AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

110TH CONGRESS
2d Session

SENATE

EXEC. REPT.
110–22

AN AMENDMENT AND THREE PROTOCOLS TO THE 1980 CONVENTIONAL WEAPONS CONVENTION

SEPTEMBER 11, 2008.—Ordered to be printed

Mr. DODD, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Docs. 105–1(B), 105–1(C), 109–10(B), and 109–10(C)]

The Committee on Foreign Relations, to which was referred the Amendment to Article 1 of 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, adopted at Geneva on December 21, 2001 (the "Amendment") (Treaty Doc. 109–10(B)) and three protocols 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: The Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, adopted at Geneva on October 10, 1980 ("Protocol III" or the "Incendiary Weapons Protocol") (Treaty Doc. 105–1(B)); The Protocol on Blinding Laser Weapons, adopted at Vienna on October 13, 1995 ("Protocol IV" or the "Blinding Laser Protocol") (Treaty Doc. 105–1(C)); and The Protocol on Explosive Remnants of War, adopted at Geneva on November 28, 2003 ("Protocol V" or the "ERW Protocol") (Treaty Doc. 109–10(C)), having considered the same, reports favorably thereon with a reservation, understandings, and declarations, as indicated in the resolutions of advice and consent for each treaty, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolutions of advice and consent.

CONTENTS

		Page
I.	Purpose	2
II.	Background and Summary	2
III.	Incendiary Weapons Protocol (Protocol III)	3
IV.	Blinding Laser Protocol (Protocol IV)	4
V.	ERW Protocol (Protocol V)	5
VI.	Scope Amendment	8
VII.	Entry Into Force	9
VIII.	Implementing Legislation	9
IX.	Committee Action	9
X.	Committee Recommendation	9
XI.	Resolutions of Advice and Consent to Ratification	12
XII.	Annex I.—Additional Material Submitted to the Committee	15
XIII.	Annex II.—Treaty Hearing of April 15, 2008	17

I. PURPOSE

These four treaties, along with the underlying 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 (the "Convention on Conventional Weapons" or the "Convention") (Treaty Doc. 103–25), which the United States ratified in 1995, are designed to protect victims of armed conflict from the effect of certain weapons.

II. BACKGROUND AND SUMMARY

The Convention on Conventional Weapons was negotiated in Geneva from 1978 to 1980 and establishes a framework (the "CCW framework") within which instruments are negotiated to control the use of conventional weapons in an effort to reduce human suffering. The Convention, to date, has 105 States Parties and is accompanied by five individual protocols that regulate specific categories of weapons and munitions. The terms of the Convention are very general, while the specific obligations regarding particular weapons or weapon systems are contained in the separate protocols to the Convention. This structure makes it possible for the CCW framework to evolve by adding new protocols in response to the development of new weapons or changes in the conduct of warfare.

In 1980, the Convention was concluded with three protocols. Protocol I prohibits the use of weapons the primary effect of which is to injure persons through the use of fragments that are not detectible by X-rays in the human body. Protocol II (or the "Mines Protocol") regulates the use of landmines and similar devices, and furthermore prohibits certain types of booby-traps. The Senate approved the Convention and these first two protocols on March 24, 1995. The Convention, along with Protocols I and II, entered into force for the United States on September 24, 1995.

By the early 1990s, however, it became clear that Protocol II was insufficient to deal with the severe humanitarian crisis caused by the indiscriminate use of anti-personnel landmines in various conflicts during the preceding decade. As a result, the United States and other countries supported a process to amend the Mines Protocol so that it would impose more rigorous restrictions on the design and use of mines. The Senate approved the Amended Mines Protocol on May 20, 1999.

Protocol III controls the use of incendiary weapons. Protocol III was not sent to the Senate along with the Convention in 1994 because of a concern that the United States might "require the use of air-delivered incendiaries to eliminate chemical or biological facilities without exposing a nearby civilian population to the massive release of dangerous substances."[1] After a careful review, however, the executive branch developed a reservation that resolves these concerns. The reservation, which the committee recommends including in the Senate's Resolution of advice and consent, would reserve the right of the United States to use incendiary weapons, whether air-delivered or otherwise, against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons.

Since the conclusion of the Convention, two other protocols have been adopted and the Convention's scope of application has been broadened. Protocol IV, which prohibits the use of blinding lasers, was adopted in 1995 and Protocol V, which provides rules with respect to unexploded and abandoned munitions remaining on the battlefield after a conflict, was adopted in 2003. The munitions dealt with in Protocol V might be artillery shells, bombs, hand grenades, mortars, rockets, and cluster munitions, but by definition do not include landmines, which are regulated by the Amended Mines Protocol. Finally, in 2001, an amendment to the main Convention was adopted, which extends the scope of application of the Convention and certain Protocols to non-international armed conflicts.

The administration has requested that the Senate give prompt consideration to Protocols III, IV, and V and the scope amendment to Article 1 of the Convention.[2] The executive branch has informed the committee that the U.S. military already complies in practice with the norms contained in all four instruments. Moreover, the Department of Defense has asserted that ratification of these treaties is a national security priority and would, among other things, serve to protect U.S. forces in combat. A detailed article-by-article analysis of each of these four treaties may be found in the two relevant Letters of Submittal from the Secretary of State to the President, which are reprinted in full in Treaty Documents 105–1 and 109–10. What follows is a discussion of significant aspects of all four treaties.

III. INCENDIARY WEAPONS PROTOCOL (PROTOCOL III)

Protocol III provides increased protection for civilians from the potentially harmful effects of incendiary weapons. In addition, the Protocol confirms the legality and military value of incendiary weapons for targeting specific types of military objectives.

An incendiary weapon is defined as "any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target." Incendiary weapons include weapons such as

[1] Exec. Rept. 104–1 at p. 5.

[2] In a letter to the Committee on Foreign Relations dated August 15, 2007, Deputy Secretary of State John D. Negroponte and Deputy Secretary of Defense Gordon England stated that the "Defense Department and the State Department strongly support [all four treaties] and encourage their prompt ratification." *See* Annex I of this Report.

napalm and flame throwers but do not include, for example, high-explosive munitions and blast or fragmentation weapons, even though they may have secondary burn effects on persons exposed or may cause secondary fires. Similarly, lasers or other directed-energy weapons are not covered by the Protocol, even if their primary effect is to set fire to objects or cause burn injuries, because they do not deliver burning substances on the target. In addition, as noted by the Department of Defense in response to committee questions, "[w]hite phosphorous is not prohibited under Protocol III because white phosphorous does not fit, and was not intended to fall within, the definition of incendiary weapon in the Protocol. There are no circumstances in which Protocol III regulates or prohibits the use of white phosphorous against a military objective."

Article 2 of the Protocol, which is the main operative provision, provides four basic rules: 1) it is prohibited in all circumstances to make civilians or civilian objects, as such, the object of attack by incendiary weapons; 2) it is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons; 3) it is prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered weapons, except when the objective is clearly separated from the concentration of civilians and all feasible precautions have been taken with a view to limiting the incendiary effects to the military objective and to avoiding or minimizing incidental loss of civilian life, injury to civilians, and damage to civilian objects; and 4) it is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons unless they are being used to conceal combatants or other military objectives or are themselves military objectives.

The executive branch has recommended a reservation to Protocol III, which would permit the United States to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, while nevertheless taking all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, or minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects. With such a reservation, the United States can retain its ability to employ incendiaries to achieve high-priority military targets in a manner consistent with the principle of proportionality, which governs the use of all weapons in armed conflict. In response to questions from the committee, the Department of Defense confirmed that with the reservation, the Protocol would be entirely "consistent with U.S. targeting practices."

To date, there are 98 parties to Protocol III, which entered into force on December 2, 1983. This includes all NATO Member States except Turkey and the United States.

IV. Blinding Laser Protocol (Protocol IV)

Protocol IV was adopted at a conference of States Parties to the Convention on Conventional Weapons in 1995. The Protocol prohibits the use on the battlefield 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." "Permanent blindness" is defined in Article 4 of Protocol IV as "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 using both eyes." This definition is consistent with widely accepted ophthalmological standards and means.

Protocol IV also obligates States 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."

Protocol IV is fully consistent with the Department of Defense's current policy. In response to questions from the committee, the Department of Defense stated that it "does not have any plans or desire to develop and use blinding laser weapons." Moreover, "[i]t has been a longstanding DoD policy that the U.S. Armed Forces will not use lasers specifically designed to cause permanent blindness of unenhanced vision." In fact, it was a Defense Department policy statement that served as the foundation for the text of Protocol IV.

Although Protocol IV prohibits the use of so-called blinding laser weapons, Protocol IV does not prohibit the use of lasers in general on the battlefield, including "dazzler" devices, which have been employed by the United States in Iraq at checkpoints as a warning device to drivers of on-coming vehicles because "dazzler" devices are not specifically designed to cause permanent blindness to unenhanced vision. Indeed, lasers are vital to our modern military and the legitimate use of lasers is acknowledged by the Protocol in Article 3. Among other things, laser systems are used for detection, targeting, range-finding, communications, and target destruction. They also can serve a humanitarian purpose in that they allow weapon systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property.

Employment of a laser is only prohibited by Protocol IV if it meets each of the following four criteria: 1) it is a weapon; 2) specifically designed;[3] 3) to cause permanent blindness; 4) to unenhanced vision. Protocol IV is desirable, therefore, both because it reduces the potential risks of proliferation of blinding laser weapons and because it clarifies the legitimacy of other types of battlefield lasers. To date, there are 89 parties to Protocol IV, which entered into force on July 30, 1998. This includes all NATO member states except the United States.

V. ERW PROTOCOL (PROTOCOL V)

Protocol V was adopted at a conference of States Parties to the Convention on Conventional Weapons in 2003. Protocol V provides rules with respect to munitions that were intended to have exploded during an armed conflict but failed to do so (known as "explosive remnants of war" or "ERW"), in order to reduce the threat

[3] "Specifically designed" is a separate element because, for example, virtually any laser may cause eye injury, including permanent blindness, under the right circumstances. The negotiators banned only this narrow class of lasers, rather than banning any use of lasers that might cause permanent blindness, so as to avoid subjecting military personnel to any liability for their use of the many lasers that are employed in modern warfare.

such munitions pose to civilians and to post-conflict reconstruction. The negotiation of this Protocol was initiated in part as a result of a report published by the International Committee for the Red Cross in 2000, which concluded that a large proportion of the civilian deaths and injuries from explosive remnants of war during the post-conflict period in Kosovo had been both predictable and preventable. Protocol V is the first international agreement specifically aimed at reducing the humanitarian threat posed by unexploded and abandoned munitions of all types remaining on the battlefield after the end of armed conflicts.

Explosive remnants of war, or ERW, are defined in detail in Article 2 of Protocol V but generally are understood to include explosive munitions that remain armed after the cessation of the armed conflict, such as artillery shells, bombs, hand grenades, mortars, cluster munitions, and rockets. This may include munitions that did not explode as intended and munitions that were abandoned. For the purposes of the Protocol, however, ERW does not include landmines because they are addressed in the Amended Mines Protocol (Protocol II), to which the United States is already a party. A summary of key provisions is set forth below.

Marking and clearing ERW after an armed conflict

Protocol V deals primarily with steps to be taken after hostilities, not during an armed conflict. The Party in control of the territory on which ERW are found is responsible for the clearance, removal, and destruction of such munitions. Specifically, Article 3 provides that as soon as feasible after the end of active hostilities, each State Party that was a party to the armed conflict shall: 1) survey and assess the threat posed by ERW; 2) assess and prioritize needs and practicability in terms of marking and clearance, removal, or destruction of ERW; 3) mark and clear, remove, or destroy ERW; and 4) take steps to mobilize resources to carry out these activities.

In response to committee questions, the Department of State clarified that these Article 3 obligations are "necessarily to be implemented based on [a] State Party's assessment of the relevant circumstances at the time. This is illustrated by the use of the phrase 'as soon as feasible' in paragraphs 2 and 3 of the article, which implies a level of discretion or judgment" in the implementation of this provision.

Recording, retaining and transmitting information regarding explosive ordnance that may become ERW

Protocol V establishes obligations on States Parties regarding the recording, retention, and transmission of specific information on the use, or abandonment, of explosive ordnance, so as to facilitate the rapid marking, clearance, removal, or destruction of such ordnance by the Party in control of the territory at the end of active hostilities. Specifically, Article 4 obligates States Parties "to the maximum extent possible and as far as practicable [to] record and retain information" on the use or abandonment of explosive ordnance. Moreover, a State Party that was a party to the armed conflict and used or abandoned explosive ordnance that may have become ERW "shall, without delay after the cessation of active hostilities and as far as practicable, subject to the parties' legitimate security interests, make available such information to the party or

parties in control of the affected area . . . .” Voluntary best practices with respect to recording, retaining, and transmitting such information are contained in the Technical Annex to the Protocol.

Taking precautions to protect civilians and civilian objects from ERW

Protocol V provides that parties to an armed conflict shall take “all feasible precautions” in the territory under their control that is affected by ERW to protect civilians and civilian objects from the risks and effects of ERW. Article 5 defines “feasible precautions” as those precautions that are “practicable or practicably possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.” Such precautions might include warnings, risk education to the civilian population, marking, fencing, and monitoring of territory affected by explosive remnants of war, as set out in Part 2 of the Technical Annex to the Protocol.

Co-operation and assistance in handling ERW

Article 7 provides that each State Party has the right to “seek and receive assistance, where appropriate,” from other Parties, non-parties, and relevant international organizations and institutions in dealing with problems posed by ERW. Article 7 further provides that States Parties “in a position to do so” shall provide such assistance “as necessary and feasible.” Article 8 addresses the provision of more general assistance, information on ERW, and cooperation with international, regional, national, and non-governmental organizations regarding ERW. Article 8 similarly provides that each State Party “in a position to do so” shall provide such assistance.

In response to committee questions, the Department of State clarified that the phrases “where feasible” and “in a position to do so” are “self-judging and are intended to reflect the necessity of states making their own evaluation of relevant factors in implementing these provisions.” Thus, each State Party must, for example, determine for itself whether it is in a “position to do so.” This determination, as noted in the article-by-article analysis attached to the Letter of Submittal from the Secretary of State, would be based on national considerations of economic, political, and military factors.[4] According to the Department of State, this understanding was made clear at the negotiations and was not disputed by other delegations.[5]

Preventive measures to minimize the occurrence of ERW

Protocol V encourages States Parties to take generic preventive measures aimed at minimizing the occurrence of ERW. Specifically, Article 9 provides that such preventive measures include, but are not limited to, those listed in part 3 of the Technical Annex. Each State Party may also, on a voluntary basis, exchange information related to efforts to promote and establish best practices in respect of such measures.

---

[4] Treaty Doc. 109–10 at p. 15.
[5] *Ibid.*

Best practices

The Technical Annex to Protocol V provides "suggested best practices" for ERW information management; risk education; marking and monitoring ERW areas; and munitions manufacturing, training, and transfer. Compliance with the Annex is voluntary under the Protocol.

The Department of Defense has assured the committee that Protocol V is fully consistent with current U.S. practice and policies with respect to ERW, including cluster munitions, and is consistent with the administration's current negotiating position on cluster munitions in particular. To date, there are 44 parties to Protocol V, which entered into force on November 12, 2006.

VI. SCOPE AMENDMENT

As discussed, the Convention on Conventional Weapons and its Protocols are part of a legal regime that regulates the use of particular types of conventional weapons that may be deemed to pose special risks of having indiscriminate effects or causing unnecessary suffering. As adopted in 1980, Article 1 of the Convention on Conventional Weapons did not extend the scope of application of the Convention to non-international armed conflicts (otherwise known as "Article 3 conflicts" because Article 3 is the common article in the Geneva Conventions of 1949 that deals with non-international conflicts). Nevertheless, when the Senate provided its advice and consent to the Convention in 1995, included in the resolution of advice and consent was a declaration that the United States would extend its application of the Convention and Protocols I and II to non-international conflicts despite the fact that the text limited the Convention's scope to international armed conflicts, otherwise known as common "Article 2 conflicts." The declaration stated as follows:

> The United States declares, with reference to the scope of application defined in Article 1 of the Convention, that the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949.

At the urging of the United States, on December 21, 2001, States Parties to the Convention on Conventional Weapons adopted the Scope Amendment, which amended Article 1 of the Convention so that the scope of application of the Convention and certain Protocols were extended to include non-international armed conflicts. This Amendment is particularly important now because many of today's armed conflicts are considered to be non-international in character.

The Amendment makes clear that recognizing the applicability of the Convention 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 all armed conflict. Finally, the extended scope of application applies not only to the Convention, but to all of the Protocols adopted before January 1, 2002, which includes Protocols I, II, III, and IV. Protocols adopted after January 1, 2002, including Protocol V, are to make clear the scope of their application in the text of each protocol. Article 1 of Protocol V provides that Protocol V applies to common Article 2 and common Article 3 conflicts.

VII. Entry Into Force

In accordance with Article 5 and Article 8 of the Convention on Conventional Weapons, the Amendment and each of the Protocols will enter into force for the United States six months after the date on which the United States deposits its instrument of ratification.

VIII. Implementing Legislation

No implementing legislation is required for these treaties. The United States already complies in practice with the norms contained in all four treaties. In response to the committee's questions, the Department of Defense additionally noted that if the United States were to ratify these treaties, existing Department of Defense and Military Department directives and publications that refer to treaties to which the United States is a party would be updated to reflect that the United States is a party to these treaties, but no new Department of Defense directives or regulations would be needed.

IX. Committee Action

The committee held a public hearing on these treaties on April 15, 2008. Testimony was received from Mr. John B. Bellinger, Legal Adviser at the Department of State; Mr. Charles A. Allen, Deputy General Counsel for International Affairs at the Department of Defense; and Brigadier General Michelle D. Johnson, Deputy Director for the War on Terrorism and Global Effects, J-5 Strategic Plans and Policy Directorate, Joint Staff. A transcript of this hearing can be found in Annex II.

On July 29, 2008, the committee considered these treaties and ordered them favorably reported, by voice vote, with a quorum present, and without objection.

X. Committee Recommendation

a. advice and consent to ratification

The Committee on Foreign Relations views U.S. ratification of these treaties as important to U.S. leadership in developing the law of armed conflict and in protecting U.S. forces abroad. The United States played a key role in negotiating each of these treaties, many of which were done at the prompting of the United States and on the basis of U.S. delegation drafts. As a result, none of these treaties requires changes to long-standing U.S. and Defense Department policies. Joining these treaties would put the United States in a better position, however, to persuade other countries to adhere to humanitarian practices in armed conflict. Moreover, U.S. ratification is important because the United States loses credibility when it does not formally become a party to the very treaties it has championed. U.S. ratification would set an important example and would make it possible for U.S. officials to participate fully in relevant international meetings regarding, for example, the implementation of these treaties. Accordingly, the committee urges the Senate to act promptly to give its advice and consent to ratification of these treaties, as set forth in this report and the accompanying resolution of advice and consent.

B. RESOLUTIONS

The committee has included in the resolutions of advice and consent various statements, which are discussed below.

I. CCW Protocol on Incendiary Weapons (Protocol III)

The proposed resolution of advice and consent for Protocol III includes a reservation, an understanding, and a declaration.

Reservation

The proposed reservation was recommended by the executive branch and would permit the United States to use incendiary weapons against military objectives located in concentrations of civilians, where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, while nevertheless taking all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects. The executive branch explained in its submission of the Protocol that this reservation is necessary because incendiaries are the only weapons that can effectively destroy certain targets such as biological weapons facilities, for which high heat would be required to eliminate bio-toxins. To use only high explosives would risk the widespread release of dangerous contaminants with potentially disastrous consequences for the civilian population. In addition, certain flammable military targets are more readily destroyed by incendiaries. Thus, with this reservation, the United States can retain its ability to employ incendiaries to achieve the destruction of high-priority military targets in a manner consistent with the principle of proportionality, which governs the use of all weapons in armed conflict.

Understanding

The proposed understanding makes clear that the actions of U.S. military personnel, for example, can only be assessed in light of information that was reasonably available at the time. In other words, U.S. military personnel cannot be judged on the basis of information that subsequently comes to light.

Declaration

The proposed declaration relates to the self-executing nature of the Protocol and is included in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008), which has highlighted the importance of clarity regarding the self-executing nature of treaty provisions. A further discussion of the committee's view on this matter can be found in Section VIII of Executive Report 110–12. In brief, the Protocol is self-executing, in the sense that it operates of its own force as domestically enforceable federal law, but the Protocol does not confer private rights enforceable in U.S. courts.

II. CCW Protocol on Blinding Laser Weapons (Protocol IV)

The proposed resolution of advice and consent for Protocol IV includes an understanding and a declaration.

Understanding

The proposed understanding makes clear that with respect to Article 2 of the Protocol, the actions of U.S. military personnel, for example, can only be assessed in light of information that was reasonably available at the time. In other words, U.S. military personnel cannot be judged on the basis of information that subsequently comes to light.

Declaration

The proposed declaration relates to the self-executing nature of the Protocol and is included in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S. Ct. 1346 (2008), which has highlighted the importance of clarity regarding the self-executing nature of treaty provisions. A further discussion of the committee's view on this matter can be found in Section VIII of Executive Report 110–12. In brief, the Protocol is self-executing, in the sense that it operates of its own force as domestically enforceable federal law, but the Protocol does not confer private rights enforceable in U.S. courts.

III. CCW Protocol on Explosive Remnants of War (Protocol V)

The proposed resolution of advice and consent for Protocol V includes an understanding and a declaration.

Understanding

In the article-by-article analysis attached to the Letter of Submittal from the Secretary of State, it was noted that during the course of the negotiations, the United States "raised the need to reconcile this Protocol with other international agreements or arrangements related to the settlement of armed conflict, in order to avoid unintended consequences in connection with peace treaties or similar arrangements." It was further noted that "[i]n the context of armed conflict, the parties to the conflict themselves will be in the best position to determine how the responsibilities for ERW should fit into an overall settlement." The proposed understanding makes clear that nothing in Article 3, which generally covers the allocation of responsibilities with respect to marking, clearing, removing, and destroying explosive remnants of war, would preclude arrangements in connection with the settlement of armed conflicts, or assistance connected thereto, that allocate such responsibilities in a manner that respects the essential spirit and purpose of the Protocol.

Declaration

The proposed declaration relates to the self-executing nature of the Protocol and is included in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008), which has highlighted the importance of clarity regarding the self-executing nature of treaty provisions. A further discussion of the committee's view on this matter can be found in Section VIII of Executive Report 110–12. In brief, with the exception of Articles 7 and 8, which deal with various forms of co-operation and assistance, the Protocol is self-executing, in the sense that it operates of its own force as domestically enforceable federal law, but the Protocol does not confer private rights enforceable in U.S. courts. In specifying that Arti-

cles 7 and 8 are not self-executing, the committee intends that the provisions of these articles will be implemented through existing statutes and authorities providing for the provision of relevant cooperation and assistance, including the Foreign Assistance Act of 1961, rather than through direct application of the Treaty in U.S. law. The committee understands that these statutes and authorities are sufficient to allow the United States to implement these articles.

IV. CCW Amendment to Article 1

The proposed resolution of advice and consent for the Amendment includes a declaration.

Declaration

The proposed declaration relates to the self-executing nature of the Amendment and is included in light of the recent Supreme Court decision, *Medellín* v. *Texas,* 128 S.Ct. 1346 (2008) has highlighted the importance of clarity regarding the self-executing nature of treaty provisions. A further discussion of the committee's view on this matter can be found in Section VIII of Executive Report 110–12. In brief, the Amendment is self-executing, in the sense that it operates of its own force as domestically enforceable federal law, but the Amendment does not confer private rights enforceable in U.S. courts.

XI. Resolutions of Advice and Consent to Ratification

CCW Protocol on Incendiary Weapons (Protocol III)

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A RESERVATION, AN UNDERSTANDING, AND A DECLARATION

The Senate advises and consents to the ratification of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons 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 (Protocol III), adopted at Geneva on October 10, 1980 (Treaty Doc. 105–1(B)), subject to the reservation of section 2, the understanding of section 3, and the declaration of section 4.

SECTION 2. RESERVATION

The advice and consent of the Senate under section 1 is subject to the following reservation, which shall be included in the instrument of ratification:

> The United States of America, with reference to Article 2, paragraphs 2 and 3, reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

SECTION 3. UNDERSTANDING

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

SECTION 4. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.

CCW PROTOCOL ON BLINDING LASER WEAPONS (PROTOCOL IV)

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO AN UNDERSTANDING AND A DECLARATION

The Senate advises and consents to the ratification of the Protocol on Blinding Laser Weapons 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 (Protocol IV), adopted at Vienna on October 13, 1995 (Treaty Doc. 105–1(C)), subject to the understanding of section 2 and the declaration of section 3.

SECTION 2. UNDERSTANDING

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

It is the understanding of the United States of America with respect to Article 2 that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

SECTION 3. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

This Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.

CCW PROTOCOL ON EXPLOSIVE REMNANTS OF WAR (PROTOCOL V)

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO AN UNDERSTANDING AND A DECLARATION

The Senate advises and consents to the ratification of the Protocol on Explosive Remnants of War 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 (Protocol V), adopted at Geneva on November 28, 2003 (Treaty Doc. 109–10(C)), subject to the understanding of section 2 and the declaration of section 3.

SECTION 2. UNDERSTANDING

The advice and consent of the Senate under section 1 is subject to the following understanding, which shall be included in the instrument of ratification:

> It is the understanding of the United States of America that nothing in Protocol V would preclude future arrangements in connection with the settlement of armed conflicts, or assistance connected thereto, to allocate responsibilities under Article 3 in a manner that respects the essential spirit and purpose of Protocol V.

SECTION 3. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

> With the exception of Articles 7 and 8, this Protocol is self-executing. This Protocol does not confer private rights enforceable in United States courts.

CCW AMENDMENT TO ARTICLE 1

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO A DECLARATION

The Senate advises and consents to the ratification of the Amendment to Article 1 of 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, adopted at Geneva on December 21, 2001 (Treaty Doc. 109–10(B)), subject to the declaration of section 2.

SECTION 2. DECLARATION

The advice and consent of the Senate under section 1 is subject to the following declaration:

> This Treaty is self-executing. This Treaty does not confer private rights enforceable in United States courts.

ANNEX I.—ADDITIONAL MATERIAL SUBMITTED TO THE COMMITTEE

RECEIVED
07 AUG 16 PM 4:01
SENATE COMMITTEE ON
FOREIGN RELATIONS

AUG 15 2007

Dear Mr. Chairman:

We are writing with regard to five treaties dealing with the law of armed conflict that are all pending before the Senate Foreign Relations Committee. Four relate to the Convention on Certain Conventional Weapons (CCW). Three of these are protocols to the CCW on incendiary weapons, blinding lasers, and explosive remnants of war, and the fourth is an amendment to the Convention itself to extend its scope to non-international armed conflicts. The fifth treaty is the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done in 1954 at the Hague.

These five treaties are all on the Administration's Treaty Priority List. The Defense Department and the State Department strongly support all five of these treaties and encourage their prompt ratification.

Thank you for your attention to this important matter.

Sincerely,

Gordon England
Deputy Secretary of Defense

John D. Negroponte
Deputy Secretary of State

The Honorable
Joseph R. Biden, Jr., Chairman,
Committee on Foreign Relations,
United States Senate.

ANNEX II.—TREATY HEARING OF APRIL 15, 2008

TREATIES

TUESDAY, APRIL 15, 2008

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 2:33 p.m., in room SD–419, Dirksen Senate Office Building, Hon. Robert P. Casey, Jr., presiding.

Present: Senator Casey.

OPENING STATEMENT OF HON. ROBERT P. CASEY, JR., U.S. SENATOR FROM PENNSYLVANIA

Senator CASEY. The hearing of the Committee on Foreign Relations will now come to order.

Today, the committee meets to consider five law of war treaties that regulate the application of military force to ensure innocent civilians are appropriately protected from harm during an armed conflict.

Four of the five treaties on the committee's docket today are protocols or amendments to the Convention on Certain Conventional Weapons, also known as the CCW. The CCW was originally concluded in 1980, which the United States ratified in 1995. It establishes a framework to regulate the use of those conventional weapons at special risk of causing indiscriminate damage or unnecessary suffering to innocent civilians. Separate protocols appended to the CCW focus on specific weapons.

Accordingly, the committee today will consider whether the Senate should give its advice and consent to U.S. ratification of three protocols to the CCW that focus on the following weapons systems and munitions.

The first, Protocol III, relates to prohibitions or restrictions on the use of incendiary weapons. Incendiary weapons are those weapons primarily designed to set targets on fire or cause burn injuries by delivering a substance that causes a chemical reaction.

The second, Protocol IV, relates to blinding laser weapons. This protocol would prohibit the use of those weapons on the battlefield that are specifically designed to cause seriously disabling and irreversible loss of vision to the unaided eye.

Next, Protocol V, relates to explosive remnants of war, which are defined as those munitions that remain armed following the end of a conflict, including artillery shells, bombs, handgrenades, cluster munitions, and rockets that do not explode as intended, but were simply abandoned on the battlefield. We're all too familiar with the tragic stories of innocent civilians, including children, who pick up these munitions, only to have them explode in their hands.

The fourth treaty the committee will consider today, also relates to the CCW and is known as the Scope amendment. When the CCW was adopted in 1980, it only applied to traditional armed conflicts between sovereign states. The drafters of the CCW failed to appreciate that the nature of armed conflict would significantly evolve over ensuing decades, such that today, the majority of armed strife in the world is a result of noninternational conflicts, such as civil wars, insurgencies, and ethnic conflict. The Scope amendment would simply extend the mandate of the CCW and certain protocols to cover these types of noninternational conflicts, in addition to traditional conflicts between States. In fact, when the Senate provided its advice and consent to ratification of the CCW in 1995, it included a declaration that the United States would extend its application of the CCW to noninternational conflicts.

The final treaty before the committee today is the Hague Cultural Property Convention, which is more than 50 years old. The Hague Convention establishes special protections for cultural properties during wartime, including a prohibition on direct attacks upon cultural property, theft and pillage of cultural property, and reprisals against cultural property. When we discuss cultural property in the context of the Hague Convention, we're referring to monuments of architecture, museums, works of art, sites of historical interest, and other uniquely important artifacts. The Hague Convention helps ensure that our common historical and cultural heritage is protected against wanton and willful destruction.

As the United States considers these five law of war treaties, it is critical to remember the following points that these protocols and conventions all share in common.

First, our uniformed military officers strongly support these treaties and believe they are consistent with U.S. national security interests. The presence today of Brigadier General Johnson of the Joint Chiefs of Staff attests to that support. The Department of Defense, including our combatant commands, already complies with, and fulfills in practice, the norms contained in all five of these law of war treaties.

U.S. ratification of these treaties will not change U.S. military practice in any way, shape, or form. Let me repeat that. Our military already complies in practice with all five treaties before this committee today. Formal U.S. ratification of these treaties would do nothing—nothing to change or alter our current military practices.

Although the United States already follows these treaties in practice, formal Senate approval and entry into force by the United States will set an important example and bolster U.S. leadership when it comes to promulgating universal adherence to law of war treaties. It is difficult for the United States to persuade other nations to adhere to humanitarian and cultural practices when we refuse to formally join the types of treaties that are before the committee today.

Formal U.S. ratification will help advance the values our Nation holds dear, and will allow us to participate fully in relevant international meetings on the implementation of these treaties.

These five treaties carry broad support within the United States, and bridge any partisan divide. Some of these agreements were

submitted by Republican administrations, others were submitted by Democratic administrations. The current administration is unified in its support of the five treaties, with Deputy Secretary of State Negroponte, Deputy Secretary of Defense England reaffirming the support of the State Department and the Pentagon in a letter to the committee in August of last year. Negroponte and England both wrote, "The Defense Department and the State Department strongly support all five of these treaties and encourage their prompt ratification."

U.S. ratification is also supported by the American Bar Association, which has long supported ratification of the Hague Convention, and which, last August, passed a resolution on the CCW Amendment and Protocol, stating, "U.S. ratification would further United States humanitarian objectives without compromising the appropriate use of important military technologies."

The committee is pleased to have a strong panel of administration witnesses testifying today in support of these five treaties. First, John Bellinger, the Legal Adviser for the Department of State and second, Charles A. Allen, the Deputy General Counsel at the Department of Defense. Also with us today, but not providing an opening statement, is BG Michelle D. Johnson, Deputy Director for the War on Terrorism and Global Effects for the Joint Chiefs of Staff. Brigadier General Johnson will be available to answer our questions, as appropriate.

I'd now like to turn to—well, Senator Lugar is not with us, he may be here later, but, if not, I wanted to thank him and thank Senator Biden for arranging this hearing.

I also wanted to make sure that we move our agenda forward, so I think we'll start with Mr. Bellinger.

And the floor is yours.

STATEMENT OF HON. JOHN B. BELLINGER, LEGAL ADVISER, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. BELLINGER. Thank you very much, Mr. Chairman. And we want to thank you for putting this hearing together for these important treaties. We appreciate your particular interest in these, and the committee's interest.

I have to say, having listened to your statement, that I could not have said it any better. I agree with everything and all the points that you have made about these treaties in your opening statement. And we do believe that they are very important for us and will contribute both to our military and also to our leadership role on international humanitarian law in the world.

I have a longer written statement that I would ask be inserted into the record——

Senator CASEY. Without objection.

Mr. BELLINGER [continuing]. And a quite short opening statement to—just to get us started, and then look forward to answering any questions that you may have.

These five important treaties operate in a field of international law that regulates the conduct of hostilities once there is an armed conflict, as do the well-known 1949 Geneva Conventions. The aim of these treaties is to reduce the suffering caused during armed conflicts and provide protection to the victims of war, particularly

to the civilian population and civilian objects, in a manner consistent with legitimate military requirements. The United States has been a longstanding and historic leader in the law of armed conflict, and we've played a significant role in shaping the treaties before you now. At the same time, we subject all treaties dealing with the law of armed conflict to very close examination, even after adoption of the texts. And I would note that in some cases the United States has taken more time than many of our friends and allies in ratifying these treaties, because of their particular concern to our military. But, we believe that such close examination allows us to be sure that the treaties we propose to ratify are, in fact, in our national interests.

Now, some may question why it's important to ratify these treaties now, after they've entered into force for other nations long ago. The answer, in part, is that over time we've seen how these treaties operate, and we're confident that they would promote U.S. national interests and are consistent with U.S. practice. And I'll—I will just add something there that I'm occasionally asked in hearings about treaties, just to be clear. We in the State and the Defense Departments, and the administration overall, don't enter into treaties to be nice to other countries because we want to be part of an international club. We do it because they are in our national security interests, and we believe that they will benefit the United States. And I think you mentioned, Senator, in the beginning, some of the reasons that these particular treaties are of importance to us.

An important reason is that ratification of these treaties would promote U.S. international security interests in vigorously supporting both the rule of law and the appropriate development of international humanitarian law. Additionally, when the United States ratifies a treaty, other nations are more likely to ratify, as well, which ultimately helps us to protect our forces.

Moreover, after ratification, the United States will be able to participate fully in meetings of States Parties to the treaties aimed at implementation of the treaties, and thereby more directly affect how the practice under these treaties develops. Becoming a party to these treaties also will significantly strengthen our negotiating leverage and our credibility in our work on other law of war treaties, to the extent that other States ask why they should cede to U.S. positions if we do not ratify those treaties after they do so.

Now, as you've said, the five treaties before us are the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict, which was transmitted to the Senate on January 6, 1999; three protocols 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 we call, for understandable reasons, by the shorthand, CCW—Protocol III of the CCW on Incendiary Weapons, which was adopted in 1980 and transmitted to the Senate on January 7, 1997; Protocol IV to the CCW on Blinding Laser Weapons, which was adopted in 1995 and transmitted to the Senate on January 7, 1997; and Protocol V on Explosive Remnants of War, which was adopted in 2003 and transmitted to the Senate on

June 20, 2006; and an amendment to this convention which was adopted in 2001 and transmitted to the Senate on June 20, 2006.

All of these instruments have already entered into force for those States that have ratified them.

Now, the Cultural Property Convention prohibits direct attacks upon cultural property, theft and pillage of cultural property, and reprisals against cultural property. While there were some initial U.S. concerns related to the convention after it was adopted, and, for that reason, it was not transmitted to the Senate until 1999, now, after some 50 years of experience and detailed interagency review, we've concluded that U.S. practice is entirely consistent with this convention, and that ratifying it will cause no problems for the United States or for the conduct of U.S. military operations.

Because of some minor concerns that relate to ambiguities in the language of the treaty, however, we propose four understandings that are set out in Treaty Document 106–1, which you have. These are entirely consistent with the goals of the convention, and they serve to clarify a number of important points.

The Convention on Certain Conventional Weapons, or CCW, is a framework instrument. It was adopted after extensive multilateral negotiations between 1974 and 1980, with significant U.S. involvement and participation, and it was approved by the Senate and ratified by President Clinton in 1995. The CCW establishes scope and procedural provisions that apply to a number of annexed protocols, each of which deals with a particular type of conventional weapon that may be deemed to pose special risks of having indiscriminate effects or causing unnecessary suffering, or a problem common to certain weapons.

We believe that the CCW is a particularly valuable framework, because it is designed to balance humanitarian and military considerations. The four CCW instruments under consideration today are consistent with U.S. military requirements and existing military practices. Each one advances the U.S. national objective of preserving humanitarian values in times of armed conflict. And ratification will permit the United States to participate fully in relevant meetings of States Parties to these instruments and to insist that other States Parties follow the norms that each instrument creates.

All the major military powers are parties to the CCW and participate in meetings convened under its framework, and all decisions are made by consensus. It's because of the involvement of all the major military powers in the CCW that the United States supported the initiation of, and has actively participated in, two rounds of negotiations on the issue of cluster munitions within the CCW framework. While this step is important, it's also critical that we ratify the existing CCW instruments, particularly the Protocol on Explosive Remnants of War, Protocol V, which will have a direct impact on mitigating the humanitarian effects of cluster munitions by focusing on concrete actions to be taken in the post-conflict period by the State in control of the affected territory, as well as the users of such munitions. While these measures are already consistent with U.S. practice, our ratification will encourage other States to adopt similar practices through their ratification.

United States ratification of the treaties before you today is in our military and security interests, and would promote the rule of

law and the development of international law. These treaties are widely supported, and, we believe, are not contentious. This administration, including the State and Defense Departments, strongly supports these treaties, and, as you noted, Senator, the American Bar Association has also urged their ratification. They promote our cultural and humanitarian values, while not interfering with legitimate military objectives, as you will shortly hear from my colleagues from the Defense Department.

Mr. Chairman, I urge that the committee give prompt and favorable consideration to these treaties.

Thank you.

[The prepared statement of Mr. Bellinger follows:]

PREPARED STATEMENT OF HON. JOHN B. BELLINGER, LEGAL ADVISER, DEPARTMENT OF STATE, WASHINGTON, DC

Mr. Chairman, I am pleased to testify, along with my colleagues from the Department of Defense, before the committee today to express the strong support of the State Department and the administration for the Senate's prompt provision of advice and consent to ratification of five important treaties that deal with the law of armed conflict. One of the treaties concerns the protection of cultural property and the other four concern certain conventional weapons.

In its February 2007 letter to Chairman Biden setting out its treaty priorities for the 110th Congress, the administration supported Senate action on each of these treaties. In August of last year, in a letter to this committee, the Deputy Secretaries of State and Defense reaffirmed their support for all five treaties. Ratification of these treaties will promote the cultural and humanitarian values of the United States, while being fully consistent with our military needs.

These treaties operate in a field of international law that regulates the conduct of hostilities once there is an armed conflict, as do the 1949 Geneva Conventions. This area of law is referred to as the law of war, the law of armed conflict, or international humanitarian law. The aim of these treaties is to reduce the suffering caused during armed conflicts and provide protection to the victims of war, particularly to the civilian population and civilian objects, in a manner consistent with legitimate military requirements.

The United States has been a longstanding and historic leader in the law of armed conflict, and we played a significant role in shaping the treaties before you now. At the same time, due to the complexity of the law in this field and the involvement of our military forces in armed conflict, we subject all treaties dealing with the law of armed conflict to close examination, even after adoption of the texts. I would note that in some cases the United States has taken more time than many of our friends and allies in ratifying the treaties we initiate, negotiate, support and with which we generally comply, even where we have not formally become a party. But we believe that such close examination is necessary, and allows us to be sure that the treaties we propose to ratify are in our national interests.

Some may question why it is important to ratify these treaties now after they have entered into force for other nations long ago. The answer, in part, is that over time we have seen how these treaties operate and we are confident that they promote U.S. national interests and are consistent with U.S. practice. Another reason for the United States to ratify these treaties is that ratification would promote U.S. international security interests in vigorously supporting, along with our friends and allies, both the rule of law and the appropriate development of international humanitarian law. Additionally, when the United States ratifies a treaty, other nations are more likely to ratify as well, with the result that overall implementation of and compliance with these norms will improve over time, which ultimately helps to protect our forces.

Ratification will also specifically enhance U.S. leadership in international humanitarian law and increase our ability to work with other states to promote effective implementation of these treaties in at least two ways. First, after ratification, the United States will be able to participate fully in meetings of States Parties aimed at implementation of these treaties and, thereby, more directly affect how the practice under these treaties develops. Second, becoming a party to these treaties will significantly strengthen our negotiating leverage and credibility in our work on other law of war treaties, to the extent other states ask why they should cede to U.S. positions if we do not ratify those treaties after they do so. We hope to change

that situation with the ratification of the five instruments under consideration today.

We believe that these treaties are not contentious. Some have been transmitted to the Senate for advice and consent to ratification by Democratic administrations and some by Republican administrations. The American Bar Association has urged the ratification of all five treaties.

The five treaties before you are the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was transmitted to the Senate on January 6, 1999; three protocols 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, or "CCW": Protocol III on Incendiary Weapons, which was adopted in 1980 and transmitted to the Senate on January 7, 1997; Protocol IV on Blinding Laser Weapons, which was adopted in 1995 and transmitted to the Senate on January 7, 1997; and Protocol V on Explosive Remnants of War, which was adopted in 2003 and transmitted to the Senate on June 20, 2006; and an amendment to this convention, which was adopted in 2001 and was transmitted to the Senate on June 20, 2006. All of these instruments have already entered into force for those states that have ratified them.

HAGUE CULTURAL PROPERTY CONVENTION

I would like to address the Cultural Property Convention first. It prohibits direct attacks upon cultural property, theft and pillage of cultural property, and reprisals against cultural property. While the United States helped negotiate this convention after World War II to address problems encountered during that war—indeed, the convention is based in large measure on practices of U.S. military forces during World War II—we have seen in much more recent conflicts how important it is to take measures to protect cultural property. While there were some initial U.S. concerns related to the convention after it was adopted, and for that reason it was not transmitted to the Senate until 1999, now, after some 50 years of experience and detailed interagency review, we have concluded that U.S. practice is entirely consistent with this convention and that ratifying it will cause no problems for the United States or for the conduct of U.S. military operations. Because of some minor concerns that relate to ambiguities in language, however, we propose four understandings that are set out in Treaty Document 106–1. These are entirely consistent with the goals of the convention and serve to clarify a number of important points.

The American Bar Association Report accompanying its resolution recommending ratification of this convention stated that "[b]y ratifying the 1954 Hague Convention, the United States would demonstrate . . . the importance the United States places on the protection of the cultural heritage of humanity."

Let me note that there are two protocols to this convention, one adopted in 1954—on preventing the exportation of cultural property and providing for restitution of illegally exported objects—and one in 1999—on establishing an enhanced system of protection for specifically designated cultural property. Both protocols require further review, but the convention itself stands on its own, and the administration urges that the committee take action now on the convention itself.

CONVENTION ON CERTAIN CONVENTIONAL WEAPONS

The Convention on Certain Conventional Weapons ("CCW") is a framework instrument. It was adopted after extensive multilateral negotiations between 1974 and 1980, with significant U.S. involvement and participation, and was approved by the Senate and ratified by President Clinton in 1995. The CCW establishes scope and procedural provisions that apply to a number of annexed protocols, each of which deals with a particular type of conventional weapon that may be deemed to pose special risks of having indiscriminate effects or causing unnecessary suffering, or a problem common to certain weapons. We believe that the CCW is a particularly valuable framework for considering such questions because it is designed to balance humanitarian and military considerations.

The framework instrument and the protocols are separate treaties each requiring advice and consent to ratification. With Senate advice and consent, the United States ratified the framework instrument and the first two protocols, on nondetectable fragments and landmines, in 1995. We ratified an amended version of the landmines protocol in 1999.

The four instruments under consideration today—a 2001 amendment to article 1 of the convention itself, the 1980 Protocol III on incendiary weapons, the 1995 Protocol IV on blinding laser weapons, and the 2003 Protocol V on explosive remnants of war—are consistent with U.S. military requirements and existing military practices. Each one advances the U.S. national objective of preserving humanitarian val-

ues in times of armed conflict, and ratification will permit the United States to participate fully in relevant meetings of States Parties to these instruments and to insist that other States Parties follow the norms that each instrument creates.

The American Bar Association Report accompanying its resolution urging ratification of this amendment and these protocols concluded that "U.S. ratification would further the United States humanitarian objectives without compromising the appropriate use of important military technologies."

All the major military powers are parties to the CCW and participate in meetings convened under its framework, and all decisions are made by consensus. It is because of the involvement of all the major military powers in the CCW that the United States supported the initiation of and has actively participated in two rounds of negotiations on the issue of cluster munitions within the CCW framework. While this step is important, it is also critical that we ratify the existing CCW instruments—particularly the protocol on explosive remnants of war, which will have a direct impact on mitigating the humanitarian effects of cluster munitions by focusing on concrete actions to be taken in the post-conflict period by the state in control of the affected territory as well as the users of such munitions. While these measures are already consistent with U.S. practice, our ratification will encourage other states to adopt similar practices through their ratification.

Let me briefly describe the four CCW instruments under consideration.

Amendment to Article 1

Article 1 of the convention as adopted in 1980 limited the scope of application of the convention to international armed conflicts between states and to wars of national liberation. As we informed the Senate, the United States declared, when we deposited the instruments of ratification, that the provision in article 1 concerning wars of national liberation would have no effect because it injected subjective and politically controversial standards into international humanitarian law and undermined the important traditional distinction between international and noninternational armed conflicts. We also informed the Senate that the United States will apply the provisions of the CCW to all armed conflicts, whatever their nature—international or noninternational—and that we intended to support an amendment to the CCW formally extending the scope of application to all armed conflicts.

The amendment to article 1 before you today does just that. The United States proposed this amendment, which conforms the convention to U.S. practice and extends the convention's and protocol's existing rules to noninternational as well as international armed conflicts. For instance, it would lead to increased protection of the civilian population from the effects of hostilities during civil war by requiring adherence by the State Party involved to the restrictions contained in any of the first four protocols it had ratified. The amendment was adopted in 2001 and was transmitted to the Senate in 2006, along with Protocol V.

As of the date of this hearing, 59 states are bound by the amendment to article 1 of the convention, including most of our NATO allies, Japan, South Korea, Russia, and China.

Protocol III (incendiary weapons)

Protocol III, which was adopted in 1980 along with the CCW and the first two protocols, provides increased protection for civilians from the potentially harmful effects of incendiary weapons, while reconfirming the legality and military value of incendiary weapons for targeting specific types of military objectives. Incendiary weapons are weapons or munitions that are primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target. They do not include tracer or smoke munitions, such as white phosphorus munitions.

This protocol was not transmitted to the Senate in 1994 along with the CCW and the first two protocols because of concerns raised at that time relating to the possible need to use air-delivered incendiaries in certain situations. It was subsequently transmitted to the Senate in 1997 with a proposed condition that would make the protocol acceptable from a broader national security perspective. The precise wording of this condition, however, continued to undergo military review, in order to ensure that the United States was able to retain its ability to employ incendiaries against high-priority military targets.

We are now in a position to state that U.S. ratification of this protocol, subject to a reservation that I will describe, would further humanitarian purposes as well as provide even clearer legal support for U.S. practice, particularly given past controversies surrounding the use of incendiary weapons. Based on the military review, we can say that U.S. military doctrine and practice are consistent with Protocol III,

except for the two paragraphs for which we have proposed the reservation—which is permitted under the CCW—in the interest of reducing risk to innocent civilians and collateral damage to civilian objects.

The protocol would prohibit the employment of incendiary weapons against military objectives within a "concentration of civilians." This is usually the right rule, but there could be particular combat situations in which it would cause fewer civilian injuries and less damage to use an incendiary, even where a concentration of civilians is present. Therefore, the administration 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 casualties and less collateral damage than alternative weapons, such as high-explosive bombs or artillery.

There are currently 99 States Parties to Protocol III, including all NATO Member States except Turkey and the United States.

Protocol IV (blinding laser weapons)

The negotiation of Protocol IV, which began in 1994, had as its impetus the possibility that countries would develop weapons with the capability to disable enemy forces through mass blinding, although such weapons had not actually been developed at the time. As adopted in 1995, the protocol prohibits the use, against any individual enemy combatant, 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 served as the principal basis for the Protocol IV text.

Protocol IV also obligates States Parties to take "all feasible precautions" in using 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. Such lasers include those used for range-finding, target discrimination, and communications.

There are currently 89 States Parties to Protocol IV, including all other NATO Member States and Israel. Protocol IV was transmitted to the Senate on January 7, 1997, together with Protocol III.

Protocol V (explosive remnants of war)

The negotiation of Protocol V was begun in 2002, based on concerns that a large proportion of civilian deaths and injuries from explosive remnants of war during post-conflict periods are both predictable and preventable. The situation in Kosovo had been cited as an example of the problems caused by explosive remnants of war. Protocol V, which was adopted in November 2003, is the first international agreement specifically aimed at reducing the humanitarian threat posed by unexploded and abandoned munitions of all types that remain on the battlefield after the end of armed conflicts (together known as "ERW"). ERW have existed since the earliest use of explosive devices in armed conflict. The protocol contains no restrictions or prohibitions on the use of weapons as such but provides rules for what must be done with respect to ERW, in order to reduce the threat such ordnance poses to civilians and post-conflict reconstruction.

The primary focus of Protocol V is on the post-conflict period. The protocol provides that, after entry into force, the party in control of the territory on which the munitions are found is responsible for the clearance, removal, and destruction of the ERW.

The party that used the munitions—if the munitions are not located on its territory—is obligated to assist "to the extent feasible." 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 protocol also includes a technical annex that encourages states to take steps to achieve the greatest reliability of munitions and to prevent munitions from becoming "duds."

There are currently 42 States Parties to Protocol V, including 14 NATO Member States, with a number of the remaining NATO Member States close to ratifying. Israel is not a party to Protocol V but it took part in the negotiations and supported the final text. A large number of states have indicated that they expect to join this protocol in the near future. Protocol V was transmitted to the Senate on June 20, 2006, along with amended Article I and Protocol III to the 1949 Geneva Convention,

following extensive interagency review. Priority for Senate action was given to Protocol III to the 1949 Geneva Convention, given its relative importance, and that protocol entered into force for the United States on March 8, 2007.

CONCLUSION

United States ratification of the treaties before you today is in our military and security interest and would promote the rule of law and the development of international law. These treaties are widely supported and are not contentious in our view. This administration, including the State and Defense Departments, strongly supports these treaties. They promote our cultural and humanitarian values while not interfering with legitimate military operations, as you will shortly hear from my colleagues from the Defense Department. The United States has traditionally been at the forefront of efforts to improve the legal regime dealing with the conduct of armed conflict, in order to protect our own forces, to reduce the suffering caused by armed conflicts and to provide protection to the victims of war, in a manner consistent with legitimate military requirements. Our ratification of these instruments will therefore serve our interests in these areas.

Mr. Chairman, I urge that the committee give prompt and favorable consideration to these treaties.

Senator CASEY. Thank you.

Mr. Allen.

STATEMENT OF CHARLES A. ALLEN, DEPUTY GENERAL COUNSEL, INTERNATIONAL AFFAIRS, DEPARTMENT OF DEFENSE, WASHINGTON, DC

Mr. ALLEN. Thank you very much, Mr. Chairman.

I'd like to begin by echoing Mr. Bellinger's comments, and not only his specific comments regarding these treaties, but also in thanking you for your very thoughtful statement regarding these treaties.

The Department of Defense believes that—and this includes the military departments and the combatant commands—these treaties are consistent with U.S. national security interests and overall U.S. interests. The U.S. Armed Forces already comply with the norms contained in these treaties, as you indicated.

Four of these treaties relate to the Convention on Conventional Weapons: An amendment to that convention, and three protocols to it. The fifth is the separate 1954 Hague Convention on the Protection of Cultural Property, which, although codifying protections for cultural property, specifically authorizes military commanders to do what is necessary to accomplish their missions. The convention does not restrict legitimate military actions that may be taken even if collateral damage is caused to cultural property. Importantly, it prohibits the use of cultural property in armed conflict for purposes likely to expose it to destruction or damage. The Department of Defense has carefully studied the convention and its effect on military practice and operations, and believes the convention to be fully consistent with good military doctrine and practice, as conducted by the U.S. Armed Forces.

We recommend that ratification of the convention be subject to the four understandings that Mr. Bellinger mentioned that are set out in the treaty document submitted to the Senate.

Among other things, these understandings reflect key law of war principles that are consistent with the convention: Prohibiting use of cultural property to shield legitimate targets from attack, and recognizing that property may be attacked using lawful and proportional means if required by military necessity.

The CCW and its protocols are part of a legal regime that takes into account both humanitarian considerations and military necessity in regulating the use of particular types of conventional weapons that may pose risks to civilian populations within the vicinity of military operations.

The first of the four CCW instruments under consideration is the amendment to article 1, which extends the scope of the application of the convention in Protocols I, II, and III to noninternational armed conflicts. The amendment is important, because many of the conflicts that occur today are noninternational in character. Ratifying this amendment will result in no changes to longstanding U.S. and Department of Defense policy, as reflected in the U.S. declaration upon becoming a party to the CCW and two protocols to CCW in 1995.

Additionally, the amendment applies the rules contained in the convention and protocols to both State and non-State belligerents. The amendment recognizes that 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 U.S. national objectives of preserving humanitarian values during armed conflict.

Now, Protocol III codifies increased protection for civilians from the potentially harmful effects of incendiary weapons. It reconfirms the legality of military use of incendiary weapons for targeting specific types of military objectives. Ratification of this protocol would further humanitarian purposes, as well as provide clearer support for U.S. practice, given past controversies surrounding incendiary weapon use. U.S. military doctrine and practice are consistent with Protocol III, subject to the proposed reservation in the interest of reducing risk to innocent civilians and collateral damage to civilian objects. In this reservation, we would reserve the right to use incendiary weapons against military objectives, but only where it is judged that such use would actually reduce the risk of civilian and friendly force casualties and collateral damage than alternative weapons, such as high-explosive bombs or artillery.

Protocol IV to CCW 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 was established prior to, and was the principal basis for, the Protocol IV text.

Protocol V to the CCW provides rules for what must be done with respect to unexploded munitions and abandoned munitions, together known as explosive remnants of war, or ERW, remaining on the battlefield after a conflict. These munitions may be artillery shells, bombs, handgrenades, mortars, rockets, and, in fact, also cluster munitions; but, by definition, do not include land mines, which are regulated by Protocol II, the Amended Mines Protocol to the CCW. 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, including the voluntary best practices stated in the technical annex to the protocol.

The United States delegation stated its understandings regarding a number of Protocol V provisions during the negotiations and upon the adoption of the final text, and these understandings were not disputed. These understandings are found in the administration's article-by-article analysis, and we believe Protocol V rules and best practices are completely consistent with U.S. military doctrine and policy.

Because the Department of Defense views these treaties as being consistent with United States national security interests and overall U.S. interests, and because being party to these treaties, as Mr. Bellinger said, will reinforce existing military norms and practices and enhance our stature in the international community with regard to the law of war, I urge you to act favorably on all five of these treaties.

Thank you.

[The prepared statement of Mr. Allen follows:]

PREPARED STATEMENT OF CHARLES A. ALLEN, DEPUTY GENERAL COUNSEL, INTERNATIONAL AFFAIRS, DEPARTMENT OF DEFENSE, WASHINGTON, DC

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 noninternational 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 noninternational 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, noninternational 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 noninternational 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 noninternational in character. Ratifying this amendment will result in no changes to longstanding 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 nonstate belligerents. The amendment provides that recognizing the applicability of the CCW and protocols to nonstate parties to a conflict does not change the legal status of those nonstate par-

ties, 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 noninternational 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 Vietnam 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 biotoxins.

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 antipersonnel 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, handgrenades, 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 inter-

ests 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.

Senator CASEY. Thank you very much.

I'll have some questions for each witness, and I'll start with Mr. Bellinger.

For those who are here and those who may be listening, and, I think, even for Senators like me, can you talk a little bit about the CCW process? Just walk through that for us. I know you touch on it a couple of times, but please walk us through the process and the relevance of that process to our national security and our standing in the world.

Mr. BELLINGER. Certainly. Thank you.

The—as I mentioned, the CCW process—it's got a long title, but the CCW generally refers to Certain Conventional Weapons—is a framework agreement that takes into account both humanitarian considerations—because of the particular impact that certain kinds of weapons can have on civilians and others, and the combatants in war—and military considerations in the process of reaching agreements. Essentially, if we are going to go to war with one another, the idea is to agree to certain limits on certain particularly destructive weapons. They need to be consistent with our military objectives, but, at the same time, our military recognizes that there are certain things that the military themselves will not use, or that they will use in a—only in a particular way, in order to limit civilian harm. And hence, there's the framework agreement and a process that brings the players together. I gather we might want to talk about this later on, but that's the process that we're using right now in Geneva to talk about cluster munitions. But, already we have reached agreement on protocols on certain types of weapons, like blinding lasers, which our military does not plan to use, incendiary devices, which would only be used under certain circumstances, and then the protocol on explosive remnants of war. So, it's an important process that we continue to place a lot of faith in to try to make war as minimally destructive as possible for civilians and for combatants.

Senator CASEY. And, if you would, take it forward from the point at which ratification takes place. What happens after that, in terms of implementation?

Mr. BELLINGER. It operates by consensus; and so, there are periodic reviews, both in the overall framework of CCW, which reviews past protocols, and then look to negotiate new ones. So, the group meets together, and it is very important that, unlike some other groups, that the major military powers are represented to look at how well the past instruments are working or to look at additional instruments. And then, there are subgroups of—that will focus, in particular, on the particular protocols, so there's a working group, for example, on Protocol V on Explosive Remnants of War. All of these negotiate by consensus.

Senator CASEY. I wanted to get your sense of understanding of the attitude of other countries toward the United States at the conferences. Have we been able to effectively influence negotiations over these treaties in these forums? What's the sense that you have

of the attitude of these other nations as it pertains to the United States?

Mr. BELLINGER. Well, thank you. It's a good question, and I am proud to answer. I would certainly ask my colleagues here to add on.

The United States, for decades and decades, if not 100 years, has been a leader in developing law of war treaties. We are a major military power, so there is recognition and pressure on us to limit our own use of military forces, and sometimes constrain ourselves in ways that we're not comfortable with, but, at the same time, there is great respect for our negotiators, for our lawyers, and for our values, as a people, to do the right thing. So, even when other countries don't agree with us—and sometimes we will have countries who never have to go to war, and so, for them, these are academic questions and are putting great pressure on the United States to limit the use of certain weapons—there is great respect for us as a leader in the laws of war. And many of the people sitting behind the witnesses at the table are the men and women who negotiate, and have for years, in these processes. And I can tell you, as the Legal Adviser at the State Department, how much respect there is for the people who do this, even if there's not agreement with every position the United States takes.

Senator CASEY. We appreciate their service. It's terribly complex assignments they have, and we appreciate that.

I wanted to move to, Mr. Bellinger—before we get to our other witnesses—to the question of cluster munitions. As it stands now, the Norwegian Government launched separate negotiations, is that correct? And they, of course, fall outside of the CCW process. And, I guess, their agreement would ban most, if not all, cluster munitions. Is that correct?

Mr. BELLINGER. Generally right, sir. Yes, sir.

Senator CASEY. And the United States is boycotting those negotiations.

Mr. BELLINGER. Well, we are not participating.

Senator CASEY. OK. Fair enough.

I want to ask you a direct question about why the administration is opposing an agreement that would not just regulate the use and disposition of cluster munitions, but would go one step beyond and ban, in fact, their production.

Mr. BELLINGER. No; it's a good question, and I will tell you we looked very hard at this, between the State and Defense Departments, as to whether we wanted to participate in the Oslo process. For the reasons that I laid out, we are a leader in the laws of war, and in their humanitarian aspects, but, at the same time, we do use cluster munitions. We have a large number of them in our inventory, and, at least for right now, until a review conducted by the Defense Department about their possible future uses, and under what terms, is finished, we could not agree to a total ban on use of cluster munitions. There are legitimate military uses for cluster munitions, that my defense colleagues can go into.

So, what we chose to do, because of the absolute ban on clusters that the Oslo process would—is pursuing, we are looking to agree to a binding instrument within the CCW process that would address cluster munitions. We're fully aware of the humanitarian

considerations involved when cluster munitions are used. The CCW process involves all of the major military players—and I think that's one of the most important things I want to emphasize—at Oslo, it's a group that does not include the major military players—Russia, China, Pakistan, India. So, it's not going to have a lot of effect if you don't have the countries in the world that have cluster munitions, or might use them. In the CCW process, we have those players represented. We think we could reach an agreement, and we've just, over the weekend, gotten back from a second round of negotiations for a protocol on cluster munitions, and we think that's a better approach, to be working with the countries that actually have got the cluster munitions.

Senator CASEY. So, it's currently—I guess you're saying it's currently under review.

Mr. BELLINGER. Well, two things. Our Defense Department procedures and policies for use of cluster munitions in our military are under review. The review is close to ending. My Defense Department colleagues may be able to say a little bit more about it as to what—how we would use them. But, we have already agreed that we would—are interested in entering into what would essentially become a Protocol VI to the CCW on Cluster Munitions, that, at a very minimum, would address the law applicable to use of cluster munitions, best practices for their use, and for cleanup after a conflict.

Senator CASEY. Let me direct my question both to you and to Mr. Allen; one or both can answer.

The results of the review, would they be made available to this committee?

Mr. ALLEN. Senator, I'm sure that we'll be in a position to brief the committee on that review. And I'm sure there'll be correspondence to the committees following the review that go into detail with respect to it.

Senator CASEY. Do you have any sense of timing on that?

Mr. ALLEN. I think we're, as Mr. Bellinger indicated, very close to it. It has had a full review through the combatant commands and the military departments, and currently it's being dealt with by the Defense Department leadership.

Senator CASEY. In terms of time, are we talking weeks or months?

Mr. ALLEN. I think, weeks.

Senator CASEY. Weeks; OK.

Mr. ALLEN. Yes, sir.

Senator CASEY. I wanted to move on, because I know we have a lot to cover.

Mr. Bellinger, one more question. With regard to Senate legislation 594, which would prohibit the export of cluster munitions to other nations with a less than 95-percent success rate, do you know the administration's position on that bill?

Mr. BELLINGER. I do, sir. And we do have concerns about that bill. We certainly understand the—and I can tell you personally, I understand the concerns that motivate it, because of the humanitarian impact of cluster munitions. But, to have legislation that would impose what appears to be an absolute ban on their use—I think it would actually require a 99-percent reliability rate—and

the cluster munitions currently in our military arsenal, while some of them have that reliability, many of them do not, at this point—would hamper the flexibility of our military commanders to say that there would be an absolute ban. Frankly, this legislation could be contrary to humanitarian purposes, because there really could be some cases where, rather than having a single weapon after single weapon after single weapon lobbed into a particular site, it actually would be more humanitarian to use a cluster munition. So, with respect to the second part of the prohibition, that says "could never be used when civilians are present," that actually could be contrary to humanitarian purposes.

Senator CASEY. Now, to your knowledge, is the approach taken by this administration different than, or in conflict with, either the prior administration—Clinton or President Bush's administration prior to President Clinton?

Mr. BELLINGER. I would have to ask my Defense and military colleagues what they recall previously, but my understanding, sir, is, because cluster munitions have been in our arsenal for a long time, and have been a staple of our arsenal, while we've been trying to increase the reliability, I think no administration would be prepared—has been or would be prepared to immediately foreswear their use, even as we try to move forward to address the humanitarian considerations.

Mr. ALLEN. I can confirm that, Senator, that the usefulness of cluster munitions is well established. Having said that, we always apply the law of war, in terms of discrimination, only going after military targets, and proportionality in the use of all of our weapons, including cluster munitions. But, there has been no change in this administration over past administrations.

Senator CASEY. Thank you.

Mr. Allen, I wanted to ask you a couple of questions. One was about the DOD implementation of these treaties now. Could you tell us—what, if anything, would change if the United States joined the treaties? What's the before and after?

Mr. ALLEN. Well, I think, as you rightly pointed out—in large measure, not very much would change, because we have implemented these treaties in our doctrine and in our training. They're in our culture of training our Armed Forces, preparing them for the different operations that they're involved in, you know, as we speak. And there—there obviously would be some changes. We have—obviously, we tune in to these matters, and at our various legal schoolhouses and training commands, they will tune in to the fact that we are now party to these treaties. And that will—that will be reflected in the training. But, again, sir, as you rightly pointed out in your statement, in regard to all five of these matters, there's really not a lot that would change, except for what we think is an increase in our stature in being able to assume and continue our lead role in the law of war, internationally.

Senator CASEY. So, it would be, in terms of the mechanics of it, mostly internal, in terms of training and——

Mr. ALLEN. Right. Exactly.

Senator CASEY. And with regard to implementation and resources spent, will more resources be devoted to implementation and training associated with these treaties if we join?

Mr. BELLINGER. I think the resources would—added resources would be negligible, in terms of implementing the treaties, in getting the word out to the Armed Forces as to the fact that we're party to the treaty instead of just applying these norms that are contained in the treaty as a part of the doctrine that soldiers, sailors, airmen, and marines have been oriented in all along. I think, truly, there's not much of a training expense at all.

Senator CASEY. And finally, with regard to just the time that's passed—these have been on the Senate calendar for quite a while now—and some of this is by way of reiteration, but if you could explain why it's important that we act on these treaties now, in light of the passage of time and in light of the significance of these treaties.

Mr. ALLEN. I think it does matter that we're party to the treaties. I think we have—in particular, in the CCW forum, we have, as Mr. Bellinger indicated, an extraordinary positive example of interagency work for the best interests of the country, the way our Defense Department and State Department colleagues work together in CCW. And we have high hopes for this instrument, which may end up being a Protocol VI, dealing responsibly with cluster munitions. And our stature and our ability to carry that forward would be enhanced by becoming party to the CCW treaties.

Senator CASEY. Thank you.

And, General, I wanted to get to questions for you. And I appreciate your patience in waiting.

First of all, thank you for your service, as well. We're grateful for your service and your participation here in this hearing.

I wanted to ask you—often when Americans hear about treaties, as I think Mr. Bellinger mentioned, they think of it in a different context than warfare or combat. And I think it's important that we bring them together. I know some of the previous testimony did just that. But, just from the vantage point of combatant commanders, can you tell us why these treaties are important, from a combatant commander's vantage point?

STATEMENT OF BG MICHELLE D. JOHNSON, DEPUTY DIRECTOR FOR THE WAR ON TERRORISM AND GLOBAL EFFECTS, J–5 STRATEGIC PLANS AND POLICY DIRECTORATE, JOINT STAFF, WASHINGTON, DC

General JOHNSON. Yes, Mr. Chairman, thank you very much. And thank you for the opportunity to represent the men and women of the Armed Forces today. And thank you for your and the committee's support for them every day. We appreciate that. Thank you very much.

As has been said before, our operations are already consistent with the content of these treaties, and it's a part of our normal approach to targeting and munitions selection as we go along. And we've had a—the opportunity for full review and concurrence, both on the Joint Staff, as well as in the combatant commands, and in the services.

Again, as has been said before, as well, anything that other countries can do in signing up to adhere to these treaties would be a benefit to our servicemembers, because it would protect them from

excessive injury. And by ratifying it ourselves, we set the example of what responsible militaries do, that we follow these rules.

And finally, several of our allies already are in compliance with these treaties, and for us to be able to fully operate with them and to participate will actually help our military operations, because some of—much of what we do is done with coalition partners.

Senator CASEY. Do you have any—and this, I guess, is a question that a lot of people would ask that aren't intimately familiar with the necessity and the rationale behind these treaties—but do these treaties in any way limit the flexibility of our military?

General JOHNSON. No; actually it does not provide an adverse effect on our operations; again, because we operate in compliance with them already, and also because of what's been cited by my colleagues, in terms of our ability to respond to military necessity in any situation, we can apply and balance the military utility with the humanitarian considerations, as well.

Senator CASEY. So, you can strike that balance.

General JOHNSON. Absolutely.

Senator CASEY. And I know that our military already implements these treaties, as previous testimony told us, just in terms of a matter of practical policy, even though we're not yet a party. Can you give us examples of how we've done this—in other words, how we've been able to implement them, as policy, without—or prior to ratification——

General JOHNSON. On any given——

Senator CASEY [continuing]. Just by way of examples.

General JOHNSON. Right. Well, at any given day—and whether it's in the coalition air operations center or in the ground counterparts, during the targeting cycle and munitions selection there is a whole team, from legal experts to munitions experts, that select targets and take into account military utility for a particular target for the desired military effect. And there's a balance given to collateral damage and the impact of—on others in the munitions selection. It's a matter of course. That's the common practice. And so, because of the care given to that, we feel like that's become common and hopefully, again, sets the example for others.

Senator CASEY. And by way of amplification—that whole theme that we've talked about, each of us in our own ways today—setting an example for the world and for countries around the world, would you give us a sense of what that means from the perspective of your work, as a part of our military. This is just to give people a sense of what that means, in terms of setting that example around the world.

General JOHNSON. America stands for something. And when we wear our uniform, we represent that every day. And so, people in uniform take that responsibility very seriously to, not just execute policy, but do it in the way that America does: Responsibly and with due attention to the humanitarian considerations of our actions in the leadership role that we've assumed, as we discussed earlier, in all the venues that we participate in.

Senator CASEY. And, Mr. Allen or Mr. Bellinger, do you want to add anything to that?

Mr. ALLEN. I would add that I think that these treaties—starting with your statement, sir, and I think throughout our statements,

as well, these treaties reflect the balance of military necessity and humanity that are the underlying principles of the law of war. So, when we develop our doctrine with respect to adhering to the law of war in our military operations, we get to the same result as these treaties; even though we haven't been party, we practice and we imbue, in our doctrine and in our operations, respect for these same principles.

Another anecdote is that, with respect to the blinding lasers protocol, it was a Defense Department policy that was adopted in the 1990s during the Clinton administration that actually became the foundation for that protocol. Credit goes to our colleagues and their predecessors who have persevered doggedly at the CCW meetings, extensive meetings where there is no time off, to deal with these issues with—on into the night, bilateral, as well as the plenary meetings, and then going back and working on the papers for the next day. Our hats are off to them for, over the years, really taking on a leadership role in that forum.

Senator CASEY. Thank you.

Mr. BELLINGER. And, Senator, thank you, I will add something to that—and I think the General said it very well, which is that we not only do set an example for the world, but we do stand for something in the world when it comes to international humanitarian law. Countries really do listen to us. As someone who spends a good deal of my time on the road in negotiations with other countries, as do my colleagues around me, on many, many treaties, but particularly because we have been in conflicts over the last 7 years on law of war treaties, I know that there is—you know, despite the controversies that all of us are aware of going on right now, there is respect for the United States legal positions—they know that we're experts, they know that we mean the right thing, they listen—other countries listen to what we have to say.

In answer to your question of, sort of, "Why now?"—and I hear this sometimes from others who are skeptical about treaties, "Well, if we're complying, and it's already incorporated in our military doctrine, and everybody else has signed up and a party, you know, why should we become a party and bind ourselves if we're already getting the benefit?" And the answer is, we go into these negotiations, people listen to us, they change their positions in response to the United States because they think we're doing the right thing. But, if we then never ratify, ourselves, they sort of feel we've pulled the football away and it does mean that, the next go-round, they are going to be less likely to compromise. And all of us have heard that in negotiations, where we say, "Would you please change the language in this provision?" and they'll say, "Well, we think you're right, it makes sense to me, but, you know, last time you asked us to change something, you said, if we change that, then you would become a party, but then you don't." So, the credibility that comes to the United States not only with doing a good job in the negotiations, but then, essentially keeping our faith with the expectations, is very important for us to go forward with these treaties in order to maintain that leadership position in the world.

Senator CASEY. Well, thank you for that explanation.

I'm out of questions. But, before we conclude, I do want to submit, for the record, the statement of Senator Lugar—of course, this

committee's ranking member—his statement from today will be made part of the record.

Senator CASEY. But, I do want to reiterate our thanks for our three witnesses and for your service, and for those who are sitting or standing behind you, figuratively and literally. We appreciate your service to the country and sometimes painstaking work it takes just to produce the information upon which these treaties are based, and also the work that goes into just bringing everyone here together today.

Thank you very much.

Meeting adjourned.

[Whereupon, at 3:25 p.m., the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA

I join the chairman in welcoming our distinguished witnesses. The "Law of War Treaties" that we will examine today seek to restrict or outlaw specific types of heinous weapons used in combat.

In 1980, 51 governments negotiated the Convention on Conventional Weapons (CCW). The primary purposes of this treaty are to prevent the use of certain types of weapons judged to be inhumane and to prevent noncombatants from being injured. The treaty entered into force in 1983 and was focused on incendiary weapons, mines, booby traps, and weapons utilizing small fragmentation to injure or maim.

Currently, 106 governments participate in the CCW. Recently, the parties—including the United States—negotiated several protocols and one amendment to the existing CCW text. Today, the Foreign Relations Committee will have an opportunity to examine these "Law of War Treaties" in detail, as well as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

I look forward to our discussion of all the agreements before us today, but I would like to highlight two that I consider to be of particular importance in strengthening U.S. leadership in conventional arms control. The first is the Amendment to Article 1 of 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—commonly called "the CCW Amendment." The second is the CCW Protocol on Explosive Remnants of War—also known as "CCW Protocol V (Five)." Both were submitted to the Senate for consent to ratification in June 2006.

The CCW Amendment was adopted at Geneva on December 21, 2001. It applies the ban on the use of certain excessively injurious conventional weapons to civil wars. Currently, the ban applies only to international conflicts. It is important to note that the legal status of rebel or insurgent groups is not changed. They are not protected under the agreement as privileged belligerents or lawful combatants.

CCW Protocol V was adopted at Geneva on November 28, 2003. It establishes rules governing the post-conflict disposition of conventional munitions such as mortar shells, grenades, artillery rounds, cluster munitions, and bombs that did not explode as intended or that were abandoned. The protocol provides for the marking, clearance, removal, and destruction of such remnants by the party in control of the territory in which the munitions are located.

The goal is to reduce the threat such munitions pose to civilians and to post-conflict reconstruction. Protocol V is the first international agreement specifically aimed at reducing humanitarian threats that remain after hostilities have ended.

It is critical that the Senate ratify the CCW Amendment and Protocol V now. Absent Senate action, we will not be able to participate in relevant meetings in which important decisions are being made on treaty implementation. The U.S. has already missed one such meeting—the June 2007 preparatory meeting on Protocol V. Continued absence could lead to changes that do not serve our national security interests.

Some members of the international community have proposed addressing issues related to cluster munitions and other weapons outside the Convention on Conventional Weapons. Some have suggested creating new forums or treaty organizations. This administration and its predecessors have made important progress in constructing the CCW. It strikes the right balance in addressing important deficiencies in international law, while preserving critical U.S. national security interests. Scut-

tling all of this hard work and starting anew is unlikely to prove beneficial to U.S. interests. In fact, if negotiations were to commence on a new agreement or structure, the U.S. position would be to advocate something identical to the CCW.

The first step in solidifying our political and diplomatic investments in the CCW and preventing potential backsliding of commitments by other nations is for the Senate to act on the CCW Amendment and Protocol V.

I thank the chairman and look forward to hearing from our witnesses.

PREPARED STATEMENT SUBMITTED BY PATTY GERSTENBLITH, PRESIDENT, LAWYERS' COMMITTEE FOR CULTURAL HERITAGE PRESERVATION, PROFESSOR, DEPAUL UNIVERSITY COLLEGE OF LAW

Senator Casey and members of the committee, thank you for the opportunity to submit this written statement in support of the ratification of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. Ratification is a crucial step toward improving our foreign relations by sending a strong signal to all nations that the United States values their cultural heritage. It would also help in assuring the preservation of the world's cultural heritage for the benefit of future generations. We urge that the committee recommend Senate ratification of the 1954 Hague Convention.

The 1954 Hague Convention was adopted in the wake of the cultural destruction inflicted on Europe by the German Nazi regime during World War II. It was based on earlier documents, including the Lieber Code instructions issued for the regulation of conduct by the United States Army during the Civil War, the Hague Conventions of 1899 and 1907, the Roerich Pact of 1935, and a draft convention prepared in the 1930s. The destruction, theft, and pillage of cultural sites, monuments, and works of art perpetrated by Germany during World War II demonstrated all too graphically the need for a new international instrument dedicated specifically to the protection of cultural property during armed conflict.

The actions of the United States Monuments, Fine Arts and Archives teams and the regulations issued by General Eisenhower to ensure respect for cultural heritage set the United States apart in its efforts to protect cultural sites and to return looted art works to their proper owners. The 1954 Hague Convention was, to a large extent, based on General Eisenhower's instructions. The United States was one of the first nations to sign the convention, indicating its intention to ratify it. Subsequent conflicts, including those in the Balkans in the 1990s and today in Iraq, have demonstrated the ongoing need for such a convention to protect the cultural and historical record of humankind.

Under the terms of the convention, States Parties are to protect the cultural property situated within their own territory and to avoid acts of hostility directed against cultural property, defined broadly to include historic structures and monuments, archaeological sites, and repositories of collections of artistic, scientific, and historical interest. There are now 118 States Parties to the convention, a number that includes most of our allies. Further, the United Kingdom has announced its intention to ratify the convention.

The convention lays out the basic principles for protecting cultural property. It begins with a preamble, which sets out the reasons for the adoption of the convention. It is worth noting two of the introductory paragraphs in particular:

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
>
> Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection . . .

These phrases are part of a tradition of nations freely joining together to care for the cultural property located within their borders and to respect their adversaries' cultural property during warfare.

Article 1 of the Hague Convention offers a broad definition of cultural property as "movable or immovable property of great importance to the cultural heritage of every people." There follows a list of examples of cultural property, which is clearly intended not to be exhaustive, but includes "monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical, or archaeological interest; as well as scientific collections and important collections of books or archives . . .". In addition to movable and immovable property, cultural property also includes repositories of cultural ob-

jects, such as museums, libraries, and archives, as well as refuges created specifically to shelter cultural property during hostilities.

Article 2 defines the "protection of cultural property" as consisting of two components: "The safeguarding of and respect for such property." Safeguarding refers to the actions a nation is expected to take during peacetime to protect its own cultural property. This is embodied in article 3, which elaborates that nations are obligated to safeguard cultural property located within their territory during peacetime from "the foreseeable effects of an armed conflict." Respect refers to the actions that a nation must take during hostilities to protect both its own cultural property and the cultural property of another nation. This obligation is embodied in the two main substantive provisions of the convention: Article 4, which regulates conduct of parties during hostilities, and article 5, which regulates the conduct of occupation.

The central premise of these articles is that parties to the convention are to show respect for cultural property by protecting cultural property situated in their own territory and by avoiding harm to similar resources situated in the territory of another State Party. Under article 4(1), nations are to avoid jeopardizing cultural property located in their territory by refraining from using such property in a way that might expose it to harm during hostilities. This means that nations should not use cultural property as the location of strategic or military equipment nor should such equipment be housed in proximity to cultural property. Also under article 4(1), a belligerent nation should not target the cultural property of another nation. Article 4(2) provides that the obligations of the first paragraph "may be waived only in cases where military necessity imperatively requires such a waiver."

Article 4(3) sets out the obligation "to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property . . .". Paragraph 3 also prohibits the requisitioning of movable cultural property located in the territory of another party to the convention. Paragraph 4 of this article prohibits carrying out acts of reprisal against cultural property. Paragraph 5 states that if one State Party has failed to comply with article 3 by not preparing to safeguard its cultural property during peacetime, this failure does not mean that another State Party can evade its obligations under article 4.

Article 5 sets out the obligations of a State Party during occupation, emphasizing that the primary responsibility for securing cultural property lies with the competent national authority of the state that is being occupied. Thus the first obligation imposed on the occupying power is to support these national authorities as far as possible. The obligation of the occupying power to care for and preserve the cultural property of the occupied territory is very limited and applies only when the national authorities of the occupied territory are unable to do so, only when the cultural property has been "damaged by military operations" and only "as far as possible."

Article 6, permitting the distinctive marking of cultural property by a special emblem, the Blue Shield, and article 7, requiring that States Parties undertake to educate their military and introduce regulations concerning observance of the convention, complete the general substantive provisions of the convention. Articles 8 to 14 are concerned with the conditions of special protection, which may be accorded to certain categories of cultural property under specific conditions. The remaining articles address such topics as personnel (article 15), the distinctive emblem of the Blue Shield (articles 16–17), the scope of the convention's applicability (article 18–19), and procedural matters (articles 20–40).

In conclusion, the policies and practices of the U.S. military are already consistent with numerous of the principles of the 1954 Hague Convention under the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex (of which the United States is a party) and as a matter of customary international law.[1] During both gulf wars, the United States military took considerable care to gather information on the locations of cultural sites in Iraq and avoided targeting them. Even so, ratification would codify the obligations of the United States military, assure our allies that we all observe the same rules, and encourage marking of cultural sites.

We urge the committee to recommend that the Senate ratify the 1954 Hague Convention.

Testimony submitted on behalf of the:

Archaeological Institute of America (AIA), Lawyers' Committee for Cultural Heritage Preservation, United States Committee of the Blue Shield (USCBS), American

[1] See, e.g., Department of Defense, January 1993 Report of Department of Defense, United States of America, to Congress on International Policies and procedures regarding the Protection of Natural and Cultural Resources during Times of War.

Anthropological Association, American Association of Museums (AAM), American Institute for Conservation of Historic & Artistic Works (AIC), American Schools of Oriental Research (ASOR), Association of Moving Image Archivists (AMIA), College Art Association (CAA), National Trust for Historic Preservation, Society of American Archivists (SAA), Society for American Archaeology (SAA), Society for Historical Archaeology (SHA), United States Committee of the International Council on Monuments and Sites (US/ICOMOS), and World Monuments Fund (WMF).

RESPONSES OF LEGAL ADVISER JOHN BELLINGER AND DEPUTY GENERAL COUNSEL CHARLES ALLEN TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR CASEY

OSLO PROCESS TO RESTRICT USE AND PRODUCTION OF CLUSTER MUNITIONS

Question. Negotiations are proceeding in the Oslo process, a negotiating forum outside the CCW framework, to regulate the use and production of cluster munitions. At the same time, States Parties to the CCW are considering a proposed Protocol VI to the CCW to go beyond the terms of Protocol V and focus on cluster munitions as a specific weapons system.

Please assess the likely practical implications if both a treaty resulting from the Oslo process and a Protocol VI to the CCW were to enter into force. What would the experience over the past nearly 10 years with the Ottawa Convention and Protocol II to the CCW teach us in this regard?

Answer. The problem with the Oslo process is not that it will in some way interfere with the operation of a potential Protocol VI to the CCW on cluster munitions, but that it would jeopardize military interoperability between State Parties and non-State Parties to a convention resulting from the Oslo process. In principle, it would be possible for the Oslo process to reach an agreement that would have no negative impact on countries that decide not to participate, but the current draft of the Oslo text would significantly complicate cooperation between the militaries of State Parties and non-State Parties in missions in which the use of cluster munitions may be effective and appropriate.

Regardless of the outcome of the Oslo process, the CCW is better positioned to take effective steps to address the humanitarian concerns associated with the use of cluster munitions in a context that recognizes their military value. Unlike the Oslo process, the CCW includes all the major users and producers of cluster munitions, and therefore a potential Protocol VI would have a more substantial impact on the humanitarian issues it seeks to address.

An Oslo process convention would pose some of the same problems as the Ottawa Convention, including those related to the storage of weapons in allied or partner countries, moving weapons in and out of such countries, and hiring workers to help in such storage or movement. In terms of military interoperability, however, an Oslo-type convention would present much greater difficulties. Cluster munitions may be very important munitions in any given military mission, and prohibitions in the current draft Oslo text would preclude cooperation with allies or partners that are parties to a convention resulting from the Oslo process. In addition, the Oslo process risks creating unnecessary and redundant humanitarian relief mechanisms, resulting in added costs and diverting resources from more important activities.

PROTOCOL V TO THE CCW

Question. Article 3 of Protocol V calls upon a State Party that used munitions on territory not under its control to provide technical, financial, material, or human resources assistance to facilitate the marking, clearance, removal and/or destruction of these explosive remnants "where feasible."

If the United States ratifies Protocol V, what would be the cost implications of meeting this obligation should the U.S. military again use cluster munitions in a manner and quantity similar to its pattern of use in Operation Desert Storm? (According to a report issued by the Government Accountability Office, millions of cluster sub munitions were dropped and at least 118,000 dud cluster sub munitions littered Iraqi territory at the end of the war in 1991.) Who determines what is feasible, and could that issue be brought before an international tribunal in the event of a dispute similar to that which occurred between Panama and the United States regarding unexploded chemical weapons on Panamanian soil?

Answer. Under Protocol V, it falls to each State Party to determine what is feasible with respect to the provision of assistance to clean up ERW after a conflict. This feasibility assessment is not necessarily tied to the financial ability to provide assistance, and other factors may be taken into account. There is no provision for

questioning a State's feasibility determination, for example, by bringing the issue before an international tribunal. In addition, the primary responsibility for clearance, marking, and other activities to protect civilians and assist victims is that of the State in control of the territory and not the State that used the munitions. This was consciously and explicitly written into the Protocol V provisions to ensure that cleanup after hostilities cease would be done as quickly as possible.

Question. Article 4 of the Protocol relates to the sharing of data concerning the use and/or abandonment of ERW following the cessation of hostilities to facilitate the clearance of said ERW. Given that many cluster munitions systems have no guidance software, how useful is the sharing of mapping information in identifying the likely locations of unexploded cluster sub munitions?

Answer. Nonprecision-guided weapons still follow a predictable course when they are fired, dropped, or launched. Even if, in some cases, the mapping information that can be provided under Article 4 of Protocol V does not provide pinpoint accuracy in locating ERW, it remains an extremely helpful procedure for assisting the country on whose territory the cluster munitions were used in cleaning up any ERW.

Question. Please describe the "legitimate security interests" referenced in Article 4 that would justify a State Party not turning over strike data once a conflict has ended.

Answer. We would expect that refusal to turn over strike data on the basis of legitimate security interests after the cessation of hostilities would be rare. However, it is possible that there could be a situation where turning over strike data would reveal classified information about a particular weapons system's capability, for example, or about targeting procedures. In such cases a State Party might justifiably invoke this provision.

RESPONSES OF LEGAL ADVISER JOHN BELLINGER TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

Question. What do you hope will be the impact of U.S. ratification of Protocol V to the CCW on the CCW process on cluster munitions?

Answer. We have played an active role in the CCW process on cluster munitions and will continue to work very hard to achieve a meaningful result in that forum. One of the issues in these negotiations is the question of how to deal with unexploded cluster munitions that may remain on the battlefield after the end of a conflict. The U.S. delegation to the CCW negotiations has taken the position that Protocol V already provides most of the international framework necessary to address this issue. It is not the international community's intent to duplicate these structures in a new instrument. Furthermore, both with respect to victims' assistance and cleanup of unexploded remnants of war, it would not make sense to have special rules for cluster munitions that differ from the rules that apply to other types of weapons. In this context it would be particularly useful to be able to ratify Protocol V in advance of the critical July negotiating session in the CCW as it would confirm our commitment to the regime established by Protocol V.

Question. In the treaty transmittal packages (105–1, 106–1, and 109–10), a reservation and several understandings were recommended for inclusion in the Senate's resolution of advice and consent to ratification. Please review the recommendations made in the transmittal packages and confirm whether there are any changes or additions you would like to propose.

Answer. As previously discussed with committee staff, we have proposed two changes to the understandings and reservation recommended in the treaty transmittal packages for these five treaties.

First, we have proposed to alter the second understanding to the Hague Convention to read as follows:

> (2) It is the understanding of the United States of America that decisions by military commanders and others responsible for planning, deciding upon, and executing activities covered by this Convention can only be judged on the basis of their assessment of the information reasonably available to them at the relevant time.

Second, we have proposed to slightly alter the proposed reservation to article 2 of the Incendiary Weapons Protocol as follows:

> The United States of America, with reference to Article 2, paragraphs 2 and 3, reserves the right to use incendiary weapons against military objec-

tives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Question. Article 3 of Protocol V to the CCW requires States Parties to take certain steps with respect to explosive remnants of war in territory under its control. Is it the executive branch view that decisions on taking actions called for in Article 3 are to be made by a State Party based on its assessment of relevant circumstances at the time? If so, please explain the basis for this view.

Answer. Yes. Under Article 3, each State Party has certain obligations with respect to explosive remnants of war in territory under its control after the cessation of active hostilities. These obligations are necessarily to be implemented based on that State Party's assessment of the relevant circumstances at the time. This is illustrated by the use of the phrase "as soon as feasible" in paragraphs 2 and 3 of the article, which implies a level of discretion or judgment in how to implement these obligations. This was clearly understood during the negotiations.

Question. Is it the executive branch view that feasibility standards and formulations that appear in Protocol V such as "in a position to do so" are self-judging and are intended to reflect a State Party's need to make its own evaluation of relevant factors in implementing Protocol V's provisions?

Answer. Yes. All the provisions in Protocol V that use the expressions "where feasible" and "in a position to do so" are self-judging and are intended to reflect the necessity of States making their own evaluation of relevant factors in implementing these provisions. This was clearly understood during the negotiations. There is no mechanism in the Protocol for any kind of outside judgment about the adequacy of a country's compliance with these types of provision.

Question. Article 8(4) of Protocol V states that Parties "shall have the right to participate in the fullest exchange of equipment, material and scientific and technical information other than weapons-related technology, necessary for the implementation of this Protocol." Would this provision prevent the United States from exercising its discretion to restrict or deny exports of items to other States Parties for national security reasons? If not, please explain why not.

Answer. No. The sentence that immediately follows the sentence quoted above specifies that "High Contracting Parties undertake to facilitate such exchanges in accordance with national legislation and shall not impose undue restrictions on the provision of clearance equipment and related technological information for humanitarian purposes." The reference to national legislation clearly includes U.S. export control requirements. In addition, the reference to "undue" restrictions would certainly not include those based on national security reasons.

Question. Article 4(3) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the "Hague Convention") requires Parties to " . . . prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property." Please explain how far this obligation extends. In other words, to what lengths is it necessary for a party to go in protecting cultural property within its own territory? In addition, does this provision obligate States Parties with respect to cultural property in territory that a party is occupying?

Answer. The obligation in Article 4(3) requires each State Party to take reasonable steps to protect cultural property within its own territory, consistent with its assessment of the relevant circumstances at the time. With respect to the application of this provision to occupied territory, Article 5 makes clear that an occupying power is to support the competent national authorities.

Question. In 2003 the Iraq National Museum in Baghdad was looted. Had the United States been a party to the Hague Convention, would the United States have been required to prevent the looting of that museum? Would the United States have done anything differently as a party to the Hague Convention?

Answer. The United States would not have been required to do anything differently nor would have done anything differently if we had been a party to the Hague Convention at the time of this unfortunate incident. U.S. policy has been entirely consistent with the provisions of the Convention for many years.

Question. Is the universe of "cultural property" an expansive one, or is it limited in practice to a small number of objects and sites? Specifically, Article 1 of the

Hague Convention defines cultural property for purposes of the Convention and provides in part that it is "movable or immovable property of great importance to the cultural heritage of every people. . . ." Is it fair to say, given the definition provided in Article 1, that cultural property refers only to a limited class of property that is of widely recognized importance, as in the case of historic monuments referred to in Article 7(1)(i) of the Amended Mines Protocol? Or does the inclusion in that definition of "works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections" mean that a wide range of property, "irrespective of origin or ownership," may be covered?

Answer. Cultural property is generally defined under Article 1 of the Hague Convention to include a broad range of monuments, buildings, works of art, books, etc. The Convention establishes a general obligation to respect and protect such property. However, there is also a more limited class of cultural property which, when registered, is placed under special protection as provided for in Article 9. Neither of these two provisions should be equated with Article 7, paragraph 1(i) of the Amended Mines Protocol, which refers to historic monuments, works of art or places of worship which "constitute the cultural or spiritual heritage of peoples."

Question. The Hague Convention provides that a limited number of (1) refuges intended to shelter movable cultural property in the event of an armed conflict; (2) centers containing monuments; and (3) other immovable cultural property of very great importance, may be placed under "special protection." Special protection is granted to such cultural property by its entry in the International Register of Cultural Property under Special Protection. Is this list available to the public? Please provide to the committee a list of what is currently listed on this International Register.

Answer. The regulations to the Hague Convention provide that the register is provided to the parties to the Convention. However, as a practical matter, very little has been registered as special property to date. For instance, the Vatican is one of the few actually registered.

Question. Should the United States become a party to the Hague Convention, would the United States be likely to apply for entry of any particular cultural property in the United States on the International Register of Cultural Property under Special Protection?

Answer. At this time, we do not anticipate applying for this special protection.

Question. Have the regulations to the Hague Convention been amended since the treaty was submitted to the Senate in January 1999?

Answer. No.

RESPONSES OF DEPUTY GENERAL COUNSEL CHARLES ALLEN TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

ASSESSMENT OF POTENTIAL COSTS ASSOCIATED WITH THE FIVE LAW OF WAR TREATIES

Question. Please provide an assessment of the costs associated with implementing each of these five treaties: (1) The Protocol on Explosive Remnants of War (Protocol V) 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; (2) the Amendment of Article 1 of 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; (3) the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; (4) the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) Additional to the Convention of October 10, 1980, on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects; and (5) the Protocol on Blinding Laser Weapons (Protocol IV) Additional to the Convention on October 10, 1980, on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects.

Answer. No additional costs associated with implementing the five listed treaties are expected.

EXPLANATION OF U.S. NATIONAL SECURITY INTERESTS INVOLVED IN THE FIVE LAW OF WAR TREATIES

Question. Please explain why it is in our national security interest to ratify each of these five law of war treaties.

Answer. Ratification of each of the five listed treaties is in our national security interest. Ratification promotes U.S. international security interests in vigorously supporting the rule of law and the appropriate development of international humanitarian law. U.S. ratification encourages other nations to ratify these treaties, which ultimately helps protect U.S. forces. When the United States becomes a party to these treaties, the United States will be able to participate fully in discussions with State Parties regarding the implementation of these treaties, enabling the United States to influence directly how practice under these treaties develops. Furthermore, by ratifying these treaties, the United States gains significant negotiating leverage and credibility in our work on other law of war treaties.

FURTHER LEGISLATION, REGULATIONS, OR DODDS THE TREATIES MAY REQUIRE

Question. Is it correct that no implementing legislation is required for any of these five treaties? If these five treaties are approved by the Senate and ratified, would it be necessary to promulgate new regulations or Department of Defense Directives in order to implement any of them? Are there existing regulations or directives that would be relied upon to implement any of these treaties? If so, please provide citations to such regulations and explain which of the treaties they would implement.

Answer. No implementing legislation is required for the five listed treaties. No new DOD directives or regulations would be needed. If ratified, DOD and Military Department directives and publications that refer to treaties to which the United States is a party would be updated to reflect that the United States is a party to these treaties. An example is Department of Defense Directive 2311.01E (May 9, 2006), Subject: DOD Law of War Program, a primary document in implementation of U.S. law of war obligations within the Department of Defense.

BLINDING LASER WEAPONS

Question. Does the Department of Defense have any plans or desire to develop blinding laser weapons? If not, why not?

Answer. The Department of Defense does not have any plans or desire to develop and use blinding laser weapons. It has been a longstanding DOD policy that the U.S. Armed Forces will not use lasers specifically designed to cause permanent blindness of unenhanced vision. Significantly, a 1995 DOD policy statement provided the foundation for the text of the Blinding Laser Protocol.

LEGITIMATE MILITARY EMPLOYMENT OF LASERS IN PROTOCOL IV, ARTICLE 3

Question. Is it important, in your view, that Protocol IV recognizes the legitimate military employment of lasers in Article 3? If so, why?

Answer. Protocol IV recognizes the legitimate military employment of lasers in that it only bans the use of a very limited category—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." DOD policy, which preceded and was the principal basis for the Protocol IV text, acknowledged international humanitarian concerns with the use of blinding laser weapons. DOD policy also acknowledges, consistent with Protocol IV, that lasers can be used effectively for lawful military purposes, such as range-finding, target discrimination, and communications.

DAZZLER DEVICES AND PROTOCOL IV

Question. Are "dazzler" devices, or the deployment of such devices, prohibited by Protocol IV in any way? If not, please explain the legal reasoning for that conclusion.

Answer. "Dazzler" devices are not prohibited under Protocol IV. They do not meet Protocol IV's definition of a blinding laser weapon; that is, they are not specifically designed to cause permanent blindness to unenhanced vision. The United States has employed "dazzler" laser devices in Iraq at checkpoints as a warning device to drivers of on-coming vehicles to avoid resort to deadly force when possible.

USE OF WHITE PHOSPHORUS AND PROTOCOL III

Question. In 2005 there were various foreign news reports alleging that the United States used white phosphorus munitions in Iraq and that doing so was a violation of Protocol III to the CCW (article in the U.K. Guardian: "Behind the Phosphorus Clouds are War Crimes Within War Crimes," November 22, 2005). Are there any circumstances in which Protocol III prohibits States Parties from using white phosphorus? Or is the use of White Phosphorus permitted because White Phosphorus is not "primarily designed . . . to cause burn injury through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target," even if, in a given case, White Phosphorus is used with the intent, as well as the effect, of causing such injury?

Answer. White phosphorous is not prohibited under Protocol III because white phosphorous does not fit, and was not intended to fall within, the definition of incendiary weapon in the Protocol. There are no circumstances in which Protocol III regulates or prohibits the use of white phosphorous against a military objective.

USE OF INCENDIARY WEAPONS AND PROTOCOL III

Question. In your testimony before the committee, you noted that "incendiary weapons are the only weapons that can effectively destroy certain counterproliferation targets such as biological weapons facilities, which require high heat to eliminate biotoxins." This statement makes it clear that under certain circumstances, it is important that the United States be able to use incendiary weapons. Under what circumstances, if any, would Protocol III, if ratified by the United States with the reservation below, purport to prohibit the United States from employing incendiary weapons against a legitimate military objective? For example, would the United States be prohibited from using any mode of delivery of an incendiary weapon? Would Protocol III prohibit the United States from employing incendiary weapons in any situation in which it would now (with the United States not having joined Protocol III) employ such an incendiary weapon?

Answer. If the United States ratified Protocol III without the stated reservation, U.S. forces might be prohibited from employing incendiary weapons against a legitimate military objective located within a concentration of civilians in situations where it is judged that employment of an alternative weapon "would cause fewer casualties and/or less collateral damage." As is the case with any treaty, good faith implementation is essential. This reservation provides for a greater protection of the civilian population and is consistent with the U.S. targeting practices.

LEGAL IMPACT OF RESERVATION ON RIGHT TO USE INCENDIARY WEAPONS ON MILITARY TARGETS

Question. The reservation would be as follows: The United States of America, with reference to Article 2, paragraphs 2 and 3, reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing, consistent with paragraph 3, will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. What would be the legal impact of the above proposed reservation if the United States were a party and used incendiary weapons in an otherwise banned manner, because it judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons? (a) If an individual were to accuse the United States of violating Protocol III, could that person bring suit against the United States in a U.S. court? (b) If a country were to accuse the United States of violating Protocol III and wished to pursue a legal case against the United States, what would be the impact of the reservation as a matter of international law?

Answer. It is always possible that an individual or other government could bring suit in U.S. court even in a case where U.S. forces chose to exercise the right to use incendiaries in a manner consistent with the reservation. We believe, however, that use of an incendiary weapon in a manner consistent with the reservation could be justified and successfully defended in U.S. courts. We anticipate that, in applying applicable law, a court would conclude that Protocol III with the U.S. reservation precludes a decision for a plaintiff in such a case.

U.S. MILITARY CONSISTENCE WITH HAGUE CONVENTION

Question. In your testimony before the committee, you noted that the "U.S. military's conduct of operations over the last 50 years has been entirely consistent with the [Hague Cultural Property] Convention's provisions." Can you describe how this policy has been implemented in practice? Is the military, for example, trained to comply with the Hague Convention? Has compliance with the Convention ever been a problem for the military? Is it difficult for the military to identify whether a target is, or contains, cultural property? If not, why not?

Answer. United States military practice in World War II was a point of reference in drafting the treaty. The U.S. Armed Forces' conduct of operations over the past 50 years has been consistent with the Convention's provisions. Military personnel are trained to observe its rules. The convention does not prevent a military commander from doing what is necessary to accomplish the mission. Balancing compliance and mission accomplishment has not been a problem. Major cultural property or landmarks are identified and taken into consideration in planning attacks. Personnel are trained not to target them unless they are being used by an enemy for military purposes, such as to shield personnel and equipment from attack. In such a case, the decision to treat the cultural object as a military objective is one taken at higher command levels.

RESPONSES OF DEPUTY GENERAL COUNSEL CHARLES ALLEN TO QUESTIONS SUBMITTED FOR THE RECORD BY SENATOR BIDEN

ASSESSMENT OF POTENTIAL COSTS ASSOCIATED WITH THE FIVE LAW OF WAR TREATIES

Question. Please provide an assessment of the costs associated with implementing each of these five treaties: (1) The Protocol on Explosive Remnants of War (Protocol V) 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; (2) the Amendment of Article 1 of 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; (3) the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; (4) the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) Additional to the Convention of October 10, 1980, on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects; and (5) the Protocol on Blinding Laser Weapons (Protocol IV) Additional to the Convention on October 10, 1980, on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects.

Answer. No additional costs associated with implementing the five listed treaties are expected.

EXPLANATION OF U.S. NATIONAL SECURITY INTERESTS INVOLVED IN THE FIVE LAW OF WAR TREATIES

Question. Please explain why it is in our national security interest to ratify each of these five law of war treaties.

Answer. Ratification of each of the five listed treaties is in our national security interest. Ratification promotes U.S. international security interests in vigorously supporting the rule of law and the appropriate development of international humanitarian law. U.S. ratification encourages other nations to ratify these treaties, which ultimately helps protect U.S. forces. When the United States becomes a party to these treaties, the United States will be able to participate fully in discussions with State Parties regarding the implementation of these treaties, enabling the United States to influence directly how practice under these treaties develops. Furthermore, by ratifying these treaties, the United States gains significant negotiating leverage and credibility in our work on other law of war treaties.

FURTHER LEGISLATION, REGULATIONS, OR DODDS THE TREATIES MAY REQUIRE

Question. Is it correct that no implementing legislation is required for any of these five treaties? If these five treaties are approved by the Senate and ratified, would it be necessary to promulgate new regulations or Department of Defense Directives in order to implement any of them? Are there existing regulations or directives that would be relied upon to implement any of these treaties? If so, please provide citations to such regulations and explain which of the treaties they would implement.

Answer. No implementing legislation is required for the five listed treaties. No new DOD directives or regulations would be needed. If ratified, DOD and Military Department directives and publications that refer to treaties to which the United States is a party would be updated to reflect that the United States is a party to these treaties. An example is Department of Defense Directive 2311.01E (May 9, 2006), Subject: DOD Law of War Program, a primary document in implementation of U.S. law of war obligations within the Department of Defense.

BLINDING LASER WEAPONS

Question. Does the Department of Defense have any plans or desire to develop blinding laser weapons? If not, why not?

Answer. The Department of Defense does not have any plans or desire to develop and use blinding laser weapons. It has been a longstanding DOD policy that the U.S. Armed Forces will not use lasers specifically designed to cause permanent blindness of unenhanced vision. Significantly, a 1995 DOD policy statement provided the foundation for the text of the Blinding Laser Protocol.

LEGITIMATE MILITARY EMPLOYMENT OF LASERS IN PROTOCOL IV, ARTICLE 3

Question. Is it important, in your view, that Protocol IV recognizes the legitimate military employment of lasers in Article 3? If so, why?

Answer. Protocol IV recognizes the legitimate military employment of lasers in that it only bans the use of a very limited category—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." DOD policy, which preceded and was the principal basis for the Protocol IV text, acknowledged international humanitarian concerns with the use of blinding laser weapons. DOD policy also acknowledges, consistent with Protocol IV, that lasers can be used effectively for lawful military purposes, such as range-finding, target discrimination, and communications.

DAZZLER DEVICES AND PROTOCOL IV

Question. Are "dazzler" devices, or the deployment of such devices, prohibited by Protocol IV in any way? If not, please explain the legal reasoning for that conclusion.

Answer. "Dazzler" devices are not prohibited under Protocol IV. They do not meet Protocol IV's definition of a blinding laser weapon; that is, they are not specifically designed to cause permanent blindness to unenhanced vision. The United States has employed "dazzler" laser devices in Iraq at checkpoints as a warning device to drivers of on-coming vehicles to avoid resort to deadly force when possible.

USE OF WHITE PHOSPHORUS AND PROTOCOL III

Question. In 2005 there were various foreign news reports alleging that the United States used white phosphorus munitions in Iraq and that doing so was a violation of Protocol III to the CCW (article in the U.K. Guardian: "Behind the Phosphorus Clouds are War Crimes Within War Crimes," November 22, 2005). Are there any circumstances in which Protocol III prohibits States Parties from using white phosphorus? Or is the use of White Phosphorus permitted because White Phosphorus is not "primarily designed . . . to cause burn injury through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target," even if, in a given case, White Phosphorus is used with the intent, as well as the effect, of causing such injury?

Answer. White phosphorous is not prohibited under Protocol III because white phosphorous does not fit, and was not intended to fall within, the definition of incendiary weapon in the Protocol. There are no circumstances in which Protocol III regulates or prohibits the use of white phosphorous against a military objective.

USE OF INCENDIARY WEAPONS AND PROTOCOL III

Question. In your testimony before the committee, you noted that "incendiary weapons are the only weapons that can effectively destroy certain counterproliferation targets such as biological weapons facilities, which require high heat to eliminate biotoxins." This statement makes it clear that under certain circumstances, it is important that the United States be able to use incendiary weapons. Under what circumstances, if any, would Protocol III, if ratified by the United States with the reservation below, purport to prohibit the United States from employing incendiary weapons against a legitimate military objective? For example,

would the United States be prohibited from using any mode of delivery of an incendiary weapon? Would Protocol III prohibit the United States from employing incendiary weapons in any situation in which it would now (with the United States not having joined Protocol III) employ such an incendiary weapon?

Answer. If the United States ratified Protocol III without the stated reservation, U.S. forces might be prohibited from employing incendiary weapons against a legitimate military objective located within a concentration of civilians in situations where it is judged that employment of an alternative weapon "would cause fewer casualties and/or less collateral damage." As is the case with any treaty, good faith implementation is essential. This reservation provides for a greater protection of the civilian population and is consistent with the U.S. targeting practices.

LEGAL IMPACT OF RESERVATION ON RIGHT TO USE INCENDIARY WEAPONS ON MILITARY TARGETS

Question. The reservation would be as follows: The United States of America, with reference to Article 2, paragraphs 2 and 3, reserves the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing, consistent with paragraph 3, will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. What would be the legal impact of the above proposed reservation if the United States were a party and used incendiary weapons in an otherwise banned manner, because it judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons? (a) If an individual were to accuse the United States of violating Protocol III, could that person bring suit against the United States in a U.S. court? (b) If a country were to accuse the United States of violating Protocol III and wished to pursue a legal case against the United States, what would be the impact of the reservation as a matter of international law?

Answer. It is always possible that an individual or other government could bring suit in U.S. court even in a case where U.S. forces chose to exercise the right to use incendiaries in a manner consistent with the reservation. We believe, however, that use of an incendiary weapon in a manner consistent with the reservation could be justified and successfully defended in U.S. courts. We anticipate that, in applying applicable law, a court would conclude that Protocol III with the U.S. reservation precludes a decision for a plaintiff in such a case.

U.S. MILITARY CONSISTENCE WITH HAGUE CONVENTION

Question. In your testimony before the committee, you noted that the "U.S. military's conduct of operations over the last 50 years has been entirely consistent with the [Hague Cultural Property] Convention's provisions." Can you describe how this policy has been implemented in practice? Is the military, for example, trained to comply with the Hague Convention? Has compliance with the Convention ever been a problem for the military? Is it difficult for the military to identify whether a target is, or contains, cultural property? If not, why not?

Answer. United States military practice in World War II was a point of reference in drafting the treaty. The U.S. Armed Forces' conduct of operations over the past 50 years has been consistent with the Convention's provisions. Military personnel are trained to observe its rules. The convention does not prevent a military commander from doing what is necessary to accomplish the mission. Balancing compliance and mission accomplishment has not been a problem. Major cultural property or landmarks are identified and taken into consideration in planning attacks. Personnel are trained not to target them unless they are being used by an enemy for military purposes, such as to shield personnel and equipment from attack. In such a case, the decision to treat the cultural object as a military objective is one taken at higher command levels.

○