3(7) of Protocol II, as amended in 1996 [Article 3(2) of the original wording of the Protocol], it is prohibited in all circumstances to direct these weapons (mines, booby-traps, and other devices) either in *offence, defence* or *by way of reprisals* against *the civilian population* as such or against *individual civilians* or civilian objects.

To protect the civilian population, Article 3(8) of Protocol II [as amended in 1996, Article 3(6) of the original wording of Protocol adopted in 1980] stresses the prohibition on the *indiscriminate use of the weapons* (mines, booby-traps, and other devices). The above weapons can *only* be used *against military objectives* and must not be used against civilian objects. Military objectives are defined in Article 2(6) of Protocol II, as amended in 1996 [Article 4(2) of the original wording of Protocol as adopted in 1980]. A *military objective* means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an *effective contribution to military action* and whose total or partial destruction, capture, or neutralization ruling at the time, offers a *definite military advantage*. This formulation is similar to that contained in Article 52(2) of Amended Protocol I of 1977. According to B. M. Carnahan,<sup>14</sup> the above-mentioned definition reflects *common international law*. An object becomes a *military objective by its nature, location, purpose or use*. The determination as to whether or not something is, under certain circumstances, a military objective cannot be made by a pilot or a foot soldier but always by an officer responsible for the action. It is necessary to distinguish between *two different categories* of military objectives. The first category includes objects which, by their nature, meet in most cases the *criteria of military objectives*, and whose condition can be pre-supposed. Such objectives primarily encompass weapons and ammunition, arm systems, military vehicles, and military material of all kinds of use.<sup>15</sup> *The second category* of military objectives is comprised of objects whose condition may change *depending on the particular circumstances* on the battlefield.<sup>16</sup> For example, a military unit/party to the conflict occupies a civilian house and establishes a shooting position in it. As a result, the civilian object is changed in an object which meets the criteria for a military objective, and can be attacked by the enemy. Provided that the military unit leaves the house because of the further development in the situation on the battlefield, the house becomes a civilian object again.

The *military advantage* received must be absolutely definite and *evident*, for example, the destruction of a bridge represents (or does not represent) a definite military advantage at a particular time and in the particular circumstances. However, the question of a *definite military advantage* contained in the definition of military

<sup>14</sup> Cf Carnahan, B.M. in: Ondřej, J. *Law of Armed Conflict at the Edge of the Millennium. International Relations*, 1999, No. 4, at p. 7.

<sup>15</sup> Cf Fuchs, J. *International Humanitarian Law*. Prague : Ministry of Defence – Agency for Military Information and Services, 2007, at p. 58.

<sup>16</sup> Ibid.

objectives can *be interpreted differently*. According to the position of Great Britain adopted at the time of the ratification of Amended Protocol I in 1977, the military advantage expected from an intended attack is the advantage expected from the *whole attack* rather than from only *isolated separated parts* of the attack.<sup>17</sup> This conception reflects *the reality* of current *air war*. For example, many sectors of the economy of a state such as the surface transportation system, communications or petrochemical industry are considered to be one system which *contributes to military actions*. A particular bridge or railway is not an objective of an attack because it could be used for military purposes at a particular time, but because it forms part of a specific system that is targeted by the attack such as the surface transport system.<sup>18</sup> Such interpretation can lead to the justification of, for example, the bombing of any targets including also those civilian that cannot be a target of an attack. This could result in the violation of the principle which forbids the indiscrimination between military and civilian objects, and contradict the second sentence of Article 3(8a) [this provision was not contained in the original wording of Article 3(3) of Protocol of 1980], which is concurrent with Article 52(3) of Amended Protocol I of 1977. According to this provision, in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

As regards the term definite military advantage, I. Detter<sup>19</sup> asks *who is going to decide whether or not an action offers a definite military advantage* and concludes that the opinions of the attacking and defending sides may be different.

*Indiscriminate use is any placement of such weapons, which is not on or directed against a military objective* [Article 3(8)(a) of Protocol II as amended in 1996].

*Indiscriminate use* also is any placement of such weapons, which *employs a method or means of delivery* which cannot be directed at a specific military objective [Article 3(8)(b) of Protocol II as amended in 1996 Article 3(3)(b) of the original wording of Protocol of 1980].

Under Article 3(8)(c) [Article 3(3)(c) of the original wording of Protocol of 1980], the term *indiscriminate use* also means the use of weapons which *may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of the above, which would be excessive in relation to the concrete or direct military advantage anticipated*. It is the same formulation as that contained in Article 51(5)(b) of Amended Protocol I of 1977.

Accordingly, the prohibition of indiscriminate attacks is restricted by the requirement that the loss of civilian life and civilian objects must not *exceed the expected and concrete and direct military advantage*. It is the expression of the concept of *proportionality, i.e.*, the proportional relation between the loss of civilian lives

<sup>17</sup> Cf Ondřej, J. *Law of Armed Conflict at the Edge of the Millennium*. International relations, 1999, No. 4, at p. 8.

<sup>18</sup> Ibid.

<sup>19</sup> Cf Detter, I. *The Law of War. Second edition*. Cambridge. Cambridge University Press, 2000, at p. 220.

and civilian objects, on the one side, and the attacker's anticipated advantage, on the other side. The principle of *proportionality* is the basis of common international law which forbids excessive and disproportional loss of civilian life in comparison with the expected military advantage.<sup>20</sup> In other words, attacks whose associated, anticipated *losses* may be expected to *overweigh the expected concrete and direct military advantage*, are forbidden<sup>21</sup>. This is how the principle of proportionality reflects the fact that there is always a risk in military operations that civilians, civilian objects, or a combination of the foregoing, will be hit.<sup>22</sup> These accidental hits are generally described as *collateral damage*.

D. Fleck<sup>23</sup> criticizes Article 3 of Protocol II because, in his opinion, it only *confirms* the general provisions concerning weapons and means of war that are contained in Article 51 of Amended Protocol I of 1977 as they *apply to mines*. According to the author, it is disappointing that the intention of the special arrangement of Protocol II is nothing more but to specify, in greater detail, the general principles of discrimination and prohibition of indiscrimination as they apply to mines. However, Article 3 of Protocol II is especially important from the point of view of the States other than the Contracting Parties to Amended Protocol I of 1977.

According to W. H. Boothby,<sup>24</sup> the rules of the original Article 3 (of 1980) – with the exception of the prohibition of reprisals – form part of *common international law* and are therefore binding on all States notwithstanding whether or not they have ratified the relevant treaties.

Further to the provisions of Article (3) of Protocol II of 1980, Article 4(2) specifically forbids *the use of mines other than remotely delivered mines, booby-traps, and other devices in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent*.

On the other hand, the prohibition of these weapons is restricted by a number of exceptions. The use of such weapons is not forbidden if, for example, *military actions take place* or are *expected to take place* in the above areas (*i.e.* cities, towns, villages).

*Booby-traps* in the form of *apparently harmless portable objects* such as cameras or pens are very *dangerous* and may even be described as *treacherous weapons*. The use of booby-traps is forbidden by Protocol II.

<sup>20</sup> Cf Ondřej, J. *Law of Armed Conflict at the Edge of the Millennium*. International relations, 1999, Chapt. 4, at p. 7.

<sup>21</sup> Cf Fuchs, J. *International Humanitarian Law*. Prague : Ministry of Defence – Agency for Military Information and Services, 2007, p.60.

<sup>22</sup> *Ibid.*, at p. 59.

<sup>23</sup> Cf Fleck, D. (ed.) *The Handbook of International Humanitarian Law*. Second edition. Oxford : Oxford University Press, 2008, at p. 144.

<sup>24</sup> Cf Boothby, W. H.: *Weapons and the Law of Armed Conflict*. Oxford : Oxford University Press, 2009, at p. 159.

Article 6 of Protocol of 1980 specifically stipulates the *forbidden ways of using booby-traps* [the same list is contained Article 7(1) of Amended Protocol II of 1996]. In all circumstances, *it is forbidden* to use a) all booby-traps in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached [Article 6(1)(a)]. In the British Manual of the Law of Armed Conflict,<sup>25</sup> this provision is interpreted so as to prohibit booby-traps made to look like *watches, personal audio players*, etc. According to the Manual, mass production of dangerous objects which could be spread among, and collected by, civilians – especially children – should be prevented.<sup>26</sup>

Article 6(1)(b) lists *ten examples of forbidden use of booby-traps* which *are in any way attached to or associated with, for example, children's toys, food or drink, medical supplies, historic monuments, works of art*, etc. The above-mentioned prohibitions contained in Article 6 are absolute and protect *members of the military forces as well as anybody else, that is civilians*.

It does not mean that *all booby-traps are forbidden*. This is evident from Article 4(2) of the Protocol designed to protect civilian population and objects against *booby-traps and other devices* (see above). The same provision is contained Article 7(3) of Amended Protocol II of 1996, particularly *in relation to booby-traps*. In view of the fact that the prohibition of the use of booby-traps does not include all mines, Article 6(2) *forbids to use in all circumstances* any booby-trap which is designed to cause superfluous injury or unnecessary suffering. In this connection, Y. Dinstein<sup>27</sup> remarks: The fact that combatants *are not entirely protected against* the use of booby-traps shows that these weapons *are not considered* to be in breach of the principle of *unnecessary suffering*.

In accordance with a study prepared by the International Committee of the Red Cross, it is forbidden to use booby-traps in connection with persons or objects which *are protected by international humanitarian law or objects, which particularly attract civilians*.<sup>28</sup> The study describes the prohibition as a rule of *international common law*,<sup>29</sup> both in *international armed conflicts* and in conflicts *not of an international character*.

In relation to the general prohibition on booby-traps, the British Manual contains *several useful general principles* which refer to the use of booby-traps. Under the Manual, the use of booby-traps is permitted provided that certain conditions are complied with. *First*, they must be directed against combatants and may not under any circumstances be directed against civilians. *Secondly, indiscriminate use is prohibited*. That means that the method used, or the circumstances, must be such

<sup>25</sup> Cf The Manual of the Law of Armed Conflict. UK Ministry of Defence. Oxford : Oxford University Press, 2004, at p.106.

<sup>26</sup> Ibid.

<sup>27</sup> Cf Dinstein, Y. in: Boothby, W. H.: *Weapons and the Law of Armed Conflict*. Oxford : Oxford University Press, 2009, at p. 163.

<sup>28</sup> Cf: Henckaerts, J.M., Doswald-Beck, L. *Customary International Humanitarian Law*. Volume I. Cambridge : Cambridge University Press, 2005, rule 80.

<sup>29</sup> Ibid., at p. 278.



that there is a reasonable prospect that only combatants will become victims of the booby-traps and that the risk to civilians *does not outweigh the military advantage* of laying booby-traps. *Thirdly*, feasible precautions must be taken to protect civilians from their effects.<sup>30</sup>

Article 5 of Protocol II of 1980 contains *restrictions on the use of remotely delivered mines* such as artillery grenades, rockets or mines dropped from airplanes. Remotely delivered mines were the subject of controversy during the 1980 Conference. Some States, *especially the so-called Third World countries*, sought a complete prohibition of *remotely delivered mines*. *On the other hand*, the majority of *industrial states* argued that a complete prohibition would contradict the requirements of military necessity. In particular, NATO member states<sup>31</sup> claimed the possibility of using the weapons on enemy territory to prevent its military operations.

Under Article 5(1), the use of remotely delivered mines is forbidden unless such mines are used only within an area which is itself a military objective or which contains military objectives. The use of those mines is therefore limited to *targeting military objectives*. Apart from that, the prohibition on the use is subject to meeting either of the following conditions: a) their location can be accurately recorded in accordance with Article 7(1)(a); or b) an effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

According to Article 5(2), effective advance warning must be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless the given circumstances make it impossible.

*A new element of International Humanitarian Law* (from the perspective of the time when adopted, *i.e.* 1980) is contained in Article 7 of Protocol II. Under Article 7(1), the parties to a conflict shall record the location of all minefields, mined areas, mines, booby-traps and other devices. All such records shall be retained by the parties to the conflict who shall take, without delay after *the cessation of active hostilities*, *all necessary and appropriate measures*, including the use of such information, *to protect civilians* from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control [Article 7(3)(a)]. *These measures serve mainly for the protection of civilians*.

Article 7(3)(a) of the Protocol further presupposes the *coordinating role* of Secretary-General of the UN who should receive all available information that the parties to the conflict have in their possession about the location of minefields, mines

<sup>30</sup> Cf The Manual of the Law of Armed Conflict. UK Ministry of Defence. Oxford : Oxford University Press, 2004, at p. 105.

<sup>31</sup> Cf Fleck, D. (ed.) *The Handbook of International Humanitarian Law*. Second edition. Oxford : Oxford University Press, 2008, at p. 149.

and booby-traps in the territory of the adverse party, in cases where the forces of neither party are in the territory of the adverse party, or once the withdrawal of the forces of the parties from the territory of the adverse party has taken place.

Issues such as *the removal of minefields, mines and booby-traps after the cessation of active hostilities* are also addressed in Protocol II. Pursuant to Article 9, the parties shall endeavour to *reach agreement*, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including joint operations.

The removal of mines is a very *expensive activity* and the provision of *assistance*, especially to poor states, is *necessary*. Calculations revealed that one anti-personnel mine worth US \$ 3 costs between US \$ 300 and US \$ 1000 to remove. *Several international organizations* are concerned with the removal of mines. This activity is also carried out by the United Nations Voluntary Trust Fund for Assistance in Mine Action established in 1994 and funded by financial contributions from the individual member states.

In this respect, the fact that the original language of the 1980 Protocol provided for *no explicit obligation of States* to remove mines after the end of the conflict has been considered as one of its shortcomings. The states are only required to *endeavour to reach agreement* to remove mines and booby-traps placed in position during the conflict. Nor does Protocol II forbid the use of *undetectable mines* except for those remotely delivered. The absence of any effective implementation or monitoring mechanisms may be considered as another weakness of Protocol II.

## 2. Protocol II as Amended in 1996

The Amendment to Protocol II of 1996 *supplements and specifies* Protocol II in greater detail while adding some *new elements*. In comparison with Protocol II of 1980, the Amendment to Protocol II of 1996 *refers to anti-personnel mines*. Considering the fact that *consensus on the complete prohibition on anti-personnel mines was not reached* in 1996, the Amended Protocol II of 1996 *contains certain restrictions on the use of anti-personnel mines*. According to the Study of the International Committee of the Red Cross, its provisions also apply to the States which are not yet bound by the *complete prohibition on anti-personnel mines, i.e.* by the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines of 1997. Under Article 4 of the Amendment of Protocol II of 1996, the use of undetectable anti-personnel mines is forbidden as specified in the Technical Annex. *The provision refers to the prohibition on the use of plastic mines*<sup>32</sup> that escape the detection by commonly-available technical mine detection equipment and can pose a serious threat to both mine clearing personnel and the civilians. Another restriction on *the use of anti-personnel mines other than those remotely delivered* is contained in Article 5. This provision is designed to minimize the risks posed specifically to the

<sup>32</sup> Cf Fleck, D. (ed.) *The Handbook of International Humanitarian Law*. Second edition. Oxford : Oxford University Press, 2008, at p. 147.

civilian population. Article 5(2) *forbids* the use of anti-personnel mines which are *not in compliance* with the provisions on self-destruction and self-deactivation as set forth in the Technical Annex. Under Article 5(2) it is further forbidden to use *anti-personnel mines*, unless they are *placed within a perimeter-marked area* which is *monitored by military personnel* and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The Technical Annex requires that all remotely-delivered anti-personnel mines be designed and constructed so that no more than 10% of activated mines fail to self-destruct within 30 days after emplacement, and each mine have a back-up self-deactivation feature designed and constructed so that, in combination with the self-destruction mechanism, no more than one in one thousand activated mines functions as a mine 120 days after emplacement. Article 5(3) relieves *a party to the conflict* from further compliance with the provisions of Paragraphs 2 if such compliance is not feasible due to forcible *loss of control of the area* as a result of *enemy military action*.

The Amendment of Protocol II also contains a new language concerning the *remotely-delivered mines*. Generally, mines delivered from a land-based system from *less than 500 metres are not considered to be remotely delivered*.<sup>33</sup> In this respect, the Amendment of Protocol II of 1996 contains another restriction in comparison with the language of 1980. However, Article 6 of the Amendment *does not completely forbid remotely-delivered mines* but requires that the States parties take all feasible precautions and technical assurances against risks to protect civilians.<sup>34</sup>

Article 6(1) *forbids* not only *the use of* remotely-delivered mines unless they are recorded in accordance with the Technical Annex, *i.e.* the *location* and the dimensions of the *area* of minefields must be specified, but it also *distinguishes remotely-delivered anti-personnel mines* which are strictly forbidden according to Article 6(2) if not in compliance with the provisions on *self-destruction* and *self-deactivation* as stipulated in the Technical Annex.

As for remotely-delivered mines other than *anti-personnel mines*, the States parties are required under Article 6(3) to equip the mines, to the extent feasible, with an effective self-destruction or self-neutralization mechanism.

The Amendment of Protocol II of 1996 *does not contain the original provision* of Article 5(1) of Protocol II of 1980 under which the use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a *military objective* or which *contains military objectives*. However, the general prohibition on *indiscriminate use* confirmed in Article 3(8)(b) (see above) *leads to identical results*.<sup>35</sup>

To protect the civilian population, the States parties are bound under Article 6(4) to give *effective advance warning* of any delivery or dropping of remotely-delivered mines

<sup>33</sup> Cf. Boothby, W. H.: *Weapons and the Law of Armed Conflict*. Oxford : Oxford University Press, 2009, at p. 171.

<sup>34</sup> Cf. Fleck, D. (ed.) *The Handbook of International Humanitarian Law*. Second edition. Oxford : Oxford University Press, 2008, at p. 149.

<sup>35</sup> Ibid.

which *may affect the civilian population*. However, there may be no warning where special circumstances do not permit. The open question is in which circumstances it is not possible to give the warning. *Some authors*<sup>36</sup> argue that *deviation* from Article 6(4) *may be justified* by the grounds of *tactical necessity* such as the moment of surprise or necessity to protect the delivering plane. Whether this is true or the interpretation of Article 6(4) of the Amendment of Protocol II of 1996 should be stricter remains a question.<sup>37</sup>

The Amendment of Protocol II of 1996 *strengthens the obligation* to record and use information about minefields, mined areas, mines, booby-traps and other devices. Under Article 9(1) of the Amendment of Protocol II (as compared to the 1980 language), parties to the conflict are obliged to *record all information*<sup>38</sup> concerning the location of minefields, mined areas, mines, booby-traps and other devices and not only in case of planned minefields and premeditated booby-traps laid on a large scale. The *binding*<sup>39</sup> Technical Annex to Protocol II also stipulates the *minimum standards* applicable to such records.

Under the Technical Annex, it is obligatory to record accurately *the location* of minefields, mined areas and areas of booby-traps and other devices. In addition, *complete information* as to the type, number, the date and time of laying, and the self-destruction time periods, etc. in respect of the above must also be recorded. Paragraph 4 of the Technical Annex specifies the warning signs (including an attached graphical example) that is to be utilized in the marking of minefields and mined areas to ensure their visibility and recognition by the civilian population. *Careful recording* of minefields, mined areas, areas of booby-traps etc. is important in situations such as extensive movement of military operations *to protect* armed forces of the enemy against the threat of minefields laid by allied units. In the absence of a careful documentation, the later *removal of minefields laid by own forces* can be *dangerous* for the engineering sapper units. For instance, each unit of the German Bundeswehr which lays minefields is requested under the applicable regulations to record all necessary information in a standardized document. The records are continuously collected and assembled into extensive log-books for the particular region.<sup>40</sup>

Under Article 9(2), the parties to the conflict are therefore required to take, without delay after the cessation of active hostilities, *all necessary and appropriate measures*. In areas under their control, this includes to use all such information *to protect civilians* from the effects of minefields, mined areas, mines, booby-traps and other devices. Military authorities of the occupying power are obliged to mark the minefields, warn the civilians etc. In case that the relevant area is *no longer under their control*, the parties to the conflict should make available *to the other party* or parties to

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<sup>36</sup> Ibid., at p. 150.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., at p. 151.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid., at p. 152.

the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them. In case that armed forces of a party to the conflict are in the *territory of an adverse party*, either party may *withhold such information* from the Secretary-General and the other party, subject to reciprocity, to the extent that *security interests* require such withholding. The parties should *come to an agreement* and the information withheld should be disclosed as soon as *security interests so permit*.

One of *the most important provisions*<sup>41</sup> of the Amendment of Protocol II of 1996 is contained in Article 10 which obliges the States parties to *clear, remove, destroy or maintain* all minefields, mined areas, mines, booby-traps, etc. W. H. Boothby<sup>42</sup> states that the expressions *clear* and *remove* are *synonyms*. Maintenance, according to him,<sup>43</sup> involves the requirement of maintaining the integrity of the minefield, maintaining the security in the affected area, etc. Under Article 10(1), the States parties are required to clear, remove, destroy or maintain all minefields, mined areas, mines, booby-traps and other devices without delay after *the cessation of active hostilities*. These *obligations* originate from Article 10(2) which imposes on parties responsibility in areas and for objects *under their control*. In case that the given *area is no longer under their control*, Article 10(3) of the Amendment specifically *requires users of mines* and other devices to provide the party controlling the area, to the extent permitted by such party, technical and material *assistance necessary to fulfil such responsibility*. Under Article 10(4), the parties are obligated to *endeavour to reach agreement*, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, technical and material *assistance necessary to fulfil such responsibilities*. Such agreement must include provisions concerning *information* referring to *location* and *character* of the minefields and booby-traps, and provisions concerning technical and material assistance necessary during the removal and clearance of mines and booby-traps including any technical and material assistance necessary for the removal.<sup>44</sup> Article 11 of the Amendment contains detailed provisions referring to technological cooperation and assistance during the removal of minefields, mines, booby-traps and other devices.

Article 8 of Protocol of 1980 sets forth the *obligations* which lead to the *requirement* for the contracting parties to *protect the United Nations forces and missions* from the effects of minefields, mines and booby-traps, and the obligation to support and cooperate with those forces and missions.<sup>45</sup> In this respect, Article 12 of the Amendment also provides for an extended protection of any United Nations force

<sup>41</sup> Cf. Boothby, W. H.: *Weapons and the Law of Armed Conflict*. Oxford : Oxford University Press, 2009, at p. 168.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Cf. Fleck, D. (ed.) *The Handbook of International Humanitarian Law*. Second edition. Oxford : Oxford University Press, 2008, at p. 155.

<sup>45</sup> Ibid., at p. 154.

or mission performing *peace-keeping, observation or similar functions*. In comparison with the text of 1980, Article 12(2)(a) of the Amendment also covers any missions established pursuant to Chapter VIII of the UN Charter. But on the other hand, the above provisions will not apply to *fighting units* of the UN in *enforcement operations* according to Chapter VII. These units are *probably not protected under the relevant provisions*.<sup>46</sup>

The 1996 Amendment *extends the protection* provided under Article 12(3) so as to cover any mission of the International Committee of the Red Cross and/or other humanitarian mission. According to Article 12(4), such missions may also include any humanitarian mission of a national Red Cross or Red Crescent Society or of other international humanitarian organizations.

Practical experience shows that *peacekeeping forces* and *observer missions* of the UN as well as the personnel of humanitarian organizations are *especially threatened* by minefields and booby-traps, because their units often have to move between enemy lines.<sup>47</sup> Their extensive protection is therefore essential.

As regards the above forces and missions, the *Contracting Parties* are required under Article 12(2)(b), if so requested by the head of a force or mission and so far as they are able, to take, among other things, such measures as are necessary to *protect the force or mission* from the effects of mines, booby-traps and other devices in any area under its control.

Article 14 stipulates an *important, new obligation* of the States parties to take all appropriate steps, including legislative and other measures, to prevent and suppress violations of the Protocol by persons or on territory under their jurisdiction or control. Under a new provision in Article 13, the Amendment also expressly requires that conferences *of the High Contracting Parties* be held annually<sup>48</sup> to strengthen and support the fulfilment of this Protocol.

In spite of the unquestionable improvements in Protocol II by the Amendment, some weaknesses can be found such as the *insufficient restrictions on the use of mines* and the *lack of specific provisions addressing anti-tank mines*. Yet another weakness may be seen in the fact that neither the Amendment and, therefore, nor Protocol II contains any compliance verification mechanism for the technical requirements applicable to mine self-destruction, or the *investigation*<sup>49</sup> *of a possible breach* of the restrictions on the use of mines. As regards the verification, *opponents*<sup>50</sup> mainly argue that it would pose an obstacle to broad accession, and that it would be difficult to implement.

<sup>46</sup> Ibid., footnote 190.

<sup>47</sup> Ibid., at p. 155.

<sup>48</sup> Cf. Sommargua, C., From Global Negotiations to National and Regional Initiatives. Disarmament, a periodic review by the United Nations, 1996, Vol. XIX, No. 2, at p. 22.

<sup>49</sup> Ibid., at p. 23.

<sup>50</sup> Cf. Molander, J., Strengthening International Humanitarian Law: The Review Conference of the 1980 Conventional Weapons Convention. UNIDIR Newsletter, Dec. 1994/May 1995, at p. 10.

### 3. Conclusion

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons of 1980 and Protocol II to it *restrict* but, as mentioned above, *do not completely forbid the use of mines*. Although the Convention is a treaty in the area of the Law of Armed Conflicts (International Humanitarian Law), it contains *certain elements of the Law of Disarmament*.<sup>51</sup> The provisions which are more typical of disarmament and armament restriction treaties are those contained in Article 8 of the 1996 Amendment. Article 8(1)(a) requires the States parties not to transfer any mines the use of which is prohibited by the Protocol.

It can be said that Protocol II and its 1996 Amendment more particularly specify the general prohibitions on the use of weapons with indiscriminate effects to the extent that they apply to *mines*. There is an evident effort to protect specifically the civilian population from both the perspective of the use of mines and that of possible consequences after the cessation of active hostilities. The Protocol and, in particular, the Amendment contain provisions designed to protect combatants. The use of certain types of mines is absolutely forbidden under certain conditions. Undoubtedly, the Protocol and the Amendment have contributed to the development of International Humanitarian Law. However, *the common law character of their provisions* which stipulate the *obligation to record the location of the mines* or their *removal after the cessation of active hostilities* is not explicit. On the other hand, there is an evident obligation not to use the mines on a *non-discriminatory basis* which has the character of a common law rule.

There are currently a total of ninety-three (93) States parties to Protocol II, and ninety-six (96) States parties to 1996 Amendment. States parties to both documents include countries such as the United States, Russia, China, Great Britain, France, Germany, India, and Pakistan. Certain States which are *important from landmine perspective* have not ratified them yet.<sup>52</sup> These countries include, for example, the Democratic Peoples Republic of Korea, Iran, Lebanon, Vietnam, Angola, or Mozambique.

The complex provisions concerning restrictions on the use of anti-personnel mines contained in Protocol II were subject to serious criticism which finally led to the adoption of the *Convention on the Prohibition of the Use of Anti-Personnel Mines of 1997*. The importance of Protocol II remains in the fact that the new Convention of 1997 has not been ratified by certain important states which possess anti-personnel mines including China, Russia, the United States, or Korea; Protocol II thus remains important as it *restricts the use of anti-personnel mines*.

<sup>51</sup> Ibid.

<sup>52</sup> Cf Boothby, W. H., *Weapons and the Law of Armed Conflict*. Oxford : Oxford University Press, 2009, at p. 177.

