Section B
International Humanitarian Law and Today's Law of Armed Conflict

Enforcement of International Humanitarian Law in the Situation of Non-International Armed Conflict

(Excerpts of oral presentation)

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With the end of the trials conducted in the Nuremberg International Military Tribunal and the Far-East International Military Tribunal and those under Control Council Order No.10 following the Second World War, there had been no internationally validated infrastructure for quite a long period of time resulting from the unwillingness of the international community to enforce application of international humanitarian law. Despite the agreement by States to create universal jurisdiction over the grave breaches of Geneva Conventions of 1949, there had been very limited use of international humanitarian law by national criminal courts for the prosecution of war criminals and for the protection of war victims.

The situation has now greatly changed. With the trials conducted in the *ad hoc* War Crimes tribunals for the Former-Yugoslavia (the ICTY) and for Rwanda (the ICTR) since 1993 and 1994 respectively, and with the establishment of International Criminal Court on 1 July 2002, the crimes under international humanitarian law are considered today as "core crimes" under international law by the international community and, with conviction and punishment by the ICTY and the ICTR of those who committed war crimes, the rules of humanitarian law have been turned from "soft law" into "hard law".

It is no doubt that the judgments and rulings of both the ICTY and the ICTR are very important to explain the current development of and challenges to international humanitarian law. Therefore, the conference

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to be held in Xi'an will be taken as an opportunity to examine some of these two *ad hoc* tribunals' ruling to see what the development and challenges are. The main issues to be reviewed are as follows:
Status of civilians
Military objectives
Measures taken by precaution
Commander responsibility
Non-international armed conflicts
Compliance with international humanitarian law

If it is clear under international humanitarian law that civilians enjoy immunity from attack, it might not be that clear to determine the status and treatment of those civilians who have directly participated in hostilities and have fallen into enemy hands. Some may take the position that such civilians are outside any protection provided by international humanitarian law. Some may argue that they belong to "unprivileged combatants" that are covered only by Common Article 3. Others may believe that the civilians who have taken a direct part in hostilities and meet the nationality criteria provided for in Geneva Convention should be protected while those civilians who do not meet the nationality criteria must be protected, at a minimum protected by Common Article 3 of Geneva Conventions and Article 75 of Protocol I.

Then, what position did the ICTY and the ICTR take on that issue? One of IHL basic principles provides that only military objectives may be directly attacked during armed conflicts. However, Article 52 of Protocol I only contains a general definition rather than a specific list of military objects. Therefore, with the involvement of the political, economic, social or psychological elements and their importance in the armed conflicts, whether an object is a military objective may become speculative and be subject to various interpretation. In this regard, it is interesting to see how the Judges in the Ad hoc tribunals considered this issue.

Furthermore, it would be also of assistance to read the views expressed by both the ICTY and the ICTR over issues such as "the measures taken as precaution" and "how to apply commander responsibility" in the situation of armed conflicts. Besides, one of the factors the international criminal jurisprudence has contributed

to the developments of humanitarian law is about non-international armed conflict. If it is true that the scope and number of treaty rules of international humanitarian law applicable to non-international armed conflicts are far less extensive than those governing international armed conflicts, as internal armed conflicts are covered only by common Article 3 of Geneva Conventions of 1949, by Protocol II of 1977 and by customary international law.

However, as the result of the development of humanitarian law and the rulings in trials by both the International Criminal Tribunal for the Former Yugoslavia and that for Rwanda, it has now become clear that many rules applicable in international armed conflicts have also become applicable in non-international armed conflict as part of international customary law. These rules include, but not limited to, the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks, the proportionality, the duty to take precautions in the military attack and the conduct of hostilities. These rules are all part of customary international law, regardless of the type of armed conflict involved.

Of course, since the rulings of the ICTY and the ICTR are to be examined in relation to the application of international humanitarian law, the issue of "enforcement" will be naturally examined as well in order to demonstrate how international humanitarian law has been turned from "soft law" or "moral law", as it was said for a long time, into "hard law" or "law with teeth".

IHL and Management of Armed Conflicts
(Summary of oral presentation)

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International Humanitarian Law (IHL) provides legal and non-political standards by which to manage armed conflicts. Until the coming of IHL, armed conflicts were judged solely by political or military standards, and often entailed a highly ideological debate on the *jus ad bellum* or the causes of armed conflict. With IHL, it has become possible to shift to legal standards, and to limit the debate to the *jus in bello*, or the conduct of armed conflict. IHL standards do not aim to establish which side has the superior cause. Instead, they ensure, if war were inevitable, that both sides minimize the human costs of war and respect human dignity.

IHL provides neutral international standards by which to manage armed conflicts.

Without IHL, armed conflicts can be governed solely by bilateral commitments between the parties to a conflict.

IHL provides neutral standards applicable to all combatants, and focusing on the duty of all combatants, even while they aim to gain military advantage, to limit human costs and respect human dignity.
IHL provides international standards applicable to both parties to the armed conflict, and enables international bodies to monitor the compliance of both parties.

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IHL enables the parties to an armed conflict to seek the assistance of neutral international bodies to ensure compliance with IHL standards.
IHL provides standards to determine the allowable use of armed force in non-international armed conflict, and recognizes the levels of hostilities from mere internal disturbances, to internal armed conflict, to international armed conflict.

IHL recognizes the principle of state sovereignty, and thus makes a distinction between international and non-international armed conflict. This distinction is reflected in the 1949 Geneva Conventions and the two Additional Protocols, which provide the minimum standards of humane treatment in non-international armed conflict, respectively, in Common Article 3 of the Conventions and in Protocol II.

IHL further makes the distinction between non-international armed conflicts, which are governed by IHL, and mere "internal disturbances and tensions" which are not considered armed conflicts. The latter are not governed by IHL, but remain subject of human rights regulations and domestic constitutional rights and processes.

IHL provides rules applicable to both parties to a conflict. Whereas it is often argued that U.N. human rights conventions bind only states and cannot apply to the armed insurgents who are thus free to violate these conventions, IHL rules can squarely apply to both the government forces and the armed insurgents.

IHL provides standards that can be applied even by national authorities to ensure human dignity. These national commissions can be empowered to inquire into compliance by both government and insurgent forces.

IHL enables post-conflict mechanisms of justice, and reminds both armed parties that those who commit atrocities will face individual criminal liability even after hostilities have ceased.
Recent events show that, those who commit atrocities can be made to face criminal charges for committing grave violations of IHL.
These criminal trials can be conducted by international as well as domestic tribunals and, indeed, by the principle of universal jurisdiction, those guilty of war crimes, genocide and crimes against

humanity can be tried in any domestic court provided that country's laws provides for universal jurisdiction.

Finally, since the criminal liability is personal and individual, it attaches to the individual. Conversely, it does not matter that the individual belongs to the victorious party. All individual officers and combatants can be held responsible, whether they win or lose the armed conflict, provided it is proved that they committed the prohibited acts.

Conduct of Hostilities and Relevance of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977 Additional Protocol I)

Wing Commander Ian Henderson[1]
The Defence Legal Service
Australian Defence Force

Good morning. It is with great pleasure that I accepted the kind invitation from the PLA and ICRC to deliver a presentation today on the application of Additional Protocol I during hostilities.

Introduction

My starting point will be the assumption that the importance of compliance with the Law of Armed Conflict (the LOAC) does not need to be restated. In this respect, I have been fortunate enough to view the VCD produced jointly by the PLA and ICRC on the LOAC. Rather, my focus will be on certain requirements of Additional Protocol I, how to apply these requirements during hostilities, and, if I may be so bold, the military benefits that arise from compliance.

As military officers, we are all very aware that a successful commander, an effective platoon leader and a sole pilot in a fighter aircraft share many traits in common. However, one of the most important traits is the ability to make decisions in the heat of battle. To be successful, the soldier, sailor or airman must take imperfect information, analyse that information, make a decision that may

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affect not only their own lives but also those of their colleagues and subordinates, and then implement that decision. In addition to this pressure, they must usually make those more quickly than the enemy, to keep inside the enemy's OODA loop (Observe, Orient, Decide, Act).

One of my aims today is to show how Additional Protocol I is a benefit and not a hindrance in this process. While the LOAC in general and the majority of Additional Protocol I is applicable across all three combat environments, due to my own background, the scenario I will often have in mind is how in modern warfare a F/A-18 Hornet pilot in a single seat jet must have the training and support to ensure accurate targeting and avoidance of injury to non-combatants while flying at over 500 knots and being tracked and shot at by anti-aircraft fire and surface to air missiles. Or when flying in a hostile air environment where the enemy has beyond visual range engagement and missile capability, the same pilot must nonetheless have the discipline to ask questions first and then shoot later, so as to be sure to identify a threat from a civilian aircraft.

In the heat of battle and when subject to the fog of war, the decisions made must be clear and unambiguous. There is no room for legal nicety and seeing every decision in shades of grey. Within the context of the application of the LOAC, neither of these outcomes is desirable or beneficial. Of course, this is not to say that the application of Additional Protocol I is such that everyone will always come to the same answer based on a set of facts. However, I do believe that Additional Protocol I is capable of clear interpretation and can be made both understandable and useable by troops and commanders, and dare I say it, even fast jet pilots.

History

Prior to World War I, Admiral Jackie Fisher, the First Sea Lord of the British Admiralty, made a famous proclamation on war fighting. He stated that 'the essence of war is violence. Moderation in war is imbecility.' He is further credited with having advised that

If you rub it in, both at home and abroad, that you are ready for instant war, with every unit of your strength in the first line and waiting to be first in, and hit your enemy in the belly and kick him when he is down, and boil your prisoners in oil (if you take any), and torture his women

and children, then people will keep clear of you.

This position is so inimical with current thought as to be difficult to credit as a serious proclamation. And yet this assertion was made less than 100 years ago (and just prior to the First World War) by one of the most powerful leaders of one of then most powerful militaries in the world.

So, what is the position today? While it is the military objective of all commanders to win in battle, there must be, and are, limits to the means and methods that may be used. Commanders must be aware of their legal obligation to prevent unnecessary injury and suffering and to alleviate as much as possible the calamities of war. The LOAC seeks to not only regulate the conduct of nations but also govern the behaviour and conduct of individual combatants and noncombatants during times of armed conflict. Commanders are also made responsible for the actions of their subordinates and at all levels bear responsibility for ensuring that forces under their control comply with the LOAC. Specifically, a commander will be held accountable if an order is given to a subordinate to commit a breach of the LOAC or knows that a breach is occurring and fails to intervene. A commander is also liable for prosecution if the commander fails to act to prevent a breach of the LOAC of which the commander should have known.

What I would now like to do is briefly outline some of the aspects of Additional Protocol I that deal with the specific issue of targeting, or the application of force against an individual or thing. After doing that, I would then like to discuss how the Australian Defence Force ensures compliance with these Additional Protocol I obligations.

Outline of Additional Protocol I

As Additional Protocol I brings together issues from both the Hague and Geneva branches of the LOAC, the scope of Additional Protocol I is quite broad. Today, however, I will be focusing on only certain aspects of Additional Protocol I, namely those parts of Additional Protocol I dealing with:

Combatants, non-combatants and civilians
Military objectives
Protected objects; and
Proportionality.

Combatants, non-combatants and civilians

When involved in attacking the enemy or any other use of force, a most important consideration is who is it lawful to attack? Or put in legal terms, against who can lethal force be used in a situation where they are not posing a threat of harm to you – and therefore the concept of self-defence does not apply?

The short answer provided by Additional Protocol I is that it is lawful to attack:

Combatants, and

Civilians taking a direct part in hostilities.

I should add that Additional Protocol I does not clearly state that combatants are lawful targets, but it is clear from the interpretation of Additional Protocol I as a whole, the LOAC generally and common sense that combatants can be targeted. Combatants are defined to mean members of the armed forces, with the exception of medical and religious personnel. Accordingly, all other persons are non-combatants, and therefore cannot be attacked unless they lose protection from attack. In the case of medical and religious personnel, by not complying with their obligations under the LOAC, and for civilians, for such time as they take a direct part in hostilities.

I might note that the term non-combatant is, for me at least, a confusing term. Some people use it to mean just medical and religious personnel of the armed forces, such personnel being prohibited from participating in combat activities by the LOAC. Others use it to mean any members of the armed forces who are not combatants, a usage which is consistent with article 3 of the 1907 *Hague Regulations Respecting the Laws and Customs of War on Land,* which states that 'The armed forces of the belligerent parties may consist of combatants and non-combatants'. Lastly, the term is also often used to include non-combatant members of the armed forces **and** civilians, with this final use being consistent with, for example, article 19 of the Lieber Code of 1863, which states that 'Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences.' I will use the term to mean any person, be they military or civilian, who is not a combatant.

As set out above while the law can be clearly stated, a mere repetition

of the above in the context of a particular armed conflict would not be of the greatest assistance to an operational or tactical commander. Rather, the better idea is for the lawyers, intelligence officers and strategic staff to sit down and prepare a list of organizations from the enemy State that meet the definition of a combatant. To use my own country as an example, the Royal Australian Air Force would be listed as a combatant organization, whereas the police force of New South Wales would not be, notwithstanding the fact that they wear a uniform and carry weapons. Because of my own knowledge is of its roles and functions, I can suggest that the Australian Security and Intelligence Organisation (ASIO) would also not be listed as combatant organization, but of course in a conflict, this is initially a decision for the opposing armed force to make, based on the information available to it at the time.

Military objectives

When considering whether an object can be targeted, article 52(2) of Additional Protocol I provides the well known test for military objectives of:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage

Whilst some people may regret that a list of military objectives was not provided, as, for instance, was envisaged by the *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in time of War* prepared by the ICRC in 1956, it is my view that the solution adopted in Additional Protocol I is preferable. As a result of article 52(2) of Additional Protocol I, there is no need to determine whether a particular object falls into some predetermined class. Rather, any given object is assessed against simple criteria, based on the information known to the attacker at the time of the assessment. Accordingly, there is no need to determine whether an electrical energy generating station or a television broadcast station falls within a class of objects that recently have been termed 'dual use'. The term dual use appears in neither Additional Protocol I nor the LOAC generally. Rather, all that is required is to see if the **particular** object, as opposed to class

of objects, falls within the definition provided by article 52(2) of Additional Protocol I.

Special protections of certain objects

As we have just seen, Additional Protocol I prohibits attacks on objects that are not military objectives. But, Additional Protocol I goes further than this. In special cases, certain objects that have some military value are also protected from attack in particular circumstances. In particular, objects indispensable to the survival of the civilian population, those cultural objects and places of worship which constitute the cultural and spiritual heritage of all people, the natural environment, and works and installations containing dangerous forces (namely dams, dykes, and nuclear electrical generating stations).

While identifying symbols are provided for in the case of cultural and spiritual property and works and installations containing dangerous forces, like medical facilities, the protection of these objects is not linked to the use of the symbol. In addition, no symbol exists for either objects indispensable to the survival of the civilian population or for the natural environment. Accordingly, care needs to be taken when tasking Information, Surveillance, and Reconnaissance (ISR) capabilities, and training the personnel involved in these capabilities, to be aware of these issues.

Proportionality

Of course, even once a person or object is determined to be a legitimate object of attack, there is still a requirement to take all feasible precautions in the choice of means and methods of attack to avoid, and in any even to minimize, incidental loss or civilian life, injury to civilians and damage to civilian objects, which, for ease of expression, I shall refer to as collateral damage. In addition, once this care has been taken, a commander must still refrain from deciding to launch any attack, which may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated.

Accordingly, there is a requirement to:

Plan an attack in such a way as to avoid as much as feasible CD;

Having so planned the attack, to assess the expected CD from the attack;

Assess the concrete and direct military advantage that is anticipated to be achieved by the attack; and
Make an assessment whether the expected CD is excessive (or disproportionate) to the military advantage anticipated.

Practical means of compliance with Additional Protocol I
So, what does the Australian Defence Force do to ensure compliance? I will use the recent operation against Iraq as an example. During the brief period of major combat operation against Iraq, Australia's forces operated over a wide area as part of a Coalition with United States and United Kingdom forces. Our contingent of approximately 2000 personnel from the Navy, Army, and Air Force performed their roles professionally and made significant contributions to the success of the operation.

The major RAAF contribution to offensive Coalition operation in Iraq was provided by 14 F/A-18 Hornets from 75 Squadron RAAF. Their initial role was to protect high-value Coalition aircraft such as air-to-air refuellers and intelligence collection aircraft. Such aircraft are important 'force multipliers' and their loss would have had a significant impact. Their protection remained a priority throughout the operation, but the evolving air situation rapidly led to other tasks that took full advantage of the versatility of the Hornet, particularly in the form of strike missions against planned targets like military headquarters, as well as interdiction and air support missions against fielded forces (e.g. tanks and artillery pieces). Also, as RAAF Hornets can carry bombs while performing an air-to-air defence role with missiles, RAAF fighters would accept new tasks while airborne and engage time-critical targets such the regime leadership or surface to air missiles.

RAAF and Special Forces officers were placed in the Combined Air Operations Centre to ensure that targets assigned to Australian Defence Force units were appropriate and lawful. Australian Commanders had Australian Defence Force legal officers to advise them on the LOAC during the process of allocating targets. In the respect, the basic principles of the LOAC that must be considered when reviewing potential targets are:
Military necessity,

Unnecessary suffering, and
Proportionality.

The three principles must be considered together in that no single principle can be considered in isolation from the other two. When Australia received targets on the US–developed strike lists, the targets were checked against Australia's own legal obligations. Several target categories were subject to Australian Ministerial approval before they could be engaged. In order to ensure that any combat action complies with the LOAC, there are whole ranges of matters that must be considered in the targeting process but are also relevant to the planning of any type of military attack. These factors will influence the choice of axes, objects of attack, and the siting of defences, and include:
Clear identification of persons, objects or locations to be attacked to ensure as little risk as possible to protected persons, objects and locations, consistent with military advantage;
A concrete and direct military advantage in any proposed course of action;
The least possible collateral damage; and
Prohibitions on the use of weapons, projectiles or other means and methods of warfare that cause superfluous injury or unnecessary suffering.

All of these legal issues, as well as other operational issues, were considered before a target was approved for attack.
Target selection is based on current intelligence and information. However, personnel executing an attack, aircrew for example, have a special and personal responsibility under Additional Protocol I to ensure compliance with the LOAC if they acquire information that was not available at the planning stage. For example, aircrew may be ordered to strike what the mission planner believes to be a command and control centre. If, in the course of the mission, the command and control centre is displaying an unbriefed symbol of protection, e.g. Red Cross symbol, then aircrew must refrain from completing their attack. The Red Cross symbol indicates the facility is a protected installation and is immune from attack unless intelligence, or higher authority, determines that the facility has lost its protected status because the emblem is being misused. During Operation FALCONER (the Australian component of the combat operations to disarm Iraq) Australian pilots could, and on occasion did, abort missions to avoid

the risk of unintended casualties if their target could not be clearly identified from the air. These arrangements, complemented by the training and professionalism of Australian Defence Force personnel, worked very smoothly.

Additional Protocol I and coalition operations

To facilitate the task of compliance with the LOAC obligations, and particularly when operating in a coalition environment, the Australian Defence force played very close consideration to the obligations imposed upon planning and other staff by Additional Protocol I. While some of the obligations of Additional Protocol I concerning protection of non-combatants rests primarily on civilian authorities and the opposing military forces who have control over the area being targeted, commanders are responsible to protect those civilians under their control, including to the extent feasible those who may be affected by any attacks that they plan or carry out. To assist commanders with compliance in the targeting process, a targeting directive will be issued for operations by the Australian Chief of the Defence Force. Amongst other things such as defining classes of legitimate targets and providing a process or methodology for determining possible unintended injury to civilians or damage to their property, the targeting directive will include a number of steps outlining the requirements of the LOAC that apply to targeting decisions. These steps include:

Locating and observing the potential target;

Assessing the target as a valid military objective and other wise unprotected by the LOAC;

Taking all necessary means to minimize unintended injury to civilians or damage to their property;

Assessing whether any expected unintended injury to civilians or damage to their property is proportional;

Releasing a weapon to achieve the best possible chance of impacting the selected aim point commensurate with the tactical situation; and

Canceling or suspending the attack should it become apparent that the assessment made under steps b and d above are no longer valid.

This final step can occur at anytime, and can be undertaken either by planning staff, a commander, or the pilot of the strike aircraft. This process, and the multi-role capabilities of the RAAF's F/A-18 Hornets were demonstrated on 20 March 2003 as a Hornet involved in escorting high-value aircraft was asked to strike a ground target. Air planning staff determined the priority of the task and analysed the

potential for collateral damage. After confirming that the proposed strike was consistent with the LOAC and the Australian Rules of Engagement, the deployed Australian Air Component Commander approved the attack. Minutes later, the first bomb dropped by an RAAF aircraft in conflict since the Vietnam War was released. The whole process took less than 30 minutes. An initial bomb damage assessment was provided to Australian headquarters just 10 minutes after the target had been engaged. RAAF Hornets were re-tasked in a similar manner on a number of occasions.

Weapons

Weapons, of course, also play an important part in complying with the LOAC. While other Coalition members used both precision guided munitions and unguided bombs, RAAF Hornets used only precision-guided weapons – either the 500-pound Guided Bomb Unit 12 or 2000-pound Guided Bomb Unit 10. This does not mean that the existence of precision-guided weapons in a military inventory requires that they must necessarily be used in preference to conventional weapons. In many cases, conventional weapons may be used to bomb legitimate military targets without violating the LOAC requirements. It is a command decision as to which weapon to use. And while May factors are relevant to the choice of weapon, this decision will be guided by the basic principles of the LOAC: military necessity, unnecessary suffering and proportionality.

Military benefits of Additional Protocol I

There are many benefits to be had form compliance with Additional Protocol I. Often the focus is on the strategic benefits. To these, I would like to suggest there are tangible benefits at the operational and tactical level form compliance with Additional Protocol I. In particular, I suggest that compliance has the following benefits:

At the strategic level, compliance affects international standing and approval, coalition cohesion and reciprocity by the enemy. Other well-known benefits of compliance include an easier transition to a long-term peace, lack of negative media coverage and no war crimes tribunals!

At the operational level, compliance leads to a focusing of resources on achieving military goals. Proper compliance with Additional

Protocol I forces the planning staff to consider just what will be the military advantage from attacking a particular target. In my view, this is clearly of benefit to the attacker when compared with the all too possible alternative of merely attacking targets based on their grouping in classes of previous attacked targets like bridges, railways etc.

At the tactical level, compliance ensures that valuable and usually scare assets are being used for worthwhile military goals. It seems to me that a pilot will have greater dedication to the task and more confidence in his or her superiors where the pilot know that the assigned tasks have been carefully and thoroughly considered, rather than just allocated based on assumptions and past practice.

Finally, I suggest that in the heat of battle and fog of war, having the criteria provided by Additional Protocol I against which decisions can be made, and have used exactly the same criteria during both command post exercises and field exercises, will lead to quicker and better decisions than there those same decisions are made in either a legal vacuum, or against much looser and fuzzy criteria as provided by earlier the LOAC treaties and customary international law.

Conclusion

It is now time for me to conclude my presentation. I hope that I have been able to give you not just an overview of Additional Protocol I in modern operations, but also how that compliance is of benefit to the Australian Defence Force, the Australian government, and of course, humanity in its broadest sense.

Weapons and IHL: Recent Developments

Lt. Gen. (ret) Jean Abt[1]
Member of the ICRC

Introduction

According to Laozi, in the Book of the Tao and its Virtue, (5th to 6th centuries BC) *"when the task of the best chiefs is achieved, people say: this was done by us!"*

In 1847, during the internal armed conflict that divided Switzerland in the 19th century, the Swiss General Dufour, who later became the first President of the organisation known today as the International Committee of the Red Cross, refused to use artillery rockets against cities. These were, he argued, indiscriminate weapons and their destructive effect would go beyond what he saw necessary to achieve his aims. Such a method of warfare would give to the war a character of violence that would ruin the cause he was fighting for.

Any advance in science, ever, be it electronics, aviation, nucleonics, electricity, chemistry, has been turned at some point to hostile use against humans, to the detriment of humans. However, in the history of warfare there has been a kind of a line in the sand drawn between legitimate and illegitimate means or methods. This was done in the past primarily by commanding officers on their own initiative, as in the case of General Dufour. Nowadays, international humanitarian law contains basic principles and treaty rules, which govern the choice of weapons, prohibit or restrict the employment of certain weapons, means and methods of warfare. Combatants are prohibited to use

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weapons which are inherently indiscriminate or which are of a nature to inflict suffering greater than that required to take a combatant "out of action". Weapons, which violate the "dictates of the public conscience", may also be prohibited on that basis alone. The use of weapons, which cause widespread, long-term and severe damage to the natural environment, is prohibited.

Today, my General's dilemma would not be about using or renouncing the use of artillery rockets. Ours is an era where the means to deliver munitions in huge numbers and over great distances are widespread. Ours is an era where the advances in the life sciences carry enormous promise for humanity but also pose acute risks to humanity and our environment, if they are inadequately controlled, or employed as a means of warfare, of spreading terror, or otherwise misused.

I would like in the next thirty minutes to refer to one important mechanism provided by Additional Protocol I for the review of weapons, means and methods of warfare: article 36. As well, I would like to refer to three specific areas of weapons with great potential for human suffering for which, respectively, new measures have recently been adopted, are currently under negotiation, or called for. Namely: Explosive remnants of war; Cluster bombs and other sub-ammunitions; and Biotechnology, weapons and humanity

Art 36

The Additional Protocol I to the Geneva Conventions under its article 36 provides for the review of weapons as well as means and methods of warfare. The purpose for such mechanism is not a mere exercise of legality review. Rather its very purpose is humanitarian by ensuring that means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering are not used on the future battlefield. It is on that same basis, that more than 100 years ago, explosive and dum-dum bullets were banned. Or more recently, that pellets, which cannot be detected by x-rays in the body, laser blinding weapons and antipersonnel landmines were prohibited.

Article 36 does not apply only to new weapons. New means or new methods also are to be reviewed. Hence ammunition, such as a bullet, that was previously declared legal may need a new review or evaluation, whenever it is to be used with a new or different delivery

means as was previously foreseen; or whenever it is considered for use in a new or different way, that is against a different target type, than was previously foreseen.

To determine whether the employment of a weapon would in some or all circumstances be prohibited by the Additional Protocol I or some other rule of International Humanitarian Law clearly applies to the study, development, acquisition or adoption of a new weapon, means or method of warfare. Although not explicitly mentioned within the text of the article, it is understood that this obligation extends to the export of such weapons or material. Indeed, High Contracting Parties undertook, according to article one common to the Additional Protocols and the Geneva Conventions, *"to respect and to ensure respect for this Protocol in all circumstances"*.

The scope of application of article 36 is very wide technologywise. I shall limit myself here only to a few instances of newly developed or under development weapons and methods of warfare as mere illustrations. Namely: "dazzlers", laser weapons whose effect would be to only temporarily dazzle rather than permanently blind; *"fuel-air explosives"*, specially when considering the possibility to develop more powerful ones; *"12.7 mm bullets which explode within the human body"* and which use against combattants remain illegal; or so-called "non lethal weapons"

For all these weapons or methods of warfare, as well as for others, a review under article 36 should aim at answering the following questions:

Which are the different treaties and rules to be taken into consideration?

For what reason or what purpose is a new weapon, a new means or method of warfare developed?

What is the military necessity for such a weapon, means or method of warfare?

What is the wounding or killing potential of such a weapon, means or method of warfare ?

What is the wounding or killing mechanism of such a weapon, means or method of warfare ?

What type of wounds should be expected for such a weapon, means or method of warfare ?

How does the invoked military necessity compare with the wounds or suffering that such a weapon, means or method of warfare will cause?

what are the foreseeable consequences for International Humanitarian Law of the proliferation of such a weapon, means or method of warfare ?

The ICRC encourages States to adopt review mechanisms at national level as well as to exchange information at international level on the implementation of article 36. Today only few States have put in place review mechanisms. The ICRC urges therefore all States to take such administrative measures, which will contribute to lessen potential human suffering.

Explosive remnants of war

Recently the 1980 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 was marked by two major developments. First at the 2001 Review Conference Article 1 of the Convention was amended. Through this amendment the scope of the Convention and its protocols is extended to non-international armed conflict. The amendment will enter into force on 18 May 2004, since already twenty States have deposited their ratification instruments. This is an important extension of international humanitarian law ensuring that the protections of the Convention apply to the many non-international armed conflicts, which are so prevalent today. All States that have not yet done so are urged to become parties to this landmark amendment.

The second development in the framework of the 1980 Convention on Certain Conventional Weapons is the adoption of Protocol V on Explosive Remnants of War by the December 2003 Conference of States Parties. The new agreement is the latest development in efforts to eliminate the scourge of unexploded and abandoned ordnance. These rules supplement the ongoing work to end the suffering caused by anti-personnel mines. Together, the initiatives being taken in these two areas are aimed at eradicating one of the most serious threats to civilians in the aftermath of war.

Each year, large numbers of civilians are killed or injured by "explosive remnants of war." These are the unexploded artillery shells, hand grenades, mortars, cluster submunitions, rockets and other explosive ordnance that remain after the end of an armed conflict. Like anti-personnel mines, the presence of these weapons has serious consequences for civilians and their communities as well as for peacekeepers and humanitarian workers even long after the conflict is over. Between 1945 and 1981, for example, the armed forces of Poland

cleared an estimated 88 million pieces of unexploded ordnance left from the Second World War. During that same period an estimated 4,094 civilians were killed and another 8,774 injured as a result of the unexploded ordnance (UXO) left in the national territory. Even today, many European countries continue to clear land contaminated by World War II munitions.

Since the Second World War the vast majority of armed conflicts have occurred in economically less favoured countries lacking the ability to ensure clearance of unexploded ordnance. The same period has witnessed a rapid proliferation of sophisticated weapons and, increasingly, the means to deliver munitions in huge numbers and over great distances. The Indochina wars of the 1950's, 60s and 70's left massive amounts of unexploded ordnance in countries of the region, giving rise to some early attempts to address the problem of "explosive remnants of war" in the context of the United Nations. In Laos alone some 9 million unexploded munitions are estimated to have killed or injured approximately 11,000 persons since 1975.

Based on these different reports, which describe how explosive remnants of war threaten civilian populations long after the end of a conflict, the ICRC submitted a report to the 2001 Review Conference of the 1980 Convention on Certain Conventional Weapons. In this report the ICRC invited States Parties to consider the development of a new legally binding instrument, which would help address, this problem in a more efficient way. Two years later the international community was in a position to adopt Protocol V on Explosive Remnants of War. While certain States would have wished more stringent obligations, it has to be recognized that the core provisions of this new Protocol are clear and provide a detailed roadmap on how the risks caused by ERW can be lessen in a substantive way. It requires each party to an armed conflict to: Clear Explosive Remnants of War in areas under their control after a conflict. Provide technical, material and financial assistance in areas not under their control with a view to facilitating the removal of unexploded or abandoned ordnance left over from their operations. Record information on the explosive ordnance used by their armed forces and share that information with organizations engaged in the clearance of Explosive Remnants of War. Warn civilians of the dangers in specific areas.

The treaty, which will enter into force after 20 States have ratified it, will apply primarily to conflicts that break out thereafter. While the ICRC believes that the treaty establishes vital new norms for future conflicts, it urges governments to give equal priority to clearing existing ERW and to reducing the volume of munitions that fail to explode on impact.

Cluster bombs and other sub munitions

Conflicts of the past twenty years have been accompanied by a steady spread of the problems caused by unexploded munitions and, in particular, of cluster bomb submunitions which can rapidly be delivered by the thousands, tens of thousands or even millions. The list of recent conflicts in which submunitions were used includes Afghanistan, Bosnia-Herzegovina, Eritrea-Ethiopia, the Falkland Islands (Malvinas), the Russian Federation (Chechnya), Serbia-Montenegro (Kosovo) and, the last Gulf Wars. In Iraq the problem of unexploded ordnance that contaminated the country during a long series of armed conflicts, has been exacerbated by munitions, which were fired but failed to explode on impact, as well as by stocks abandoned by the former government, following the most recent war. Of particular concern are the unexploded cluster-bomb and other submunitions found in many parts of the country. These pose a serious risk to civilians and humanitarian aid organizations.

Working in war zones, ICRC witnesses first-hand the humanitarian consequences of unexploded cluster bombs and other munitions. Such weapons kill and injure civilians long after a conflict has ended. They also block the delivery of humanitarian assistance, prevent the cultivation of crops and slow the reconstruction of war-affected areas. As cluster bombs spread their effects over wide areas and can have far-reaching consequences, the ICRC strongly believes that these weapons should not be used against military objectives, which are located in populated areas. In this sense the ICRC will continue to urge governments to address the specific problems caused by cluster bombs and other types of sub munitions, which are only partially dealt with in the new Protocol on Explosive Remnants of War. In the framework of the Group of Governmental Experts Meeting of the 1980 Convention on Certain Conventional Weapons the ICRC continues to promote restrictions on the use of these weapons as an essential means of reducing the civilian casualties they inflict.

Biotechnology, weapons and humanity

Today, advances in the life sciences carry enormous promise for humanity. But these advances will also pose acute risks to humanity and our environment if they are inadequately controlled. They could facilitate the development and use of biological weapons either in armed conflict or as a means to spread terror. The deliberate spread of disease and the ability to change bodily functions without a person's knowledge could become easier, deadlier, cheaper and more difficult to detect. Hereafter a few examples of potential misuse of developments in the field of biotechnology: Known biological warfare agents may be manipulated so as to increase their potential for use as weapons. They could be made more resistant to antibiotics and to environmental factors.

Harmless microbes could be engineered in such a way that they could create toxins causing illness and disease. Well-intentioned research could generate information about new and dangerous organisms. Recently researchers unintentionally created a more dangerous version of the «mouse pox virus» which is similar to smallpox. Alerted by this potential for misuse of new biotechnologies and alarmed by the failure of the 2001 Review Conference of the Biological Weapons Convention to strengthen its implementation mechanisms, the ICRC decided in September2002 to launch a public Appeal on *Biotechnology, Weapons and Humanity.* This is not something the ICRC undertook lightly or often, but there was precedent. In 1918, in the aftermath of a devastating World War in which poison gas was used, the ICRC called for a global ban on chemical weapons in a vigorous public Appeal. This contributed to the achievement of the 1925 Geneva Protocol, which formed the precursor for the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention.

The ICRC's Appeal on *Biotechnology, Weapons and Humanity,* launched 84 years after our first Appeal concerning chemical and biological agents, is not only addressed to political and military authorities, but also to scientific and medical communities, industry and civil society in general. We are convinced that if we want to succeed in protecting humanity from poisoning or from the deliberate spread of disease then all concerned actors in the field of biotechnology will have to take proactively appropriate measures and will have to

work together in order to develop appropriate regulations and codes of conduct.

As part of its Appeal, the ICRC invited States to consider the adoption of a high-level political Declaration on Preventing the Misuse of the Life Sciences for Hostile Purposes. Such a Declaration would reaffirm existing norms of international humanitarian law on biological and chemical weapons, create political awareness of the problem and propose a range of measures which could reduce the potential for biotechnology to be put to hostile use. In general States showed interest for such a declaration, however a large group felt that the timing was not appropriate and urged the ICRC to postpone for the time being such discussions.

In parallel our first contacts with a cross-section of the professional life science community and industry have failed to reassure us that there' s sufficient awareness of existing legal and ethical responsibilities to prevent poison and the deliberate spread of disease, commensurate with these life science advances. In response to this lack of awareness the ICRC is planning to organize national or regional roundtables that could facilitate the awareness–building and the dialogue with scientific, medical, industrial and military circles on how to prevent effectively the hostile use of the life sciences.

For many centuries poisoning and the deliberate spread of disease have been the subject of public abhorrence; they are proscribed in diverse cultures, religions and military traditions. Today a scientific revolution is challenging this proscription. However through concerted actions the risks posed by these scientific developments can be lessen and the advances in biotechnology used for the benefit, and not the detriment, of all humanity.

As a conclusion

How to conclude on this subject? *"There is no glory, where there is no virtue"* according to the ancient Greek Heraclites, c. 5th century BC. Suffice to say that the law must always develop along any advance of science that may be turned to hostile use against humans. Suffice to say that, where there are no written law, one must refer to the "dictates of the public conscience". All of us, in this respect, share a common responsibility. Working in war zones, ICRC witnesses first-hand the

humanitarian consequences of certain weapons or methods of warfare. As a result it will continue to urge governments to address the specific problems caused by certain types of weapons or methods of warfare.

The ICRC will as well continue its efforts for the dissemination of international humanitarian law toward the Armed Forces. This, with a full appreciation of the responsibility and burden put on the military, in particular on the commanders, for the instruction of, but before all for the application of the law of armed conflicts. Recognizing that the law also protects those who do apply it. This is a long-lasting endeavour, indeed. However, *"a one-thousand li trip starts with the first step"* as we learned from Laozi.

Targeting in Contemporary Armed Conflicts

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Introduction

During the recent war in Iraq, we experienced once again the dichotomy between the declared respect of the laws of war by belligerents engaged in aerial bombardments and missile attacks on the one hand, and the number of civilian victims resulting from such attacks on the other hand. Was international humanitarian law (IHL) violated, or is it inadequate to protect civilians in contemporary armed conflicts? The answer first and foremost depends on an accurate assessment of the facts, which cannot be my aim in this presentation. Second, there are, however, controversies about the law: what it says, how it should be interpreted and whether its rules are adapted to the nature of contemporary armed conflicts. I will comment upon those legal aspects.

According to an uncontroversial principle of customary international humanitarian law, codified in Article 48 of the Protocol Additional I to the Geneva Conventions, parties to an armed conflict must distinguish between the civilian population and combatants as well as between civilian objects and military objectives. Solely combatants and military objectives may be attacked. This limitation is not so

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much based on the higher danger represented by military objectives and combatants for the enemy. The latter is probably more afraid of the nuclear scientist than of the infantryman. Nevertheless, the nuclear scientist belongs to the civilian population. The limitation is rather based on the understanding that if there should be rules and restraints in war, violence may only be lawful if it is militarily necessary. IHL is a compromise between humanity and military necessity. If a military action is not even militarily necessary, it is therefore always prohibited because with regard to it, no compromise between military necessity and humanity is needed.

The definition of military objectives

As only military objectives may be attacked, the need to define the latter is imperative. It is not due to its intrinsic character, but according to its use by the enemy or potential use for the attacker that an object becomes a military objective. Every object other than those benefiting from special protection may become a legitimate object of attack. It has therefore not been possible to formulate an exhaustive list of military objectives, although such a list would have greatly simplified the rule's practical implementation.

Article 52 (2) of Protocol I

Article 52 of Protocol I provides a definition in its paragraph 2, along with an open list of examples of civilian objects which are presumed not to be military objectives in its paragraph 3. Only a material, tangible thing can be a target. Immaterial objectives, *e.g.* victory, cannot be attacked, but only achieved. An object must cumulatively fulfil two criteria to be a military objective. First, the object has to contribute effectively to the military action of the enemy. This is exemplified by an object's "nature, location, purpose or use", which clarifies that not only objects of a military nature are military objectives. Second, its destruction, capture, or neutralization has to offer a definite military advantage for the attacking side. Characterizing the contribution as "effective" and the advantage as "definite", the drafters excluded *indirect* contributions and *possible* advantages. Without this restriction, the limitation to "military" objectives could be too easily undermined. Both criteria must be fulfilled "in the circumstances ruling at the time". Without this limitation to the actual situation at hand, the principle of distinction would be void, as every

object could *in abstracto,* under possible future developments, *e.g.*, if used by enemy troops, become a military objective.

Before Protocol I was actually adopted, the U.S., which has still not ratified Protocol I, retained the exact wording of Article 52 (2) for a definition of military objectives in the military manuals of the army and the air force. U.S. officials have expressed on several occasions their opinion that this definition corresponds to customary international law. The definition of Article 52 was also repeated word by word in Protocols II and III of the 1980 UN Convention on Certain Conventional Weapons and in the 1999 Hague Protocol on the Protection of cultural property. This shows how much States consider the question of the definition of military objectives as clarified by Protocol I.

Limitation of attacks to military objectives

The rule that only military objectives may be attacked is based on the principle that, while the aim of a conflict is to prevail politically, acts of violence for that purpose may only aim at overcoming the military forces of the enemy. This was already stated in the Declaration of St. Petersburg of 1868. Acts of violence against persons or objects of political, economic or psychological importance may sometimes be more efficient to overcome the enemy, but are never necessary, because every enemy can be overcome by weakening sufficiently its military forces. Once its military forces are neutralized, even the politically, psychologically or economically strongest enemy can no longer resist. A recent U.S. military manual and recent U.S. Military Commission instructions include among military objectives targets that "indirectly but effectively support and sustain the enemy's war-fighting capability". However, to include "war-sustaining capability" means to abandon in effect the limitation to military objectives, and to admit attacks on political, financial and psychological targets (*e.g.* the main export industry, the stock market or taxation authorities), as long as they influence the possibility or the decision of the enemy to continue the war.

Some also question the philosophy behind the limitation to military objectives, pointing out that the aim of contemporary conflicts is the capitulation of a (dictatorial) government or modifying its decisions,

to defeat the enemy's will. Acquiring a non-military advantage over the enemy can more effectively accomplish that aim. Under the widely used theory of "effects based targeting", the desired aim will result from the effects of attacking specific links, nodes or objects. If the enemy is seen as a system, attacks upon certain targets, which politically, financially or psychologically sustain an enemy regime, may have a greater impact, than attacks that affect military operations. In many countries the centre of gravity is not in the armed forces. To aim at an impact on persons other than the armed forces may appear particularly indicated if those attacking are not prepared to occupy the enemy country, if there is no fighting on land. In such a situation, aerial bombardment may "run out of military targets", while the enemy government is not yet ready to give in.

During the Kosovo air campaign NATO listed government ministries among the legitimate military objectives, independently of their contribution to military action. This appears to have also been U.S. practice in its recent war against Iraq. There are also strong indications that television stations were targeted independently of whether they contributed to military action. During the war in Iraq, the Baghdad television station was targeted several times, as was the Iraqi information ministry. The attack against the Belgrade radio and TV station was justified by some claiming that the transmitters were integrated into the military communications network, while others, including official NATO statements, mentioned generically the media among the legitimate objectives of attacks. It was pointed out that the targets were an essential part of the propaganda machinery of the regime. It may furthermore be argued that the limitation to military objectives obliges belligerents to give hypocritical justifications for their attacks. When they interrupt the power supply to show the civilian population that it will live in the dark as long as it does not get rid of a regime, they have to claim that the power stations also produce power for the military. When they attack a radio station because it maintains the morale of the population, they have to claim that the station also serves as a military communications relay station.

All aforementioned challenges to the concept of military objectives deserve consideration, as they appear to take the reality rather than formal qualifications and preconceived ideas into account. First,

however, those who suggest a large interpretation of the concept of military objectives mention that the targeting of bank accounts, financial institutions, shops and entertainment sites may prove in the long run more destructive than attacks on dual-use targets. If this argument was decisive, in some societies, in particular in democracies, it may be hospital maternity wards, kindergartens, religious shrines or homes for the elderly whose destruction would most affect the willingness of the military or of the government to continue the war. Second, the experience of World War II, Yugoslavia and Iraq has shown that extensive aerial bombardment affecting the civilian population did not succeed in undermining neither popular support to the regime, nor in sufficiently disrupting the economy. Third and most importantly, no one has come forward with criteria, other than the direct contribution to military action, which could guarantee a minimum of humanity in an armed conflict and yet be assessed objectively and applied independently of the causes attributed to the parties and the nature of the regimes involved. If it was lawful to achieve the political aim of overcoming the enemy by gaining other than military advantages, it could also be justified to attack the civilian population as such or hospitals, as such attacks may influence a country to give up. In this case, no IHL would survive, but only speculations about efficacy.

Dual-use objects

A dual-use object serves both civilian and military purposes. Particularly in times of war, the military uses civilian infrastructure, telecommunications and logistics also for military purposes. In industrialized countries power-generating stations are crucial for civilian access to clean water, but they also provide power to war industries – and in an integrated power grid all stations provide power to both. In the era of high technology, the construction of computer hardware and software may be essential for military purposes, and it is nearly impossible to identify that technology actually destined or useful for military purposes. When a certain object is used for both military and civilian purposes, it may be held that even a secondary military use turns it into a military objective. However, if the effects on the civilian use of the object imply excessive damages to civilians, an attack on such a dual-use object may nevertheless be unlawful under the proportionality rule.

Infrastructure potentially useful for the military, in particular bridges

Factories producing agricultural machines may be converted into tank and ammunition factories. May they be attacked because of that potential? Is the destruction of lines of communication lawful before they are actually used for military purposes, simply because they could be used so? Are all bridges and railway lines of a country military objectives from the very first day of a war, independently of where fighting erupts and where troops have to move to and fro? NATO mentioned bridges generically as military objectives during the Kosovo air campaign. Some include at least bridges which could replace those situated on the supply lines among the military objectives, while others are of the opinion that bridges may only be attacked if supplies destined to the front must pass over them. This question is particularly acute when a party declares to limit itself to aerial bombardments. What is, in such a situation, the definite military advantage in hindering the movement of enemy ground troops? However, if bridges were not considered as military objectives in such a situation, why would tanks still be legitimate targets?

A possible solution may be to allow attacks on objects of a military nature even before they have an impact on military operations, while objects that are military because of their location, purpose or use could only be attacked at the moment they actually provide an effective contribution to military action. If everything, which could be converted into something useful for the military, is considered to be a military objective, nothing remains as civilian and therefore as protected. For some authors, it is sufficient that the likelihood of military use is reasonable and not remote. According to the text of Protocol I, the object must however "make" (in the present tense) an effective contribution to military action. Admittedly, as the purpose can turn an objective into a military one, an intended future use may be sufficient, but not a possible future use.

Persons who may be targeted

Combatants are military objectives. Civilians, who unlawfully take a direct part in hostilities, lose their protection against attacks, as long as they directly participate. Commentators dispute both what "direct participation in the hostilities" is, and for how long a civilian

thus participating loses immunity from attack. The ICRC is presently holding expert consultations on both questions. My view is that any analogy to the situation of members of armed forces should be avoided. The fact that members of regular armed forces (who may be attacked) normally perform a certain activity (*e.g.*, cooking for combatants) does not mean that civilians who undertake such activity are directly participating in hostilities. What counts is the immediate impact on the enemy. As for the duration of the loss of protection, one should not deduce from the fact that combatants may be attacked until they are *hors de combat*, that civilians who are suspected of planning to participate directly in hostilities, or who could resume a previous participation are legitimate targets. Otherwise, the whole civilian population would be placed in jeopardy; as such civilians cannot be distinguished, unlike members of the armed forces, from the rest of the civilian population. What is needed are easily applicable and factually-based criteria that can be readily established in the heat of battle.

Everyone who is neither a combatant nor a civilian directly participating in hostilities is a civilian protected against attacks. Together, the categories of civilians and combatants are mutually exclusive and in complement to one another, which is very important for the completeness and effectiveness of IHL; in effect avoiding circumstances where some people may fight but may not be fought against, or where others may be attacked but may not – and do not - defend themselves. Some claim that civilians who contribute so fundamentally to the military effort or the war effort (*e.g.*, workers in ammunition factories) lose their civilian status although not directly participating in hostilities. This suggested category of "quasi-combatants" may be based on a failure to distinguish between objectives that may be attacked and persons who may be the target of an attack. Military objectives, such as armament factories, may be attacked, and, subject to the principle of proportionality, the attack on a military objective does not become unlawful because of the risk that a civilian who works or is otherwise present in a military objective may be harmed by such an attack.

There is therefore no military necessity that the armament worker or the weapons development scientist might be targeted individually, *e.g.* through aerial bombardment of the residential area where he lives or

by enemy ground forces capturing his factory. In the latter example the question would furthermore arise as to how he could "surrender"? To allow such attacks would furthermore put the rest of the civilian population at risk. Similar thoughts must be expressed concerning politicians, civil servants, and propaganda officials. In addition, it would be very difficult to draw a line. Why should, *e.g.*, international law professors who justify the legitimacy of a war (or of violations of IHL) be less legitimate targets than foreign ministry officials or television speakers? In both World Wars, German and British men could not have been incorporated so extensively into the armed forces if they had not been replaced by women in their functions essential for the society and the continuation of the war. Were those women all quasi-combatants?

The proportionality principle

The proportionality principle codified in Article 51 (5) (b) of Protocol I, prohibits attacks, even if directed at a military objective, if they "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". Despite the qualifications of the military advantage, it remains very difficult and subject to inevitable subjective value judgments to compare a military advantage with civilian losses, specially if in addition, the probability of gaining the advantage and of affecting the civilian population is not 100%, but lower and different. It might however be possible to identify with military experts indicators and criteria to evaluate the proportionality and to make the subjective judgment implied slightly more objective.

Even when identified, the application of such indicators and the respect of such criteria would be largely based upon the good faith of the military who will naturally tend to over-evaluate the importance of the military advantage part of the equation. It is probably unrealistic to expect transparency during the conflict. On the other hand some ex post monitoring would be possible and some preventive effect achieved, if belligerents undertook to keep records of their evaluation and to make them public after a certain period of time. Subsequent disclosure would allow belligerents to counter false accusations and avoid the impression among the public that IHL is not respected in war, an impression which seriously undermines the readiness to respect it.

Precautionary measures to be taken by those launching an attack
Once an attack is directed at a military objective and must not be expected to cause excessive civilian losses, it is lawful. A belligerent must however take precautionary measures to spare civilians and civilian objects. An attack must be cancelled once it becomes apparent that it is of the type prohibited. If circumstances permit, advance warning must be given whenever the civilian population may be affected. In determining the objective of an attack between several conferring a similar military advantage, the one causing the least danger to the civilian population must be chosen, when a choice is possible. In addition, those who plan or decide upon an attack must verify that the targets they attack are lawful and choose means (*i.e.* weapons) and methods (*e.g.* time and tactics) to avoid, or in any event minimize civilian losses. These rules are more operational and precise than the proportionality principle. Even less than for the latter is it however possible to assess objectively whether they were respected.

The planning and decision-making process of a commander is by definition secret and we will never know what he knew, or what alternatives he had. In this respect too, it may be appropriate to ask belligerents to keep records, while it may be even more difficult to ask for those records to be made subsequently public. It may however be possible that military experts from different countries compare practical examples of best practices and exchange them with IHL experts.

Obligations of defenders
The issue on which there is probably the greatest controversy about the legal standards applicable concerns the extent to which the protection of the civilian population from indiscriminate attacks is a shared responsibility between the belligerent launching attacks against military objectives, and the belligerent subject to those attacks. While the U.S. has always claimed that both sides have an equal responsibility, the text, legislative history and context of Protocol I indicate that the main responsibility is conferred upon the "attacker" as understood in *ius in bello, i.e.* the belligerent committing acts of violence against the adversary, whether in attack or in defence, whether in self-defence or in violation of the *ius ad bellum* prohibition of the use of force.

The main prohibition addressed to the defender concerns the use of civilians as human shields. Article 51 (7) of Protocol I reads:
"The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."

Beyond this prohibition, Article 58 of Protocol I provides that a defending party must take basic precautionary measures to protect the civilians against the effects of attacks against military objectives, such as removing the civilian population and civilian objects from the vicinity of military objectives and avoiding locating military objectives within or near densely populated areas. The wording of the provision however clearly indicates that these obligations are weaker than those of an attacker. They have to be taken only "to the maximum extent possible", the defender has only to "endeavour to remove" the civilian population and "avoid" locating military objectives nearby.

Even with those qualifications, several delegations at the 1974-1977 Diplomatic Conference that adopted Protocol I stressed that the provision may not hinder a State to organise its national defence as it considers it necessary. Participants report that in the competent working group of the conference "many representatives of both developing and developed countries strongly objected to the obligation to endeavour to avoid the presence of military objectives within densely populated areas. This was deemed by representatives of densely populated countries to restrict their right to self-defense, and by others to impose too heavy an economic burden to disperse their industrial, communications and transportation facilities from existing locations in densely populated areas." When becoming a party to Protocol I, Belgium, Italy, the Netherlands and Algeria declared that the term "feasible" must be understood taking the available means or military considerations into account. Switzerland and Austria made even formal reservations subjecting Article 58 to the "exigencies dictated by the defence of the national territory."

Conclusion

In conclusion, I would submit that the concept of "military objective" is not yet as precise and practicable as one would wish in the interest of the civilian population. Efforts to find some more precise agreed interpretations of the terms and to devise specific measures of implementation are important, but in view of the considerable controversies about the concept one may fear that they will not succeed in the near future. Beyond such possible refinements, no one has however suggested an alternative definition, which would be first practicable, second as objectively assessable as that of the contribution to the military effort, and third grant a minimum of protection to the civilian population. In addition, even if a new concept could be found, it appears as nearly impossible that such definition would be accepted by States. It may however be possible to operationalize the proportionality principle and the obligation to take precautionary measures in attacks by identifying best practices and evaluation criteria and by creating a minimum of transparency about the measures taken.

Weapons: Mines, IHL and the Ottawa Treaty

Colonel Razali Hj Ahmad[1]
Malaysian Army

Introduction

Landmines kill and maim people in at least 65 of the world's poorest countries. No one knows how many mines there are in the ground, and in some countries, there are certain level of landmine or unexploded ordnance contamination. These, in our opinion are less important than their impact. We know that it can only take two or three mines to make an area of land useless. Some of the most affected territories include Afghanistan, Angola, Bosnia, Cambodia, Iraq, Laos, Mozambique, Somalia, Sri Lanka, Sudan, to name a few. Statistics show there are an estimated 20,000 deaths and injuries every year. Approximately half are killed and half are injured. Virtually all survivors require at least one amputation, with at least 85% of all the injured (children mostly) die before they reach hospital[2].

Landmines are a developmental disaster, denying the people the use of land and infrastructure and treating survivors drains the poorest countries of scarce resources. In 1997, for example, the anti-landmine work of the International Red Cross and Red Crescent Movement, the International Campaign to Ban Landmines (ICBL) and various governments concerned culminated in the successful adoption of a new international humanitarian law treaty banning anti-personnel mines. Subsequently signed by 123 States by the end of 1997, the Convention on the Prohibition of Anti-Personnel Mines and on their Destruction (more commonly known as the "Ottawa Treaty") represents a true

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[2] The Worldwide Epidemic of Landmine Injuries, Geneva, 1995.

victory for humanity in the continuing struggle to alleviate the humanitarian suffering caused by the use of millions of anti-personnel mines in dozens of countries around the world.

Principal protocols

The International Committee of the Red Cross (ICRC) became heavily involved in the mines issue at the beginning of the 1990s as a result of the experiences of its field staff, who were treating increasing numbers of mine victims, including an appalling proportion of civilians. An international symposium on landmines, held in Montreux in April 1993, brought together legal, medical and military experts from interested governments, agencies and organizations. In February 1994, following a public call for a total ban on anti-personnel mines, the ICRC launched its first ever public advocacy campaign against landmines using the slogan 'Landmines must be stopped'.

International humanitarian law (IHL)

IHL is the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities. Its central purpose is to limit and prevent human suffering in times of armed conflict. The rules are to be observed not only by governments and their armed forces, but also by armed opposition groups and any other parties to a conflict. The four Geneva Conventions of 1949 and their two Additional Protocols of 1977 are the principal instruments of humanitarian law. This with ICRC's efforts combined and using a combination of public and private lobbying, are working hand in hand to raise awareness of the mines problem and to persuade governments that the only effective solution to the epidemic of mine injuries is the total prohibition of anti-personnel mines[3]. The strength and effectiveness of the international effort against landmines are largely derived from the close cooperation between the landmines campaign and ICBL, with a number of National Societies playing an active role in both.

It was through this remarkable effort that the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction entered into force on 1 March 1999[4]. The treaty's universalization and full implementation

[3] The Worldwide Epidemic of Landmine Injuries, Geneva, 1995.

[4] ICRC Special Report Mine Action 1999

remains a priority for the entire Movement, and National Red Cross and Red Crescent Societies have a key role to play in providing advice on national legislative measures needed to implement the treaty's provisions. In order to make the prohibition of anti-personnel mines truly universal, continuing efforts will be required to convince non-signatory States to adhere to the Convention as soon as possible, and ICRC and IHL must also continue to address the impact of anti-personnel mines by implementing preventive and curative programmes.

The Ottawa Treaty

While the security of those living in mine-contaminated regions will remain threatened until the mines are destroyed or removed from the ground, ending the use of anti-personnel mines is central to efforts to spare future generations from the horror of these weapons. The Ottawa Treaty is an important step towards this goal because it establishes a comprehensive ban on the devices. It does not ban all landmines, only those classified as anti-personnel. It not only prohibits the use of anti-personnel landmines in all situations, it also forbids their development, production, stockpiling, and transfer. In addition, it requires the destruction of such mines, whether held in stockpiles or already emplaced in the ground. What is an anti-personnel mine? The Ottawa Treaty only prohibits anti-personnel mines. A distinction is therefore made in the treaty between mines designed to kill or injure people, anti-personnel mines and those designed to destroy tanks or vehicles, anti-vehicle mines, commonly referred to as anti-tank mines[5]. The former are generally small devices, containing between 10g and 250g of explosive substance that will detonate under 0.5 kg to 50 kg of pressure, while the latter or anti-vehicle mines, are larger than anti-personnel mines, containing between 2 kg and 9 kg of explosive, and are normally activated by 100-300 kg of pressure. Generally, the large amount of pressure needed to activate anti-vehicle mines, combined with the fact that they are used in smaller numbers and are easier to locate, has made them less of a threat to the civilian population.

However, in many areas anti-vehicle mines placed on roadways used by civilians still pose a serious threat to the civilian population.

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[5]Banning Anti-Personnel Mines: The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

The definition of an anti-personnel mine laid down in the Ottawa Treaty covers all *"person"* activated mines irrespective of whether they are placed in the ground in marked minefields or remotely delivered over large areas. It also includes so-called *'smart'* anti-personnel mines, mines which have the capacity to self-destruct or self-deactivate (for example mines that are programmed to automatically explode or become inert after a set period of time). However, owing to recent developments in landmine technology, the traditional distinction between anti-personnel mines and anti-vehicle mines is becoming blurred. Several types of mines have been developed which can be considered to have a *'dual purpose'*, designed to be detonated by both people and vehicles. The treaty prohibits any dual-purpose mine or any anti-vehicle mine if one of its functions is to be detonated by a person.

The sole exception to this is an anti-vehicle mine equipped with an anti-handling device.

An anti-handling device is a mechanism attached to the mine which causes the mine to explode when a person attempts to remove, disturb or tamper with it. These mechanisms are increasingly being fitted to anti-vehicle mines to prevent their removal or clearance and are a particular danger to soldiers and deminers. The definition of an anti-personnel mine contained in the Ottawa Treaty is significantly stronger than the formulation found in amended Protocol II to the UN Convention on Conventional Weapons (CCW) which defines an anti-personnel mine as *'a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons'*.

Although not within the ambit of the Ottawa Treaty, all anti-vehicle mines capable of detonation only by vehicles or tanks are nonetheless covered by the rules established by customary law and Protocol II to the 1980 CCW. Governments must ensure that such mines, especially when remotely delivered and equipped with anti-handling devices, are used responsibly in accordance with international humanitarian law and established military doctrine.

Landmines do not discriminate

The disastrous humanitarian impact of landmines on civilian populations in the aftermath of war has been well publicised. However,

there is far less awareness of the effect of unexploded ordnance (UXO) and abandoned ordnance on innocent lives. These explosive remnants of war (ERW) leave a deadly legacy long after conflict has ended. They are also more likely to cause death than landmines and there are often multiple casualties in one incident. A high proportion of incidents involve children. Unlike landmines, there is no existing international humanitarian law or IHL that addresses the humanitarian concerns related to these deadly weapons. However, the UN CCW, which has been discussing the issue in 2002, and States Parties have agreed to negotiate post-conflict humanitarian measures last year will continue to discuss preventive measures and specific weapons[6].

In similar note, in the ICRC estimated, on average, 24,000 people were being killed or injured by landmines every year worldwide. However, no one really knows the total number of casualties. For example, statistics gathered by the ICRC in 1997, in Afghanistan alone, the ICRC admitted over 1,900 mine-injured patients at seven of Afghanistan's hospitals in one year alone. Bearing in mind that only a minority of victims would reach these hospitals in Afghanistan, and that Afghanistan is just one of the many countries affected by mines. In Bosnia and Herzegovina, another severely mine-affected country, in the six months immediately after the war ended, an average of 50 people were killed or injured by mines every month. Since mid-1996, this number has gradually decreased. From August 1996 to August 1997, the ICRC estimates that there were 30 to 35 casualties per month[7].

The aim of direct assistance for mine victims is to enable amputees to become fully integrated and productive members of society once again. To meet this challenge means providing the requisite transport, first aid, surgery, safe blood for transfusions, prostheses, psychological counseling and social services. Mine victims cannot receive the care they need if basic health facilities and social structures are inadequate, have been disrupted or have collapsed altogether owing to poverty or war. A strong commitment must therefore be made to multilateral and bilateral partnerships aimed at funding community-based reconstruction programmes in post-conflict societies.

[6]Seeking Rebel Accountability: Report of the Geneva Call Mission to the MILF in the Philippines 2nd – 8th April 2002, Phillippines, 2002.
[7]ICRC Special Report Mine Action 1999

The Ottawa Treaty is unique because it seeks to eliminate the anti-personnel mine as a weapon from the arsenal of fighting forces. In order to achieve this goal, the treaty identifies and prohibits a wide range of activities, specifically the development, production, stockpiling, transfer and use of the weapon. This comprehensive approach is a welcome innovation in international humanitarian law. Specifically, the treaty provides that each State Party undertakes never under any circumstances[8]:

To use anti-personnel mines.

To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel landmines.

To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

An end to the use of anti-personnel landmines

Each country adhering to the Ottawa Treaty obliges itself *'never, under any circumstances'* to use anti-personnel landmines[9] . This includes all situations of armed conflict, whether between countries (international armed conflict) or a civil conflict (internal armed conflict), as well as troubles of a lesser intensity commonly referred to as internal unrest or civil disturbances. All offensive and defensive usage is prohibited. Moreover, any resort to the weapon during peacetime is also proscribed. A country cannot deploy anti-personnel mines to fortify its borders as a means of preventing unwanted persons from entering its territory or to protect important military or other installations. In ratifying the Ottawa Treaty, a country accepts that mines are no longer a legitimate weapon to be used either in peacetime or in time of war.

A prohibition on development and production

The Ottawa Treaty prohibits the development and production of anti-personnel mines. A country cannot manufacture the devices, nor can it initiate any projects intended to improve current models, develop new models, or generate any such weapons in the future.

A prohibition on stockpiling

In addition to prohibiting the development, production and use of

[8]Banning Anti-Personnel Mines: The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

[9]Banning Anti-Personnel Mines: The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

anti-personnel mines, the Ottawa Treaty precludes a country from stockpiling them. A country is not allowed to purchase, procure, or otherwise obtain the devices. Furthermore, any existing stocks must be destroyed within four years of the date on which the treaty enters into force for a given country. States requiring assistance in order to ensure the destruction of anti-personnel mines within the specified time period may apply to other States Parties to the treaty for such assistance. However, a country is permitted to retain or transfer a limited quantity of mines for training in mine detection, mine-clearance, and mine-destruction techniques. The number of mines kept shall not exceed the minimum number absolutely necessary for such purposes.

A prohibition on transfer

The final component of the comprehensive ban established by the Ottawa Treaty is a prohibition on transferring anti-personnel mines. A country is not allowed, in any way or under any circumstances, to transfer anti-personnel mines either directly or indirectly. According to the treaty, the term 'transfer' involves, *in addition to the physical movement of anti-personnel mines into or from national territory, the transfer of title to and control over the mines, but does not involve the transfer of territory containing emplaced anti-personnel mines*[10] . The prohibition on transfer covers import and export as well as transfer of ownership of mines. In order to facilitate mine detection, destruction and clearance, there are, however, a small number of narrow exceptions to this prohibition.

Countries are permitted to transfer anti-personnel mines for the purpose of destruction.

Countries may transfer the limited number of mines allowed to be retained for training purposes. Any other exchange of anti-personnel mines beyond these exceptions is forbidden.

As the definition above makes clear, the transfer of territory containing anti-personnel mines does not constitute a *'transfer'* of those mines for the purposes of the treaty. By proscribing the production, stockpiling, transfer and use of anti-personnel mines,

[10]Commonwealth Red Cross and Red Crescent Conference on International Humanitarian Law, London 26th – 28th February 2003: Summary Report A Guide to Action, British Red Cross and the United Kingdom Foreign & Commonwealth Office, November 2003.

the Ottawa Treaty takes an important step in preventing the future deployment of these weapons. Yet, until the millions of anti-personnel mines already in the ground are cleared and destroyed, these devices will continue to pose a serious threat to populations in many regions of the world.

Clearing mined areas

The Ottawa Treaty obliges each State Party to clear all anti-personnel mines already in the ground within a period of 10 years following its entry into force for that country. Specifically, the State must destroy all anti-personnel mines in "mined areas" under its jurisdiction or control. This covers not only a country's own territory but also territory which it may be occupying. The treaty defines a mined area as *'an area which is dangerous due to the presence or suspected presence of mines*[11]*'*. This includes all territory known to contain mines, such as minefields, which are defined areas where these weapons have been systematically laid in such places as national borders and tracts around military installations. It also includes all other public or private land known or believed to contain the devices.

Mines may travel long distances owing to floods or the movement of desert sands. It is irrelevant how the mines came to be in a particular area, and a country assumes responsibility for clearance whether the mines were laid by its own military units or by other forces. An area is considered to be "mined" if it is thought to contain either anti-personnel or anti-vehicle/anti-tank mines. Since anti-personnel mines are often used to prevent the removal or deactivation of anti-vehicle mines, if an area is suspected of containing anti-vehicle mines it will often also contain anti-personnel mines. If this is found to be the case, all anti-personnel mines in the area must be destroyed. There is no obligation in the Ottawa Treaty to remove or destroy the anti-vehicle mines.

However, they remain regulated by the relevant provisions of Protocol II to the CCW, which require that as soon as possible after the cessation of active hostilities all mined areas be either cleared, or marked, fenced and monitored to ensure the effective exclusion of civilians. The treaty recognizes that some mine-affected countries may

[11]Banning Anti-Personnel Mines: The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

not be in a position to clear and destroy all anti-personnel mines in areas under their jurisdiction or control within 10 years. Such countries may therefore request that the other States Parties accord them an extension period of up to 10 years[12] . This offers an opportunity for States requiring assistance to present their case and to seek appropriate help, whether in terms of financing, human resources or technical aid, in their mine-clearance efforts. This opportunity is reinforced by the obligation on States able to do so to provide international cooperation and assistance for mine clearance.

As stipulated under this Treaty also, each country *'shall make every effort'* to identify all areas under its control known or suspected to contain anti-personnel mines. Once an area has been identified as possibly containing such weapons, action must be taken to ensure that civilians are prevented from entering it. The perimeter must be marked, monitored and protected, by fencing or other means. The method chosen must ensure the effective exclusion of civilians. A country has a responsibility not only to close off the area, but also to make certain that the barriers remain in good condition and do not deteriorate, become damaged, or otherwise disintegrate. The protections put up are to remain in place until all of the anti-personnel mines have been destroyed. In marking an area, certain minimum standards set out in the amended version of Protocol II of the CCW must be met.

Assisting the victims.

The mine-injured, especially amputees, face a difficult future in many countries. They are often ostracized by a community unable to shoulder the burden of caring for them, and they are distressed by their own inability to contribute effectively to improving the conditions of life of their family and society. One of the greatest challenges now facing the international community with respect to mines is how adequately to address the needs of the mine-injured in general, and specifically amputees, who form a significant percentage of the war-wounded. Recognizing this challenge, the treaty calls upon all countries able to help to do their utmost to ensure the care, rehabilitation and reintegration of mine victims[13]. The ICRC, for its part, will continue to work with its partners to improve the assistance rendered to all war-

[12]Engaging Non-States Actors in a Landmine Ban, Conference Proceedings 24th and 25th March 2000 Geneva, Quezon City, 2001.

wounded people and particularly mine victims, who both need and deserve a lifetime of care and assistance.

The Malaysian experience

There is a problem of uncleared mines from the long guerrilla insurgency mounted by the Communist Party of Malaysia. The areas, which still have a problem, are in mountainous and remote terrain, especially along the Malaysia/Thailand border. Malaysia does not produce or export mines, but it is not known whether it maintains a stockpile of landmines[14]. Malaysia was one of the first nations to express support for an immediate ban on anti-personnel mines, in remarks the UN General Assembly in December 1994. Malaysia voted *'Yes'* on UNGA Resolution 51/45S and endorsed the Brussels Declaration. Malaysia participated in the Oslo Negotiations and signed the Treaty in December 1997. Later, Malaysia ratified the Ottawa Treaty banning anti-personnel mines in 1999 and began implementing its provisions at once. In January 2001, Malaysia completed the destruction of its stockpiles of these weapons.

Malaysia became the first ASEAN state since the signing of the Mine Ban Treaty to be landmine free. Malaysian military engineers destroyed the country's entire stockpile of anti-personnel landmines, numbering more than 94,000. In October 2000 a special government commission visited sites of a former internal conflict to confirm that no landmines remained in the ground within the country. Malaysia has kept no live anti-personnel mines for training purposes, stating that it is not necessary to retain explosive mines to train its military forces. Malaysia speedy destruction, completed in 12 days at 3 sites throughout the country, was intended as a message to its neighbours that Malaysia is fully behind the Mine Ban Treaty and believes in the total elimination of this 'weapon without eyes'. Malaysia feels that stockpile destruction is important because it stands to affect the lives of thousands of people around the world by preventing indescriminate and inhumane weapons that can maim and injure innocent civilians from ever being used.

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[13]Seeking Rebel Accountability: Report of the Geneva Call Mission to the MILF in the Philippines 2nd – 8th April 2002, Phillippines, 2002.

[14]Engaging Non-States Actors in a Landmine Ban, Conference Proceedings 24th and 25th March 2000 Geneva, Quezon City, 2001.

For the Malaysian government, the Ottawa Convention is a comprehensive framework for the elimination of the global humanitarian threat caused by anti-personnel mines, and that, all parties are encouraged and should join the Ottawa Convention as soon as possible and support this new humanitarian norm. In addition to the humanitarian benefits of eliminating the threat caused by anti-personnel mines and other remnants of war, stockpile destruction is also a good means of ensuring the economic development of affected states. For example, destruction of stockpiles prevents the contamination of land for agricultural or other use. Most important of all, stockpile destruction contributes to regional peace and stability by functioning as a confidence building measure that develops trust between neighbors as do the transparency measures of the Ottawa Convention.

Stockpile destruction brings two benefits to nations who undertake them. The first benefit is humanitarian. Every mine destroyed is a mine, which can never be laid to produce a landmine victim. While laying is cheap, the cost to society of the loss, whether civilian or combatant, and the cost of care of survivors, is high. The second benefit is security. The destruction of stocks is the key element which legitimizes a nation signature and ratification of the Convention[15]. Until the mines have been declared, counted, certified and destroyed, a ratification is simply a good intention. Once a nation publicly destroys its entire stock of this indiscriminant weapon it backs up its words with action. Building trust enhances security. However, to inspire trust, this process must take place in an open and transparent way.

Mine awareness

Even with the best will in the world, it will be many years before all emplaced anti-personnel mines are successfully cleared and destroyed. For this reason, mine awareness programmes will remain an important element of mine-related activities for some time to come. Mine awareness programmes aim to reduce the risk of death and injury by promoting safe behaviour and facilitating appropriate responses to the problem. In general, programmes provide information on the

[15]Seeking Rebel Accountability: Report of the Geneva Call Mission to the MILF in the Philippines 2nd – 8th April 2002, Phillippines, 2002.

identification of mines and unexploded ordnance (UXO) and the dangers they represent, and seek to teach safe behaviour to civilians living in or moving into mine-affected communities[16]. This includes guidance on how to recognize that mines and UXO may contaminate an area as well as what to do if someone accidentally finds himself in the middle of a minefield. Instruction in basic first aid for mine victims will often be part of the programme.

In many post-conflict settings, economic necessity is such that returning refugees or internally displaced persons knowingly venture into mined areas in search of food, water or wood. Before establishing a mine awareness programme, a needs assessment should first be undertaken[17]. The assessment should seek to obtain information on the scale of the mine problem and collect any hospital statistics or anecdotal reports indicating the causes of mine incidents. It should also identify available or potential resources in-country, human, financial and logistical, which could be mobilized to establish a mine awareness programme.

Once the need is identified, plans can be drawn up for a programme. The areas to be covered by the programme must be identified, the numbers and profiles of instructors to be trained must be defined, and local and national partners to be included in the programme must be approached. This planning stage is best undertaken in close collaboration with the target communities: imposing solutions from outside is unsustainable and almost invariably ineffective.The following examples illustrate the ICRC's mine awareness programmes (MAP)[18]:

Azerbaijan

Launched in 1996, the ICRC's programme in Azerbaijan is directed towards those living in front-line areas and in settlements for the displaced, seeking to provide information that will prevent people from being killed or maimed by mines or unexploded ordnance. The first phase of the programme has alerted the population to the danger

[16]Engaging Non-States Actors in a Landmine Ban, Conference Proceedings 24th and 25th March 2000 Geneva, Quezon City, 2001.

[17]Banning Anti-Personnel Mines: The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

[18]Engaging Non-States Actors in a Landmine Ban, Conference Proceedings 24th and 25th March 2000 Geneva, Quezon City, 2001.

of mines and to the fact that a problem actually exists. Ten different relief agencies took part in the distribution of mine awareness material, and information was also handed out through the armed forces. Over 28,000 leaflets were distributed in seed kits between 1996 and 1998. More than 110,000 families received mine awareness information during spring and summer 1997. So far, 18,000 posters have been displayed in front-line villages and in settlements for displaced people. The second phase aims at bringing more specific information and knowledge to the community. Since early autumn 1997, schoolchildren in front-line schools and in schools for the internally displaced have been targeted through mine awareness training given by their teachers. They have also received stickers, posters, timetables and exercise books bearing a mine awareness message. By early 1999, ICRC mine awareness officers had trained more than 9,000 teachers in eight districts along the front-line and in areas throughout the country where internally displaced people had settled. More than 120,000 children will eventually be reached. Mine awareness training and the distribution of posters and copybooks will continue.

Bosnia and Herzegovina

Launched in the spring of 1996 with an emergency public awareness campaign, the programme consists of four components: a community-based approach which seeks to encourage local communities to initiate mine awareness activities in their areas tailored to their own needs. For example, local Red Cross volunteers have organized summer camps focusing on mine awareness and first aid, theatre shows for children, etc. Today, a dozen paid staff and more than 120 volunteers are implementing activities throughout the country; a mass media campaign which involves the distribution of leaflets, posters and brochures, plus 11 new radio spots and six TV spots. Supported by local media which broadcast or publish mine awareness messages, it is backed up by mass distribution of information materials in the communities at risk; a data-gathering component, in which the ICRC – the only organization to do so – systematically gathers information on mine victims, including data on age, gender and activity at the time of injury. The data gathered should help the ICRC to improve targeting of future activities; a school-based programme which, thanks to nearly universal school attendance, reaches the majority of children through the classroom. The ICRC has developed a school curriculum, which is currently being implemented in Bosnian schools in cooperation

with the Ministry of Education. In addition, it launched a nationwide drawing and essay competition in January 1997. The competition was intended to raise children's awareness of the dangers of mines and unexploded ordnance (UXO) and mobilize local communities, including Red Cross branches. Schools located in mine-affected areas and schools attended by children living in mine-affected villages were given priority for the competition. Thanks to the development of their structures, the Red Cross organizations in the two entities of Bosnia and Herzegovina are playing an increasingly important role in implementing the programme and ensuring its sustainability, thus boosting the ICRC's efforts in this area.

Mine clearance

Mines continue to inflict injuries and suffering everyday. One of the solutions to reducing the risk of accidents is demining. Mine clearance is required both by amended version of Protocol II to the CCW (anti-tank and anti-personnel mines) and by the Ottawa Treaty (anti-personnel mines only)[19]. The International Red Cross and Red Crescent Movement is not directly involved in undertaking or funding mine-clearance operations, but strongly supports the need for humanitarian demining efforts that take account of the real needs of affected communities[20]. The United Nations Department of Peacekeeping Operations (DPKO) is the new focal point within the United Nations system for mine clearance.

A number of dedicated specialist non-governmental organizations (NGOs), such as Halo Trust and the Mines Advisory Group from the UK and Norwegian People's Aid from Norway, are active in clearing mines in many countries. In addition to supporting indigenous mine-clearance capacities, a number of governments are also financing research activities to develop improved mine detection and mine-clearance techniques.

Humanitarian mine clearance

A humanitarian mine-clearance operation aims to remove all mines

[19]Banning Anti-Personnel Mines: The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

[20]Engaging Non-States Actors in a Landmine Ban, Conference Proceedings 24th and 25th March 2000 Geneva, Quezon City, 2001.

from an area in which civilians are already living or are planning to resettle, while minimizing the risks for demining personnel. Clearance operations usually include the following phases: minefield location and marking, detection of individual mines, disposal and/or demolition[21]. Locating minefields involves delimiting and marking an area suspected of having mines, without necessarily finding them. The fact that in many conflicts mines are seldom laid in accordance with military doctrine means that mined areas are rarely demarcated and no records are available. Mine clearers often resort to local intelligence, asking the villagers where mine incidents have occurred and whether any livestock has been killed by mines, to identify areas likely to be mined. Once unmarked minefields are found, they must be demarcated. This task is often complicated in areas where marking signs may be valued as building materials or firewood. The fact that no mines are found in 90% of a suspected area does not necessarily mean that none will be discovered in the last 10%; the smallest "minefield" is of course a single, isolated mine.

Conclusion

Anti-personnel landmines and other unexploded ordnance left behind from wars and conflicts are a deadly threat to many thousands of people in many parts of the world. They are a silent threat to civilian populations in more than 60 countries. A landmine does not distinguish between a soldier and a civilian. Once placed it can remain on or under the ground for years and decades, waiting to kill or maim its victim. Each year thousands of people fall victim to landmines. Those who survive often face great challenges in reintegrating into their societies and in receiving medical care and rehabilitation services. Landmine-contaminated areas can not be used for farming, hunting, collecting firewood or many other daily activities.

They prevent displaced persons from returning to their homes. And the threat of landmines hampers efforts for post-conflict reconstruction and rehabilitation, and the consolidation of peace. Compliance with the core provisions of the Convention is good. This is not due to a verification regime and sanction mechanism, but to the ongoing commitment and co-operation of governments, international and

[21]Banning Anti-Personnel Mines : The Ottawa Treaty Explained, International Committee of the Red Cross, Geneva, 1998.

non-governmental organisations. Future compliance will likewise depend on the strong commitment and close co-operation we have seen over the last five years. Abating this process would hamper the dynamic of the Convention and challenge its objectives. The progress achieved thus far should not dwarf the enormous work still ahead. What the States Parties have done is a beginning only. Universalizing the Convention should be the guiding goal of any actor involved in advocating the international norms established by the Convention.

It is now becoming generally accepted that the world's mine contamination problem is reaching crisis point. The number of uncleared landmines around the world is about 84 million in 64 countries. The United Nations projects that if the use of mines were stopped immediately it would take 1,100 years and $33 billion dollars to clear, at current rates, those already in place. Landmines, which were originally conceived to counter the use of tanks and other armoured vehicles, have been increasingly designed to target human beings. Anti-personnel (AP) mines have become the weapons of choice for parties involved in guerrilla-type operations and internal conflicts, as they are cheap, easy to lay and highly effective in killing and maiming human beings.

Landmines differ from most weapons, which have to be aimed and fired. Once they have been laid, mines are completely indiscriminate in their action. Unless cleared, they continue to have the potential to kill and maim long after the warring parties they targeted have ceased fighting. Landmines are at least ten times more likely to kill or injure a civilian after a conflict than a combatant during hostilities. They are also long-lasting. No estimate has been given for the *'life'* of a mine; compared to mines laid during World War II may still be active and causing casualties, modern plastic-cased mines, which are stable and waterproof, are likely to remain a hazard for many decades.

Landmines affect victims in many ways. Since many landmines have been planted in the world's poorest countries, their devastating effects become harsher as victims attempt to cope with shattered lives, communities and homes while development remains stagnant. When an individual is injured or killed by a landmine, his or her family and community also suffer. An injured landmine survivor may be sent a long way away to medical facilities, if such facilities are available

at all. If the survivor is able to return, he or she may not be able to reintegrate into the communities, for the survivor may be perceived as a burden. Without the physical aids and resources, which would make it possible for survivors to contribute to their communities again through their work, it is sometimes difficult to achieve acceptance by those left to carry the burden of the work.

Communities in the agriculturally based developing world tend to be labour-intensive. A large number of people can be affected psychologically by a mine incident, over and beyond the victim and his or her family. Collecting the necessities of life, wood and water, becomes a danger, especially for women and children who are often responsible for these tasks. Labour is lost, and the productivity of the community and the country falls. Basic health programs for developing countries are a challenge to begin with: safe sanitation procedures, public health outreach, basic vaccination programs, minimal hospital care, and programs for the diseases common to the region are a luxury for the poorest countries who have yet to afford such systems.

The treatment of mine victims and their families, which can go on for many years, is a re-allocation of resources from health areas which still do not have sufficient resources themselves. The production of prostheses and their continuous renewal for landmine survivors, especially children as they grow, represent another new strain on the system. From the agriculture perspective, many hectares of productive land are unsafe and have been abandoned, especially in border areas. People may move to less productive but safer areas, and then risk malnutrition or starvation. Alternatively, people may remain on the land, but landmine casualties may lead to fewer available workers and reluctance to use the land, resulting in lower yields and possible malnutrition or starvation. Agricultural development programs cannot proceed in mine-infested regions until demining can occur. Pastoralists, people who live off their animals rather than plant fields, are also affected, because they cannot move their herds where they might wish, and livestock may not be led to the most productive pastureland.

Inevitably, roads and bridges are avoided if it is suspected that mines are implanted there, leading to disruptions in commodities, including inputs into production and consumer goods. Local shortages and price rises result, and economic output is affected. For our future

generation, children will be discouraged from going to school if it is suspected they must walk over mine-infested areas. Child victims are often not able to walk to school at all. In countries where walking is usually the only mode of transport to the institutions of everyday life, an early incident with a landmine means the resources by which they can become productive in adult life is denied them. On other regions of the country, or other countries, landmines turn inhabitants into refugees within their own countries or outside them, placing a burden on government authorities outside their affected communities, and increasing pressure on local resources, including food and water. They may remain afraid to go home, and yet there may be no room for productive employment and/or activity in the new location. For those who do go home, the trip is a high-risk journey to an uncertain destination.

Landmines have adverse affect on the environment. The pervasiveness of landmines in the soil and water of some countries can lead to devastating environmental consequences. Weather related variables, such as floods and desertification, cause landmines to shift and relocate, leading to uncertainty and paralysis of nearby inhabitants. Wildlife and livestock are also affected, as is the ecology of great tracts of land. Resources must be dedicated to demining, resources, which are not evident in the first place.

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Weapons of Mass Destruction

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It gives me great pleasure to speak to you today on two counts. First it is a particular pleasure to have the opportunity to come to China and to make my second visit to Xi'an, which will give me a greater understanding of this great country and its people. Second, as a former military officer for more than three decades, with service in many parts of the world, I have enormous respect for the work of the International Committee of the Red Cross and I am always ready to support the important work they do. In the field of the laws of armed conflict military officers have, in my view, a direct obligation to support the implementation of this body of international law. This is not only for moral and humanitarian reasons but also, as a result of their evolution over many years in response to military-technical, political and societal developments, they are good for military efficiency and discipline.

Traditionally the legal obligations in relation to weapons of mass destruction have not been included in discussions of the laws of armed conflict. The tendency has been to group them separately in the area of arms control and disarmament. I am glad that this separation of these bodies of law is becoming less the case and that this subject is included in this conference. It is important because the laws embodied in the relevant treaties apply not only to the governments of the state parties but also to their citizens; in particular, because of their application to weapons and their use, members of armed forces have a special responsibility.

I must at the start make clear the scope of my remarks. The term weapon of mass destruction has a political origin rather than a technical one. It came into use soon after the end of Second World War following the first use of nuclear weapons at Hiroshima and Nagasaki

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in 1945. As part of the reaction to this demonstration of the enormous destructive power of nuclear weapons there were proposals to bring these weapons under international control with a view to a total ban. This brought considerations of controls on nuclear weapons within the ambit of the then existing restrictions on the use of biological and chemical weapons. The use of these weapons was banned for those subscribing to the 1925 Geneva Protocol[2] .

Subsequently in most international forums, despite the obvious technical differences in the nature of their destructive power and the kind of effective controls that would be needed for each type of weapon, too often they are grouped under the heading of this portmanteau word, weapons of mass destruction or to use the famous acronym in English 'WMD'. For the purpose of my remarks today I will discuss each type of weapon separately. An important point to keep in mind, however, is that while total bans on possession and use of biological and chemical weapons are in force, this is not the case for nuclear weapons. This is not to say that there are no restrictions on the use of nuclear weapons; they are subject to rules relating to the conduct of war, as is the use in armed conflict of any weapon. I will discuss this aspect more later in my remarks. I should point out that I will not give a detailed analysis of each of the relevant treaties. Time precludes that. I will focus on a few selected issues, particularly in relation to the responsibility of individuals, in the spirit of promoting a discussion for the Panel that follows.

1925 Geneva Protocol

The progress towards the bans on chemical weapons began over one hundred years ago at the Hague Conference of 1899 when a declaration was made to the effect that the signatories would not use "poisonous" substances as a weapon of war. However the attempt to give this ban legal force with a more universal application had to wait until 1925. Following the extensive use of chemical weapons in the First World War, as part of the effort to prevent a devastating conflict on the same scale occurring again attempts were made to develop a

[2]Its full title is the "Protocol for the Prohibition of the Use in War of Asphyxiating, poisonous or Other Gases and of Bacteriological Methods of Warfare", hereinafter referred to as the 1925 Geneva Protocol. While the term 'bacteriological" is used in the text of the Protocol for the purpose of this paper the term "biological", now in modern usage, is used.

series of protocols that would form part of a convention to restrict the use of weapons to lessen the horrors of war for combatants and non-combatants alike. In the event the only protocol that came into effect was the 1925 Geneva Protocol banning the use of biological and chemical weapons.

This protocol rapidly gained widespread adherence and remains in force today despite the fact that separate treaties banning possession and use of biological and chemical weapons are now in force. However, many adherents to the treaty reserved the right to retaliate in kind. Thus for many it was a ban on first use of these weapons; perhaps understandable given that it would be some time before there would be near universal adherence and that a number of major countries retained substantial arsenals (particularly of chemical weapons). It would be another fifty or more years before treaties banning the possession of these weapons became a reality.

In more recent times in the UN General Assembly and the UN Security Council there have been repeated expressions of support for the 1925 Geneva Protocol. For example, in 1988, in condemning the use of chemical weapons during the Iran-Iraq war, the United Nations Security Council re-affirmed the ban of the use of these weapons in UN Security Council Resolution 620 by citing the 1925 Geneva Protocol. Similarly in the 1989 Paris Conference on the Prohibition of Chemical Weapons the representatives of 149 states attending also re-affirmed legal standing of the Protocol. Partly because of the large number of states party to the Protocol and the repeated affirmations of support for it in the UN and other bodies the bans in the Protocol are widely believed to be part of customary international law. If this is the case the provisions of the Protocol apply to all states whether or not they have ratified, acceded or succeeded to it[3] .

Biological and Toxin Weapons Convention

Building on the 1925 Geneva Protocol the Biological and Toxin

[3]There is general agreement that first use of chemical or biological weapons is part of international customary law; but a few question that such a ban on retaliatory use of such weapons. However, parties to the Biological and Chemical Weapons Conventions forgo the right of retaliatory use. The issue of a similar application of international customary law to non-lethal weapons remains controversial. For further discussion see Documents on the Laws of War, Adam Roberts and Robert Guelff, Oxford University Press, Third Edition, 2000.

Weapons Convention (BWC) opened for signature in 1972 and entered into force in 1975. This treaty is complementary to the 1925 Geneva Protocol in that it relies on it for the ban on use of the weapon and itself introduced a ban on research, development, production and possession. The treaty allows research for defensive purposes. An important new development in this type of multi-lateral treaty introduced by this treaty is that it contains a specific obligation on its members to implement the norms in the treaty in national laws thus explicitly extending the obligations to individuals within their sovereign territories. This obligation is stated in Article IV as follows: "Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere."

Thus this treaty is more than a government-to-government arrangement. According to the data I have to hand there are there are 145 States Party to the BWC[4]. There have been five review conferences since the Convention came into force. The next review conference is scheduled to take place in 2006. Since the last review conference in 2001 expert working groups have been meeting to consider aspects to enhance implementation of the Convention. I note that one of those groups in the coming year is working on encouraging codes of conduct which is intended to enhance implementation of the provisions in different spheres such as academia, private industry and in government, including that of the military. In countries that take their legal obligations seriously this would mean that, for example, that the obligations under the BWC should be in military law and regulations.

Chemical Weapons Convention

After 12 years of negotiations, the Chemical Weapons Convention (CWC) was adopted by the Conference on Disarmament in Geneva on 3 September 1992. The CWC contains a mechanism for verifying compliance by States with the provisions of the Convention that is unprecedented in scope of its verification regime. The CWC opened

[4]There are 18 signatory states that have yet to ratify the Convention.

for signature in Paris on 13 January 1993 and entered into force on 29 April 1997. This treaty bans use as well as possession, research, development and production of chemical weapons, thus for the treaty members it supersedes the 1925 Geneva Protocol as far as chemical and toxin weapons are concerned [5]. While the CWC draws its central inspiration from the 1925 Geneva Protocol it is a much more comprehensive prohibition. The comprehensive nature of the CWC is reinforced by the withdrawal on joining the CWC, by those parties who made them, of the reservations made under the 1925 Geneva Protocol with regard to retaining the right of retaliatory use.

Also like the BWC this Convention contains an obligation to extend the provisions to individual citizens and others within the jurisdiction of the states concerned. In the more recent CWC this obligation is made far more specific than in the BWC as the following extract from Article VII shows:

Article VII NATIONAL IMPLEMENTATION MEASURES
General undertakings

"1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity; Not permit in any place under its control any activity prohibited to a State Party under this Convention; and Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law."

Thus as for the BWC the armed forces of states party to the Convention would have to bring the obligations within the ambit of their military laws and regulations."

Also, as for the BWC defensive research and development is permitted but there are very specific provisions to cover what is permitted under the convention with a rigorous declaration and verification system.

[5]There is an overlap between the BWC and the CWC on the obligations in relation to toxin weapons.. Possession and use are banned under both conventions.

Nuclear Weapons

As far as nuclear weapons are concerned the bilateral and multilateral treaties that exist are related to limiting possession to certain states[6] or to limiting their numbers[7] . However as with all weapons the normal rules apply to the use of nuclear weapons as for any other type of weapon including proportionality, use against only legitimate military targets and all the other rules relating to the protection of the civilian population. It would seem therefore, given their extraordinary destructive power, the use of nuclear weapons could only be justified in the most extreme circumstances of self-defence related directly to national survival. Such a case might be, for example, in retaliating in response to a nuclear attack to prevent further attacks by an adversary with nuclear weapons.

While it remains controversial, the advisory opinion of the International Court of Justice in 1996[8] highlights the very exceptional circumstances in which the use of nuclear weapons might be justified. This Court was unanimous in giving an opinion that the threat or use of nuclear weapons should be compatible with the international laws of armed conflict. However, they were unable to agree on what explicit circumstances the threat or use of nuclear weapons would be lawful in circumstances of self-defence. Given this legal context and massive destructive power of these weapons political and military control of their use, or threat of their use, has to be at the highest level with a secure command and control system. Apart from the legal considerations there are of course very strong security reasons for this to be the case. It is one of the many examples of the convergence of the laws of armed conflict and military efficiency.

Recent developments and trends

The laws of armed conflict continue to evolve to reflect technical, political and social circumstances. In my remarks I have indicated that in the field of weapons of mass destruction treaties the trend

[6]The Nuclear Non-proliferation Treaty recognises only five legal nuclear weapon states

[7]Such as in the Moscow Treaty of 2003, and its predecessor the Strategic Arms Reduction Treaty (START 1) under which the USA and Russia have agreed to reduce the number of operational strategic nuclear weapons and delivery means.

[8]The formal title is the 1996 Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons

is to extend the responsibility in relation to the obligations from governments to individuals whether in the armed forces or as civilians. The most recent examples are in the 1998 Rome Statute of the International Criminal Court and in a recent UN Security Council Resolution. In the case of the Rome Statute[9] the court includes the use of "asphyxiating and other poisonous gases"[10] within its competence as a war crime. In the case of UN Security Council Resolution 1540 (2004) of 28 April there is a specific call on all UN member states to implement national laws and regulations to help prevent the proliferation of nuclear, biological and chemical weapons. In the case of this resolution it is aimed at preventing such capabilities from getting into the hands non-state groups. This is yet another example of the trend to apply obligations related to nuclear, biological and chemical weapons to individuals.

While my remarks by no means give a full account of international laws relating to nuclear, biological and chemical weapons I hope I have touched on issues that will give rise to a discussion.

[9]The Rome Statute entered into force on 11 April 2002 on submission of the 60th ratification. As at 3 May 2004 there were 94 state parties.

[10]In Article 8 (2)(b) (xvii)