



# Government Positions on Protocol III on Incendiary Weapons

Memorandum to Convention on Conventional Weapons Delegates  
Human Rights Watch and the Harvard Law School International Human Rights Clinic  
November 2012 (updating April 2012 memorandum)

## I. Introduction

International support for strengthening existing law on incendiary weapons is growing. At the Fourth Review Conference of the Convention on Conventional Weapons (CCW)<sup>1</sup> in November 2011, states parties approved a document that opened the door for discussions on incendiary weapons in that forum. In addition, almost 25 states have made statements or written letters expressing a willingness to take up the issue, and representatives of other states have articulated similar positions in private conversations. Human Rights Watch and Harvard Law School’s International Human Rights Clinic (IHRC) are calling on CCW states parties to build on this momentum by establishing in November 2012 a group of governmental experts that can hold discussions on incendiary weapons over the course of 2013.

At the Fourth Review Conference, states parties actively took on the issue of incendiary weapons for the first time since the adoption in 1980 of CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons. While the final documents from the first three Review Conferences merely “note[d] the provisions” of Protocol III,<sup>2</sup> the Fourth Review Conference’s Final Document stated:

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<sup>1</sup> The full title of the CCW is 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.

<sup>2</sup> See CCW Third Review Conference Final Document, CCW/CONF.III/11 (Part II), Geneva, November 7-17, 2006, [http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/84E7CBDD66F28699C125729E00605345/\\$file/CCW+CONF.II+11+PART+II+E.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/84E7CBDD66F28699C125729E00605345/$file/CCW+CONF.II+11+PART+II+E.pdf) (accessed April 12, 2012), p. 12; CCW Second Review Conference Final Document (Part II), CCW/CONF.II/2,

The Conference notes the concerns raised during the discussions on Protocol III by some High Contracting Parties about the offensive use of white phosphorus against civilians, including suggestions for further discussion on this matter. The Conference further notes that there was no agreement on various aspects of this matter.<sup>3</sup>

With this language, CCW states parties raised concerns about the harmful effects of white phosphorus munitions, an issue that could be addressed under Protocol III on incendiary weapons. Moreover, states specifically noted the possibility of further discussion about strengthening prohibitions or restrictions on incendiary weapons, including white phosphorus, under the protocol.

As the Fourth Review Conference's Final Document suggests, Protocol III is ripe for reexamination. The protocol has failed to live up to its promise of protecting civilians from the effects of incendiary weapons, which cause horrific burns, permanent disfigurement, and death.<sup>4</sup> States adopted Protocol III "in order to assure complete protection of civilians from incendiary weapons"<sup>5</sup>; however, loopholes and inconsistent restrictions have limited its effectiveness.<sup>6</sup>

Over the past two years, the situation has taken on increasing urgency in the international community. States have voiced their concerns about the dangers of incendiary weapons

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Geneva, December 11-21, 2001, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/602/61/IMG/G0260261.pdf?OpenElement> (accessed April 12, 2012), p. 17; CCW First Review Conference Final Document (Part I), CCW/CONF.I/16, Geneva, 1996, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/617/03/PDF/G9661703.pdf?OpenElement> (accessed April 12, 2012), p. 40.

<sup>3</sup> CCW Fourth Review Conference Final Document (Part II), CCW/CONF.IV/4/Add.1, Geneva, November 14-25, 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/652/03/PDF/G1165203.pdf?OpenElement> (accessed April 12, 2012), p. 9

<sup>4</sup> Human Rights Watch and the Harvard Law School International Human Rights Clinic, *Memorandum to Convention on Conventional Weapons Delegates: The Human Suffering Caused by Incendiary Munitions*, March 2011, [http://www.hrw.org/sites/default/files/related\\_material/2011\\_arms\\_incendiariespastharmanduse.pdf](http://www.hrw.org/sites/default/files/related_material/2011_arms_incendiariespastharmanduse.pdf).

<sup>5</sup> Letter from Valentin Zellweger, Director for International Law, Swiss Federal Department of Foreign Affairs, to Human Rights Watch, March 22, 2011.

<sup>6</sup> Human Rights Watch and the Harvard Law School International Human Rights Clinic, *Memorandum to Convention on Conventional Weapons Delegates: The Need to Re-Visit Protocol III on Incendiary Weapons*, November 2010, <http://www.hrw.org/en/news/2010/11/22/memorandum-ccw-delegates>.

and the inadequacy of the protocol in letters to Human Rights Watch and in statements at CCW meetings. In addition, recent use of weapons with incendiary effects has posed an ongoing threat to civilians, while continued production and stockpiling raise concerns about potential civilian casualties from future use. In 2011, the United States and non-state armed groups used white phosphorus in Afghanistan, while in Libya weapons depots containing napalm and white phosphorus were left unsecured as Gaddafi's forces fled.

To minimize the harm to civilians from the use of incendiary weapons, Human Rights Watch and IHRC urge CCW states parties to agree to a mandate for further discussions on Protocol III. These discussions, held in a Group of Governmental Experts, should then lead to a mandate to amend the protocol. A comprehensive ban on the weapons would have the most far-reaching humanitarian benefits. But at a minimum, states should address the key shortcomings of the instrument by:

1. Adopting a broader, effects-based definition of incendiary weapons that encompasses multipurpose munitions with incendiary effects, such as white phosphorus ones, and
2. Prohibiting the use of *all* incendiary weapons in civilian areas, regardless of whether they are air or ground launched.<sup>7</sup>

This memorandum details government positions regarding incendiary weapons, which have bolstered the argument for revisiting Protocol III. It analyzes the concerns of states as well as those of the International Committee of the Red Cross (ICRC) about the humanitarian harm from these weapons. It also illuminates states' openness to strengthening existing international law. The memorandum concludes that states should initiate formal discussions as soon as possible with an eye to eliminating the flaws of the protocol and the harmful effects of white phosphorus and other incendiary weapons.

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<sup>7</sup> For further discussion of these recommendations, see Human Rights Watch and the Harvard Law School International Human Rights Clinic, *Strengthening the Humanitarian Protections of Protocol III on Incendiary Weapons: Memorandum to Convention on Conventional Weapons Delegates*, August 2011, <http://www.hrw.org/news/2011/08/22/strengthening-humanitarian-protections-protocol-iii-incendiary-weapons>.

## II. Background

### A. Incendiary Weapons<sup>8</sup>

Incendiary weapons are munitions that produce fire through a chemical reaction. Burns from incendiary weapons inflict excruciating injuries, disfigure victims, and often lead to death. In modern warfare, these weapons are generally used to ignite fuel and ammunition supplies, destroy tanks and other equipment, and attack personnel. Napalm, widely used during the Vietnam War, is the most notorious incendiary substance, but more than 180 models of incendiary weapons currently exist. The harm caused by white phosphorus munitions, used in more recent conflicts, exemplifies the specific humanitarian problems weapons with incendiary effects present. As discussed below, while some states believe white phosphorus munitions do not fall under Protocol III's definition of "incendiary weapon," other states and Human Rights Watch believe that because of their incendiary effects, they produce the same kind of harm, and therefore should be treated as incendiary weapons.

### B. White Phosphorus<sup>9</sup>

White phosphorus is a chemical substance that ignites when exposed to atmospheric oxygen. The chemical reaction creates intense heat of about 1,500 degrees Fahrenheit (815 degrees Celsius) and produces light and a thick smoke. White phosphorus is highly soluble in fat, so when it touches human skin it causes severe thermal and chemical burns, often down to the bone, that are slow to heal and likely to develop infections. Wounds that have been cleaned and dressed can reignite when the dressings are removed. Moreover, white phosphorus can enter the bloodstream through the burns and cause multiple organ failure.

While white phosphorus munitions are frequently used for creating smokescreens, illuminating targets, and marking and signaling, they are also often used to ignite fuel

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<sup>8</sup> For more information, see Human Rights Watch and the Harvard Law School International Human Rights Clinic, *Q&A on Incendiary Weapons and CCW Protocol III*, November 2011, <http://www.hrw.org/news/2011/11/11/qa-incendiary-weapons-and-ccw-protocol-iii>; Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Human Suffering Caused by Incendiary Munitions*; Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Need to Re-Visit Protocol III on Incendiary Weapons*.

<sup>9</sup> For more information, see Human Rights Watch and the Harvard Law School International Human Rights Clinic, *Q&A on Incendiary Weapons and CCW Protocol III*; Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Need to Re-Visit Protocol III on Incendiary Weapons*.

supplies, ammunition, and other materiel. In addition, armed forces have used white phosphorus munitions to “smoke out” enclosures, forcing anyone inside to flee the smoke and fire by going outside where they can be attacked with high explosive rounds. This type of use is controversial, even when applied to enemy combatants, because of the nature of the injuries caused by the fire and smoke. Regardless of how they are used, weapons containing white phosphorus raise humanitarian concerns. Not only do they produce cruel injuries, but they also often have a broad area effect, which means they cannot be used in a way that discriminates between soldiers and civilians in populated areas.

White phosphorus was first used in World War I and was subsequently used extensively in World War II and the Vietnam War. Over the past two decades, white phosphorus has been used by the Taliban and NATO forces in Afghanistan (2003-2011), Israel in Gaza and Lebanon (2008 and 2006, respectively), Ethiopia in Somalia (2007), the United States and the United Kingdom in Iraq (2004), and Russia in Chechnya (1994-1995).<sup>10</sup> Continued use and/or stockpiling of incendiary munitions in countries such as Afghanistan and Libya present ongoing threats to civilians.<sup>11</sup>

### *C. Shortcomings of Protocol III<sup>12</sup>*

As written, Protocol III fails to protect civilians adequately. The protocol’s definition of “incendiary weapon” is too narrow because it does not clearly cover multipurpose munitions<sup>13</sup>. Article 1 of Protocol III provides a loophole for such munitions in two ways: it encompasses only munitions “primarily designed” to set fires or cause burn injuries, and it

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<sup>10</sup> See Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Human Suffering Caused by Incendiary Munitions*; Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Need to Re-Visit Protocol III on Incendiary Weapons*.

<sup>11</sup> For more details on the use of white phosphorus in Afghanistan and the incendiary weapons found in Gaddafi’s abandoned stockpiles, see Human Rights Watch and the Harvard Law School International Human Rights Clinic, “Incendiary Weapons: Government Positions and Practices,” April 2012, <http://www.hrw.org/news/2012/04/17/incendiary-weapons-government-positions-and-practices>.

<sup>12</sup> See Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Human Suffering Caused by Incendiary Munitions*; Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Need to Re-Visit Protocol III on Incendiary Weapons*.

<sup>13</sup> Protocol III defines an incendiary weapon 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 combination thereof, produced by a chemical reaction of a substance delivered on the target.” The definition excludes: “Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems.” Protocol III, art. 1(1).

creates exceptions for munitions with incendiary effects that are “incidental.” This definition allows multipurpose and widely used incendiary munitions, such as those containing white phosphorus, to escape regulation because their classification is based on the discretion of the manufacturer or the user instead of on their incendiary effects.

Furthermore, Article 2 of Protocol III’s restrictions on the use of incendiary weapons, however defined, are insufficiently rigorous. They include exceptions that too often permit attacks that could endanger and cause cruel injuries to civilians. While the article prohibits attacks in populated areas with air-dropped incendiary weapons, it permits the same kinds of attacks with ground-launched models under certain circumstances<sup>14</sup>. These inconsistent provisions fail to recognize that incendiary weapons, whether air or ground delivered, can have the same harmful impacts, especially when used in populated areas.

### III. State Positions on Protocol III

Over the past two years, at least 28 CCW states parties have provided their views on the use and regulation of incendiary weapons, in interventions at CCW sessions and in letters to Human Rights Watch.<sup>15</sup> A wide variety of states from six continents have articulated positions. They include countries large and small, developed and developing, currently involved in conflict and not. All but four of these states have expressed some concern about and/or a willingness to examine the protocol.

The states clearly open to examining the protocol are: Australia, Austria, Belarus, Belgium, Canada, Djibouti, Estonia, Finland, Germany, the Holy See, Honduras, Ireland, Jamaica, Kazakhstan, Latvia, Mauritius, Mexico, Moldova, New Zealand, Qatar, Saudi Arabia, Slovenia, and Switzerland.<sup>16</sup>

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<sup>14</sup> Protocol III, art 2(2) and (3).

<sup>15</sup> Human Rights Watch sent letters to each of the 114 CCW states parties attaching a November 2010 memorandum to CCW delegates: Human Rights Watch and the Harvard Law School International Human Rights Clinic, *The Need to Re-Visit Protocol III on Incendiary Weapons*. Ten states responded. Human Rights Watch sent a second set of letters to 113 CCW states parties on March 28, 2012, and eleven states responded. Others made comments during CCW meetings.

<sup>16</sup> While Cyprus expressed concerns about the use of incendiary weapons and pledged to support efforts to minimize the weapons’ effects, its letter suggested it would be reluctant to amend the Protocol in any significant way. For more information on Cyprus’s position, see footnote 21 below. Israel, Japan, and the United States expressed implicit or explicit opposition to revisiting the protocol. Italy objected to discussing white phosphorus under Protocol III, but it appeared willing to consider it under different auspices. Moldova’s letter only addresses its practices regarding production, stockpiling, and transfer.

In their letters and statements, most of these countries have outlined positions regarding the civilian impact of incendiary weapons and what should be done about it within the CCW forum. Some have called for the formation of a Group of Governmental Experts, and some have explicitly supported amending the provisions of Protocol III. The International Committee of the Red Cross (ICRC) has also issued strong statements regarding the need to revisit Protocol III.<sup>17</sup>

### *A. Humanitarian Concerns*

Many states that have made their positions publicly known have highlighted the humanitarian harm caused by incendiary munitions. Estonia wrote that “the humanitarian concerns caused by the use of incendiary weapons must be alleviated and that civilians must be protected.”<sup>18</sup> Djibouti stated its “concern toward reducing the deep and traumatizing wounds inflicted upon civilian populations by incendiary weapons.”<sup>19</sup>

Several states have focused on white phosphorus. Belgium, for example, wrote that it shared “the concern about the humanitarian problem caused by the misuse of white phosphorus munitions from their normal use of ... illuminating.”<sup>20</sup> Cyprus noted that it “shares the concerns of the International Community concerning the humanitarian consequences of the use of incendiary weapons, including white phosphorus, and in this framework supports every initiative in the direction of minimizing the humanitarian impact of these weapons.”<sup>21</sup> Slovenia similarly wrote that it shares the humanitarian concerns

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<sup>17</sup> Statement of Jakob Kellenberger, President of the International Committee of the Red Cross, Fourth Review Conference of States Parties to the CCW, Geneva, November 15, 2011, <http://www.icrc.org/eng/resources/documents/statement/ccw-statement-2011-11-15.htm> (accessed April 4, 2012). See also Statement of Louis Maresca, Legal Adviser, Arms Unit, Legal Division, International Committee of the Red Cross, Fourth Review Conference of States Parties to the CCW, Geneva, November 16, 2011, [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/C77CB1DD06229E70C1257967003BC545/\\$file/MCI\\_ICRC\\_ProtocolIII.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/C77CB1DD06229E70C1257967003BC545/$file/MCI_ICRC_ProtocolIII.pdf) (accessed April 4, 2012). For further discussion of the ICRC’s position, see Part III(E) below.

<sup>18</sup> Letter from Urmas Paet, Ministry of Foreign Affairs of the Republic of Estonia, to Human Rights Watch, April 25, 2011.

<sup>19</sup> Statement of Isse Abdillahi, Deputy Director in Charge of Disarmament Affairs, Djibouti Ministry of Foreign Affairs, Tenth Meeting of States Parties to the CCW, Geneva, November 2010.

<sup>20</sup> Letter from Steven Vanackere, Minister of Foreign Affairs and Institutional Reforms of Belgium, to Human Rights Watch, May 3, 2011 (unofficial translation).

<sup>21</sup> Letter from Ambassador Euripides Evriviades, Ministry of Foreign Affairs of the Republic of Cyprus, to Human Rights Watch, June 5, 2012. Despite its concerns about the humanitarian impacts of incendiary weapons, including white phosphorus,

“regarding the issue of white phosphorous.”<sup>22</sup> Switzerland emphasized the considerable number of victims that incendiary weapons have created<sup>23</sup> and expressed concern about the “grave effects” these weapons produce.<sup>24</sup> It also highlighted the definitional loophole that the protocol creates for white phosphorus and noted that “the problem of incendiary weapons raised under Protocol III is still not resolved.”<sup>25</sup>

In discussions on the Fourth Review Conference’s Final Document, some states linked white phosphorus to Protocol III. Mexico argued that the Final Document’s language on white phosphorus should appear under the heading of Protocol III. Although as written the protocol may not apply directly to white phosphorus, Mexico noted that states have expressed their concerns about white phosphorus munitions in the context of the incendiary weapons protocol.<sup>26</sup> Australia and Switzerland supported Mexico’s position on this point.<sup>27</sup> Italy, by contrast, expressed doubts about whether the language about white phosphorus should appear under the heading of Protocol III because “white phosphorus is not really an incendiary weapon.”<sup>28</sup> Italy said it supported including the proposed language somewhere in the Final Document, however, and noted the “harmful effects on civilians” of white phosphorus.<sup>29</sup>

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Cyprus appears to support both the current definition of incendiary weapons and the inclusion of a right to use them “against military targets exclusively” and in the way intended by their manufacturer. *Ibid.*

<sup>22</sup> Letter from Ambassador Roman Kirn, Embassy of the Republic of Slovenia Washington, to Human Rights Watch, April 9, 2012.

<sup>23</sup> Statement of HE Alexandre Fasel, Permanent Representative of Switzerland to the Conference on Disarmament, Fourth Review Conference of States Parties to the CCW, Geneva, November 16, 2011, [http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/B85AA07EFD972BCAC125796700508F48/\\$file/MCI\\_Switzerland.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/B85AA07EFD972BCAC125796700508F48/$file/MCI_Switzerland.pdf) (accessed April 4, 2012).

<sup>24</sup> Letter from Valentin Zellweger, March 22, 2012.

<sup>25</sup> Statement of HE Alexandre Fasel, November 16, 2011.

<sup>26</sup> Statement of Mexico, Fourth Review Conference of States Parties to the CCW, Geneva, November 22, 2011, notes by Human Rights Watch.

<sup>27</sup> Statements of Australia and Switzerland, Fourth Review Conference of States Parties to the CCW, Geneva, November 22, 2011, notes by Human Rights Watch.

<sup>28</sup> Statement of Italy, Fourth Review Conference of States Parties to the CCW, Geneva, November 17, 2011, notes by Women’s League for International Peace and Freedom. See also Statement of Italy, Fourth Review Conference of the States Parties to the CCW, Geneva, November 22, 2011, notes by Human Rights Watch.

<sup>29</sup> Statement of Italy, November 22, 2011.

Although these comments indicate that there is not yet a consensus on classifying white phosphorus munitions, they do reflect concern that the CCW needs to deal with these munitions' incendiary effect and potential to inflict civilian harm.

### *B. Proposal for an Experts Meeting*

At least five states have called for a meeting of experts to discuss Protocol III and the use of incendiary weapons. During the Fourth Review Conference, Australia stated that it “would welcome a genuine exchange between experts in the coming year on the scope and applicability of Protocol III on other weapons that can have the same effect as incendiary weapons.”<sup>30</sup> By referring to these other weapons, Australia implied that white phosphorus should be central to the discussion. Australia further noted the “inconsistency in Protocol III that allows two munitions used for the same purpose and having the same effect to be subject to differing levels of restrictions under international humanitarian law.”<sup>31</sup> The latter statement can be read as criticizing either the possible exclusion of white phosphorus from the definition in Article 1 or the different standards for ground- and air-launched weapons under Article 2.

Germany echoed Australia's recommendation for an experts meeting. It found it “appropriate to begin to study and examine the possible misuse of white phosphorous as a weapon, for instance by devoting one day of an experts' meeting to presentations on the subject and in light of this possibly the development of recommendations for the further treatment of this topic.”<sup>32</sup>

Other states have called for an experts meeting in letters sent to Human Rights Watch since April 2012. Estonia expressed its openness “to the idea of the formation of a group of experts” to consider the use of incendiary weapons, including white phosphorus.<sup>33</sup> Suggesting a willingness to take action as well as discuss the issue, it wrote that it was

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<sup>30</sup> Statement of HE Peter Woolcott, Permanent Representative of Australia to the United Nations in Geneva and Ambassador for Disarmament, Fourth Review Conference of States Parties to the CCW, Geneva, November 16, 2011, [http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/A042E1F9A0DE9DB5C12579660059B081/\\$file/MCI\\_Australia\\_NewProposals.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/A042E1F9A0DE9DB5C12579660059B081/$file/MCI_Australia_NewProposals.pdf) (accessed October 30, 2012).

<sup>31</sup> *Ibid.* (emphasis in original).

<sup>32</sup> Statement of HE Hellmut Hoffmann, German Ambassador for Global Disarmament Affairs, Fourth Review Conference of States Parties to the CCW, Geneva, November 15, 2011.

<sup>33</sup> Letter from Sulev Kannike, Ministry of Foreign Affairs of the Republic of Estonia, to Human Rights Watch, April 20, 2012.

also “open to adopting further measures within the CCW and ... review[ing] and improv[ing] the mechanisms of Protocol III ... in order to minimize the impact of armed conflicts on both the civilian population as well as combatants.”<sup>34</sup> Mauritius wrote that it “supports the formation of a group of experts under the [CCW] auspices to discuss States’ concerns and explore how to minimize the humanitarian consequences of the use of incendiary weapons, including white phosphorus.”<sup>35</sup> Saudi Arabia stated that “the training of experts under the auspices of the [CCW] is conducive to the achievement of the objective to which the High Contracting Parties are aspiring.”<sup>36</sup> These statements are consistent with the call of Human Rights Watch and the IHRC for a Group of Governmental Experts to initiate discussions of Protocol III that cover white phosphorus munitions.

Although it did not specifically mention an experts meeting, Switzerland said at the Review Conference that it favored a mandate “to deal with all the humanitarian problems caused by white phosphorus.”<sup>37</sup> It also recognized the need for Protocol III to change with the times. Switzerland stated that the CCW, as well as the Geneva Conventions, are “dynamic instrument[s]... [that] should be able to respond to developments in the nature and conduct of armed conflict, to continuously address humanitarian concerns, and should be reviewed, amended and improved if this is deemed necessary.”<sup>38</sup> Switzerland thus did not narrow its focus to white phosphorus but described CCW as a living instrument that must adapt to the ever evolving means and methods of warfare.

### *C. Support for Amendment*

In order to reduce the humanitarian harm of incendiary weapons, some states have gone beyond calling for an experts meeting and have already articulated the need to amend Protocol III. Several expressed such a position in letters to Human Rights Watch. Qatar wrote that it “supports the principle of amending the Protocol III on Incendiary Weapons....

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<sup>34</sup> Letter from Urmas Paet, April 25, 2011. See also Letter from Sulev Kannike, April 20, 2012. Estonia supports the “prohibition of, or restrictions on the amount of white phosphorus used in ammunitions designed to produce incendiary effect” but does not support “restriction on white phosphorus which is used for creating smokescreens.” Ibid.

<sup>35</sup> Letter from the Republic of Mauritius to Human Rights Watch, August 8, 2012.

<sup>36</sup> Letter from the Permanent Mission of the Kingdom of Saudi Arabia to the United Nations Office and other International Organizations at Geneva to Human Rights Watch, May 14, 2012.

<sup>37</sup> Statement of HE Alexandre Fasel, November 16, 2011.

<sup>38</sup> Letter from Valentin Zellweger, March 22, 2011.

[and] will also work positively to achieve the objective of this amendment, which will provide a better protection to civilians from the harmful effects of these weapons.”<sup>39</sup> Likewise, Honduras deemed it appropriate to “pronounce in favor of the amendment of Protocol III on the prohibitions or restrictions to the use of incendiary weapons.”<sup>40</sup> Mexico explained that it “supports technical and humanitarian deliberations with a view to amend Protocol III to include white phosphorus for the sake of contributing to the protection of the civilian population.”<sup>41</sup> Mexico added that it intends to continue advocating for this issue in the CCW forum.<sup>42</sup> Finally, after describing the cruel suffering caused by white phosphorus, Mauritius wrote it “supports [a] definition of incendiary weapons ... encompassing white phosphorous.”<sup>43</sup>

Other states have drawn attention at CCW meetings to the need to adopt stronger provisions in Protocol III. At the 2011 Review Conference, the Holy See stated “it would be useful to revisit this issue in order to improve and strengthen provisions for the protection of civilians from the harmful effects of these weapons.”<sup>44</sup> At the 2010 Meeting of States Parties, Djibouti focused on the definitional loopholes and argued for “the necessity of revisiting, redefining, and clarifying the clauses contained in Protocol III on Incendiary Weapons, in order to reach greater clarity in the designation of white phosphorus explosives.”<sup>45</sup>

These positions reflect a growing interest across several continents in augmenting the civilian protections under Protocol III.

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<sup>39</sup> Letter from Ambassador Abdulla Falah Al Dosari, Permanent Mission of the State of Qatar before the United Nations in Geneva, to Human Rights Watch, October 24, 2011. See also Statement of Qatar, Fourth Review Conference of States Parties to the CCW, Geneva, November 15, 2011, notes by Human Rights Watch.

<sup>40</sup> Letter from Col. Juan Angel Blanco Bejarano, Director of Humanitarian Law, Joint Chiefs of Staff of the Honduran Armed Forces, to the Chairman of the Joint Chiefs of Staff of the Honduran Armed Forces, May 24, 2011 (transmitted to Human Rights Watch in Letter from Permanent Mission of Honduras before the United Nations in Geneva, July 5, 2011) (unofficial translation).

<sup>41</sup> Letter from Ambassador Juan José Gómez Camacho, Permanent Representative of Mexico, to Human Rights Watch, April 13, 2012 (translation by IHRC).

<sup>42</sup> Ibid.

<sup>43</sup> Letter from the Republic of Mauritius.

<sup>44</sup> Statement of the Holy See, Fourth Review Conference of States Parties to the CCW, Geneva, November 14, 2011, notes by Human Rights Watch.

<sup>45</sup> Statement of Isse Abdillahi, November 2010.

While not discussing Protocol III in particular, Jamaica also called for a strengthening of the law on incendiary weapons. It wrote that it “remains committed to international efforts aimed at eliminating these weapons [incendiary weapons, including white phosphorus] which have a lethal and harmful effect on civilian populations.”<sup>46</sup>

#### *D. Openness to Discussion*

In letters to Human Rights Watch and statements at CCW meetings, the large majority of states that expressed a position on Protocol III were open to holding further discussions at a future CCW forum. Austria declared that it would take proposals “into due consideration.”<sup>47</sup> Belarus stated it was “ready to listen and discuss the humanitarian concerns in this area.”<sup>48</sup> Canada noted its “long standing policy of addressing the humanitarian impact of weapons on civilians”<sup>49</sup> and pledged it would “examine all relevant proposals.”<sup>50</sup> Finland wrote that it was “happy to continue discussions of incendiary weapons in future CCW meetings.”<sup>51</sup>

Several states explicitly or implicitly said they were willing to talk about white phosphorus in particular. Belgium wrote about the possibility of “consider[ing] this issue [of white phosphorus] within the general framework offered by [the CCW].”<sup>52</sup> Ireland wrote that it was “open to proposals to consider particular weapons in the CCW context, including white phosphorus, within the overall mandate of the CCW to address weapons which may be deemed to be excessively injurious or to have indiscriminate effects.”<sup>53</sup> Kazakhstan

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<sup>46</sup> Letter from Arnold Nicholson, Minister of Foreign Affairs and Foreign Trade of Jamaica, to Human Rights Watch, June 15, 2012.

<sup>47</sup> Letter from Alexander Kmentt, Head of Department for Disarmament, Arms Control and Non-Proliferation, Austrian Federal Ministry for European and International Affairs, to Human Rights Watch, May 18, 2011.

<sup>48</sup> Statement of Belarus, Fourth Review Conference of States Parties to the CCW, Geneva, November 14, 2011, notes by Human Rights Watch.

<sup>49</sup> Letter from the Honourable Lawrence Cannon, Minister of Foreign Affairs of Canada, to Human Rights Watch, March 22, 2011.

<sup>50</sup> *Ibid.*

<sup>51</sup> Letter from Markku Virri, Ministry for Foreign Affairs of Finland, to Human Rights Watch, May 25, 2012.

<sup>52</sup> Letter from Steven Vanackere, May 3, 2011.

<sup>53</sup> Letter from Aidan Cronin, Private Secretary on behalf of the Minister of Foreign Affairs, Office of the Minister for Foreign Affairs of Ireland, to Human Rights Watch, February 5, 2011.

stated that it shares the “common aspiration of the entire world community to protect civilians from any effects of such weapons as white phosphorus.”<sup>54</sup> Latvia agreed in general “to explore and discuss the possibilities to strengthen this instrument [to] minimize[e] the humanitarian consequences when incendiary weapons are being used,” adding that it “believe[s] that [the CCW] needs to be strengthened.”<sup>55</sup> In particular Latvia “acknowledge[d] [its] resolution to prevent the humanitarian consequences caused by white phosphorus.”<sup>56</sup> Similarly, New Zealand stated that it would “consider the issues raised regarding white phosphorus in particular” and “looks forward to discussions on the issue.”<sup>57</sup> Slovenia wrote it “is in favor of exploring the possibilities for the reinforcement of Protocol III and for comprehensively addressing humanitarian consequences of the use [of] white phosphorous.”<sup>58</sup> Although states have yet to delve into the details of a discussion mandate, their willingness to start a dialogue on Protocol III shows that the time to revisit the protocol is now.

#### *E. International Committee of the Red Cross*

At the Fourth Review Conference, the ICRC, the arbiter of international humanitarian law, expressed grave concerns and noted, “Recent reports of the use of weapons with incendiary effects in densely populated areas, and the humanitarian impact of such use, highlight the relevance of this issue and the dangers that exist for the civilian population.”<sup>59</sup> As a result, there is a need to examine “the adequacy of protections provided under Protocol III of the CCW.”<sup>60</sup> On white phosphorus in particular, the ICRC emphasized not only the “horrific burns” of this substance, but also the difficulty in treating the burns and the risks flammable remnants pose for medical personnel.<sup>61</sup>

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<sup>54</sup> Letter from Minister-Counselor Murat Nurtileuov, Permanent Mission of Kazakhstan to the UNOG, to Human Rights Watch, April 12, 2012.

<sup>55</sup> Letter from Ambassador Baiba Braze, April 18, 2012.

<sup>56</sup> Letter from Ambassador Baiba Braze, Ministry of Foreign Affairs of the Republic of Latvia, to Human Rights Watch, April 18, 2012.

<sup>57</sup> Letter from Hon. Georgina te Heuheu QSO, Minister for Disarmament and Arms Control of New Zealand, to Human Rights Watch, April 5, 2011.

<sup>58</sup> Letter from Ambassador Roman Kirn, April 9, 2012.

<sup>59</sup> Statement of Louis Maresca, November 16, 2011.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

The ICRC specifically proposed holding an experts meeting in some forum. Given that some states believe that weapons containing white phosphorus escape the restrictions of Protocol III, the ICRC said it found “a value in examining a range of military, technical, legal and humanitarian aspects of weapons with significant incendiary effects either through work on this issue in the CCW's Group of Governmental Experts or within other informal settings.”<sup>62</sup> In sum, the ICRC concluded that “the protections afforded to civilians and civilian objects by Protocol III warrant a review.”<sup>63</sup>

### *F. Reluctant and Opposing States*

In spite of the growing willingness to open discussions on Protocol III, some states have hesitated to support that step. Japan and Israel noted there was no consensus at the Review Conference on the issue of incendiary weapons. Japan pointed out that although states have expressed concern regarding the use of white phosphorus, “this concern was just raised by some of the parties and not all of us.”<sup>64</sup> Israel also said there was no agreement on the issue,<sup>65</sup> and it stated, “With regard to the suggestions to revisit protocols and issues previously dealt with by the CCW, we remain to be convinced that the current circumstances are conducive for the achievement of consensus [that Protocol III should be revisited].”<sup>66</sup> Although it is not a state party to Protocol III, Israel has previously explained that it does not consider white phosphorus used as a smokescreen to be covered by the protocol.<sup>67</sup>

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Statement of Japan, Fourth Review Conference of States Parties to the CCW, Geneva, November 17, 2011, notes by Women’s International League for Peace and Freedom.

<sup>65</sup> Statement of Israel, Fourth Review Conference of States Parties to the CCW, November 24, 2011, notes by Human Rights Watch.

<sup>66</sup> Statement by Tamar Rahamimoff-Honig, Israeli Representative to the Conference on Disarmament, Fourth Review Conference of States Parties to the CCW, November 16, 2011, [http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/6C78EFA1FD108DCBC1257967003C89E1/\\$file/MCI\\_ISRAEL.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/6C78EFA1FD108DCBC1257967003C89E1/$file/MCI_ISRAEL.pdf) (accessed April 9, 2012).

<sup>67</sup> Israel Ministry of Foreign Affairs, “The Operation in Gaza: Factual and Legal Aspects,” July 2009, <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2Do-017675DAFEF7/o/GazaOperationwLinks.pdf> (accessed March 11, 2012), p. 147. This report added that Israel also used small numbers of exploding munitions containing white phosphorus in Gaza for marking and signaling. It said that Israel observed the rules of Protocol III when using these weapons even though Israel is not a party to Protocol III. Ibid., p. 146.

Besides taking note of Japan's point,<sup>68</sup> the United States made clear that it does not support revisiting Protocol III. It stated, "As far as discussions related to Protocol III or the use of white phosphorus, we do not believe it is necessary or appropriate to reopen existing protocols that already have significant humanitarian value."<sup>69</sup> This statement echoes previous ones the United States has made in other contexts.<sup>70</sup> The US Department of Defense has further explained that it does not consider white phosphorus to be an incendiary weapon under the definition of Protocol III and has argued that it can legally use white phosphorus munitions even for antipersonnel purposes.<sup>71</sup>

At the Fourth Review Conference, the United States also participated in a brief discussion of the reservation it made to Protocol III upon consenting to be bound in 2009. This reservation, widely objected to by other states parties, states:

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.<sup>72</sup>

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<sup>68</sup> Statement of the United States, Fourth Review Conference of States Parties to the CCW, Geneva, November 17, 2011, notes by Women's International League for Peace and Freedom.

<sup>69</sup> Statement of Phillip Spector, Head of US Delegation, Fourth Review Conference of States Parties to the CCW, Geneva, November 15, 2011, [http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/09734904BF0CB2B9C125796700529405/\\$file/MCI\\_UnitedStatesofAmerica.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/09734904BF0CB2B9C125796700529405/$file/MCI_UnitedStatesofAmerica.pdf) (accessed April 9, 2012).

<sup>70</sup> Jeff Abramson, "Cluster Negotiations Again Extended," *Arms Control Today*, January-February 2011, [http://www.armscontrol.org/act/2011\\_01-02/Cluster](http://www.armscontrol.org/act/2011_01-02/Cluster) (accessed March 11, 2012).

<sup>71</sup> US Department of Defense Answers to Questions from Senator Leahy, enclosure 2, p. 5 (facsimile to Human Rights Watch, June 12, 2009).

<sup>72</sup> Reservation of the United States on Consent to Be Bound by Protocol III, 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), January 21, 2009, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-2&chapter=26&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en#EndDec) (accessed March 17, 2012).

The United States declared that it “took this reservation to reduce the risk to civilians.”<sup>73</sup> In discussions of the Review Conference’s Final Document, however, other states parties proposed including language about the need for reservations to be consistent with the purpose of a protocol under the Protocol III heading, which was a thinly disguised critique of the US reservation.<sup>74</sup> Although the United States successfully had the sentence moved to a more general part of the Final Document, where it became a generic statement not tied to any particular protocol, a version of the language did appear in the final text.<sup>75</sup>

This language about reservations was inspired by the opposition to the US reservation. Seventeen of the 107 states parties to Protocol III have filed objections to the reservation, arguing it goes against the object and purpose of Protocol III: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and the United Kingdom.<sup>76</sup> Belgium, for example, wrote that this reservation could “negate the specific object and scope of those provisions, thus leaving the Protocol devoid of any useful effect.”<sup>77</sup> Sweden underlined that the “duty to take feasible precautions does not remove the obligation to ensure that specific treaty

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<sup>73</sup> Statement of the United States, November 17, 2011.

<sup>74</sup> The proposed language read, “The Conference further notes ... the need to ensure that reservations to this Protocol are in accordance with the objectives and purpose of the Convention.” CCW Fourth Review Conference Draft Final Document, CCW/CONF.IV/CRP.1, Geneva, November 14, 2011, p. 9.

<sup>75</sup> The final language in the preamble to the review of the convention reads, “The Conference ... recalls the basic principle that reservations to the Convention or its Protocols must be in accordance with the object and purpose of the Convention or its Protocols, respectively.” CCW Fourth Review Conference Final Document, p. 6.

<sup>76</sup> Denmark and the United Kingdom welcomed a narrow definition of the reservation that would not defeat the purpose of the protocol. This interpretation would allow the use of incendiary weapons to destroy counter-proliferation targets, such as biological weapons facilities requiring high heat to eliminate biotoxins. Objections of Denmark and the United Kingdom, 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), February 4, 2010, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-2&chapter=26&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en#EndDec) (accessed April 12, 2012).

<sup>77</sup> Objection of Belgium, 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), February 2, 2010, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-2&chapter=26&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&lang=en#EndDec) (accessed April 10, 2012).

obligations are fulfilled.”<sup>78</sup> Furthermore, France considered that “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.”<sup>79</sup>

The controversy provoked by the United States reservation underscores that it is the position of many states that incendiary weapons should be strictly regulated to fulfill the ultimate goal of Protocol III, the protection of civilians and the minimization of humanitarian harm caused by incendiary weapons.

#### IV. Conclusion

States parties to the CCW should take both short-term and long-term steps to alleviate the concerns articulated by states and to minimize the dangers posed by ongoing use, stockpiling, and production of incendiary weapons. In the immediate future, following the lead of the Review Conference’s Final Document statement about further discussions, CCW states parties should adopt at the November 2012 Meeting of States Parties a mandate to establish a Group of Governmental Experts on Protocol III. That discussion mandate should then lead to a mandate to negotiate amendments to the flawed protocol.

A complete ban would ultimately provide the strongest protections for civilians. If that is not possible at this point, states parties should at least:

1. Adopt an effects-based definition of incendiary weapons that encompasses multi-purpose munitions, based on their substantial incendiary effects and not the purpose for which they are primarily designed, and
2. Prohibit the use of all incendiary weapons within concentrations of civilians under all circumstances, regardless of the means of launching the weapons. Air-dropped attacks are already prohibited, but surface-launched ones should be absolutely proscribed as well.

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<sup>78</sup> Objection of Sweden, 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), February 2, 2010, <http://disarmament.un.org/treaties/a/ccwc/sweden/rat/un> (accessed March 30, 2012).

<sup>79</sup> Objection of France, 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), February 2, 2010, <http://disarmament.un.org/treaties/a/ccwc/france/rat/un> (accessed March 30, 2012).

States could also establish a presumption that the use of incendiary weapons outside of civilian concentrations is disproportionate and thus illegal except where states can show that expected military advantage substantially outweighs risk to civilians. States should further consider a prohibition on the use of incendiary weapons as antipersonnel weapons, even if they are targeted at military personnel.

Thirty years ago, the use of napalm during the Vietnam War was the trigger to negotiate and adopt Protocol III. Today, white phosphorus may serve as the impetus to revisit the standards of this protocol. Nevertheless, the end goal of this process should not be simply to classify white phosphorus as an incendiary weapon. Instead states should adopt a broader definition of incendiary weapons and more coherent restrictions on their use in order effectively to regulate new incendiary technology and related targeting methods that could threaten civilians in the future.