



DATE DOWNLOADED: Tue Apr 2 10:58:56 2024

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Michael Callan & Christopher Henry, *Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War*, 24 B.U. PUB. INT. L.J. 175 (2015).

ALWD 7th ed.

Michael Callan & Christopher Henry, *Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War*, 24 B.U. Pub. Int. L.J. 175 (2015).

APA 7th ed.

Callan, Michael, & Henry, Christopher. (2015). *Baptized by fire: protocol iii's imperfect ban on incendiary weapons against civilians in times of war*. Boston University Public Interest Law Journal, 24(2), 175-194.

Chicago 17th ed.

Michael Callan; Christopher Henry, "Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War," Boston University Public Interest Law Journal 24, no. 2 (Summer 2015): 175-194

McGill Guide 9th ed.

Michael Callan & Christopher Henry, "Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War" (2015) 24:2 BU Pub Int LJ 175.

AGLC 4th ed.

Michael Callan and Christopher Henry, 'Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War' (2015) 24(2) Boston University Public Interest Law Journal 175

MLA 9th ed.

Callan, Michael, and Christopher Henry. "Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War." Boston University Public Interest Law Journal, vol. 24, no. 2, Summer 2015, pp. 175-194. HeinOnline.

OSCOLA 4th ed.

Michael Callan & Christopher Henry, 'Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons against Civilians in Times of War' (2015) 24 BU Pub Int LJ 175
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Provided by:

Fineman & Pappas Law Libraries

ARTICLES

BAPTIZED BY FIRE: PROTOCOL III'S IMPERFECT BAN ON INCENDIARY WEAPONS AGAINST CIVILIANS IN TIMES OF WAR

MICHAEL CALLAN* AND CHRISTOPHER HENRY**

I. INTRODUCTION	175
II. THE MEANING AND EFFECTS OF INCENDIARY WEAPONS	177
A. <i>Napalm</i>	178
B. <i>White Phosphorous</i>	179
III. EXAMPLES OF THE USE OF INCENDIARY WEAPONS IN THE TWENTY-FIRST CENTURY	180
A. <i>Syria</i>	180
B. <i>The United States</i>	181
C. <i>Israel</i>	182
IV. ISSUES IN APPLYING INTERNATIONAL LAW TO INCENDIARY WEAPONS	183
A. <i>Incendiary Weapons and the Fourth Geneva Convention</i> ..	183
B. <i>The Convention on Certain Conventional Weapons and Protocol III</i>	185
C. <i>Protocol III's Definition of "Incendiary Weapon"</i>	186
D. <i>The United States' Reservation and Understanding</i>	188
1. The Text of the Reservation and Understanding	188
2. The Reservation and Understanding under International Law	190
3. International Criticism	191
E. <i>Ensuring Compliance with Protocol III through an Absolute Ban of Incendiary Weapons</i>	193
V. CONCLUSION	193

I. INTRODUCTION

The widespread use of incendiary weapons prompted the international com-

* University of Louisville, Brandeis School of Law, J.D., 2014. A special thanks to my family for all their love and support over the years.

** University of Louisville, Brandeis School of Law, J.D., *magna cum laude*, 2014. Thank you Professor Jamie Abrams and Justice Daniel Venters for your professional and academic support.

munity, through the United Nations, to adopt the Convention on Certain Conventional Weapons (CCW).¹ The purpose of the CCW was to prohibit or restrict the use of specific weapons or weapon systems deemed to be inhumane,² as said weapons cause unnecessary suffering to combatants or indiscriminately affect civilians.³ Negotiations over the CCW were held in Geneva from September 10 to September 28 in 1979, and from September 15 to October 10 in 1980.⁴ The CCW entered into effect on December 2, 1983.⁵

The CCW is a legally binding international agreement with five Protocols, each dealing with specific weapons or weapons systems.⁶ Protocols I through III concern traditional weapons of war.⁷ Specifically, Protocol I pertains to weapons which primarily cause injury through fragments not detectable by the use of x-rays.⁸ Protocol II relates to mines, booby-traps, and other similar devices.⁹ Protocol III, the main focus of this Article, seeks to prohibit or restrict the use of incendiary weapons amongst civilians.¹⁰ Protocols IV and V concern blinding laser weapons and explosive remnants of war, respectively.¹¹

The international community included Protocol III in the CCW to combat the use of incendiary weapons inflicting death, disfigurement, and severe injuries

¹ *Memorandum to CCW Delegates—The Need to Re-Visit Protocol III on Incendiary Weapons 1*, HARVARD LAW SCH. INT'L HUMAN RIGHTS CLINIC (Nov. 22, 2010) [hereinafter *The Need to Re-Visit Protocol III*], available at <http://www.hrw.org/news/2010/11/22/memorandum-ccw-delegates>.

² *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*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, available at <http://disarmament.un.org/treaties/t/ccwc/text> (last visited May 7, 2015) [hereinafter *Restrictions on Excessively Injurious Conventional Weapons*]; see also *Disarmament, The Convention on Certain Conventional Weapons*, UNITED NATIONS OFFICE AT GENEVA [hereinafter *Convention on Certain Conventional Weapons*], available at [http://www.unog.ch/80256EE600585943/\(http-Pages\)/4F0DEF093B4860B4C1257180004B1B30](http://www.unog.ch/80256EE600585943/(http-Pages)/4F0DEF093B4860B4C1257180004B1B30) (last visited May 7, 2015).

³ *Id.*

⁴ See *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to Have Indiscriminate Effects* (with Protocols I, II and III), Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter *Convention on Prohibitions or Restrictions*], available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en.

⁵ *Id.*

⁶ *Convention on Certain Conventional Weapons*, *supra* note 2.

⁷ *Convention on Certain Conventional Weapons*, *supra* note 2.

⁸ *Convention on Certain Conventional Weapons*, *supra* note 2. See also Customary International Humanitarian Law, ICRC, Rule 79: Weapons Primarily Injuring by Non-Detectable Fragments, available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule79.

⁹ *Convention on Certain Conventional Weapons*, *supra* note 2.

¹⁰ *Convention on Certain Conventional Weapons*, *supra* note 2.

¹¹ *Convention on Certain Conventional Weapons*, *supra* note 2.

amongst civilians during armed conflicts.¹² The catalyst for this international response was, in part, the use of napalm against civilians by the United States during the Vietnam War.¹³ Even though 109 countries have joined Protocol III, incendiary weapons continue to be used during conflicts in Africa, Asia, Latin America, and the Middle East.¹⁴

This Article will demonstrate the shortcomings of Protocol III and present solutions to these deficiencies consistent with internationally recognized human rights, which protect civilians in times of war. First, in Part II, this Article will define “incendiary weapons,” and discuss the effects of incendiary weapons, such as napalm and white phosphorus, in order to provide readers with a better understanding of why incendiary weapons have been regulated internationally. Several case studies involving the recent conflicts within Syria, the United States, and Israel are presented to demonstrate that incendiary weapons are still widely used in modern warfare.¹⁵ In Part III, this Article will discuss the Fourth Geneva Convention Protection of Civilians in Times of War and Protocol III to the CCW in order to convey the minimal international obligations necessary to protect civilians during wartime. Finally, in Part IV, this Article will discuss many of the problems with Protocol III’s efficacy and propose a variety of solutions for these problems.

II. THE MEANING AND EFFECTS OF INCENDIARY WEAPONS

Incendiary weapons are “any weapon or munition which is primarily designed to set fire to objects or cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.”¹⁶ Protocol III lists “flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary sub-

¹² *The Need to Re-Visit Protocol III*, *supra* note 1.

¹³ *The Need to Re-Visit Protocol III*, *supra* note 1.

¹⁴ *Memorandum to Convention on Conventional Weapons Delegates—The Human Suffering Caused by Incendiary Munitions* 2, HARVARD LAW SCH. INT’L HUMAN RIGHTS CLINIC 1, 2 (2011) [hereinafter *Human Suffering Caused by Incendiary Munitions*], available at <http://hrp.law.harvard.edu/wp-content/uploads/2011/04/sufferingweapons.pdf>. See also Convention on Prohibitions or Restrictions, *supra* note 4 (providing a list of Protocol III’s parties and signatory states).

¹⁵ Although this Article discusses the use of incendiary weapons by Israel and Syria, it does so primarily to illustrate that the use of incendiary weapons is still prevalent worldwide. Arguably, the three most recent and well-documented cases of the use of incendiary weapons are in Syria, Israel and the United States. As Israel and Syria are not signatories to Protocol III, however, this Article does not engage in any legal analysis as to either of them. Most of the legal analysis in this Article focuses on the United States because the United States is a signatory to Protocol III. See Convention on Prohibitions or Restrictions, *supra* note 4 (providing the list of the parties and signatory states to Protocol III).

¹⁶ Protocol on Prohibitions or Restriction on the Use of Incendiary Weapons (Protocol III) art. 1, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter Protocol III], available at <http://>

stances” as types of incendiary weapons.¹⁷ The burns caused by incendiary weapons are so severe that they often penetrate human skin to the bone.¹⁸ These burns are difficult to treat, lead to permanent scarring and disfigurement, and often result in social ostracism.¹⁹ The secondary effects of incendiary weapons are also a major international human rights concern.²⁰ For example, white phosphorus, a deplorable modern incendiary weapon, has secondary effects that include internal poisoning, organ damage and death.²¹ Moreover, the adverse effects of incendiary weapons are compounded in areas that lack adequate medical facilities, which undoubtedly have insufficient treatment options.²² In addition, fires caused by incendiary weapons frequently produce significant damage to infrastructure.²³ These fires are difficult to extinguish and often become widespread due to their broad area of effect.²⁴ This broad area effect is of particular concern within the international community because it is impossible to use incendiary weapons in a way that distinguishes between soldiers and civilians in populated areas.²⁵

A. Napalm

Perhaps the most well-known incendiary weapon is napalm,²⁶ which was invented at Harvard University in the early 1940s.²⁷ Napalm was named for its combination of naphthenic and palmitic acid, which can turn petroleum or any other fuel into a weapon.²⁸ Napalm’s inventor, chemist Louis Fieser, never expected napalm to be used on humans.²⁹

[www.unog.ch/80256EDD006B8954/\(httpAssets\)/B409BC0DCFA0171CC12571DE005BC1DD/\\$file/PROTOCOL+III.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/B409BC0DCFA0171CC12571DE005BC1DD/$file/PROTOCOL+III.pdf).

¹⁷ *Id.*

¹⁸ Syria: *Incendiary Weapons Used in Populated Areas, Evidence Military Used Bombs That Cause Horrendous Burns*, HUMAN RIGHTS WATCH (Dec. 12, 2012) [hereinafter *Incendiary Weapons Used in Populated Areas*], <http://www.hrw.org/fr/node/111987>.

¹⁹ *Id.*

²⁰ Philip Hashey, *White Phosphorous Munitions: International Controversy in Modern Military Conflict*, 17 NEW ENG. J. INT’L & COMP. L. 291, 295 (2011).

²¹ *Id.*

²² *Incendiary Weapons Used in Populated Areas*, *supra* note 18.

²³ *Incendiary Weapons Used in Populated Areas*, *supra* note 18.

²⁴ *Incendiary Weapons Used in Populated Areas*, *supra* note 18.

²⁵ *Incendiary Weapons Used in Populated Areas*, *supra* note 18.

²⁶ *Q & A on Incendiary Weapons and CCW Protocol III*, HARVARD LAW SCH. INT’L HUMAN RIGHTS CLINIC 1, 1 (2011) [hereinafter *Q & A on Incendiary Weapons*], available at http://www.hrw.org/sites/default/files/related_material/2011_arms_qandaincendiaryweaponsccwpii.pdf.

²⁷ Gal Beckerman, *Napalm, from Harvard to Vietnam*, THE BOSTON GLOBE (Mar. 24, 2013), available at <http://www.bostonglobe.com/ideas/2013/03/23/napalm-from-harvard-vietnam/j0xgS7MbgGIX1MqFTjPznO/story.html>.

²⁸ *Id.*

²⁹ *Id.*

Many still associate napalm with the Pulitzer Prize-winning picture of a young girl running with a group of other children after American forces mistook the children for soldiers and doused with their village with napalm during the Vietnam War.³⁰ Nearly 400,000 tons of napalm were dropped on Vietnam during the Vietnam War, and napalm was the primary method to cover general targets when tactical air strikes could not be used effectively.³¹

B. *White Phosphorous*

White phosphorus is a chemical substance that ignites when exposed to oxygen.³² After combustion, white phosphorus creates intense heat of about 1,500° F (815° C) and produces a thick smoke.³³ Known by United States military personnel as “Willie Pete,” white phosphorus is frequently used as a smoke-screen to obscure enemy vision of troop movement and equipment, a military necessity during urban combat.³⁴ In addition, white phosphorus also serves as an illuminant.³⁵ Through an initial airburst, a target or an area is illuminated, and remains illuminated as burning particles descend toward the ground.³⁶ The airburst and subsequent descending burning chemicals often fall outside the intended target zone.³⁷ Such imprecisions raise humanitarian concerns, as they increase the potential for human casualties.³⁸ White phosphorus’s intense heat makes it a weapon of choice to ignite fuel supplies, ammunition, and other material.³⁹ White phosphorus has also been used by armed forces to “smoke out” enclosures, causing persons inside the enclosure to flee to areas where they can be attacked with high explosive rounds.⁴⁰ This type of use is controversial even when applied to enemy combatants because of the potential for severe injury.⁴¹

White phosphorus produces severe thermal and chemical burns when it comes into contact with human flesh.⁴² These burns are slow to heal and prone

³⁰ *Military, Napalm in War*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/munitions/napalm-war.htm> (last modified July 7, 2011); Tiffany Hagler-Geard, *The Historic ‘Napalm Girl’ Pulitzer Image Marks its 40th Anniversary*, ABC NEWS (June 8, 2012), <http://abcnews.go.com/blogs/headlines/2012/06/the-historic-napalm-girl-pulitzer-image-marks-its-40th-anniversary/>.

³¹ *Napalm in War*, *supra* note 30.

³² Q & A on Incendiary Weapons, *supra* note 26, at 1–2.

³³ Q & A on Incendiary Weapons, *supra* note 26, at 2.

³⁴ Hashey, *supra* note 2021, at 291.

³⁵ See Q & A on Incendiary Weapons, *supra* note 26, at 2.

³⁶ Hashey, *supra* note 20, at 297.

³⁷ Hashey, *supra* note 20, at 303.

³⁸ Hashey, *supra* note 20, at 303.

³⁹ Q & A on Incendiary Weapons, *supra* note 26, at 2.

⁴⁰ Q & A on Incendiary Weapons, *supra* note 26, at 2.

⁴¹ Q & A on Incendiary Weapons, *supra* note 26, at 2.

⁴² Q & A on Incendiary Weapons, *supra* note 26, at 2.

to infection.⁴³ Furthermore, once a wound has been cleaned and dressed, exposure to oxygen, such as when medical bandages are removed, can reignite any residual elements of white phosphorus.⁴⁴ White phosphorus is especially dangerous because it doubles as a poison; even a burn covering as little as ten percent of the human body can be fatal due to its toxic effects on vital organs.⁴⁵

The initial treatment of white phosphorus burns requires dousing the affected area with water, and then keeping the area wet in order to prevent it from reigniting until medical treatment arrives.⁴⁶ Because persons involved in armed conflict might not have access to running water, proper treatment can be difficult, if not impossible, to attain.⁴⁷

III. EXAMPLES OF THE USE OF INCENDIARY WEAPONS IN THE TWENTY-FIRST CENTURY

Despite the widely known harmful effects of incendiary weapons and the subsequent international attempts to limit their use, several states, including Iraq, Lebanon, Gaza, and Afghanistan, continue to use incendiary weapons and continue to consider these weapons as viable articles of warfare.⁴⁸

A. Syria

Between 2012 and 2013, the Syrian military used incendiary bombs, predominantly white phosphorus bombs, in fifty-six instances across Syria.⁴⁹ Four of these attacks occurred in civilian-populated areas.⁵⁰ Approximately twenty civilians were wounded on December 3, 2012 when the Syrian government launched an airstrike on a school and the surrounding residential area in Quseir.⁵¹ Four adults, including two Free Syrian Army fighters, were wounded on November 28, 2012 during an airstrike involving incendiary weapons in Maarat al-Numan.⁵² Markings on the remnants reveal that the Soviet Union appeared to have manufactured these weapons.⁵³ Some of the recovered shells had the ability to broadcast explosive remnants equivalent to the size of a foot-

⁴³ *Q & A on Incendiary Weapons*, *supra* note 26, at 2.

⁴⁴ *Q & A on Incendiary Weapons*, *supra* note 26, at 2.

⁴⁵ Hashey, *supra* note 20, at 296.

⁴⁶ Hashey, *supra* note 20, at 295.

⁴⁷ Hashey, *supra* note 20, at 295–96.

⁴⁸ *Human Suffering Caused by Incendiary Munitions*, *supra* note 14, at 2.

⁴⁹ *Syria: Widespread Use of Incendiary Weapons*, HUMAN RIGHTS WATCH (Nov. 10, 2013) [hereinafter *Widespread Use of Incendiary Weapons*], <http://www.hrw.org/news/2013/11/10/syria-widespread-use-incendiary-weapons>; *Incendiary Weapons Used in Populated Areas*, *supra* note 18.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

ball field.⁵⁴

In total, Human Rights Watch (HRW) and the Violations Documentation Center have documented at least forty-one civilian deaths from Syria's use of incendiary weapons, with at least seventy-one others wounded.⁵⁵ Syria is not known to be a producer or exporter of incendiary weapons,⁵⁶ and is not a signatory to Protocol III.⁵⁷

B. *The United States*

In November of 2005, the Pentagon admitted that the United States used white phosphorus munitions in the 2004 offensive in Fallujah.⁵⁸ The Pentagon emphasized the legality of such use, and categorically denied Italian news reports that U.S. troops had employed these munitions against civilians.⁵⁹ Bryan Whitman, a Pentagon spokesman, stated that, "[white phosphorus is] part of our conventional-weapons inventory and we use it like we use any other conventional weapon."⁶⁰

Napalm is also still used in war,⁶¹ even though the international stigma associated with napalm has led many nations to refrain from its use.⁶² The United States has recently used a substance which is "remarkably similar" to napalm, called a "Mark 77" firebomb.⁶³ During the initial invasion of Iraq, reports detailed massive fireballs that obliterated several Iraqi military positions.⁶⁴ The Pentagon emphatically maintained the report was untrue, saying, "[w]e completed destruction of our last batch of napalm on [] April [4], 2001."⁶⁵ Colonel James Alles, commander of Marine Air Group 11, stated to the contrary that "[w]e napalmed both those [bridge] approaches . . . unfortunately there were people there . . . you could see them in the [cockpit] video. They were Iraqi soldiers. It's no great way to die. The generals love napalm. It has a big psycho-

⁵⁴ *Id.*

⁵⁵ *Syria's Use of Incendiary Weapons*, HUMAN RIGHTS WATCH (Nov. 11, 2013), <http://www.hrw.org/news/2013/11/11/syria-s-use-incendiary-weapons>.

⁵⁶ *Incendiary Weapons Used in Populated Areas*, *supra* note 18.

⁵⁷ See Convention on Prohibitions or Restrictions, *supra* note 4 (listing the parties and signatory states to Protocol III, of which Syria does not appear).

⁵⁸ *US Defends White Phosphorus Use*, AFX News (November 17, 2005), <http://www.military.com/NewsContent/0,13319,80667,00.html?ESRC=army.nl>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Andrew Buncombe, *US Admits it Used Napalm Bombs in Iraq*, INDEP. (Aug. 10, 2003), <http://www.independent.co.uk/news/world/americas/us-admits-it-used-napalm-bombs-in-iraq-99716.html>.

⁶² See *id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

logical effect.”⁶⁶ In response to growing pressure by the media, Pentagon officials responded that they were not being intentionally deceptive, and had journalists asked, they would have confirmed that the pilots used Mark 77 firebombs.⁶⁷

C. *Israel*

The Israeli campaign into the Gaza Strip in 2009, named Operation Cast Lead, was met with sharp international condemnation after accusations arose that white phosphorus was repeatedly fired over densely populated areas.⁶⁸ After an in-depth investigation into those allegations, HRW issued a report entitled “Rain of Fire.”⁶⁹

HRW also verified at least three specific instances of internationally prohibited use of white phosphorus within a densely populated Gaza City neighborhood by the Israeli Defense Forces (IDF).⁷⁰ On one occasion, the Israeli military fired a white phosphorus air-burst directly over buildings with civilians inside, killing at least four in one family.⁷¹ On the same day, white phosphorus shells struck a hospital and another building run by the Palestinian Red Crescent Society.⁷² Multiple fires forced the evacuation of about fifty patients and five hundred neighborhood residents who had taken refuge in the hospital.⁷³

Three white phosphorus shells also struck the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) building.⁷⁴ Several persons were wounded and multiple fires broke out inside, where approximately seven hundred civilians had taken shelter at the time.⁷⁵ Similarly, at another well-marked United Nations facility, two young brothers were killed and twelve others were injured when a classroom was hit by a discharged shell just one day before hostilities ceased.⁷⁶ HRW determined that Israel’s use of phosphorus must have been solely for its incendiary effect because Israeli forces had night-vision equipment at the time of the attacks, and thus no apparent need for illumination or a smokescreen.⁷⁷

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Rain of Fire*, HUMAN RIGHTS WATCH, 1, 2 (Mar. 25, 2009), <http://www.hrw.org/node/81726/section/2>.

⁶⁹ *See generally id.*

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 6.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 9.

⁷⁷ *Israel: Strengthen White Phosphorus Phase-Out*, HUMAN RIGHTS WATCH (May 18, 2013) [hereinafter *White Phosphorus Phase-Out*], <http://www.hrw.org/news/2013/05/18/israel-strengthen-white-phosphorus-phase-out>.

Medical personnel who treated the burn victims acknowledged the severity of the burns and confirmed the effects of white phosphorus.⁷⁸ One doctor in Gaza City stated: "For the first time I'm seeing strange kinds of burns, very deep to the bone. They cause a bacterial infection unlike anything else."⁷⁹ A doctor in Cairo, where Palestinians sought treatment due to the inadequate facilities in Gaza, stated: "We have a lot of burns, actually chemical burns. Most are third degree burns, which look like chemical burns and not ordinary burns. There is no skin and sometimes even no muscle."⁸⁰ All of the shells found and included in the HRW Report were made in the United States.⁸¹

After initially denying the use of white phosphorus, Israel publicly acknowledged its use.⁸² On May 13, 2013, the Israeli Supreme Court heard a petition by Israeli human rights and other civil society groups,⁸³ in which the state attorney for Israel proposed a prohibition on the use of white phosphorus in areas with civilians "for the time being."⁸⁴ However, these exceptions were provided during a separate *ex parte* hearing, and the petitioners and lawyers were not allowed to view these exceptions due to undisclosed "security reasons."⁸⁵ Israel has yet to become a signatory to Protocol III.⁸⁶

IV. ISSUES IN APPLYING INTERNATIONAL LAW TO INCENDIARY WEAPONS

A. *Incendiary Weapons and the Fourth Geneva Convention*

The international community's foundation for protecting civilians in times of war is found in the Fourth Geneva Convention (Convention).⁸⁷ The Convention, a component of the International Law of War, became binding on its signatories in 1949.⁸⁸ In 1993, the United Nations Security Council approved a report from the Secretary-General, formally passing the Geneva Conventions into the body of customary international law.⁸⁹ This report had the effect of

⁷⁸ *Rain of Fire*, *supra* note 68, at 2.

⁷⁹ *Rain of Fire*, *supra* note 68, at 2.

⁸⁰ *Rain of Fire*, *supra* note 68, at 2.

⁸¹ *Rain of Fire*, *supra* note 68, at 2.

⁸² *White Phosphorus Phase-Out*, *supra* note 77.

⁸³ *White Phosphorus Phase-Out*, *supra* note 77.

⁸⁴ *White Phosphorus Phase-Out*, *supra* note 77.

⁸⁵ *White Phosphorus Phase-Out*, *supra* note 77.

⁸⁶ See Convention on Prohibitions or Restrictions, *supra* note 4 (listing the parties and signatory states to Protocol III, of which Israel does not appear).

⁸⁷ See generally Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>.

⁸⁸ *Id.*

⁸⁹ See Fausto Pocar, *Statute of the International Criminal Tribunal for the former Yugoslavia*, Security Council resolution 827 (May 25, 1993), available at <http://legal.un.org/avl/ha/icty/icty.html> (regarding the resolution that allowed the Secretary General to establish a

making these international agreements binding even upon non-signatories.⁹⁰ However, the additional Protocols are not yet binding on a number of states involved in conflict today.⁹¹

The Fourth Geneva Convention was enacted due in part to the large-scale loss of civilian life during World War II.⁹² The Convention protects “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”⁹³ The Convention applies not only to cases of declared war, but also to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,”⁹⁴ as well as “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”⁹⁵

Ultimately, the Convention was intended to alleviate the sufferings of civilians caused by war.⁹⁶ Article 3 of the Fourth Geneva Convention provides that it applies to the following persons and circumstances:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat ’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinc-

commission and gather evidence of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia, and discussing how the Security Council approved the report); Resolution 827 (1993), Adopted by the Security Council at its 3217th meeting on 25 May 1993, *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf (approving the report of the Secretary-General); Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/1994/674 (recognizing the Geneva Convention as customary international law).

⁹⁰ *Customary International Humanitarian Law*, INTERNATIONAL COMMITTEE OF THE RED CROSS (2005) *available at* http://www.redcross.int/EN/mag/magazine2005_2/24-25.htm (summarizing JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW—VOLUME I: RULES* (2005)).

⁹¹ *Id.*

⁹² Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, INTERNATIONAL COMMITTEE OF THE RED CROSS, *available at* <https://www.icrc.org/ihl/INTRO/380> (last visited August 10, 2015) [hereinafter *Convention IV* relative to Protection of Civilians] (“The events of World War II showed the disastrous consequences of the absence of a convention for the protection of civilians in wartime The Convention adopted in 1949 takes account of the experiences of World War II.”)

⁹³ Geneva Convention IV, *supra* note 87, at art. 4.

⁹⁴ Geneva Convention IV, *supra* note 87, at art. 2.

⁹⁵ Geneva Convention IV, *supra* note 87, at art. 2.

⁹⁶ See *Convention IV* relative to Protection of Civilians, *supra*, note 92.

tion founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁹⁷

Even though this international agreement is now binding law for all nations, the continued use of modern incendiary weapons undermines its efficacy.⁹⁸ The phrase “cruel treatment” is not defined anywhere in the Fourth Geneva Convention, and the term is obviously broad.⁹⁹ It is clear, however, that the above-described effects of incendiary weapons might meet this definition.

B. *The Convention on Certain Conventional Weapons and Protocol III*

In its original form, the Convention on Certain Conventional Weapons (CCW) applied only to situations of international armed conflict.¹⁰⁰ At the Second Review Conference in 2001, state parties agreed to amend the CCW to include international governance over intra-state armed conflict.¹⁰¹ This amendment was intended to address the fact that most modern conflicts occur within the borders of a state.¹⁰² As of 2014, there are 121 parties to the CCW and fifty

⁹⁷ Geneva Convention IV, *supra* note 87, at art. 3.

⁹⁸ *Government Positions on Protocol III on Incendiary Weapons*, HUMAN RIGHTS WATCH (2012) <https://www.hrw.org/news/2012/11/12/government-positions-protocol-iii-incendiary-weapons> (“States adopted Protocol III ‘in order to assure complete protection of civilians from incendiary weapons;’ however, loopholes and inconsistent restrictions have limited its effectiveness.”).

⁹⁹ See Geneva Convention IV, *supra* note 87 (review of Convention’s text revealed no definition for “cruel treatment”). Although the phrase “cruel treatment” is broad, it includes “torture, mutilation and any form of corporal punishment.” For a more in depth discussion concerning the lack of guidance on for the term “cruel treatment,” see M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 335–36 (BRILL 2008) (positing that the perpetrator might be guilty of cruel treatment if he or she only “inflicts severe physical or mental pain or suffering upon one or more persons”).

¹⁰⁰ *Convention on Certain Conventional Weapons*, *supra* note 2.

¹⁰¹ *Convention on Certain Conventional Weapons*, *supra* note 2.

¹⁰² *Convention on Certain Conventional Weapons*, *supra* note 2.

signatories,¹⁰³ as well as 111 nations who are parties to Protocol III.¹⁰⁴

Protocol III contains very strict standards governing the use of incendiary weapons.¹⁰⁵ Intending to use incendiary weapons on a specific civilian population or on civilian objects is internationally banned under international humanitarian law, and is explicitly prohibited by Protocol III.¹⁰⁶ Article 2, Subsection 1 of Protocol III prohibits the use of incendiary weapons on individual civilians or the civilian population in all circumstances.¹⁰⁷ Subsection 2 prohibits attacking any military objective located inside a civilian-populated area by air-delivered incendiary weapons.¹⁰⁸ Subsection 3 prohibits the use of incendiary weapons located within a concentration of civilians except when a "military objective is clearly separated from a concentration of civilians and all feasible precautions are taken" to avoid and to minimize civilian casualties.¹⁰⁹ Subsection 4 prohibits the use of incendiary weapons on forests or other plant cover unless those natural elements are "used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives."¹¹⁰

C. Protocol III's Definition of "Incendiary Weapon"

Human Rights scholars have indicated that the definition of "incendiary weapon" in Protocol III is overly narrow.¹¹¹ "Incendiary weapon," as defined in Article 1 of Protocol III, is "any weapon or munition which is *primarily designed* to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target," and includes "flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances."¹¹² Munitions which may have incidental or incendiary effects, such as "illuminants, tracers, smoke or signaling systems" are not defined as incendiary weapons under the treaty.¹¹³

¹⁰³ *Restrictions on Excessively Injurious Conventional Weapons*, *supra* note 2, at "Status of the Treaty."

¹⁰⁴ *Protocol III 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*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, available at http://disarmament.un.org/treaties/uccwc_p3 (last visited May 7, 2015).

¹⁰⁵ See Protocol III, *supra* note 16, at art. 2.

¹⁰⁶ Mark Cantora, Note, *Israel and White Phosphorus During Operation Cast Lead: A Case Study in Adherence to Inadequate Humanitarian Laws*, 13 GONZ. J. INT'L L. 2 (2009–2010).

¹⁰⁷ Protocol III, *supra* note 16, at art. 2.

¹⁰⁸ Protocol III, *supra* note 16, at art. 2.

¹⁰⁹ See Protocol III, *supra* note 16, at art. 2.

¹¹⁰ See Protocol III, *supra* note 16, at art. 2.

¹¹¹ See generally *The Need to Re-Visit Protocol III*, *supra* note 1.

¹¹² Protocol III, *supra* note 16 (emphasis added).

¹¹³ See Protocol III, *supra* note 16.

The definition of “incendiary weapon” also does not include the following:

Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is *not specifically designed* to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.¹¹⁴

“Specifically designed” refers to the purpose and design of such weapon, as labeled by the manufacturer.¹¹⁵ The Protocol only considers a weapon’s primary design in determining whether it constitutes an “incendiary weapon;” neither the secondary effects of incendiary weapons nor military intent behind using incendiary weapons are considered.¹¹⁶ For example, since weapons containing white phosphorus are primarily designed to serve as a smoke or signaling system,¹¹⁷ they have escaped proper regulation under Protocol III despite secondary incendiary effects and intentional use to burn enemy positions.¹¹⁸

Major Shane R. Reeves, a professor at WestPoint, has stated that “[i]nternational law regulates smoke munitions differently than incendiary weapons, and understanding the intent for the use of white phosphorous is, therefore, a prerequisite for determining the applicable law.”¹¹⁹ However, this standard might be too arduous. Determining the intent of battlefield commanders can be convoluted and difficult to discern, and might result in mis-evaluations. Major Reeves used the following example to illustrate this point: if a military commander is conducting operations in a city where civilians are commingled with enemy combatants, and the commander reasonably determines the traditional law of war is satisfied, then white phosphorous may be used to obscure the unit’s movement through the city despite incidental civilian casualties.¹²⁰ Further, “[i]f the same commander decides to use white phosphorous to burn enemy positions in that same city, any incidental civilian casualties or incidental damage to civilian objects would violate Protocol III.”¹²¹ The legal distinction between permissible non-incendiary use and impermissible in-

¹¹⁴ See Protocol III, *supra* note 16 (emphasis added).

¹¹⁵ *The Need to Re-Visit Protocol III*, *supra* note 1.

¹¹⁶ See generally Protocol III, *supra* note 16 (defining an incendiary weapon as one “primarily designed to set fire to objects or cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target”).

¹¹⁷ Shane R. Reeves, *The “Incendiary” Effect of White Phosphorous in Counterinsurgency Operations*, ARMY LAW. 84, 86 (2010).

¹¹⁸ *Id.*

¹¹⁹ *Id.* (construing Peter Herby, *Phosphorous Weapons—The ICRC’s View*, Int’l. Comm. of the Red Cross (ICRC), (Jan. 17, 2009), <https://www.icrc.org/eng/resources/documents/interview/weapons-interview-170109.htm>).

¹²⁰ *Id.* at 88.

¹²¹ See *id.*

cendiary use of white phosphorous concerns using white phosphorous to hide a unit's movement versus to burn enemy positions.¹²² This legal distinction is arbitrary and results in hit-or-miss civilian protection, not because of a flawed interpretation, but because of the language of the third Protocol itself.¹²³ An effects-based test would solve this problem.

Exemptions for "incidental incendiary effects" and munitions "not specifically designed to cause burn or injury" are prime examples of the overly narrow, design-based definition of "incendiary weapon."¹²⁴ An effects-based definition would address the deficiencies of Protocol III in order to reflect an acute need for balance between military necessity and humanity.¹²⁵ Further, by adopting an effects-based test for Protocol III, the international community would strengthen its global commitment to the Protocol, the Fourth Geneva Convention, and the International Law of War.

D. *The United States' Reservation and Understanding*

1. The Text of the Reservation and Understanding

A "reservation" is defined as a unilateral statement by a nation attached to a treaty, expressing its consent to be bound by a treaty.¹²⁶ States may use reservations in order to modify the obligations imposed on a state by a particular treaty, or to exclude or to modify the provisions of the treaty themselves as applied to that state.¹²⁷ The Vienna Convention on the Law of Treaties (VCLT), opened for signature on May 23, 1969 and enacted January 27, 1980, codified existing customary law and established norms as to how and with whom a treaty could be established.¹²⁸

¹²² See *id.*

¹²³ Protocol III, *supra* note 16, at art. 1, sec. 1.

¹²⁴ Protocol III, *supra* note 16, at art. 1, sec. 1.

¹²⁵ See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50. VA. J. INT'L. L. 795, 797-99 (2010).

¹²⁶ *Glossary of terms relating to Treaty actions*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#reservation (last visited Aug. 25, 2015) (defining "reservation" as "a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state." Furthermore, "[a] reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply").

¹²⁷ *Id.* Note, however, that a reservation cannot conflict with a treaty's object and the purpose.

¹²⁸ Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, at art. 10, available at http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention]. See also Karl Zemanek, Vienna Convention on the Law of Treaties Vienna, 23 May 1969, available at <http://legal.un.org/avl/ha/vclt/vclt.html> (last visited Aug. 25, 2015).

When the United States signed Protocol III in 2009,¹²⁹ sixteen nations, including many allies of the United States, publicly opposed the United States' reservation,¹³⁰ claiming that it broadened the right to continue to use incendiary weapons among civilian populations.¹³¹ The United States' reservation is as follows:

The United States . . . 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.¹³²

The United States' reservation and the text of Protocol III may seem similar, but there are distinct differences. The United States has "reserved the right to use such weapons . . . located in a concentration of civilians" so long as "feasible precautions" are taken and the military deems it necessary to ensure fewer civilian casualties.¹³³ Protocol III, by contrast, stipulates an outright prohibition of incendiary weapons use except when civilians and a military objective are clearly separated.¹³⁴

The United States has also implemented an "declaration" to Protocol III.¹³⁵ A state might make a declaration "as to their understanding of some matter or as to the interpretation of a particular provision."¹³⁶ Furthermore, "[u]nlike reservations, declarations merely clarify the state's position and do not purport to exclude or modify the legal effect of a treaty."¹³⁷ The United States' declaration to Protocol III, however, essentially creates an exception to Article III for the decisions of military commanders.¹³⁸ The understanding issued upon the signing of the United States to Protocol III is, in full, as follows:

It is the understanding of the United States of America that any decision by any military commander, military personnel, or any other person re-

¹²⁹ Schmitt, *supra* note 125, at 815.

¹³⁰ See Convention on Prohibitions or Restrictions, *supra* note 4, at 9–13 (looking to the text of nations who have raised objections against the United States' reservation).

¹³¹ Convention on Prohibitions or Restrictions, *supra* note 4, at 9–13.

¹³² Convention on Prohibitions or Restrictions, *supra* note 4, at 9.

¹³³ Schmitt, *supra* note 125, at 815 (citation omitted).

¹³⁴ Protocol III, *supra* note 16.

¹³⁵ *Glossary of terms relating to Treaty actions*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#declarations (last visited Aug. 25, 2015).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Convention on Prohibitions or Restrictions, *supra* note 4, at 9 (looking to the nations that raised objections to the United States' reservation and understanding).

sponsible 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.¹³⁹

2. The Reservation and Understanding under International Law

The International Law Commission's *Guide to Practice on Reservations to Treaties* details how reservations are to operate, as well as their restrictions and potential alternatives.¹⁴⁰ States are required to determine the object and purpose of a treaty in good faith,¹⁴¹ and states are prohibited from issuing reservations which are incompatible with the object and purpose of a treaty in certain circumstances.¹⁴² Article 19(b) of the VCLT provides, in full, as follows:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.¹⁴³

The VCLT does not explicitly prohibit the United States' reservation, and the CCW does not provide that "only specified reservations . . . may be made . . ."¹⁴⁴ It is possible, however, that the United States' reservation violates the "object and purpose" of Protocol III under Article 19(c) because, as discussed below, the United States' reservation creates a broad exception that erodes Protocol III's applicability.¹⁴⁵

Article 31 of the VCLT provides:

- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

¹³⁹ See Convention on Prohibitions or Restrictions, *supra* note 4, at 9.

¹⁴⁰ Rep. of the Int'l Law Comm'n, 63rd Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, GAOR, 66 Sess., Supp. No. 10, 34 (2011), available at <http://legal.un.org/ilc/reports/2011/english/addendum.pdf>

¹⁴¹ *Id.* at 359.

¹⁴² *Id.* at 331.

¹⁴³ Vienna Convention, *supra* note 128, at art. 19(b).

¹⁴⁴ Vienna Convention, *supra* note 128, at art. 19(b).

¹⁴⁵ See Vienna Convention, *supra* note 128, at art. 19(c).

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.¹⁴⁶

In other words, pursuant to Article 31(3)(c), a treaty should be interpreted in light of customary international law.¹⁴⁷ Rule 84 and Rule 85 of Customary International Humanitarian Law are implicated when a state uses incendiary weapons on civilians, as per Article 31(3)(c) of the VCLT.¹⁴⁸ Rule 85, entitled Use of Incendiary Weapons against Combatants, provides that “[t]he anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person *hors de combat*.”¹⁴⁹ Rule 84, entitled Restriction on the Use of Incendiary Weapons, provides that “[i]f incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”¹⁵⁰ In light of its obligations under customary international law, it is likely that the United States’ reservation and understanding violate the object and purpose of Protocol III.

3. International Criticism

Many signatories to Protocol III that opposed the United States’ reservation and understanding believe that the United States violates Article 19 of the VCLT by negating the specific object and purpose of Protocol III.¹⁵¹ As a

¹⁴⁶ Vienna Convention, *supra* note 128, at art. 31.

¹⁴⁷ Vienna Convention, *supra* note 128, at art. 31(3)(c).

¹⁴⁸ See Rule 84, The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons, Customary IHL, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule84 (last visited Sept. 14, 2015); Rule 85, The Use of Incendiary Weapons Against Combatants, Customary IHL, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule85 (last visited Sept. 14, 2015).

¹⁴⁹ 2 Int’l Comm. of the Red Cross, *Customary International Humanitarian Law*, ch. 30, at 289 (Rule 85).

¹⁵⁰ *Id.* at 287–89 (Rule 84).

¹⁵¹ See *id.* (e.g., Australia’s reservation states that “according to customary international

result, several signatories to Protocol III have filed an objection to the United States' reservation and understanding. The effects of such objections are to counter the United States' understanding and to preclude the United States' reservation from having its intended effect or otherwise dispute the substance of the reservation.¹⁵² For example, France's objection to the United States' reservation states that:

By [its] reservation, the United States of America 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. In so doing, the reservation both excludes the prohibition set out in Article 2, paragraph 2, and alters the derogation regime set out in Article 2, paragraph 3.

Accordingly, the Government of the French Republic considers this reservation to be contrary to the object and purpose of the Protocol since, despite the assurances given by the United States of America, it cannot guarantee the protection of civilians, which is the *raison d'être* of the Protocol. The Government of the French Republic therefore wishes to register an objection to this reservation. This objection shall not preclude the entry into force of the Protocol between France and the United States of America.¹⁵³

The substance of France's objection is an accurate representation of other member states who have voiced opposition to the United States' reservation and understanding.¹⁵⁴ France is critical of the United States for reserving the

law as codified in the Vienna Convention on the Law of Treaties . . . a reservation incompatible with the object and purpose of a treaty shall not be permitted . . . For these reasons, the Government of Austria objects to the aforementioned reservation made by the United States of America 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)." Belgium's objection states that it "wishes to register an objection to [the United States'] reservation, which it considers to be incompatible with the object and purpose of Protocol III." Finland's objection states that "the reservation made by the United States of America in respect of that provision appears to undermine the object and purpose of Protocol III." Ireland's objection states that it "regards the reservation made by the United States of America as invalid, inasmuch as it is incompatible with the object and purpose of Protocol III.").

¹⁵² Rep. of the Int'l Law Comm'n, 63rd Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, GAOR, 66 Sess., Supp. No. 10, 235 (2011), available at <http://legal.un.org/ilc/reports/2011/english/addendum.pdf> at 235 ("Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation).

¹⁵³ Convention on Prohibitions or Restrictions, *supra* note 4, at 10.

¹⁵⁴ See *supra* text accompanying note 152.

right to use incendiary weapons in areas with civilian concentrations, thereby undermining the prohibition of incendiary weapons within the Protocol.

E. *Ensuring Compliance with Protocol III through an Absolute Ban of Incendiary Weapons*

The biggest obstacle to effectively enforcing Protocol III is the potential for the Protocol's directives to interfere with military operations, particularly if international compliance officers are tasked with performing on-site inspections during conflict.¹⁵⁵ Therefore, the best way to guarantee compliance with Protocol III is through an absolute ban on incendiary weapons.¹⁵⁶ The policy justification for a complete ban on incendiary weapons is not that these weapons have the potential to cause serious physical injury, but that incendiary weapons continue to be illegally used on civilians.¹⁵⁷ In the absence of an outright ban, civilians and civilian structures remain at unnecessary risk of suffering, death, and destruction.

V. CONCLUSION

As mentioned, Syria and Israel are not signatories to Protocol III.¹⁵⁸ Their signatures alone would send a significant message to the international community about their commitment to justice in wartime. However, even if they were to sign, enforcement would still be problematic. Stringent state-to-state compliance mechanisms are necessary in order for Protocol III and the CCW to be enforced effectively. Therefore, by broadening the scope of Protocol III to include the secondary effects of weaponry, the international community would be encouraged to increase compliance.

With the War in Iraq now over and the Afghanistan War coming to an end, the United States no longer needs to preserve freedom of action on the battlefield as a priority, especially regarding incendiary weapons.¹⁵⁹ By striking its reservation, the United States would convey to the international community generally that using incendiary weapons on civilian populations is no longer justifiable under any circumstances. As long as the United States continues to use incendiary weapons, civilians will continue to be unnecessarily put at risk, possible violations of Protocol III may occur, and the United States will be less effective at persuading other nations that the use of such weapons is impermissible.¹⁶⁰

¹⁵⁵ David Kaye & Steven Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AM. J. INT'L L. 922, 936 (2002) (The Fourth Geneva has developed into customary international law).

¹⁵⁶ Cantora, *supra* note 106, at Part IV.A.

¹⁵⁷ Cantora, *supra* note 106, at Part IV.A.

¹⁵⁸ See *supra* Parts III.A, III.C.

¹⁵⁹ See generally Schmitt, *supra* note 125, at 837.

¹⁶⁰ *The Need to Re-Visit Protocol III*, *supra* note 1, at 8.

Additionally, the United States can spearhead an international movement to adopt an effects-based test advocated by international scholars in order to serve as a tool of enforcement, provide a more comprehensive list of prohibited weapons of war, and solidify the meaning and definitional terms of Protocol III.¹⁶¹ The most complete answer for the protection of civilians against incendiary weapons, however, is still an outright ban.¹⁶²

International criticism on the use of incendiary weapons has diminished the strength of the United States. By fulfilling the object and purpose of Protocol III, the United States will achieve international praise through its renewed effort to advance leadership in the international community in regards to the International Law of War and Fourth Geneva Protection of Civilians. The intense suffering associated with these weapons can no longer be tolerated. It is important that the United States initiate and continuously advocate for the proposed solutions discussed within this Article. These solutions are necessary for the fulfillment of the object and purpose of Protocol III. Moreover, the United States will achieve international praise through its renewed effort to advance leadership in the international community with regard to the International Law of War and Fourth Geneva Protection of Civilians.

¹⁶¹ See generally *The Need to Re-Visit Protocol III*, *supra* note 1, at 9 ("Focusing on a munition's substantial effects would better protect civilians by ensuring that all de facto incendiary weapons are subject to the same standards. The burden would fall on states to demonstrate that any incendiary effects of a munition are minimal and incidental enough for the munition to be excluded from the protocol's restrictions.").

¹⁶² Cantora, *supra* note 106, at Part IV.A.