DISCUSSION PAPER #2
(CCW/AP.II/GX/2010/2*)

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reports by High Contracting parties according to paragraph 4 of article 13 of Amended
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LEGAL POSSIBILITY AND FEASIBILITY OF TERMINATING
CCW PROTOCOL II

Food-for-Thought Paper

MANDATE

1. Pursuant to the Final Document of the Eleventh Conference of High Contracting Parties to
Amended Protocol II “[...] the Group of Experts shall consider the legal possibility and the
feasibility of terminating the original CCW Protocol II.”

RATIONALE

2. CCW Protocol II failed to prevent the disastrous humanitarian crisis faced by the
international community in the early 1990s which was provoked by the worldwide use of
antipersonnel landmines. Already at that time it was widely recognized that “[...] Protocol II
has serious shortcomings as it stands and it is clear that in order to try to find an effective way
of improving the situation it is essential to consider much firmer measures [...]” Against this
background urgent negotiations had taken place and culminated in the adoption of Amended
Protocol II* (AP.II) and – consequently - the Mine Ban Treaty.4

3. Today Protocol II has little (if any) humanitarian, legal, military, or political logic and is
superseded by the higher international standards. However, it creates confusion, in particular,
among the States not parties to the Convention which are often perplexed by the complicated
structure of the CCW with its amended Article 1, five annexed protocols, one of which was
also amended. For instance, three of the High Contracting Parties to Protocol II which have
not yet consented to be bound by Amended Protocol II have ratified the former after the entry
into force of AP.II (3 December 1998).

* Note: This is not an official UN document and the symbol is used for reference purposes only!
II. The military and humanitarian perspectives concerning the amendment of Protocol II”, April 1994,
Background document prepared by ICRC at the request of the GGE established to prepare the First CCW
Review Conference.
3 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3
May 1996.
4 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and
their Destruction.
LEGAL BACKGROUND

4. As at 31 March 2010, Protocol II has 92 States parties. Amended Protocol II has 93 States parties. There are currently 12 States that are parties to Protocol II but have not yet consented to be bound by Amended Protocol II, as follows: Cuba, Djibouti, Lao PDR, Lesotho, Mauritius, Mexico, Mongolia, Montenegro, Serbia, Togo, Uganda, and Uzbekistan. Any decision on the termination of Protocol II has to be taken by all the 92 High Contracting Parties to Protocol II, although the individual parties should take into account their own constitutional requirements with respect to the termination of a treaty.

5. In accordance with Article 42 (2) of the 1969 Vienna Convention on the Law of Treaties (VCLT) “[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.”

6. Pursuant to Article 54 of VCLT:

“The termination of a treaty or the withdrawal of a party may take place:
(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.”

7. Furthermore, Article 59 of the 1969 Vienna Convention on the Law of Treaties stipulates as follows:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.”

8. A specificity of the CCW is that pursuant to Article 4 (3) of the Convention a condition sine qua non for a State to become a party to this treaty is to notify the Depository of its consent to be bound by at least two of the protocols annexed to it. It is, therefore, imperative that in the case of an eventual termination of Protocol II no State falls below consenting to be bound by “any two or more of these Protocols”. The following two observations should be noted in this context:

(a) currently, all the 12 High Contracting Parties to Protocol II that have not yet consented to be bound by Amended Protocol II are parties to three or more CCW protocols hence none of them will fall below the two-protocol benchmark in the case of the eventual termination of Protocol II; and

(b) there are only three CCW High Contracting Parties which have consented to be bound by the minimum of two CCW protocols: Benin, Gabon, and Monaco. None of them are party to Protocol II hence running the risk of falling below the two-protocol minimal limit in the case of an eventual termination of Protocol II.
TERMINATION IN CONFORMITY WITH THE PROVISIONS OF THE TREATY (Article 54 (a) of VCLT)

9. The Convention on Certain Conventional Weapons contains a provision on denunciation of the Convention or its protocols by individual High Contracting Parties: pursuant to Article 9 (1) of the CCW “any High Contracting Party may denounce this Convention or any of its annexed Protocols by so notifying the Depositary”.

10. However, the Convention, as well as Protocol II and Amended Protocol II, are silent as to the possibility of terminating this treaty or its protocols completely for all High Contracting Parties. This would have been an easier option during the negotiation of AP.II if relevant language terminating Protocol II had been included before adoption.

11. The denunciation provision of the Convention (Article 9) could be invoked but this would be a rather cumbersome and lengthy process. Firstly, all States would need to agree to denounce the original Protocol II and would then need to deposit instruments of denunciation with the Depositary. The date of effect of the denunciation, however, affects only the denouncing State. As such, the treaty would only be terminated once the denunciations of all 92 Parties to the unamended Protocol II would have been deposited and would have taken effect, in accordance with Article 9. In addition, since there are 12 States which are not yet party to Amended Protocol II, it would appear that the overall treaty framework would be weakened if these States were to denounce Protocol II without consenting to be bound by the amended Protocol II.

TERMINATION BY UNANIMOUS CONSENT OF THE STATES PARTIES
(Article 54 (b) of VCLT)

12. As stated in paragraph 4 above, each State will have to take into account its own constitutional requirements to terminate a treaty. From an international law perspective, however, it is always possible for all the parties to a treaty to agree together to put an end to it provided that there is a consent of all parties to the treaty to terminate it. The parties are also free to agree to terminate just one part or different parts of a treaty.

13. The parties may also choose the form of their consent for the termination of the treaty. On this last point the International Law Commission, in its commentaries on the provision of Art.54 (b) of VCLT, did not accept that the civil law theory of the “acte contraire” (a rule can be altered only by a rule of the same legal nature) applied. Although it is desirable that the parties’ consent is formalized in writing, the agreement of the parties does not have to be in the same form as the treaty and the States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty.5

14. Article 54(b) of VCLT also imposes the precondition that the High Contracting Parties must consult with the contracting States (e.g., those states which have consented to be bound (deposited their instruments with the Depositary), but for which Protocol II is not yet in force) before taking action.

15. The decision and the parties' consent to terminate could be made at a special meeting of the High Contracting Parties to Protocol II, e.g. in the margins of the 2011 CCW Fourth Review Conference, as long as the decision is unanimous and the record of the meeting shows this. A date of effect of the termination shall also be agreed upon by the parties and included in the decision.

16. Against this background, the parties could adopt a very simple instrument (protocol, arrangement, memorandum of understanding, etc.) terminating the original Protocol II using a simplified procedure that the States would need to agree to. Basically, the High Contracting parties would have to adopt such an instrument at a meeting by consensus. The instrument would include final clauses providing for a simplified procedure, i.e., the adopted text of such a protocol would be circulated by the Depositary to all States concerned and unless objections are received within a specified timeframe (e.g., 6 months), the instrument would enter into force for all 92 States at the same time.

17. Under this option, the instrument would also need to specify a date of termination, which would be, most likely, the date of entry into force of the protocol. As in all other options, all of the States concerned shall remain bound by at least three CCW Protocols. The added value of this option will be that not all of the States would need to be present at the moment of the decision, but they would need to be in agreement with the adoption of such an instrument otherwise such a State could object, which would kill the instrument.

**TERMINATION BY CONCLUSION OF SUBSEQUENT TREATY**
(Article 59 (1) of VCLT)

18. The amendment to Protocol II was not aimed at creating an alternative treaty, but at “strengthening restrictions on the use of anti-personnel mines and, in particular, those without neutralizing or self-destruction mechanisms; considering the establishment of a verification system for the provisions of this protocol; studying opportunities for broadening the scope of this Protocol to cover armed conflicts that are not of an international character [...].”

Regrettably, Amended Protocol II does not contain express abrogation of Protocol II and it may be difficult to satisfy the requirements of article 59 of the VCLT regarding termination of a treaty by conclusion of a later treaty relating to the same subject matter. Still, the whole matter which formed the subject of Protocol II is governed by Amended Protocol II and the option of the tacit abrogation could, therefore, be considered.

19. The termination of Protocol II by using AP.II as a subsequent agreement that would replace the original protocol requires, however, that the parties to both treaties are identical or that the parties to AP.II include all High Contracting Parties to Protocol II. Once the Amended Protocol II enters into force for those States, the original Protocol could arguably be considered terminated. At this stage, as indicated in paragraph 4 above, there are twelve States that are parties to Protocol II, but have not consented to be bound by Amended Protocol II.

20. Whatever option is used for the eventual abrogation of Protocol II, this will be registered with the Depositary who will notify all States on the termination of the treaty.

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