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Department of Defense

Before the Senate Committee on Foreign Relations

Law of Armed Conflict Treaties

April 15, 2008

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the ratification of five Law of Armed Conflict treaties. As Mr. Bellinger has indicated, ratification of these treaties is fully supported by both the Departments of State and Defense. Mr. Bellinger provided reasons why the treaties are important to us. I will discuss the content of the treaties in more detail.

On February 7, 2007, the State Department transmitted to the Senate Foreign Relations Committee the Administration's Treaty Priority List for the 110th Congress. This List includes six treaties dealing with the law of armed conflict currently on the Committee's calendar. Senate action on the five treaties summarized as follows is proposed at this time.

Action on these treaties now, as proposed in Treaty Docs. 105-1, 106-1, and 109-10, is important because:

- these treaties promote the humanitarian and cultural values of the United States;
- they promote the rule of law and international law;
- they are widely supported, including by the Departments of State and Defense, and we do not believe they pose contentious issues; some have been sent to the Senate by Republican Administrations and some by Democratic Administrations;
- the Department of Defense believes these treaties are consistent with U.S. national security interests and overall U.S. interests. The Department of Defense, including the Military Departments and Combatant Commands, already comply with the norms contained in them;
- by becoming party to the treaties, the United States will be in a stronger position to urge treaty partners to comply with them;
- ratification will allow us to participate fully in relevant meetings of states party to the treaties;
- ratification will increase U.S. negotiating leverage and credibility as we seek to negotiate other treaties generally and instruments concerning the law of armed conflict in particular.

In addition, this year a key element in our effort to deal with the issues posed by cluster munitions is ratification of Protocol V to the Convention on Conventional Weapons (CCW), on explosive remnants of war. Our ratifying this Protocol would strengthen U.S. efforts to show that we are serious about dealing with cluster munitions in the CCW framework. The CCW framework is advantageous to the United States because it balances humanitarian and military interests; the alternative to CCW is an effort by some other countries to achieve a ban on the use, production, and transfer of these weapons without recognizing their military utility in some circumstances.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

The Hague Convention for the Protection of Cultural Property, among other things, prohibits direct attacks upon cultural property, theft and pillage of cultural property, and reprisals against cultural property. It also prohibits the use of cultural property in armed conflict for purposes likely to expose it to destruction or damage.

The definition of cultural property includes monuments of architecture, art or history, archeological sites, groups of buildings of historical or artistic interest, works of art, manuscripts, books and other objects of artistic, historical or archeological interest, as well as scientific collections and important collections of books or archives.

The Convention was negotiated following World War II with the purpose of avoiding problems encountered during and following World War II. U.S. military practice in World War II was a point of reference in drafting the treaty. The Convention was concluded in 1954 and entered into force in 1956. The United States was one of the original signatories.

It was initially believed that implementation of the treaty could cause operational problems for U.S. military forces. The Convention was not sent to the Senate for advice and consent immediately following U.S. signature. The U.S. military's conduct of operations over the last 50 years has been entirely consistent with the Convention's provisions. After almost 50 years of practice, initial concerns did not materialize. Following the experience of Operation Desert Storm, the Department of Defense informed the Department of State in 1992 of its support for U.S. ratification. The Convention and its first Protocol were submitted to the Senate in 1999.

The Convention does not prevent military commanders from doing what is necessary to accomplish their missions. Legitimate military actions may be taken even if collateral damage is caused to cultural property. Protection from direct attack may be lost if a cultural object is put to military use. The Department of Defense has carefully studied the Convention and its impact on military practice and operations. The Department believes the Convention to be fully consistent with good military doctrine and practice as conducted by U.S. forces.

We have recommended that ratification of the 1954 Convention be subject to the following four understandings:

1. The “special protection” as defined in Chapter II of the Convention prohibits the use of cultural property to shield any legitimate targets from attack, and allows all property to be attacked using lawful and proportionate means if required by military necessity.
2. Decisions by military commanders and others responsible for planning and executing attacks can only be judged on the basis of the information reasonably available to them at the relevant time.
3. The rules established by the Convention apply only to conventional weapons.
4. The primary responsibility for the protection of cultural objects rests with the party controlling the property.

Amendment to Article 1 of the Convention on Conventional Weapons (“CCW”)

The CCW entered into force on December 2, 1983, for those states that had ratified it. The CCW and its Protocols are part of a legal regime that regulates the use of particular types of conventional weapons that may pose risks to civilian populations within the vicinity of military objectives. As adopted in 1980, Article 1 of the CCW did not extend the scope of application of the Convention to non-international armed conflicts. On December 21, 2001, states parties to CCW adopted an amended Article 1 that extended the scope of application of the Convention and Protocols I, II, and III to non-international armed conflicts as well.

At the time it ratified the CCW, the United States made a declaration stating that the United States would apply the Convention and the first two Protocols to conflicts referred to in Common Article 3 of the Geneva Conventions – that is, non-international armed conflicts. Additionally, in 1996 the United States successfully led the initiative to amend CCW Protocol II (regulating mines, booby traps, and other devices) to apply in both international and non-international armed conflicts. The United States ratified the amended CCW Protocol II on May 24, 1999, with one reservation and nine understandings. In view of this success, and of U.S. humanitarian goals, the United States urged CCW states parties to build on the success of the Protocol II amendment by amending Article 1 of the CCW to achieve the same effect for the Convention and Protocols I and III. This amendment is important because many of the conflicts that occur today are non-international in character. Ratifying this amendment will result in no changes to long-standing U.S. and Department of Defense policy.

The amendment to Article 1 makes clear that the rules contained in the Convention and Protocols will apply to both state and non-state belligerents. The Amendment provides that recognizing the applicability of the CCW and Protocols to non-state parties to a conflict does not change the legal status of those non-state parties, and it advances the U.S. national objective of preserving humanitarian values during armed conflict.

CCW states parties negotiating future protocols will decide on a case-by-case basis whether the new protocols should apply in non-international armed conflicts.

Fifty-nine states currently are parties to amended Article 1 to the CCW, including most of our NATO allies, Japan, South Korea, Russia, and China.

Protocol III (“Incendiary Weapons”)

Protocol III to the Convention on Conventional Weapons (CCW) provides increased protection for civilians from the potentially harmful effects of incendiary weapons, and it reconfirms the legality and military value of incendiary weapons for targeting specific types of military objectives. Accordingly, U.S. ratification of this Protocol would further humanitarian purposes as well as provide clearer support for U.S. practice given past controversies surrounding the use of incendiary weapons. U.S. military doctrine and practice are consistent with Protocol III other than the two paragraphs to which the United States intends to reserve, in the interest of reducing risk to innocent civilians and collateral damage to civilian objects.

Protocol III was the product of hard-fought negotiations in 1978-1980 and for many delegations it was the *raison d’être* for the CCW. Widespread use of incendiary weapons by Axis and Allied forces in WWII and by the United States in Viet Nam was widely criticized. The provisions of Protocol III were the result of a last-minute compromise on the part of both proponents (Sweden and Mexico) and opponents (United States, the Soviet Union and its Warsaw Pact members, and other governments). The U.S. delegation agreed to the language *ad referendum* in order to reach a successful conclusion of the debate.

The compromise centered on retaining the use of incendiaries for recognized and legitimate military purposes. Even with that compromise, however, the United States cannot accept the Protocol’s prohibition on the employment of incendiary weapons – of any mode of delivery - against military objectives within a “concentration of civilians.” A “concentration of civilians” is undefined and could encourage enemy forces to use innocent civilians as human shields around military objectives to avoid attack. Nonetheless, the United States carries out all military operations with a view to taking feasible precautions to protect the civilian population and individual civilians not taking a direct part in hostilities.

The Administration therefore recommends that the United States, when ratifying Protocol III, reserve the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer civilian and friendly force casualties and less collateral damage than alternative weapons, such as high-explosive bombs or artillery. In addition, incendiary weapons are the only weapons that can effectively destroy certain counter-proliferation targets such as biological weapons facilities, which require high heat to eliminate bio-toxins.

In 2005 a foreign news report alleged that U.S. employment of white phosphorous munitions in Iraq constituted the illegal use of an incendiary weapon or a chemical weapon. This report was incorrect. White phosphorous does not fit the definition of *incendiary weapon* in the Protocol. Nor does white phosphorous meet the definition of “chemical weapon” in the Chemical Weapons Convention. White phosphorous is a lawful weapon used for target marking and limited anti-personnel purposes against military objectives and enemy combatants. In any

case, U.S. and Coalition forces take measures to protect civilians and select weapons to minimize risk to civilians and civilian property, notwithstanding efforts by insurgents to use civilians and civilian objects as shields from attack.

There are currently 99 States Party to Protocol III, which entered into force on December 2, 1983. This includes all NATO member states except Turkey and the United States.

Protocol IV (“Blinding Laser Weapons”)

Protocol IV to the Convention on Conventional Weapons prohibits the use of blinding laser weapons “specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.” This prohibition is fully consistent with DoD policy, which preceded and was the principal basis for the Protocol IV text.

Protocol IV also obligates State Parties to take “all feasible precautions,” in the employment of laser systems, “to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.” This is also fully consistent with DoD policy. To date, no individual has suffered permanent blindness, as that term is defined in the Protocol, from battlefield laser use. Such lasers include those used for range-finding, target discrimination, and communications. Military personnel fighting in Afghanistan and Iraq, as in previous armed conflicts, have suffered blindness from blast and fragmentation weapons.

The definition of permanent blindness is consistent with widely accepted ophthalmological standards and means “irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured in both eyes.”

The United States has employed “dazzler” laser devices in Iraq at checkpoints and elsewhere as a warning device to drivers of oncoming vehicles to avoid resort to deadly force. Although not a laser weapon, each dazzler has undergone a legal review as required by DoD directives to ensure its consistency with our law of war obligations and Protocol IV.

There are currently 89 States Party to Protocol IV, which entered into force on July 30, 1998, including all other NATO member states and Israel.

Protocol V (“Explosive Remnants Of War”)

Protocol V to the Convention on Conventional Weapons provides rules for what must be done with respect to unexploded munitions and abandoned munitions (together known as “ERW”) remaining on the battlefield after a conflict. These munitions may be artillery shells,

bombs, hand grenades, mortars, rockets, and cluster munitions, but by definition do not include landmines, which are regulated by Amended Protocol II.

In the view of the United States and other major military powers, many of the reported problems concerning the use of cluster munitions can be addressed through the effective implementation of Protocol V.

The primary focus of Protocol V is on the post-conflict period. The Party in control of the territory on which the munitions are found is responsible for the clearance, removal, and destruction of the ERW. In the case of ERW located in Iraq, this would mean that Iraq is responsible for the clearance, removal, and destruction, although other states could assist Iraq – financially or otherwise - in carrying out those activities.

The Party that used the munitions – if the munitions are not located on its territory - is obligated to assist “to the extent feasible.” This obligation does not apply to a state that sold or transferred the munitions to the user.

The users of munitions are obligated to record and retain information on the use of munitions and on the abandonment of munitions “to the maximum extent possible and as far as practicable.” They are also to transmit such information to the party in control of the territory. The Protocol contains voluntary best practices on recording, storage, and release of information on ERW, as well as on warning and risk education for ERW-affected areas.

The parties to an armed conflict are obligated to take “all feasible precautions” in the territory under their control to protect civilians and civilian objects from ERW. They are also to protect humanitarian missions and organizations from ERW “as far as feasible.”

Protocol V also contains voluntary best practices to prevent munitions from becoming “duds.”

All obligations concerning clearance, removal, and assistance apply only to ERW that were created after entry into force of the Protocol for the Party on whose territory the ERW are located. That being said, a Party has the right to seek and receive assistance, “where appropriate,” for ERW that existed in its territory prior to entry into force of the Protocol, and other Parties may provide assistance on a discretionary basis.

The Protocol is not intended to preclude future arrangements or assistance connected with the settlement of armed conflicts that may set different divisions of responsibilities for parties to a conflict.

The United States delegation stated its understandings with regard to a number of provisions during the negotiations and on the adoption of the final text, and these understandings were not disputed. We do not believe that there is a need to repeat those understandings – which are found in the Administration’s Article-by-Article analysis – in the Senate resolution of advice and consent.

There are currently 42 States Party to Protocol V, which entered into force on November 12, 2006, including 14 NATO member states. Israel is not a party to Protocol V but took part in the negotiations and supported the final text.

Thank you for your consideration of these treaties. Because the Department of Defense views these treaties as being consistent with U.S. national security interests and overall U.S. interests, and because the Department already complies with the norms within these treaties, I urge you to act favorably on these five important treaties.