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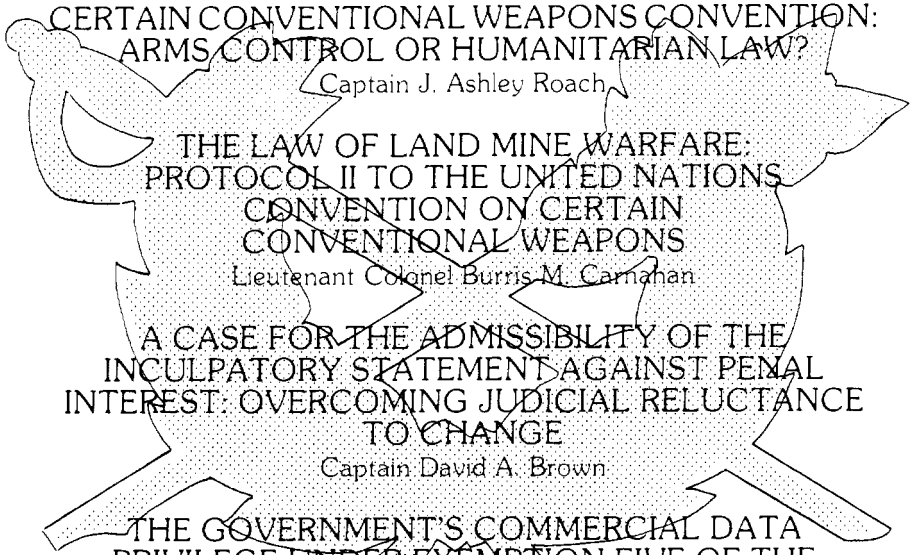
MILITARY LAW REVIEW

PROFESSIONAL WRITING AWARD FOR 1983



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The *Military Law Review* has been published quarterly at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, since **1958.** The *Review* provides a forum for those interested in military law to share the products of their experience and research. Writings offered for publication should be of direct concern and import in this area of scholarship, and preference will be given to those writings having lasting value as reference material for the military lawyer. The *Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

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SUBMISSION OF WRITINGS: Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate. double-spaced, to the Editor. *Military Law Review*, The Judge Advocate General's School, U.S. Army. Charlottesville, Virginia 22901.

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PROFESSIONAL WRITING AWARD FOR 1983

Each year, the Alumni Association of The Judge Advocate General's School presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The purposes of the award are to recognize outstanding scholarly achievements in military legal writing and to encourage further writing.

The award was first given in 1963, the sixth year of the *Review's* existence. The award consists of a citation signed by The Judge Advocate General and an engraved plaque. Selection of the winning article is based upon the article's usefulness to judge advocates in the field, its long-term values as an addition to military legal literature, and the quality of its writing, organization, analysis, and research.

The award for 1983 was presented to Major Charles E. Trant, JAGC, U.S. Army, for his article entitled "The American Military Insanity Defense: **A** Moral, Philosophical, and Legal Dilemma," which appeared in volume 99, the winter 1983 issue of the *Military Law Review.* Major Trant, currently serving as a special court-martial judge in the Fifth Judicial Circuit of the U.S. Army Trial Judiciary in Mannheim, Federal Republic of Germany, originally prepared the article as a thesis in partial fulfillment of the requirements for the completion of the 31st Judge Advocate Officer Graduate Course, 1982-83. It was selected as the best thesis submitted during that Course.

In the award-winning article, Major Trant first examined the historical origins and development of the insanity defense and noted the various tests employed to test for insanity. The insanity defense in the United States was specifically studied, as was the specific application of the defense to courts-martial. The alternatives to the current military insanity defense were individually examined and, in conclusion, Major Trant proposed that the military adopt the "guilty but mentally ill'' verdict as the best option through which to protect society against criminal conduct while assuring rehabilitative treatment for the accused.

With deep satisfaction, the *Military Law Review* congratulates Major Trant in his achievement. His excellent work has helped earn the respect of the military legal community for the *Review*, The Judge Advocate General's School, and the Judge Advocate General's Corps. It is hoped that others will be encouraged to emulate his efforts in producing this fine work of legal scholarship.

CERTAIN CONVENTIONAL WEAPONS CONVENTION: ARMS CONTROL OR HUMANITARIAN LAW?

by Captain J. Ashley Roach*

I. INTRODUCTION

This article examines the 1980 Conventional Weapons Convention[1] and the first protocol annexed thereto relating to nondetectable fragments. The second protocol to this treaty, regarding mines, booby traps and similar devices, is analyzed by Lieutenant Colonel Burrus M. Carnahan, USAF, of the International Law Division, Office of The Judge Advocate General, U.S. Air Force, who was also a member of the American delegation to the United Nations Conference on Prohibitions or Restrictions on Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Geneva, 1979-1980 (CCW).

The conventional negotiations combined both humanitarian and arms control efforts, although the mixture was not equally balanced. This article describes and attempts to explain both the mixture and its causes and effects. It also preserves some of the negotiating history of this new multilateral treaty.

There is hardly any meaningful public record of the negotiations of this convention. There are verbatim records available only of the

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*AB 1960, JD 1963, University of Pennsylvania: LL.M. 1971, George Washington University. Captain, Judge Advocate General's Corps, U.S. Navy; Head, Law of Armed Conflict Branch, International Law Division, Office of the Judge Advocate General, Department of the Navy.

Captain Roach was a member of the United States Delegation to the United Nations Conference on Prohibitions or Restrictions of use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Geneva, 1979-80.

The author wishes to express his thanks for the most helpful comments in reviewing the manuscript to Lieutenant Colonel Burrus Carnahan, U.S. Air Force, Lieutenant Colonel James C. Moore, U.S. Air Force, Professor George K. Walker, and Michael John Matheson. The views expressed in this article are, however, his own, and do not necessarily represent those of the Department of the Navy, the U.S. Department of Defense or the U.S. Government.

'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, with annexed Protocols, *opened for signature* April 10, 1981, U.N. Doc. A/CONF.95/15, Annex I, at 20 (1980). *reprinted in* 19 Int'l Leg. Mat. 1524 (1980); 1981 Int'l Rev. Red Cross 20; U.S. Dep't of Air Force, Pamphlet No. 110-20, Selected International Agreements, 3-177 (1981) [hereinafter cited as AFP 110-20].

twelve plenary sessions of the conference, yet the real negotiations took place in unrecorded private discussions and in the many sessions of the three working groups. As to these working groups, there are only the slim reports of their chairmen. There are no summary records of the working groups' meetings, as are available, for example, for the 1974-1977 Diplomatic Conference on Humanitarian Law (CDDH). Accordingly, it is hoped that these articles by two of the United States' negotiators will assist in fleshing out the record.

During the 1970s, the United States was not particularly desirous of concluding a weapons agreement and neither promoted nor opposed the multilateral negotiating process. This neutral position had been taken during the CDDH partly because of a widely shared skepticism about both the humanitarian aspects of some of the proposals advanced and the prospects for success in prohibiting or restricting conventional weapons, and partly because of the concern that certain other countries might succeed in developing broad support for prohibitions and restrictions inimical to United States security interests. The United States ultimately participated fully in the weapons negotiations with a view to shaping the results.

The United States entered the CCW negotiations as a holding action. The first session, in 1979, was, from the United States' perspective, spent mostly in identifying others' objectives and in pursu-

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[2]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 [hereinafter cited as Additional Protocol I]. *reprinted in* U.N. Doc. A/32/144; 1977 Int'l Rev. Red Cross (Aug.-Sep.); 16 Int'l Leg. Mat. 1391 (1977); 72 Am. J. Int'l L. 457 (1978); U.S. Dep't of Army, Pamphlet No. 27-1-1 Protocols to the Geneva Conventions of 12 August 1949 (1979) [hereinafter cited as DA Pam 27-1-1]; AFP 110-20, at 3-127 (1981); D. Schindler & J. Toman. The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents 551 (2d ed. 1981) [hereinafter cited as Schindler & Toman]; 42 Law & Contemp. Probs. 203 (1978).

Protocol Additional to the Geneva Conventions of 12 August 1949. and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977 [hereinafter cited as Additional Protocol II]. *reprinted in* U.N. Doc. A/32/144; 1977 Int'l Rev. Red Cross (Aug.-Sep.); 72 Am. J. Int'l L. 502 (1978): 16 Int'l Leg. Mat. 1442 (1977): Schindler & Toman. *supra*, at 619; DA Pam 27-1-1; AFP 110-20. at 3-157; 42 Law & Contemp. Probs. 282 (1978).

The four 1949 Geneva Conventions for the protection of war victims are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362. 75 U.N.T.S. 31 [hereinafter cited as First Convention]: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as Second Convention]: Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316. T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Third Convention]: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Fourth Convention].

ing a few ideas which seemed appropriate at the time. The second session, in 1980, was devoted to insuring that it was the last session of multilateral negotiations for restrictions on the use of conventional weapons in armed conflict.

All states will need the next two decades to understand fully the implications of and to implement the truly major developments in the law of armed conflict represented by the two protocols of 1977 to the 1949 Geneva Conventions for the Protection of War Victims[2] and the 1980 Conventional Weapons Convention. This will require lengthy and detailed military assessments of their provisions, realistic appraisal of how well their humanitarian purposes can be achieved and informed judgments as to likely adherence to their requirements in actual combat between anticipated opponents. Only to the extent their terms can and will be complied with by all parties, in the heat and fog of battle as well as in peacetime, will there be respect for these new rules and for the law of armed conflict as a whole. Current examples of warfare in Afghanistan, Laos, and Kampuchea caution against further comprehensive development of the law regulating the means and methods of warfare until there is greater acceptance of its terms and adherence to its requirements, notwithstanding the generally good record of compliance in the Falklands/Malvinas war. This body of law should never be codified or developed for its own sake but rather to affect the actual conduct of states and their armed forces in warfare. Until there is substantial evidence that potential opponents are likely to abide by existing law governing the conduct of warfare, the utility of new rules is questionable. Simply stated, what is now needed is implementation of existing law, not further development of that law.[3]

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[3] This is also the view of the Deputy Director, Department of Principles and Law, International Committee of the Red Cross, Yves Sandoz, expressed in his article, *Unlawful Dnmage in Armed Conflicts and Redress under International Humanitarian Law*, 1982 Int'l Rev. Red Cross 131, at 152-53 [hereinafter cited as Sandoz, *Unlawful Damage*]:

> With the Protocols of 1977 and the instruments adopted in 1980, it appears that international humanitarian law has attained the limit of its possibilities. True, the use of some weapons could probably be still further restricted and other weapons could perhaps be added to the three categories covered by the Protocols of 1980, but so far as its principles are concerned, international humanitarian law could hardly develop any further without "preventing" armed conflicts from taking place at all, which is not its function... The proportions of the conflicts now going on, and above all of the potential conflicts which threaten us all, in view of the weapons now in the hands of the States, makes it obvious that we must exert unceasing efforts, going beyond attitudes and gestures which have become routine, in order that the principle of non-resort to force, set forth in the United Nations Charter, may at last be truly applied. It is clear,

II. BACKGROUND OF THE NEGOTIATIONS

Modern efforts to restrict or prohibit the use of conventional weapons[4] have their principal origins in reaction to the well-publicized use of modern conventional weapons such as incendiary weapons, land mines, and small calibre high velocity bullets in the Indochina war. These efforts involved parallel, and not always coordinated, work by the United Nations General Assembly and Secretariat, the International Committee of the Red Cross (ICRC), and a few countries, notably Sweden and Mexico. These actions purported to be motivated by purely humanitarian concerns, but the subject matter necessarily involved political views about the Vietnam conflict and questions of national security. The negotiations and resulting treaty restricting the use of certain conventional weapons had to take into account these frequently opposed considerations. The success or failure of the treaty depends on the acceptability of that balance.[5]

The modern attempts to impose international restrictions on the use of weapons did not begin in earnest until after efforts[6] were well underway to modernize and update the 1949 Geneva Conventions for

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however, that such efforts cannot take place within the limited ambit of international humanitarian law.

The 1981 quadrennial reports to the ICRC from governments on their dissemination and teaching of international humanitarian law is not encouraging. Only thirty-one governments replied and many replies were so lacking in relevant substance that the President of the ICRC was moved to write that "some of the reports received do not, in the ICRC's view. have much more than a vague connection with the question of dissemination of international humanitarian law," and that "the ICRC, while stressing that there is no question of its levelling any form of criticism, takes the liberty of stating that such reports were not quite what has been expected." ICRC, Dissemination of Knowledge and Teaching of International Humanitarian Law and of the Principles and Ideals of the Red Cross: Answers from Governments and National Societies to the ICRC Questionnaire, 24th International Red Cross Conference doc. CPA/4.1/1, Aug. 1981, at 9.

[4] Previous efforts to restrict or prohibit the use of weapons are well recorded elsewhere. *See, e.g.*, Robblee, *The Legitimacy of Modern Conventional Weaponry*, 71 Mil. L. Rev. 95 (1976). These historical examples include: burning arrows (600 A.D.), crossbow and arbalist (1139), explosive projectiles less than 400 grams (1868). asphyxiating gases (1899), expanding bullets (1899), launching projectiles and explosives from balloons (1899), automatic submarine contact mines and torpedoes (1907). submarines (1922, 1925, 1930, 1936), poisonous gas (1922 and 1925). and biological weapons (1922, 1925 and 1971).

[5] *See* note 125 *infra*.

[6] Which began with the ICRC's 1953 Conference of Government Experts on the Protection of Civilians and culminated in the two 1977 Protocols Additional to the 1949 Geneva Conventions for the Protection of War Victims.

the Protection of War Victims.7

The weapons efforts can be said to have begun at the International Conference on Human Rights, Tehran, from April 22 to May 13, 1968. That conference had been convened by the United Nations in observance of the "International Year for Human Rights," on the 20th anniversary of the 1948 Universal Declaration of Human Rights.[8] Resolution XXIII of that Conference requested the General Assembly to invite the Secretary-General to study, *inter alia*, "the need for additional humanitarian international conventions...to ensure the prohibition and limitation of the use of certain methods and means of warfare."[9]

By Resolution 2444 (XXIII), 19 December 1968,[10] the General Assembly invited the Secretary-General to undertake this study. Submitted on November 20, 1969, the study's sections on weapons[11] summarized previous efforts at imposing legal restrictions on the use of weapons and suggested the necessity for a study on the legality of the use of napalm.[12]

'These efforts are well summarized in *Law of War Panel: Directions in the Development of the Law of War*, 82 Mil. L. Rev. 3 (1978); *Changing Rules for Changing Forms of Warfare*, 42 Law & Contemp. Probs. (1978); Recent Developments, *International Agreements: Law of War*, 22 Harv. Int'l L. J. 436, 437 n.2 (1981).

The initiative for the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH) dates back to Resolution XXVIII of the XXth International Conference of the Red Cross held in Vienna in 1965. That resolution urged "the ICRC to pursue the development of International Humanitarian Law in accordance with Resolution No. XIII of the XIXth International Red Cross Conference," held in New Dehli in 1957. Schindler & Toman, *supra* note 2, at 195.

Resolution XIII had taken note of the ICRC's 1956 "Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War," and asked the ICRC to submit them to governments for their consideration. Schindler & Toman, *supra* note 2, at 187. Although most of those rules were not related to the use of weapons, Article 14 would have prohibited certain uses of incendiaries and delayed action weapons and Article 15 would have required charting of minefields and the use of self-neutralizing mechanisms on mines. It thus can be said that the mines and incendiaries protocols to the 1980 Conventional Weapons Convention originated here. However, since there was virtually no reaction from governments to the Draft Rules, "no further action was taken with a view to adopting a convention on the basis of this draft." Schindler & Toman. *supra* note 2, Intro. Note at 187.

The interplay between the United Nations and the ICRC is candidly described in Baxter, *Perspective: The Evolving Laws of Armed Conflicts*, 60 Mil. L. Rev. 99 (1973).

[8]G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948).

[9]U.N. Doc. A/CONF.33/41, *reprinted in* Schindler & Toman, *Supra* note 2, at 197.

[10]*Reprinted in id.* at 199.

"*Respect for Human Rights in Armed Conflict: [First] Report of the Secretary-General*, U.N. Doc. A/7720, paras. 183-201, at 59-63 (1969).

[12]*Id.*, para. *200*, at 62-63.

At the same time, the ICRC, in its report on the reaffirmation and development of the law and customs applicable in armed conflict, which it submitted to the XXIst International Conference of the Red Cross, Istanbul, 1969, referred, in connection with the different fields in which international humanitarian law should be developed, to the "prohibition of 'non-directed' weapons or weapons causing unnecessary suffering." The XXIst International Conference of the Red Cross requested the ICRC

> on the basis of its report to pursue actively its efforts in this regard with a view to
>
> 1. proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law,
>
> 2. inviting governmental, Red Cross and other experts representing the principal legal and social systems in the world to meet for consultations with the ICRC on these proposals,
>
> 3. submitting such proposals to Governments for their comments, and
>
> 4. if it is deemed desirable, recommending the appropriate authorities to convene one or more diplomatic conferences of States parties to the Geneva Conventions and other interested States, in order to elaborate legal instruments incorporating those proposals.[13]

In preparation for the 1970 session of the General Assembly, the Secretary-General repeated, in his second report on respect for human rights in armed conflict, a suggestion that a study be conducted on napalm and other incendiary weapons to "facilitate subsequent action by the United Nations with a view to curtailing or abolishing such uses of the weapons in questions as might be established as inhumane."[14]

Meanwhile, the ICRC decided to convene at Geneva, from May 24 to June 12, 1971, a conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflict. Most of the documents under consideration at

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[13] Resolution XIII. *reprinted in* ICRC, *International Red Cross Handbook* 449-50 (11th ed. 1971).

[14] *Respect for Human Rights in* **Armed** *Conflict: [Second] Report of the Secretary-General.* U.N. Doc. A/8052, para. 126, at 41 (1970). It was not until G.A. Res. 2852, 26 U.N. GAOR. Supp. (No. 29), 90-91, U.N. Doc. A/8429 (1971), that the General Assembly finally requested the Secretary-General to prepare such a report on napalm.

that conference related to improvements to the 1949 Geneva Conventions. However, several proposals were briefly discussed dealing with restrictions on napalm bombs and other incendiary weapons, fragmentation bombs, and land mines.[15] Concern was expressed, however, by many Western countries that the question of specific conventional weapons was outside the scope of that conference and should properly be dealt with in a disarmament forum. The United States, at that time, was also concerned that work on questions relating to specific conventional weapons would delay the work, which was already further advanced, on two additional protocols to the 1949 Geneva Conventions.[16]

As a result of these exchanges of views, the ICRC decided to convene a second conference of government experts in the spring of 1972 to consider those protocols in detail. However, there was general recognition that the weapons issues were not developed well enough at that time to be included in those draft protocols.

At its 1971 session, the General Assembly expressed the hope that the second session of the ICRC conference of government experts would produce recommendations for action by governments, and asked the Secretary-General for a report as soon as possible on napalm and other incendiary weapons and all potential aspects of their possible use to be prepared by qualified governmental experts.[17]

The second meeting of governmental experts under ICRC auspices was held in Geneva from May 3 to June 3, 1972 and considered draft protocols to the 1949 Geneva Conventions. Amendments were offered to one draft article on means of combat[18] to forbid the use of certain conventional weapons,[19] such as delayed action and incendiary weapons,[20] but they were opposed by delegates who thought that such proposals went beyond the conference's purpose to develop

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[15] They are summarized in *Respect for Human Rights in Armed Conflict: [Third] Report of Secretary-General*, U.N. Doc. A/8370, paras. 105-07, at 47-50 (1971). *See also* Kalshoven, *Reaffirmation and Development of International Huninnitarian Law Applicable in Armed Conflicts: The Conference of Government Experts. 24 Mail-12 June 1971*, 2 Neth. Y.B. Int'l L. 61 (1971).

[16] Blix. Remarks. *Panel: Human Rights nnd Armed Conflict: Conflicting Views*, 67 Proc. Am. Soc. Int'l L. 141, 155-56 (1973); *Conference of Government Experts—Geneva, 24 May-12 June 1971 (II)*, 1971 Int'l Rev. Red Cross 587, 592-95.

[17] G.A. Res. 2852.

[18] Article 30.

[19] As well as nuclear weapons, *see* note **83** *infra*.

[20] These proposals are summarized in *Human Rights in Armed Conflict—Respect for Human Rights in Armed Conflicts, [Fourth] Report of the Secretary-General*, U.N. Doc. A/8781, paras. 145-55, at 51-54 (1972).

humanitarian law applicable in armed conflicts.[21] Those amendments were not accepted.

During the summer of 1972, the Secretary-General had a report on napalm and other incendiary weapons prepared by a group of seven governmental consultant experts[22] that was submitted to the 27th session of the General Assembly in the fall of 1972. The report pointed out "the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons."[23]

Pursuant to General Assembly Resolution 2932A (XXVII), November 29, 1972, this report was circulated to governments for comment. The comments from twenty-two member States[24] generally supported the report's recommendation for controls on the use of incendiary weapons, although there was a wide divergence of views on the appropriate forum for development of those controls. Some urged the matter be considered by the Conference of the Committee on Disarmament; others by the ICRC or the CDDH. Some felt further study by governments was required. The United Nations later stated that this report

> had a major influence on future deliberations to ban or restrict certain weapons. The report revealed that incendiary weapons caused widespread and largely uncontrollable conflagration and concluded that there was a need

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"Which was viewed as the law of Geneva, while restrictions on the use of weapons were considered to be part of the Law of the Hague. Erickson. *Protocol I: A Merging of the Hague and Genera Law of Armed Conflict*, 19 Va. J. Int'l L. 557 (1979); Kaishoven, *Reaffirmation and Development of International Humanitarinn Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May-2 June 1972*, 3 Neth. Y. B Int'l L. 18, 29-30 (1972).

[22] They were from Nigeria. Romania, Czechoslovakia, Sweden, the Soviet Union, Peru, and Mexico, and worked with members of the U.N. Secretariat, World Health Organization, and ICRC. *Napalm and Other Incendiary Weapons and All Aspects of their Possible Use: Report of the Secretary-General*, U.N. Doc. A/8803/Rev.1, at 1 (1973). The United States had doubts whether the U.N. was the appropriate forum for work on specific conventional weapons and therefore decided not to participate in the preparation of this study on napalm. Report of United States Delegation to the Meeting of Government Experts. Lucerne, 1974, at 1: *Napalm and Other Incendiary Weapons and All Aspects of their Possible Use: Report of the Secretary-General*, U.N. Doc. A/9207, at 24 (1973).

[23] U.N. Doc. A/8803/Rev.1, para. 193, at 56. The mixed arms control and arms use nature of this proposal is evident. and may be the source of the dichotomous nature of these weapons negotiations.

[24] They are collected in U.N. Docs. A/9207 (1973), and A/9207/Add.1 (1973). These countries were Australia. Barbados. Byelorussian S.S.R.. Cyprus. Czechoslovakia, Denmark, Finland, Guatemala. India, Iran, Kuwait. Mexico, Mongolia, Netherlands, Norway, Poland, Sweden, Syria, the Soviet Union, United Kingdom, United States, and Canada.

> for measures prohibiting their use, production, development and stockpiling.[25]

Ascertaining the truth of this assertion was central to prolonging the negotiations on weapons once they got underway.

At this point a single government, Sweden, publicly entered the international arena on this subject. Shortly after publication of the United Nations Report, a private but Swedish government-supported body, the Stockholm International Peace Research Institute (SIPRI), published an *Interim Report on Napalm and other Incendiary Weapons: Legal and Humanitarian Aspects.* This report complemented the U.N. study by laying particular stress on the legal and humanitarian aspects of the use of these weapons.[26] The following year, the Swedish Ministry of Foreign Affairs published a report on conventional weapons.[27] That report recommended prohibitions and restrictions on the use of small-calibre high velocity projectiles, fragmentation warheads, flechette warheads, land mines, booby traps, and incendiary weapons.[28]

Meanwhile, during the first part of 1973, the ICRC held a series of meetings of experts with a view to harmonizing as far as possible the divergent views that had been expressed on certain issues at its 1971 and 1972 conferences of government experts. From February 26 to March 2, and from June 12 to 15, 1973, a group of military, medical, and legal experts met to consider questions relating to the use of such conventional weapons as may cause unnecessary suffering or have indiscriminate effects. The main purpose of these meetings was to describe the military characteristics and main effects on the human body of such weapons as small calibre high velocity weapons, fragmentation warheads and land mines.[29]

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[25] U.N. Brochure, "United Nations Conference on Prohibitions or Restrictions on Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects," August 1979, at 2.

[26] The final report, in book form entitled *Incendiary Weapons,* was published in 1975. For a summary of Sweden's international efforts to have the international community undertake serious discussion of the use of conventional weapons that may cause unnecessary suffering or have indiscriminate effects, see CDDH/SR.14, paras. 13-21, 5 Swiss Federal Council, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977).* at 143-46 (1978) [hereinafter cited as *Official Records]; Swedish Working Group Study, infra* note 27, at 8; and Baxter, *supra* note 7, at 109.

[27] Swedish Ministry of Foreign Affairs, *Conventional Weapons. Their Deployment and Effects from a Humanitarian Aspect: Recommendations for the Modernization of International Law, A Swedish Working Group Study* (1973).

[28] *Id.* at 163-71.

[29] *Respect for Human Rights in Armed Conflict: Fifth] Report of the Secretary-General,* U.N. Doc. A/9123, para. 10, at 3 (1973); ICRC, *Weapons that May Cause*

In June 1973 the ICRC published another draft of two, now more polished, additional protocols to the 1949 Geneva Conventions which appeared to form a suitable basis for negotiation at a diplomatic conference.[30] Accordingly, in November 1973 in Tehran, as a result of discussions at the XXII International Conference of the Red Cross, the United States and other countries with a similar view now considered that the work on specific conventional weapons could be undertaken without prejudicing the work on the two protocols additional to the 1949 Geneva Conventions. Doubt about the forum in which the work should be carried on were subordinated at that time.[31]

The Tehran Red Cross Conference thus adopted by consensus a resolution urging CDDH to consider at its first session, in early 1974, "the question of the prohibition or restriction of the use of conventional weapons which may cause unnecessary suffering or have indiscriminate effects" and invited the ICRC to call in 1974 "a conference of government experts to study in depth" that question and transmit a report of it to all governments participating in CDDH.[32]

The General Assembly supported this resolution in 1973[33] and CDDH supported it at its 1974 session after establishing an Ad Hoc Committee on Conventional Weapons.[34] The ICRC held this conference of government experts at Lucerne, Switzerland, from September 24 to October 18, 1974,[35] following the first session of CDDH held at Geneva, from February 20 to March 29, 1974, and then held a second meeting of government experts at Lugano, Switzerland in 1976.[36]

The so-called 4th or Ad Hoc Committee on Weapons met during the four sessions of CDDH.[37] From all these discussions developed the realization that restrictions could be negotiated on only three

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Unnecessary Suffering or have Indiscriminate Effects: Report on the Work of Experts (1973).

[30] ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, CDDH/1 (1973).

[31] Report of United States Delegation to Weapons Experts Conference, Lucerne, at 2.

[32] Res. XIV, 1974 Int'l Rev. Red Cross 32-33, *reprinted in* U.N. Doc. A/9123/Add.2, Annex, at 4 (1973).

[33] G.A. Res. 3076, 28 U.N. GAOR. Supp. (No. 30). at 15, U.N. Doc. A/9030 (1973).

[34] CDDH/SR.9, para. 50, 5 *Official Records* 90.

[35] ICRC, *Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, September 24 to October 18, 1974* (1975). The ICRC's invitations to governments are set forth in 1974 Int'l Rev. Red Cross 289 & 453.

[36] ICRC, *supra* note 35, *The Work of the Second Session, Lugano, January 28 to February* 36, ***1976*** (1976).

[37] 16 *Official Records*.

categories of weapons: fragments not detectable by X-ray, land mines and booby traps, and incendiary weapons.

However, no agreement was reached on those weapons during CDDH, except at the conclusion of CDDH in 1977, to recommend to the General Assembly the convening of a conference to consider prohibitions or restrictions on the use of specific conventional weapons, including those which might be deemed to cause indiscriminate effects or to cause superfluous injury, *i.e.*, weapons whose use might be considered to be indiscriminate and therefore unlawful.[38]

In response to this CDDH resolution, the General Assembly[39] sponsored two preparatory conferences for a United Nations Conference on Prohibitions or Restrictions on Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW) in the fall of 1978 and the spring of 1979.[40] During those preparatory conferences, as before, focus was on specific weapons and no attempt was made to devise a legal framework for coping with any new agreements which might come out of those multilateral negotiations. However, at the end of the second preparatory conference, Mexico tabled an Outline of a General Treaty, that suggested an "umbrella" arrangement under which there might be attached a series of optional protocol agreements containing particular restrictions or prohibitions on the use of specific conventional weapons.[41]

During the few months between publication of this umbrella proposal and convening of the first session of the United Nations Conference in the fall of 1979, some Western delegations, not including the United States, met to elaborate on the Mexican outline. The results of these consultations were then communicated to all the Western nations with a request for their views. This resulted in the so-called Anglo-Dutch draft umbrella treaty tabled early in the first session.[42]

During the first session of the CCW, treaty negotiations centered only on a few issues: the application of this convention to national liberation movements and their concomitant rights and obligations,

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[38]Resolution 22(IV) of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (1977), 1 *Official Records* 52-53, *reprinted in* Schindler & Toman, *supra* note 2, at 647-48; DA Pam 27-1-1, at 117-18; AFP 110-20, at 3-116 to 3-167.

[39]G.A. Res. 32/152, 32 U.N. GAOR, Supp. (No. 45), at 57, U.N. Doc. A/32/45 (1977) and G.A. Res. 33/70, 33 U.N. GAOR Supp. (No. 45), at 47, U.N. Doc. A/33/45 (1978).

[40]The reports of the preparatory conferences appear in U.N. Docs. A/33/44 (1978) and A/CONF.95/3 (1979).

[41]U.N. Doc. A/CONF.95/8, Ann. II, App. A (1979).

[42]U.N. Doc. A/CONF.95/WG/L.1.

procedures for review and amendment, including the role of the Committee on Disarmament (CD) in future efforts to deal with such restrictions on conventional weapons, *i.e.*, whether this was to be treated as a humanitarian effort or future efforts were to be subsumed in the larger strategic role of the CD, and other more mundane matters such as treaty format, common definitions, final clauses, and the preamble.[43]

It was only during the second session that the details of the umbrella treaty were finally agreed upon, but then not until quite late in the session, when it became clear that a protocol on incendiaries acceptable to both ends of the spectrum, *i.e.*, the "prohibitionists", Sweden and Mexico on the one end, and the "realists", the United States and the Soviet Union on the other, could be written.

It should be noted that the negotiators involved in CCW were, for the most part, not major players in CDDH. Indeed, the most remarkable feature of CCW is that this "son of CDDH" was for the most part negotiated by arms control and disarmament personnel who had little or nothing to do with the development of the Additional Protocols.[44] Indeed, this fundamental change in the members of the delegations probably accounts for many of the variances of the CCW treaty and its protocols from the Additional Protocols as discussed in this article.

The mixed lineage of the weapons convention is well illustrated in its preamble. The link with the Additional Protocols appears in those four preambular paragraphs that refer to the general principles of the law of armed conflict,[45] while the arms control influence appears

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[43] Szasz, *The Conference on Excessively Injurious or Indiscriminate Weapons*, 74 Am. J. Int'l L. **212, 214** (1980).

"Compare the CDDH List of Participants, **2** *Official Records* 29-30, with the CCW List of Participants, U.N. Doc. A/CONF.95/INF.5, which reveals that only **34** of the **76** States represented at the second session of CCW sent delegates who had attended CDDH, and that only 13 heads of delegation at CCW had attended CDDH. They were Columbia, Czechoslovakia, Ireland, Libya, Luxembourg, Mexico, Morocco, Philippines, Portugal, Sudan, Sweden. Switzerland, and the United States. Not all of these heads of delegation at CCW were heads of their delegations at CDDH.

[45] *Further recalling* the general principle of the protection of the civilian population against the effects of hostilities,

Basing themselves on the principle of international law that the right of the parties to armed conflict to choose methods or means of warfare is not unlimited, and on the principle that prohibits the employment in armed conflict of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,

Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread.

in the five subsequent paragraphs referring to ending the arms race and encouraging disarmament.[46]

The analysis below generally follows the order of material in the umbrella treaty. However, articles 2 and 7 are considered *seriatim* because of their close relationship. The more politically significant review and amendment article 8, along with the sole substantial obligatory article 6, concerning dissemination, are considered before the sections describing the final clauses and discussing compliance mechanisms.

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long-term and severe damage to the natural environment,

Confirming their determination that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law and derived from established custom, from the principles of humanity and from the dictates of public conscience...,

[46] *Desiring* to contribute to international detente, the ending of the arms race and the building of confidence among States, and hence to the realization of the aspiration of all peoples to live in peace,

Recognizing the importance of pursuing every effort which may contribute to progress towards general and complete disarmament under strict and effective international control,

Wishing to prohibit or restrict further the use of certain conventional weapons and believing that the positive results achieved in this area may facilitate the main talks on disarmament with a view to putting an end to the production, stockpiling and proliferation of such weapons,

Bearing in mind that the General Assembly of the United Nations and the United Nations Disarmament Commission may decide to examine the question of a possible broadening of the scope of the prohibitions and restrictions contained in this Convention and its Annexed Protocols,

Further bearing in mind that the Committee on Disarmament may decide to consider the questions of adopting further measures to prohibit or restrict the use of certain conventional weapons...

111. UMBRELLA TREATY

A. TITLE

Until two days before the second session was due to close, the title of the agreement had never been discussed. At the end of the last session of the Conference Working Group on a General Treaty, the representative of Switzerland inquired concerning the title of this agreement, which by then had been agreed to in substance. The Chairman, Ambassador de Icaza of Mexico, referred the question to the Drafting Committee, as one without any substance.

At the Drafting Committee meeting later that afternoon, the question of a title for this agreement was posed to the members of the committee. None had any suggestions. The observer from the United States suggested "United Nations Convention on the Prohibition or Restrictions of Use of Certain Conventional Weapons in Armed Conflict." The Argentine delegate immediately objected that the use of the term "United Nations" was without precedent and therefore should be rejected. The representative of France then objected to the use of the term "in armed conflict." It was then suggested that the words from the title of the Conference be used instead of "armed conflict": "which may be deemed to be excessively injurious or to be indiscriminate effects." The representative of the United States pointed out that although such a title for a conference was most appropriate, it was not so for a convention wherein the delegates had specifically *not* found that the use of such weapons were excessively injurious or to cause superfluous effects and thus, by implication, *not* to have found that their prior use was unlawful.[47] For the moment those words were then placed in brackets.

At the end of the last meeting of the Drafting Committee, late in the afternoon of the last day of the conference, the issue of the title reappeared. The French delegate suggested deletion of the brackets. The Soviet observer and Warsaw Pact delegate opposed retention of the words within brackets, on the grounds that they provided inaccurate meaning to the results of the conference's deliberations. The Chinese delegate stated that the translation of "certain" in the title was rather uncertain in content. In a spirit of compromise, the American observer suggested use of the term "specific" in lieu of "certain," as the former was used in the General Assembly Resolution first establishing the weapons conference.[48] After some discus-

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[47] *See* text accompanying note 86 & note 86 *infra*.
[48] G.A. Res. 32/152, *supra* note 39.

sion, this suggestion was accepted and the title referred to the plenary was "Convention on Prohibitions or Restrictions on the Use of Specific Conventional Weapons."[49]

When this information reached Ambassador de Icaza, on the floor of the Plenary, well before the text ever reached the plenary,[50] he contended that this title severed the last link with CDDH and put this convention in the hands of the disarmament negotiators. He thereupon successfully lobbied on the floor of the plenary for a change in the title of the treaty to reflect that of the conference.51

In the process, the American representative, supported by the British delegate, made the point, unrebutted either from the floor or by the President of the Conference, that the restrictions were here agreed to not because there was any finding that any prior use of these weapons in similar circumstances was then unlawful but rather because, as a matter of present military and political judgment, these new restrictions could now be the subject of agreement.[52] The new restrictions were simply contractual undertakings adopted out of the common desire of the negotiators to control the conduct of future hostilities among those states willing to accept them and are not statements of customary law.[53]

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[49]U.N. Doc. A/CONF.95/14/Add.1, October 10,1980;U.N. Doc. A/CONF.95/SR.12, para. 1,at 2.

[50]Indeed, the conference adopted at 2220 hours the text of the Convention before the text as reported out by the Drafting Committee (at 1600 hours) was even in the hands of the Plenary.

[51]*See* U.N. Doc. A/CONF.95/SR.12, para. 2, at 2.

[52]U.N. Doc. A/CONF.95/SR.12, para. **4,** at 2; *id.*. para. 89, at 18.

[53]*Cf.* Robblee, *supra* note **4,** who analyzes such weapons in terms of the traditional legal criteria of unnecessary suffering and indiscriminate attack. In a pamphlet issued by the United Nations at the beginning of the first session of the weapons conference, the U.N. asserted:

> The principal obstacle to agreement on any of the weapons under consideration has been the position of the military advanced countries. Their view is that insufficient evidence that has been advanced to show that the weapons in question are unduly inhumane against military personnel or indiscriminate in their effects when properly used. Thus, according to this view, any restrictions applied to such weapons should pertain only to their use against civil populations.

U.N. Brochure, *supra* note 25, at **4.** ***See*** *also* the two volume compilation of existing rules in U.N. Doc. A/9215, (1973). As noted below in connection with article 2, ***see*** text accompanying note 86 *infra,* the view of these "militarily advanced countries" prevailed.

B. SCOPE OF APPLICATION

Article 1

The original Mexican preliminary outline had no provision indicating to or in what factual situations of armed conflict the weapons restrictions would apply. The Outline of a Draft Convention at the end of the first session contained a scope article, based on a United States proposal, which provided, with one important proviso to be discussed below in connection with article 7(4), that this convention would apply in

> the situations referred to in common Article 2 to the Geneva Conventions of 12 August 1949 for the Protection of War Victims"—i.e., in wars or other international armed conflict regardless of whether or not a state of war had been declared or was otherwise recognized by one of the parties to the conflict; and
>
> wars of national liberation as defined in paragraph **4** of Article 1 of Additional Protocol I.

In other words, these new weapons restrictions would apply in exactly the same factual situations to which Additional Protocol I applied or could be made to apply. This formula was ultimately adopted by the Conventional Weapons Conference:

> This Convention and its annexed Protocols shall apply in the situations referred to in Article **2** common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.

The negotiations on scope are succinctly stated in the Report of the United States Delegation to the second session:

> The question of the scope of application of the Convention was extensively considered at the first session, but still proved to be among the most difficult to resolve at the second session. Most delegations were prepared to accept language which applied the Convention to international armed conflicts, (as opposed to internal conflicts), including those conflicts between a State and a people fighting for self-determination which are covered by Article 1(4) of the Additional Protocol I to the 1949 Geneva Conventions; however, certain difficult issues remained to be resolved at the second session.

The United States and other Western delegations argued that the Convention should apply to conflicts covered by Article 1(4) of Additional Protocol I only if the authority representing the people in question had accepted and applied the rules of warfare which already applied to States as a result of various international agreements; whereas the African group (supported by other non-aligned representatives) strongly preferred to have no preconditions. Furthermore, the Israeli Delegation objected to language strongly favored by the non-aligned delegations which provided that an authority's declaration of acceptance of the Convention be presented to the Secretary-General of the United Nations as Depositary to the Convention. (Israel regarded this as giving too much political recognition to such movements.)

After considerable negotiation, a compromise package was developed providing: first, a statement in Article 1 of the Convention that it would apply to any situation described in Article 1(4) of Additional Protocol I; second, a requirement in Article 4 of the Convention that no authority fighting against a State would be entitled to the benefits of the Convention unless it accepted and applied this Convention, the 1949 Geneva Conventions, and Additional Protocol I to the 1949 Geneva Conventions (if that State is also a party to Additional Protocol I); and third, the deletion of the procedure for the filing of declarations with the U.N. Secretary-General which Israel opposed.

The effect of this compromise is to provide for a complete reciprocity of obligations between the parties to such a conflict, and to ensure that no authority claiming to represent such a people could take advantage of the Convention unless it had accepted and applied certain rules of warfare concerning (among other things) the treatment of prisoners and the protection of noncombatants. (The African group also abandoned language which it had strongly pressed for in the Preamble to the Convention which would have asserted the right of so-called liberation movements to use all available means to defeat their alleged colonial and racist oppressors, including the use of force.)[54]

[54] Aldrich, Report of the United States Delegation to the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious **or** to have Indiscriminate Effects, Second Session, Geneva, Switzerland, September 15-October 10.1980, at **13-14** [hereinafter cited as 1980 U S. Delegation Report].

These negotiations will be discussed in greater detail below

As with Additional Protocol I, it seems clear that the weapons convention and its annexed protocols do not apply to ordinary criminal activity or to insurgent groups which do not meet the requirements of the provisions of Articles 1 and 7(4) of the weapons convention and of Articles 1 and 96(3) of Additional Protocol I,[55] or whenever a group merely claims it is fighting a war of national liberation.

The term "armed conflict," whether applied to international or internal armed conflicts, although not defined either in the weapons convention or in Additional Protocol I, implies a certain intense degree of violence or the capability to engage in such violence such as that possessed by states. Riots, isolated acts of violence, or fighting by a group which does not control a sufficient amount of territory or which is not able to conduct sustained and concerted military operations, would not meet the minimum amount of violence necessary for the conflict to be a non-international "armed conflict" under Additional Protocol II and should also be excluded from wars of national liberation denominated as international armed conflicts under Additional Protocol I and the weapons convention.

Regardless of the level of violence involved, the question of the application of the weapons convention and Additional Protocol I to wars of national liberation lacks any substantive international legal effect. No state will ever concede that it is a racist, colonial, or alien regime in any conflict in which it is engaged, and thus will not apply either treaty on this basis, and therefore not recognize these "free-

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[55] On signature to the Additional Protocols, the United Kingdom stated:

> in relation to Article 1 [of Additional Protocol I], that the term "armed conflict" of itself and in its context implies a certain level of intensity of military operations which must be present before the [1949 Geneva] Conventions or the Protocol are to apply to any given situation, and that this level of intensity cannot be less than that required for the application of Protocol II, by virtue of Article 1 of that Protocol, to internal conflicts.

Schindler & Toman, *supra* note 2, at 634-35; **DA** Pam 27-1-1. at 140. Article 1(2) of Additional Protocol II provides that:

> This protocol shall not apply to situations of internal disturbances and tensions. such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

This view, also made by the United Kingdom in the final debate on Article 1 of Additional Protocol 1 (CDDH/SR.36, paras. 87-88, 6 *Official Records* 47) and by Australia (CDDH/SR.36 Annex 6 *Official Records* 60). was not contradicted during that debate or in the explanations of vote.

dom fighters" as legitimate combatants.[56] Further, the narrow term "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" refers only to the past African wars involving Portugal and Rhodesia, and the current conflicts in southern Africa and involving Israel in the Middle East.[57] Those states are not likely to ratify either treaty in any event, at least until those conflicts are settled. That phrase would not apply,

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[56] CDDH/SR.36, para. 61.6 *Official Records* 42 (Israel) and CDDH/SR.36, para. 93, 6 *Official* Reeords 49 (Canada).

[57] CDDH/I/SR.6, para. 2.8 *Official* Records 43 (Tanzania): CDDH/I/SR.6, para. 7, 8 *Official* Records 45 (Zimbabwe ANU): CDDH/I/SR.6, para. 14, 8 *Official* Records 46 (Pan-Africanist Congress): CDDH/SR.36, para. 90, 6 *Official* Records 48 (Nigeria): CDDH/SR.36, para. 99.6 *Official Records* 50 (Mozambique); CDDH/SR.36, para. 103, 6 *Official* Records 51 (Belgium); and CDDH/SR.36, para. 114, 6 *Official* Records 53 (PLO).

The full text of article 1(4) of Additional Protocol I reads as follows:

> The situations referred to in the preceding paragraph [article 1(3)] include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The Friendly Relations Declaration, referred to in article 1(4), was adopted by the U.N. General Assembly on 24 October 1970, annexed to G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28), at 121, U.N. Doc. A/8028 (1970). This resolution gives to *all peoples* the right to self-determination, not just those peoples fighting against colonial domination, alien occupation and against racist regimes:

> The principle of equal rights and self-determining of peoples
>
> By virtue of the principle of equal rights and *self-determination of peoples enshrined in the Chnrter. all peoples* have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle in order to:
>
> (a) To promote friendly relations and co-operation among States: and
>
> (b) To bring a speedy end to *colonialism*, having due regard to the freely expressed will of the peoples concerned;
> and bearing in mind that subjection of peoples to *alien subjugation, domination and exploitation* constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations. . . .

(emphasis added).

for example, to secessionist movements in multi-ethnic nations, such as the Biafran attempt to seceed from Nigeria.[58] Finally, many states have stated that only those genuine liberation groups that are recognized by the relevant regional intergovernmental group concerned can qualify for Article 1(4) status under Additional Protocol I,[59] none has yet to grant such recognition.

It is beyond the scope of this article to discuss the impact of articles 1(4) and 47 of Additional Protocol I on the necessity for an equally and reciprocally applicable law of armed conflict and the problems of the just/unjust war concept, which some have characterized as politicizing the law of armed conflict.

C. TREATY RELATIONS UPON ENTRY INTO FORCE

Article 7 and Provisional Application.

Article 7, like most of its counterpart Article 96 of Additional Protocol I, deals with various situations where the parties to a conflict are not all parties to the agreement. Situations where none of the parties to the conflict are parties to the weapons convention and relevant protocol are discussed below in connection with provisional application.

1. *Situations where all parties to the conflict are States*

If all parties to the conflict are also parties to the weapons convention and the relevant weapons protocols, then they are of course bound by them in their mutual relations as a matter of treaty law. No particular provision on this point was needed in this convention, in contrast to Additional Protocol I, because this convention stands

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[58] CDDH/I/SR.2, para. 41, 8 *Official Records* 13 [statement of Nigeria); CDDH/I/SR.14, paras. 28-29. 8 *Official Records* 109-10 (statement of Cameroon).

[59] Statement of United Kingdom on signature, Schindler & Toman. *supra* note 2, at 635; statements of Turkey. CDDH/I/SR.5, para. 43, 8 *Official Records* 39; CDDH/I/SR.68, para. 15, 9 *Official Records* 372; CDDH/SR.36, para. 121, 6 *Official Records* 55; Brazil, CDDH/I/SR.4, para. 41, 8 *Official Records* 31; Mauritania CDDH/I/SR.67, para. 76, 9 *Official Records* 366; Indonesia CDDH/I/SR.68, para. 5, 9 *Official Records* 370; CDDH/SR.36 Annex, 6 *Official Records* 63: Oman CDDH/I/SR.68, para. 29, 9 *Official Records* 375; and Zaire CDDH/I/SR.68, para. 30.9 *Official Records* 375. No states disputed these assertions. *Cf.* Statement of Cuba. CDDH/I/SR.14, para. 4, 8 *Official Records* 105.

alone and does not formally supplement any other treaty.[60]

On the other hand, if one of the parties to the conflict is not bound by a weapons protocol, the weapons convention follows the general pattern of Article 96 of Additional Protocol I and common article 2 of the 1949 Geneva Conventions in rejecting the *clausula si omnes* formula of the 1907 Hague Conventions. Under such a clause, a Hague Convention was applicable, as a matter of treaty law, only in conflicts in which *all* belligerents were bound by the agreement.

Article 7 provides in such situations that those parties bound by the weapons convention and that weapons protocol remain bound by them in their mutual relations, *i.e.*, with respect to others who are bound by them. Further, like the second sentence of Article 96(2) of Additional Protocol I, Article 7(2) permits a state not party to the weapons convention or to a particular weapons protocol to obligate a state party to a particular protocol to follow its restrictions if the non-party State "accepts and applies" the convention or relevant protocol and so notifies the Depositary, the U.N. Secretary-General. In other words, the non-party belligerent alone controls when to bring the provisions of the weapons protocols into force for each conflict in which it may engage and the state party is bound to give effect to its obligations under this convention as to that state with which it otherwise has no treaty relations.

On the other hand, treaty relations are imposed only if the non-party both "accepts and applies" the convention or weapons protocol. This wording, identical to that of Article 96(2) of Additional Protocol I and modeled upon common article 2(3) of the 1949 Geneva Conventions, is intended to impose a continuing obligation of compliance with the convention and relevant weapons protocol on the non-party, on penalty of unilateral severance of those relations by the state party.[61]

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[60] In contrast, Article 96(1) of Additional Protocol I provides that where parties to the 1949 Geneva Conventions are also parties to Additional Protocol I, the 1949 Geneva Conventions apply "as supplemented by" Protocol I. ***See*** text accompanying notes 89-90 and notes 89-90 ***infra.***

[61] *See* text preceding note 93 ***infra.*** Pictet, in his commentaries on the four Geneva Conventions, acknowledges this point, while arguing for the moral obligation on a state to apply the Geneva Conventions in hostilities with noncontracting belligerents because of the Conventions' humanitarian provisions. Commentary on I Geneva Convention 34-37 (J. Pictet ed. 1952); Commentary on II Geneva Convention 29-31 (J. Pictet ed. 1960); Commentary on III Geneva Convention 24-27 (J. Pictet ed. 1960); Commentary on IV Geneva Convention **22-25** (J. Pictet ed. 1958) [hereinafter cited as Pictet, Commentary].

2. *Situations involving national liberation movements*

The original United States proposal for scope of application of the convention had a condition attached to it, a compromise version of which was ultimately incorporated in Article 7(4) of the convention. That provision would have had the weapons convention apply to wars of national liberation *only* if and when the 1949 Geneva Conventions and Additional Protocol I had been made applicable to the "situation" in accordance with Article 96(3) of Additional Protocol I. Such a condition, which for different reasons was unacceptable to Israel and the African states, would have required an authority[62] representing a people engaged in such conflicts to file a unilateral declaration with the Swiss Federal Council, as depository of Additional Protocol I, by which it undertook to apply those Conventions and Additional Protocol I to the conflict.[63] This procedure would apply whether or not the state against which the national liberation movement was fighting was a party to Additional Protocol I or one of those few states which are not party to the 1949 Geneva Conventions.[64]

The African states perceived this requirement as imposing an unwarranted and unfair extra burden on the national liberation movement. It was noted, however, that states were already bound by customary international law to apply "the law of the Hague" reflected in Additional Protocol I. The major fallacy in this "Western" view of fairness was that nations were not obliged to apply the law of armed conflict to rebels or national liberation movements unless they chose

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[62]There is no commonly agreed definition of such an "authority." On signature to Additional Protocol I, the United Kingdom declared:

> in relation to paragraph 3 of Article 96, that only a declaration made by an authority which genuinely fulfils the criteria of paragraph 4 of Article 1 can have the effects stated in paragraph 3 of Article 96, and that. in the light of the negotiating history, it is to be regarded as necessary also that the authority concerned he recognised as such by the appropriate regional intergovernmental organisation.

Schindler & Toman. *supra* note 2, at 635; DA Pam 27-1-1. at 140.

The United Kingdom can be expected to maintain that statement on ratification and other European NATO countries may deposit similar statements on ratification of Additional Protocol I.

In its final plenary statement at the weapons conference, the United Kingdom made the same statement with regard to Article 7(4) of the weapons convention as it made on signature with regard to Article 96(3) of Additional Protocol I. U.N. Doc. A/CONF.95/SR.12, para. 112, at 23.

[63]Aldrich, Report of the United States Delegation to the United Nations Conference on Prohibitions or Restrictions of Useof Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects 11-12 (1980) [hereinafter cited as 1979 U.S. Delegation Report]; 1980 U.S. Delegation Report 13-14.

[64]*See* note 118 *infra* for a list of these states.

to do so. However, that response was not put forward. Rather, the African delegates indicated merely that they wanted to be under the same legal obligations as the state against which the national liberation movement was fighting. On the other hand, Israel opposed any provision expressly calling for the filing of a declaration of acceptance of the convention — and particularly a second declaration, this time to the Secretary-General, depositary of the weapons convention — as giving too much political recognition to such movements. Four weeks of intensive negotiation focused on this issue; the resulting compromise language provides for a balance of obligations regarding the protection of war victims, but no compulsory balance regarding means and methods of combat.

Paragraph **4** of Article 7 then has separate provisions for the application of this weapons convention by national liberation movements against states which are, and are not, parties to Additional Protocol I.

If the state is a state party both to Additional Protocol I and the weapons convention, the weapons convention will apply to the national liberation movement only if the authority has filed a unilateral declaration with the Swiss Federal Council in accordance with Article 96(3) of Additional Protocol I and the authority undertakes to apply the weapons convention and the relevant annexed protocols to that conflict.

The manner of making that second undertaking is deliberately not stated. The Israeli delegation succeeded in its stated principal objective of not creating a second unilateral declaration mechanism by which national liberation movements could attempt to enhance their political status. It desired these undertakings to be no more than informal *ad hoc* notices between the parties to the conflict and the ICRC. However, under the treaty, such notices can be given as part of the Article 96(3) declaration or separately to the Secretary-General, the depositary of this convention.[65]

In those, perhaps more likely, situations where the state against which a national liberation movement is fighting is not a party to Additional Protocol I, an ingeniously simple formula was presented. The weapons convention will apply, as against the state party to the weapons convention, if the authority "accepts and applies the obligation of the [1949] Geneva Conventions and of this [weapons] conven-

[65] *Contra* Sandoz, ***A** New Step Forward in International Law: Prohibitions or Restrictions on the Use of Certain Conventional Weapons*, 1981 Int'l Rev. Red Cross **3,** 10 [hereinafter cited as *A New Step*], who views this as a victory for national liberation movements, giving them direct access to the Geneva Conventions.

tion and the relevant annexed Protocols in relation to that conflict." This formula was again borrowed from the second sentence of Article 96(2) of Additional Protocol I. Here, too, the principal Israeli objective was met, no new or separate provision is made for how that undertaking is to occur. Indeed "accepts" in subparagraph 4(b) was viewed as having the same meaning as "undertakes to apply" in subparagraph 4(a) of Article 7.[66] Presumptively, the same procedures are to be used, informal *ad hoc* ones for which the ICRC has many examples, such as in the Middle East conflict, which do not imply recognition of the national liberation movement.

Several differences should, however, be noted. First, there is a continuing obligation on the national liberation movement to apply the obligations of the Geneva Conventions and the weapons convention and an implicit right for the state to terminate its relationship under the weapons convention with the national liberation movement if the latter does not observe the reciprocal obligations under both. This is quite a different situation from that provided for when the state is a party to Additional Protocol I. Thus, if, in the unlikely event a state should ever agree that it is engaged in a conflict of the type mentioned in Article 1(4) of Additional Protocol I, *i.e.*, that it is a regime which is colonially dominating peoples, engaged in alien occupation, or is a racist regime, it would be in a better position, should the national liberation movement not continue to apply the obligations of the Geneva Conventions and this weapons convention, if the state were not a party to Additional Protocol I. Under subparagraph 4(b), it is released from its obligations whenever the national liberation movement fails to continue to apply those provisions. However, if the state is a party to Additional Protocol I, then it may not terminate its obligations to the national liberation movement under the Geneva Conventions or Additional Protocol I, since they continue to apply *unilaterally*[67] as long as the conflict is one of the categories in common article 2 or Article 1(4) of Additional Protocol I and the state has not timely denounced the Conventions68 or Additional Protocol I.[69]

A second difference between Article 96(3) and Article 7(4)(b) concerns the effects of the national liberation movement's (NLM) under-

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[66] *See* text accompanying note 61 *supra*.

[67] Common article 1 to the 1949 Geneva Conventions; Article 1(1) of Additional Protocol I: Pictet, commentary I, at 25; *id.*, Commentary II, at 26: *id.*. Commentary III, at 17-18: *id.*. Commentary IV. at 15. This is not to say that states are not without remedies in the event of noncompliance by such movements. *See* text accompanying notes 172-89 & notes 172-89 *infra*.

[68] Common article 63/62/142/158.

[69] Article 99, Additional Protocol I.

taking to apply the Geneva Conventions and Additional Protocol I or the weapons convention. Subparagraphs (i), (ii), and (iii) Article 7(4)(b) of the weapons convention were modeled upon but are not identically worded as subparagraphs (a), (b) and (c) of Article 96(3) of Additional Protocol I.

The first subparagraphs each provide that the treaties are brought into force "with immediate effect." This provision is needed in both the weapons convention and Additional Protocol I to overcome the delayed entry into force provisions.[70] However, under Additional Protocol I, they are brought into force "for the said authority as a Party to the conflict," while under the weapons convention they are brought into force "for the parties to the conflict." These differences in formulation could raise questions of interpretation, particularly since both of the third subparagraphs refer to "all parties to the conflict." However, these differences in the first subparagraph are probably mere drafting matters without substantive differences in meaning."

The second subparagraphs are for all practical purposes identical in language and purpose. They each provide that the authority "assumes the same rights and obligations as those which have been assumed by a High Contracting Party" to the Geneva Conventions and either Additional Protocol I or the weapons convention. These provisions are designed to impose on the NLM and the states parties to the conflict the same obligations of the law of armed conflict arising under these treaties. However they are not without ambiguity. Suppose a multi-state conflict involves an NLM in which the states have differing obligations under the Conventions and either Additional Protocol I or the weapons convention because of differing reservations. This second subparagraph provides the NLM is to assume the rights and obligations assumed by "a" High Contracting Party. Does "a" here mean "all," or the least common to the states, or just those each state has assumed vis-a-vis the NLM? None of these possible interpretations are entirely satisfactory, but they illustrate the difficulties allies in the conflict can have with differing reservations to the same treaty. Although, as a matter of treaty law, the obligations will be viewed bilaterally *seriatim*, the end result can have allies with differing obligations to each other and to the enemy. If an enemy alliance is similarly varied, significant operational diffi-

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[70] Of six months. Article 95. Additional Protocol I; weapons convention Article 5. "The weapons convention first subparagraph omits any reference to "the said authority," which as a matter of English grammar in the Additional Protocol I third subparagraph requires the singular form, "as a Party", and thus the weapons convention's sentence as a matter of English grammer needs the plural form "for the parties."

culties can result unless there is agreement on the rules to be applied, for example, in a particular operation or conflict.

The third subparagraphs are also, for all practical purposes, identically worded. Each provides that the Geneva Conventions and either Additional Protocol I or the weapons convention are, "equally binding upon all parties to the conflict." This phrase is also not without some ambiguity. At least three different meanings are possible. First, if the situation is simply a single state engaged in a conflict with an NLM, then "all" simply means "both." On the other hand, if the conflict involves two or more states as well as an NLM and one of the states is not a party to Additional Protocol I or the weapons convention, then a literal intepretation of "all" would seem effectively to bring either Additional Protocol I or the weapons convention into force for that state against its will. This interpretation would fall if the second subparagraph is interpreted as applying one-on-one and not across the board. The preferable interpretation of "all" would, however, seem to apply "all" broadly but not literally, *i.e.*, to apply the third subparagraph only to those states already parties to Additional Protocol I or the weapons convention and to those authorities accepting the obligations and not to any state not a party to either convention. It would certainly be impermissible and unacceptable to governments to interpret "all" as permitting an authority to be able to bind to Additional Protocol I or the weapons convention a state that had not ratified or acceded to the treaty at the time the authority's declaration is filed.

Finally, in connection with article 7, it should be noted that the state and the authority may also agree to '(accept and apply the obligations of Additional Protocol I to the Geneva Conventions on a reciprocal basis." This compromise formula was designed to accomodate the desire to require or at least enable the national liberation movement to apply the "law of the Hague" and solve the difficulty of specifying exactly what those obligations are. Various formulations were tried and rejected: "the customary law of armed conflict," "the rules of international law applicable in armed conflict,"[72] the "Hague Convention No. IV of 1907 with its annexed Regulations" and "Articles 48-58 of Additional Protocol I."[73] But the African representatives were unwilling to agree to a formula that would bring into play the law of the Hague or the means and methods of combat provisions of Additional Protocol I as parts of the basic formula. Perhaps it was a matter of appearances: having said they would not accept a link to those provisions of Additional Protocol I, they could not have it

[72] Article 2(b), Additional Protocol I.
[73] Dealing the with means and methods of warfare

appear in that formula. So it was separated out and perhaps unfortunately so from the perspective of the combatant forces. It appears, at least, that protection of war victims is more important than regulating the methods of warfare, a somewhat inconsistent position when one considers that the weapons convention affects what combatants may do with their weapons, not how they deal directly with the civilian population. The result can then well be an inconsistent application in national liberation wars of the humanitarian law applicable in armed conflicts depending on whether the states and movements are bound by Additional Protocol I.

3. *Provisional Application*

A Dutch proposal for a treaty article on provisional application[74] was not accepted by the Conference Working Group when it was first considered on September 26, 1979.[75] Two objections were raised to this proposal. First, the role attributed to the U.N. Secretary-General, as Depositary, could not be very well performed by him, and second, such provision included in the convention could not achieve anything as long as the convention had not entered into force.[76] The Netherlands withdrew this proposal during the second session in favor of its substitute article 7 on treaty relations[77] dealing only with those situations in which the convention would be in force and one or more parties to an armed conflict would be parties to the convention, while other parties to the conflict were not. In lieu of its original proposal on provisional application, the Dutch representative submitted a draft conference resolution covering those situations in which either the convention was not yet in force or none of the parties to an armed conflict were party to the convention. It was felt that this resolution would be at least as persuasive as the withdrawn treaty text article:[78]

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[74] If, pending the entry into force of this Convention, a situation arises as contemplated in Article 1, the Depositary shall immediately invite the Parties to the conflict to agree on the application of the rules set out in [one or more of] the annexed Protocols. The agreement may be concluded either directly or through the Depositary, and may consist of reciprocal and concordant declarations.

U.N. Doc. A/CONF.95/WG/L.9, Sept. 25, 1979.

[75] Report of the Conference to the General Assembly, U.N. Doc. A/CONF.95/8, Oct. 8, 1979, Ann. II, App. A, Outline of a Draft Convention, at **42-43,** where article **7,** Provisional Application, appears in brackets.

[76] U.N. Doc. A/CONF.95/9, Oct. **6,** 1980, para. **6,** at **3.**

[77] U.N. Doc. A/CONF.95/WG/L.11, Sept. 19, 1980.

[78] U.N. Doc. A/CONF.95/9, para. 6, at **3.**

The United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons,

Considering that, by virtue of its entry into force provision, the Convention and its annexed Protocols shall not enter into force until a certain period of time will have elapsed,

Mindful that even after its entry into force a number of States will not be bound by it and its annexed protocols until such time as they have become party to these instruments,

Considering that, in consequence, and however regrettably, the possibility cannot be excluded that armed conflict will occur between States not bound by the Convention and its annexed Protocols,

1. *Calls upon* all States which are not bound by the present Convention (or: full title of the Convention) and which are engaged in an armed conflict, to notify the Secretary-General of the United Nations that they will apply the Convention and one or more of its annexed Protocols in relation to that conflict, with respect to any other party to the conflict which accepts and abides by the same obligations.[79]

However, because consensus could not be reached on a number of other resolutions,[80] this resolution, like all the others, was merely noted by the Conference.[81]

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[79]U.N. Doc. A.CONF.95/L.6, Oct. 8, 1980.

[80]On regional agreements. submitted by Belgium, Ireland and the Netherlands (A/CONF.95/L.1); on the protection of civilian population and freedom fighters during wars against colonial domination, and against racist regimes, submitted by Cuba, Hungary, Poland, Ukrainian Soviet Socialist Republic. and Vietnam (A/CONF.95/L.2); on the role of a world disarmament conference in the future negotiations on prohibitions or restrictions on use of certain conventional weapons. submitted by Bulgaria. the German Democratic Republic. Mongolia, the Ukrainian Soviet Socialist Republic. and the Union of Soviet Socialist Republics (A/CONF.95/L.3); on the protection of combatants against incendiary weapons, submitted by Denmark. Finland. Norway and Sweden (A/CONF.95/L.4); and on "future work", submitted by Egypt, Ireland, Mexico. Sweden. Switzerland, and Yugoslavia (A/CONF.95/L.5/Rev.1).

[81]U.N. Doc. A/CONF.95/15, para. 25. at 7-8. They do however "enjoyequal status as part of the record of the Conference." C.N. Doc. A/CONF.95/SR.11, para. 4, at 2, Nov. 3, 1981.

D. RELATIONS WITH OTHER INTERNATIONAL AGREEMENTS

Article 2

Article **2** provides that nothing in the convention or its annexed protocols shall be interpreted as detracting from other obligations imposed upon the parties by international humanitarian law applicable in armed conflict. The principal effect of this article is to eliminate application of the rule of treaty interpretation *lex posterior derogat legi priori.* For example, as to states party both to the weapons convention and to Additional Protocol I, the weapons convention does not prevail over Additional Protocol I and the rights and obligations of state parties to both treaties are not altered by the weapons convention. Of course, the rule of the weapons protocols are *lex specialis*[82] with respect to the provisions of Additional Protocol I because they deal with certain conventional weapons whereas Additional Protocol I covers all conventional weapons.[83] Nevertheless, as

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[82]It would not be correct to view the weapons convention as the sole valid source of international law for the weapons covered by the weapons convention since the rest of the law of armed conflict, including the customary international humanitarian law applicable in armed conflict, including the law of the Hague and the law of Geneva (and Additional Protocol I to the extent it is in force for a State or otherwise codifies that customary law), applies simultaneously to protect combatants and the civilian population. Recent Developments, 22 Harv. Int'l L.J. 436,442 n.32 (1981)also suggests that "the[weapons] Convention, in combining the approaches of the laws of the Hague and Geneva by restricting the use of specific weapons against civilians,might lead to a military assumption that the use of other weapons against civilians is acceptable, despite the law of Geneva," (citing P. Joenniemi & **A.** Rosas, International Law and Conventional Weapons 13(1975)), and properly concludes that "Article 2 is meant to refute such an interpretation of the Convention.''

[83]The weapons convention is clearly not applicable to nuclear weapons because of the specific words of its title, the ninth and twelfth preambular paragraphs, Articles 8(2)(a) and 8(3)(b) of the umbrella treaty, and the scope of the three annexed protocols dealing only and specifically with conventional weapons.

However, a few writers have taken the view that the Additional Protocols apply to nuclear, or even chemical and biological weapons. Rauch, *The Protection of the Civilian Population in International Armed Conflicts and the Use of Landmines,* 24 German Y.B. Int'l L. 262,264(1981); Rauch, *The Relationship between Protocol Iof 10 June 1977 relating to the protection of Victims of International Armed Conflictsand the Weapons Convention of 10 October 1980 with its annexed Protocols on Non-Detectable Fragments, Mines, Booby Traps and other Devices and Incendiary Weapons,* ms. text at nn. 34-35; Meyrowitz, *Remarks at Meeting of the Lieber Group on the Law of War: The Past 75 Years and the Laws of War,* 1981 Proc. Am. Soc. Int'l L. ——; Falk, Meyrowitz & Sanderson, Nuclear Weapons and International Law, World Order Studies Program, Occasional Paper No. 10, Center of International Studies, Princeton University (1981); Graefrath, *Zum Anwendungsbereich der Erganzungsprotokolle zu den Genfer Abkommen vom 12. August 1949,* Stadt und Recht, 2/80 at 132 *(The Scope of the Supplementary Protocols to the Geneva Conventions of August 12, 1949);* Rauch, *The Use of Nuclear Weapons and the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,* **33** Rev. Hellenique

de Droit International 1 (1980); Rauch, *Attack Restraints, Target Limitations and Prohibitions or Restrictions of Use of Certain Conventional Weapons*, 18 Mil. L. & Law of War Rev. 51, 54. 56 & n.8 (1979); Ipsen, *The Dilemma of Nuclear Arms Employment, in* Bothe. Ipsen & Partsch, *Die Genfer Konferenz uber humanitares Volkerrecht: Verlauf und Ergebrisse*. 38 ZaoRVR 1, at 43-44 (1978)(title as trans. from German). **See** E. Rosenblad. International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems 50-51 (1979): Roling, *Criminal Responsibility for Violations of the Laws of War, in* 2 The New Humanitarian Law of Armed Conflict 141, 143 (A. Casseseed. 1979). *Cf.* Bindler & Graubard, The International Law of Armed Conflict: Implications for the Concept of Assured Destruction, Rand Report R-2804-FF (1982).

Such views are not supported by the treaty and its *travaux preparatoires*. Meyrowitz, *Strategie nucleaire et le Protocole additionnel I aux Conventions de Genere de 1949*, 83 R.G.D.I.P. 905 (1979): Collier, *International Law on thr Use of Nuclear Weapons and the United States Position*, U.S Library of Congress. Congressional Research Service Rep. No. 79-28F, Feb. 6, 1979, at 21-22: Green, *Aerial Considerations in the Law of Armed Conflict*, 5 Annals of Air & Space L. 89, 112 (1980). *See also* Bothe. K. Partsch & W. Solf. New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 188-92 (1982) (opinion of Mr. Solf). Nor are they supported in the writings of the ICRC. Pilloud, *Conventions de Genere de 1949 pour le protection des victimes de In guerre, les Protocols additionnels de 1977 et les armes nucleaires*, 21 German Y. B. Int'l L. 169 (1978); Sandoz, *Unlawful Damage in Armed Conflicts and Redress under International Law*, 1982 Int'l Rev. Red Cross 131, 145.

The Diplomatic Conference of Geneva of 1949. which produced the 1949 Geneva Conventions for the protection of war victims. rejected Soviet efforts to ban atomic weapons as being outside the scope of that Conference. IIA *Final Record* 805; III *Final Record* 181 (No. 396); reservations to the 1949 Geneva Conventions of Bulgaria and Hungary, *reprinted* in Schindler & Toman. *supra* note 2, at 496, 504-05.

The ICRC was the principal author and sponsor of the 1977 Protocols and has consistently. since 1972, taken the position that nuclear. as well as biological and chemical, weapons were not being addressed by the Protocols, and since then has not changed its position. This constituted, however, a reversal in ICRC strategy, since, from 1945 to 1965, it had attempted to persuade states to consider aspecific prohibition on the use of nuclear. biological, and chemical weapons. in article 10 of its 1955 *Draft Rules for the Protection of the Civilian Population from the Dangers of Indiscriminate Warfare* and in article 14 of its 1956 *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*. This effort failed and halted progress toward modernization of the rules for mitigating casualties and damage to civilians resulting from the use of conventional means of warfare. Pilloud. *Reservations to the Genera Conventions* of 2949 (pts. 1-2), 1976 Int'l Rev. Red Cross 107, 163, 177.

By 1969, the ICRC had abandoned this approach. At the XXIst International Conference of the Red Cross (Istanbul 1969), this issue was separated from the resolution (XIII) urging the ICRC to develop humanitarian law. Resolution XIV merely requested the ICRC to devote great attention to this question "consistent with its work for the reaffirmation and development of humanitarian law" while also asking the UN to continue its efforts to ban weapons of mass destruction. 10 M. Whiteman. Digest of International Law 487-90 (1968).

Thus, in introducing its first draft article on means of combat (article 30 of the 1972 draft Additional Protocol I), the ICRC stated "that as far as atomic, bacteriological and chemical weapons were concerned, they were questions dealt with by such organizations as the United Nations and the Conference of the Committee on Disarmament. . . ." ICRC, Report of Committee III, para. 15, *quoted in* UN Doc. A/8781, para. 147, at 51.

A number of amendments to that draft article were proposed by states, including a clause to prohibit nuclear, bacteriological and chemical weapons (CE/COM.III/C 17 & 44) but none were accepted. U.N. Doc. A/8781, para. 148-49, at 52; *Conference of Government Experts: Second Session*, 1972 Int'l Rev. Red Cross 381, 384.

The 1973 ICRC-sponsored meetings of government experts on weapons did not consider nuclear, chemical, or biological weapons "to any substantial extent, for both the U.N. Secretary-General and the World Health Organization have published reports on chemical and biological weapons...and the U.N. Secretary-General has also published one on nuclear weapons...." ICRC, *Weapons that may cause Unnecessary Suffering or have Indiscriminate Effects, Report on the Work of Experts*, para. 12, at 8 (1973); U.N. Doc. A/9123, para. 10, at 3 (1973).

In submitting their Draft Additional Protocols to the 1949 Geneva Conventions, the International Committee of the Red Cross stated that it did not intend to broach the problems relating to atomic, bacteriological and chemical warfare which were the subjects of international agreements or negotiations by governments. ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, CDDH/1, at 2 (June 1973); ICRC, *Draft additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, CDDH/3, at 2 (October 1973): *Draft Additional Protocols to the Geneva Conventions: Commentary*, 1974 Int'l Rev. Red Cross 45, 48; *id.*, *Brief Summary*, 1973 Int'l Rev. Red Cross 507-508.

The states participating in the Diplomatic Conference on Humanitarian Law (which used those ICRC drafts as bases for negotiation) agreed that the question of regulation of the use of nuclear weapons was excluded from the deliberations. Proposals for the Additional Protocols to cover nuclear weapons were made, in each of the first three sessions, by a total of nine States but, after extensive and repeated debate, none of these proposals was accepted. Albania: CDDH/SR.14, paras. 24 and 27, 5 *Official Records* 146, 146 (1974); CDDH/III/SR.8, para. 87, 14 *Official Records* 70 (1974). *Cf.* CDDH/IV/SR.3, paras. 12-13, 16 *Official Records* 27-28 (1974); People's Republic of China: CDDH/SR.12, para. 18, 5 *Official Records* 120 (1974); Statement of the President of the Conference, CDDH/SR.9, para. 40, 5 *Official Records* 88 (1974); CDDH/SR.9, para. 51, 5 *Official Records 90* (1974), where the proposal to establish the Ad Hoc Committee without a mandate to consider nuclear weapons issues was adopted 68-0-10 and China still objected to exclusion of nuclear weapons. Ghana: CDDH/SR.10, para. 36, 5 *Official Records* 97 (1974); Iraq: CDDH/SR.12, para. 32, 5 *Official Records* 123 (1974); Democratic People's Republic of Korea: CDDH/SR.26, para. 31, 14 *Official* Records 241-42 (1974); Philippines: CDDH/56/Add.1 & Corr. 1, 4 *Official Records* 129 (1974); CDDH/I/SR.60, para. 23, 9 *Official Records* 258 (1976); Romania: CDDH/SR.9, para. 31, 5 *Official Records* 86 (1974); CDDH/SR.9, paras. 51-53, 5 *Official Records* 90, where the proposal to establish the Ad Hoc Committee without a mandate to consider nuclear weapons issues was adopted 68-0-10 and Romania still objected to exclusion of nuclear weapons; CDDH/SR.11, para. 13, 5 *Official Records* 103 (1974); CDDH/IV/SR.3, para. 16, 16 *Official Records* 28 (1974); CDDH/III/SR.27, paras. 16-17, 14 *Official Records* 247 (1975); Yugoslavia: CDDH/SR.11, paras. 20, 22, 5 *Official Records* 104, 105 (1974); Zaire: CDDH/SR.19, para. 5, 5 *Official Records* 195 (1974).

The states at CDDH had agreed at the outset that the question of the use of nuclear weapons was excluded from the decisions of the Conference. CDDH/SR.9, para. 50, 5 *Official Records* 90 (March 4, 1974, unanimous vote to establish Ad Hoc Committee on Weapons to consider conventional weapons only).

Further, four of the nuclear weapons states, China excepted, and other states and nongovernmental organizations have consistently noted that the rules relevant to the use of weapons established by Additional Protocol I apply to conventional weapons and were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons and that those questions are the subject of negotiations elsewhere. United Kingdom: CDDH/SR.13, para. 36, 5 *Official Records* 134 (1974); CDDH/SR.58, para. 119, 7 *Official Records* 303 (1977); on signature to Additional Protocol I on June 10, 1977, Schindler & Toman 635, DA Pam 27-1-1, at 141; United States: CDDH/III/SR.40, para. 123, 14 *Official Records* 441 (1975); CDDH/SR.58, para. 82, 7 *Official Records* 295 (1977); on signature to Additional Protocol I on June 10, 1977, Schindler & Toman, *supra* note 2, at 636; DA Pam 27-1-1, at 138; France: CDDH/SR.56, para. 3, 7 *Official Records* 193 (1977); USSR: *see* CDDH/SR.12, para. 26, 5 *Official Records* 122 (1974). *Cf.* the statements of China, CDDH/SR.12, para. 18, 5 *Official Records* 120; CDDH/SR.19, para. 85, 5 *Official Records* 209; Sweden:

to states party to both treaties, Article 2 of the weapons convention acts to prevent the specific rules of its annexed protocols from derogating the proper application of Additional Protocol I, other "international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable in armed conflict."[84] However, as the Preamble to the weapons convention states, the parties reaffirm the need to *continue* the codification and progressive development of the rules of international law applicable in armed conflict, and express the wish to prohibit or restrict *further* the use of certain conventional

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CDDH/SR.14. para. 21, 5 *Official Records* 145-46. ICRC, *supra.* These statements have not been contested by other delegations or states, except perhaps by the Indian written explanation of vote on the adoption of Article 35 that it understood the basic rules contained therein apply "to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons." CDDH/SR.39 annex, 6 *Official Records* 115, 2 Levie 279 (1977). Although Article 35 is entitled *Basic Rules,* only the first two paragraphs generally reaffirm existing principles, while the third paragraph states a new rule of considerably less scope. It is likely that India was referring only to the first two paragraphs, particularly since India has not signed or acceded to Protocol I. No other state has made any similar statement. *See also* Aldrich, *New Life for the Laws of War,* 75 Am. J. Int'l L. 764, 780-81 & n.48 (1981); Green, Book Review, 1980 Can. Y.B. Int'l L. 400, 404-05; Erickson. *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict,* 19 Va. J. Int'l L. 557. 560 & n.16 (1979); Roach, Book Review, 75 Am. J. Int'l L. 1022, 1023 & n.3 (1981). *See also* D. Forsythe. Humanitarian Politics: The International Committee of the Red Cross 117-21 (1977).

The U.N. Secretary-General noted, after conclusion of the first session of CDDH. that in the opening Plenary:

> Different views were expressed on the question of the categories of weapons which should be studied by the Conference, some delegations favouring to include in the study not only conventional weapons but also nuclear weapons and other mass-destruction weapons. The view prevailed that the Conference should limit its Study toconventional weapons only.

U.N. Doc. A/9669, *[Sixth] Report of the Secretary-General: Report on Human Rights in Armed Conflicts: Firs?Session of CDDH.* para. 39, at 20 (1974). His report also noted, in connection with the activities of the Ad Hoc Committee on Conventional Weapons, that "many other delegations, however. accepted the limitation of the work of the Diplomatic Conference to conventional weapons." *Id.*. para. 109, at 49.

Finally. the XXIIId Red Cross Conference, which took place in October 1977. a few months after the Protocols were adopted, seems to have considered the Protocols did not address nuclear weapons. Its Resolution XII, "Weapons of Mass Destruction," merely repeats the call made at each Red Cross Conference since the XVIIth, Stockholm 1948, that the ICRC urge governments agree to a total ban of weapons of mass destruction.

In the event the views expressed by Elmar Rauch and Bernhardt Graefrath are deemed correct, the acceptability of the Additional Protocols to those powers relying on the nuclear deterrent could well be called into question.

[84] Article 2(b), Additional Protocol I, defining the term "rules of international law applicable in armed conflict" from which is derived the phrase in Article 2 of the weapons convention "international humanitarian law applicable in armed conflict."

weapons.[85]

It is important to remember that the Conference ended with no finding that the restrictions and prohibitions contained in the weapons convention were imposed because of any agreed belief or finding that those weapons were in fact excessively injurious or had indiscriminate effects or that its rules were statements of customary international law.[86] Thus, the adoption of this convention in no way affects the legality, under the customary and conventional law of armed conflict, of past uses of these weapons in the modes to be restricted or prohibited. As the Report of the United States Delegation stated: "The restrictions and prohibitions contained in the Convention were recognized by the Conference as being primarily new contractual rules which would only bind parties in the future."[87] The United States, in its final plenary statement on October 10, 1980, also made this and other points:

> For the most part, this new Convention contains a series of new contractual rules which will govern the future use of specific types of weapons by the States that become Parties to it. However, certain parts of the Preamble and the annexed protocols restate rules contained in Additional Protocol I to the 1949 Geneva Conventions, and these rules must of course be understood and interpreted in the same manner as that Protocol.[88]

In contrast to the weapons convention that stands on its own as a separate treaty, Additional Protocol I "supplements," but does not replace, the Geneva Conventions of 12 August 1949 for the protection of war victims.[89] The 1949 Conventions however "replace," "comple-

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[85]The United States made this point explicitly at the time of its signature to the Convention:

> As indicated in the negotiating record of the 1980 Conference, the prohibitions and restrictions contained in the Convention and its Protocols are of course new contractual rules (with the exception of certain provisions which restate existing international law) which will only bind States upon their ratification of, or accession to, the Convention and their consent to be bound by the Protocols in question.

[86]Indeed, the convention does not even provide or refer to any objective criterion for determining whether any weapon has such effects.

[87]1980 U.S. Delegation Report 16. *Accord* Fenrick, *New Developments in the Law Governing the Use of Conventional Weapons in Armed Conflict*. 1981 Can. Y.B. Int'l L. 229, 255; *id.*. *The Law of Armed Conflict: The CUSHIE Weapons Treaty*, 11 Can. Def. Q., summer 1981, 25, at 30.

[88]U.N. Doc. A/CONF.95/SR.12, para. 85, at 17, Oct. 10, 1980.

[89]Article 1(3), Additional Protocol I. Additional Protocol I is not an additional separate convention; its provisions are to be construed in accordance with the law in the 1949 Geneva Conventions and certain provisions of Hague Convention No. IV. *See* Article 154 of the Fourth Geneva Convention.

ment," or "supplement" earlier Geneva and Hague Conventions[90] in relations between powers who are bound by both.

The scope of Article 2 is thus much wider, encompassing the applicable customery international law, than the original Anglo-Dutch proposal that "nothing in this Convention can be interpreted as detracting from obligations assumed by any State Party under previously concluded international agreements applicable in armed conflict,"[91] and somewhat broader than its replacement, a proposal by the Federal Republic of Germany,[92] that "nothing in this Convention shall be interpreted as detracting from obligations imposed upon the Parties by international humanitarian law applicable in armed conflict."

As a result, it is also clear that the weapons convention neither codifies customary international law nor constitutes the kind of unilateral obligations states parties to the 1949 Geneva Conventions have undertaken to comply with its provisions regardless of the behavior of any other party to the Convention who may not comply with particular provisions. The remedies available to a state party to the weapons convention, in the event of breach of its provisions by another party, are thus broader than they might have been had these rules not been viewed as being new contractual undertakings.[93]

E. DISSEMINATION

Article 6.

The only substantive obligation of the umbrella treaty requires dissemination of the convention and relevant protocols. The article was first proposed late in the second session of the Conference by the

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[90]The First Convention "replaces the Conventionsof 22 August 1864, 6 July 1906and 27 July 1929" for the amelioration of the condition of the wounded in armies in the field (Article 59, First Convention): the Second Convention "replaces the Xth Hague Convention of 18 October 1907, for theadaptation to Maritime Warfareof the principlesof the Geneva Convention of 1906"(Article 58, Second Convention): the Third Convention "complements" Chapter II)on prisoners of war of Section I on belligerents) of the Regulations annexed to the 1907 Hague Convention No. IV (Article 135, Third Convention) as well as "replacing the Convention of 27 July 1929"relative to the treatment of prisoners of war (Article 134, GPW); the Fourth Convention "supplements" Sections II (on hostilities) and III (on military authority over the territory of the hostile state) of the Regulations annexed to Hague Convention No. IV of 1907 (Article **154,** Fourth Convention).

[91]U.N. Doc. A/CONF.95/CW/WG.1/L.1, Sept. 12, 1979, Article 3.

[92]U.N. Doc. A/CONF.95/WG/CRP.6, Sept. 25. 1979.

[93]*See* text accompanying notes 172-89 *infra* for a discussion of compliance mechanisms.

Moroccan delegate[94] based on a rough French translation from the English text of and analogy to Article 83 of Additional Protocol I.[95] The article omitted any reference to civil instruction since the wea-

94U.N. Doc. A/CONF.95/WG/L.14, Sept. 22, 1980.

95Article 6 of the weapons convention continues what is already an important part of the law of armed conflict dealing with implementation. Article 1 of the Fourth Hague Convention of 1907 states that the High Contracting Parties "shall issue instructions to their armed forces which shall be in conformity with the Regulations respecting Laws and Customs of War on Land annexed through the present Convention." Article 6 is also complementary to the provisions in the four Geneva Conventions of 1949 which deal with dissemination, and it is upon these provisions that Article 83 of the Protocol I is based. Article 83 of Additional Protocol I reads:

> 1. The High Contracting Parties undertake, in time of peace as in time of armed conflict to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population.

Article 83(1) is based on the articles on dissemination common to the four 1949 Geneva Conventions. Article 47 of the First Convention and Article 48 of the Second Convention state:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military, and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

Article 127 of the Third Convention reads:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Article 144 of the Fourth Convention states:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.
>
> Any civilian, military, police or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions.

The primary difference between the provisions in additional Protocol I and those quoted above from the 1949 Geneva Conventions on dissemination is that the 1949 texts of the First and Second Convention also mention specifically the desirability of instruction to the medical personnel and chaplains.

It is obvious that, without appropriate instruction in the law, the 1949 Geneva Conventions, the Additional Protocols, and the weapons convention with its annexed

pons convention was thought not to be of such significant interest to the civilian population and civilian instruction of the principles of the Fourth Geneva Convention relative to the protection of civilian persons in time of war is no resounding success. The proposal was twice reissued for "technical reasons" to bring it more closely in line with the peculiarities of the weapons convention's structure.[96] It was adopted by the Conference Working Group on October 1, 1980, subject to action by the Drafting Committee to ensure that "for each State Party this undertaking relates only to the Convention and to those Protocols by which it is bound."[97]

As reported by the Drafting Committee, and adopted by the Conference, the article provides:

> The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed force.

This article shows the linkage of this weapons convention to the humanitarian conventions of Geneva, and should be simple to implement to the extent that the prior dissemination obligations are themselves being carried out.[98]

F. REVIEW AND AMENDMENT

Article 8.

Negotiation of the provisions for review and amendments of the convention and its annexed protocols was, together with the articles involving national liberation movements, the most difficult and lengthy out, particularly because of its intimate connection with the

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protocols have no reasonable chance of being respected. Sadly, many states have proved unwilling to include adequate instruction in the law of armed conflict in their military programs. The establishment of a requirement for legal advisers in Article 82 of Additional Protocol I should facilitate the task of providing adequate instruction. *See* Norsworthy, *Organization for Bott/e: The Judge Advocate's Responsibility under Article 82 of Protocol I to the Geneva Conventions*, 93 Mil. L. Rev. 9 (1981): Parks, *The Law of War Adviser*, 31 JAG J. 1 (1980).

[96] U.N. Docs. A/CONF.95/WG/L.14*, Sept. 22, 1980 and A/CONF.95/WG/L.14*, Sept. 29. 1980.

"Report of the Conference Working Group on a General Treaty, U.N. Doc. A/CONF.95/9, Oct. 6, 1980. para. 7, at 4.

[98] *See* note 3 *supra*.

progress of negotiations on the incendiaries protocol. Until the last week of the second session when the United States indicated that it would no longer object if the Conference adopted a ban on the use of aerially delivered pure incendiary weapons against military targets located within concentrations of civilians and learned the true Soviet position on this issue, some participants, notably Sweden and Mexico, felt that the weapons protocols would not be sufficiently substantive or far-reaching and that provision had to be made to return to this subject matter in the near future in order to improve them.[99]

The United States Delegation Report describes the process as follows:

> It had generally been agreed at the first session that there should be a provision in the Convention for the possible future convening of conferences of States Parties to consider proposals for and amendments to the existing Convention and protocols, or for the addition of new protocols to deal with types of weapons not presently covered, which, if adopted, would be subject to ratification and entry into force in the same manner as the Convention itself. There were, however, a number of important unresolved issues as to the manner in which this procedure would operate. First, several delegations (particularly the Soviets) wanted to give the Committee on Disarmament a predominant (if not exclusive) role in the negotiation of possible new protocols (presumably to ensure their ability to veto any proposals they opposed, since the CD works by consensus). Because of their reservations about the CD, the non-aligned were adamantly opposed to such an arrangement, but it was possible at the second session to reach agreement on a provision (in Article 8) that amendments and new protocols would be adopted in the same manner as this Convention (that is, by consensus), and a preambular paragraph acknowledging that the CD might decide in the future to examine the question of restrictions on the use of conventional weapons.[100]

Since the incendiaries and other weapons protocols were deemed to be significant, the review and amendment procedures were designed to be difficult to activate in the near future and unlikely to

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[99] 1979 U.S. Delegation Report 12.
[100] 1980 U.S. Delegation Report 14-15

produce any significant changes.[101] The review and amendment process cannot begin until the convention enters into force, six months after twenty States have deposited their instruments of ratification, acceptance, approval or accession.[102] This was expected not to occur in less than five years, since it took almost five years for twenty States to ratify or accede to the 1977 Additional Protocol I; as of this writing only **26** States have ratified or acceded to Additional Protocol I, over

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[101] Article 8, Review and amendments, reads:

1. (a) At any time after the entry into force of this Convention any High Contracting Party may propose amendments to this Convention or any annexed Protocol by which it is bound. Any proposal for an amendment shall be communicated to the Depositary, who shall notify it to all High Contracting Parties and shall seek their views on whether a conference should be convened to consider the proposal. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, he shall promptly convene a conference to which all High Contracting Parties shall be invited. States not parties to this Convention shall be invited to the conference as observers.

(b) Such a conference may agree upon amendments which shall be adopted and shall enter into force in the same manner as this Convention and the annexed Protocols, provided that amendments to this Convention may be adopted only by the High Contracting Parties and amendments to a specific annexed Protocol may be adopted only by the High Contracting Parties which are bound by that Protocol.

2. (a) Any time after the entry into force of this Convention any High Contracting Party may propose additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. Any such proposal for an additional protocol shall be communicated to the Depositary. who shall notify it to all the High Contracting Parties in accordance with subparagraph 1(a) of this Article. If a majority, that shall not be less than eighteen of the High Contracting Parties so agree, the Depositary shall promptly convene a conference to which all States shall be invited.

(b) Such a conference may agree, with the full participation of all States represented at the conference, upon additional protocols which shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs 3 and **4** of Article 5 of this Convention.

3. (a) If, after a period of ten years following the entry into force of this Convention. no conference has been convened in accordance with subparagraph 1(a) or 2(a) of this Article, any High Contracting Party may request the Depositary to convene a conference to which all High Contracting Parties shall be invited to review the scope and operation of this Convention and the Protocols annexed thereto and to consider any proposal for amendments of this Convention or of the existing Protocols. States not parties to this Convention shall be invited as observers to the conference. The conference may agree upon amendments which shall be adopted and enter into force in accordance with subparagraph 1(b) above.

(b) At such conference consideration may also be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing Protocols. All States represented at the conference may participate fully in such consideration. Any additional protocols shall be adopted in the same manner as this Convention, shall be annexed thereto and shall enter into force as provided in paragraphs **3** and **4** of Article 5 of this Convention.

(c) Such a conference may consider whether provision should be made for the convening of a further conference at the request of any High Contracting Party if, after a similar period to that referred to in subparagraph 3(a) of this Article. no conference has been convened in accordance with subparagraph 1(a) or 2(a) of this Article.

[102] Article 5(1).

five years since it was adopted. After entry into force of the convention, a majority of the states parties must agree to an amending conference and that majority "shall not be less than eighteen of the High Contracting Parties."[103] Thus some western delegates found it difficult to envision any changes or additions to the conventional weapons convention or its protocols before the mid-1990s at the earliest. However, as of this writing, sixteen states have ratified the convention only two years after its adoption.[104] A review conference could conceivably occur before the end of this decade.

Article 8 has significantly different provisions for amending the weapons convention or its annexed protocols[105] and for establishing "additional protocols relating to other categories of conventional weapons not covered by the existing annexed protocols."[106] The crucial difference in these provisions regarding control of the outcome of negotiations lies in the fact that, although the consensus procedure[107]

[103] Articles 8(1)(a), 8(2)(a).

[104] *See* note 127 *infra*.

[105] Article 8(1), to provide. for example, protections for combatants against incendiary weapons as suggested in U.N. Doc. A/CONF.95/L.3.

[106] Article 8(2). These might include small calibre weapons, flechettes, anti-personnel fragmentation weapons, and fuel air explosives. See U.N. Doc. A/CONF.95/L.5.

[107] As a result of the failure of the CCW Preparatory Conference to reachagreement on rules for decisionmaking, U.N. Doc. A/CONF.95/3, paras. 13-14, at 13(1979), no votes were taken at the Preparatory Conference or at the Conference itself. Decisions were reached on the basis of an unofficial, and undefined, consensus.
The Report of the Preparatory Conference noted:

> In the course of its work, the Preparatory Conference considered the question of the rules pertaining to decision making and related rules of its rules of procedure (A/CONF.95/PREP.CONF./4) which could not be adopted at the first session. The Preparatory Conference was unable to reach agreement on the method of decision making in a formal rule of procedure. Notwithstanding that fact, during its two sessions, the Preparatory conference, in practice, conducted its work and reached decisions, including the adoption of the report and the appointment of officials of the Preparatory Conference, without resorting to voting.
>
> The Preparatory Conference recommends to the United Nations Conference the provisional rules of procedure contained in document A/CONF.95/PREP.CONF./7 and Corr.1 and 2, with the exceptionof the rules set out in chapter VI, entitled "Decision-Making", and with the necessary adjustments to reflect the deletion of that chapter. . . .

U.N. Doc. A/CONF.95/3, paras. 38-39, at 13.
The U.S. Department of State has described the effects of a consensus decisionmaking procedure in the context of the U.N. system for adoption of resolutions:

> In practice, consensus means that the decision is substantially acceptable to delegations and that those which have difficulties with certain aspects of the resolution are willing to state their reservations for the record rather than vote against it or record a formal abstention. Consensus must be distinguished from unanimity, which requires the affirmative support of all participants. Essentially, consensus is a way of

> proceeding without formal objection. Yet the result is virtually the same: a resolution is adopted with the support of all states present, albeit frequently with recorded statements of reservation or interpretation.
>
> There are both advantages and disadvantages in the use of consensus. In addition to avoiding confrontations. consensus may facilitate reasonable compromise and thus permit passage of an acceptable resolution. It may avoid bloc voting and polarization. It offers a means of keeping a matter alive, allowing for possible subsequent development of greater agreement and commitment. It may avoid political embarrassment to nations on certain issues.
>
> However. consensus may reduce the level of agreement to a general declaration of little substance. Widespread reservations can render it meaningless: misused it may serve only to blur differences and confuse decisionmaking.
>
> Whether the use of consensus is on balance a helpful decisionmaking procedure and a desirable alternative to the formal invocation of the one-country. one-vote process depends on the circumstances in which recourse is had *to* it. Consensus is not applicable in all situations: it cannot be a substitute for voting where member states have strong objections to a resolution.
>
> Nevertheless. where there is a desire to avoid confrontation and the imposition of uncompromising positions. the consensus approach offersa useful way of proceeding. . . .

Digest of U.S. Practice in International Law 1978, at 158 (1981) (quoting Dep't of State. *Reform and Restructuring of the U.N. System*, Selected Docs. No. 8 (1978)). Sen. For. Rel. Comm. Print, *Proposals for United Nations Reform*, 95th Cong.,2d Sess..at 27-28 (1978).

One perspective on the results of using the consensus procedure in negotiating the weapons convention argues:

> While this approach enabled states to protect what they perceived as their legitimate security interests, it did not. in the final analysis. serve the best interests of humanitarian law because it enabled singlestatesor small groups to block progress on issues where the great majority of participants were agreed. Unfortunately, the end result of consensus negotiations between states with widely divergent interests was a text which is not always easy to understand, which at time attempts to paper over difficulties and which contains some unusual provisionsdesigned to satisfy certain states which adopted extreme positions on certain issues.

Fenrick. *New Developments*, *supra* note 87, at text following n.36. However, consensus does permit the negotiations to procced to a result that is generally acceptable. Voting might well not permit that result to be achieved where important issues with divergent views are involved.

> *Compare* Sandoz. *Unlawful Damage*, supra note 3, at 148: Texts adopted by *consensus*. . . have a certain value from the very day of their adoption, and this is especially true for the conventions embodying international humanitarian law. It would seem shocking indeed, if a State. after recognizing the indiscriminate or particularly cruel character of a method or means of combat in an international conference were subsequently to use such a method or means and attempts to justify its act by legal arguments.

Shocking it may be to some, but lawful in the case of the weapons convention. *See* text accompanying notes 121-23 *infra;* notes 47 and 86 *supra*.

should apply to both,[108] a state can participate in or block the consensus on amendments to the convention or any annexed protocol, including those considered at the review conference called by Article 8(3), only if it is bound by that convention or protocol. However, as to proposals for "additional protocols relating to other categories of conventional weapons not covered by the existing Protocols" any state may block consensus[109] even if they are proposed at a review conference called pursuant to Article 8(3).[110]

It was in realization of this control that the United States candidly stated in its closing plenary statement:

> Finally, with respect to the review mechanism, we believe that it will be of importance for the nations of the world to have available a generally accepted treaty machinery that can be used to consider future additions to the three Protocols. In the course of time it is certainly possible that prohibitions or restrictions on the use of other weapons may be found desirable, and we agree that there should be a means to consider proposals for such rules whenever general support for them appears likely. However, Mr. President, I would be less than candid if I did not say clearly that, on the basis of present knowledge, we do not expect that to happen in the foreseeable future. The Conference has limited itself in this negotiation to the weapons and to the restrictions in these Protocols not, as the language of our Conference reports sometimes implies, primarily because it lacked the time to consider other weapons, but rather because these were the only

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The history and problems associated with voting procedures, including consensus, are discussed in Sohn. *Voting Procedures in United Nations Conferences for Codification of International Law*, 69 Am. J. Int'l L. 310, n.1 (1975).

[108] "[S]hall be adopted. . . in the same manner as this Convention." Articles 8(1)(b), 8(2)(b), 8(3)(a), and 8(3)(b). *Accord* Sandoz, *A New Step*. *supra* note 65, at 11.

> Fenrick correctly notes that:
> At the Weapons Conference every effort was made to obtain general agreement and, in the event, no votes were taken, but certain delegations repeatedly asserted that voting would be possible if there was an apparent near unanimous agreement on a particular text.

Fenrick. *New Developments*, *supra* note 87, at n.36. However, it is not all clear that the assertion that voting at the weapons conference was possible is correct. Certainly, the United States delegation was of the view that the treaty's language "shall be adopted. . . in the same manner as this Convention and the annexed Protocols" means by consensus and only by consensus.

[109] Since Article 8(2)(b) provides "with the full participation of all States represented at the conference" and Article 8(2)(a) provides "to which all States shall be invited."

[110] *See* Article 8(3)(b).

> weapons and the only restrictions on which it seemed likely we could all agree. This is not to say be should abandon hope of future additions, but it is to suggest that we should be realistic about our expectations.[111]

It may be noted that such a detailed review and amendment mechanism is more a product of the arms control than the humanitarian law treaties. Neither the 1949 Geneva Conventions nor any of the older treaties in the field of international humanitarian law applicable in armed conflict contain no revision procedure or review mechanism. The 1977 Additional Protocols are quite similar.[112] On the other hand, arms control treaties provide a more detailed and restrictive review and amending process.

G. FINAL CLAUSES

The final clauses of any treaty are frequently not considered of much relative importance by negotiators since they deal with such seemingly mundane topics as signature, ratification, entry into force, denunciation, depositary and authentic texts. **As** a result, the final clauses of many treaties are not models of clarity or utility.[113] Yet, care in their drafting can be useful in avoiding future problems and in protecting certain provisions. These considerations were fully observed in the conventional weapons convention.

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[111] *See* U.N. Doc. A/CONF.95/SR.12, para. 89, at 18.

[112] Article 97, Additional Protocol I; Article 24, Additional Protocol II.

[113] *See, e.g.*, the "Final Provisions," Part VIII, of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969.[1980] Gr. Brit. T.S. No. 58(Cmd. 7964). *reprinted in* 8 Int'l Leg. Mat. 679 (1969).which do not follow the "law" codified in the body of that treaty.

The Vienna Convention on the Law of Treaties is not in force for the United States. However, the United States generally considers its provisions to be declaratory of customary international law.

It entered into force on January 27, 1980, following the deposit of the 35th instrument of ratification or accession. The following43 countries are parties *to* the Vienna Convention: Argentina, Australia, Barbados, Canada, Central African Empire, Chile, Congo. Cyprus, Denmark, Egypt, Finland, Greece, Haiti, Honduras, Italy, Jamaica, Japan, Republic of Korea, Kuwait, Lesotho, Mauritius, Mexico, Morocco, New Zealand, Niger, Nigeria, Pakistan. Panama, Paraguay, Philippines, Rawanda, Spain, Sweden. Syria, Tanzania. Togo. Tunisia, United Kingdom, Uruguay. Vatican, Yugoslavia. and Zaire.

H. SIGNATURE

Article 3.

The original Mexican proposal for an "umbrella" treaty[114] simply provided "This Treaty shall be open to signature by all States." This formulation failed to deal with such issues as when it would be opened for signature, the duration of the period it would be open for signature, and the location at which the treaty would be open for signature. These questions were addressed during the first session, where it was generally agreed to follow the imperfect model of Additional Protocol I. A six-month period was prescribed before the convention would be open for signature, in order to allow governments time to study the ramifications of the finally agreed text.

In contrast to the Additional Protocols, which were opened for signature in Bern, Switzerland, the capital of that conference's sponsor, the weapons delegates, most of whom were permanent representatives of their governments based in Geneva, preferred the United Nation's Headquarters in New York or Geneva as the location for signature, since this was to be the product of a conference which had been sponsored by the General Assembly.

Following the Additional Protocol I model, the treaty was open for signature for a period of twelve months from April 10, 1981.[115] An early draft,[116] based on a British suggestion, would have had the twelve month period begin with "the closing of the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects." Once it became clear during the second session that a treaty would be produced by the end of that

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[114] U.N. Doc. A/CONF.95/PREP.CONF./L.8 and Corr.1, reissued as U.N. Doc. A/CONF.95/3, Annex 11, at 9.

[115] On April 10, 1981, the Convention was signed on behalf of the following 35 states: Afghanistan, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Cuba, Czechoslovakia, Denmark, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sudan, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, the United Kingdom, and Vietnam. On May 1, 1981, Sierra Leone signed: Yugoslavia on May 5, 1981; India and Philippines on May 15, 1981; Nicaragua on May 20, 1981; Switzerland on June 18, 1981; Ecuador on September 9, 1981; China on September 14, 1981: Togo on September 15, 1981; Japan on September 22, 1981; Argentina on December 2, 1981; Nigeria and Pakistan on January 26, 1982; Liechtenstein on February 11, 1982; Turkey on March 26, 1982; and Australia, Romania and the USA on April 8, 1982. Dep't State Bull., June 1982, at 90.

[116] U.N. Doc. A/CONF.95/WG/CRP.2, Sept. 18, 1979.

session, the Drafting Committee substituted a date certain for those words, October 10, 1980 being the closing date of the conference.

A provision relating to accession by nonsignatories was moved by the Drafting Committee to the article on means of expressing consent to be bound by the treaty, where it more logically fit.[117]

On the question of who would be permitted to sign the convention. the formal proposals spoke of "all States," leaving to later stages of the negotiations the questions of national liberation movements and how many weapons protocols had to be accepted in addition to the convention itself.

It should be noted that, in contrast to Additional Protocol I, this weapons convention stands on its own even though it is closely related in negotiating history and philosophy to Additional Protocol I. The weapons convention was open to signature by all states; Additional Protocol I could only be signed to by state parties to the 1949 Geneva Convention. In one sense, however, this point is mostly academic, since only 17 nations of the 168 states of the world today are not party to the 1949 Geneva Conventions.[118] However, the structure of the weapons convention, particularly evident in Article 7(4),[119] contemplates states not party to Additional Protocol I becoming party to this weapons treaty.

In the one year period, *53* states signed the weapons convention, all of whom are parties to the 1949 Geneva Conventions. During the one year period in which the Additional Protocols were open for signature, 62 States signed Additional Protocol I and 58 signed Additional Protocol 11.

Signature of the weapons convention is subject to ratification, acceptance, or approval.[120] Accordingly, under contemporary international law, the weapons convention is not binding on a state signatory until it has ratified the treaty.[121] although, upon signature, a

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[117] *See* text accompanying note 134 *infra*.

[118] ICRC, Signatures, Ratifications and Accessions to the Geneva Conventions of 12 August 1949 and to the two Additional Protocols of 8 June 1977. as of 25th October, 1982, ICRC Doc. INFO/DIF Nr. 1/2, 21 October, 1982. These states are Angola, Antigua and Barbuda, Belize. Bhutan, Burma, Cape Verde, Comoros. Equatorian Guinea, Guinea, Kiribati. Maldives, Mozambique, Nauru, Samoa, Seychelles, Vanuatu, and Zimbabwe. Yves Sandoz incorrectly states that "the unlikely hypothesis of a State's becoming a party to the [Weapons] Convention without being a party to the Geneva Conventions was not even envisaged." Sandoz, *A New Step*, *supra* note 65, at 10.

[119] *Discussed in* text accompanying notes 65-73 *supra*.

[120] Article 4. The Additional Protocols are not as carefully drafted, since they merely provide that the "Protocol shall be ratified as soon as possible." Additional Protocol I Article 93, Additional Protocol II Article 21.

[121] Vienna Convention on the Law of Treaties, Article 14(1)(n).

state is, prior to the treaty's entry into force, "obliged to refrain from acts which would defeat the object and purpose" of the treaty "until it shall have made its intention clear not to become a party to the treaty."[122] It is difficult, however, to imagine any such act in the case of the weapons convention, since the only substantive obligation undertaken in the treaty itself is that of dissemination and no obligations of the protocols are undertaken prior to indication at ratification of which two or three Protocols by which the state intends to be bound. There is, however, the political risk run by a state that had actively participated in the weapons negotiations and signed the weapons convention not to abide by the restrictions set forth in the protocols prior to expressing publicly its intention not to ratify.

Signature would indicate that the weapons convention and at least two of its protocols, notwithstanding any contemplated reservations, are acceptable to the executive branch of the government, although there is no obligation in this convention to indicate which, if any, protocol is not likely to be found acceptable. However, not even signature is necessary for certain of the final clauses to go into effect.[123] This, of course, does not amount to provisional application of the substantive provisions of the convention or its protocols.

The time of signature is also the first formal opportunity for states to present their reservations or understandings, if any,[124] as to the

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[122] *Id.* at Article 18. *See* Note. *Legal Implications of Deferring Ratification of SALT II*, 21 Va. J. Int'l L. 747, 759-69 (1981).

[123] Article 24(4) of the Vienna Convention on the Law of Treaties provides:

> The provision of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of adoption of its text.

[124] The weapons convention contains no provision limiting the right of states to formulate reservations. Accordingly. any reservation to the convention or any of its protocols would be permissible so long as it is not "incompatible with the object and purpose of the treaty." Article 19(c), Vienna Convention on the Law of Treaties. To date, only France has signed subject to a reservation, that reads as follows:

> France, which is not bound by Additional Protocol I of 10 June 1977 to the Geneva Conventions of 12 August 1949:
>
> Considers that the fourth paragraph of the preamble to 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, which reproduces the provisions of article 35, paragraph 3, of Additional Protocol I, applies only to States parties to that Protocol:
> States, with reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, that it will apply the provisions of that Convention and

umbrella treaty or to those protocols which are contemplated being adhered to on ratification, and any difficulties they may have as to any protocol not contemplated being adhered to on ratification.[125] However, no such statements need be made until deposit of the instrument of ratification indicating which Protocols are being accepted.

Finally signature lends support to attempts to have the parties apply the Convention and its protocols during armed conflict, especially any that may erupt after the signing of the convention.[126]

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its three Protocols to all the armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949:
States that as regards the Geneva Conventions of 12 August 1949. the declaration of acceptance and application provided for in article 7, paragraph 4(b), of the Convention on Prohibitionsor Restrictions on the Useof Certain Conventional Weapons will have no effects other than those provided for in article 3 common to the Geneva Conventions. in so far as that article is applicable.

U.N. Doc. A/36/406, Annex. at 3: 20 Int'l Leg. Mat. 1287 (1981)

[125]On signature the United States stated:

> The United States Government welcomes the adoption of this Convention, and hopes that all States will give the most serious consideration to ratification or accession. We believe that the Convention represents a positive step forward in efforts to minimize injury or damage to the civilian population in time of armed conflict. Our signature of this Convention reflects the general willingness of the United States to adopt practical and reasonable provisions concerningconduct of military operations, for the purpose of protecting noncombatants.
>
> In addition, the United States of course reserves the right, at the time of ratification. to exercise the option provided by Article 4(3) of the Convention, and to make statements of understanding and/or reservations, to the extent that it may deem that to be necessary to ensure that the Convention and its Protocols conform to humanitarian and military requirements.

[126]Signature of a treaty has the practical effect of making it easier for third states, the ICRC. or an international organization such as the U.N. to request a signatory to apply a treaty before it goes into effect.This is particularly relevant in times of war or other armed conflict. An example of this is the Korean Conflict. The United States signed the four Geneva Conventions in 1949. However. it decided after the initiation of hostilities with Korea not to forward the treaties to the Senate for its advice and consent. ***See*** *Geneva Conventions for the* ***Protection*** *of* ***War*** *Victims: Hearings Before the Sen. Comm. on Foreign Relations*, 82d Cong., 1st Sess., 1. 5 (1955). During the Korean Conflict, the ICRC asked the parties to the conflict to apply *de facto* the humanitarian provisions of the Conventions. The United States and both Korean Governments made statements to the effect that they were applying the provisions of the 1949 Geneva Conventions. ***See.*** 10 M. Whiteman, Digest of International Law 58-62 (1968). The ICRC asked the participants in the 1973 Arab-Israeli conflict to apply provisionally Additional Protocol I before it was completed. *The International Committee's* ***Action*** *in the Middle East*. 1973 Int'l Rev. Red Cross 583, 584-85. It can be expected that

I. RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

Article 4.

Article 4(1) provides that signature is subject to ratification, acceptance or approval and that any state which does not sign may accede to the weapons convention.[127] Negotiation of these provisions provoked some discussion because of their variance from the Additional Protocols which provide simply for signature, ratification, and accession.[128] Specific povision for acceptance or approval, as alternatives to ratification, was first suggested in the Anglo-Dutch text[129] in recognition of those articles of the Vienna Convention on the Law of Treaties[130] that acknowledge differing constitutional systems for expressing consent of a state to be bound by a treaty. However, some delegations noted that signature of the Additional Protocols and their predecessors was subject only to ratification,[131] but abandoned their concerns in face of the broad desire to accommodate as many differing systems as possible.[132]

Some parliaments may view these alternatives with disfavor if they are considered to usurp their role in the adherence process for important treaties, especially if they have not yet ratified the Vienna Convention.[133] However, it was the negotiators' intention to permit each state to determine, in accordance with its own internal procedures, how to adhere to the treaty and not to limit that process to ratification and accession. It certainly was not meant to require a

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similar requests will occur in the future, whether or not a particular state has signed the weapons convention. Signature would, however, reinforce the claims of those who would request that state to apply provisionally the provisions of the weapons convention. **See** *also* text accompanying notes 74-81 *supra*.

[127] As of the time of writing of this article, sixteen states have ratified the Convention, all agreeing to be bound by all three protocols: Mexico on February 11, 1982; China on April 7, 1982; Finland on April 8, 1982; Ecuador on May 4, 1982; Mongolia on June 8, 1982; Japan on June 9, 1982; the USSR on June 10, 1982; Hungary on June 14, 1982: Byelourussia and the Ukraine on June 23, 1982; Denmark and Sweden on July 7, 1982; German Democratic Republic on July 20, 1982; Switzerland on August 20, 1982; Czechoslovakia on August 20, 1982; and Bulgaria on October 15, 1982. Dep't State Bull.. June 1982, at 90; *id.*. Sept. 1982, at 80; telephone call to U.S. State Department, Office of Treaty Affairs, 8 December 1982.

[128] Additional Protocol I Articles 92-94, Additional Protocol II Articles 20-22.

[129] U.N. Doc. A/CONF.95/WG/L.1, Sept. 12, 1979, article 7.

[130] Articles 11, 14.

[131] For example, the 1949 Geneva Conventions common article 57/56/137/152 and Hague Convention No. IV of 1907 Article 5.

[132] International Law Commission, Lauterpacht's First Report on the Law of Treaties, Article 8, Comment and Note, U.N. Doc. A/CN.4/63. [1953] 2 Y.B. I.L.C. 90. 122-23 (1953).

[133] *See* note 113 *supra*.

state to use approval or acceptance following signature in lieu of ratification.

It may be noted that, as to the Convention, like the Additional Protocols, a state may express its consent to be bound by accession, without signature, even while the treaties are open for signature.[134] This untidy but perfectly permissible possibility did not occur.

The weapons convention does not require the substantive protocols to be either signed or ratified. Rather, the weapons obligations are undertaken in whatever instrument of ratification, acceptance, or approval is used to express its consent to be bound, or by whatever form of notice is used thereafter by a state to indicate its consent to be bound, for example at time of accession, or by agreeing to be bound by a third or additional protocol subsequently negotiated.

One of the issues not resolved until late in the 1980 session was whether the protocols should be mandatory or optional. At the first session of the Preparatory Conference in September 1978, Mexico introduced a preliminary outline of a proposal for a general and universally acceptable treaty on conventional weapons with optional protocols or clauses that would embody such prohibitions or restrictions of use of certain conventional weapons deemed to be excessively injurious or to have indiscriminate effects as might be negotiated by the U.N. Conference.[135] This proposal, the first formal suggestion of how any weapons restrictions might be cast, was for an umbrella treaty with optional weapons protocols, in contrast to a single comprehensive agreement, or to separate agreements linked only by a final act. The Mexican approach received considerable support and became the basis for further discussions.[136]

At the beginning of the Conference Working Group on a General Treaty's deliberations at the first session in September 1979, a far more detailed "umbrella" proposal was introduced by the United Kingdom and the Netherlands[137] that still provided for optional protocols. The Working Group decided to proceed on the basis of this new draft. It soon became clear, however, that the idea of completely optional agreements was no longer as attractive as it had been at the Preparatory Conference, principally because of the *de facto* adoption of a consensus decision-making procedure.[138]

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[134]Weapons convention Article 4(1); Additional Protocol I Article 94; Additional Protocol II Article 22.
[135]U.N. Docs. A/CONF.95/PREP.CONF./L.8 and Corr.1.
[136]U.N. Docs. A/CONF.95/3. Annex I. at 8-9: A/CONF.95 3. para. 40. at 13.
[137]U.N. Doc. A/CONF.95/WG L.1. Sept. 12, 1979.
[138]1979 U.S. Delegation Report 10-11.

As a result, during the 1979 session of the conference, many delegations felt that the formal product of the conference should be acceptable to all the participants and that there was no valid reason why agreement reached by consensus should be made optional. The consensus procedure insured that no protocol restricting or prohibiting the use of a weapon could be adopted over the objection of any participating government. Considerable support developed for a general umbrella treaty with annexed protocols that would constitute an integral and non-optional part of the convention, an approach suggested by the United States and strongly supported by Mexico. At the end of the first session, it appeared that only a few countries found unacceptable the idea that the three initial protocolsshould be a package and indicated a willingness to reassess their position prior to the second session of the conference.[139]

However, those governments, such as Sweden and Mexico, which desired a review mechanism that could easily result in review conferences perceived a risk that an obligatory package of protocols would be looked upon more as a final result with a limited need for review than would a set of optional protocols.[140] Moreover, it became clear at the second session that most delegations, including the Soviet Union and most of the western group, no longer favored such a solution, in part because they thought an obligatory package might impede adherence to the convention by states which might have serious doubts about one of the protocols but had not wanted to be responsible for blocking action by the conference.

In view of this general feeling, the United States had, despite its initial preference for mandatory protocols, agreed to a system of partial optionality under which each state, at the time of ratification or accession, had the option of choosing which of the protocols to which it would adhere, but insisted that it must accept at least two protocols. This alternative would avoid a situation in which a state might gain the political advantages of adhering to the convention while accepting only the relatively insignificant restrictions of the protocol on nondetectable fragments. After some initial resistance by the Soviet bloc, this solution was ultimately adopted by the conference.[141] Most delegations felt that this would maximize the possibility of adherence to the Convention by all states, since all could be expected to adhere to the nondetectable fragments protocol and at

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[139] *Id.* at 11.

[140] *See, e.g.*, Commentary on the "Outline of a Draft *Convention*" as presented at the 1st Session of the Conference 26 (1980) (manuscript prepared by one of the Swedish delegates to the conference, by Mr. Ove Bring, for the Conference Secretariat).

[141] 1980 U.S. Delegation Report 13.

least either the mines or incendiaries protocol. This belief was particularly held because the ultimately adopted review conference mechanism that preserved the consensus procedure for the adoption of new protocols guaranteed at least the attendance of all states at any review conference, although not participation in the decisionmaking process on amendments to any existing protocol by which it was not bound, and because of the relative good assurance that well over a decade would elapse before the first review conference.[142]

It is for these reasons of partial optionality and nonsignature that Article 4(5) provides that "any Protocol by which a High Contracting Party is bound shall for that Party form an integral part of this Convention." For such states, those protocols are not severable absent denunciation.

Reservations and Understandings.

The Conventional Weapons Convention has no provision restricting the right of states to attach reservations to it. Accordingly, any relevant reservation would only have to be not incompatible with the treaty's object and purpose.[143]

Some states may need to consider attaching an understanding regarding the definition of terms. States party to Additional Protocol I considering ratification of the weapons convention are in a different position than states not party to Additional Protocol I since many of the terms in the weapons convention are also used, with the same meaning, in Additional Protocol I, and yet are defined in one but not the other treaty. For example, "civilians" and "civilian population" are defined in Article 50 of Additional Protocol I, but are not defined in any protocol attached to the weapons convention. On the other hand, "feasible" is defined in Article 3(4) of Protocol II and Article 1(5) of Protocol III, but not in Additional Protocol I.[144] States will thus have to be careful to insure that common definitions are maintained on ratification of these documents.

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[142] *But see* text accompanying note 103 *supra*.

[143] *See* note 124 *supra*. *See generally* Pilloud, *Reservations to the Geneva Conventions of 1949*, *supra* note 83.

[144] This definition is similar to the British understanding of this term noted at the time of its signature to Additional Protocol I: "in relation to Articles 41, 57 and 58. that the word "feasible" means that which is practicable or practically possible. taking into account all circumstances at the time including those relevant to the success of military operations. Schindler & Toman. *supra* note 2, at 635.

Protocols II and III to the weapons convention define "feasible" in the context of "feasible precautions" as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."

J. ENTRY INTO FORCE

Article 5.

Although modeled on the entry into force provisions of Additional Protocol I,[145] Article 5 of the weapons convention has a number of notably different requirements. For example, in contrast to the lowest minimum of two states set forth in Additional Protocol I, which is consistent with prior humanitarian treaties,[146] the weapons convention will enter into force only when twenty states have consented to be bound by it. In all cases, however, there is a six-month waiting period to insure sufficient time to inform the affected states and persons about the convention. The high number of twenty urged by states viewing this as in part an arms control agreement[147] was part of the compromise related to review and amendment.[148] The high number was viewed as effectively delaying the latest date on which the first review conference could be held until well into the 1990s. A number of the smaller states most concerned with humanitarian aspects of the weapons convention had wanted an early entry into force.[149] In face of opposition and reluctance from other countries that were concerned about early and "unfavorable" new protocols and amendments to the weapons protocols, those smaller states settled for a resolution on application by non-parties.[150]

The negotiations on entry into force are further described in the United States Delegation Report:

> most of the non-aligned and neutral delegations wanted the Convention to enter into force and be open for amendment as soon as possible (as is usually the case for law-of-war agreements), largely because they wanted to move as quickly as they could to the consideration of restrictions on use of incendiaries against combatants and small-calibre projectiles, which were not attainable at this Conference.

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[145] Article 95.

[146] For example. the 1949 Geneva Conventions common article 58/57/138/153.

[147] *See, e.g.*, the Environmental Modification Convention, T.I.A.S. No. 9614 (twenty states parties for entry into force); Biological Weapons Convention, **26** U.S.T. **583,** T.I.A.S. No. 8062 (twenty-two states parties for entry into force): Seabed Arms Control Treaty. 23 U.S.T. 701, T.I.A.S. No. 7337 (twenty-two states parties for entry into force): Non-Proliferation Treaty, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (forty-three states parties for entry into force); the Antarctic Treaty, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (twelve states parties for entry into force).

[148] *See* text accompanying notes 102-04 *supra*.

[149] The Mexican original draft called for 5 ratifications to bring the convention into force. U.N. Doc. A/CONF.95/3, Annex I, Article 4, at 9.

[150] *See* text accompanying notes 68-76 *supra*.

> The United States Delegation, on the other hand, insisted that the provisions for entry into force and amendments, taken together, should not permit amendment of the Convention by a relatively small number of States before the rest of the international community had had sufficient time to complete their ratification processes. In the end, agreement was reached on a provision (in Article 5) for entry into force six months after the deposit of the twentieth instrument of ratification, and a requirement (in Article 8) that a conference to consider amendments or new protocols could not meet unless and until requested by a majority of the States parties, including at least 18 States. (Such a conference could be called on the request of any party ten years after entry into force if no such conference had been called by then.) These provisions should give Western countries ample time to ratify before amendments can be considered, and should limit the ability of radical governments to press for an endless series of conferences to expand the current restrictions.[151]

One anomoly of this provision on entry into force is the possibility that the convention can enter into force without any of the protocols entering into force, even though Article **4** requires states to indicate "acceptance" of at least two protocols at the time of deposit of instruments of ratification, acceptance, approval or accession. This possibility could occur if, for example, the first twenty States each accept only two protocols and split their indications of consent to be bound among the nondetectable fragments, mines, and incendiaries protocols. Although such a result was not considered desirable or likely, as to at least the nondetectable fragments protocol, it was necessary to achieve consensus with those states which, as a matter of sovereignty, felt that there should be greater freedom of choice, and with those states wanting a simple entry into force provision.[152]

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[151] 1980 U.S. Delegation Report 15.

[152] This possibility is not going to occur, since the first sixteen ratifications have included acceptance of all three protocols. *See* note 127 *supra*.

One informal draft article on entry into force recognized the interrelationships between entry into force of the convention. entry into force of the protocols. and entry into force of each with respect to a particular state, as follows:

> 1. This Convention shall enter into force upon:
> (a) the passage of six months after the date of deposit of 20 instruments of ratification, acceptance. approval or accession: and
> (b) the fulfillment of the condition, stated in subparagraph 2(a) of this Article. for entry into force of at least two of its Protocols.
>
> 2. Each of the Protocols to this Convention shall enter into force upon:
> (a) the passage of six months after the date by which 20 States have

One of the Soviet bloc's negotiating ploys was a proposal that entry into force be contingent upon ratification by the governments of all the permanent members of the Security Council.[153] Although the Soviets had insisted on this requirement until quite late in the second session, it was never considered to be a serious proposal.

K. DENUNCIATION

Article 9.

This Article provides procedures whereby states can denounce the Convention under limited circumstances.

Like many others of the convention's final clauses, its article on denunciation is modeled on the corresponding provision of Additional Protocol I,[154] but modified by the Drafting Committee to meet the peculiarities of the weapons convention caused by the limited optionality of the weapons protocols. A state cannot be a party just to the Convention; it must also consent to be bound by at least two of the annexed protocols. Accordingly, if a state simply denounces the convention, it will also be deemed to have denounced the annexed protocols by which it has agreed to be bound.[155] This provision was thought necessary to insure that no state could avoid provisions of the

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expressed their consent to be bound by that Protocol; and
(b) the entry into force of this Convention.

3. This Convention shall enter into force with respect to a State upon:
(a) the entry into force of this Convention;
(b) the passage of at least six months after the deposit by the State of its instrument of ratification, acceptance, approval or accession: and
(c) the entry into force of at least two Protocols with respect to that State in accordance with paragraph **4** of this Article.

4. Each Protocol shall enter into force with respect to a State upon:
(a) the entry into force of this Convention with respect to that State:
(b) the entry into force of the Protocol; and
(c) the passage of at least six months after the expression by the State of its consent to be bound by that Protocol.

As may be seen by comparison with the article as finally adopted, the convention might well have come in force without any substantive weapons restrictions in force. Such a possibility, however remote, should not trouble those states concerned about early conferences, since it is only as to those protocols in force by which they are not bound that states cannot participate in the decision-making process regarding their amendment. ***Srr*** text accompanying notes 107-10 *supra.*

[153] U.N. Docs. A/CONF.95/L.6, Sept. 18, 1979; A/CONF.95/8, Oct. 8, 1979, Report of the Conference to the General Assembly, Ann. II, App. A, Outline of a Draft Convention, Article 6, at **42.**

[154] Article 99.

[155] Article 9(3).

convention it did not like and yet keep particular protocols that it favored. Similarly, if a state denounces any number of protocols so that it would attempt to remain bound by less than two protocols, it will necessarily be considered to have denounced the convention and all annexed protocols by which it was bound.[156]

Article 9(2)[157] of the weapons convention, as with Article 99(1) of Additional Protocol I, reinforces the traditional concept that once an armed conflict has begun, a state cannot refuse to apply the codified law during that conflict. It also reaffirms the principle that the law of armed conflict must be applied throughout a period of belligerent occupation, thus precluding any permanent change in the status of the occupied territory or the forfeiture by the civilian population of their legal rights under the codified law of occupation including the Hague and Geneva Conventions. The provision also insures that protected individuals are to receive the benefits of the convention during the whole of the conflict and as long as they are in enemy hands.

Article 9(2) extends these protections, for the first time, to United Nations forces or missions conducting peacekeeping, observation or similar functions in the area concerned, but only insofar as it relates to annexed protocols containing such provisions.[158]

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[156]Because of this reasoning, the Conference Working Committee on October 9. 1980, decided it was unnecessary to include a paragraph that would have commanded this result: "3. If, as a result of any such denunciation, a Party would no longer be bound by at least [2] Protocols. it shall be considered as havingdenounced the Convention." Alternative text for Final Provisions. Informal Text for Final Provisions, conference unnumbered document dated Oct. 9,1980.This language had been drafted by the Conference's Legal Advisor in consultation with the United States' representative on October 6th.

[157]Article 9(2) of the weapons convention provides:

> Any such denunciation shall only take effect one year after receipt by the Depositary of the notification of denunciation. If, however, on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and. in every case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned until the termination of those functions.

[158]*I.e.*, the mines protocol. This provision was added by the Drafting Committee on October 8. 1980, on the suggestion of Netherlands that U.N. forces had been overlooked in this regard.

Article 9, of course, does not derogate from any other remedies available to a state party under international law in the event of a breach of obligations by an enemy.[159]

As does Article 99(3) of Additional Protocol I, the weapons convention Article 9(4), from which it was copied, provides that any denunciation only applies to the denouncing party and thus does not release the other parties from their obligations under the convention and the protocols by which they are bound.

Criminal Responsibility

Article 9(5) of the weapons convention, like its source Article 99(4) of Additional Protocol I, provides that a denunciation does not free the denouncing state from any obligations "already incurred by reason of an armed conflict, under this Convention and its annexed Protocols by such denouncing High Contracting Party in respect of any act committed before this denunciation becomes effective? The meaning of this article is not entirely clear; Article 99(4) of Additional Protocol I has an equally cloudy history. There is no officially published *travaux* for that latter article. An unofficial analysis states that its purpose is to insure that criminal "[a]cts committed before the denunciation became effective remains unlawful."[160] This rationale is particularly inappropriate for Article 9(5) of the weapons convention, since that convention contains no provisions making

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[159] *See* text accompanying note 91 *supra*. text accompanying notes 172-89 *infra*.

[160] M. Bothe, K. Partsch & W. Solf, New Rules for Victims of Armed Conflicts 565 (1982).

Paragraph 4 was added to the provision after Article 99 had been adopted by Committee I. CDDH/SR.47, para. 106, 7 *Official Records* 35. The United Kingdom felt that a provision was desirable which would clearly indicate that a state which commits war crimes or whose troops commit war crimescould not invoke this provision in order to abrogate its responsibilities, including the obligation to prosecute offenders. This concept is, of course. consistent with common Articles 51/52/131/148 of the 1949 Conventions on the "Responsibilities of the High Contracting Parties." This common provision states that High Contracting Parties shall not be allowed to absolve themselves of any liability incurred in respect of grave breaches. Although this was deemed to be implicit in Article 99, the United Kingdom felt that the modern trend in treaty law should be followed by stating expressly that this would be the situation. Such an approach is reflected in Article 70(1)(b) of the Vienna Convention on the Law of Treaties:

> Unless the treaty otherwise provides or the Partiesotherwiseagreed, the termination of a treaty under its provisions or in accordance with the present Convention, . .does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

The United Kingdom argued that some provision along the lines of the Vienna Convention would he desirable, especially since the Vienna Convention was not then in force. The provisions was adopted with little debate in Committee I as a provision that

violation of the protocols annexed thereto a war crime or grave breach of its provisions, unlike Article 85 of Additional Protocol I and common article 50/51/130/147 of the 1949 Geneva Conventions, and no provision on penal sanctions such as those found in Article 86(1) of Additional Protocol I and common article 49/50/129/146. Accordingly, the weapons convention is in this regard only partially a law of armed conflict treaty, since unlike the humanitarian conventions, it contains no provisions for individual criminal responsibility of the service member for international breaches of its protocols. Thus, violations of the standard set forth in the weapons protocols would likely only be punishable by the law of the armed forces to which the soldiers belong and would not be war crimes and, as such, internationally extraditable offenses. The effect of Article 9(5) of the weapons convention is to insure that a state which violates the weapons protocols cannot denounce this convention in order to abrogate its international responsibilities. Its effect is not to provide a basis for individual criminal responsibility for violations of the weapons protocols.

L. DEPOSITARY

Article 10.

As a result of efforts in the weapons convention Drafting Committee to bring logic, order, and usefulness to these provisions, the depositary article is notably different from its multi-article Additional Protocol I counterpart.

As originally proposed in the Mexican draft of April 1979[161] and consistent with other treaties on the law of armed conflict, the desig-

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was designed to follow modern trends in treaty law. CDDH/405, Rev.1, Annex III, paras. 23-25, 10 *Official Records* 234-44; CDDH/405/Rev.1, paras. 101-03, 10 *Official Records* 199.

Common article 51/52/131/148 of the 1949 Geneva Conventions, providing that states cannot be allowed to absolve themselves of any liability incurred in respect of grave breaches, probably derives from Article 3 of Hague Convention No. IV of 1907, which provides in part that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation." Although no specific language appears in the 1949 Geneva Conventions, its essentials are repeated in Article 91 of Additional Protocol I. Pictet believes this common article is designed "to prevent the defeated Party from being compelled in an armistice agreement or peace treaty to abandon all claims due for infractions committed by persons in the service of the victor." Pictet, Commentary I, *supra* note 61, at 373.

[161] U.N. Doc. A/CONF.95/3, Annex I, Article 3, at 9.

nation of the depositary was made in the article on ratification.[162] The later, more detailed drafttexts included in other articles a number of duties to be imposed on the U.N. Secretary-General as Depositary. These included different kinds of notifications: proposals for amendments (Article8(1)(a)), additional protocols (Article8(3)), invitations to review conferences (Article 8(3)(a)), and of acceptances by a state not party to the weapons convention (Article 7(3)), in addition to routine notifications of signature and deposit of instruments of consent to be bound (Article 10(2)(a), (b)),date of entry into force of the convention (Article 10(2)(d)), and of denunciations (Article 10(2)(e)).

In the Drafting Committee, it became clear that such a structure was neither helpful to users of the treaty text nor complete, inasmuch as Part VII of the Vienna Convention on the Law of Treaties, for which the U.N. Secretary-General also acts as depositary, sets forth in greater detail the duties of depositaries. Accordingly it was decided to consolidate the routine designations in a single article, while leaving the exceptional dutiesof those that would not necessarily require notice to all states for mention only in the specific articles concerned, such as Articles 7 and 8.

Thus, the weapons treaty has a specific article labeled *Depositary* to which one can turn to find out who is the depositary and what are most of his duties.

Article 10(1) designates the U.N. Secretary-General as depositary. Article 10(2) begins "in addition to his usual functions," an oblique reference to article 77, concerning functions of depositaries, of the Vienna Convention on the Law of Treaties. The stem of Article 10(2) continues: "the Depositary shall inform all States of". It may appear to be unnecessary to require the Depositary to inform "all States", since Article 77(1)(e) of the Vienna Convention requires depositaries to inform "the Parties and the Statesentitled to become parties to the treaty of acts, notifications and communications relating to the treaty." However, the text of article 10 transmitted by the Conference Working Group to the Drafting Committee[163] required notice be

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[162] "The depositaries shall be the following States...and, after..., the Secretary-General of the United Nations."

The first detailed draft text, prepared by the Dutch and British delegations, provided: "Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations, who shall be the Depositary of the Convention." U.N. Doc. A/CONF.95/WG/L.1, Sept. 12, 1979, Article 7. This language was maintained through the later iterations and was transmitted by the Conference Working Group on a General Treaty to the Drafting Committee as Article 5(2). U.N. Doc. A/CONF.95/9/Add.1, Oct. 9. 1980, at 4.

[163] Based upon the Anglo-Dutch Draft, U.N. Doc. A/CONF.95/WG.1/L.1, Sept. 12, 1979. Article 10.

given only to "all States which have signed this Convention or acceded to it." Such a restrictive approach seemed inappropriate in a humanitarian document of this nature. Accordingly, the restrictive words "which have signed this Convention or acceded to it" were deleted by the Drafting Committee.

One function that is noticably absent from those given to the U.N. Secretary-General as Depositary is notice under Article 7(4) between parties to a conflict where one of the parties is a national liberation movement. The Secretary-General is understandably reluctant to so act in such cases where the issue of recognition is highly charged. If, however, the parties to the conflict are states only some of which are party to the weapons convention, then the Depositary under Article 7(3) is required to notify all High Contracting Parties of any notifications received by a *state* that it accepts and applies the weapons convention or relevant protocol to the conflict.

Under Article 8, the Secretary-General is charged with the responsibility of convening review conferences to consider specific proposed amendments, either after determining that a majority of High Contracting Parties, but never less than eighteen, desire to do so, or on request of one High Contracting Party ten years after entry into force of the convention. During the final plenary session, the Secretary-General's caution in this regard was expressed: "[W]e would be able to convene conferences pursuant to requests made under the General Convention if the necessary financial arrangements therefor were made either by the General Assembly or by the State participating in the Conference."[164]

M. AUTHENTIC TEXTS

Article 11.

The provision on authentic texts is modeled after Article 102 of Additional Protocol I, with one interesting difference. Article 102 provides that copies of Additional Protocol I shall be transmitted to "all the Parties to the Conventions," while Article 11 requires copies of the weapons convention be transmitted "to all States."

The first formal draft of weapons convention containing any provision, the 1979 Anglo-Dutch draft,[165] would have required copies to be sent to "all States which have signed this Convention or acceded to

[164]U.N. Doc. A/CONF.95/SR.11, para. 11, at 3.
[165]U.N. Doc. A/CONF.95/WG/L.1, Sept. 12, 1979.

it." This version avoided the apparent difficulty of Additional Protocol I that certified true copies will not be sent to a state until after it is a party to it and bound by the Convention. Both versions also limit distribution to states and thereby exclude national liberation movements. The Anglo-Dutch version was adopted by the Conference Working Group on a General Treaty and transmitted to the Drafting Committee. The Drafting Committee again deleted the words "which have signed this Convention or acceded to it" in order to promote wider knowledge and more rapid signature of and adherence to this convention because of its humanitarian nature. This result permits the depositary to carry out the normal duties of a depositary to transmit such copies "to all States entitled to become parties to the treaty."[166]

Article 11 establishes six authentic languages consistent with the six official and working languages of CDDH and CCW. In contrast, French was the sole authentic language of the pre-1949 Geneva Conventions and of the 1907 Hague Regulations, and only French and English were the authentic languages of the 1949 Geneva Conventions. The Swiss Federal Council, as depositary of the 1949 Geneva Conventions, arranged for official translations into Russian and Spanish. However, changing world circumstances made having more than two authentic languages quite desirable for many nations. The 1945 United Nations Charter has five authentic languages, Chinese, French, Russian, English, and Spanish.[167] This practice is also consistent with Article 85 of the Vienna Convention on the Law of Treaties, which uses the same five languages for the authentic texts.[168] In the 1977 Protocols, Arabic was added as a sixth authentic language.

The effect of different languages being equally authentic is significant. It means that each such text carries the same weight and is as valid as any other.[169] As stated in the *Commentary* to the Fourth Geneva Convention:

> It was to the English version just as much as to the French that the Plenipotentiaries appended their signatures in 1949. In the same way, ratifications and accessions will be valid for the two versions. States which are party to the Convention are thus bound by one as much as by the other.[170]

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[166] Article 77(1)(b). Vienna Convention on the Law of Treaties.
[167] Article 111, Charter of the United Nations, June 26, 1945, articles 2(3) and 33(1), 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153.
[168] "Article 85, Vienna Convention.
[169] *Id.* at article 33.
[170] Pictet, Commentary IV, *supra* note 61, at 607-08.

It was recognized in 1949 that awkward situations would arise if there was a conflict between two authentic texts. This problem will be complicated in the case of the 1977 Additional Protocols and this weapons convention and its annexed protocols, each with authentic texts in six languages.[171]

N. COMPLIANCE MECHANISMS[172]

Any rules limiting or prohibiting the use of any type of weapon in armed conflict require adequate guarantees that their observance will be reciprocal. Formal adherence by states to agreements containing such rules would be of little purpose if the parties were not at the same time firmly committed to taking every appropriate step to insure compliance with those restrictions after their entry into force. The provisions of the Conventional Weapons Convention and its Protocols would have little humanitarian value if parties were inclined to tolerate breaches in the future by states which are bound to comply with them. However, this weapons convention has no positive provision in this regard and no provisions for individual[173] or state responsibility[174] for violations of its terms.[175]

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[171]Article 33(4) of the Vienna Convention provides:

> When a comparison of the authentic texts discloses a differenceof meaning which the application of articles 31 [general rules of interpretation] and 32 [supplementary means of interpretation] does not remove, the meaning which best reconciles the texts. having regard to the object and purposes of the treaty. shall be adopted.

The problems of linguistic reality in drafting the 1977 Additional Protocols. described in Bothe, Partsch & Solf, *supra* note 160, at 569-70, were repeated in the weapons conference.

[172]"Verification" would be an inappropriate concept because. in this regard. the weapons convention is not an arms control agreement. The weapons convention is not an agreement limiting in *peacetime* the testing. development. production, transfer. stockpiling. or other acquisition or retention of weapons. Accordingly. there is nothing except non-events to "verify" so long as the weapons convention is not violated. Rather the weapons convention regulates the *use* in *armed conflict* of certain conventional weapons. and therefore is referred to as an "arms use" agreement. In relation to such arms-use treaties, it is therefore better to refer to "complaints mechanisms" or "complaints procedures" and "investigations" or "factfinding procedures" rather than verification. since mere possession of the weapons in question is not itself illegal under the weapons convention.

The 1925 Geneva Gas Protocol, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65, and the 1977 Environmental Modification Convention. *supra* note 147. are the only arms control agreements containing restrictions on the use of non-nuclear weapons in armed conflict.

[173]*E.g.*, the 1949 Geneva Conventions common article on grave breaches (50/51/130/147); the Additional Protocol I Article 85 on grave breaches.

[174]*E.g.*, article 3, Hague Convention No. IT' of 1907; article 91, Additional Protocol I.

[175]In this regard, the weapons convention is then rather more an arms control agreement that typically has no such provision for individual or state responsibility.

States parties would nevertheless have a variety of actions open to them to deal with any situation in which significant doubts might arise as to compliance with or reciprocal observance of the weapons convention. For example, they might request the state or states in question to consult promptly and fully regarding any such situation and to act responsibly to cease any violations, which is of course the duty under international law of states party to any treaty.[176] In case of violations by any adversary, they might publicize the facts, protest and demand compensation or punishment of the individual offenders, or resort to the right of reprisal as defined and limited by the international law of armed conflict.[177] They might raise compliance problems at any conference of parties convened under Article 8 of the convention and agree upon appropriate action to deal with them. They might invoke the provisions of Article 90 of Additional Protocol I to the extent that the factfinding procedures of that article might apply to the case in question.[178] Finally, in serious cases, they might

[176] Charter of the United Nations, *supra* note 167; Declaration on Friendly Relations, G.A. Res. 2625, *supra* note 57.

[177] The customary laws of reprisal best ensure that retaliatory actions are property limited and directed to encourage renewed observance rather than a collapse of the agreed restrictions. *See also* the comments of Colonel Waldemar A. Solf, JAGC, USA (ret.), formerly Chief of the International Law Branch, International Affairs Division, Office of The Judge Advocate General of the U.S. Army:

> Except for a provision prohibiting the reprisal use of mines directed against civilians as such, the Convention is silent as to measure to ensure reciprocity of application. This silence may permit Parties to respond against persistent breaches through the reprisal use of otherwise illegal weapons and methods of warfare against enemy combatants and other military objectives. It also remains open to the Parties to express reservations similar to those made to the 1925 Geneva Gas Protocol suspending the treaty obligations in relation to any enemy who does not respect its norms.

Solf, *U.N. Convention on Conventional Weapons*, Judge Advocates Association Newsletter, July 1981, at 4. *See* Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 Int'l & Comp. L.Q. 416, 432-39 (1981). These customary laws of reprisal would be severely curtailed for those States accepting Additional Protocol I without reserving the extensive new prohibitions against reprisals contained, for example, in article 51(6) of that protocol.

[178] The provisions of Article 90 of Additional Protocol I cannot be said to be part of international law as it has thus far been ratified by only twenty-six States of which only six have accepted the competence of the International Fact-Finding Commission established in that article. ICRC Doc. INFO/DIF Nr. 1/2, *supra* note 118, at 16-18. The acceptance of not less than twenty High Contracting Parties is necessary before the Commission could be established. Thus, not only can the article not be invoked until it has become part of international law, but it is doubtful if the Fact-Finding Commission foreseen by Article 90 could act in the area of violations of the Conventional Weapons Convention, since the competence of the Commission is limited to:

> enquire into any facts alleged to be a grave breach as defined in the [Geneva] Conventions and this [Additional] Protocol or other serious violation of the Conventions or of this Protocol;

call upon the appropriate bodies within the United Nations system to take suitable action in accordance with their particular mandates to address and resolve the situation[179] or terminate or suspend the

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> facilitate, through its good efforts, the restoration of an attitude of respect for the Conventions and this Protocol; [and]
>
> in other situations,... institute an enquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned.

Articles 90(2)(c), (d), Additional Protocol I. *Compare* Sandoz, *Unlawful Damage*, *supra* note 3, at 148-48:

> On the other hand, no provision was made [in the weapons convention] for control, repression of infractions and reparations for injuries. Even though the Convention is not undisputably bound to Protocol I of 1977, it seems legitimate to consider that the Convention and the three Protocols of 10 October 1980 do in fact supplement that Protocol, and hence to apply its rules on control, repression of infractions and reparations. For example, it could be considered that the prohibition against using incendiary weapons against military objectives located within concentrations of civilians, contained in 1980 Protocol III. is covered by the general rule in Protocol I of 1977 requiring combatants to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects. . .which would be excessive in relation to the concrete and direct military advantage anticipated" (Article 57, 2a, iii). If we accept this point of view. the Protecting Powers to be appointed under the terms of the Protocol could be called upon to ensure respect for this rule (Article 5, paragraph 1):to the extent that the competence of the International Fact-Finding Commission is recognized, the Commission could be charged with carrying out an enquiry (Article90); such an attack should be repressed as a grave breach of 1977 Protocol I (Article 85, 3b) and lastly the payment of indemnities should be considered under the terms of Article 91.
>
> This question, however, has not been fully clarified. First of all, it is not impossible for a State to be bound by the 1980 Convention and Protocols without being a party to 1977 Protocol I and it would be unrealistic to attempt to apply the provisions of that Protocol to such a State, even though, on some points, it does no more than affirm or develop the "Law of the Hague" which has generally come to be recognized as customary law. . . It would be a mistake in any event to consider the 1980 Protocols as constituting no more than "interpretations" of the general rules of Protocol I of 1977. Such an attitude, which would make it possible to regard the Protocols of 1980 as automatically applicable to the States which are parties to Protocol I of 1977, would certainly be wrong. The long negotiations which led to the Protocols of 1980 do not justify them as a mere "interpretation" of previously existing rules and any a *posteriori* judgement based only upon them could certainly not be legally sustained. It is nonetheless difficult to dismiss the work leading to the 1980 Convention and Protocols as an important element in determining the exact substance of some of the provisions of Protocol I of 1977, and only future experience will enable us to ascertain, with some degree of precision, the relation between these instruments.

[179] U.N. Charter Articles 10-14 (General Assembly), 24, 33-50 (Security Council); Statute of the International Court of Justice.

convention for material breach.[180] This range of remedies may provide adequate means for states parties to insure compliance with the convention if they are determined to do so; the convention does not significantly limit any of these remedies.

However, in view of the compliance problems which had arisen during the previous year in various arms control contexts,[181] the United States Delegation at the second session of the weapons conference encouraged the introduction of a proposal by the Federal Republic of Germany, sponsored by other members of the western and others group, for the creation of a special consultative committee of experts to assist in dealing with specific compliance questions under this convention.[182] Unfortunately, this proposal, formally

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[180] "Article 60(3) of the Vienna Convention defines material breach of a treaty in part as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." However, Article 60(5) of the Vienna Convention excludes termination or suspension on account of material breach of provisions relating to the protection of the human person of a treaty of a humanitarian character. This limitation on the right to terminate or suspend operation of a treaty was added to the ILC draft during plenary consideration on the suggestion of the Swiss delegate in recognition of the necessity not to authorize "injury to innocent people" in the event of violation by one party to such humanitarian treaties as "the 1949 Geneva Conventions,. . . .status of refugees, the prevention of slavery, the prohibition of genocide, and the protection of human rights in general." U.N. Conference on the Law of Treaties, *Official Records of the Second session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole,* para. 21, at 112; Daniel, *The Vienna Convention of 1969 on The Law of Treaties and Humanitarian Law,* 1972 Int'l Rev. Red Cross 367, 378-79. Although the United States does not share this view, some states would also include the 1925 Geneva Gas Protocol as a treaty of humanitarian character. Article 60(5) may be applicable to some provisions of the protocols annexed to the weapons convention because of the significant humanitarian protections they are in part designed to achieve and the convention's clear descent from CDDH and Additional Protocol I.

[181] *E.g.,* Sverdlovsk regarding Soviet noncompliance with the Biological Weapons Convention, described in *The Sverdlovsk Incident: Soviet Compliance with the Biological Weapons Convention? Hearing Before the Subcomm. on Oversight of the House Perm. Select Comm. on Intelligence,* 96th Cong., 2d Sess. (1980); Twining, *Sverdlovsk Anthrax Outbreak.* Air Force Mag., March 1981, at 124-28.

[182] U.N. Doc. A/CONF.95/L.7, Oct. 9, 1980, sponsored by Belgium, Canada, the Federal Republic of Germany, France. Ireland, Italy, Japan and the Netherlands, would have provided:

> *DRAFT ARTICLE ON A CONSULTATIVE COMMITTEE OF EXPERTS*
>
> 1. The States Parties to this Convention undertake to consult one another and to co-operate with the aim of conciliation in solving any problems which may arise in relation to the objectives of, or in the application of, the provisions of this Convention and the Protocols annexed thereto.
>
> **2.** A Consultative Committee of Experts shall be established after the entry into force of this Convention. For this purpose each State Party shall communicate to the Depositary the name of one expert member of the Committee.

introduced late in the second session, was taken by most delegations as a political gesture by the West as part of its campaign of condemnation of Soviet actions in Afghanistan and elsewhere. As a result, the Soviet bloc made it clear that they would exercise their right under the consensus procedure to block its adoption and support from other quarters was at best lukewarm. Consequently, a consensus in favor of this proposal was not achievable.[183] Since then, the

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3. The Depositary shall, if possible immediately. in any case within one month of the receipt of a request from any State Party for an enquiry into facts which raise concern about compliance with the Convention or the Protocols[.] convene this Consultative Committee of Experts,

4. The Consultative Committee of Experts shall be competent to:

(1) enquire into the facts of the situation which is the subject of the request,

(2) report to the Depository, as well as to the Parties to the conflict. its findings of fact and recommendations, incorporating (in its report) all views and information presented to the Committee during its proceedings, and

(3) facilitate through its good offices compliance with the Protocols.

(The Depositary shall distribute the report to all State Parties.)

5. The Committee or any of its members may be empowered to request from States, international organizations, groups and individuals, such information and assistance as may be appropriate and relevant to its work. The Committee may seek to examine the state of affairs on site, including the collection and examination of samples, photographs and other evidence.

6. Each State Party undertakes to co-operate with the Committee in the accomplishment of its work.

7. (a)The Committee shall organize its work in such a way as to permit it to accomplish the functions set forth in this article. The Committee shall decide procedural questions relative to the organization of its work, where possible by consensus, but other wise by a majorityof those present and voting. There shall be no voting on matters of substance.

(b) If the Committee is unable to provide for a common report on its findings of fact, it shall present the different views of experts.

In order to facilitate its proceedings. the Committee may establish subgroups for specific enquiries on the basis of equitable geographical representation.

[183]Statements of support for a Consultative Committee of Experts were made in the closing Plenary by the Protocol's eight cosponsors, as well as Sweden and Australia. Netherlands also spoke on behalf of the the nine states members of the European Community. U.N. Doc. A/CONF.95/SR.12. paras. 49, 52. 72, 75, 101, 104 & 115, at 9. 10, 14, 15. 20, 21. 23.

United States,[184] Sweden,[185] and the nine members of the European Community[186] have reserved their right to return to proposals of this sort at a later date if necessary.

There should be no question that states parties to the weapons convention have a right under that treaty to resort to legitimate belligerent reprisals as a means of compelling adversaries to cease a course of conduct in violation of the rules of warfare. With the exception of one limited prohibition in the mines protocol on reprisals directed against the civilian population as such, the Conference did not further restrict this traditional remedy.[188] By failing to

[184] 1980 U.S. Delegation Report 16; U.S. statement in U.N. GA First Comm., Nov. 20, 1980 in connection with U.S. acceptance of consensus on the Nigerian draft resolution on the results of the weapons convention, U.N. Doc. A/C.1/PV.37, Nov. 20, 1980, at 47-48; U.S. statement in U.N. General Assembly First Committee, Nov. 23, 1981 in favor of Nigerian draft resolution on the weapons convention, U.S. Doc. A/C.1/PV.39, Nov. 23, 1981, at 8-10; G.A. Res. 36/93, Dec. 9, 1981, U.N. Doc. A/36/753. The United States' statement on signature included the following:

> At the same time, we want to emphasize that formal adherence by States to agreements restricting the use of weapons in armed conflict would be of little purpose if the parties were not firmly committed to taking every appropriate step to ensure compliance with those restrictions after their entry into force. It would be the firm intention of the United States and, we trust, all other parties to utilize the procedures and remedies provided by this Convention, and by the general laws of war, to see to it that all parties to the Convention meet their obligations under it. The United States strongly supported proposals by other countries during the Conference to include special procedures for dealing with compliance matters, and reserves the right to propose at a later date additional procedures and remedies, should this prove necessary, to deal with such problems.

China, on signature, also noted "that the Convention fails to provide for supervision or verification of any violation of its clauses, thus weakening its binding force."

[185] Statement in the First Committee, U.N. Doc. A/C.1/PV.33, Nov. 18, 1981, at 36-37.

[186] By Netherlands, speaking on behalf of all nine members, during the final plenary, U.N. Doc. A/CONF.95/SR.12, para. 41, at 7; in the U.N. General Assembly First Committee on November 20, 1980, when it adopted draft resolution U.N. Doc. A/C.1/31/L.15 (subsequently adopted as G.A. Res. 35/153), U.N. Doc. A/C.1/PV.37, at 42-43; and in a note verbale of April 23, 1981, U.N. Doc. A/36/225. Five of them have also spoken out on this matter: France: declaration on signature, a translation of which is reproduced at 20 Int'l Leg. Mat. 1287 (1981); U.N. Doc. A/36/406 Annex at 2-3 (1981); Italy: declaration on signature, a translation of which is reproduced in U.N. Docs. A/36/224; A/36/406 Annex at 3-4 and 20 Int'l Leg. Mat. 1287; Federal Republic of Germany in a note verbale of April 22, 1981, U.N. Doc. A/36/221; Belgium in a note verbale of May 28, 1981, U.N. Doc. A/36/309; and Ireland in a note verbale of June 18, 1981, U.N. Doc. A/36/334.

[187] Article 3(2).

[188] The report of the U.S. Delegation states

> There was also the more general question of the remedies available to States Parties in the event of violation by other States of the restrictions in the Convention and its protocols. One important objective of the U.S. Delegation was the preservation of the right of each State to engage in

make any other specific prohibitions on the use of reprisals, the traditional right is retained and the new prohibitions on reprisals contained in Articles 51 through **56** of Additional Protocol I were not carried forward to this treaty, except as to those states accepting

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> legitimate reprisals during armed conflict (to the extent permitted under current law) as a means of compelling its adversary to cease a course of conduct in violation of the rules of warfare: and with the exception of one limited prohibition in the Mines Protocol on reprisals directed against the civilian population as such, the Conference did not further restrict this traditional remedy. In view of this, and of other remedies which may be available in the event of violation, further compliance provisions of the type customarily sought in arms control negotiations were not thought necessary to protect Western interests.

1980 U.S. Delegation Report 16. The Report of the Conference to the General Assembly supports this conclusion more subtly in its explanation of the reference to "other" obligations in Article *2:*

> The reference to "other" obligations was thought appropriate because, although the Convention and its Protocols consist primarily of new prohibitions or restrictions which will bind Parties in the future, there are also certain provisions restating existing international obligations.

U.N. Doc. A/CONF.95/9, para. 5, at **3.** Although the negotiating record is to the contrary, the phrase "in all circumstances," in Article *2* of the incendiaries protocol, Protocol III, might appear to prohibit reprisals, even though there is no express prohibition on reprisals in that protocol. The Report of the Incendiaries Working Group establishes that the phrase was limited to the restrictions contained in Articles 51(2) and 52(1) of Additional Protocol I to the 1949 Geneva Conventions:

> It was the understanding of the Working Group that the phrase "in any [sic] circumstances", which is contained in paragraphs 9 and 10 [Articles 2(1) and 2(2) of Protocol III], was intended as reinforcing language for the restrictions contained in those rules. Addition of the phrase was not intended to suggest any modification of the general prohibition on attack of the civilian population as such, or individual civilians, contained in Article 51(2) of Additional Protocol I, or of civilian objects, as stated in Article 52(1) of Additional Protocol I; that is, use of the words "in any [sic] circumstances" in the restrictions on the use of incendiary weapons stated in paragraphs 9 and 10 was not intended to imply that there are circumstances in which the civilian population as such, individual civilians, or civilian objects may be attacked with other weapons. Nor was the expression "in any [sic] circumstances" intended to prevent civilians from losing the protection by those rules, if they take a direct part in hostilities.

U.N. Doc. A/CONF.95/CW/6, para. 9, at 3. Explicit prohibitions against reprisals are contained in Articles 51(6) and 52(1) of Additional Protocol I, but not in the incendiaries protocol, and thus may not be inferred to have been intended by the drafters of the incendiaries protocol.

The phrase "in *any* circumstances" was changed by the Drafting Committee to "in *all* circumstances" to bring it into line with the terminology of Article 51(1) of Additional Protocol I. *Compare* U.N. Doc. A/CONF.95/14/Add.4, Text of Protocol III as agreed to by the Drafting Committee, at 4, *with* U.N. Doc. A.CONF.95/C-W/6/Add.1, Report of the Working Group on Incendiary Weapons. at 2. The phrase "in any circumstances" is not used at all in Additional Protocol I, which "in all circumstances" is consistently used there in similar contexts; the same may be said of the mines protocol.

those prohibitions.[189]

IV. NON-DETECTABLE FRAGMENTS

Protocol I to the Conventional Weapons Convention provides *in toto:* "It is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays." This new rule would seem to articulate in broader terms the generally accepted view that "using clear glass as the injuring mechanism in an explosive projectile or bomb is prohibited, since glass is difficult for surgeons to detect in a wound and impedes treatment."[190] Although a new rule, the protocol is a more specific application of the basic rules prohibiting the employment of arms, projectiles or material of a nature to cause superfluous injury[191] or calculated to cause unnecessary suffering.[192] Consequently, this rule does not codify existing customary law but rather develops the basic rules.

It has been asserted that this Protocol I bans nonexistent weapons;[193] it thus found easy acceptance at the Diplomatic Conference on Humanitarian Law and at the United Nations Conference on Certain Conventional Weapons. That may well be true, because Protocol I does not prohibit

> the use, for instance, of plastic casing for mines or shells unless the primary effect [is] to injure by fragments of

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[189] In other words, it should be possible to invoke the customary law if reprisals using incendiary weapons become necessary, provided that the general right to take reprisals against the civilian population is not renounced by the acceptance without reservation of Article 51(6) of Additional Protocol I.

[190] U.S. Dep't of Air Force, Pamphelt No. 110-34, Commander's Handbook on the Law of Armed Conflict. para. 6-2a(2), at 6-1 (1980). *Accord* U.S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 34b (1956); U.S. Dep't of Navy, Information Pamphlet No. 10-2, Law of Naval Warfare, para. 600 n.2 (1955); British Manual on Military Law, Part III, para. 110 (1958). *But cf.* U.S. Dep't of Air Force, Pamphlet No. 110-31, para. 6-3b(2) International Law—The Conduct of Armed Conflict and Air Operations, (1976) ("usage and practice has. . . determined that it is *perse* illegal to use projectiles filled with glass or other materials inherently difficult to detect medically").

[191] Article 23e of the Regulations annexed to the Convention with respect to the laws and customs of war on land, July 29, 1899, 32 Stat. 1803, T.S. 403, 1 Bevans 247.

[192] Article 23e of the Regulations annexed to the Convention respecting the laws and customs of war on land, October 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631. Sandoz, *Unlawful Damage, supra* note 3, at 150, properly notes that Protocol I "is the expression, in a particular case, of the principle that the purpose of a weapon must not be to prevent the care and healing of the wounds it creates." The 1899 and 1907 versions of this rule are combined in Additional Protocol I article 35(2) prohibiting the employment of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

[193] Fenrick, *The CUSHIE Weapons Treaty, supra* note 87, at 27; N.Y. Times, Oct. 10, 1980, at A3, col. 4. *See also* Sandoz, *A New* Step, *supra* note 65, at 11; Sandoz. *Unlawful Damage, supra* note 3, at 150.

> such casing rather than by the blast effect of the weapons. . . . [Protocol I is] not concerned with components in some weapons which might as an incidental effect of the use of such weapons enter the human body and be undetectable by X-ray.[194]

All participants in the Diplomatic Conference on Humanitarian Law agreed that by this prohibition "they were concerned only with those weapons which were ***designed*** to injure by such fragments."[195]

In contrast to this more limited yet traditional rule, the original proposal by Switzerland and Mexico at the 1976 Lugano Weapons Experts Conference was more comprehensive: "The use of weapons producing fragments which in the human body escape detection by the usual medical methods shall be forbidden."[196] The Swiss delegate explained that the main purpose of this proposal

> was to reduce needless suffering. Fragments which were not removed from the human body in time could cause severe medical complications that were not justifiable on the ground of military requirements. Moreover, fragments of material consisting solely or mainly of atoms of low weight, such as wood, glass and particularly plastic, could only be detected with difficulty, if at all, by the X-ray equipment that was generally used in wartime. Those were the very materials that were often used in modern weapons, for instance in mine casings so that mines could not be discovered by detectors. The intention was not to prohibit such weapons but simply to eliminate some of their effects. That could be done by adding atoms of higher weight to the materials in question to render fragments detectable by X-ray but not by mine detectors. Thus, the balance between military needs and humanitarian requirements would be achieved.[197]

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[194]Report of the Working Group, Committee IV, Diplomatic Conference on Humanitarian Law, CDDH/IV/224/Rev.1, paras. 8 & 9, annexed to the Report of Committee IV, CDDH/408/Rev.1, *in* 16 *Official Records* 526.527. *Contra* Szasz, *supra* note 43. at 212-13.

[195]Report of the Working Group, *supra* note 194, at para. 9 (emphasis added). As noted in the Report of the U.S. Delegation to the second session of the Weapons Conference, "the proposal does not, however, preclude non-metallic casing materials or other parts or components which are not designed as the primary wounding mechanism." 1980 U.S. Delegation Report, *supra* note 54. at 5 (1980).

[196]COLU/212 *in* ICRC, *Report of Conference of Government Experts on the Use of Certain Conventional Weapons, 2d sess. Lugano, 1976*, Annex B.11. at 188 (1976).

[197]CDDH/IV/SR.31, para. 32, 16 *Official Records* 327. See also CDDH/IV/SR.25, paras. 2-5 16 *Official Records* 253-54 (statement of swiss delegate).

Although there was general agreement that it was desirable to prohibit munitions designed to wound by means of fragments made of materials such as glass and plastic, several experts criticized this original proposal as being unclear in its references to "producing"[198] and to "usual medical methods."[199] As a result of ensuing discussions, the cosponsors modified their draft to read as first quoted above. This modified proposal received wide support at the Diplomatic Conference on Humanitarian Law in 1976 and 1977, was widely cosponsored at the Conventional Weapons Conference in 1979, was the subject of no opposition at that Conference, and was the first protocol adopted by the Weapons Conference in 1980.

The phrase "not detectable by X-ray in the human body" is still not without ambiguity. For example, what standard of X-ray technology is to be applied: advanced, latest technology, or that found at the field hospital? Or are there no relevant differences in X-ray technology? It is submitted that the standard should be a reasonable one, involving those X-ray machines located nearest the battle area where most battlefield shrapnel wounds are first photographed by X-ray.

If so, then whose level of technology is to be applied: a common standard applicable to all belligerents, or to the belligerents in a particular conflict? Or is the standard to be national only, and if so, is it to be the standard of the country of manufacture, of the user, of the location of use, or of the injured enemy? From a humanitarian perspective, it should be the last mentioned, since it is the enemy who will usually have to treat such wounds. From the perspective of the user, however, who falls into the hands of that enemy and is charged with violating this rule, he would prefer to rely on his own country having established, in its legal review of the weapon,[200] that those fragments were detectable by the X-ray machines most likely to be used in treatment of the wounds by his own country. It would seem some-

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[198] Some felt that "producing" would place

> excessive restrictions on weapons which, by chance rather than intent, sometimes gave rise to wounds in which the fragments could not subsequently be detected: it was convenient, for example, to use plastic parts rather than metal ones in some munitions.

Report of the General Working Group, *Luguno Conference of Government Experts, supra* note 196, para. 78, at 122. Australia proposed to accommodate this criticism by substituting for the word "producing" the words "which rely for their injurious effect on." COLU/216 *in* id., Annex B.15, at 190.

[199] Some felt that "medical methods which might be usual in one country might be unavailable in another." Report of the General Working Group, *supra* note 198, para. 79, at 123.

[200] As required by article 36 of Additional Protocol I and, for the United States, by Department of Defense Instr. 5500.15, Review of Legality of Weapons Under International Law (16 Oct. 1974).

what unfair to require the weapons-developing countries to know what the enemy's field X-ray capability is, if the enemy was even identified or his future capability known at the time the weapon was developed.

Another problem could be that of shadowing. If a fragment otherwise normally detectable by X-ray is, viewed from the perspective of the X-ray gun, located *behind* another object such as a bone, only that bone will likely show up on the exposed X-ray film and the shrapnel fragment will then be hidden in the bone's shadow. It cannot reasonably be argued in that circumstance that otherwise unprescribed fragments are forbidden simply because of their chance location in the shadow of other X-ray detectable matter within the human body. What certainly was intended by this rule was to prohibit fragments that would *not* absorb sufficient X-rays if directly exposed to them to show up on a X-ray film. The rule certainly was not designed to apply when the fragment was hidden from the X-rays by something else more absorbent of X-rays.

One can imagine, perhaps, that, a country might now wish to develop a projectile less trackable by radar. Such would seem to be permissible under Protocol I, provided that the projectile's fragments designed to injure persons were detectable by X-ray under "normal battlefield treatment conditions" as suggested above. Otherwise, one can imagine allegations of violations of Protocol I simply because the projectile was not detectable by the much lower frequencies of radar.[201] This question was not considered at the Conventional Weapons Conference. Nevertheless, it would seem to be technologically feasible to insure that those fragments of any material are of such density and/or chemical composition as to be detectable by X-ray.

The foregoing discussion illustrates that this seemingly innocuous one sentence protocol does develop the law. Yet at the same time the protocol is not clear as to its scope and application. On the other hand, the fragments protocol, on examination, has some particular substance and utility. It should provide some guidance to and provide some restraint upon the development of certain weapons. Nevertheless, its true scope and effect will necessarily be determined by the practice of nations in applying this protocol to actual situations.

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[201] Radar and X-rays are on opposite sides of the electromagnetic spectrum from light waves. Radar uses frequencies between 10^6 and 10^{12} Hertz, visible light between $4x10^{14}$ and $8x10^{14}$ Hertz, and X-rays from about 10^{16} to 10^{19} Hertz.

THE LAW OF LAND MINE WARFARE: PROTOCOL II TO THE UNITED NATIONS CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

by Lieutenant Colonel Burris M. Carnahan*

I. INTRODUCTION

Until recently, international law gave little guidance on the proper use of land mines and booby traps in armed conflict. Despite the widespread use of these weapons since World War I, land mines and booby traps have remained "neglected stepchildren" in the modern law. Thus, the 1907 Hague Regulations on Land Warfare[1] did not mention land mines, even though the use of mines at sea became the subject of the VIII Hague Convention, negotiated at the same international conference.[2] Similarly, and in contrast with more controversial arms such as poison gas, napalm and nuclear weapons, the land mine has attracted almost no attention from writers on the law of armed conflict.[3] Of the recent treatises, only that of Morris Greens-

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This paper represents an independent effort on the part of the author and was not undertaken in connection with his position as an officer of the United States Air Force. He has not had special access to special information or ideas and has employed only open-source material available to any writer on this subject. The views and conclusions expressed are those of the author. They are not intended and should not be thought to represent official ideas, attitudes or policies of any agency of the United States Government.

[1]Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, 18 October 1907, 36 Stat. 2277, T.S. 539.

[2]Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, 18 October 1907, 36 Stat. 2332, T.S. 541.

[3]*See, e.g.*, M. McDougal & F. Feliciano, Law and Minimum World Public Order (1961); 2 L. Oppenheim, International Law (7th ed. H. Lauterpacht 1952); 2 G. Schwarzenberger, International Law as Applied by International Courts and Tribunals (3d ed. 1968). These standard works all discuss the law of mine warfare at sea but contain no mention of mine warfare on land. Curiously, of the United States military publications on the law of armed conflict, only the Air Force pamphlet mentions land mine warfare. U.S. Dep't of the Air Force, Pamphlet No. 110-31, International Law—The Conduct of Armed Conflict and Air Operations, para 6-6d (1976).

pan even considers whether the use of land mines might be subject to any special rules. Greenspan concluded that land mines might lawfully be used as a defensive weapon, "used to protect a defensive position or by a retiring force to delay pursuit by the enemy."[4] When used as an offensive weapon, however, "such mines would be open to objection, as, for instance, when laid by a raiding force in enemy territory, since generally there would be no way of ensuring that they would not injure or kill persons...protected by the law from attack."[5] In his view, offensive mines would be considered "indiscriminate" weapons.

The concerns expressed by Professor Greenspan finally became the subject of serious negotiation at the Geneva Diplomatic Conference on Humanitarian Law, which met from 1974 to 1977 and produced two Additional Protocols to the 1949 Geneva Conventions on War Victims.[6] At the request of several delegations, the Conference formed an *ad hoc* committee on weapons to consider, among other issues, the creation of new limitations on the use of land mines and booby traps.[7] In support of the committee's work, the International Committee of the Red Cross convened two meetings of government experts on weapons, one at Lucerne in 1974 and the second at Lugano in 1976.[8]

4M. Greenspan, The Modern Law of Land Warfare 363 (1959).

5*Id.*

6Int'l Committee of the Red Cross, Protocols Additional to the Geneva Conventions of 12 August 1949 (1977), *reprinted* in 16 Int'l Legal Materials 1391 (1977); 72 Am. J. Int'l L. 457 (1978). The first Protocol is hereinafter cited as the 1977 First Protocol. The 1949 Geneva Conventions on War Victims are The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter citedas the First Geneva Convention]; The Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12,1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as the Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in time of War, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; The Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as the Fourth Geneva Convention]. The delegates to the Weapons Conference uniformly turned to the 1949 Geneva Conventions and the 1977 Protocols for definitions, terminology and basic principles of law. The 1949 Conventions and the 1977 First Protocol are therefore to be considered *in para materia* with the Land Mines Protocol.

7*See* the Reports of the Ad Hoc Committee, 16 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 453 (1978)[hereinafter cited as Official Records].

8*See* Int'l Committee of the Red Cross, Conference of Government Experts on the Use of Certain Conventional Weapons (1976); Int'l Committee of the Red Cross, Reports on the Work of the Conference of Government Experts on the Useof Certain Conventional Weapons (temp. ed. 1974) [hereinafter cited as Lucerne Report].

The sudden interest in restricting land mines and other "delayed action weapons" arose for both political and technical reasons. Politically, the rise of international terrorism in the 1960s and 1970s stimulated efforts to curb some of the terrorists' favorite weapons, booby traps and time bombs. On the technical side, the development of remotely delivered mines caused new concern that "offensive" mines might be used indiscriminately.

The 1977 Diplomatic Conference was not, however, able to successfully conclude any agreements on specific conventional weapons; in the end this subject was passed to the United Nations General Assembly.[9] The Assembly took up these issues by convening the Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May by Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The Conference held two sessions, in 1979 and 1980, at the United Nations European Headquarters in Geneva, Switzerland. It was preceded by two Preparatory Conferences, which met in 1978 and 1979. Eighty-five nations participated in the Conference, including all the major military powers.[10]

At both the Preparatory Conference and the Conference, work on land mines and booby traps was referred to a working group, which used a draft prepared by the United Kingdom as a starting point for negotiations. The end result was the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II).[11]

11. THE NATURE OF THE THREAT

Unlike ordinary munitions, land mines and booby traps are not designed to explode when they approach the target. They are, instead, designed to lie dormant until enemy vehicles or personnel approach them. While most munitions are intended primarily to destroy enemy property or personnel, land mines are, in contrast, used primarily to impede enemy access to certain areas of land by requiring mine clearance before those areas are used. Militarily, minefields are similar to ditches, tank traps, and concertina barbed

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[9] *See* Conference Resolution 22(IV), *Follow-Up Regarding Prohibition of Restriction of the Use of Certain Conventional Weapons,* 1 Official Records, pt. 2, at 52.

[10] *See* G. Aldrich, Report of the United States Delegation to the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects—Second Session (1981). The first session is briefly described in Szaz, *The Conference on Excessively Injurious or Indiscriminate Weapons,* 74 Am. J. Int'l L. 212 (1980).

[11] The Land Mines Protocol is *reprinted in* 19 Int'l Legal Materials 1534 (1980).

wire in that they are obstacles to enemy movement. Their casualty-producing effects are secondary to this primary effect.[12]

The threat which land mines pose to civilians has two dimensions: a *geographic* dimension and a *temporal* dimension. The geographic dimension arises from the danger that mines will be emplaced in an area containing a concentration of civilians or that civilians will enter an area where mines have been laid. The temporal dimension arises from the danger that mines and minefields might not lie cleared after their military utility has ceased and that they will therefore present a threat to civilians for years and even decades after the armed conflict has ended.[13] The Land Mines Protocol addresses both dimensions of the problem. Before examining these provisions in detail, however, it is appropriate to look briefly at the question of who is to be protected against these dangers.

111. PERSONS BENEFITING FROM THE PROTOCOL

Most of the articles in the Land Mines Protocol are intended to protect civilians and the civilian population. While the Protocol does not define the terms "civilian population," these terms are defined in Article 50 of the 1977 First Protocol to the Geneva Conventions. The "civilian population" is therein defined as comprising "all persons who are civilians" and a civilian is defined as anyone who is not a member of the armed forces of a party to the conflict. "Armed Forces" includes all organized forces, groups and units under the command of a person or group responsible to a Party to the conflict for the conduct of subordinates,[14] including militia, volunteer corps, organized resistance groups and members of a *levee en masse.*[15] Further, it was the understanding of the Working Group on Land Mines and Booby Traps that civilians who take a direct part in hostilities are not protected by the Land Mines Protocol.[16]

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[12] *See* Lucerne Report, para **229;** Alder, *Modern Land Mine Warfare,* 6 Armada International **6 (1980).**

[13] On December 5, **1980,** the **UN** General Assembly adopted Resolution **35/71, Problem** *of Remnants of War,* ____ U.N. GAOR ____, U.N. Chronicle, March, **1981,** at 52. The Resolution recongizes "that the presence of material remnants of war, particularly mines, on the territories of certain developing countries seriously impedes their development efforts and entails loss of life and property." The Resolution was pushed by Libya, which has had several civilian casualties resulting from mines emplaced during World War II.

[14] 1977 First Protocol, art. **43.**

[15] Third Geneva Convention, art. **4A.**

[16] *See* Report of the Working Group on Landmines and Booby Traps, ____ U.N. GAOR ____, **U.N.** Doc. A/CONF./CW/7 **(1980)** at 3; Report of the Conference to the General Assembly, ____ **U.N.** GAOR ____, U.N. Doc. A/CONF.95/8 (1979), at 18 [hereinafter cited as **1980** Working Group Report and **1979** Conference Report, respectively].

Article 50 of the 1977 First Protocol further states, however, that the "presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character." Presumably, the same principle applies to the Protocol on Land Mines, Booby Traps and Related Devices.

While most of this Protocol is intended only to protect civilians, certain provisions have been included which protect members of United Nations missions and peacekeeping forces.[17] Such missions and forces have, in the past, often been endangered by land mines and booby traps. Express mention of them in the Land Mines Protocol marks an important innovation in the law of armed conflict; previously, the only persons protected by that law were civilians, medical personnel, chaplains, and the sick and wounded.

Finally, it should be noted that this Protocol is not intended to interfere with the existing laws of mine warfare at sea. Article 1 limits the Protocol's material scope of application as follows: "This Protocol relates to the use on land of mines, booby-traps and other devices defined herein, including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways."[18] The Protocol does not, therefore, protect persons who might be endangered by naval mines.

IV. GEOGRAPHIC PROTECTION

General protection for the civilian population against the effects of land mine warfares is embodied in Article 3 of the Protocol. This article forbids the Parties to "direct" land mines, booby-traps, and "other devices"[19] against the civilian population or individual civilians. It further requires the Parties to take "all feasible precautions"[20]

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[17] Land Mines Protocol, art. 8.

[18] *Id.*, art. 1. *See* 1980 Working Group Report at 2; 1979 Conference Report at 17. Mine warfare at sea is governed by the Hague Convention VIII of 1907.

[19] The Land Mines Protocol, art. 2 defines these terms as follows:

> 1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.
>
> 2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person distributes or approaches an apparently harmless object or performs an apparently safe act.
>
> 3. "Other devices" means manually-emplaced munitions and devices

to protect civilians from these weapons, and prohibits their "indiscriminate" use. Indiscriminate use is defined as any placement of the weapons:

> (a) which is not on, or directed at, a military objective; or
> (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
> (c) 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.[21]

All of these provisions draw heavily on Articles 51 and 57 of the 1977 First Protocol to the Geneva Conventions and may be thought of as an adaption of those Articles to the peculiarities of land mine warfare.[22]

The term "military objective" includes, insofar 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, in the circumstances ruling at the time, offers a definite military advantage."[23] This defi-

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designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

Note that delayed action bombs, which are dropped from aircraft and explode at a predetermined time after impact, are not included in any of these definitions, and thus are not regulated by the Land Mines Protocol. Article 3, para. 2, prohibits directing mines and booby-traps against civilians "in all circumstances" even "by way of reprisals." This paragraph is the only limitation in the Land Mines Protocol on this traditional means of enforcing the law of armed conflict. The other rules in this Protocol would, then, be subject to selective violation for individual acts of reprisal under customary international law. This is not to say, however that the entire Protocol could be suspended indefinitely in response to any enemy violation of it. While violation of a treaty by one party generally gives any other party affected thereby the power to suspend its compliance with the treaty, there is a growing consensus that this principle should not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character." Vienna Convention on the Law of Treaties, art. 60, para. 5, 8 Int'l Legal Materials 679 (1969). With regard to treaties limiting the use of specific weapons in armed conflict, the eminent authority on reprisals, Dr. Frits Kalshoven, remarked shortly before the Conference that a "complete prohibition on reprisals in this sensitive field of the law of warfare seems hardly probable nor, perhapseven desirable: after all, recourse to reprisals represents a less severe measure than the unmitigated operation of the principle of reciprocity." Kalshoven, *Belligerent Reprisals in the Light of the 1977 Geneva Protocols.* in European Seminar on Humanitarian Law 31, 43 (1979).

[20] "Feasible precautions" are those which "are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." Land Mines Protocol, art. 3, para. 4.

[21] Land Mines Protocol, art. 3, para. 3.

[22] *See* 1980 Working Group Report at 3, 1979 Conference Report at 18.

[23] Land Mines Protocol, art. 2, para. 4.

nition is drawn from the 1977 First Protocol.[24] It is clear, from the reference to the placement of mines "on" a military objective, that an area of land can be a military objective. Indeed, the ordinary use of land mines is to "neutralize" an area which is a military objective by denying the enemy access to it. Article 3 of the Mines Protocol may thus also clarify the meaning of the term "military objective" in the 1977 First Protocol.[25]

V. REMOTELY DELIVERED MINES

In the future, most land mines will probably not be laid by hand; they will, rather, be rapidly scattered from aircraft or by rockets or artillery. The West German 110SF multiple rocket launcher can, for example, emplace a minefield up to fourteen kilometers from the launch site, and the Italian SY-AT system allows a helicopter to drop up to 160 anti-tank mines or **2496** anti-personnel mines, or a combination of the two.[26] Other systems, such as the American CBU-89/B GATOR, allow mines to be dropped from high-speed military aircraft.[27] The result of this new technology is that a minefield which, only a few years ago, might have required up to eight hours work by a full company of troops can now be laid in minutes.[28] Another consequence is that minefields can now be emplaced far behind the enemy's own lines. It should be obvious that these systems will play an increasingly important role in the defense of Western Europe against armored attack.

The Protocol refers to these new weapons as "remotely delivered mines," defined as any mine, "delivered by artillery, rocket, mortar or similar means or dropped from an aircraft."[29] The use of remotely

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241977 First Protocol, art. **52,** para. **3.**

[25]The government of the United Kingdom signed the **1977** First Protocol on the basis of an understanding "that a specific area of land may be a military objective if, because of its location **or** other reasons.. .its total **or** partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage." U.S. Dep't of the Army, Pamphlet No. **27-1-1,** Protocols to the Geneva Conventions of **12** August **1949,** at **140 (1979).** The United States is considering making a similar understanding on ratification. In any event, the United states agrees with the substance of the British understanding.

[26]*See* Alder, ***supra*** note **12,** at 8. ***See also*** Lucerne Report, para. **234-35.**

[27]*See* Alder, ***supra*** note **12,** at **10.**

[28]The Western Europe **MWI** system, for example, which will be carried by the Tornado fighter-bomber, can create an anti-tank minefield measuring 500 meters by **2500** meters while flying at an altitude of about 50 meters. ***See*** Honnig, ***Can Western Europe be Defended by Conventional Means?,*** **12** Int'l Defense Rec. **27, 30 (1979).**

[29]Land Mines Protocol, art. **2,** para. **1.** The term "aircraft" includes helicopters, drones, remotely-piloted vehicles and balloons in addition to fixed-wing aircraft. **1980** Working Group Report at **2; 1979** Conference Report at 18. It should again be noted that delayed-action bombs are not within the definition of remotely delivered mines.

delivered mines was the subject of much discussion at the Conference, primarily due to the fear that they might be indiscriminately laid so as to endanger the civilian population. A few delegations wanted to ban their use entirely, purportedly on humanitarian grounds, but also in the belief that such a ban would work to the advantage of the technologically less advanced nations. The opponents of remotely delivered mines ultimately surrendered their position in exchange for an express understanding that all of the general restrictions on mine warfare in Article **3** also applied to remotely delivered mines.[30]

In addition to the general restrictions in Article **3,** Article **5** contains certain special limitations on the use of remotely delivered mines. It is thus prohibited to use these weapons except "within an area which is itself a military objective or which contains military objectives." This language reinforces the argument that an area of land can itself be a military objective under both the First Protocol of 1977 and the Land Mines Protocol of 1980. Paragraph **2** of Article **5** also requires that "effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit." This language is taken from the 1977 First Protocol to the Geneva Conventions.[31] Among the "circumstances" which might not permit prior warning would be the necessity for tactical surprise or guarding the safety of the aircraft dropping remotely delivered mines.

Curiously, the Protocol does not require that the civilian population be warned *after* remotely delivered mines have been emplaced if circumstances did not permit warning *before* emplacement. This omission is surprising since a warning may often be feasible dfter emplacement, even though the safety of the aircraft delivering mines would not permit prior warning. Subsequent warning under these circumstances would, however, usually be required by Article **3,** Paragraph **4** which states that "all feasible precautions shall be

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[30] *See* Report of the Committee of the Whole, ___ U.N. GAOR ___, U.N. Doc. A/CONF.95/11 (1980), at **2;** 1980 Working Group Report at 7; 1979 Conference Report at **20.**

[31] "Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit." 1977 First Protocol, art. 57, para. 2(c). The drafters of the Land Mines Protocol obviously assumed that the dropping of remotely delivered mines on a target is an "attack" in the same sense that dropping conventional munitions on that target would be. Article **57,** para. 2(c) is itself an adaption of Article **26** of the 1907 Hague Regulations on Land Warfare, which provides that "the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities" of a city under a siege.

taken to protect civilians from the effects of weapons to which this Article applies."

VI. RESTRICTIONS ON OTHER MINES, BOOBY TRAPS AND DEVICES

With regard to mines which are not "remotely delivered," as well as to booby traps and "other devices," Article **4** prohibits their use in "any city, town, village or other area containing a similar concentration of civilians."[32] This prohibition is, however, subject to exceptions which remove much of its apparent force.

First, Article **4** does not apply to towns, villages, and cities where combat between ground forces is taking place or where it "appears imminent." Even if ground combat is not imminent, mines, booby traps, and other explosive devices may still be used "on or in the close vicinity of a military objective belonging to or under the control of an adverse party."[33] This would, for example, permit the destruction of an enemy military objective, located in a city, by a commando force using demolition charges. Alternatively, the raiders could lawfully place mines or booby traps around the objective to prevent its use.

Finally, mines, booby traps, and "other devices" may be used in concentrations of civilians if "measures are taken to protect civilians from their effects," such as "the posting or warning signs, the posting of sentries, the issue of warnings or the provisions of fences."[34] At the Preparatory Conference, this rule had been put forward as a requirement that either "effective" precautions be taken to protect civilians or that "all feasible" precautions be taken to this end. The Soviet Union opposed the first of these formulations on the ground that it was too inflexible and might amount to a guarantee that no civilian would ever be injured by the mines, booby traps, and other devices covered by Article **4.** The Western powers, on the other hand, opposed the "all feasible" language as allowing too little weight to humanitarian factors, since military commanders could justify taking no measures at all to protect civilians by finding that none were "feasible" under the circumstances. The present compromise language requires that *some* measures be taken to protect civilians, but does not guarantee the "effectiveness" of the measures. Some delegations believed that guerilla fighters could meet the requirements of

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[32] Since the purpose of this rule is to protect civilian persons, Article **4** probably does not apply to abandoned or uninhabited cities, towns and villages. For the definition of "other devices," *see* note 19 *supra.*

[33] Land Mines Protocol, art. **4,** para. **2.**

[34] *Id.* at art **4,** para. 2(b).

this rule by orally informing the civilian population of the location of mines and booby traps, without disclosing the location of these munitions to enemy troops.

VII. TEMPORAL PROTECTION

As noted above, land mines present a unique threat to civilians in that they may not detonate until long after the land where they have been laid has lost its military significance, perhaps even decades after the end of the war which caused the emplacement of the mines. By that time the location of the minefield may be entirely forgotten, endangering civilians who innocently enter it. To deal with this long-term threat, the Protocol has several provisions which are intended to facilitate and encourage the clearance of minefields after the end of the conflict.

Thus, the Parties to a conflict should, "whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines and booby traps, particularly in agreements governing cessation of hostilities."[35] Article 9 further states:

> After the cessation of active hostilities, 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 in appropriate circumstances, joint operations necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.[36]

Professor Georg Schwarzenberger has castigated "rules" of this type as "merely formal" and "purely admonitory," "the most questionable variant of the rules of warfare," whose true purpose is not to "safeguard the minimum standard of civilization" but rather to

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[35] *Id.* at art. 7, para. 3(c).

[36] *Id.* at art. 9. As to the scope and content of agreements under Article 9:

> The Working Group agreed that in agreements concluded pursuant to this Protocol, the parties should, where appropriate, provide information to facilitate the removal or neutralization of mines, minefields and booby-traps. Such information could include, for example, in addition to the information contained in the Technical Annex, the type of mines (whether anti-tank or anti-personnel); the type of booby-traps; the number of mines within a given minefield; the number of booby-traps within a given booby-trapped area; and the presence or absence of anti-handling devices. 1980 Working Group Report at 8.

"cover up the inability or unwillingness to achieve this object."[37] Provisions for clearing land mines are, nevertheless, common in armistices and agreements ending hostilities. The recent peace treaty between Egypt and Israel provided, for example, that as they withdrew from the Sinai, Israeli forces would make their "best effort to remove or destroy all military barriers, including. . ,minefields" from areas they abandoned.[38] First priority was to be given to mines near populated areas, roads and utilities. Any mines or barriers not cleared would be identified to Egypt and the United Nations and "detailed maps" of them would be provided.

Earlier, the 1953 Armistice Agreement ending the Korean war provided that all "demolitions, minefields, wire entanglements and other hazards" be removed from the Demilitarized Zone within forty-five days of the ceasefire.[39] The 1973 Paris Agreement ending the war in Vietnam similarly provided:

> (a) Within fifteen [after] days the cease-fire comes into effect, each party shall do its utmost to complete the removal or deactivation of all demolition objects, minefields, traps, obstacles or other dangerous objects placed previously, so as not to hamper the population's movement and work in the first place on waterways, roads and railroads in South Vietnam. Those mines which cannot be removed or deactivated within that time shall be clearly marked and must be removed or deactivated as soon as possible.
>
> (b) Emplacement of mines is prohibited, except as a defensive measure around the edges of military installations in places where they do not hamper the population's movement and work, and movement on waterways, roads and railroads. Mines and other obstacles already in place at the edges of military installations may remain in place if they are in places where they do not hamper the population's movement and work, and movement on waterways, roads and railroads.[40]

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[37] 2 G. Schwarzenberger, International Law as Applied by International Courts and Tribunals 11 (1968).

[38] Treaty of Peace Between Egypt and Israel, Annex I, Appendix art. VI, para. 4, *signed* March 26, 1979, 18 Int'l Legal Materials 362, 383 (1979).

[39] Agreement concerning a Military Armistice in Korea, July 27, 1953, art. II, para. 13a, 4 U.S.T. 234, T.I.A.S. No. 2782.

[40] Protocol to the Agreement on Ending the War and Resorting Peace in Vietnam, Concerning the Cease-fire in South Vietnam and the Joint Military Commissions, January 27, 1973, art. 5, 24 U.S.T. 148, T.I.A.S. No. 7542.

VIII. RECORDING REQUIREMENTS

Aside from the rather hortatory provisions in Articles 7(c) and 9, the Protocol requires that the location of all "preplanned" minefields be recorded, as well as the location of all areas in which the Parties to the conflict have made "large scale and preplanned" use of booby traps.[41] The parties are to "endeavor" to record the location of minefields, mines and booby traps which were not "preplanned."

Unfortunately, the Protocol does not define the term "preplanned." This concept was the subject of little formal debate at the Conference, though a few delegations did point out that there is, strictly speaking, no such word in English or the other official Conference languages. It is clear that the term was intended to refer to a degree of advance preparation beyond that covered by the word "planned." In a military sense, a "planned" minefield is one for which detailed efforts have been made to schedule, organize and program the minefield in advance of the actual execution of those efforts. Since "preplanned" means more than "planned," a "preplanned" minefield is, by its nature, one for which a detailed military plan exits considerably in advance of the proposed date of execution. Naturally, such a detailed military plan could not exist for the vast majority of minefields emplaced during wartime. In the heat of combat many minefields will be created to meet immediate battlefield contingencies with little "planning" or "preplanning."

Virtually all preplanned minefields will be those for which detailed military plans have been written long before the outbreak of hostilities. Needless to say, the mere fact that an operations plan or contingency plan mentions the possibility that mines might be used in certain contingencies does not make any resulting minefields "preplanned."

Note that the Protocol only requires recording the *location* of preplanned minefields. There is no requirement that the composition of the minefield be recorded, or the pattern in which the mines were laid. Neither is there any obligation to record the location of individual mines within the minefield. At the insistence of one delegation, the Working Group on Land Mines drafted a nonbinding technical annex containing guidelines on recording. This annex serves to "flesh out" the obligation to record:

> Whenever an obligation for the recording of the location of minefields, mines and booby-traps arises under the Pro-

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[41] Land Mines Protocol, art. 7, para. 1.

tocol, the following guidelines shall be taken into account.

1. With regard to pre-planned minefields and large-scale and pre-planned use of booby traps:

(a) maps, diagrams or other records should be made in such a way as to indicate the extent of the minefield or booby-trapped area; and
(b) the location of the minefield or booby-trapped area should be specified by relation to the co-ordinates of a single reference point and by the estimated dimensions of the area containing mines and booby-traps in relation to that single reference point.

2. With regard to other minefields, mines and booby-traps laid or place in position:
In so far as possible, the relevant information specific in paragraph 1 above should be recorded so as to enable the areas containing minefields, mines and booby-traps to be identified.[42]

While these guidelines are not legally binding, if a party to the conflict complies with them it can at least be confident that it has met all its legal obligations to record the location of minefields under Article 7.[43]

XI. DISCLOSURE

"After the cessation of active hostilities" the parties to a conflict are to "make available to each other and the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby traps in the territory of the adverse party."[44] These disclosures are intended to facilitate clearance of the minefields. The notification is to take place "immediately" provided that "the forces of neither parts are in the territory of the adverse party." This last phrase is a euphemism for belligerent occupation of enemy territory; the term "occupation" is currently out of favor with some nonaligned states who, for various reasons, do not recognize that their territories can ever be occupied by an enemy power which would thereby acquire rights over the population of the occupied territory. There is also some belief among these nations that

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[42] *Guidelines on* ***Recording,*** Technical Annex to the Land Mines Protocol.
[43] ***See*** G. Aldrich, *supra* note 10, at 8, 96.
[44] Land Mines Protocol, art. 7, para. 3(a).

all occupations are the product of illegal aggression. In response to the sensitivities of this faction, the Conference adopted the circumlocution quoted above. When an occupation continues after cessation of hostilities, the location of mines, minefields, and booby-traps will be disclosed "once complete withdrawal of the forces of the parties from the territory of the adverse party has taken place."

The draft produced by the Preparatory Conference would have called upon a nation whose territory is partially occupied by enemy forces at the close of hostilities to reveal the location of any minefields left behind in the occupied area.[45] The purpose of such disclosure was to facilitate clearance of the minefields as a means of protecting the civilian population. This provision also ran into opposition. Some delegations refused to recognize even the theoretical possibility that hostilities could cease while any part of their territory remained occupied. Others were publicly aghast at the suggestion that they should have any communications with or reveal any information to a nation occupying part of their territory, even if the purpose of the communication was to protect their own civilians.

As a substitute, the Conference eventually adopted a compromise formulation drafted by Ambassador George Aldrich, head of the United States Delegation. This provision requires the parties to take "all necessary and appropriate measures. . .to protect civilians," including the use of their minefield records, immediately after cessation of active hostilities.[46] Arguably, this text creates a stricter standard than the proposal originally drafted by the Preparatory Conference. Construed objectively, the use of minefield records to protect civilians by "all necessary and appropriate measures" should include divulging the location of mines, minefields and booby-traps still in occupied territory. Unlike the text produced at the Preparatory Conference, the present provision is not subject to the "legitimate defense interests" of the party whose territory is occupied. However, due to the sensitivity surrounding such situations, the

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[45] Under draft Article 3, para. (3)(a)(iii), the parties to the conflict shall:

> Whenever it is possible to do so, having regard to their legitimate defense interest, make public after the cessation of active hostilities information concerning the location of minefields, mines and booby-traps in any parts of their own territory occupied or controlled by the forces of an adverse party.

Report of the Preparatory Conference for the 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, ___ U.N. GAOR ___ U.N. Doc. A/CONF.95/3 (1979), Annex II, at 7.

[46] Land Mines Protocol. art. 7, para. 3(a)(i).

conference did not discuss the implications of the present text for occupation situations, and it is not at all clear that the conference had intended to adopt a rule of disclosure stricter than that which had come out of the Preparatory Conference. A number of delegations were, in fact, concerned that the present wording weakened the

The disclosure requirements of Article 7, as well as the cooperation provisions of Article 9, are both triggered by the "cessation of active hostilities." This phrase was consciously lifted from Article 118 of the Third Geneva Convention on Prisoners of War. The first paragraph of that Article states that "prisoners of war shall be released and repatriated without delay after the *cessation of active hostilities."* One delegation at the Weapons Conference wanted to adopt a formal definition of this term, but the Working Group concluded that it was not feasibile to define it in a simple, straightforward manner.[48]

It does seem clear that the "cessation of active hostilities'' can begin long before a formal peace treaty enters into force, but also that it refers to something more than a temporary truce or ceasefire:

> Probably the phrase "cessation of active hostilities" in the sense of Article 118 refers not to suspension of hostilities in pursuance of an ordinary armistice which leaves open the possibility of a resumption of the struggle, but to a cessation of hostilities as the result of total surrender or of such circumstances or conditions of an armistice as render it out of the question for the defeated party to resume hostilities.[49]

Christiane Shields Delessert has examined Article 118 in detail and has similarly concluded that whether or not a particular truce,

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"These delegations accepted Article 7 only on the condition that the following interpretation be recorded as the "understanding of the Conference":

> Article [7](3)(a)(i) must be read in combination with Article [7](3)(c) and [9]. They are of universal application, irrespective of the whereabouts of opposing forces. The parties must take whatever measures are open to them to protect civilians wherever they are. They must use the records for this purpose by, for example, marking minefields or otherwise warning the civilian population of the dangers of mines and booby-traps. The parties may, if they wish, assist in this process by providing, either unilaterally, by mutual agreement, or through the Secretary-General of The United Nations, information about the location of minefields, mines and booby-traps.

1980 Working Group Report at 5; Report of the Committee of the Whole, ____ U.N. GAOR ____, U.N. Doc. A/CONF.95/11 (1980) at 2.

[48] 1980 Working Group Report at 2.

[49] 2 L. Oppenheim, International Law 613 (H. Lauterpacht 7th ed. 1952).

armistice or ceasefire is a "cessation of active hostilities" depends on the interpretation of the factual situation in each particular case. On the one hand, the parties to a conflict "cannot be expected to release their prisoners if there is some real danger that the enemy will renew hostilities;" on the other hand, a remote possibility of resumed future hostilities will not be sufficient to defeat the duty to release prisoners.[50] Similarly, under the Land Mines Protocol the parties cannot be expected to divulge the location of minefields if it is likely that those minefields will regain their tactical importance in the immediate future. On the other hand, there is no need to continue to endanger the civilian population on the basis of a purely speculative belief that hostilities might reopen in the far future.

Finally, it should be noted that the phrase, "cessation of active hostilities," refers to cessations which occur *after* the Land Mines Protocol enters into force for the parties to the conflict. This is in accord with the Vienna Convention on the Law of Treaties, which provides that the provisions of a treaty "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist" before entry into force.[51] For example, if both North Korea and the Republic of Korea became parties to the Land Mines Protocol, this would not create any new obligation to disclose minefields as a result of the **1953** cessation of active hostilities between those two governments.

At the Conference, Libya was especially forceful in urging that the Protocol create a present obligation to remove mines emplaced during past conflicts, such as World War II.[52] Having failed to incorporate this principle in the Protocol, Libya recently succeeded in obtaining passage of a United Nations General Assembly resolution which purports to recognize the existence of an obligation on the part of "colonial" powers to remove mines which they had implanted in former colonies, and to compensate anyone injured by such mines.[53]

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[50] C. Delessert, Release and Repatriation of Prisoners of War at the End of Active Hostilities 103-04 (1977).

[51] Vienna Convention on the Law of Treaties, opened for signature May 23, 1969. art. 28, 8 Int'l Legal Materials 679 (1969). ***See*** T. Elias, The Modern Law of Treaties 46-49 (1974); I Sinclair, The Vienna Convention on the Law of Treaties 55 (1973).

[52] The Libyan proposal would, by its terms, have applied to "all minefields, mines and booby-traps remaining in position at the date this Convention enters into force, as well as to minefields, mines and booby-traps placed in position thereafter." 1980 Working Group Report, at 6.

[53] G.A. Res. 35/71, note 13, *supra*. It is evident that Libya, having had its proposal rejected by an international conference familiar with the issues raised by it, moved to the General Assembly, where its proposal was adopted by delegates unfamiliar with the background or implications of the matter. In the Assembly, the Resolution was apparently presented as a "development" issue rather than a "law of war" issue. This

X. REMOTELY DELIVERED MINES

Because they can be quickly emplaced during fluid battlefield conditions and even dropped from aircraft far behind enemy lines, remotely delivered mines may present special dangers to the civilian population after the end of hostilities. It may not be practical to record the location of remotely delivered minefields under these conditions. Article **5** therefore requires that remotely delivered mines not be used unless their location can be accurately recorded as in the case of a "preplanned" minefield or an "effective neutralizing mechanism" is used on each such mine.[54] A "neutralizing mechanism" is defined as an automatic or remote control device that will render the 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 emplaced. The Protocol does not set a maximum time limit beyond which all mines must "neutralize" themselves. The setting of such a limit is a matter for professional military judgment and the appropriate period is likely to vary considerably from case to case depending on both tactical and humanitarian considerations.

XI. BOOBY-TRAPS

Article 6 of the Protocol Prohibits the useof certain "booby-traps," a term which is apparently unique to the English language. In addition, the general restrictions in Articles **3** and **4** apply to booby-traps, so that the prohibition on "indiscriminate" use of booby-traps in Article **3** serves to forbid the use of "letter bombs" in armed conflict.[55] Also, Article 7 requires the parties to record the location of "all areas in which they have made large-scale and preplanned use of booby-traps."

The term "booby-trap'' is defined as "any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act."[56] At one point, the United States delegation wished to amend this definition by adding the phrase, "with respect to such an object,"

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episode illustrates the danger of using General Assembly Resolutions as evidence of customary law without carefully examining the background of each resolution. Resolution 35/71 was adopted by a vote of 119 to 0, with 29 abstentions.

[54]Originally, the draft Protocol had referred to mines "fitted" with neutralizing mechanisms. This was changed to a reference to such mechanisms being "used" on remotely delivered mines to make it clear that such mechanisms must actually be utilized on the mines.

[55]*See* 1980 Working Group Report at **4**; 1979 Conference Report at 20.

[56]Land Mines Protocol, art. **2,** para. **2.**

after the end. The purpose of this proposal was to clarify the distinction between land mines and booby traps, since it could be argued that all land mines were, technically, booby traps under this definition because walking across an open area of land, which happened to be mined, might be considered an "apparently safe act." Other delegations believed that the present definition was sufficiently precise and pointed out that the proposed change could give rise to other interpretation problems. The working groups on mines and booby traps agreed, however, that the phrase "apparently safe act" was intended to refer to any act, whether intentional or unintentional, in relation to the booby-trap itself. "For example, in the case of a booby-trapped doorway, opening the door would be an apparently safe act with respect to the door."[57]

Article 6, paragraph **2,** of the Land Mines Protocol prohibits the use of booby traps "designed to cause superfluous injury or unnecessary suffering." The Protocol thus reaffirms that this well-established principle applies to booby-traps just as it does to other weapons.[58] This would, for example, prohibit the use of hidden pits containing "pungi sticks," poisoned with excrement.

Paragraph 1(a) of Article 6 forbids the use, "in all circumstances," of, "any booby trap 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." This rule thus prohibits "prefabricated" booby traps which might be mass-produced.[59] One effect of this prohibition is that remotely delivered booby traps, such as those which might be dropped *en masse* from aircraft, are forbidden.[60]

Paragraph 1(b) of Article 6 similarly prohibits the use "in all circumstances" of booby traps "in any way attached to or associated with:

(i) internationally recognized protective emblems, signs or signals;

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[57] 1980 Working Group Report, at 3.

[58] Article 23e of the 1907 Hague Regulations prohibits the use of "arms, projectiles or material calculated to cause unnecessary suffering." There has been considerable controversy over whether the original French phrase *maux superflus* is more properly translated as "unnecessary suffering" or **"superfluous** injury." The 1977 First Protocol, art. 35, resolved this by using both terms and this solution has also been incorporated in the Land Mines Protocol. The Working Group noted that "particular attention is required for the adequate translation of this paragraph into all languages" and that the translations should follow those of the 1977 First Protocol, art. 35. 1980 Working Group Report, at 8.

[59] *See* 1979 Conference Report at 20.

[60] *See* Report of the Preparatory Conference, Annex II, at 1.

(ii) sick, wounded or dead persons;
(iii) burial or cremation sites or graves;
(iv) medical facilities, medical equipment, medical supplies or medical transportation;
(v) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
(vi) food or drink;
(vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
(viii) objects clearly of a religious nature;
(ix) historic monuments, works of art of places or worship which constitute the cultural or spiritual heritage of peoples;
(x) animals or their carcasses.

At first glance, this paragraph establishes a rather mixed bag of prohibitions. Underlying these various rules, however, is a common policy of reinforcing the respect and protection which international law already accords to civilians, cultural property, and the sick and wounded. Clauses (i), (ii), (iii), and (iv), for example, reinforce the respect which parties to the First Geneva Convention of 1949 owe to medical personnel and the sick, wounded and dead. To booby-trap persons and objects protected by this Convention is to use them to commit "acts harmful to the enemy" outside of their humanitarian functions and, therefore, deprives them of protection under the First Convention.[61]

The Red Cross and Red Crescent are, of course, the most widely recognized international "protective emblems" of the type referred to in clause (i).[62] The reference to objects using protective "signals" would apply, for example, to medical aircraft using radio or light signals as authorized by Article 18 of the 1977 First Protocol.[63]

Clauses (viii) and (ix) provide a somewhat parallel reinforcement of the traditional protection which the law of armed conflict accords

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[61] First Geneva Convention, art. 21.
[62] *Id.* at art. 38. The Convention also authorizes use of a "red lion and sun," until recently the medical symbol used by Iran. In 1980, Iran notified the Red Cross that it was adopting the red crescent as the distinctive sign of its armed forces medical services. [1980] Int'l Rev. of the Red Cross 316.
[63] *See also* Annex I to the 1977 First Protocol, which describes the appropriate signals in detail.

to religious and cultural property.[64] It should be noted, however, that the phrase "which constitute the cultural or spiritual heritage of peoples" also appears in Article 53 of the 1977 First Protocol. As used there, it has been given a very restrictive meaning, applying only to a limited category of objects which, by virtue of their generally recognized importance, constitute part of the cultural or spiritual heritage of all mankind.[65]

Clauses (v), (vi), (vii), and (x) are intended to protect the civilian population against booby traps by prohibiting the use of these devices on things which civilians might ordinarily use. Clause (vi) on booby-trapping "food or drink" thus recalls Article 54 of the 1977 First Protocol, which prohibits attacks on foodstuffs and other "objects indispensible to the survival of the civilian population." In the same tradition is clause (x), which forbids booby traps on "animals or their carcasses." Clause (x) was added at the request of Mongolia and reflects concern for civilian populations of nomadic herders who rely on their animals for survival in harsh environments.

With regard to clause (v), it might be noted that the Land Mines Protocol does not define the term "children." The Fourth Geneva Convention of 1949, however, refers to "children under fifteen," as does the 1977 First Protocol[66] so the term "children" certainly applies to persons under that age. Presumably, clause (v) does not apply to "children," of whatever age, who are members of an armed force or otherwise taking a direct part in active hostilities.

For states party to both the Land Mines Protocol and the 1977 First Protocol, Article 6/1(b), clause (i), will also provide some protection to civilians. Article 66 of the 1977 First Protocol establishes an "international distinctive sign" of civil defense, for use on civil defense personnel, materials, buildings, and civilian bomb shelters.[67] Under clause (i), it will be specifically forbidden to place booby traps in or on such objects, if marked with the "distinctive sign."

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[64] *See, e.g.*, Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, April 15. 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 279: Hague Regulations of 1907, arts. 27, 56. For parties signatory to it, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, established a new distinctive emblem for cultural property, consisting of a blue and white shield.

[65] For declarations to this effect, *see* 6 Official Records *207* (Netherland and Belgium), 224 (Canada), 225 (West Germany), 238-39 (United Kingdom), and 240 (United States).

[66] *See* First Geneva Convention, arts, 14, 38; 1977 First Protocol, art. 77.

[67] "The international distinctive sign for civil defense is an equilateral blue triangle on an orange ground when used for the protection of civil defenseorganizations. their personnel. buildings, and *materiel* and for civilian shelters." 1977 First Protocol. art. 66, para. 4.

Article 56 of the 1977 First Protocol also authorizes the use of a "special sign" on those dams, dikes and nuclear power stations "which may cause the release of dangerous forces and consequent severe losses among the civilian population."[68] Since Article 6 of the Land Mines Protocol forbids the use of booby traps "in any way attached to or associated with. . .internationally recognized protective. . .signs," it would be prohibited to use booby-traps to defend the dams, dikes, and nuclear power stations marked with the "special sign" in accordance with Article 56. Article 56, paragraph 5, otherwise permits the installation of defensive armamants on such dams, dikes and power stations, but, under the Land Mines Protocol, those armaments could not include booby-traps.

XII. ROLE OF THE UNITED NATIONS

The 1949 Geneva Conventions and the 1977 First Protocol both refer to the role of neutral "protecting powers" and the nongovernmental International Committee of the Red Cross in securing compliance with international humanitarian law.[69] The Land Mines Protocol establishes, for the first time, a modest role for the United Nations in enforcing the law of armed conflict. Under Article 7, paragraphs 3(a)(ii) and (iii), whenever the parties to a conflict are required to notify the other side of the locations of landmines and booby-traps, they are also required to give this information to the Secretary-General of the United Nations, presumably so he can insure that it is properly disseminated for the protection of the civilian population. During the Conference, the Secretary-General offered the following comments on his role under Article 7:

> To avoid any misunderstanding on this point, particularly at the stage when these provisions are implemented in respect to a particular conflict, the Secretary-General would now like to indicate that heconsiders that whenever information is provided to him pursuant to the cited provisions of the proposed Protocol, he would be free to use such information as he deems fit. He would naturally exercise this right at his direction in the interest of the restoration and maintenance of peaceful conditions, as well as the facilitation of the functioning of any United Nations or other humanitarian missions or operations.[70]

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[68] *Id.* at art. 56. The "special sign" established by paragraph 7 of that article is "a group of three bright orange circles placed on the same axis."

[69] *See, e.g.*, the Third Geneva Convention arts. 8, 9, 10 and 11; 1977 First Protocol, art. 5.

[70] 1980 Working Group Report, at 24.

The Land Mines Protocol also recognizes, for the first time, that United Nations personnel may be entitled to special protection under the law of armed conflict. Article 8 of the Protocol states that whenever a United Nations "force or mission" performs "peacekeeping, observation or similar functions" in an area of conflict, the parties to the conflict are obligated to take certain actions to protect the United Nations force or mission:

(a) remove or render harmless all mines or booby traps in that area;
(b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby traps while carrying out its duties; and
(c) make available to the head of the United Nations force or mission in that area all information in the party's possession concerning the location of minefields, mines and booby traps in that area.

Each party to the conflict is obligated to take these actions "as far as it is able." The Working Group Report noted that Article 8 did not address whether United Nations forces should themselves clear minefields."

A different standard applies to United Nations "fact finding missions." In United Nations practice, "fact finding missions" are small bodies, as compared to peacekeeping forces or observation missions. Under Article 8, paragraph 2, "any party concerned shall provide protection" from mines and booby traps to fact finding missions, "except where, because of the size of such mission, it cannot adequately provide such protection." In that case, the party is to provide all information in its possession relating to the location of land mines and booby traps to the head of the mission. In the case of small fact finding missions, therefore, the parties to the conflict are placed in the position of insurers against injury from land mines and booby traps. In the event of a mission member being injured or killed by such devices, the party controlling the area and the party which emplaced the device would presumably owe international responsibility to the United Nations.[72]

The special protection for United Nations personnel established by Article 8 is limited to situations in which they perform fact-finding, peacekeeping, observation, "or similar functions." Article 8 thus protects only those personnel who are stationed in an area for non-

[71] *Id.* at **4.**
[72] *See* Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174.

combatant purposes. It would not apply to United Nations forces who take a direct part in active hostilities, as in Korea in the 1950s or the Congo in the 1960s.

XIII. CONCLUSION

In drafting the Land Mines Protocol, the Conference attempted to adapt recognized principles of the law of armed conflict to the special needs of mine warfare. There will, naturally, be disagreement among experts on whether the adaption has, in all cases, been properly carried out. By even undertaking the task of codifying and developing the law of land mine warfare, however, the Conference broke important new ground. The Land Mines Protocol thus fills a major gap in existing humanitarian law. By recognizing the need for protecting United Nations personnel in a conflict zone, and by giving the Secretary-General of that organization a role in the enforcement of humanitarian law, the Protocol makes contributions that may ultimately have effects far outside the field of mine warfare. Finally, if it is widely and conscientiously applied by all sides in future wars, the Protocol may meaningfully expand the protection of civilian populations in armed conflict.

A CASE FOR THE ADMISSIBILITY OF THE INCULPATORY DECLARATION AGAINST PENAL INTEREST: OVERCOMING JUDICIAL RELUCTANCE TO CHANGE

by Captain David A. Brown*

The struggle in the law between constancy and change is largely a struggle between history and reason, between past reason and present needs.

Felix Frankfurter[1]

I. INTRODUCTION

With the enactment of the Military Rules of Evidence (MRE),[2] "substantial changes in the prior military law of evidence" were anticipated.[3] Over two years after the promulgation of the Rules, however, and as an ever-increasing number of cases dealing with the Rules reach the military appellate courts, very little change in the decisional law of military evidence can be noticed.[4] Indeed, in reading many of the recent opinions interpreting the Rules, one begins to

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[1]F. Frankfurter, Mr. Justice Holmes and the Constitution 40 (1972).

[2]Manual for Courts-Martial, United States, 1969 (Rev. ed.), ch. 27 [hereinafter cited as MRE].

[3]Statement of Robinson O. Everett, Chief Judge, United States Court of Military Appeals, *reprinted in* S. Saltzburg, L. Schinasi, & D. Schleuter, Military Rules of Evidence Manual, Foreword (1981) [hereinafter cited as Evidence Manual].

[4]One apparent bright spot in the ominous clouds surrounding the judicial interpretation of the Rules is the favorable response to the waiver provisions of MRE 103(a). *See* United States v. Shelwood, 15 M.J. 222 (C.M.A. 1983); United States v. Frazier, 14 M.J. 773 (A.C.M.R. 1982); United States v. Akers, 14 M.J. 768 (A.C.M.R. 1982). While a cursory examination of these opinions would seem to indicate a long-awaited recognition of the professional competence of military trial lawyers, a closer reading reveals that no dramatic change in the law has been articulated. Indeed, while the admission of the evidence considered in each of these cases would have constituted error under pre-Rules practice, the error would not have been found sufficiently prejudicial to warrant relief in accordance with Article 59(a), Uniform Code of

sense a judicial antagonism toward any changes in past practice, in disregard of the intended construction of the Rules.[5]

Perhaps the judicial interpretation and application of MRE 804(b)(3) most clearly represents this judicial reluctance to fully embrace the changes in the law of military evidence intended by the drafters of the Rules.[6] Although there have been several recent military opinions constructing MRE 804(b)(3), each has, for a variety or reasons, refused to uphold the admission of evidence pursuant to this Rule.[7] In the face of such resistance, the question becomes whether the practitioner should risk reversal on appeal by resorting to MRE 804(b)(3) to establish his or her case. It is the purpose of this article to answer that question in the affirmative by exploring the law governing the admissibility of hearsay evidence against an accused in general and, in particular, by developing an analytical framework to guide the practitioner in securing the admission of statements against penal interest against an accused at courts-martial.

II. PREFACE

Whenever evidence is offered against a criminal defendant in a manner other than through the testimony of a witness present at trial, who is subject to cross-examination and who has personal

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Military Justice, 10 U.S.C. § 859(a) (1976) [hereinafter cited as UCMJ]. ***See*** *Shelwood*, 15 M.J. at 224 n.1 (dicta); *Foust*, 14 M.J. at 831 (although the issue was waived, the evidence was properly admitted); *Frazier*, 14 M.J. at 781 (Fulton, J., concurring in result) (improper admission of evidence was not prejudicial): ***Akers.*** 14 M.J. at 770 (erroneous admission of evidence had minimal impact on sentence). Furthermore, when faced with the erroneous admission of evidence "critical to the prosecution," the Army Court of Military Review declined to invoke the waiver doctrine "because of the short time the Military Rules of Evidence have been in effect." United States v. Robinson, 16 M.J. 766, 768 (A.C.M.R. 1983). ***See*** *also* United States v. Meyer, 14 M.J. 935, 937 (A.C.M.R. 1982) (the burden is solely on the government to establish admissibility of evidence pursuant to MRE 804(b)(3)).

[5] "These rules shall be construed to secure. . . promotion of growth and development of the law of evidence. . . ." MRE 102.

[6] Other examples of this miserly approach to the application of the Rules can be found in the cases dealing with MRE 404 and 412. ***See*** United States v. Clemons, 16 M.J. 44, 50 (C.M.A. 1983) (Everett, C.J., concurring) (court used an "unusual construction [of MRE 404(a)]. . . in order to avoid an unjust - and possibly unconstitutional - result"): United States v. Colon-Angueira, 16 M.J. 20, 30 (C.M.A. 1983) (Everett, C.J., concurring) (MRE 412 must not be applied mechanically by military judges); United States v. Dorsey, 16 M.J. 1, 12 (C.M.A. 1983) (Cook, J., dissenting) (theory of relevance applied to MRE 412 required "speculation upon speculation upon speculation").

[7] *See* United States v. Bruce, 14 M.J. 254 (C.M.A. 1982): United States v. Garrett, 16 M.J. 941 (N.M.C.C.M.R. 1983); *Robinson*, 16 M.J. at 769; ***Meyer,*** 14 M.J. at 938. In one unpublished opinion, and with little analysis of the Rule, the Navy-Marine Corps Court of Military Review upheld the admission of evidence pursuant to MRE 804(b)(3). United States v. Velez, NMCM 822745 (N.M.C.C.M.R. 16 Mar. 1983).

knowledge of the facts, both evidentiary and constitutional questions of admissibility are raised. As the out-of-court assertion, when offered to prove the truth of the matter asserted, is generally classified as hearsay,[8] it is traditionally excluded[9] in the absence of a specific exception authorizing its admission.10 As the statement is also being introduced against an accused in a criminal prosecution, however, the constitutionally-guaranteed right to confrontation also generally precludes admission of the statement."

While it is true that the hearsay rule and the Confrontation Clause emanate from the same historical roots and, indeed, are "generally designed to protect similar values," it does not necessarily follow that the Confrontation Clause is merely a codification of the common law hearsay rule.[12] The principles embodied in each have never been held congruent.[13]

The underlying premise of the hearsay rule is that untrustworthy evidence should not be the basis for judicial decisions, criminal or civil.[14] Thus, the question from an evidentiary viewpoint is whether the circumstances surrounding the creation of the evidence are such as to provide a threshold of reliability in the accuracy of the evidence.

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[8]*See* MKE 801(*c*).

[9]*See* MRE 802.

[10]*See, e.g.*, MRE 803, 804. MRE 801(*c*), by definition, permits the introduction of out-of-court statements of an unavailable declarant when offered for a purpose other than to prove the truth of the matter therein asserted. Furthermore, MRE 801(*d*) provides that certain types of statements, although not made by the declarant while testifying in court, do not constitute hearsay. The most important of these nonhearsay statements is that made by a coconspirator of the accused during the course and in furtherance of the conspiracy. ***See*** MRE 801(*d*)(2)(E). The justification for this provision is that the declarant is either available for cross-examination, MRE 801(*d*)(1), or that the statement of the party against whom it is offered. MRE 801(*d*)(2).

[11]*See, e.g.*, Bruton v. United States, 391 U.S. 123 (1968). *Bruton* is often miscited for the proposition that out-of-court statements of one co-accused, which also inculpates another co-accused, are constitutionally inadmissible against the latter in the absence of an opportunity for cross-examination. ***See*** Hendrix v. Smith, 639 F.2d 113 (2d Cir. 1981); Goodwin v. Page, 418 F.2d 867 (10th Cir. 1969). ***See also*** Drafters' Analysis to Military Rule of Evidence 804, ***reprinted in*** Manual for Courts-Martial, United States, 1969 (Rev. ed.), at app. 18 [hereinafter cited as Drafters' Analysis] (there is considerable doubt that the Rule may be constitutionally applied to this situation). The Supreme Court recently rejected this interpretation and ruled that *Bruton* is limited "to the situation in which it arose 'where the powerfully incriminating extrajudicial statements of a co-defendant, who stands side-by-side with the defendant, are deliberately spread before the jury *in a joint trial.*'" Parker v. Randolph, 442 U.S. 62, 75 n. 7 (1979) (emphasis added). Thus, simplistic reliance on *Bruton* to preclude the admission of statements against interest which inculpate a co-accused should be avoided.

[12]California **v.** Green, 399 U.S. 149, **155** (1970).

[13]*Id. See also* United States v. McConnico, 7 M.J. 302 (C.M.A. 1979); United States v. Whalen, 15 M.J. 872, 877 (A.C.M.R. 1983).

[14]Chambers v. Mississippi, 410 U.S. 284, 298 (1973); *McConnico*, 7 M.J. at 302.

The Confrontation Clause, by contrast, is designed to prevent criminal convictions based "solely on *ex parte* affidavits."[15] The Confrontation Clause is more concerned with providing the trier of fact with an accurate method of determining the truth of a prior statement through what Dean Wigmore has called the great engine of cross-examination, as opposed to the evidentiary requirement that only trustworthy evidence be presented to the court.[16] In other words, the Confrontation Clause provides a criminal accused with a right to test the veracity of declarants of facially trustworthy evidence.

While the Confrontation Clause precludes the use of some hearsay evidence, no court has ever held that all hearsay evidence is inadmissible in the face of a claimed violation of the right to confrontation. Indeed, the Supreme Court, in one of its earliest attempts to reconcile the Confrontation Clause with the hearsay rule, held that the language of the Sixth Amendment was not to be given a literal construction.[17] While these principles are indeed interrelated, they are not coextensive:

> Thus simply "because evidence is admitted in" accordance with "a long established hearsay rule" or in violation thereof, allows no "automatic conclusion" to be drawn with respect to an accused's confrontation rights under the Sixth Amendment. These are two separate questions.[18]

Accordingly, the admissibility of a statement against penal interest must be analyzed from both evidentiary and constitutional perspectives. Each of these separate analyses must be subdivided further. For purposes of simplicity, these subdivisions may be referred to as questions of unavailability and reliability. Thus, admissibility of a statement against penal interest requires the establishment of: (1) unavailability of the declarant from an evidentiary perspective; (2) reliability of the statement from an evidentiary perspective; (3) unavailability of the declarant from a constitutional perspective: and (4) reliability of the statement from a constitutional

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[15] *California v.* ***Green,*** 399 U.S. at 156.

[16] Dutton v. Evans, 400 U.S. 74, 89 (1970).

[17] Maddox v. United States, 156 U.S. 237 (1895) (dying declarations admissible despite literal language of Confrontation Clause).

[18] *McConnico*, 7 M.J. at 305 (citing California v. Green, 399 U.S. 149, 156 (1970)). ***See,*** *e.g.*, Douglas v. Alabama, 380 U.S. 415 (1965) (nonhearsay evidence used purportedly to refresh the recollection of a recanting witness violated the accused's right to confrontation due to the inability to cross-examine the witness regarding the truth of the statement). *But see Bruton*, 391 U.S. at 136 n.12 (the reason for excluding evidence as an evidentiary matter also requires its exclusion as a constitutional matter). The corollary to this axiom is that if evidence is inadmissible "under any of the exceptions to the rule against hearsay, whether its admission would offend the Confrontation Clause becomes moot." ***Meyer,*** 14 M.J. at 937.

perspective. While there is often substantial overlap between these requirements, it is important at this juncture to view them as analytically distinct.

III. ADMISSIBILITY FROM AN EVIDENTIARY PERSPECTIVE

MRE 802 precludes the admission into evidence of hearsay statements except as provided by, *inter alia*, other rulesof evidence. MRE 804 provides one such exception and lists several categories of admissible evidence, dependent upon the nonavailability of the declarant. Thus, to properly admit a statement against penal interest from an evidentiary perspective, the statement must meet the requirements set forth in MRE 804(*b*) and the declarant must have been properly determined to have been unavailable as that word is defined in MRE 804(*a*). These requirements will be discussed *seriatim.*

A. UNAVAILABILITY FROM AN EVIDENTIARY PERSPECTIVE

MRE 804(*b*) provides that certain statements, although generally inadmissible under the rule precluding the use of hearsay evidence,[19] are nevertheless admissible as substantive evidence where the declarant is unavailable as a witness at trial. "Unavailability," as defined by MRE 804(*a*), includes, *inter alia*,[20] the situation in which the witness has invoked his or her right to remain silent and that claim is sustained by the military judge.[21]

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[19]MRE 802.

[20]MRE 804(*a*) provides six specific definitions of unavailability, each of which requires the establishment of certain facts. Only unavailability predicated upon an assertion of the privilege against self-incrimination will be discussed in detail in this article as this will be the situation most likely to be encountered when a statement against interest which inculpates an accused is offered into evidence. Reliance upon one of the other definitions of unavailability should be preceded by research in the federal and state jurisdictions to discover whether any judicial requirements have been added to those continued in the Rule. ***See,*** *e.g.*, United Statesv. Hogan, 16M.J. **549** (A.F.C.M.R. 1983) (unavailability predicated upon a refusal to testify pursuant to MRE 804(*a*)(2)).

[21]MRE 804(*a*)(1). This Rule is not limited to the assertion of the privilege against self-incrimination, but applies to any privilege recognized under the Constitution, federal statute, the Manual for Courts-Martial, or common law. ***See*** MRE 501(*a*). For specific privileges recognized by the MRE, **see** MRE **301-03; 502-09.** It should be noted that a privilege recognized by a state in which a witness resides or is domiciled is not applicable in trials by courts-martial unless such privilege is also recognized by one of the authorities listed in MRE 501(*a*).

It is the burden of the proponent of the evidence to establish unavailability under MRE 804(*a*) as a prerequisite to introduction of the evidence pursuant to MRE 804(*b*).[22] The determination of whether unavailability has been sufficiently established is made by the military judge, subject to review for an abuse of discretion.[23]

The failure to adequately demonstrate unavailability will render erroneous the admission of evidence pursuant to MRE 804(*b*), irres-

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[22] In *United States v.* ***Meyer.*** the court ruled:

> [W]e see no duty on the trial defense counsel to work to prove or disprove the validity of the Government witness' claim of privilege prior to any attempt by the Government to use the witness' unavailability as a springboard to admit a prior our-of-court statement of the witness/declarant. The burden is solely on the Government to establish either the validity of the claim of privilege or the intransigence of the witness (or that the other qualifications for unavailability are met) before the witness/declarant's statement may be admitted.

14 M.J. at 937. In the abstract, this statement is entirely correct. It should be remembered, however, that, due to the waiver provisions of MRE 103(*a*), the nonmoving party does have an obligation to object specifically to the validity of the assertion of unavailability when the proponent of the evidence attempts to use that unavailability as a "springboard" to introduce evidence pursuant to MRE 804(*b*). *Cf. Shelwood,* 15 M.J. at 244 n.1 (failure to identify the specific ground of objection precludes appellate review of the issue); *Bruce,* 14 M.J. at 257 (government's failure to demonstrate unavailability rendered admission of a statement against penal interest erroneous in a case tried prior to the effective date of the MRE, despite the lack of a particularized objection).

[23] MRE 104(*a*). The Rule fails to articulate the standard of proof required to establish unavailability. **As** rulings on preliminary questions are interlocutory in nature, however, the determination of unavailability should only require proof by a preponderance of the evidence. ***See*** Manual for Courts-Martial, United States, 1969 (Rev. ed.). para. 57g. ***See*** United States v. Shielch, 654 F.2d 1057 (5th Cir. 1981): United States v. Tsui, 646 F.2d 365 (9th Cir. 1981); United States v. Metz, 608 F.2d 147 (5th Cir. 1979), ***cert.*** denied, 449 U.S. 821 (1980). ***See also*** United States v. Hogan, 16 M.J. 549, 550 (A.F.C.M.R. 1983) (military judge abused his discretion in declaring a recalcitrant witness unavailable under MRE 804(*a*)(2) without exercising all the moral persuasion available to the court): **Meyer,** 14 M.J. at 937 (determination that a witness has properly invoked the privilege against self-incrimination will satisfy the requirements of MRE 804(*a*)(1), only if that determination is not an abuse of discretion).

Hogan represents an example of the addition by judicial legislation to the requirements to establish unavailability. MRE 804(*a*)(2) provides that a witness is unavailable if he or she persists in a refusal to testify despite an order from the military judge. Thus, the Rule contemplates that there will be a refusal to testify, followed by a judicial order to testify, culminating in a continued refusal in defiance of the order. Thus, to the extent that Hogan prohibits the military judge from simply acceeding to an initial refusal to testify, the decision is consistent with the Rule. The witness in Hogan, however, was a citizen of a foreign country, neither required to comply with the orders of the military judge nor subject to the contempt power of any court of the United States. Thus, it is submitted that, when the military judge asked the witness and received a negative response to whether she would comply with a judicial order to testify, the definition of unavailability under MRE 804(*a*)(2) was satisfied. ***See*** Evidence Manual, *supra* note 3, at 374. Nevertheless, the court in Hogan found the failure of the military judge to exert all the "moral," as well as legal, persuasion available to the court prior to declaring the witness unavailable constituted an abuse of discretion.

pective of whether the requirements of that provision have been met and despite the unquestionable reliability of the statement.[24]

In establishing unavailability predicated upon the assertion of the privilege against self-incrimination, it should be noted at the outset that the scope of this privilege is extremely broad. As recently stated by the Court of Military Appeals: "[t]he privilege may be invoked when a 'witness has reasonable cause to apprehend danger' that he will implicate himself in a criminal offense by answering a question."[25] Indeed, in *Hoffman v. United States*,[26] the Supreme Court held that the privilege does not merely apply to responses which would in themselves be tantamount to a confession, but also extends those which would "furnish a link in the chain of evidence'' necessary to obtain a conviction.[27]

A witness, however, unlike an accused, does not have the absolute right to refuse to testify regarding a particular subject matter simply by invoking the privilege against self-incrimination.[28] The

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By the addition of this requirement, the court not only mandated that the trial judge engage in an exercise in futility, it also injected a substantial degree of uncertainty into the Rule itself by linking the definition of unavailability to the status of the witness. Where the witness, as in *Hogan*, is a foreign national, perhaps the military judge need only explain to the witness the necessity of the testimony and the ramifications to the parties of a continued refusal to testify. If, however, the witness is an American citizen subject to the jurisdiction of a federal court, will the military judge be required to institute contempt proceedings prior to declaring the witness unavailable? More troubling is the situation in which the witness is a service member subject to the provisions of the Uniform Code of Military Justice. Can the military judge declare the military witness unavailable immediately upon a finding of contempt for refusal to testify, or should the military judge abate the proceedings until the witness agrees to comply with an order to testify? It is submitted that, in the interests of judicial economy and clarity in the application of the Rule, the *Hogan* requirement should be abandoned. If the witness persists in refusing to testify despite an order to do so, the witness should be declared unavailable for the purposes of MRE **804.** The legal consequences to the witness of the refusal to testify should not be considered.

[24]Two situations not included in the definition of unavailability under MRE 804(*a*) are the denial that the proffered statement was ever made and the claim that the subject matter of the statement is false. The first situation will usually arise where no written record of the statement was made and the proponent of the evidence is required to rely on the testimony of the witness who heard the statement when made. The second situation may arise even though the statement has been reduced to writing and signed by the declarant. The allegation in this situation will usually be that the statement was obtained as a result of coercion. In either situation, if the statement has been reduced to writing and sworn to by the witness, the evidence would be admissible as substantive evidence as a prior inconsistent statement. ***See*** MRE 801(*d*)(1)(A). If the statement has not been reduced to a sworn writing and the statement does not fall within one of the exceptions listed in MRE **803,** the evidence would be admissibly solely for the limited purpose of impeachment. ***See*** MRE **607.**

[25]United States v. Villines, **13** M.J. **46, 52** (C.M.A. **1982)** (citing Hoffman v. United States, **341** U.S. **479, 486 (1951)).**

[26]341 U.S. **479 (1951).**

[27]*Id.* at **486.** ***See*** *also* MRE **301.**

[28]***See Meyer,*** **14** M.J. at **937** n.5.

privilege generally protects the witness only from being required to answer a specific question, the answer to which might tend to incriminate.[29] The burden, however, is not on the witness to demonstrate the incriminating nature of the proposed question.[30] To require the witness to establish the manner in which the answer to a particular question might be incriminating would compel the witness to "surrender the very protection which the privilege is designed to guarantee."[31] The ultimate determination of whether the claimed privilege was properly asserted must be made by the trial court based upon the facts and circumstances surrounding the case.[32]

Although the general rule provides that a privilege should be sustained only on a question-by-question basis, several federal courts have ruled that the peculiar circumstances of the case may justify a trial judge's refusal to *voir dire* a witness in order to determine the validity of that witness' privilege against self-incrimination.[33] Indeed, in *United States v. Nelson*, the Fifth Circuit held that the assertion of blanket privilege against testifying should be sustained if the only relevant information the witness could provide would be "facially incriminatory."[34] As the admissibility of the evidence hinges on a proper determination of unavailability, however, a witness should be permitted to assert a blanket privilege against testifying only with extreme caution.[35]

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[29] *Id.*

[30] Several federal court decisions would seem to require the witness to make some minimal showing that a claimed privilege is valid. *See, e.g.*, United States v. Melchor-Moreno, 536 F.2d 1042 (5th Cir. 1976). Those decisions, however, merely restate the general rule that a witness may not assert a "blanket privilege" against testifying where it appears that not every possible relevant matter of inquiry would yield an incriminatory response. As will be discussed later in this article, before sustaining a blanket privilege against self-incrimination, the trial court must be convinced either by the facts and circumstances of the case or through a particularized inquiry that the assertion of the privilege is valid. *See In re* Investigation Before April 1975 Grand Jury, 513 F.2d 600 (D.C. Cir. 1976).

[31] Hoffman v. United States, 341 U.S. 479, 486 (1951).

[32] *Id.*

[33] *See* United States v. Nelson, 529 F.2d 1131 (5th Cir. 1971); United States v. Canseler, 419 F.2d 952 (7th Cir. 1969).

[34] 529 F.2d at 43.

[35] Even where the assertion of a blanket privilege is proper, a distinction should be drawn between the privilege to refuse to testify as to the subject matter of the statement and the privilege to refuse to answer any question. For example, there may be no relevant evidence regarding the statement which the witness could provide without causing self-incrimination. The witness' blanket privilege against testifying regarding the contents of the statement could then be properly sustained. *Nelson*, 526 F.2d at 43. The nonmoving party, however, may be less interested in the contents of the statement than why the statement was made. To preclude inquiry into the possible motives or bias of the witness, which appears facially nondiscriminatory, would be error, at least in the absence of an inquiry by the military judge. *See Melchor-Moreno*, 536 F.2d at 1045. The Court of Military Appeals has indicated that whether this line of inquiry should be permitted is to be determined under a compulsory process analysis.

One final caveat is in order before proceeding to the question of reliability. Assuming that unavailability can be properly established under MRE 804(a)(1) prior to offering the evidence as a statement against interest pursuant to MRE 804(b)(3), a determination must be made whether to seek immunity for the witness.[36] As will be discussed below, when the evidence is being offered by the government, a common objection is that the failure to grant the witness immunity constitutes a violation of the right to confrontation. While this issue has been resolved adversely to the military accused,[37] a prosecutor nevertheless would be well advised to weigh the risks attendant to the admission of a statement against interest against the potential difficulties in the event of trial, or retrial, of the witness, before ignoring the immunity option and proceeding under MRE 804(b)(3).

B. RELIABILITY FROM AN EVIDENTIARY PERSPECTIVE

Statements against interest are but one of the enumerated exceptions to the hearsay rule codified in MRE 804. Nevertheless, this exception is probably the most frequently utilized and certainly the most extensively litigated of all the hearsay exceptions. Thus, it is critical for the practitioner to become familiar with its requirements and well-versed in its terminology.

The Rule, with facial simplicity, provides that a statement is against the penal interest of the declarant if it:

> At the time of its making...so far tended to subject the

United States v. Vietor, 10 M.J. 69 (C.M.A. 1980). The correctness of this decision is, however, certainly open to question. *See* Ohio v. Roberts, 448 U.S. 56 (1980). *See also* **Vietor, 10** M.J. at 79 (Fletcher, J., concurring in the result) (prior military "case law cannot stand immutable in the face of subsequent Supreme Court decisions to the contrary".

[36] *See* MRE 301(c)(1).

[37] It is clear that a court-martial convening authority *may* grant immunity to a witness and that once the witness is granted immunity, that witness may be compelled to testify without infringing upon the privilege against self-incrimination. *Villines*, 13 M.J. at 52-53; United States v. Kirsch, 15 C.M.A. 84, 88-91, 35 C.M.R. 56, 60-63 (1964). However, a convening authority has broad discretion in deciding whether or not to grant immunity. *Kirsch*, 15 C.M.A. 92, 35 C.M.R. at 64. A military judge may review a convening authority's decision only when it appears to have been an abuse of discretion. *Villines*, 13 M.J. at 55. If there is sufficient evidence of an abuse of discretion by the convening authority, based on a "deliberate intention of distorting the judicial fact-finding process," the prosecution may be required to justify the grant or denial of immunity in terms of a strong command interest. *Id.* In *Villines*, the court held that the possibility of retrial of the witness for offenses arising from the same set of facts which gave rise to the charges against the accused was a sufficient basis for the government's refusal to grant immunity, as the government would otherwise have a heavy burden to show at retrial that the evidence that it introduced was not a result of the witness' immunized testimony. *Id.* at 54.

> declarant. . .to criminal liability,. . .that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true.[38]

The Rule further provides that, when such a statement is offered to *exculpate* an accused, corroborating circumstances demonstrating the trustworthiness of the statement are required.[39]

It should be noted at this juncture that the Rule itself does not prohibit the admission of a statement against penal interest when offered to *inculpate* a criminal defendant.[40] Indeed, the legislative history of Rule 804(*b*)(3) of the Federal Rules of Evidence, from which the military rule was taken without change, unequivocably demonstrates that statements against penal interest, whether inculpatory or exculpatory of an accused, were intended to be admissible as an evidentiary matter.[41] Thus, while several legal commentators have been critical of the use of such statements,[42] there is no reason to doubt that Federal Rule 804(*b*)(3) was intended to permit the admis-

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[38] MRE 804(*b*)(3).

[39] *Id.* ***See*** United States v. Robinson, 16 M.J. 766, 767-68 (A.C.M.R. 1983).

"Although the military drafters apparently found disconcerting the failure of the Rule to specifically address this "particularly vexing problem," the recognized that "[o]n the face of the Rule, such a statement should be admissible, subject to the effect, if any of *[Bruton]* and [MRE] 302." Drafters' Analysis, at A18-111. Furthermore, while the drafters expressed "considerable doubt as to the applicability of the Rule to such a situation," they specifically stated their intent that such statements be admissible in the military "to the same extent that subdivision 804(b)[3] [of the Federal Rules of Evidence] is held by Article III courts to apply to such statements." *Id.*

[41] *See* Report of the Senate Judiciary Comm., S. Rep. No. 93-1277, 93d Cong., 2d Sess., ***reprinted in*** 1974 U.S. Code Cong. & Admin. News 7051, 7068 [hereinafter cited as Legislative History]. Although the Judiciary Committee of the House of Representatives had originally indicated a desire to prohibit the use of such statements, the version ultimately adopted by Congress did not include such a provision. ***See*** Fed. R. Evid. 804(*b*)(3). The basis for the deletion of this provision was the belief by the House-Senate Conference Committee that it was unwise to codify or attempt to codify "constitutional evidentiary principles." Legislative History, *supra*. In its comment to the Rule as finally adopted by Congress, the Advisory Committee on the Federal Rules stated that the admissibility of statements against interest which inculpate an accused is anticipated and that such admission would be proper from a purely evidentiary perspective. ***See*** Advisory Committee's Note, Federal Rules of Evidence, ***reprinted in*** 56 F.R.D. 186,327-28 [hereinafter cited as Committee]. The Committee explicitly distinguished the constitutional and evidentiary aspects of admissibility by excluding any attempt "to deal with questions of the right to confrontation" and limited the inquiry into the admissibility of an inculpatory statement to whether the "statement is in fact against interest." *Id.*

[42] *See* IV J. Weinstein & M. Berger, Weinstein's Evidence, para. 804(b)(3)[03] (1975); Evidence Manual, *supra* note 3, at 379. Weinstein's concern, however, is really that a statement against interest which inculpates a third person may be made solely to shift the blame from the declarant. A statement which is less against the interest of the declarant than it is someone else would not qualify as a statement against interest under the definition of the Rule. The editors of the Evidence Manual, by contrast, are more concerned by what they view as the "serious confrontation problems with using statements of available witnesses that include references to third persons."

sion of statements against penal interest against a defendant in a criminal trial, at least from an evidentiary perspective.

The justification for the statement against penal interest exception to the hearsay rule is generally founded on the assumption that people do not, as a matter of course, make statements to their detriment unless the statement is truthful. Thus, the critical issue in determining the admissibility of a statement pursuant to this exception is whether the statement is in fact against the interest of the declarant.[43] This issue is further complicated when the statement is not only facially against the interest of the declarant but also, directly or indirectly, implicates a third person.[44] For purposes of analysis, it may be said the such statements contain aspects which are both inculpatory of the declarant (disserving) and either neutral or potentially exculpatory of the declarant (self-serving).[45]

Three distinct approaches to the question of the admissibility of a statement containing both disserving and self-serving aspects have been identified.[46] First, if the statement contains any disserving aspects, it is admissible in its entirety. Second, if the nature of the statement is predominantly disserving, the entire statement is admissible; conversely, if the self-serving aspect of the statement is predominant, the entire statement is excluded. Third, if the self-serving and disserving aspects of the statement can be severed, only

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[43] Committee, *supra* note 41, at 328.

[44] As succinctly stated by the editors of the Evidence Manual, "the point about reliability of declarations against interest is that reasonable people do not make statements against their *own* interest, yet reasonable people do make statements implicating others more readily than they make statements concerning their own liability." Evidence Manual, *supra* note 3, at 379.

[45] *See* Weinstein, *supra* note 42, at para. 804(b)(3)[02]. *See also* United States v. Riley, 657, F.2d 1377, 1381 n.5 (8th Cir. 1981). Lest the reader become needlessly confused, this is perhaps an appropriate juncture to explain the terminology surrounding statements against penal interest. A statement against penal interest is, by definition, inculpatory of the declarant in some manner. For example, in the statement "John and I robbed the bank," the admission that "I robbed the bank" is inculpatory of the declarant and is referred to as the inculpatory aspect of the statement. The words "John and" are either a neutral or potentially exculpatory aspect of the statement as to the declarant, depending on the circumstances surrounding the making of the statement. Nevertheless, the statement as a whole is referred to as an inculpatory statement against interest because it inculpates someone other than the declarant. If the statement exculpates some third person, the statement is referred to as an exculpatory statement against interest. For example, "I robbed the bank but John was not with me" is exculpatory of John, while simultaneously inculpating the declarant. To avoid this obvious confusion, Wigmore chose to refer to the specific aspects of the statement as either disserving, neutral, or self-serving. *See* V J. Wigmore, Evidence §§ 1464-1465 (Chadbourn rev. ed. 1974) [hereinafter cited as Wigmore].

[46] *See* C. McCormick, Evidence § 279, at 677 (2d ed. 1972) [hereinafter cited as McCormick]; Wigmore, *supra* note 45, at §§ 1464-1465.

the disserving aspect is admitted and the self-serving aspect is excluded through redaction.[47]

Although there is some support for each of these approaches, it is submitted that the second approach best fulfills the purpose of the Rule to present all relevant and trustworthy evidence to the trier of fact. The first approach, championed by Dean Wigmore,[48] fails to recognize that, in some situations, an individual may admit to a slightly disserving fact, while inculpating another person of a more serious offense in order to "curry favor with the authorities."[49] Under the first appraoch, the entire statement would be admissible, despite the fact that the statement, as a whole, was not against the interest of the declarant. Under such circumstances, the presumption that the statement was inherently trustworthy would not arise and the trier of fact would be presented with evidence the accuracy of which could not be examined.[50]

The third approach also ignores the underlying justification for the rule that statements which are against the interest of the declarant are inherently trustworthy.[51] Thus, under this approach, the trier of fact would be denied evidence which was both relevant and trustworthy. This approach was explicitly rejected as logically unsound by Dean Wigmore:

> Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy, it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also to every fact contained in the same statement.52

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[47] *Id.*

[48] Judge Weinstein cites to Wigmore as one of the "number of commentators" who have determined that "the rationale for the exception for statements against interest is lacking for that part of the declarant's statement which inculpates an accomplice." Weinstein, *supra* note 42, at para. 804(b)(3)[03]. Recognizing the statureof the learned jurist, it is submitted that Wigmore unequivocably believed that if any part of the statement is against the interest of the declarant, the entire statement is trustworthy. *See* Wigmore, *supra* note 45, at § 1465.

[49] *See* Committee, *supra* note 41, at 328.

[50] *See* Weinstein, *supra* note 42. at para. 804(b)(3)[03].

[51] *Cf.* United States v. Whalen, 15 M.J. 872, 878 (A.C.M.R. 1983)(declaration similar to a statement against penal interest possessed similar guarantees of trustworthiness).

[52] Wigmore, *supra* note 45, at § 1465 (emphasis in original). *But* see United States v. Lilley, 581 F.2d 182 (8th Cir. 1978) (portions of statement that were not against interest should have been excluded). *Cf.* United States v. Meyer, 14 M.J. 935, 938 n.6 (A.C.M.R. 1982)(the same notion of testing the validity of an assertion of the privilege against self-incrimination question-by-question to determine the issue of unavailabil-

The second approach has been utilized by the majority of the courts which have considered this specific issue[53] and it is submitted that this approach should also be adopted for use in the military.[54] By examining the entire statement to determine whether the disserving or self-serving aspect predominates, the justification for the Rule is preserved. If, after balancing the two opposing aspects, it is deter-

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ity under MRE 804(*a*)(1) applies to the determination of whether various segments of a statement qualify as a statement against penal interest under MRE 804(*b*)(3)). It should be noted that the decision in *Lilley* would have been the same under the second approach discussed above. As the court stated, the statement was only "partially" against the interest of the declarant. 581 F.2d at 187. The majority of the statement was self-serving and inculpatory of the appellant. *Id.* Indeed, the court found that even that "small portion" of the statement which could be classified as disserving was only "marginally" against the declarant's interest. *Id.* at 187-88. Thus, as the statement was predominently self-serving, it should have been totally excluded due to the lack of a presumption of trustworthiness. Interestingly, in two cases decided by the Eighth Circuit after *Lilley*, the court refused to decide whether an inculpatory statement against another, contained in an otherwise proper declaration against interest, must always be excluded. ***See*** *Riley*, 657 F.2d at 1385 n.11; United States v. Love, 592 F.2d 1022 (8th Cir. 1979).

While it is less than clear whether the court in *Meyer* was advocating an adoption of the third approach discussed above, such a conclusion follows directly from a reading of the single citation relied upon by the court to support its rationale. ***See*** United States v. Manguez, 462 F.2d 893 (2d Cir. 1972). This author submits that the balancing test envisioned by the second approach best fulfills the purpose of the Rule. As ***Meyer*** is the only military case to address this issue even tangentially, it should not be summarily disregarded. In all fairness, however, the court had already found error in what it called the "precipitous" determination of unavailability prior to reaching the question of whether the statement was in fact against the interest of the declarant. *Meyer*, 14 M.J. at 938. Thus, the court's rather ambiguous reference to the approach to be utilized when confronted by statements against penal interest containing both disserving and self-serving aspects is merely dicta, not controlling precedent. Furthermore, the authority upon which the court chose to rely is itself somewhat suspect, having been decided prior to the adoption of the Federal Rules of Evidence and being concerned with the admission of an *exculpatory* statement against interest, which is inherently untrustworthy. ***See*** United States v. White, 553 F.2d 210 (2d Cir. 1977). Finally, the approach suggested in *Manguez* was rejected by the same court in United States v. Liberman, 637 F.2d 95, 103 (2d Cir. 1980) (statement, not each portion thereof, must be against interest). *Compare* State v. Allen, 139 N.J. Super. 285, 353 A.2d 546 (1976) (portion of statement not against the interest of the declarant was inadmissible) *with* State v. Abrams, 140 N.J. Super. 232, 356 A.2d (1976), *aff'd mem.*, 72 N.J. 342, 370 A.2d 852 (1977) (as the Rule does not require that each separate provision of a statement must inculpate the declarant, exclusion of a portion of a statement which is not against penal interest is not required). ***See*** *also* McCormick, *supra* note 46, at § 279, at 679 (while the exclusion of self-serving aspects of a statement against interest "seems the most realistic method of adjusting admissibility to trustworthiness," the balancing of the serving and disserving aspects is also appropriate); Evidence Manual, *supra* note 3, at 379 (redaction should be employed to avoid potential confrontation problems).

[53] *See* Wigmore, *supra* note 45, at § 1464 and cases cited therein. ***See*** *also Liberman*, 637 F.2d at 104.

[54] Several military decisions have found the proferred statement to be against the interest of the declarant without discussing the approach used in reaching this conclusion. ***See, e.g.***, United States v. Garrett, 16 M.J. 941 (N.M.C.C.M.R. 1983); United States v. Robinson, 16 M.J. 766 (A.C.M.R. 1983); United States v. Velez, NMCM 822745 (N.M.C.C.M.R. 16 Mar. 1983).

mined that the statement is predominantly self-serving, the logical conclusion from that determination is that the statement is not in fact against the interest of the declarant. Thus, as the statement no longer carries with it the presumption of trustworthiness it should be excluded *in toto.* Conversely, if the disserving aspect of the statement predominates, the statement is cloaked with a presumption of trustworthiness and the entire statement should be admitted. The self-serving nature of the statement should affect only the weight of the statement, not its admissibility.[55]

This balance approach also seems to be the approach envisioned by the drafters of the Federal Rules of Evidence:

> Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest.... On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying.[56]

As MRE 804(*b*)(3) was adopted without change from the Federal Rule, the balancing approach for determining the admissibility of statements against interest under the Federal Rule should also be adopted in the military.[57]

In applying this proposed balancing test, those portions of the statement which are disserving the the declarant should be placed on one side and those aspects which are neutral or potentially self-serving on the other. Each portion of the statement should then be examined separately in light of the facts and circumstances surrounding the making of the statement to determine whether the disserving or self-serving aspect of the statement predominates. The objective of this examination is to determine whether the statement, as a whole, "so far tended" to subject the declarant to criminal

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[55] *See* Wigmore, supra note 45, at § 1465. See also State v. Abrams, 140 N.J. Super. 232, 356 A.2d 26 (1976), *aff'd* mem., 72 N.J. 342, 370 A.2d 852 (1977) (that a statement against penal interest may have been tainted by an improper motive affects only the weight of the statement and is irrelevant to the question of admissibility).

[56] Committee, supra note 41, at 328. See also United States v. Garris, 616 F.2d 626, 630 (2d Cir.), *cert.* denied, 447 U.S. 926 (1980) (there is no requirement "that a remark taken out of a statement which as a whole is against penal interest must itself. standing along, be against the declarant's interest in order to be admitted").

[57] *See* Drafters' Analysis, at A18-110 to -111.

liability that a reasonable person would not have made the statement if it were not true.[58]

Some of the factors which should be considered in determining whether the self-serving aspect of the statement is substantial include where that statement was made,[59] to whom the statement was made,[60] the degree to which the accused is implicated in criminal activity by the statement,[61] and the prior relationship between the accused and the declarant. In considering the disserving aspect of the statement, the following factors, in addition to those previously discussed, should be considered: whether the declarant as admitted to criminal conduct which does not implicate the accused, whether the declarant's admitted criminal conduct is more serious than that of which the accused is implicated,[62] the temporal proximity between the accused's conduct and the declarant's statement,[63]

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[58]Committee, *supra* note 41, at 328. *See* United States v. West, 574 F.2d 1131 (4th Cir. 1978). *See also* United States v. Whalen, 15 M.J. 872, 878 (A.C.M.R. 1983) (circumstances under which a statement is made can establish its trustworthiness); United States v. Velez, NMCM 822745 (N.M.C.C.M.R. 16 Mar. 1983) (circumstantial evidence establishing truthfulness of a statement qualifies the evidence for admission as an exception to the hearsay rule).

[59]Substantial concern has been expressed regarding the use of statements made while the declarant is in custody due to the coercive nature of the surroundings, the obvious motives for falsification, a natural desire to curry the favor of the arresting officers, and the desire to minimize culpability. ***See*** United States **v.** Sarmiento-Perez, 633 F.2d 1092, 1102 (5th Cir. 1981); United States v. Bailey, 581 F.2d 341, 349 (3d Cir. 1978); Committee, *supra* note 41, at 816. By contrast, a statement made in the privacy of a declarant's home provides less reason for concern. Even the fact that the statement was made while in custody should not be deemed dispositive. "Recognizing the danger [in admitting custodial statements against interest which inculpate the accused] does not answer the question" of whether such statements are against the interest of the declarant. Garris, 616 F.2d at 631. Where the statement was made constitutes but one of the factors to be examined. *Id.* at 632. ***See Riley,*** **657** F.2d at 1384.

[60]As noted above, a statement made to a law enforcement official while in custody may be inherently suspect. Not every statement to the police, however, raises this inference of unreliability. Where the statement is made outside the coercive environment of the stationhouse, or where the declarant is not under apprehension when the statement is made, the statement becomes less suspect. At the opposite extreme from a custodial statement to a law enforcement official is the statement made to a friend or a member of the declarant's family. This type of statement possesses a clear inference of reliability. Committee, *supra* note 41, at 816.

[61]A statement which, only in conjunction with other facts, implicates an accused is obviously less self-serving to the declarant than one which attempts to portray the accused as the more culpable individual. ***Cf. Meyer,*** 14 M.J. at 938 (a confession which admits nothing more than is already known but which directly implicates the accused in more serious criminal conduct does not qualify as a statement against interest under MRE 804(*b*)(3)).

[62]As stated by the Court of Military Appeals, whatever benefit may be obtained by confessing to a crime is secured "only at the expense of [the declarant's] own conviction." ***McConnico,*** 7 M.J. at 308 n.19.

[63]The trustworthiness of a particularly hearsay statement depends in part on the ability of the declarant to perceive and remember the events as they occurred with clarity. *See* I Weinstein, *supra* note 42, at paras. 800-10 to -11; United States v. Satterfield, 572 F.2d 687, 691 (9th Cir. 1978); *Whalen,* 15 M.J. at 878.

whether the statement was made under oath,[64] and whether it was reduced to writing.[65]

If, after analyzing each aspect of the statement in light of these factors, it is determining that the disserving aspect of the statement is predominant, the statement meets the requirements of a statement against penal interest and qualifies for admission pursuant to MRE 804(*b*)(3). Alternatively, if the self-serving aspect of the statement predominates, the statement is not truly against the interest of the declarant and, hence, would not qualify for admission. Nevertheless, the statement can still be admitted if one other factor is added to the analysis: corroboration.

Although corroboration is required under the Rule only as a prerequisite to the admissibility of a statement against interest introduced to exculpate an accused,[66] several federal courts have required

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[64] The importance of the fact that a statement has been made under oath is that the "solemnity of the occasion" is marked and the declarant is put on notice to be truthful under the threat of a prosecution for perjury. *See* I Weinstein, *supra* note **42,** at para. **800-12. See also *California v. Green*, 399 U.S.** at **158** (the purpose of requiring a witness to be placed under oath is to impress him with the seriousness of the matter and guard against the lie by the possibility of a penalty for perjury").

[65] *Robinson,* **16** M.J. at **768;** *Whalen,* **15** M.J. at **878.**

[66] MRE 804(*b*)(3). *See Garrett,* **16** M.J. at **944; Robinson, 16** M.J. at **766-68.** In *Garrett.* the court expressed concern over the absence of a requirement for corroboration of inculpatory as well as exculpatory statements: "We cannot see how a separate test, or no test, should similarly exist for inculpatory statements. The facts of legislative omission of a parallel test must be filled by this court to equate with the holdings of the Supreme Court.. .." 16 M.J. at **945-46.** While purporting to deal with the admissibility of such statements only from an evidentiary perspective, the court went on to hold "that the admissibility of inculpatory statements against penal interest under [MRE 804(*b*)(3)] requires corroborating circumstances that clearly indicate the trustworthiness of the statement." *Id.* at **946.** It is apparent that the court in *Garrett* recognized the distinction between admissibility from an evidentiary perspective and admissibility from a constitutional perspective. *Id.* at **945.** Nevertheless, the court became confused as to the standards applicable to each. To the extent that *Garrett* seeks to require corrobation of inculpatory statements against penal interest as a matter of evidentiary law, the decision represents inappropriate judicial legislation. To the extent that the court intended to require corroboration only as a matter of constitutional law, the decision is merely overbroad.

In the context of its discussion of the need for corroboration, the court in *Garrett* added a second requirement for the admission of inculpatory statements against penal interest. When the contents of a statement are related by a witness in court, the military judge must determine as a preliminary matter whether the witness is credible and, hence, "that there is a high likelihood that the statement was not actually made." The military judge must then determine whether the purported statement is reliable enough to be considered by the finders of fact. **Id.** at **947.** It is submitted that this requirement is entirely unnecessary. First, the determination of the credibility of every in-court witness falls within the province and is the sole responsibility of the finder of fact. *See* United States v. Frierson, **20** C.M.A. **452, 43** C.M.R. **292 (1971);** United States v. Albright, **9** C.M.A. 628, 26 C.M.R. 408 **(1958).** Thus, such an initial determination by the military judge would usurp a traditional function of the court-members. To permit, indeed require, exclusion of the testimony of a witness on the

such corroboration in order to justify admission of the statement as an exception to the right to confrontation.[67] As the ultimate criterion for the admission of hearsay statements is trustworthiness,[68] evidence which corroborates the truth of the statements may be used to strike the balance in favor of admitting a statement against interest which contains both disserving and self-serving aspects.[69] Although a statement which is predominantly self-serving would not technically qualify as a statement against penal interest under the balancing test as set forth above, despite such additional corroboration, such a statement should nevertheless be admitted pursuant to MRE 804(*b*)(3).[70]

IV. ADMISSIBILITY FROM A CONSTITUTIONAL PERSPECTIVE

Assuming that an out-of-court statement is admissible as an exception to the hearsay rule, the prosecution is still required to establish that the statement meets the constitutional standards of admissibility when it is offered to inculpate a criminal defendant.[71] Similar to

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ground that the *military judge* found it incredible would represent a radical departure from current military trial procedure. Such preliminary exclusions would themselves raise troubling constitutional questions if the evidence is being offered by the accused. ***See*** United Statesv. Satterfield, 572 F.2d 687, 692 (9th Cir. 1978). Finally, the requirement enunciated by the court is logically unsound. If the military judge determines as a preliminary matter that a witness is not credible, the judge also, by necessary implication, determines that the purported statement was never made. How the military judge is then *to* determine whether this nonexistent statement is sufficiently reliable to go to the fact finder is difficult of conception. It is submitted that the credibility of a witness testifying as to the contents of a statement against interest should only affect the weight to be given to the statement, not its admissibility. *Cf.* Dutton v. Evans, 400 U.S. 74, 87 n.19 (1970), where the Supreme Court upheld the admission of a statement against penal interest, presented through the testimonyof an in-court witness whose credibility was so severely attacked on cross-examination as to raise a serious doubt as to whether the statement was ever made.

[67] *See* United States v. Palumbo, 639 F.2d 123, 131 (3d Cir. 1981) (Adams, J., concurring); United States v. Alvarez, 548 F.2d 694 (5th Cir. 1978). *See also Robinson*, 16 M.J. at 768.

[68] *See* MRE 804(*b*)(3) (exculpatory statements against penal interest require corroboration to establish the trustworthiness of the statement). ***See*** *also Whalen*, 15 M.J. at 877 (admission of hearsay is premised on the circumstances establishing trustworthiness).

[69] *See Garris*, 616 F.2d at 632-33.

[70] If in fact the statement is sufficiently corroborated to assure that it is trustworthy, it would be admissible under the residual hearsay exception, MRE 804(*b*)(5). ***See*** United Statesv. Ruffin, 12 M.J. 952, 955 (A.F.C.M.R. 1982). *Cf.* ***Whalen,*** 15 M.J. at 878 (circumstantial guarantees of trustworthiness satisfy the requirements for admission under MRE 803(24)). It would be nothing less than form over substance to preclude admission of such a statement under MRE 804(*b*)(3), only *to* permit its admission under MRE 804(*b*)(5).

[71] United States v. McConnico, 7 M.J. 302 (C.M.A. 1979); United States v. Meyer, 14 M.J. 935 (A.C.M.R. 1982).

the evidentiary question of admissibility, the constitutional question of admissibility requires a bifurcated analysis. This process has been recently enunciated by the Supreme Court: "[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate indicia of reliability."[72] As with the question of admissibility from an evidentiary perspective, these analytical components will be addressed separately.

A. UNAVAILABILITY FROM A CONSTITUTIONAL PERSPECTIVE

Beginning with its decision in *Mattoxv. United States*,[73] the United State Supreme Court recognized that, where the declarant is physically unavailable, the right to confrontation "must occasionally give way to considerations of public policy and the necessities of the case."[74] Although unavailability of the declarant continued to be a prerequisite to the admission of evidence in the face of an objection based on the Confrontation Clause,[75] the Court did not have occasion to address the requirements for establishing constitutional unavailability for over seventy years after *Mattox* was decided. When the Court finally chose to address the issue in *Barber v. Page*,[76] the decision imposed an affirmative obligation on the prosecution to make "a good-faith effort to obtain [the] presence at trial" of any witness whose testimony is to be admitted against a criminal accused.

In its next decision concerning the issue of unavailability, the Court appeared to retreat from the strict requirements of *Barber v. Page,* in *California v. Green.*[78] Although the Court restated the

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[72]Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[73]156 U.S. 237 (1895).

[74]*Id.* at 243. In a previous opinion in the same case, the Court found proper the admission of a dying declaration despite the literal language of the Confrontation Clause. 146 U.S. 140 (1982). The Court found such statements admissible "not in conformity with any general rule regarding the admission of testimony, bit as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice." *Id.* at 152.

[75]*See, e.g.*, Pointer v. Texas, 380 U.S. 400. 401 (1965) (admission of evidence predicated upon fact that witness was not subject to process of court).

[76]390 U.S. 719 (1968).

[77]*Id.* at 724-25. The Court expressly rejected the argument that unavailability was established simply by showing that the witness was outside the jurisdiction of the trial court. *Id.* at 723. Adopting the language of the dissenting judge from the lower court, the Supreme Court ruled that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Id.* at 724.

[78]399 U.S. 149 (1970).

requirement that the prosecution must make a good-faith effort to produce an unavailable witness, the Court emphasized that it is the lack of fault on the part of the prosecution in procuring the absence of the witness which satisfies the requirement for unavailability.[79] Similarly, in *Mancusi v. Stubbs*,[80] the Court found that the prosecution's demonstration that the absent witness was residing in a foreign country satisfied the requirement to make a good-faith effort to produce the witness, despite the lack of any request for the witness to appear voluntarily.[81]

Finally, in *Ohio v. Roberts*,[82] the Court, after restating the good-faith test for unavailability first enunciated in *Barber v. Page*, redefined the prosecution's burden under this test:

> The basic litmus of Sixth Amendment unavailability is established: **[A]** witness is no "unavailable" for purpose of...the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith* effort to obtain his presence at trial.
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> Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good-faith *may* demand their effectuation.[83]

Although noting that the burden was on the prosecution to demonstrate the good-faith efforts undertaken, the Court adopted a stand-

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[79] *Id.* at 161, 167 n.16. In the next Term, the Court decided Dutton v. Evans, 400 U.S. 74 (1970), in which the Court "found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." Ohio v. Roberts, 448 U.S. 56, 65 n.7 (1980) (explaining *Dutton v. Evans*). *Dutton* should not be construed as dispensing with the requirement to demonstrate unavailability. Rather, the case indicates only that the failure to satisfy this requirement will be deemed harmless error beyond a reasonable doubt where the utility of in-court examination of the witness is negligible. ***See*** *Dutton v. Evans*, 400 U.S. at 90 (Blackmun, J., concurring).

[80] 408 U.S. 204 (1972).

[81] *Id.* at 212-13.

[82] 448 U.S. 56 (1980).

[83] *Id.* at 74 (citations omitted) (emphasis in original).

ard of "reasonableness" by which to judge the prosecution's efforts.[84]

As a practical matter, establishing unavailability of a witness as an evidentiary matter should also establish unavailability as a constitutional matter.[85] It should be remembered, however, that, while unavailability is not always required as a prerequisite to the introduction of hearsay evidence,[86] a good-faith effort to produce an unavailable witness will always be constitutionally required in the fact of an objection predicated upon the Confrontation Clause.[87]

B. RELIABILITY FROM A CONSTITUTIONAL PERSPECTIVE

Until quite recently, attempting to understand the Supreme Court's view of the Confrontation Clause, despite the Court's innumerable attempts to articulate the relationship between this constitutional provision and the hearsay rule, could be likened to walking

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[84] *Id. See California v. Green,* 399 U.S. at 189 n.2 (Harlan, J., concurring) ("The lengths to which the prosucution must go to produce a witness before it may offer an extra-judicial declaration is a question of reasonableness").

[85] The converse of this statement is not necessarily correct. Establishing that a witness has been advised to claim a blanket privilege against testifying and that the witness intends to rely on that advice would certainly satisfy the good faith burden under the Constitution, even if that witness is not required to appear at trial. *Ohio v. Roberts,* 448 *U.S.* at 74 (the law does not require the doing of a futile thing). The failure to produce the witness at trial where the witness could be subjected to a particularized inquiry into the validity of the privilege may, however, preclude a proper determination of unavailability under MRE 804(a)(1). *See Meyer,* 14 M.J. at 937 n.5. *Compare California v. Green,* 399 *U.S.* at 188, where Justice Harlan opined that the prosecution has fulfilled its obligation under the Sixth Amendment where it produces a witness at trial, even though the witness does not testify as to the subject matter of an extra-judicial statement: "The witness is, in my view, [constitutionally] available. . . ." *with Hogan, 16* M.J. at 550, where the court found the failure to exert all the available moral persuasion to encourage a recalcitrant witness to testify and declared erroneous the determination of unavailability under MRE 804(a)(2), despite the physical presence of the witness at trial. *See also* United States v. Thorton, CM 442885 (A.C.M.R. 13 Sept. 1983) (compliance with MRE 804(a)(5) satisfied requirement to establish unavailability under the Sixth Amendment).

[86] *See* MRE 803, which provides that the types of evidence enumerated therein "are not excluded by the hearsay rule, even though the declarant is available as a witness." This phrase has been construed to mean that the presence or absence of the declarant is immaterial to the admissibility of the evidence. Evidence Manual, supra note 3, at 355. As previously noted, the continued admission of such evidence without regard to the constitutional considerations is questionable. *See Vietor,* 10 M.J. at 79 (Fletcher, J., concurring).

[87] *Ohio v. Roberts,* 448 U.S. at 65. But *see Vietor,* 10 M.J. at 69, in which the Court of Military Appeals held that unavailability was not a prerequisite to the admissibility of evidence pursuant to MRE 803.

through a maze blindfolded.[88] The Court itself has recognized that its approach to this area of constitutional law has resulted in an avalanche of scholarly criticism.[89] Nevertheless, finding none of the suggested alternatives totally satisfactory and believing that the Court's gradual approach had been successful in steering an appropriate middle course, the Court repeatedly rejected the invitation to abandon its past efforts to reconcile the competing interests of an accused's right to confrontation with the public's right to effective law enforcement,[90] juxtaposed by the unavailability of a witness against the accused.

In *Ohio v. Roberts*,[91] however, the Court at last attempted to recapitulate the general approach to the accommodation of the competing interests established by the Court's prior decisions. First, the Court found that the Confrontation Clause is a rule of preference, desiring face-to-face confrontation over trial by *ex parte* affidavit.92 The Court also found that the Confrontation Clause was designed to secure the right to cross-examination in order to insure the reliability of the evidence presented against an accused.[93] Accordingly, the Court noted that the Confrontation Clause restricts the use of hearsay evidence in two separate ways:

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution

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[88] For a thoughtful guided tour through the Supreme Court's decisions in this area, *see California v. Green,* 399 U.S. at 172-90 (Harlan, J., concurring). Justice Harlan concluded that, due to the "stultifying effect" of the course that the Court had charted, the time had come "for taking a fresh look at the constitutional concept of 'confrontation,' " *stare decisis* notwithstanding. *Id.* at 173. Less than six months later, however, Justice Harlan was forced to admit that his view of the Confrontation Clause/hearsay rule dichotomy had completely changed. *Dutton* v. *Evans,* 400 US. at 94.

[89] *See Ohio v. Roberts,* 448 US. at *66-67* n.9.

"This right, referred to in *Maddox* as "the necessities of the case," is protected by the establishment of a rational system of evidence that guarantees that all trustworthy evidence will be brought to light "to the end that the truth may be ascertained and proceedings justly determined." MRE 102. *See* Snyder v. Massachusetts, 291 U.S. 97 (1934).

[91] 448 U.S. *56* (1980).

[92] *Id.* at 63. This conclusion was first articulated bv Justice Harlan in *Californiav. Green,* where he stated that "the Confrontation dlause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witnesses whose declarations it seeks to use in a criminal trial." 399 U.S. at 174 (Harlan, J., concurring) (emphasis in opinion).

[93] 448 U.S. at 63 n.6. This conclusion follows directly from the majority opinion in *California* v. *Green,* which held that the Confrontation Clause is not violated by admitting a declarant's out-of-court statement, provided that the declarant is testifying as a witness and is subject to full and effective cross-examination. 399 U.S. at 158.

> must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.
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> . . . .
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> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test evidence, the clause countenances only hearsay marked with such trustworthiness that "there is not material departure from the reason of the general rule."[94]

Citing to *Mancusi v. Stubbs*,[95] the Court defined this requisite mark of trustworthiness as "indicia of reliability."[96]

Thus, the Court has clearly articulated the standard which must be met to satisfy the Confrontation Clause when evidence is offered as an exception to the hearsay rule. While the Court declined to

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[94]448 U.S at 65 (citations omitted). As one of the two stated purposes of the Confrontation Clause is to secure the right to cross-examination, the latter requirement stated by the Court must be construed to permit the dispensation of that right when the proferred hearsay evidence is sufficiently trustworthy.

[95]408 U.S. 204 (1972).

[96]448 U.S. at 65-66 (citing *Mancusi*. 408 U S . at 213). Despite the Supreme Court's unambiguous holding that the admission of a hearsay statement possessing adequate indicia of reliability will not violate the Confrontation Clause, the Navy-Marine Corps Court of Military Review has ruled that "[a]n examination of the 'indicia of reliability'. . .is not conclusive as to sixth amendment issues." *Garrett*, 16 M.J. at 948. Ignoring the holding of *Ohio v. Roberts*, the court in *Garrett* construed the requirement to demonstrate indicia of reliability as being applicable only to the determination of whether a statement against penal interest is admissible as an evidentiary matter. *Id.* In reaching this conclusion, the court relied upon language in *Dutton v. Evans* and *Douglas v. Alabama*, which indicated that the importance of the evidence was determinative of the issue of admissibility from a constitutional perspective. *Id.* at 948-49 (citing *Dutton v. Evans*, 400 U.S. at 87-88; *Douglas v. Alabama*, 380 U.S. at 419-20). Thus, the court in *Garrett* held that, reliability of the evidence notwithstanding, admission of statements against penal interest which provide the crucial or only direct evidence of guilt, violates the right to confrontation. This interpretation is not supported by the holdings of the cases relied upon in *Garrett* and is directly repudiated by the Supreme Court's decision in *Ohio v. Roberts*.

Initially, the error condemned in *Douglas* was the improper use of a co-accused's confession "under the guise of cross-examination," to place before the jury hearsay evidence that was unquestionably inadmissible under the state's evidentiary rules. 380 U.S. at 416, 418. The Supreme Court of Alabama had itself found error in the admission of the evidence but concluded that the issue had been waived. *Id.* at 418. Rejecting the waiver argument, the Supreme Court found a violation of the right to confrontation in the admission of the evidence due to the inability to cross-examine the declarant as to the subject matter of the statement. *Id.* at 420. Thus, the Court's holding is no broader than that the use of *inadmissible* hearsay as the only direct evidence of guilt violated the Confrontation Clause in the absence of cross-examination, Whether the *Douglas* Court would have similarly found error in the use of evidence admitted pursuant to a legitimate hearsay exception is sheer speculation.

determine the validity of all hearsay exceptions, sufficient guidance was provided to permit the determination of whether a particular hearsay statement possess the "adequate indicia of reliability" to be made on an exception-by-exception basis: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[97]

Accordingly, an inculpatory statement against penal interest will be admissible from a constitutional perspective if it qualifies as a firmly rooted hearsay exception and the inference of reliability which arises from this fact has not been rebutted. Alternatively, such statements will be admissible where adequate indicia of reliability are demonstrated through the particularized guarantees of trustworthiness surrounding the statement.

Statements against the declarant's pecuniary or proprietary interest under MRE 804(*b*)(3) undoubtedly qualify as firmly rooted hearsay exceptions. Indeed, such statements were among the few exceptions to the hearsay rule recognized at common law.[98] Whether statements against penal interest also qualify as a firmly rooted hearsay exception is a closer question. The common law rule permitting the admission of statements against interest specifically excluded statements against penal interest.[99] As the justification for the admission of each type of statement is the same, however, there is little logic in treating the two types of statements differently. Reasonable people simply do not make statements against their own interest, be that interest proprietry, pecuniary, civil, or penal, unless the statement is true.[100]

In *Dutton,* the Court was faced with the exact opposite situation from that considered in *Douglas,* the admission of non-crucial evidence pursuant to a recognized hearsay exception. 400 U.S. at 87. Although the Court emphasized the "peripheral significance" of the evidence, the holding that no violation of the right to confrontation had occurred was predicated in large part on a finding that the statement possessed adequate indicia of reliability. *Id.* at 88-89. Whether the Court would have ruled differently had it found the challenged evidence "crucial" cannot be determined from the language of the opinion.

In any event, the Court, in ***Ohio** v. Roberts,* laid to rest any lingering doubt as to admissibility of evidence pursuant to a recognized hearsay exception despite the lack of trial confrontation. 448 U.S. at 66. Nothing in the Court's opinion qualifies this holding based upon the crucial-non-crucial distinction. Such a requirement should not be added by the military courts absent further guidance from the Supreme Court. *McConnico,* 7 M.J. at 309 n.23.

[97] 448 U.S. at 66.

[98] *See* Wigmore, *supra* note 45, at § 1455.

[99] Dean Wigmore points out that, as the rule developed, it embraced both proprietary and penal interests and that the limitation of the exception to only those against proprietary interests was "a fairly modern novelty of judicial invention." *Id.*

[100] *See* Evidence Manual, *supra* note 3, at 378.

Furthermore, the judicial recognition which the statement against penal interest has received, both before and after its codification in the Federal Rules of Evidence, establishes its place as a firmly rooted hearsay exception.[101] Therefore, in accordance with *Ohio v. Roberts,* an inference arises that statements against penal interest are constitutionally reliable.[102]

This inference of reliability, however, does not guarantee the admissibility of a statement against penal interest. The facts and circumstances surrounding the making of the statement may rebut this inference. This is particularly true of the inculpatory statement against penal interest where the declarant is a co-accused and was in custody at the time that the statements was made.[103] Thus, a demonstration of the particularized guarantees of trustworthiness may be required to establish the constitutional reliability of the statement.[104]

Three separate and distinct methods of establishing these guarantees of trustworthiness have been articulated by the courts. First, and most consistent with the purpose of the Confrontation Clause, is prior cross-examination.[105] While the situation may be rare in which a statement against penal interest is made under circumstances

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[101] *See* Chambers v. Mississippi, 410 U.S. 284,299 (1973); Dutton v. Evans, 400 U.S. 74, 89 (1970); United States v. Bruce, 14 M.J. 254 (C.M.A. 1982); United States v. McConnico, 7 M.J. 302 (C.M.A. 1979); United States v. Johnson, 3 M.J. 143 (C.M.A. 1977); United States v. Garrett, 16 M.J. 941 (N.M.C.C.M.R. 1983); United States v. Robinson, 16 M.J. 766 (A.C.M.R. 1983); United States v. Whalen, 15 M.J. 872 (A.C.M.R. 1983); United States v. Velez, NMCM 822745 (N.M.C.C.M.R. 16 Mar. 1983).

[102] *See* United States v. Robinson, 635 F.2d 365 (5th Cir. 1981); United States v. Liberman, 637 F.2d 95, 104(2d Cir. 1980)(court found that statement wasadmissible against a criminal defendant pursuant to Fed. R. Evid. 804(b)(3) and did not further discuss the constitutional question of admissibility). *But see* Olson v. Green, 668 F.2d 421, 427-28 (8th Cir. 1982)("custodial statements implicating a third person do not fall within a firmly rooted hearsay exception"). The court's decision in *Olson* was predicated upon the difficulty encountered by the federal courts in reconciling the hearsay nature of statements against interest with the Confrontation Clause. *Id.* at 428. Many of the decisions cited, however, were decided prior to *Ohio v. Roberts,* during a time when the federal courts were struggling to reconcile any of the hearsay exceptions with the right to confrontation. Furthermore, the court in *Olson* was concerned with the declarant's apparent motive to fabricate. *Id.* Thus, the decision can be explained as a determination by the court that the inference of reliability, which arose from the fact that the statement fell within a firmly rooted hearsay exception, was rebutted by the circumstances surrounding the making of the statement.

[103] *See* Olson v. Green, 668 F.2d 421 (8th Cir. 1982); Committee, *supra* note 41, at 328.

[104] *Ohio v. Roberts,* 448 U.S. at 66.

[105] *See* California *v. Green,* 399 U.S. at 165-66. *See also Ohio v. Roberts,* 448 U.S. at 69 n.lO; United States v. Thorton, CM 442885, slip op. at 5 (A.C.M.R. 13 Sept. 1983).

giving rise to an opportunity for cross-examination, this method of establishing the reliability of the statement should not be ignored.[106]

The second method of establishing the particularized guarantees of trustworthiness of a statement against penal interest is through the circumstances surrounding the making of the statement.[107] The particular circumstances which demonstrate the requisite trustworthiness are too numerous and varied to be detailed.[108] An examination of those same factors used to determine whether a statement containing both self-serving and disserving aspects is in fact against the interest of the declarant will provide an initial basis for analysis.[109] The specific facts which will provide the guarantees of trustworthiness, however, must, by necessity, be established by the particular facts of the case.

The third method of demonstrating the particularized guarantees of trustworthiness essential to establish the reliability of the statement is through the use of independent corroboration.[110] This method

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[106] Two situations in which such a statement might be made are hearings pursuant to Article 32, UCMJ and courts-martial at which no punitive discharge is adjudged. Unless a verbatim record has been made of these proceedings, the testimony elicited would not qualify as former testimony pursuant to MRE 804(*b*)(1). *See* Evidence Manual, supra note 3, at 377.

[107] *See Dutton v. Evans*, 400 U.S. at 89; Robinson, 635 F.2d at 365; United States v. West, 574 F.2d 1131, 1138 (4th Cir. 1978); United States v. Velez, NMCM 822745, slip. op. at 5 (N.M.C.C.M.R. 16 Mar. 1983). *Cf.* United States v. Ruffin, 12 M.J. 952, 955 (A.F.C.M.R. 1982) (admission of hearsay statements does not violate the right to confrontation if there is circumstantial evidence supporting the truth of the statement).

[108] For example, in Dutton *v. Evans*, the Court found the sponteniety of the statement, as well as that it was against the penal interest of the declarant, to be "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before a jury though there is no confrontation of the declarant." 400 U.S. at 89. Another important circumstance is the fact that the statement was made under oath. Indeed, that a statement was made under oath takes on significant proportions in establishing the reliability of a statement and its admissibility despite the lack of opportunity for cross-examination, Keeping in mind that the purpose of the Confrontation Clause is to provide the trier of fact with a means to weigh the truth of the evidence presented to it, the Supreme Court has found the imposition of an oath a compelling safeguard against untruthful statements. *California v. Green,* 399 U.S. at 158. *See also Ohio v.* Roberts, 448 U.S. at 63 n.6.

[109] *See West,* 574 F.2d at 1138 (the same circumstances which demonstrate the trustworthiness of an exception to the hearsay rule will also suffice to meet the constitutional requirements of reliability); *Velez*, NMCM 822745, slip op. at 5 (circumstantial evidence which supports the truth of the statement also provides the requisite indicia of reliability).

[110] *See* United States v. Riley, 657 F.2d 1377, 1383 (8th Cir. 1981); United States v. Sarmiento-Perez, 633 F.2d 1092, 1092 (5th Cir. 1981); United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978); United States v. Robinson, 16 M.J. 766, 768 (A.C.M.R. 1983). In Robinson, the court found that the admission of an inculpatory statement against penal interest violated the accused's right to confrontation due to the absence of "independent evidence showing the trustworthiness of the statement, despite the fact that the statement itself 'exhibited some intrinsic indicia of trustworthiness. . . .'"

has received the most judicial recognition,[111] in part due the requirement for corroboration for exculpatory statements against interest provided by the Rule.[112] Independent corroboration undoubtedly provides the most certain assurance that the contents of a statement against penal interest are trustworthy and should guarantee the admission of such a statement from a constitutional perspective.[113] This method should be utilized whenever the facts of the case permit, but the absence of corroboration should not be deemed fatal to the admissibility of an inculpatory statement against penal interest.

V. CONCLUSION

Despite the reluctance of appellate judges and military courts to sanction the use of inculpatory statements against penal interest pursuant to Rule 804(*b*)(3), neither the Confrontation Clause, as interpreted by the Supreme Court, nor the evidentiary rule itself precludes the use of such evidence against an accused at court-martial. Indeed, where the evidence to be introduced is reliable and the unavailability of the declarant renders face-to-face confrontation impossible, the community's right to the just enforcement of criminal laws compels the use of this evidence.

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16 M.J. at 768. While recognizing that the Constitution requires only that evidence indicating the trustworthiness of the statement be adduced, Ohio *v.* Roberts, 448 U.S. at 66, the court held that this evidence must be independent of the statement itself:

> Accordingly, we hold that the confrontation clauseengraftsonto Federal Rule of Evidence 804(*b*)(3) and its military counterpart, Military Rule of Evidence 804(*b*)(3), a constitutional requirement for proving by inde*pendent* evidence that statements against penal interest which inculpate an accused are trustworthy.

16 M.J. at 768 (emphasis added). Nothing in Ohio *v.* Roberts or any earlier Supreme Court decision supports this conclusion that the particularized guarantees of trustworthiness required to demonstrate the reliability of the statement must be established by independent evidence. Indeed, the holding in *Dutton v. Evans*, which relied exclusively on the indicia of reliability intrinsic to the statement, is contrary to the decision in Robinson. 400 US. at 88-89. In the absence of further guidance from the Supreme Court, military tribunals should be reluctant to enlarge the scope of the right to confrontation in derogation of a legally promulgated rule of evidence. *Cf.* McConnico, 7 M.J. at 309 n.23.

[111] In addition to the cases previously cited, ***see*** *also* United States v. Palumbo, 639 F.2d 123, 131 (3d Cir. 1981); United States v. Goins, 593 F.2d 88, 92 (8th Cir. 1979). *Cf.* MRE 804(*b*)(3) (corroboration sufficient to establish the trustworthiness of the statement is required to justify admission of exculpatory statements against penal interests).

[112] ***See*** *Garrett*, 16 M.J. at 945; Robinson, 16 M.J. at 768.

[113] As noted above, corroboration will also generally tip the balance in favor of admission of inculpatory statements against interest from an evidentiary perspective as well. ***See*** text accompanying note 70 and note 70 *supra*.

The prosecutor's task is to stand ready to articulate the requirements that must be satisfied to permit the admission of inculpatory statements against penal interest and to demonstrate the satisfaction of these requirements in the record. Defense counsel, in turn, must be required to specify the nature of their objections to admissibility and should not be permitted to rest on such amorphous complaints as the denial of the right of confrontation. Correlative with the obligations of the trial attorneys, military trial judges must avoid precipitous rulings of admission or preclusion of hearsay evidence without permitting or requiring counsel to fulfill their respective responsibilities. Finally, military appellate judges, schooled in the belief that hearsay evidence is incompetent and that the lack of cross-examination equates with the denial of confrontation, must cease their attempts to fit the new rules of evidence into preconceived notions of admissibility. Whatever their feelings as to the soundness of the changes from past practice, the requirements for the admission of evidence should not be judicially redrafted out of reluctance to change with the rules.

THE GOVERNMENT'S COMMERCIAL DATA PRIVILEGE UNDER EXEMPTION FIVE OF THE FREEDOM OF INFORMATION ACT

by Steven W. Feldman*

I. INTRODUCTION

In *Federal Open Market Committee* v. *Merrill*,[1] the United States Supreme Court held in 1979 that Exemption Five of the Freedom of Information Act (FOIA)[2] contains a qualified privilege for confidential commercial data that the government generates incident to the award of a federal contract.[3] The *Merrill* Court ruled that the information is protected only if the agency establishes that the data has sufficient commercial "sensitivity" and that public disclosure would cause significant harm to the government's legitimate commercial interests.[4] The Court further stated that the privilege would expire

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[1] 413 F. Supp. 494 (D.D.C. 1976), *aff'd*, 565 F.2d 778 (D.C. Cir. 1977), *vacated*, 443 U.S. 340 (1979), *on remand*, 516 F. Supp. 1028 (D.D.C. 1981).

[2] 5 U.S.C. § 552 (1976). The Act is implemented within the Department of the Army by U.S. Dep't of Army, Reg. No. 340-17, Office Management - Release of Information and Records from Army Files (1 Oct. 1982) [hereinafter cited as AR 340-17], and Defense Acquisition Reg. § 1-329, App. L. (1982). *See generally* U.S. Dep't of Army, Pamphlet No. 27-153, Procurement Law, ch. 22 (15 Mar. 1983). On 1 April 1984, federal contracting agencies adopted the Federal Acquisition Regulation (FAR). 48 Fed. Reg. 44215 (28 Sept. 1983). The FAR basically parallels the DAR.

[3] *Merrill*, 443 U.S. at 360.

[4] *Id.* at 359-63.

when its rationale disappears, for example, "[o]nce the contract is awarded or the offer [is] withdrawn."[5]

Unfortunately, the *Merrill* Court did little more than recognize a new privilege under Exemption Five and articulate a general balancing test for determining the releasability of the government's commercial information.[6] This article, therefore, will attempt to mark the contours of the new FOIA privilege. The article will provide an overview of the Act, analyze *Merrill* and its progeny, and finally, attempt to answer the questions created by *Merrill.*

II. OVERVIEW OF THE FREEDOM OF INFORMATION ACT

After years of public debate, Congress enacted the Freedom of Information Act in 1966 to remedy serious deficiencies in section III of the Administrative Procedure Act.[7] Originally, this latter provisions was designed to allow citizen access to government records. Nonetheless, experience showed that, in actuality, this legislation frustrated rather than facilitated open government. Among other shortcomings, section III required the requestor to establish a direct and proper concern with the desired records, thereby denying the general public a right of access.[8] Additionally, federal agencies were interpreting section III as a withholding statute rather than as a disclosure statute.[9]

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[5] *Id.* at 360

[6] *Id.* at 363-64. *See* Belazis, *The Government's Commercial Information Privilege: Technical Information and the FOIA's Exemption Five,* 33 Ad. L. Rev. 415, 419 (1981): "In finding that the FOIA provides qualified protection to the government's confidential information, the *[Merrill]* Court left open the breadth, precise duration, and other characteristics of the privilege." For other commentary on *Merrill, see* Comment, *Developments Under the Freedom of Information Act - 1979,* 1980 Duke L.J. 139, 155-159; Note, Federal Open Market Committee of the Federal Reserve System v. Merrill: *Delayed Disclosure to Protect Governmental Interests Under the Freedom of Information Act,* 1980 Det. Coll. L. Rev. 669; Recent Developments, *Government Commercial and Precontractual Information Under Exemption 5 of the Freedom of Information Act:* Merrill v. FOMC, 60 B.U.L. Rev. 765 (1980) [hereinafter cited as Boston Note]; Recent Developments, *Administrattae Law - Freedom of Informatton Act - Exemytion 5 Includes a Qualified Privilege for Commercial Information,* 25 Vill. L. Rev. 507 (1980).

[7] 5 U.S.C. § 1002(1964). *See* Kuersteiner & Herbach, *The Freedom of Information Act: An Examination of the Commercial or Financial Exemption,* 16 Santa Clara L. Rev. 193, 193 (1976) (citing H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966)).

[8] H. R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966).

[9] *Id.*; S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).

FOIA now affords any person a judicially-enforceable right to obtain releasable agency records.[10] The Act contains a general philosophy of full agency disclosure of government records unless the information is exempted by clearly delineated statutory language." As the Supreme Court stated in *National Labor Relations Board v. Robbins Tire and Rubber Co.*,[12] "the basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.[13]

FOIA contains nine exemptions from disclosure for classified records, internal personnel rules and practices, records exempted by other federal withholding statutes, confidential business data, privileged agency records, personnel, medical, and similar files, investigatory records compiled for law enforcement purposes, reports of financial institutions, and scientific data concerning wells.[14] The Supreme Court has indicated that all FOIA exemptions are permissive rather than mandatory.[15] A typical standard for permissive disclosure of exempt records is when it is determined that no governmental interest will be jeopardized by their release.[16] Based on FOIA's overriding disclosure policy, courts have construed these exemptions narrowly.[17] Further, the agency bears the burden of

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[10] 5 U.S.C. § 552(a) (1976). The Act includes only administrative and executive agencies and excludes Congress and the federal judiciary. Kuersteiner & Herbach, *The Freedom of Information Act: An Examination of the Commercial or Financial Exemption*. 16 Santa Clara L. Rev. 193, 194 (1976).

[11] Federal Open Market Committee v. Merrill, 443 U.S. 340, 351-52 (1979).

[12] 437 U.S. 214 (1978).

[13] *Id.* at 242.

[14] 5 U.S.C. § 552(b) (1976). In certain respects, Exemption Four is closely related to Exemption Five. *See* text accompanying notes 43-46, 83-90 *infra*. This former exemption safeguards "tradesecrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4)(1976). For a good analysis of Exemption Four, *see* Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 Geo. L.J. 103 (1978); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587 (1977); Note, *Protecting Confidential Busines Information From Federal Agency Disclosure After Chrysler v. Brown*, 80 Colum. L. Rev. 109 (1980); Note, *"Reversing" the Freedom of Information Act: Legislative Intention or Judicial Invention?*, 51 St. John's L. Rev 734 (1977).

[15] Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

[16] *See* U.S. Dep't of Defense, Reg. No. 5400 7-R, DoD Freedom of Information Act Program (Dec. 1980), *amended by* Dep't of Defense Dir. Systems Transmittal 5400-7 (C.3, 3 Dec. 1980), *further amended by* Memorandum from Director, Freedom of Information and Security Review, Dep't of Defense, to Dep'ts of Army, Navy, and Air Force, subject: Dep't of Defense Reg. 5400 7-R (27 July 1982).

[17] Department of the Air Force v. Rose, 425 U.S. 352, 360-62 (1976).

establishing the exempt status of the requested records[18] and must disclose reasonably segregable portions of exempt documents.[19]

All federal agencies must publish their regulations implementing the Act in the ***Federal Register***.[20] These regulations typically inform the public of addresses for requests, records maintained by the agency, prerequisites for a valid FOIA request, fee schedules for search and duplication costs, and administrative appeal procedures.[21]

Although the Act offers no definition of releasable agency records, courts have attempted to develop uniform standards. As one commentator has noted:

> A record must be an "agency record.". . .Physical possession by an agency of a record generated by an entity not subject to the Act does not, by itself, dictate agency status. Evidence of dominion and control appears to be the evolving standard. While possession is only one of several factors which must be considered in making this determination, possession is essential to status as an agency record. Agencies are not required to retrieve records formerly in their possession. Similarly, agencies are not required by the Act to obtain or create records in order to satisfy a FOIA request. Agencies are required instead to release identifiable records which presently exist and are under the control of the agency.[22]

The Act sets forth three methods of public access to government records: publication, indexing for public inspection, and access upon request.[23] The agency must publish in the ***Federal Register*** documents containing agency organizational structure, operational methods, form materials, statements of policy and rules of general applicability, and amendments, revisions, or repeals of the above records.[24] The agency also must index and make available for public inspection and copying the agency's final opinions and orders made in the adjudication of cases, statements of policy and interpretation adopted by the agency not otherwise available in the ***Federal***

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[18] 5 U.S.C. § 552(a)(4)(B) (1976).
[19] *Id.* at § 552(b).
[20] *See, e.g.*, **AR** 340-17.
[21] *Id.*
[22] Schempf, ***Release*** of *Information,* The Army Lawyer, July 1981, at 1, 5-6 (citation omitted).
[23] 5 U.S.C. § 552(a) (1976).
[24] *Id.* at § 552(a)(1).

Register, and administrative staff manuals or staff instructions affecting a member of the public.[25] Finally, the Act provides for access to records upon request only when the requestor reasonably describes the desired documents and complies with the agency's published procedural guidelines.[26]

Upon receipt of a proper FOIA request, the government agency must inform the requestor of its decision within ten working days.[27] If the request is denied, this notice must both explain the reasons for denial and advise the requestor of available administrative appellate remedies.[28] The agency may extend the time limits for initial denial and subsequent administrative appeals for an additional ten working days.[29] In so doing, the agency must give the requestor written notice of both the unusual circumstances substantiating the delay and the expected date the agency will dispatch its decision.[30]

After exhausting administrative remedies, the requestor may sue in federal district court to obtain any records or parts of records withheld by the agency.[31] "In such a case, the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld. . . ."[32]

III. *FEDERAL OPEN MARKET COMMITTEE v. MERRILL*

In ***Merrill,*** the requestor, a law student at Georgetown University, invoked the Act to obtain the Federal Open Market Committee (FOMC) of the Federal Reserve System's monthly instructions concerning the Reserve's purchases of government securities and foreign currencies on the open market.[33] The Committee strenuously objected to the request, arguing that prompt disclosure would undermine the government's trading strategy on the open market and

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[25] *Id.* at § 552(a)(2). The only exception to this rule is when the materials are published promptly and copies are offered for sale. *Id.*

[26] *Id.* at § 552(a)(3).

[27] *Id.* at § 552(a)(6).

[28] *Id.* at § 552(a)(6).

[29] *Id.* at § 552(a)(6)(B).

[30] *Id.* The requestor is deemed to have exhausted his or her administrative remedies if the agency fails to comply with the applicable time limits. *Id.* at § 552 (a)(6)(C).

[31] *Id.* at § 552(a)(4)(B). *See* Hedley v. United States, 594 F.2d 1043, 1044 (5th Cir. 1979).

[32] 5 U.S.C. § 552 (a)(4)(B) (1976).

[33] 443 U.S. at 343-47.

would prevent the Reserve from establishing adequate controls on national monetary policy.[34]

In addressing the releasability of the data, the *Merrill* Court first analyzed the governing sections of the Act. The exemption pertinent to *Merrill* was Exemption Five, which protects "interagency or intra-agency memoranda or letters [that] consist of material that would not be [routinely] available by law to a party...in litigation with the agency."[35]

First ruling that these documents were intra-agency memoranda within the meaning of Exemption Five, the Court then discussed the "difficult question" of whether these records would be routinely available by law to a party in litigation with the agency.[36] In resolving this issue, the Court cautioned that "it is not clear that Exemption Five was intended to incorporate every privilege known to civil discovery."[37] Previously, the Supreme Court had recognized only two civil discovery privileges within the Exemption: the executive privilege for predecisional deliberations and the attorney work-product doctrine.[38] The Court had incorporated these privileges within Exemption Five because "both of these privileges are expressly mentioned in the legislative history of that Exemption."[39] Accordingly, the *Merrill* Court examined the Act's congressional history and related statutes to ascertain the legislative intent concerning government commercial data.

The *Merrill* majority read the language of Federal Rule of Civil Procedure 26(c)(7) to establish a partial basis for a government commercial information privilege under Exemption Five. Rule 26(c)(7) provides that "a district court for good cause shown may order that a trade secret or other confidential research, develop-

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[34] *Id.* at 348-50. The Committee argued that disclosure of FOMC monetary policy objectives would have an "announcement affect" on the market, as investors would arrange their holdings in ways that could cause harmful, uncontrollable price and interest rate changes. The FOMC also contended that immediate disclosure of these policy instructions would similarly harm national fiscal policy because large investors have the means to react quickly to these changes, thereby giving them an unfair advantage over smaller investors. *Id.*

[35] 433 U.S. at 352-53 (discussing 5 U.S.C. § 552(b)(5) (1976)). ***See*** *also* Government Land Bank v. GSA, 671 F.2d 663, 666 (1st Cir. 1982).

[36] 443 U.S. at 352.

[37] *Id.* at 354.

[38] *Id.* at 354-55 (citing NLRB v. Sears Roebuck and Co., 421 U.S. 132, 150-54 (1975)). The courts also have recognized the evidentiary privilege for attorney-client communications in FOIA cases. *Merrill*, 443 U.S. at 355 n.15; Mead Data Central v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

[39] 443 U.S. at 355 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong. 1st Sess. 2 (1965)).

ment, or commercial information need not be disclosed or be disclosed only in a designated way."[40] Although this qualified evidentiary privilege usually protects only private parties,[41] the *Merrill* Court commented: "The Federal Rules. . .are fully applicable to the United States as a party. . .and we see no reason why the government could not, in an appropriate case, obtain a protective order under Rule 26(c)(7)."[42]

Having found a qualified discovery privilege for confidential commercial government data, the ***Merrill*** Court analyzed the Act's legislative history to determine possible justification for Exemption Five coverage. Conceding that the House and Senate Reports fail to supply "unequivocal" support for this FOIA privilege, the Court also noted that the congressional hearings contained substantial testimony by government agencies concerning the harmful, premature disclosure of procurement-sensitive information.[43] In a "significant" passage, the House Report stated:

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision, or regulation. [Exemption Five] is intended to exempt from disclosure this and other information and records whenever necessary without, at the same time, permitting indiscriminate administrative secrecy.[44]

Relying on this legislative history, the ***Merrill*** Court determined that Congress specifically contemplated a limited Exemption Five privilege for the government's confidential commercial information pertaining to its contracts.[45] Further, the Court noted that the new privilege parallels a commercial privilege under Exemption Four attaching to a private party's records in the possession of the government: the only distinction is the source of the information.46

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[40] 443 U.S. at 355056 (analyzing Rule).

[41] *E.g.*, E.I. du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917).

[42] 443 U.S. at 356-57. The FOMC also advanced the argument that Exemption Five contains a substantive privilege for official government information that would harm the public interest, citing Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir. 1963), a pre-FOIA case. The ***Merrill*** Court expressly refused to decide this issue, 443 U.S. at 355 n.17. But see *id.* at 354 (rejecting any FOIA exemption that would allow an agency to withhold information on the basis of a "efficiency" or "public interest" standard). See also 5U.S.C. §552(c) (1976) (Act forbids withholding of government records except as specified in statute).

[43] 443 U.S. at 357-59 (analyzing legislative history).

[44] *Id.* at 359 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)).

[45] 443 U.S. at 359.

[46] *Id.* at 360.

The Court next explained the policy of the new privilege and applied the exemption to the instant case:

> [Unlike the executive privilege doctrine,] [t]he theory behind a privilege for confidential commercial information generated in the process of awarding a contract is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.[47]

The Court examined the Domestic Policy Directives and found that the documents "are substantially similar to confidential commercial information generated in the process of awarding a contract."[48] The Court then enunciated a general balancing test, which assesses "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure [as the] relevant criteria in determining the applicability of this Exemption Five privilege."[49] The *Merrill* district court, however, had failed to make the necessary findings concerning the economic impact of immediate release of the requested records. The Court therefore remanded the case to the district court for an eviden-

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[47] *Id.*

[48] *Id.* at 361. The Court pointed out that most evidentiary and discovery privileges are qualified rather than absolute. *Id.* at 362. The Court also noted that these privileges apply in Exemption Five cases only "by way of rough analogies." *Id.* (quoting **EPA v.** Mink, 410 **U.S.** 73, 86 (1973)). Additionally, the *Merrill* Court emphasized that the need **of** the requestor is not a valid factor in determining the releasability of the government's commercial information. *Id.* at 362-63 (citing NLRB v. Sears Roebuck and Co., 421 **U.S.** 132, 149 n.16 (1975)). Following this principle, the First Circuit in Government Land Bank **v.** GSA, 671 F.2d 663, **667** (1st Cir. 1982), rejected the requestor's argument that disclosure should occur despite Exemption Five when the requestor has a "special relationship" with the agency.

[49] 443 **U.S.** at 363.

tiary hearing.[50] On remand, the district court denied disclosure, holding that the FOMC had presented sufficient proof of adverse economic effects resulting from prompt release of this confidential material.[51]

IV. CASE LAW AFTER *MERRILL*

Several later courts have analyzed the government's commercial information privilege under Exemption Five. Like ***Merrill,*** these cases involved data the government generated in connection with a federal contract.

In ***Hoover v. Department of the Interior***,[52] the requestor sought release of the agency's appraisal report of his private property incident to a condemnation proceeding.[53] The agency had offered Hoover **$325,000** for the property, but Hoover rejected the offer and asked for the government's appraisal to assist him in the negotiations.54 Although an outside expert had prepared the document, the Fifth Circuit ruled that the report was an intra-agency memorandum within the intent of Exemption Five.[55] The ***Hoover*** court then discussed whether ***Merrill*** protected the appraisal. Under Federal Rule of Civil Procedure **26(**B)(4), the appraiser's report would have been routinely unavailable by law to a party in litigation with the agency:

"Merrill v. Federal Open Market Committee, 516 F. Supp. 1028 (D.D.C. 1981). On remand, the FOMC presented various arguments concerning the harmful effects of prompt disclosure of the materials. *Id.* at 1031-32. The requestor countered with expert testimony challenging the FOMC's assertion of economic detriment. *Id.* The court accepted the agency's argument, saying that "no credible evidence has been offered by the plaintiff to rebut the agency's assertion that premature release of the [data] would harm the government interest in profitably trading in government securities." *Id.* at 1032. This passage illustrates that courts will defer to the agency's justified and unrebutted assertion of competitive harm. Mere disagreement over economic policy constitutes insufficient rebuttal evidence. *Id.* at 1032-33. Other courts have deferred to the agency's reasonable assertion of resultant economic harm. ***See*** Hack v. Department of Energy, 538 F. Supp. 1098, 1102 (D.D.C. 1982). In arguing for an exemption, conclusions or generalized allegations **of** harm are insufficient; the government must support its claim with specific factual or evidentiary material for each document. *Cf.* Comstock Int'l **(USA),** Inc. v. Export Bank, 464 F. Supp. 804, 806-07 (D.D.C. 1979) (Exemption Four).

[51] 516 F. Supp. at 1031-32.

[52] 611 F.2d 1132 (5th Cir. 1980).

[53] *Id.* at 1135.

[54] *Id.*

[55] *Id.* at 1138. The ***Hoover*** court reasoned that the outside expert's report deserved protection because the government frequently has a special need for the opinions and recommendations of temporary consultants. *Id.* (citing Wu **v.** National Endowment for the Humanities, 460 F.2d 1030 (5th Cir. 1972), *cert.* ***denied,*** 410 U S. 926 (1973)).

it would ordinarily be a privileged report of an expert witness.[56] After reviewing the evidence, the court concluded that the report had sufficient commercial importance and that public disclosure would undermine the government's legitimate commercial interests. The *Hoover* court stated: "It is our belief that this qualified privilege should be recognized in the instant FOIA action to avoid premature disclosure of the government's appraisal report in order to protect the government's bargaining position with the landowner during the negotiation process."[57]

In *Shermco Industries v. Secretary of the Air Force*,[58] an unsuccessful bidder on a government contract sued the Secretary of the Air Force to obtain all documents related to the protest, including the Air Force's recommendations. While deciding the case on other grounds,[59] the Fifth Circuit noted that Exemption Five excludes confidential legal research memoranda prepared incident to the generation of privileged information.[60] The *Shermco* court further ruled that intra- or inter- federal agency transmittal of Exemption Five data does not waive the agency's right to maintain the privilege.[61]

In *Government Land Bank v. General Services Administration*,[62] the Government Land Bank of Massachusetts requested disclosure under FOIA of the federal government's appraisal of surplus military housing at the former Westover Air Force Base in Chicopee, Massachusetts. Although the General Services Administration offered the property to the Land Bank for approximately three million dollars, the Land Bank sought to strengthen its bargaining position by obtaining a copy of the agency's outside expert's appraisal and any other internal government documents relating to GSA's offer.[63] In resolving the issues, the First Circuit commented: "[E]xemption Five protects the government when it enters the market place as an ordinary buyer or seller. The protection is limited

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[56]611 F.2d at 1139-42. The *Hoover* court also commented that a report would not be "routinely available" within the meaning of Rule 26(B)(4) and Exemption Five where a party would have to show substantial need to override the privilege. *Id.*

[57]*Id.* at 1142.

[58]613 F.2d 1314 (5th Cir. 1980).

[59]*Id.* at 1317-20. The *Shermco* court declared that other FOIA exemptions protected the requested material. *Id.*

[60]*Id.* at 1319-20 n.11.

[61]*Id.* at 1320.

[62]671 F.2d 613 (1st Cir. 1982).

[63]*Id.*

to what is essential. . . ."[64] The court applied the Exemption to these materials, stating:

> When an agency such as GSA is about to dispose of realty, its own expert's appraisal of value is sensitive: it is a critical factor in computing its initial asking price and its rock bottom price. . . . Finally, pre-sale disclosure would harm the agency's commercial interests in at least two ways. If the agency has set its initial asking price above the appraised value, disclosure would encourage prospective buyers to hold out for a lower figure. Perhaps even more significantly, a prospective buyer could use the information as a political shillelagh, citing the discrepancy between appraisal and asking price as evidence of agency "gouging."
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> . . . .
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> We conclude that appraisals such as the one at issue at this case are prime candidates for exemption under *Merrill*.[65]

In *Hack v. Department of Energy*,[66] the plaintiff requested that the Department of Energy release portions of government reports the agency used to select architectural/engineering contractors.[67] The government argued that the reports fell within the Exemption Five commercial privilege, reasoning that disclosure of the government's analysis of its requirements would enable the requestor to formulate an acceptable offer merely by copying the government's recommendations.[68] The agency also objected that disclosure of the Department's confidential cost estimates for the pending contract would give the requestor an unfair bargaining advantage over the government during the negotiations.[69] Agreeing with the government, the U.S. District Court for the District of Columbia ruled that the disputed portions of the reports were maintained confidentially and that the materials had sufficient commercial importance under *Merrill* to warrant non-disclosure.[70] Regarding the government's analysis of its requirements, the court said: "[A] firm's creativity is a factor

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[64] *Id.*
[65] *Id.* at 666. For a pre-*Merrill* case protecting a government expert's appraisal of excess government property under an executive privilege theory, *see* Martin Marietta Aluminum, Inc. v. Administrator, General Services Administration, 444 F. Supp. 945 (C.D. Cal. 1977).
[66] 538 F. Supp. 1098 (D.D.C. 1982).
[67] *Id.* at 1099.
[68] *Id.* at 1100.
[69] *Id.* at 1101.
[70] *Id.* at 1100-04.

that the agency may consider at the discussion stage, and the disclosure of [the requested documents] at or before that point most certainly would render inquiries as to this factor meaningless."[71] Regarding the government's own pre-award cost estimates, the court stated:

> [I]t is clear that the price information that the agency generates itself is a factor crucial toward the agency's establishment of its bargaining position. There can be no doubt that were cost estimates made public the agency would not be on equal footing with the selected firm at the bargaining table. Requiring the agency to tip its hand by compelling the disclosure of its cost estimates could destroy all incentive a firm would have to propose a lower price. As such, the cost estimates contained in the [requested documents] are confidential commercial information to which the privilege in [Merrill] applies. . . .[72]

In general, the post-Merrill cases have properly applied the new FOIA privilege. Hoover, Shermco Industries, and Hack have allowed the government's data the same protection that a private party's data would have received under Exemption Four. In Government Land Bank, however, the court appeared to increase the necessary showing of competitive harm by stating that the new privilege covers only "essential" information.[73] Although the court's statement also can be construed as an effort to apply the exemption narrowly, the Government Land *Bank's* reference to "essential" documents finds no support in Merrill, its other progeny, or in the Exemption Four precedent.

V. THE CONTOURS OF THE GOVERNMENT'S COMMERCIAL DATA PRIVILEGE

A threshold issue is whether the Exemption Five privilege extends *only* to data generated incident to the award of a federal contract.[74] A strong argument exists that *Merrill* also encompasses confidential commercial information compiled outside the acquisition process.

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[71] *Id.* at 1102.
[72] *Id.* at 1103-04.
[73] 671 F.2d at 665.
[74] The *Merrill* Court indicated as much when it stated: "We accordingly conclude that Exemption Five incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract." 443 U.S. at 360. See *also id.* at 359, 366 (same).

First, the facts of *Merrill* are broader than its holding; the Court implicitly acknowledged this tension by saying: "Although the analogy is not exact, we think that the [requested records] are *substantially similar* to confidential commercial information generated in the process of awarding a contract."[75] Second, the *Merrill* Court founded the new privilege on the broad language of Federal Rule of Civil Procedure 26(c)(7), which covers all "trade secrets or other confidential research, development or commercial information."[76] Properly construed, Exemption Five should protect all government confidential commercial data, regardless of whether the data was generated incident to the award of a contract. The real issue is whether the information has sufficient commercial sensitivity such that disclosure would significantly harm the government's legitimate commercial interests.[77]

The *Merrill* Court stated that the government's Exemption Five commercial privilege parallels a private party's commercial privilege under FOIA's Exemption Four.[78] The analogy is complete because the government should receive only the same protection as any other competitor when the government descends into the market place.[79] Consequently, the cases interpreting Exemption Four provide appropriate guidelines for determining the limits of the government's Exemption Five commercial privilege.

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[75] *Id.* at **361.**

[76] *See* note **40** *supra.* **Also,** Exemption Four and its decisional law have no limitation to a private party's contractual data. ***See*** note 100 *infra.*

[77] *See* **443** U.S. at **363.** The commentators addressing this point agree that ***Merrill*** includes commercial information outside the acquisition setting. ***See*** Belazis, *supra* note **5,** at **419;** Boston Note, *supra* note **5,** at **787-800.** Further, the legislative history contains no limitations to government contracts. ***See*** **443** U.S. at **357-59** (analyzing legislative history). For an argument opposing an expansive government commercial information privilege, ***see*** Boston Note, *supra* note **5,** at 787-800.

[78] 443 U.S. at **360** (analyzing **5** U.S.C. **§ 552(b)(4) (1976)).**

[79] *Cf.* U.S. Dep't **of** Army, Pamphlet No. **27-153,** Procurement Law, at **1-1 (15** Mar. **1983):** "The Supreme Court has stated, when the Government comes down from its position **of** sovereignty and enters the domain of commerce, it submits itself to the same law that governs individuals there" (citing Cooke v. United States, **91 U.S. 389, 398 (1875);** Perry v. United Stats, **294 U.S. 330, 353 (1935);** Lynch v. United States, **292 U.S.** 571 **(1934)).**

In certain areas, the Court has given the government rights greater than a private contractor. Thus, unlike private parties, the government is not bound contractually when a contracting officer has only apparent authority to enter into the agreement. ***See*** Federal Crop Ins. Corp. v. Merrill, **332** U.S. **380 (1947).** These rules are based on a general policy that "it is better than an individual should occasionally suffer from the mistakes **of** public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." Whitesides v. United States, **92 U.S. 247, 257 (1876).** These sovereignty considerations are absent in the commercial privilege context since, by definition, the government treats itself as an ordinary buyer or seller in the marketplace. ***See*** notes **64-66** *supra.*

The next issue centers on the definition of the government's trade secrets under Exemption Five.[80] Under Exemption Four, trade secrets might be entitled to absolute protection from disclosure.[81] Also unresolved is the definition of a "trade secret" under this exemption. Several courts have adopted the *Restatement (Second)* of *Torts* standard, which safeguards "any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an advantage over competitors who do not have it."[82] The better view has defined the term more narrowly, requiring a direct relationship between the information and a business commodity or service.[83] Commentators have noted the persuasive arguments for the narrow standard:

> (1) Engrafting the broader *Restatement* definition onto Exemption Four would be contrary to the FOIA's express mandate that the exemptions be narrowly construed, *Department of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976); and (2) the *Restatement* definition, which represents a refinement of common law tort doctrine stemming principally from cases concerning the breach of trust by former employees and competing rights of ownership under state tort law, has little bearing on the markedly different issues raised in Exemption Four litigation.[84]

The weight of the case law and the above policy considerations favor

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[80] The United States government is actively involved in the production of new technologies, particularly in the defense arena. *See* Belazis, supra note 5. The United States may also patent its employees' inventions, *see* U.S. Dep't of Army, Reg. No. 27-60, Legal Services - Patents, Inventions, and Copyrights, para. 4-10 (15 May 1974) (citing 37 C.F.R. 100), although the government grants liberal licensing rights. Boston Note, *supra* note 5, at 788. Unquestionably, the United States and its instrumentalities possess many valuable trade secrets.

[81] *Compare* Union Oil Co. v. FPC, 542 F.2d 1036, 1044-45 (9th Cir. 1976) (allowing absolute protection by implication) *with Merrill*, 443 U.S. at 361 (implying that trade secrets have only qualified protection under Exemption Four). The Trade Secrets Act, 18 U.S.C. § 1905 (1976), prohibits federal employees from disclosing trade secrets except as permitted by law. The Supreme Court has yet to decide whether the Trade Secrets Act and FOIA are coextensive. U.S. Dep't of Army, Pamphlet No. 27-153, Procurement Law, at 22-7 (15 Mar. 1983) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979)).

[82] *E.g.*, Chevron Chem. Co. v. Costle, 443 F. Supp. 1024, 1032 n.4 (N.D. Cal. 1978).

[83] *E.g.*, Public Citizens Health Research Group v. Food and Drug Administration, 704 F.2d 1280 (D.C. Cir. 1983); Martin Marrietta v. FTC, 475 F. Supp. 338 (D.D.C. 1979); Consumer's Union of United States v. Veterans Administration, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

[84] 1983 Edition of Litigation Under the Federal Freedom of Information Act and Privacy Act 55 (A. Adler & M. Halperin ed. 1983).

a narrow construction of the government's trade secrets under Exemption Five.[85]

Apart from trade secrets, Exemption Four offers qualified protection to a private party's confidential commercial data.[86] The courts have emphasized that Exemption Four requires that the data have present commercial or financial importance.[87] Thus, courts have held that private records in the agency's possession containing new raw test data,[88] a bare list of names,[89] or witness statements,[90] without more, are not Exemption Four material.

Courts also have ruled that the documents must be truly confidential. A few post-*Merrill* cases have considered this point and indicate that any Exemption Five protection is waived if authorized disclosure occurs outside controlling government rules and regulations.[91] The Exemption Four waiver cases reach a similar result.[92] The courts will refuse to find waiver, however, when the evidence shows only that the materials *could* have been disclosed to unauthorized

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[85]The legislative history also shows that Congress intended to give the government's trade secrets some measure of protection under FOIA. Belazis, *supra* note 5, at 422.

[86]*See* note 78 and accompanying text *supra.*

[87]*E.g.* Brockway v. Department of the Air Force, 518 F.2d. 1187, 1188 (8th Cir. 1975); Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971); Comstock Int'l (USA), Inc. v. Export-Import Bank, 464 F. Supp 809, 810 (D.D.C. 1979). ***But see*** American Airlines v. National Mediation Board, 588 F.2d 863 (2d Cir. 1978) (pure technical data falls within Exemption Four if the general enterprise is profit-oriented). In determining the presence of commercial value, the courts will accept the supplier's prima facie argument of competition. J. O'Reilly, Federal Information Disclosure § 14.07, at 14-31 (1979).

[88]Johnson v. HEW, 462 F. Supp. 336, 337 (D.D.C. 1972).

[89]Getman v. NLRB, 450 F.2d 670, 673 (D.C. Cir. 1971).

[90]Brockway v. Department **of** the Army Force, 518 F.2d 1184, 1188-89 (8th Cir. 1975). The information should be releasable if the records relate to matters concerning which no competition exists. ***See*** Hughes Aircraft ***Co.*** v. Schlesinger, 384 F. Supp. 292, 297-98 (C.D. Cal. 1974). In Gulf and Western Indus., Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979), the court set forth the prevailing rule on 'competitive harm' under Exemption Four: "[T]o show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown." *Id.* at 530.

[91]*E.g.* Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314, 1320 (5th Cir. 1980); Hack v. Department **of** Energy, 538 F. Supp. 1098, 1101 (D.D.C. 1982). The ***Merrill*** Court indicated that the information must be confidential. 443 U S . at 363. ***See also*** Safeway Stores, Inc. v. FTC, 428 F. Supp. 346, 347 (D.D.C. 1977) (unauthorized disclosure will not waive the government's interest in Exemption Five material). In this regard, agency regulations such as U.S. Dep't of Army, Reg. No. 600-50, Personnel-General, Standards **of** Conduct for Department **of** the Army Personnel, para. 4-2b (15 Aug. 1982), forbid agency personnel from releasing procurement information outside the established contracting process. For other Exemption Five cases analyzing the waiver issue, ***see*** Cooper v. Department **of** Navy, 594 F.2d 484 (5th Cir. 1979); North Dakota ***ex rel.*** Olson v. Andrus, 581 F.2d 177 (8th Cir. 1978); Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976).

[92]*See* Gulf and Western Indus. v. United States, 615 F.2d 527 532-33 (D.C. Cir. 1980).

persons.[93] Further, these rules must be qualified when a potential bidder on a government contract obtains unauthorized access to procurement-sensitive information. In this context, waiver or its equivalent must be found to conform with agency directives. For example, the Defense Acquisition Regulation94 requires that all potential bidders should, to the greatest extent possible, have equal access to the government's procurement information on a pending acquisition. Thus, if the agency learns that one bidder has obtained improper disclosure by any means, the agency should take the affirmative step of making the same data available to all potential bidders.

Cases considering Exemption Four have ruled that, absent waiver, substantive confidentiality outside the trade secrets context depends on whether the supplier or recipient of information will suffer a likely specific harm from disclosure. In the leading case of National Parks and Conservation Association v. *Morton*,[95] the District of Columbia Circuit stated that commercial or financial data is privileged or confidential "if disclosure of the information is likely to have either of the following effects: **(1)** to impair the Government's ability to obtain the necessary information in the future; or **(2)** to cause substantial harm to the competitive position of the person from whom the information was obtained. . . ."[96] The policy of this exemption is to prevent competitors from gaining valuable insights into the supplier's operational strengths and weaknesses through unfair advantage.[97]

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[93] *See* Hack v. Department of Energy, 518 F. Supp. 1098, 1101 (D.D.C. 1982). In *Hack*, the court denied the existence of waiver even though the proof showed that up to 200 copies of the records were placed in uncontrolled distribution within the agency and that the documents were ultimately disposed of as ordinary trash. *Id.*

[94] Defense Acquisition Reg. § 2-211 (1 July 1976). In this regard, one commentator noted that government personnel conducting debriefings of unsuccessful offerors under Defense Acquisition Reg. § 3-508.4 (1 July 1976) must refrain from disclosing confidential information under Exemption Five. Cornelius, *Debriefing of Unsuccessful Offerors*, The Army Lawyer, Aug. 1983, at 23, 27-28.

[95] 498 F.2d 765 (D.C. Cir. 1974). One authority noted that the *National Parks* test has been applied in "numerous cases." B. Mezines, J. Stein & J. Gruff, Administrative Law § 10.05(3) (1980).

[96] 498 F.2d at 770. One commentator argued that, although the courts continue to apply the *National Parks* test, the Supreme Court might have revised the standard to "some" competitive injury based on the *Chrysler* Court's analogy between Exemption Four and the Trade Secrets Acts, 18 U.S.C. § 1905 (1976). J. O'Reilly, Federal Information Disclosure § 14.20, at 4-84 (1979) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 319 n.49 (1979)).

[97] Comstock Int'l (USA), Inc. v. Export-Import Bank, 464 F. Supp. 804, 810 (D.D.C 1978).

The *National Parks* standard should apply with equal force in Exemption Five commercial privilege cases. Frequently, the government hires outside experts to prepare confidential reports on government business matters.[98] If disclosure would hinder the agency's ability to obtain outside services in the future, the documents should be protected. Additionally, the ***Merrill*** Court in effect adopted the second part of the *National Parks* test; the Court referred expressly to the potential harm resulting to the government's competitive position as a guide for applying the new privilege.[99]

In determining the presence of competitive harm under Exemption Four, courts have protected, among others,[100] data that reveals assets, profits, losses, and market shares,[101] reports of resource reserve data and intrastate sales information, including names of purchasers, date and location of sales, sales volume, and price terms,[102] data describing a company's workforce, from which competitors could deduce labor costs, profit margins, competitive vulnerability, and predict product and process changes,[103] and,information relating to government contracts that reveals a company's commercial capabilities and costs.[104] Consequently, courts should protect similar government records under Exemption Five.

A few courts have indicated that the government's commercial information privilege expires automatically after contract award or offer withdrawal.[105] Nonetheless, the government may need continued secrecy in these situations even after contract award when necessary to safeguard its valid business interests. For example, the

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[98] *See* Hoover v. Department of the Interior, 611 F.2d 1132, 1138 (5th Cir. 1980).

[99] 443 U.S. at 360, 363.

[100] 1983 Edition of Litigation Under the Federal Freedom of Information Act and Privacy Act 58 (A. Adler & M. Halperin ed. 1983). For a comprehensive listing of records falling within Exemption Four, see J. O'Reilly, Federal Information Disclosure § 14.07 (1979).

[101] National Parks Ass'n v. Morton, 489 F.2d 765 (D.C. Cir. 1974).

[102] Union Oil Co. of California v. FPC, 542 F.2d 1036 (9th Cir. 1976); Continental Oil Co. v. FPC, 519 F.2d 31 (5th Cir. 1975). *See also* Sterling Drug Co. v. FTC, 450 F.2d 698, 708-09 (D.C. Cir 1971) (supplier's sales, cost, and profit data).

[103] Westinghouse Elec. Corp. v. Schlesinger, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). *But* see Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974) (business data was not so revealing to require Exemption Four coverage).

[104] Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314 (5th Cir. 1980). *See also* Gulf and Western Indus., Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979) (contractor's profits and costs); Orion Research, Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980) (competitor's technical proposal).

[105] *E.g.*, Shermco Indus. v. Secretary of the Air Force, 613 F.2d 1314, 1320 n.11 (5th Cir. 1980).

agency might use the same data to award separate contracts to be performed in different time periods. In this example, the agency has a legitimate need for continued confidentiality even though the government has awarded the original contract.[106]

VI. CONCLUSION

In ***Merrill,*** the Supreme Court recognized a new privilege under Exemption Five for the government's own confidential commercial information. The Court failed to define the particulars of the new qualified privilege, however, and left the lower courts with only a general balancing test for determining releasability. This article has suggested some contours for the new privilege by synthesizing post-***Merrill*** lower court decisions, other Exemption Five cases, and Exemption Four precedent.

The following principles reflect the synthesis of these authorities. The Exemption Four cases are persuasive authority in resolving undecided issues under Exemption Five. The new privilege should apply to the government's confidential commercial information, both contractual and noncontractual, if the material has sufficient commercial importance and if disclosure would likely harm the government's legitimate commercial interests. The privilege should extend to the reports of outside consultants if the government shows a special reason for obtaining these services. The needs of the requestor are irrelevant to releasability, regardless of whether the requestor is a state agency or if the requestor asserts a special relationship with the federal government. The privilege excludes legal research memoranda prepared incident to the creation of the government's commercial data. The government's trade secret protection should be construed in the same manner as a private person's trade secrets under Exemption Four. The courts should defer to the expertise of the agency when it advances a reasonable argument for both commercial importance and a likelihood of substantial economic harm. The government waives the privilege if the agency intentionally discloses the material outside procedures established by law or regulation. Ordinarily, unauthorized disclosure will not amount to

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[106] *Cf.* FTC v. Grolier Inc. **103** S. Ct. **2209** (1983)(Exemption Five's work product privilege remains regardless of status of litigation for which it was prepared). Similarly, the privilege should continue where the government withdraws a solicitation and then immediately resolicits the same or a similar acquisition. *But see Merrill,* **443** U.S. at 360 ("rationale for protecting [Exemption Five] information expires as soon as. . .the offer [is] withdrawn").

waiver. If, however, a potential bidder on a pending contract obtains unauthorized disclosure of such materials, the agency should then release the privileged materials to all potential bidders to maintain the integrity of the procurement system. Finally, the privilege may continue to attach even after contract award or offer withdrawal when the government establishes a legitimate need for further protection.[107]

[107] The government's commercial information privilege, and Exemption Five in general, have taken on added significance in view of the federal government's increasing reliance on the Commercial Activities Program. The Commercial Activities Program includes a multi-billion dollar contracting project whereby the federal government relies "on the private sector as the main source for satisfaction of its needs." U.S. Dep't of Army, Pamphlet No. 27-153, Procurement Law, at 23-1 (15 Mar. 1983); Dempsey, *Contracting Out Under OMB Circular No. A-76 in the Department of Defense,* 16 Nat'l Cont. Mgt. J. 41 (1982). As part of the contracting process, the government prepares a confidential in-house study of the projected costs of performance from available budget and financial data. In view of the highly competitive nature of these contracts, federal activities participating in the program receive numerous FOIA requests for Exemption Five data from potential bidders during the solicitation phase. Interview with Mr. Jimmie Cowan, Chief, A-76 Contracts Branch, Fort Gordon, Georgia, 28 Dec. 1983 (estimating approximately 30 such requests at Fort Gordon during fiscal year 1983). Other Army installations report a similar volume of requests. Interview with Captain Oren Smith, Contract Law Division, Office of The Judge Advocate General, U.S. Army, Washington, D.C., 28 Dec. 1983. Undoubtedly, private industry will turn increasingly to FOIA litigation to obtain a competitive edge in the commercial activities arena. One such action is pending in the United States District Court for the District of Columbia. Morrison-Knudsen Co. v. Department of the Army, Civ. No. 83-2835 (D.D.C. 1983).

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review.* With volume *80,* the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review.*

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and, in Section III, Titles Noted, the number in parenthesis following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review.* They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

11. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Adzigian, Denise Allard, editor, *Encyclopedia* of *Governmental Advisory Organizations* (Fourth Edition) (No. 1).

Alexander, Yonah, and Ray S. Cline, *Terrorism: The Soviet Connection* (No. *6).*

Barber, Sotirious A., On *What the Constitution Means* (No. 2).

Beckwith, COL Charlie A., and Donald Knox, *Delta Force* (No. **3).**
Blasi, Vincent, editor, *The Burger Court: The Counter-Revolution That Wasn't* (No. **4).**
Blasier, Cole, *The Giant's Rival: The USSR and Latin America* (No. *5).*
Buss, Terry F., Joseph A. Waldron, and Carol A. Sutton, *Computers in Criminal Justice: An Introduction to Small Computers* (No. 11).
Cline, Ray S., and Yonah Alexander, *Terrorism: The Soviet Connection* (No. **6).**
Filler, Louis, editor, *The President in the 20th Century: Volume I: The Ascendant President From William McKinley to Lyndon B. Johnson* (No. *7).*
Golden, James R., Lee D. Olvey, and Robert C. Kelley, *The Economics of National Security* (No. 9).
Kelly Robert C., Lee D. Olvey, and James R. Golden, *The Economics of National Security* (No. 9).
Knox, Donald, and COL Charlie A. Beckwith, *Delta Force* (No. **3).**
Lomperis, Timothy J., *The War Everyone Lost - And Won: America's Intervention in Viet Nam's Twin Struggles* (No. *8).*
Olvey, Lee D., James R. Golden, and Robert C. Kelly, *The Ecomonics of National Security* (No. 9).
Paper, Lewis J., *Brandeis* (No. 10).
Sutton, Carol A., Terry F. Buss, and Joseph A. Waldron, *Computers in Criminal Justice: An Introduction to Small Computers* (No. 11).
Waldron, Joseph A., Terry F. Buss, and Carol A Sutton, *Computers in Criminal Justice: An Introduction to Small Computers* (No. 11).

111. TITLES NOTED

Brandeis, *by Lewis J. Paper* (No. 10).
Burger Court: The Counter-Revolution That Wasn't, The, *edited by Vincent Blasi* (No. **4).**
Computers and Criminal Justice: An Introduction to the Small Computer, *by Joseph A. Waldron, Carol A. Sutton, and Terry F. Buss* (No. 11).
Delta Force, *by COL Charlie A. Beckwith and Donald Knox* (no. **3).**
Economics of National Security, The, *by Lee D. Olvey, James R. Golden, and Robert C. Kelly* (No. 9).
Encyclopedia of Governmental Advisory Organizations, *edited by Denise Allard Adzigian* (No. 1).
Giant's Rival, The USSR and Latin America, The, *by Cole Blasier* (No. **5).**
On What the Constitution Means, *by Sotirios A. Barber* (No. **2).**

President in the 20th Century: Volume I: The Ascendant President From William McKinley to Lyndon B. Johnson, The, *edited by Louis Filler* (No. *7).*

Terrorism: The Soviet Connection, *by Ray S. Cline and Yonah Alexander* (No. 6).

War Everyone Lost - and Won: America's Intervention in Viet Nam's Twin Struggles, The, *by Timothy J. Lomperis* (No. *8).*

IV. PUBLICATION NOTES

1. Adzigian, Denise Allard (ed.), *Encyclopedia of Governmental Advisory Organizations* (Fourth Edition). Detroit, Michigan: Gale Research Co., **1983.** Pages: **964.** Appendices, Alphabetical and Keyword Index. Price: **$350.00.** Publisher's address: Gale Research Co., Book Tower, Detroit, Michigan 48226.

One is often bewildered or overwhelmed by the myriad commissions, study groups, and task forces simultaneously at work at literally hundreds of problems at the federal governmental level. Among the more recently publicized of such bodies have been the National Bipartisan Commission on Central America (the "Kissinger Commission") and the President's Commission on Strategic Forces (the "Scowcroft Commission"). There are, however, literally thousands of other such commissions that tackle problems for venereal disease to tank production. To the general public, their existence may be unknown, their missions misunderstood, and their personnel entirely faceless. Yet, those bodies frequently formulate the policy and proposals that may find their way into the law of the land.

In the fourth edition of the *Encyclopedia of Governmental Advisory Organizations,* the Gale Research Company solves those mysteries in connection with over **3,900** such governmental agencies and committees. Both active and defunct organizations are listed; the latter to alert the practitioner to past governmental concern with a particular issue or for general historical interest. The entries are divided into ten broad categories: Agriculture; Business, industry, economics, and labor; Defense and military science: Education and social welfare; Environment and natural resources; Health and medicine; History and culture; Government, law and international affairs; Engineering, science and technology; and Transportation. To assist the researcher, an alphabetical and key word index is provided.

Locating an agency may reward the researcher with the official name, address, telephone number, executive secretary or director of the body, its history and authority, its program or mission, its membership, staff, subsidary units, publications and reports.

2. Barber, Sotirios A., *On What the Constitution Means.* Baltimore, Maryland: The Johns Hopkins University Press, 1984. Pages: viii, 245. Notes, Index. Price: $17.50. Publisher's address: The Johns Hopkins University Press, Baltimore, Maryland 21218.

Attorneys who follow the workings of the Supreme Court frequently see a variety of theories of constitutional interpretation presented in the opinions and dissents of the ultimate arbiters of the meaning of the document. As we approach the bicentennial of our Constitution, Sotirios A. Barber, a Professor of Political Science at the University of South Florida, proposes yet another theory of constitutional interpretation.

After admitting that his view of the Constitution is closer to that of Justice Marshall than that of Justice Rehnquist, Professor Barber expounds upon a theory that blends the preexisting notions of textual, intentionalist, and consensual interpretation to form a theory of constitutional aspirations. Eschewing both the case method and a theory of judicial review that presupposes an infallible Supreme Court, the author espouses the view that the Constitution has a meaning entirely apart from what anyone or any body say that it means. Such a theory would permit, as was suggested by Justice Marshall in a speech to the Second Circuit quoted in the Introduction to the book, that lower court judges could rationally delimit rulings of the Supreme Court should those judges deem the Court to have been incorrect. This and other unconventional ideas proposed in the book are likely to spark controversy among attorneys and non-attorney students of government alike.

3. Beckwith, COL Charlie A., USA (Ret.) and Donald Knox, *Delta Force.* New York, New York: Harcourt Brace Jovanovich, Publishers; 1983. Pages: ix, 310. Glossary, Index. Price: $14.95. Publisher's address: Harcourt Brace Jovanovich, Publishers, 757 Third Avenue, New York, New York 10017.

There is a tremendous temptation to regard this book as the "one about the Iranian hostage rescue attempt.'' It is that; it is more. This book also relates the bureaucratic and military history of one man's efforts to create within the Army a unit capable of responding to the most unconventional challenges of the day.

For the sake of perspective, one must recognize that the account is rendered by the American midwife of the idea of an antiterrorist regiment. Trained with the British Special Air Services Regiment (SAS) in the early 1960s, then-Captain Charlie A. Beckwith dedicated himself to creating an American counterpart to that seemingly superhuman unit. By dint of persistence, good fortune, and not infre-

quent insubordination, Beckwith eventually triumphed over bureaucratic, traditionalist, and practical opposition to create and command the "Delta Force," an antiterrorist regiment charged with attaining objectives worthy of "Mission Impossible."

The plan to liberate the fifty-two Americans held hostage in Iran, "Operation Eagle Claw," was Delta's first real test. The planning, training, and rehearsal for the mission began shortly after the embassy seizure and continued even as Delta was billeted in Egypt awaiting departure for Tehran. It was at that point that the Americans learned from an embassy cook released by the terrorists that all of the hostages were being held in the same building on the embassy compound. Throughout the book, Beckwith displays no modesty, false or otherwise, about Delta; his people were the best, period.

The fate of the rescue mission is history. The proverbial weakest link in the mission and one not organic to Delta, the helicopters, failed. Had Delta reached Tehran, had the Americans engaged the Iranians, the capabilities of America's **SAS** could have been accurately assessed. The reader is left to speculate. The author certainly intended to convey the view that success was virtually inevitable; others have expressed contrary views. Yet, as the only current "inside story" of Delta and Eagle Claw, COL Beckwith's book stands as an historical document that will likely be a subject of rebuttal and contradiction as history continues to debate the wisdom and execution of the rescue mission.

4. Blasi, Vincent (ed.), *The Burger Court: The Counter-Revolution That Wasn't.* New Haven, Connecticut, Yale University Press, 1983. Pages xiii, 326. Profiles of the Justices, Chronology, Bibliography, Notes, Contributors, Index. Price: $25.00. Publisher's address: Yale University Press, 92A Yale Station, New Haven, Connecticut 06520.

The year 1969 appeared to bode well for those who had generally opposed the liberalization of America of the 1960s. In January of that year, Richard M. Nixon took the oath of office of the Presidency, having campaigned against big government and for law and order and sharply attacked a decade of decisions of the United States Supreme Court. In June, President Nixon nominated and the Senate confirmed federal Circuit Court Judge Warren E. Burger, a "strict constructionist,''as Chief Justice of the United States. In succeeding years, President Nixon would place three more justices, Harry Blackmun, Lewis Powell, and William Rehnquist, on the Court. By December 1971, a "Nixon Court" was in place. The resulting panel, later more traditionally termed the "Burger Court" to reflect the tutelage of its Chief, initially inspired a great disquiet on the part of those advocates and scholars who had found a receptive ear in the

Court of Chief Justice Earl Warren. Would the breakthroughsof the Warren Era be rolled back? Would the desegregation decisions be diluted? Would busing be outlawed? Would the exclusionary rule or *Miranda* warnings be scrapped? Many feared for the worst.

Yet today, almost a decade and a half into the reign of the Burger Court, none of the above has occurred. Indeed, for every supposed trimming of the decisions of the Warren Court, one may find Burger Court activism in areas such as abortion, the death penalty, sex discrimination, and the authority of the Court to serve as the arbiter of disputes among the various branches and levels of government. Not only did the feared reactionism fail to materialize, but the downfall of the architect of the makeup of the Court himself was rendered inevitable by the Court's unanimous decision, authored by the Chief Justice, in *United States v. Nixon.*

In *The Burger Court: The Counter-Revolution That Wasn't,* Professor Vincent Blasi of the Columbia Law School has collected eleven essays which discuss various aspects of the work of the Burger Court. In each chapter, the Court draws both praise and criticism, both for what it has done and, perhaps more significantly, for what it had been expected yet failed to do.

For example, in the duscussion of the Burger Court and criminal procedure by Yale Kamisar, the Court is faulted for emasculating the pretrial identification cases of the Warren Court, but praised for its steadfast adherence to the rules established in the right to counsel cases and its extension of *Miranda* protections into the sentencing phase of the criminal trial. In the field of sex discrimination, Ruth Bader Ginsburg upbraids the Court for its failure to establish a coherent doctrinal framework for its decisions, but lauds it for its assertive entry into a field into which the federal courts had only recently ventured. Finally, while the Burger Court is not generally noted for landmark decisions in the field of racial desegregation and discrimination, Paul Brest notes that this "Nixon Court" is the one that sanctioned both busing and affirmative action plans as remedies for past discrimination.

The remaining topic-oriented essays include Thomas Emerson on the Burger Court and the freedom of the press, Norman Dorsen and Joel Gora on freedom of speech, Robert W. Bennett on poverty law, Robert **A.** Burt on family law, Theodore J. St. Antoine on labor law, and R.S. Markovits on antitrust. In the penultimate chapter, Professor Blasi himself discusses the "rootless activism" of the Burger Court. **A** search for the values underlying the jurispurdence of the Burger Court is undertaken in the final essay by Martin Shapiro. **A**

Foreword by Anthony Lewis, critical biographies of the thirteen justices who have sat on the Court during the Burger Era, and a chronology of the significant events and decisions of that Era are also provided.

Collections of essays frequently suffer from the infirmaties of a lack of a transcending theme, a variety of writing styles, and a repetition of material; this compilation is no exception. Moreover, the essays have been written at various times; some are current to the 1982-1983 Term of Court, others appear dated. Finally, certain of the essays, most notably those concerning free speech and antitrust, are less than faithful to the title of the book. Rather than evaluating the "counter-revolution that wasn't," the authors instead opt either to propose a theoretical explanation for the decisions of the Burger Court or posit and defend an appropriate test for the Court to employ in particular areas of the law.

Overall, however, the book performs a valuable role in precisely separating the myth from the reality of the activity of the Burger Court. Although there is certainly no shortage of criticism for particular decisions or for a general lack of judicial philosophy or agenda, the various authors concede, albeit sometimes grudgingly, that the Court has responded in a balanced manner to the contemporary legal dilemmas that have come before it and for which there was a scarcity of judicial precedent or tradition upon which to proceed. Those who abhorred the Warren Era could not award the present Court an A; those who cherished it could not award a D. On balance, from both conservatives and liberals, the Burger Court might earn a B-; perhaps that is the best grade of all.

5. Blasier, Cole, *The Giant's Rival: The USSR and Latin America.* Pittsburgh, Pennsylvania: University of Pittsburgh Press, 1983. Pages: xvi, 213. Appendices, Notes, Index, Tables. Price: $14.95 (cloth), $7.95 (paperbound). Publisher's address: University of Pittsburgh Press, 127 North Bellefield Avenue, Pittsburgh, Pennsylvania 15260.

Prior to the 1960s, one would strain to find evidence of Soviet influence, whether political, economic, or cultural, in Latin America. With the possible exceptions of Mexico and Venezuela, Latin American nations had generally reacted adversely to perceived Soviet-sponsored subversion in the area, a perception that nicely fit the needs of authoritarian governmental structures that were eager to consolidate power in a central government. Indeed, even in those nations in which at least economic cooperation with the Soviets seemed possible, revolutions or coups would often cause the termination of negotiations or the abrogation of negotiated agreements.

Beginning with the 1960s, however, Soviet influence in Latin America grew in a number of ways. First, and most obvious, was the successful Cuban revolution of Fidel Castro. Castro's ascension to power gave the Soviets a political and military foothold in the area. Moreover, the pathos of the Cuban economy rendered the island critically dependent on the USSR for its daily survival.

Nations of the Americas increasingly began to see that a relationship with the Soviet Union, however minimal, provided a measure of leverage for that state in its dealings with the North American power, the United States. Encouraged in many instances by perceived exercises of latent American imperialism in the region, such as the intervention in the Dominican Republic in **1965,** certain Latin American states were more willing to enter into a dialogue with the Soviet Union.

In *The Giant's Rival: The USSR and Latin America,* Cole Blasier, a student of the Latin American region and founding director of the University of Pittsburgh's Center for Latin American Studies, review this tortured history of Soviet influence in the area and reaches some conclusions concerning the future of the region in light of superpower rivalries. In so doing, the author argues for a divorce of the region's problems from the overriding US-USSR struggle, in which Latin America is but one of many stakes. This book is a sequel to *The Hovering Giant: U.S. Responses to Revolutionary Change in Latin America,* in which the author had evaluated United States behavior in the region.

The author provides a study of Soviet relations with many of the nations of the hemisphere. This survey strikingly reveals that Russian relations with a nation depend entirely upon Soviet interests in that state and do not appear to be a part of a larger regional strategy. For example, the Soviet interest in Mexico stems from that nation's leadership role in Latin America and its proximity to the United States. Accordingly, the Soviets have fostered political and cultural contacts with Mexico, but have had few trade relations with it. By contrast, Soviet interest in Argentina and Brazil has been purely economic, such that even the assumption of power in those states by virulently anti-communist, rightist regimes did not affect Soviet relations with them. Finally, in those nations with which the Soviet Union has neither political nor economic relations, such as El Salvador or Somoza's Nicaragua, armed resistance will supported.

Throughout the balance of the book, many important insights are noted, For example, the Soviet options regarding Cuba are discussed at length. Cuba is seen to be at once the USSR's largest boon and burden in the region. While Cuba provides a base for Soviet influence

in Latin America, it also requires a massive annual subsidy from the USSR to survive. Yet, the USSR of necessity must shoulder this burden or communist Cuba will collapse from its own economic ills. However, Cuba is geopolitically to the Soviet Union as Berlin is to the West, a listening post deep within the opposition's sphere of influence. Just as the West would have to seriously ponder its nuclear options were the Soviets to move on Berlin, so, too, would the USSR have to make a nuclear decision were the United States to move on Cuba. Significantly, the USSR has never made an unequivocal offer of military support for Cuba and Cuba is not a member of the Warsaw Pact. Consequently, the author opines that, as Latin America is relatively low on the global list of Soviet priorities, an American attack upon Cuba would not produce Armgeddon; the Soviets would not invite a nuclear holocaust to save Fidel Castro.

The book concludes with some advice for United States foreign policy in the region. Understanding of the indigenous nature of many of the region's problems is a start. Beyond that, the author argues that a healthy respect for the desires and fears of the region's inhabitants - a chief historical fear being United States unilateral intervention into Latin American affairs - would go a long way to denying the USSR the military foothold that it might desire in the hemisphere. The Bay of Pigs was a paradigm wrong. Under such ground rules should the United States proceed in a region most vital to its national security.

6. Cline, Ray S. and Yonah Alexander, *Terrorism: The Soviet Connection.* New York, New York: Crane, Russak & Company, Inc., 1984. Pages: xi, 162. Documents, Notes, Bibliography, Index. Price: $9.75 (paper). Publisher's address: Crane, Russak & Company, Inc., 3 East 44th Street, New York, New York 10017.

The issue of international terrorism is seldom long gone from the front page of the newspaper. Whether reflected in the enhanced security precautions in the nation's capital, the slaughter of sleeping Marines in Beirut, or the attempted assassination of the Pope, public consciousness of a form of violence that is "cheap to activate and costly to counter" has been vastly heightened in recent years.

In *Terrorism: The Soviet Connection,* the authors, a Senior Associate of the Center for Strategic and International Studies and a Professor of International Studies at Georgetown University and a Professor and Director of The Institute for Studies in International Studies of the State University of New York, seek to indicate Soviet interests in fostering international terrorism and forge a link between the Soviet Union and the activities of the Palestine Liberation Organization.

That the Soviet Union is intimately involved with terrorism does not surprise the authors. Marx advocated it, Lenin favored it if useful in pursuing his goals, and current support of terrorism dovetails nicely with Soviet backing of "national liberation movements," To members of pluralistic western societies, however, the notion that a superpower would systematically and regularly engage in training, arming, and financing those whose activities are directed against innocent civilian populations is abhorrent and, by extension, unbelievable.

Yet, with the aid of access to documents captured during the 1982 Israeli invasion of Lebanon, the authors construct just such a scenario. The Soviet Union, its satellites, and its allies, since at least the late 1970s, have regularly given political, financial, intelligence, and training support to the PLO. Indeed, thousands of PLO cadre are found to have graduated from military institutes within the Soviet Union itself and untold numbers from training camps in Eastern Europe and Marxist nations of Africa and the Middle East. In return, the PLO has performed a service as well. Through training camps in Lebanon and Syria, the PLO has trained countless terrorists of every radical stripe and served as a conduit for arms shipments to those groups.

Supported by the captured documents and corroborated by photographs of "graduations" from the Soviet and Eastern European "schools," the authors' thesis is that the terrorist groups of the world are linked and that the main link lies in Moscow. The reader is left to draw appropriate conclusions.

7. Filler, Louis (ed.), *The President in the 20th Century: Volume I: The Ascendant President From William McKinley to Lyndon B. Johnson.* Englewood, New Jersey: Jerome S. Ozer, Publisher, **1983.** Pages: **418.** Index. Price: **12.95** (paperbound); **$22.95** (cloth). Publisher's address: Jerome S. Ozer, Publisher, **340** Tenafly Road, Englewood, New Jersey **07631.**

Americans have seldom objectively evaluated their presidents. Many presidents considered great in their time have been villified in historical perspective. Many unpopular during their time have been lionized over time. The myths that have surrounded many of our leaders have clouded our judgments as well. George Washington, for example, never warned against entangling alliances; Theodore Roosevelt would have blanched if a friend called him "Teddy," as would have Calvin Coolidge if called "Cal;" Martin Van Buren was less the aristocrat than William Henry Harrison, yet the latter campaigned as "Tippicanoe," born in a log cabin. Finally, while Washington and Jefferson are consistently rated among our "great"

presidents, it is difficult to recall exactly what they did *as president* to have them so revered. While Washington was the first president and Jefferson did complete the Louisiana Purchase, history recounts that both "achievements" were virtually foisted upon at least reluctant individuals.

In *The President in the 20th Century*, Louis Filler, author and editor of innumerable historical works, has attempted to place in historical perspective, through their own words, our twentieth century American presidents from McKinley to Johnson.

The student of history or politics will appreciate the inclusion of the most telling presidential pronouncements of the twentieth century. Thus, one may read the words of Theodore Roosevelt on the muckrakers (1906); William Howard Taft on "dollar diplomacy" (1912); Woodrow Wilson on neutrality (1914), preparedness (1916), a declaration of war (1917), the Fourteen Points (1918), and the League of Nations (1919); Herbert Hoover on the Bonus Marchers (1932); Franklin Roosevelt on the Supreme Court (1937), the Four Freedoms (1941), Lend Lease (1941), the Atlantic Charter (1941), and a declaration of war (1941); Harry Truman on the United Nations (1945), atomic weapons (1945), the Truman Doctrine (1947), and McCarthyism (1951); Dwight Eisenhower on the Korean Armistice (1953), Hungary and Suez (1956), the crisis at Little Rock (1957), and the military-industrial complex (1961); John Kennedy at his inaugural (1961), on the Peace Corps (1961), and the Cuban Missile Crisis (1962), and Lyndon Johnson's 1964 State of the Union Message. Each presidential message is put in perspective by a critical historical preview by the author.

One may debate the relative merits and demerits of our twentieth century presidents. This compilation offers both the proponents and detractors a basis upon which to justify or reconsider their positions.

The subtitle of this book suggests that a second volume will chronicle the decline of the presidency from Lyndon Johnson's later years to the tenure of Jimmy Carter. One looks with anticipation for that volume.

8. Lomperis, Timothy J., *The War Everyone Lost -And Won: America's Intervention in Viet Nam's Twin Struggles*. Baton Rouge, Louisiana: Louisiana State University Press, 1984. Pages: x, 192. Bibliography, Index. Price: $22.50. Publisher's address: Louisiana State University Press, Baton Rouge, Louisiana 70803.

The issue of who won the Vietnam War would appear well settled. A glance at the map will indicate that Ho Chi Minh City is where Saigon used to be and the saffron and red flag has become an item of

history. Yet, in *The War Everyone Lost - And Won*, Timothy J. Lomperis, a visiting Assistant Professor of Political Science at Duke University, posits the thesis that the North Vietnamese achieved less than complete victory in the south; they have yet to assume the historical mantle of legitimacy and, indeed, in the end failed to demonstrate the ability of a "people's war" to achieve victory. It was only by the brute force of the North Vietnamese regular army that the south was conquered.

Beginning with a survey of Vietnamese history and the communist movement and ideology, the author proceeds to demonstrate how the North Vietnamese war effort, although militarily successful, failed to impress either audience before which it was played. Domestically, the victory in the "people's war" has not yet gained legitimacy with the Vietnamese people. The postwar economic lethargy and the unprecedented exodus of the "boat people" served to represent the inability of the victors to gain the confidence and harness the energy of their new minions. On the world stage, the showcase example of a guerilla war had been lost in 1968 with the communist debacle in the Tet Offensive. Thereafter, in 1972 and 1975, the North Vietnamese resorted to undisguised conventional warfare in their offensives. In reflecting upon this latter point, the author debunks some of the commonly articulated "lessons" of Vietnam. If the Vietnam War is to be judged by the ability of the United States to counter a guerilla war, then the American effort was a success. After Tet, the Viet Cong was **a** nonfactor in the war. That the North Vietnamese had to resort to its regular army after 1968 confirmed this defeat. Moreover, as demonstrated by the failure of the North's 1972 Easter Offensive, the South, if aided by American air power, could ably fight on the ground to blunt a conventional attack. Ironically, the 1975 invasion that caused the collapse of the South was a duplication of the 1972 offensive. In 1975, however, the United States first stayed its hands and then washed them of the region. Thus, the communists lost when they should have won (the guerilla war) and won when they should have lost (the conventional war).

Although the book is also critical of those policymakers who would ignore the local vagarities of a nation when deciding to commit American troops, this book is more intended to cause consternation among those who glibly see "another Vietnam" in every foreign commitment of United States forces, however minimal. In this regard, the author has introduced a new perspective to the myriad hindsight studies of the Vietnam War.

9. Olvey, Lee D., James R. Golden and Robert C. Kelly, *The Economics of National Security*. Wayne, New Jersey: Avery Publishing

Group Inc., **1984.** Pages: ix, **404.** Price: **$35.00.** Publisher's address: Avery Publishing Group Inc., **89** Baldwin Terrace, Wayne, New Jersey 07470.

The allocation and best use of increasingly precious government dollars has recently become a national concern of the first magnitude. In most economic or political discussions of the issue, the defense budget becomes the prime target for the scalpel of the austerity-minded.

In *The Economics of National Security,* the authors, two active duty Army colonels who currently serve on the faculty of the United States Military Academy and the Director of Corporate Development at the Continental Resources Company of Houston, Texas, analyze in detail the objectives, processes, and domestic and international aspects of spending to support the national defense.

The book is broadly divided into seven parts: Perspectives on Defense Spending; The Macroeconomics of National Security; Resource Allocation in the Defense Sector; Microeconomic Issues; Interindustry Relations and the Defense Sector; The International Aspects of the Economics of National Security; and Comparative Economic Issues. These parts are further divided into chapters, each of which tackles a subissue of the topic. Each chapter opens with an introduction designed to place the chapter in perspective for even one unschooled in economics or economic theory.

For both the layman and the expert, *The Economics of National Security* provides telling insights into the factors and processes by which we allocate - or should allocate - resources in the national defense arena. It will be a valuable resource in informed discussions of the issue in the future.

10. Paper, Lewis J., *Brandeis.* Englewood Cliffs, New Jersey: Prentice-Hall, Inc., **1983.** Pages: **442.** Notes and Sources, Index. Price: **$18.95.** Publisher's address: Prentice-Hall, Inc., Englewood Cliffs, New Jersey **07632.**

A controversial figure during his lifetime, Louis Brandeis has continued to occupy the thoughts of legal and historical scholars some four decades after his death. Most recently remembered for his off-the-bench relationship with Felix Frankfurter and advancement of political causes even while a Supreme Court justice, Brandeis has yet again become the subject of a probing biography.

In *Brandeis,* Lewis J. Paper, an attorney himself and former Kennedy biographer, has examined the letters and Supreme Court papers of the former justice and conducted numerous interviews

with former clerks and family members of the justice to compile a biography that rests heavily upon the contemporaneous words of Louis D. Brandeis to explain why he did what he did throughout his brilliant legal and judicial career.

The book traces the roots of the Brandeis family to Europe and immigration to the United States. Although, through his identification with Harvard and his law practice and public interest advocacy in Massachusetts, Brandeis is considered a New Englander, his family settled in Louisville, Kentucky. Brandeis' decision to leave Louisville was not an easy one, but once made, it was irrevocable.

Without time for extensive thought, the lawyer will typically remember Louis Brandeis as the creator of the "Brandeis brief," an advocatory document that includes extra-record material in its presentation for an appellate court, and for his role as a liberal thinker on a conservative Supreme Court. *Brandeis,* however, uncovers the role of Louis Brandeis in his pre-Court years in the development of many of the laws and institutions that form a part of current everyday life. Among the achievements in which Brandeis played a major role were the creation of a system of savings bank life insurance, the passage of a system of unemployment compensation, the Clayton Antitrust Act, the Federal Reserve Act, and the Balfour Declaration, which committed Great Britain to the establishment of a Jewish homeland in Palestine.

Brandeis emerges as a brilliant lawyer, advocate, scholar, and counsellor, whose views and advice were widely sought after. If he had a shortcoming, it was his sense of propriety in occasionally choosing to take positions contrary to those of his client in the forum before which he was purporting to represent the client. On one occasion, when the inevitable conflict of interest between the interests of one client that he had assumed and another client were pointed out to him, Brandies dismissed the notion of impropriety: "I was counsel for the situation." It was this occasional lapse of judgment, with the resulting dupliciousness that it seemed to demonstrate to others, that became the chief point of contention at Brandeis' confirmation hearings on his appointment to the Supreme Court. None doubted his brilliance; several doubted his character.

Of one "impropriety" Brandeis is absolved: his alleged behind the scenes political relationship with Felix Frankfurter. That Brandeis supplied Frankfurter with money and ideas is beyond dispute; that these activities were improper and that Brandeis should have known this is ascribed to our post-Watergate morality. There is no evidence that Brandeis' activity affected this vote on the Court and Paper ascribes the financial generousity of Brandeis to his fondness of

Frankfurter, a "son" that Brandeis never had.

Also detailed in the book is Brandeis zealous activity in support of finding a Jewish homeland. Although Jewish himself, Brandeis was not religious. However, he was converted to the cause of Zionism. Extremely active before the first world war, Brandeis stepped up his activity between the two wars, to include entreaties to President Roosevelt and various British officials and extensive financial support for the activities of David Ben-Gurion. Indeed, one of Brandeis' last activities prior to his death in 1941 was to travel to the White House to ask Roosevelt to exert pressure on the British to increase immigration quotas for Jews to Palestine in the face of the European holocaust.

This book is extensively footnoted and indexed. In the book, Brandeis becomes less of an enigma and more of a great American advocate and statesman. It is worthwhile reading.

11. Waldron, Joseph A., Carol A. Sutton, and Terry F. Buss, *Computers in Criminal Justice: An Introduction to Small Computers.* Cincinnati, Ohio: Anderson Publishing Co., 1983. Pages: 93. Price: $6.95. Publisher's address: Anderson Publishing Co., 646 Main Street, Cincinnati, Ohio 45201.*

Though geared more for the social service agency than for lawyers, this book is still worthwhile reading for lawyers because it is always good to be aware of the perspective of closely related professions and because this book is a first-rate introduction to the basic concept of the small computer. The book has an excellent combined glossary and index which is a lifesaver for the novice computer person. At the beginning of each chapter is a list of the important new terms which will be found in the upcoming text. In addition, the important terms are marked with an asterisk the first few times they are used to remind the reader to refer to the back of the book for the definition of that term. The authors are to be commended for keeping their use of technical jargon to a minimum and for defining the terms that are used. This avoids one of the great failings of many other computer books: the need to already know the subject before you can understand the book. For those who desire more advanced technical knowledge, there is a reference section at the end of each chapter.

Perhaps the most interesting part of the book for lawyers is Part 5, Professional Issues. The issues of justifying the request for the computer, file security, client confidentiality, and staff acceptance are very much the same in any professional setting; the book's discussion of these issues is excellent. The key questions: what can it do for me; what can it do to me; and how do I get my people to use it are all dealt

with here. As in the other chapters, the authors have provided an overview and a list of references for further information.

Overall, the book is well worth its cost and the few hours it takes to read it. The computer novice will find the factual section very useful in understanding how the machine works and both the novice and the more experienced person will enjoy the applications sections. The book does a fine job of demystifying the computer and laying out its usefulness as a tool to aid the busy professional.

*This publication note was prepared by Captain Bill C. Wells, USAF, Assistant Staff Judge Advocate, Wurtsmith Air Force Base, Michigan.

By Order of the Secretary of the Army:

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